

Merit Systems Protection Board

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(iii) Any documentation relevant to the agency's position on these issues.

[55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994; 78 FR 39548, July 2, 2013]

§ 1209.10 Hearing and order ruling on stay request.

(a) *Hearing.* The judge may hold a hearing on the stay request.

(b) *Order ruling on stay request.* (1) The judge must rule upon the stay request within 10 days (excluding Saturdays, Sundays, and Federal holidays) after the request is received by the appropriate Board regional or field office.

(2) The judge's ruling on the stay request must set forth the factual and legal bases for the decision. The judge must decide whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal, and whether the stay would result in extreme hardship to the agency.

(3) If the judge grants a stay, the order must specify the effective date and duration of the stay.

[55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

§ 1209.11 Duration of stay; interim compliance.

(a) *Duration of stay.* A stay becomes effective on the date specified in the judge's order. The stay will remain in effect for the time period set forth in the order or until the Board issues a final decision on the appeal of the underlying personnel action that was stayed, or until the Board vacates or modifies the stay, whichever occurs first.

(b) *Interim compliance.* An agency must immediately comply with an order granting a stay request. Although the order granting a stay request is not a final order, petitions for enforcement of such orders are governed by 5 CFR part 1201, subpart F.

Subpart D—Reports on Applications for Transfers

§ 1209.12 Filing of agency reports.

When an employee who has applied for a transfer to another position in an Executive agency under 5 U.S.C. 3352 asks the agency head to review a rejection

of his or her application for transfer, the agency head must complete the review and provide a written statement of findings to the employee and the Clerk of the Board within 30 days after receiving the request.

Subpart E—Referrals to the Special Counsel

§ 1209.13 Referral of findings to the Special Counsel.

When the Board determines in a proceeding under this part that there is reason to believe that a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8) or (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.

[78 FR 39548, July 2, 2013]

PART 1210—PRACTICES AND PROCEDURES FOR AN APPEAL OF A REMOVAL OR TRANSFER OF A SENIOR EXECUTIVE SERVICE EMPLOYEE BY THE SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

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AUTHORITY: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 713.

SOURCE: 79 FR 48943, Aug. 19, 2014, unless otherwise noted.

§ 1210.1 Authority to issue decisions under this part.

(a) Under 38 U.S.C. 713(d)(2)(A), as created by the Veterans Access, Choice and Accountability Act of 2014 (the Act), an employee covered by this part may appeal a removal from the civil service or a transfer to a General Schedule position based upon performance or misconduct to the MSPB.

(b) MSPB administrative judges have the authority to issue a decision in an appeal covered by this part. (38 U.S.C. 713(e)(1)).

(c) The administrative judge's authority under this part to issue a decision terminates following the passage of 21 days after the appeal is initially filed. (38 U.S.C. 713(e)(3)).

(d) An administrative judge's decision in an appeal filed under this part is not subject to any further appeal. (38 U.S.C. 713(e)(2)).

(e) This part applies only to the Secretary's authority to remove or transfer an employee covered under 38 U.S.C. 713 and the Board's authority to review such decisions. This authority is in addition to the authority already provided the agency in 5 U.S.C. 3592 and the authority provided the Board under 5 U.S.C. 7541, *et seq.* to take an adverse action against an employee. (38 U.S.C. 713(f)).

§ 1210.2 Definitions.

(a) The term *employee covered by this part* means an individual career appointee as that term is defined in 5 U.S.C. 3132(a)(4) or an individual who occupies an administrative or executive position and is appointed under 38 U.S.C. 7306(a) or 7401(1). (38 U.S.C. 713(a) and (g)).

(b) The term *administrative judge* means a person experienced in hearing appeals and assigned by the Board to hold a hearing and decide an appeal

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arising under this part. (38 U.S.C. 713(e)(1)).

(c) The term *response file* means all documents and evidence the Secretary of the Department of Veterans Affairs, or designee, used in making the decision to remove or transfer an employee covered by this part. It also may include any additional documents or evidence that the agency would present in support of the Secretary's determination in the event that an appeal is filed.

(d) The term *misconduct* includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. (38 U.S.C. 713(g)(2)).

(e) The term *transfer* means the transfer of an employee covered by this part to a General Schedule position. (38 U.S.C. 713(a)(1)(B)).

[79 FR 48943, Aug. 19, 2014, as amended at 79 FR 49423, Aug. 21, 2014]

§ 1210.3 Application of practices and procedures to appeals filed under this part.

(a) The following provisions of part 1201 of this chapter are inapplicable to appeals filed under this part:

(1) Section 1201.22 (inapplicable to appeals brought under this part pursuant to Public Law 113-146, section 707(b)(2));

(2) Section 1201.27 (class appeals are not allowed as such appeals cannot be adjudicated within 21 days);

(3) Section 1201.28 (case suspensions are not allowed because they are inconsistent with the requirement to adjudicate appeals under this part within 21 days);

(4) Section 1201.29 (dismissals without prejudice are not allowed because those procedures are inconsistent with the requirement to adjudicate appeals under this part within 21 days);

(5) Section 1201.56 (this regulation is not controlling; parties should refer to § 1210.18);

(6) Sections 1201.91 through 1201.93 (interlocutory appeals are not allowed because the Board lacks authority to review appeals filed under this part);

(7) Sections 1201.114 through 1201.120 (petitions for review are not allowed because the decisions in appeals filed under this part are not subject to further appeal) (38 U.S.C. 713(e)(2));

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(8) Sections 1201.121 through 1201.145 (procedures for other original jurisdiction cases are not relevant to appeals filed under this part);

(9) Sections 1201.152, 1201.153(b), 1201.154, 1201.155, 1201.156, 1201.157, and 1201.161 (these provisions are inapplicable to appeals filed under 38 U.S.C. 713).

(b) Except as modified by this part, the remaining relevant provisions of part 1201 of this chapter are applicable to appeals filed under this part.

§ 1210.4 Waiver of MSPB regulations.

The Board may waive any MSPB regulation in order to provide for the expedited review of an appeal covered by this part. Public Law 113-146, section 707(b)(3).

§ 1210.5 Determination of the Secretary effecting a removal or transfer; required notice of expedited procedures; initial disclosures.

An agency notice of a removal or transfer pursuant to 38 U.S.C. 713 must include the following:

(a) A statement identifying the action taken based on the Secretary's determination, stating the factual reasons for the charge(s), and statement setting forth the basis for the Secretary's determination that the performance or misconduct warrants removal or transfer.

(b) Notice regarding the Board's expedited procedures applicable to an appeal. Such notice shall include a copy of this part and access to the remainder of the Board's adjudicatory regulations.

(c) A copy of the materials the Secretary relied upon to remove or transfer the appellant (normally referred to as the "response file").

(d) The name and contact information of the agency's representative for any appeal filed with the MSPB under this part.

(e) Notice that MSPB appeals must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this chapter.

§ 1210.6 Electronic filing procedures; expedited filing procedures.

(a) *Required use of MSPB e-filing system.* All parties must electronically file

all pleadings and documents listed in 5 CFR 1201.14(b) by using the MSPB's e-filing system (e-Appeal Online). An attempt to file an appeal using any other method will result in rejection of the appeal and will not constitute compliance with the 7-day filing deadline under the Act, except in the limited circumstances described in § 1210.7(c).

(b) *Expedited filing and service requirements.* All documents and pleadings not otherwise covered in paragraph (a) of this section must be filed in accordance with any expedited filing and service procedures ordered by the administrative judge.

(c) The parties should frequently check the Repository on e-Appeal Online to ensure that they are aware of new pleadings, orders and submissions in a timely fashion. A party's failure to check for updates on e-Appeal Online may lead to a denial of a request to extend a deadline and/or the imposition of sanctions.

§ 1210.7 Filing an appeal and a response to an appeal.

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

(b) *Time for filing an appeal and agency response.* An appeal of an action taken pursuant to 38 U.S.C. 713 must be filed no later than 7 days after the effective date of the removal or transfer being appealed. (38 U.S.C. 713(d)(2)(B)). An agency response must be filed within 3 days of the filing of the appeal.

(c) *Timeliness of appeals.* If an appellant does not submit an appeal within 7 days of the effective date of the action it will be dismissed as untimely filed. This deadline cannot be extended for any reason. (38 U.S.C. 713(d)(2)(B)). However, if an appellant establishes that he or she attempted to file an appeal using e-Appeal Online within the 7-day deadline and that the filing was unsuccessful due to a problem with e-Appeal Online, the administrative judge may deem the filing to have been completed on the date it was attempted, provided the appellant took reasonable steps to immediately advise the MSPB of the failed attempt to file the appeal using e-Appeal Online. The

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21-day deadline for issuance of a decision will commence on the day such an appeal was deemed to have been filed.

(d) *Time limits for other appeals not brought under 38 U.S.C. 713.* The time limit prescribed by paragraph (b) 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 chapter for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339); see part 1209 of this chapter for the statutory filing time limits applicable to whistleblower appeals and stay requests.

§ 1210.8 Stay requests.

An administrative judge may not grant a stay request in any appeal covered by this part. (38 U.S.C. 713(e)(4)).

§ 1210.9 Disclosures of information required with initial appeal.

An appellant must attach to his or her appeal a copy of the agency's decision notice and the response file that the agency is required to disclose to the appellant pursuant to § 1210.5(c).

§ 1210.10 Representatives.

Motions challenging the designation of a representative must be filed within 3 days of the submission of the designation of representative notice.

§ 1210.11 Initial status conference; scheduling the hearing.

This regulation contains guidance for the parties concerning when initial status conferences will occur and the issues that will be addressed. In any appeal under this part the administrative judge retains complete discretion in deciding when to schedule the initial status conference and in selecting the issues to be addressed.

(a) *Scheduling the conference.* The administrative judge will schedule the initial status conference. Generally, the parties should expect that the initial status conference will take place within a week after the appeal is filed.

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(b) *Issues likely to be addressed at the initial status conference.* The parties should be prepared to discuss the following issues at the initial status conference:

- (1) The hearing date and anticipated length of the hearing;
- (2) Settlement;
- (3) Discovery deadlines and disputes;
- (4) Admission or rejection of exhibits;
- (5) Witnesses to be called to testify at the hearing;
- (6) Motions; and,
- (7) Any other issues identified by, or that require the involvement of, the administrative judge.

(c) *Additional status conferences.* The administrative judge may schedule additional status conferences as necessary to fully develop the case for hearing.

§ 1210.12 Discovery.

Except as noted in paragraphs (a) through (d) of this section, 5 CFR 1201.71 through 1201.75 apply to appeals filed under this part.

(a) *Initial disclosures.* The parties must make the following initial disclosures prior to the initial status conference.

- (1) *Agency.* The agency must provide:
 - (i) A copy of all documents in the possession, custody or control of the agency that the agency may use in support of its claims or defenses; and,
 - (ii) The name and, if known, address, telephone number and email address for each individual likely to have discoverable information that the agency may use in support of its claims or defenses.

(2) *Appellant.* The appellant must provide:

- (i) A copy of all documents in the possession, custody or control of the appellant that the appellant may use in support of his or her claims or defenses; and,
- (ii) The name and, if known, address, telephone number and email address for each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses.

(b) *Time limits.* The time limits set forth in § 1201.73 of this chapter shall not apply to an appeal under this part.

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The following time limits apply to appeals under this part:

(1) Discovery requests must be served on the opposing party prior to the initial status conference.

(2) Responses to discovery requests must be served on the opposing party no later than 3 days after the initial status conference.

(3) Discovery motions, including motions to compel, must be filed no later than 5 days after the initial status conference.

(c) *Methods of discovery.* Parties may use one or more of the following methods of discovery provided under the Federal Rules of Civil Procedure:

(1) Written interrogatories;

(2) Requests for production of documents or things for inspection or copying;

(3) Requests for admissions.

(d) *Limits on discovery requests.* Absent approval by the administrative judge, discovery is limited as follows:

(1) Interrogatories may not exceed 10 in number, including all discrete subparts;

(2) The parties may not take depositions; and

(3) The parties may engage in only one round of discovery.

(e) *Administrative judge's discretion to alter discovery procedures.* An administrative judge may alter discovery procedures in order to provide for the expedited review of an appeal filed under this part.

§ 1210.13 Deadlines for filing motions.

(a) *Motions.* All non-discovery motions must be filed no later than 5 days after the initial status conference.

(b) *Objections.* Objections to motions must be filed no later than 2 days after the motion is filed.

(c) *Administrative judge's discretion to alter deadlines.* An administrative judge may exercise discretion to alter or waive these deadlines.

§ 1210.14 Sanctions for failure to meet deadlines.

Section 1201.43 of this chapter, which allows administrative judges to impose sanctions on parties that do not comply with orders or do not file pleadings in a timely fashion, shall apply to any appeal covered by this part. Strict en-

forcement of deadlines will be required to meet the 21-day deadline for issuance of a decision by the administrative judge.

§ 1210.15 Agency duty to assist in expedited review.

(a) As required by 38 U.S.C. 713(e)(6), the agency is required to provide the administrative judge such information and assistance as may be necessary to ensure that an appeal covered by this part is completed in an expedited manner.

(b) The agency must promptly notify the MSPB whenever it issues a Secretarial determination subject to appeal under this part. Such notification must include the location where the employee worked, the type of action taken, and the effective date of the action. Notification should be sent to VASES@mspb.gov.

§ 1210.16 Intervenors and amici curiae.

Intervenors and amici curiae are permitted to participate in proceedings under this part as allowed in §1201.34 of this chapter. Motions to intervene and requests to participate as an amicus curiae must be filed at the earliest possible time, generally before the initial status conference. All intervenors and amici curiae must comply with the expedited procedures set forth in this part and all orders issued by the administrative judge. The deadlines applicable to the timely adjudication of cases under this part will not be extended to accommodate intervenors or amici curiae.

§ 1210.17 Hearings.

(a) *Right to a hearing.* An appellant has a right to a hearing as set forth in 5 U.S.C. 7701(a).

(b) *General.* Hearings may be held in person, by video or by telephone at the discretion of the administrative judge.

(c) *Scheduling the hearing.* The administrative judge will set the hearing date during the initial status conference. A hearing generally will be scheduled to occur no later than 18 days after the appeal is filed.

(d) *Length of hearings.* Hearings generally will be limited to no more than 1 day. The administrative judge, at his

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or her discretion, may allow for a longer hearing.

(e) *Court reporters.* The MSPB will contract for a court reporter to be present at hearings.

§ 1210.18 Burden of proof, standard of review, and penalty.

(a) *Agency.* Under 5 U.S.C. 7701(c)(1), and subject to exceptions stated in paragraph (c) of this section, the agency (the Department of Veterans Affairs) bears the burden of proving that an appellant engaged in misconduct, as defined by 38 U.S.C. 713(g)(2), or poor performance, and the Secretary's determination as to such misconduct or poor performance shall be sustained only if the factual reasons for the charge(s) are supported by a preponderance of the evidence. Proof of misconduct or poor performance shall create a presumption that the Secretary's decision to remove or transfer the appellant was warranted. The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case. The following examples illustrate the application of this rule:

Example A. The Secretary determines that the appellant intentionally submitted false data on the agency's provision of medical care and that the misconduct warrants transfer to a General Schedule position. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge by preponderant evidence. The appellant's transfer is presumed to be warranted, absent a showing that such a penalty was unreasonable under the circumstances of the case.

Example B. The Secretary determines that the appellant's performance or misconduct warrants removal, but the notice of the decision and the agency's response file do not identify any factual reasons supporting the Secretary's determination. The appellant files an appeal with the Board. The administrative judge may not sustain the removal because the agency, in taking its action, provided no factual reasons in support of its charge(s).

Example C. The Secretary determines that the appellant's performance or misconduct warrants removal. The appellant files an appeal with the Board. During the processing of the appeal, the appellant contends that the agency unduly delayed or refused to engage in discovery. If the agency has obstructed the appeal from being adjudicated in a timely fashion, the administrative judge

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may impose sanctions, up to and including the drawing of adverse inferences or reversing the removal action. Because the administrative judge finds that the agency has not unduly delayed or refused to engage in discovery, he declines to impose sanctions and affirms the removal.

Example D. The Secretary decides to remove the appellant based on a charge that the appellant engaged in a minor infraction that occurred outside the workplace. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge and further finds that the appellant established that the penalty of removal was unreasonable under the circumstances of the case. The presumption that the Secretary's decision to remove was warranted is rebutted and the action is reversed.

(b) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, concerning:

- (1) Issues of jurisdiction;
- (2) The timeliness of the appeal; and
- (3) Affirmative defenses.

(c) *Affirmative defenses.* Under 5 U.S.C. 7701(c)(2), the Secretary's determination may not be sustained, even where the agency met the evidentiary standard stated in paragraph (a) of this section, if the appellant shows that:

(1) The agency, in rendering its determination, committed harmful error in the application of its procedures;

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

(3) The determination is not otherwise in accordance with law.

(d) *Penalty review.* As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed. However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

[79 FR 48943, Aug. 19, 2014, as amended at 79 FR 49423, Aug. 21, 2014]

§ 1210.19 Bench decisions.

(a) *General.* The administrative judge may issue a bench decision at the close

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of the hearing. A bench decision is effective when issued.

(b) *Transcription of bench decision.* A transcribed copy of the decision will be prepared by the court reporter under the administrative judge's supervision to memorialize the oral decision. The official issuance of a bench decision is the date the administrative judge announces the decision and not the date the administrative judge signs the transcription.

§ 1210.20 Effective date of a decision issued by an administrative judge; continuing jurisdiction over certain ancillary matters.

(a) A decision by an administrative judge under this part will be effective upon issuance.

(b) Pursuant to 38 U.S.C. 713(e)(2), a decision by the administrative judge is not subject to further appeal.

(c) A decision by the administrative judge is nonprecedential. Such a decision may be cited as persuasive authority only in an appeal filed pursuant to 38 U.S.C. 713(e)(2). Such a decision may not be cited in any appeal not filed pursuant to 38 U.S.C. 713(e)(2).

(d) Following issuance of a decision by the administrative judge under this part, the MSPB retains jurisdiction over the appeal covered by this part for purposes of the following ancillary matters:

(1) *Enforcement of decisions and orders.* The procedures set forth in subpart F of 5 CFR part 1201 are applicable to petitions for enforcement filed after the administrative judge issues a decision in an appeal filed under this part; and,

(2) *Attorney fees, witness fees, litigation expenses, and damages.* The procedures set forth in subpart H of 5 CFR part 1201 (attorney fees, costs, expert witness fees, and litigation expenses, where applicable, and damages) are applicable to requests for fees and damages filed after the administrative judge issues a decision in an appeal filed under this part. (5 U.S.C. 7701(g)).

PARTS 1211–1214 [RESERVED]

PART 1215—DEBT MANAGEMENT

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Subpart B—Claims Collection

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SOURCE: 54 FR 50603, Dec. 8, 1989, unless otherwise noted. Redesignated at 72 FR 56885, Oct. 5, 2007.

Subpart A—Salary Offset

AUTHORITY: 5 U.S.C. 5514, Executive Order 11809 (redesignated Executive Order 12107), and 5 CFR 550 subpart K.

§ 1215.1 Purpose and scope.

(a) This regulation provides procedures for the collection by administrative offset of a Federal employee's salary without his/her consent to satisfy certain debts owed to the Federal Government. These regulations apply to all Federal employees who owe debts to the MSPB and to current employees of the MSPB who owe debts to other Federal agencies. This regulation does not apply when the employee consents to recovery from his/her current pay account.