7400-01-P

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1200, 1201, 1203, 1208, and 1209

Practices and Procedures

AGENCY: Merit Systems Protection Board

ACTION: Proposed Rule

SUMMARY: The Merit Systems Protection Board (MSPB or the Board), following an internal review of MSPB regulations and after consideration of comments received from MSPB stakeholders, is proposing to amend its rules of practice and procedure in order to improve and update the MSPB's adjudicatory processes.

DATES: Submit written comments on or before [Insert date 45 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments concerning this proposed rule by one of the following methods and in accordance with the relevant instructions:

Email: mspb@mspb.gov. Comments submitted by email can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML and PDF. If possible, commenters are asked to use a text format and not an image format for attachments. An email should contain a subject line indicating that the submission contains comments to the MSPB's proposed rule. The MSPB asks that parties use email to submit comments if possible. Submission of comments by email will assist MSPB to process comments and speed publication of a final rule;

Fax: (202) 653-7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's proposed rule;

Mail or other commercial delivery: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington DC 20419;

Hand delivery or courier: Should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419, and delivered to the 5th floor reception window at this street address. Such deliveries are only accepted Monday through Friday, 9 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: As noted above, MSPB requests that commenters use email to submit comments, if possible. All comments received will be included in the public docket without change and will be made available online at www.mspb.gov/regulatoryreview/index.htm, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information whose disclosure is restricted by law. Those desiring to submit anonymous comments must submit comments in a manner that does not reveal the commenters identity, include a statement that the comment is being submitted anonymously, and include no personally-identifiable information. The email address of a commenter who chooses to submit comments using email will not be disclosed unless it appears in comments attached to an email or in the body a comment.

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

SUPPLEMENTARY INFORMATION:

This proposed rule is the product of a comprehensive internal review of MSPB's adjudicatory regulations, the first such review since the establishment of MSPB in 1979. This review began in January 2011 when the Board solicited suggestions for revisions to MSPB's adjudicatory regulations from MSPB staff. Subsequently, an internal working group was created to review the proposals

submitted by MSPB staff, identify meritorious proposals, and develop draft amendments to MSPB's regulations. During the working group's deliberations, MSPB also received two requests for rulemaking from interested parties, and those requests were considered during the internal review process.

The recommendations prepared by the internal working group were preliminarily evaluated by the Board Members. The internal working group then sought input from over 30 stakeholder agencies, organizations, and individuals in accordance with the public participation requirement in Executive Order 13563, "Improving Regulation and Regulatory Review." The stakeholders were invited to provide comments concerning the preliminary recommendations of the working group. The stakeholders were also asked to propose needed changes to any of MSPB's adjudicatory regulations not identified by the internal review. Comments were received from 15 stakeholders, and those entities were offered an opportunity to present any additional comments at a meeting with representatives of MSPB's internal working group. That meeting was held on March 6, 2012, at MSPB's headquarters, and the 6 stakeholders who responded to the invitation were each allocated 10 minutes to speak. Although members of MSPB's internal working group attended the meeting to hear the presentations by the stakeholders, the Board Members did not attend. Following the stakeholder presentations, MSPB's internal working group reconvened to draft a proposed rule for consideration by the Board Members.

The proposed rule published today is therefore the result of the most comprehensive review of MSPB's adjudicatory procedures ever undertaken. In order to ensure transparency and to assist the parties who wish to comment, MSPB's communications with stakeholders, responses received from the stakeholders, and a transcript of the stakeholders' March 6, 2012 oral presentations are available for review by the public at www.mspb.gov/regulatoryreview/index.htm.

Scope of comments requested

The MSPB asks commenters to provide their views on the regulations proposed by MSPB. The MSPB also invites additional comments on any other aspect of MSPB's adjudicatory regulations that commenters believe should be amended.

Summary of changes

Set forth below is a summary of the amendments proposed by the MSPB.

§ 1200.4 Petition for Rulemaking.

This proposed amendment authorizing petitions requesting the MSPB to amend its regulations is 5 U.S.C. 7121specifically authorized by 5 U.S.C. 553(e), which states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." At present, the MSPB has no procedures in place for responding to these requests. This proposed amendment will ensure that parties wishing to petition the Board for regulatory changes are aware of their right to make such a request and the MSPB's procedures for filing and responding to such requests.

§ 1201.3 Appellate Jurisdiction.

The MSPB proposes to amend the opening paragraph to explain that this regulation is not a source of MSPB jurisdiction and that the cited laws and regulations need to be consulted to determine the MSPB's jurisdiction. The proposed amendment emphasizes that jurisdiction depends on the nature of the employment or position held as well as the nature of the action taken. The proposed regulation also revises the listing of appealable actions within the MSPB's appellate jurisdiction to achieve several ends: (1) to make the regulations easier to understand (plain English where possible); (2) to give each category of appealable action a descriptive label; (3) to list appealable actions in order from most common to least common; and (4) to group like actions together, which resulted in a list of 11 appealable actions instead of the previous 20.

§ 1201.4 General Definitions.

The MSPB proposes revising subsection (a) to eliminate the phrase "attorney-examiner," which was believed to be an archaic term, and substitute the language of 5 U.S.C. 7701(b)(1).

The MSPB is proposing to revise subsection (j) out of a concern that the definition of "date of service" is both circular ("the date on which documents are served") and unclear, since "service" is defined as the "process of furnishing a copy of any pleading" to the MSPB and other parties. It is thus not clear if the date of service refers to when a pleading is sent out, e.g., the postmark date, or when the pleading is received. Parties have interpreted "date of service" both ways. The revised regulation resolves this ambiguity by providing that "date of service" refers to when a document is sent out, not when it is received.

The MSPB further determined that it was inequitable to allow the amount of time that a party has to file a pleading depend on the method of service used by the opposing party. To redress such inequity the proposed regulation also states that "whenever a regulation in this part bases a party's deadline for filing a pleading on the date of service of some previous document, and the previous document was served on the party by mail, the filing deadline will be extended by 5 calendar days." This incorporates the presumption of 5 CFR 1201.4(k) that mailed documents are received 5 days after the postmark date.

§ 1201.14 Electronic Filing Procedures.

The MSPB proposes adding new subsections (4) and (5) to section (c) to reflect current policy and procedure regarding Sensitive Security Information (SSI) and classified information. The MSPB has determined that it is inappropriate to use the e-Appeal Online system for SSI or classified information. The proposed revision to section (m) makes the regulation consistent with the intent expressed by the Board when it originally published this provision at 73 Fed. Reg. 10127, 10128 (2008). Finally, an additional subsection is being proposed to 5 CFR 1201.14 to provide that amici are not permitted to e-file. The MSPB considered the option of reconfiguring e-Appeal Online to address Privacy

Act concerns and allow amici to file using e-Appeal Online but determined that the cost of such a change was not justified considering how rarely the Board receives amicus briefs.

§ 1201.21 Notice of Appeal Rights.

As discussed more fully below, in connection with jurisdiction over Individual Right of Action (IRA) appeals under Part 1209, the Board is proposing to change longstanding jurisprudence concerning allegations of reprisal for whistleblowing under 5 U.S.C. 2302(b)(8) where an employee has been subjected to an otherwise appealable action. Under the provisions of 5 U.S.C. 7121(g)(3), such an employee "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under subsection (g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

A plain reading of § 7121(g) would appear to indicate that, contrary to longstanding Board precedent, an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from the Office of Special Counsel (OSC) before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses. As discussed in 5 CFR 1209.2 below, the proposed regulation would overrule the Board's longstanding precedent in this area.

The proposed regulation would require agencies to fully notify employees of their rights in these situations so that they can make an informed choice among the available 3 options. Paragraph (e) was added to require notice in mixed cases.

§ 1201.22 Filing an appeal and responses to appeals.

The MSPB proposes to revise this regulation to include a new section stating the MSPB's general rule about constructive receipt. This provision also includes several illustrative examples.

§ 1201.23 Computation of time.

The MSPB proposes to amend the first sentence of this regulation so that it will apply to all situations in which a deadline for action is set forth in the MSPB's regulations or by a judge's order, including discovery requests and responses between the parties.

§ 1201.24 Content of an appeal; right to hearing.

The proposed revision radically reduces the scope of requested attachments from "any relevant documents" to a request for the proposal notice as well as the decision notice, and for the SF-50 if available. It also cautions appellants not to delay filing and miss a deadline if they lack any of these documents.

In the MSPB's experience these documents, in conjunction with the items of information mandated in 5 CFR 1201.24(a)(1)-(9), are all that is necessary in order to docket a new appeal and issue appropriate acknowledgment and jurisdictional orders. Under the current regulation, appellants frequently file numerous attachments, many of which will be included as part of the agency file, and other documents that are not relevant to the disposition of the appeal.

The proposed regulation does not mandate the attachment of documents that would demonstrate that the appellant has satisfied the jurisdictional requirement of exhausting an administrative procedure in IRA and Veterans Employment Opportunity Act (VEOA) appeals. Obtaining such documents is best left to acknowledgment and jurisdictional orders issued after an appeal is filed.

The current MSPB Appeal Form requests the attachment of numerous documents. If the proposed revision is adopted, the MSPB will revise the Appeal Form so that it is consistent with the regulation.

The definition of "right to hearing" in paragraph (d) is amended to explain that "in an appeal under 5 U.S.C. 7701, 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."

§ 1201.28 Case suspension procedures.

The MSPB proposes to overhaul its case suspension procedures. Unlike the current regulation, the draft regulation does not include separate subsections for unilateral requests and joint requests. The amended regulation allows for more than a single 30-day suspension period and eliminates the current restrictions on when a request must be filed.

§ 1201.29 Dismissal with prejudice.

This proposed regulation codifies existing case law concerning dismissals without prejudice. See, e.g., Wheeler v. Department of Defense, 113 M.S.P.R. 519, ¶ 7 (2010); Milner v. Department of Justice, 87 M.S.P.R. 660, ¶ 13 (2001). The regulation also recognizes the necessity to give administrative judges discretion to grant dismissals without prejudice and does not include a requirement that cases that have been dismissed without prejudice should automatically be reinstated because many cases are not reinstated at all following a dismissal without prejudice. The regulation sets forth a rule requiring the judge to fix a date certain by which the appeal must be refiled. In a case where the setting of such a date is impractical, the rule includes a reference to a judge's authority under 5 CFR 1201.12 to waive the regulation when appropriate.

§ 1201.31 Representatives.

The "or after 15 days" clause is proposed to be added at the end of the third sentence in 5 CFR 1201.31(b) to acknowledge that a representative's conflict of interest may not be readily apparent. The MSPB also proposes to move the

provisions in 5 CFR 1201.31(d) governing exclusion and other sanctions for contumacious behavior by parties and representatives to 5 CFR 1201.43 (Sanctions). See that section for proposed revisions.

§ 1201.33 Federal witnesses.

The proposed language has been added to clarify that an agency's responsibility under this regulation includes producing witnesses at depositions as well as at hearings.

§ 1201.34 Intervenors and amicus curiae.

The present regulation defines an amicus curiae as a person/organization that files a brief with "the judge," and that persons/organizations may, in the discretion of "the judge," be granted permission to file a brief. In practice, the Board has recently been receiving motions to file amicus briefs for the first time on petition for review, and the Board has been granting at least some of those requests. The proposed regulation addresses this discrepancy and also provides further explanation as to what an amicus is permitted to do.

In addition, there are presently no criteria in the regulation indicating when requests to file amicus briefs will be granted or denied. The proposed regulation sets forth general guidelines while maintaining the current language that provides that such requests may be granted in the judge's (or Board's) discretion. These general guidelines (legitimate interest, no undue delay, material contribution to proper disposition) are similar to those found in the regulations of some other federal adjudicatory agencies.

§ 1201.36 Consolidating and joining appeals.

In the second sentence of subsection (a)(2), the MSPB proposes to substitute "removal" for "dismissal." Dismissal is not a term used by the Board to describe an employee's separation from employment for disciplinary reasons.

§ 1201.41 Judges.

The proposed amendment reflects the language used in the MSPB Strategic Plan.

§ 1201.42 Disqualifying a judge.

The proposed amendment reflects the fact that under current MSPB practice a judge who considers himself or herself disqualified notifies the Regional Director, not the Board.

§ 1201.43 Sanctions.

Excluding parties and representatives for contumacious behavior is currently covered by 5 CFR 1201.31 (Representatives). The MSPB believes that this subject is better covered under 5 CFR 1201.43 (Sanctions), as exclusion or other action for contumacious behavior is a sanction. The revised regulation would give explicit authority for suspending or terminating a hearing that has begun. The proposed rule also deletes the requirement of a show-cause order in favor a general requirement that, before imposing a sanction, the judge must provide a prior warning and document the reasons for any sanction. A formal show-cause order is simply not feasible where the misconduct occurs during a hearing. Similarly, the proposed rule also proposes to eliminate the provision for an interlocutory appeal of a sanction for contumacious behavior. The MSPB believes that review of sanctions of this nature via petition for review is sufficient and delaying the entire proceeding to adjudicate the appropriateness of a sanction is not warranted. The proposed rule also amends this regulation to permit a judge to limit participation by a representative without excluding the representative from the case entirely. Finally, the proposed rule deletes the term "appellant's representative" and instead substitutes the term "party's representative."

§ 1201.51 Scheduling the hearing.

The current extensive list of fixed hearing sites contained in Appendix III of Part 1201 causes administrative inefficiencies and can have adverse budgetary considerations for the MSPB, as the cost of airfares are renegotiated by GSA each fiscal year and cost of court reporters can vary considerably from one city to the next. This proposal gives the MSPB greater flexibility to change approved

hearing sites listed on the Board's public website instead of changing Appendix III through a federal register notice.

§ 1201.52 Public Hearings.

This proposed amendment would give administrative judges express authority to control the use of electronic devices at a hearing.

§ 1201.53 Record of proceedings.

The MSPB proposes to make several changes to the regulation. In light of changing technology, the term "tape recording" has been replaced by the word "recording" and because of the existence of e-transcripts and other electronic formats, the term "written transcript" has been replaced by "transcript."

More significantly, the MSPB proposes to allow a judge or the Board to order the agency to pay for a transcript in certain circumstances: "In the absence of a request by a party, and upon determining that a transcript would significantly assist in the preparation of a clear, complete, and timely decision, the judge or the Board may direct the agency to purchase a full or partial transcript from the court reporter, and to provide copies of such a transcript to the appellant and the Board." The regulation proposed by the MSPB is more narrowly-tailored than the comparable EEOC regulation that requires federal agencies to "arrange and pay for verbatim transcripts." 29 CFR 1614.109(h).

Under 5 U.S.C. 7701(a) an appellant is entitled to a hearing for which a transcript will be kept. The MSPB has long satisfied this requirement by recording the hearing. Gonzalez v. Defense Logistics Agency, 772 F.2d 887, 890 (Fed. Cir. 1985). The MSPB is not, however, required to produce a verbatim written transcript of the hearing. Gearan v. Department of Health and Human Services, 838 F.2d 1190, 1192-93 (Fed. Cir. 1988). Thus, while the MSPB has in the past used appropriated funds to prepare a written hearing transcript when an agency fails to elect to transcribe a recorded hearing, the MSPB is not required to prepare a written transcript. As a result, the MSPB believes that a regulation requiring a Federal agency to prepare a written hearing transcript does not

constitute an improper augmentation of the MSPB's appropriations because the Board is not required to prepare such a transcript and Federal agencies receive appropriations to pay for the costs of litigating appeals before the Board.

§ 1201.56 Burden and degree of proof; affirmative defenses.

The Board's current regulation at 1201.56 provides without qualification that jurisdiction must be proved by preponderant evidence. This regulation is in conflict with a significant body of Board case law holding that some jurisdictional elements may be established by making nonfrivolous allegations. The U.S. Court of Appeals for the Federal Circuit has ruled that the Board must abide by its published regulation in section 1201.56. See Bledsoe v. Merit Systems Protection Board, 659 F.3d 1097, 1101-04 (Fed. Cir. 2011); Garcia v. Department of Homeland Security, 437 F.3d 1322, 1338-43 (Fed. Cir. 2006) (en banc). In Garcia, the court observed that, because 5 U.S.C. 7701 is silent with respect to the burden of proof for establishing jurisdiction, the Board can make rules regarding this matter by notice-and-comment rulemaking, and that when it does so, its rules are entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). Garcia, 437 F.3d at 1338-39. The court observed that, if the Board is dissatisfied with its current rule at section 1201.56, and desires to change what is required to establish jurisdiction, it may do so by notice-and-comment rulemaking. Id. at 1343. The Board is now doing so.

In reviewing our jurisprudence is this area, there appear to be only four types of jurisdictional elements in the cases the Board is authorized to hear: (1) whether the appellant is a person entitled to bring the sort of appeal authorized by the law, rule, or regulation that gives the Board jurisdiction; (2) whether the agency action or decision being challenged is of a type covered by the law, rule, or regulation that gives the Board jurisdiction; (3) whether the appellant has exhausted a required administrative procedure; and (4) elements that relate to the nature or merits of the appeal or claim over which the Board has been given jurisdiction.

When there is no overlap between jurisdictional issues and merits issues, i.e., when the only jurisdictional issues are of types (1) through (3), we conclude that all jurisdictional elements must be established by preponderant evidence. Adverse action appeals under 5 U.S.C. 7511-7514 provide a good example why this conclusion is warranted. Section 7511 sets out applicable definitions, including who is an "employee"; section 7512 specifies the personnel actions that are covered; and section 7513 sets forth the two merits issues — whether the action was taken "for such cause as will promote the efficiency of the service," and whether the agency complied with prescribed procedures. The jurisdictional grant to the Board is stated in section 7513(d): "An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title." The grant of jurisdiction thus focuses on and is limited to the first two elements identified above: (1) whether the appellant is a covered "employee" as defined in section 7511; and (2) whether the appellant was subjected to one of the personnel actions listed in section 7512. Implicit in this statutory structure is an "if-then" condition precedent. If, but only if, the appellant actually is a covered "employee" who has been subjected to a covered personnel action, then the appellant is entitled to a Board determination of whether the agency took the action for such cause as will promote the efficiency of the service and whether the agency followed prescribed procedures. Determining whether the appellant actually is a covered employee who has been subjected to one of the listed personnel actions requires proof by a preponderance of the evidence.

When Congress (or the Office of Personnel Management where an OPM regulation is the source of Board jurisdiction) has not clearly differentiated jurisdictional issues from merits issues, i.e., where some matters are both jurisdictional and merits, there is no justification for inferring that a "dual purpose" issue is a condition precedent that must be proved by preponderant evidence before the merits of the case are reached. Such a requirement led to the

counter-intuitive finding in Latham v. U.S. Postal Service, 117 M.S.P.R. 400, ¶ 10 n.9 (2012), that, because the issue of whether a denial of restoration was arbitrary and capricious had been held to be a jurisdictional issue as well as a merits issue, an appellant who establishes jurisdiction over a partial recovery restoration claim automatically prevails on the merits of that claim.

Individual right of action (IRA) appeals under 5 U.S.C. 1221 provide another example where the grant of Board jurisdiction does not clearly differentiate between jurisdictional issues and merits issues. Paragraph (a) of this section provides that:

Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

Although the first three types of jurisdictional elements are referenced in the grant of jurisdiction — the appellant must be a covered "employee, former employee, or applicant for employment," must have been subjected to a covered "personnel action" that was "taken, or proposed to be taken," and must have exhausted his or her administrative remedy with the Special Counsel — so is the merits issue of whether the covered personnel action was taken or proposed to be taken as a result of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8), i.e., whether the personnel action was retaliation for protected whistleblowing. Both the Board and its reviewing court have regarded this latter matter as both jurisdictional and merits in nature. See Yunus v. Department of Veterans Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001); Rusin v. Department of the Treasury, 92 M.S.P.R. 298, ¶ 12 (2002). For jurisdictional purposes, a nonfrivolous allegation will suffice. On the merits, the appellant must establish by preponderant evidence that he or she made a protected whistleblowing disclosure,

and that the disclosure was a contributing factor in the personnel action that was taken or proposed. E.g. Schnell v. Department of the Army, 114 M.S.P.R. 83, ¶ 18 (2010); Fisher v. Environmental Protection Agency, 108 M.S.P.R. 296, ¶ 15 (2008).

§ 1201.58 Closing the record.

This proposed amendment is based upon case law indicating that, notwithstanding an order setting the date on which the record will close, a party must be allowed to submit evidence to rebut new evidence submitted by the other party just prior to the close of the record. See Miller v. U.S. Postal Service, 110 M.S.P.R. 550, ¶ 9 (2009); Mooney v. Department of Defense, 44 M.S.P.R. 524, 528 (1990); Naekel v. Department of Transportation, 32 M.S.P.R. 488, 496 (1987).

§ 1201.62 Producing prior statements.

The MSPB proposes to delete this regulation in its entirety as it has virtually never been invoked or applied and is believed to be unnecessary.

§ 1201.71 Purpose of Discovery.

This proposed amendment adds a sentence to the end of this section stating that discovery requests and discovery responses should not ordinarily be filed with the Board. Statements to this effect are currently contained in standard orders.

§ 1201.73 Discovery procedures.

The proposed changes to the regulation address several important matters. The initial disclosure requirement of subsection (a) has been eliminated in its entirety. The Board's initial disclosure provision is based on Fed. R. Civ. P. 26(a)(1). Although such a requirement makes a great deal of sense in article III courts, it makes little sense in the adjudication of MSPB appeals. First and foremost, there is nothing comparable in federal court litigation to the Agency File in an MSPB proceeding. The agency file, required by 5 CFR 1201.25, contains "[a]ll documents contained in the agency record of the action" being appealed. In the MSPB's experience, the initial disclosure requirement results in unnecessary

and unfruitful motion practice, and distracts both parties from more important matters, such as the preparation of the agency file and responses to orders on timeliness and jurisdiction.

The current regulation includes separate subsections governing discovery from a party and discovery from a nonparty. The proposed amendments eliminate that distinction as unnecessary. There was an intermediate process for unsuccessful attempts at discovery from a nonparty, in which the party seeking discovery would seek an order from the judge directing that the discovery take place. If that was insufficient, a subpoena could be sought and issued.

Under the proposed regulation, the requirements are essentially the same for parties and nonparties. The discovery request is served on the party or nonparty and/or their representative. If a discovery response is not forthcoming or is inadequate, attempts must be made to resolve the matter informally. If those attempts are unsuccessful, then a motion is filed with the judge. If the non-responsive entity is a party, a motion to compel discovery is filed. If the non-responsive entity is a non-party, a motion for issuance of a subpoena under 5 CFR 1201.81 is filed.

This proposed amendment also increases the time period in which initial discovery requests must be served from 25 days to 30 days after the date on which the judge issues the acknowledgment order. That order requires the production of the agency file within 20 days. The increase of time to 30 days should ensure that, in most cases, appellants have the opportunity to initiate discovery after they have seen what is in the Agency File. As is already the case, parties can seek permission to initiate discovery after the deadline has passed, and such permission should be granted where appropriate.

The proposed amendments also revise subparagraph (d)(4) to clarify that, if no other deadline has been specified, discovery must be completed no later than the prehearing or close of record conference. A proposed change in subparagraph (c)(i) reflects the MSPB's view that a motion to compel must contain a statement

showing that the request was not only for relevant and material information, but that the scope of the request was reasonable. The proposed amendment also makes several other minor changes in the regulation.

§ 1201.93 Procedures.

The proposed amendment of this regulation replaces the word "hearing" with the word "appeal" because there may or may not be a pending hearing in a case where an interlocutory appeal has been certified to the Board. The term "stay the processing of the appeal" is also proposed to be inserted in lieu of the term "stay the appeal" to avoid any ambiguity.

§ 1201.101 Explanation and definitions.

This proposed change will clarify that Mediation Appeals Program (MAP) mediators and settlement judges may discuss the merits of an MSPB case with a party without running afoul of the prohibition on ex parte communication. Some parties, confused on this issue, believe that while a mediator or settlement judge may discuss settlement terms ex parte, they cannot discuss the merits of a case, even within the context of settlement discussions.

§ 1201.111 Initial Decision by the judge.

This proposed amendment would delete language about serving OPM and the Clerk of the Board to conform with longstanding Board practice. OPM has access to all of the Board's initial and final decisions via the MSPB Extranet, and is not separately served with each initial decision as it is issued. The Clerk of the Board has immediate access to all issued initial decisions.

§ 1201.112 Jurisdiction of the judge.

This proposed amendment would allow an administrative judge to vacate an initial decision to accept a settlement agreement into the record when the settlement agreement is filed by the parties prior to the deadline for filing a petition for review, but is not received until after the date when the initial decision would become the Board's final decision by operation of law.

§ 1201.113 Finality of decision.

The proposed amendment to paragraph (a) is intended to conform this regulation to the proposed revision to 5 CFR 1201.112(a)(4) described above. Paragraph (f) is added to indicate that the Board will make a referral to OSC to investigate and take any appropriate disciplinary action whenever the Board finds that an agency has engaged in reprisal against an individual for making a protected whistleblowing disclosure. Previously, the MSPB's regulations (5 CFR 1209.13) only required a referral when retaliation was found in an IRA appeal. Such referrals will also be made when retaliation for whistleblowing is found in an otherwise appealable action.

§ 1201.114 Petition and cross petition for review – content and procedure.

The MSPB proposes to institute page limitations for pleadings on petition for review, allow for replies to responses to petitions for review, and define petitions for review and cross petitions for review. Courts and many other federal agencies currently have page limitations on pleadings. Subsection (e) incorporates by reference the rules governing constructive receipt as proposed for 5 CFR 1201.22(b)(3). Finally, paragraph (b) now specifies that a petition or cross petition for review must include "all of the party's legal and factual arguments." This was added to ensure that parties do not assume that the MSPB works like many courts, where all that is required is to file a notice of appeal with the appellate court, and the Clerk of that court then promulgates a briefing schedule.

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

The proposed amendments set forth here address the criteria for granting petitions and cross petitions for review. The Board will grant a petition for review whenever the petitioner demonstrates that the initial decision was wrongly decided, or that the adjudication process was so unfair that the petitioner did not have an appropriate opportunity to develop the record. The proposed regulation lists the 4 most common situations in which a petition or cross petition for review will be granted, but specifies that this listing is not exhaustive.

§ 1201.116 Compliance with orders for interim relief.

The proposed modifications to this regulation will combine the existing contents of 5 CFR 1201.116 with the provisions of 5 CFR 1201.115(b) and (c).

§ 1201.117 Procedures for review or reopening.

The proposed revision to subparagraph (a)(1) reflects the significant revision to 5 CFR 1201.118, which would restrict "reopening" to situations in which the Board members have previously issued a final order or the initial decision has become the Board's final order by operation of law.

§ 1201.118 Board reopening of final decisions.

The proposed amendment is intended to change the current Board practice of "reopen[ing] the appeal on the Board's own motion under 5 CFR 1201.118" when a party's petition for review is denied, but the Board deems it appropriate to issue an Opinion and Order. The MSPB believes the better practice would be to amend its regulations to state that "reopening" only applies to, and should be reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law.

The MSPB's current practice may involve a misinterpretation of 5 U.S.C. 7701(e), which provides that an initial decision "shall be final unless – (A) a party to the appeal or the Director [of OPM] petitions the Board for review within 30 days after the receipt of the decision; or (B) the Board reopens and reconsiders a case on its own motion." As now read by the MSPB, if either party files a timely petition for review, the appeal remains "open" and there is no final decision until the Board issues an Opinion and Order or Final Order.

In addition to clarifying the situations in which an appeal may be reopened, the proposed amendment corrects an apparent anomaly in the current regulations in that, as presently written, 5 CFR 1201.118 applies only to the reopening of initial decisions. Neither 5 CFR 1201.118 nor any other existing regulation discusses the Board's authority under 5 U.S.C. 7701(e) to reopen a final decision issued by the Board itself. The proposed revision addresses reopening of all final Board decisions, whether issued by the Board or when an initial decision has

become the Board's final decision. It also incorporates well-established case law as to the rare and limited circumstances in which the Board will reopen a final decision.

§ 1201.119 OPM petition for reconsideration.

The MSPB proposes to make minor wording changes in this regulation in light of the language used in 5 CFR 1201.117 and 1201.118, and to eliminate any confusion between "Final Order" as the document title of a particular type of final Board decision and the generic term "final decision," which applies to any type of final decision, whether it be an Opinion and Order or a "Final Order."

§ 1201.122 Filing complaint; serving documents on parties.

This proposed amendment is designed to correct an oversight in the MSPB's regulations. When e-Appeal Online was first established, it could not accommodate the initial filing in an original jurisdiction action. That was remedied a few years ago, and the e-filing regulation itself, 5 CFR 1201.14, was amended so that it no longer excludes from e-filing the initial filing in original jurisdiction actions. 73 Fed. Reg. 10127, 10129 (2008). Unfortunately, the regulations governing the filing of particular original jurisdiction actions were not amended, and they still prohibit using e-Appeal Online to file the initial pleading in these cases. Paragraph (a) is amended to require OSC to file a single copy of the complaint.

Regarding the deletion of paragraphs (d) and (e), we note that other special types of proceedings—including petitions for enforcement under 5 CFR 1201.182 and motions for attorney fees under 5 CFR 1201.203—do not address the acceptable methods of service. That is unnecessary, as the matter is covered generally under 5 CFR 1201.4(i) and 5 CFR 1201.14, and 5 CFR 1201.121(a) specifies that, except where otherwise expressly provided, the provisions of subpart B (which includes 5 CFR 1201.14) apply to original jurisdiction cases.

§ 1201.128 Filing complaint; serving documents on parties.

See explanation under 5 CFR 1201.122.

§ 1201.134 Deciding official; filing stay request; serving documents on parties.

See explanation under 5 CFR 1201.122.

§ 1201.137 Covered actions; filing complaint; serving documents on parties.

See explanation under 5 CFR 1201.122.

§ 1201.142 Actions filed by administrative law judges.

This proposed amendment corrects a typographical error. The reference to 5 CFR 1201.37 in the second sentence should be changed to 5 CFR 1201.137.

§ 1201.143 Right to hearing; filing complaint; serving documents on parties.

See explanation under 5 CFR 1201.122.

§ 1201.153 Contents of appeal.

The MSPB proposes to amend (a)(2) to clarify that not all discrimination matters may be raised with the Board. The MSPB is also proposing to substitute the term "under a negotiated grievance procedure" for the word "grievance" to reflect that these are the only types of grievances covered under the mixed cases regulations.

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

The MSPB proposes to incorporate by reference the rules governing constructive receipt as proposed for 5 CFR 1201.22(b)(3). See explanation above.

§ 1201.155 Requests for review of arbitrators' decisions.

The MSPB proposes to remove the existing regulation as unnecessary and put in its place a new regulation addressing requests for review of arbitrators' decisions. Although requests for review of arbitrators' decisions under 5 U.S.C. 7121(d) by definition must include claims of unlawful discrimination under 5 U.S.C. 2302(b)(1), they are quite different from other mixed cases covered by Subpart E of Part 1201, in that they have not been adjudicated in the Board's

regional offices by administrative judges pursuant the provisions of Part 1201. Because of this, arbitrators' decisions are subject to a much more lenient standard of review than are decisions by administrative judges. See, e.g., Fanelli v. Department of Agriculture, 109 M.S.P.R. 115, ¶ 6 (2008).Because of these differences, the MSPB concluded that such requests merited a single regulation devoted to that subject. Therefore, this revised regulation removed the existing regulation at 5 CFR 1201.154(d) and moved into 5 CFR 1201.155.

The Board proposes to amend paragraphs (a) and (b) of the transferred regulation. It has long been established in case law that the Board has jurisdiction to review arbitration decisions in which an appellant is raising claims of unlawful discrimination, even when the appellant failed to raise the discrimination issue before the arbitrator. This was not always the case. The Board had held that its review was limited to discrimination claims that were raised before the arbitrator until the Federal Circuit's contrary ruling in Jones v. Department of the Navy, 898 F.2d 133, 135-36 (Fed. Cir. 1990). That decision was based on the court's analysis and interpretation of the requirements of both statute (5 U.S.C. 7121(d) and 7702(a)(1)) and regulation (5 CFR 1201.151, .155, and .156), and the court specifically noted that no statute or regulation had been called to its attention that required an issue of prohibited discrimination to be raised before an arbitrator before the Board would have jurisdiction to consider it on appeal. 898 F.2d at 135. The proposed rule would restore the rule that existed prior to the Federal Circuit's decision in Jones. As required by sections 7121(d) and 7702(a)(1), the employee would still receive Board review of both the Title 5 claim and the discrimination claim(s), so long as the discrimination claim was raised before the arbitrator.

In addition to moving and amending the existing regulatory language, the MSPB proposes to add a new paragraph (d), which provides that the Board may, in its discretion, "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 an administrative judge to conduct a hearing." This is because even when the discrimination claim was raised before the arbitrator, the factual record may be insufficiently developed to allow the Board to resolve the discrimination claim(s). Thus, the revised regulation would give the Board the option of ordering the parties to supplement the record or forwarding the matter to an administrative judge to gather additional evidence and/or conduct a hearing and make factual findings.

§ 1201.181 Authority and explanation.

The proposed amendments to this regulation are not substantive, but merely reorder the information and add descriptive labels to each paragraph.

§ 1201.182 Petition for enforcement.

The proposed amendments to this regulation clarify that the Board's enforcement authority under 5 U.S.C. 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of enforcement as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

§ 1201.183 Procedures for processing petitions for enforcement.

The proposed amendments to this regulation would change the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The goal is to ensure, to the extent feasible, that all relevant evidence is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues: "[T]he 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 . . ." In addition, the amended regulation provides that the "responsible agency official" whose pay may be suspended should a finding of noncompliance become the Board's final decision will be served with a copy of any initial decision finding the agency in noncompliance.

To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. This was done for several of reasons. First, where the initial decision is the first time that the agency learns definitively what actions it must take, 15 days would rarely be sufficient to have taken all required actions, e.g., the issuance of SF-52s and/or SF-50s and action taken by a payroll office. Second, the MSPB determined that there should not be different deadlines for submitting evidence of compliance as compared to contesting compliance actions with which the agency disagrees by filing a petition for review.

As noted above, the proposed revision to 5 CFR 1201.182 explains that the MSPB considers petitions for enforcement in two different situations: (1) when the MSPB has ordered relief or corrective action and (2) when the parties have entered a settlement agreement into the record for enforcement. Proposed new paragraph (c) in 5 CFR 1201.183 codifies existing case law regarding the different burdens of proof that apply in these enforcement actions depending on whether the Board is adjudicating a petition to enforce relief ordered by the Board (typically status quo ante relief when the Board has not sustained an agency action), or a petition to enforce a settlement agreement that a party is alleging that the other party breached. See, e.g., Kerr v. National Endowment for the Arts, 726 F.2d 730, 732-33 (Fed. Cir. 1984) (emphasizing the Board's obligation, in ensuring status quo ante relief in a compliance action, to "make a substantive assessment of whether the actual duties and responsibilities to which the employee was returned are either the same as or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge"); House v. Department of the Army, 98 M.S.P.R. 530, ¶ 14 (2005) (when the Board orders an agency action cancelled, the agency must return the appellant, as nearly as possible, to the status quo ante, which requires, in most instances, restoring the appellant to the position he occupied prior to the adverse action or placing him in a position that is

substantially equivalent); Fredendall v. Veterans Administration, 38 M.S.P.R. 366, 370-71 (1988) (adopting judicial precedent that an action to enforce a settlement agreement is analogous to an action for breach of contract, and the burden of proof in an action for breach of contract rests on the plaintiff). Both the Board and the Federal Circuit have emphasized that, even though an appellant who alleges that the agency breached a settlement agreement bears the burden of proof, the agency bears the burden to produce relevant evidence regarding its compliance. See Perry v. Department of the Army, 992 F.2d 1575, 1588 (Fed. Cir. 1993); Fredendall, 38 M.S.P.R. at 371.

Heading of Subpart H

The Board proposes to revise the heading for Subpart H of Part 1201 to reflect that the subpart, as the MSPB proposes to amend herein, addresses attorney fees and related costs, consequential damages, compensatory damages, and liquidated damages.

§ 1201.201 Statement of purpose.

The MSPB proposes to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA.

§ 1202.202 Authority for awards.

The MSPB proposes to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA.

§ 1201.204 Proceedings for consequential, liquidated, and compensatory damages.

The MSPB proposes to change "3-member Board" to "the Board" in order to cover situations in which there are only two Board members. In addition, because requests for "liquidated damages" in VEOA appeals are also handled in addendum proceedings, the MSPB proposes to modify this regulation to include requests for such damages.

Appendix III to Part 1201

The MSPB proposes to remove and reserve Appendix III. See earlier discussion regarding proposal to amend 5 CFR 1201.51(d).

§ 1203.2 Definitions.

The MSPB proposes to revise this regulation to acknowledge that there are now 12 prohibited personnel practices.

§ 1208.3 Application of 5 CFR part 1201.

The MSPB proposes to amend this section to reflect the references to liquidated damages in section 5 CFR 1201.204.

§ 1208.21 VEOA exhaustion requirement.

The purpose of the proposed revision to paragraph (a) is to clarify and codify an appellant's burden of proving exhaustion in a VEOA appeal. 5 CFR 1208.21 currently explains that to exhaust his administrative remedies with the Department of Labor (DOL), an appellant must file a complaint with DOL and allow DOL 60 days to resolve the complaint. However, this provides an incomplete and misleading picture of the exhaustion process. It is incomplete because it does not include the exhaustion requirement that DOL close the complaint, either on its own accord or based on a letter from the appellant after 60 days have elapsed stating that the appellant intends to file a Board appeal. See 5 U.S.C. 3330a (d)(1); Burroughs v. Department of Defense, 114 M.S.P.R. 647, ¶¶ 7-9 (2010) (the administrative judge erred in finding that the appellant exhausted his administrative remedy with DOL based on the mere fact that the appellant filed a complaint and waited 60 days before appealing to the Board); Becker v. Department of Veterans Affairs, 107 M.S.P.R. 327, ¶¶ 9, 11 (2007); 5 CFR 1208.23(a)(5). It is misleading because it does not account for the fact that DOL might close its investigation before 60 days have elapsed. The proposed revision provides a more accurate and complete picture of what is required to establish exhaustion in a VEOA appeal.

The addition of paragraph (b) regarding equitable tolling reflects the Federal Circuit's ruling in Kirkendall v. Department of the Army, 479 F.3d 830, 836-44 (Fed. Cir. 2007) (en banc).

§ 1208.22 Time of filing.

The MSPB proposes to add paragraph (c) to address the possibility of excusing an untimely filed appeal under the doctrine of equitable tolling.

§ 1208.23 Content of a VEOA appeal; request for hearing.

Subparagraphs (a)(2)-(5) of the current 5 CFR 1208.23 require that a VEOA appeal contain information to establish Board jurisdiction. See Jarrard v. Department of Justice, 113 M.S.P.R. 502, ¶ 9 (2010) (jurisdictional elements in a VEOA appeal). In particular, current subparagraphs (a)(4)-(5) require that an appellant submit evidence that he exhausted his remedy with DOL. See Downs v. Department of Veterans Affairs, 110 M.S.P.R. 139, ¶ 7 (2008) (exhaustion of the administrative remedy is a jurisdictional requirement in a VEOA appeal). However, the current provisions pertaining to the exhaustion requirement are incomplete. Both the Board and the Federal Circuit have found that the Board has VEOA jurisdiction only over the particular claims for which an appellant has exhausted his administrative remedy. See Gingery v. Department of the Treasury, 2010 WL 3937577 at *5 (Fed. Cir. 2010); Burroughs v. Department of the Army, 2011 MSPB 30, ¶¶ 9-10; White v. U.S. Postal Service, 114 M.S.P.R. 574, ¶ 9 (2010). The first step of the statutory exhaustion process is to "file a complaint with DOL containing 'a summary of the allegations that form the basis for the complaint.'" Gingery, 2010 WL 3937577 at *5 (quoting 5 U.S.C. 3330a(a)(2)(B)); Burroughs, 2011 MSPB 30, ¶ 9. The purpose of this requirement is to afford DOL an opportunity to investigate the claim before involving the Board in the matter, which is the same as the purpose of the exhaustion requirement in an IRA appeal. See Gingery, 2010 WL 3937577 at *5 (citing Ward v. Merit Systems Protection Board, 981 F.2d 521, 526 (Fed. Cir. 1992)); Burroughs, 2011 MSPB 30, ¶ 9. In order for the Board to make a jurisdictional

ruling in a VEOA appeal, it must have evidence of the particular claims that the appellant raised before DOL, but an appellant can meet the literal requirements of the Board's current regulations without submitting any such evidence.

Because it is now clear that the Board and the court will scrutinize the exhaustion issue in a VEOA appeal in the same way that they scrutinize the exhaustion issue in an IRA appeal, the Board's regulations on VEOA exhaustion ought to reflect that fact. See Gingery, 2010 WL 3937577 at *5 ("when an appellant's complaint entirely fails to inform the DOL of a particular alleged violation or ground for relief, the Board lacks jurisdiction over the claim"); cf. Boechler v. Department of the Interior, 109 M.S.P.R. 638, ¶ 6 (2008) (the Board may consider only those charges of whistleblowing that the appellant raised before OSC), aff'd, 328 F. App'x 660 (Fed. Cir. 2009). The proposed amendment would, therefore, add a new subparagraph between current 5 CFR 1208.23(a)(4) and (5), stating that a VEOA appeal must contain evidence to identify the specific claims that the appellant raised before DOL.

In drafting the proposed revision, the MSPB considered that an appellant might exhaust his administrative remedy on an issue that was not mentioned in the original 5 U.S.C. 3330a(1) complaint itself. Cf. Covarrubias v. Social Security Administration, 113 M.S.P.R. 583, ¶ 19 (2010) ("in showing that the exhaustion requirement [in an IRA appeal] has been met, the appellant is not limited by the statements in her initial complaint, but may also rely on subsequent correspondence with OSC"). Therefore, the proposed revision does not require an appellant to submit evidence of the issues raised in the "complaint," and it does not suggest that the requirements of the section can be satisfied by submitting a copy of the complaint. Rather, the proposed amendment is broad enough to encompass all matters that an appellant might have raised before DOL during the course of the complaint process.

§ 1209.2 Jurisdiction.

The MSPB proposes to change the reference in paragraph (a) from 5 U.S.C. 1214(a)(3) to 5 U.S.C. 1221(a). The latter provision is the one that authorizes appeals to the Board for claims of reprisal for protected whistleblowing. Section 1214(a)(3) contains the exhaustion requirement applicable to IRA appeals that do not involve an otherwise appealable action. The revised regulation also includes several new examples to aid in determining the MSPB's jurisdiction over IRA appeals.

Most importantly, this proposed regulation would overrule a significant body of Board case law. Starting with its decision in Massimino v. Department of Veterans Affairs, 58 M.S.P.R. 318 (1993), the Board has consistently maintained the position that an individual who claims that an otherwise appealable action was taken against him in retaliation for making whistleblowing disclosures, and who seeks corrective action from the Special Counsel before filing an appeal with the Board, retains all the rights associated with an otherwise appealable action in the Board appeal. In an adverse action, for example, the agency must prove its charges, nexus, and the reasonableness of the penalty by a preponderance of the evidence, and the appellant is free to assert any affirmative defense he might have, including harmful procedural error and discrimination prohibited by 5 U S C. 2302(b)(1). In an IRA appeal, however, the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures.

In 1994, the year after Massimino was issued, Congress amended 5 U.S.C. 7121 to add paragraph (g). Pub. L. No. 103-424, section 9(b), 108 Stat. 4361, 4365-66 (1994). Subsection (g)(3) provides that an employee affected by a prohibited personnel practice "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C.§ 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under

5 U.S.C. 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

A plain reading of 5 U.S.C. 7121(g) indicates that, contrary to Massimino, an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses. The Board has never reconsidered or amended its holding in Massimino in light of the 1994 amendment to section 7121, despite the fact that OSC later suggested that the Board change its regulatory guidance in 5 CFR 1201.21 "to include notice of the right to file a prohibited personnel practice complaint with the Special Counsel and the requirement for making an election among a grievance, an appeal to MSPB, and a complaint to the Special Counsel." See 65 Fed. Reg. 25623, 25624 (2000). The proposed rule adopts this plain language reading of 5 U.S.C. 7121(g) and overrules Massimino and its progeny.

When taking an otherwise appealable action, agencies would be required, per revised 5 CFR 1201.21, to advise employees of their options under 5 U.S.C. 7121(g) and the consequences of such an election, including the fact that the employee would be foregoing important rights if he or she seeks corrective action from OSC before filing with the Board.

§ 1209.4 Definitions.

The Board's case law, as well as its acknowledgment and jurisdictional orders, speak in terms of "protected disclosures," but this regulation defines "whistleblowing" and the Part 1209 regulations refer in several places to "whistleblowing activities." This minor revision to the definition combines the two concepts so that the use of "whistleblowing activities" is not ambiguous.

§ 1209.5 Time of filing.

The MSPB proposes to amend this regulation to eliminate the distinction between IRA appeals and otherwise appealable actions in light of the change made to 5 CFR 1209.2; and revise the language regarding equitable tolling consistent with the changes made in sections 5 CFR 1208.21 and .22. In a number of IRA appeals, the Board has considered whether an untimely appeal can be excused under the doctrine of equitable tolling. See, e.g., Pacilli v. Department of Veterans Affairs, 113 M.S.P.R. 526, ¶ 11 1011 10; Bauer v. Department of the Army, 88 M.S.P.R. 352, ¶¶ 8-9 (2001); Wood v. Department of the Air Force, 54 M.S.P.R. 587, 593 (1992). As in VEOA appeals, the MSPB believes that the possibility of excusing the filing deadline under the doctrine of equitable tolling should be addressed in the Board's timeliness regulation

§ 1209.6 Content of appeal; right to hearing.

As with the proposed modification to 5 CFR 1201.24(d), this proposed rule clarifies that an appellant does not automatically have a right to a hearing in every Board appeal; the right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal.

List of Subjects in 5 CFR Parts 1200, 1201, 1203, 1208, and 1209

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board proposes to amend 5 CFR parts 1200, 1201, 1203, 1208, and 1209 as follows:

PART 1200--[AMENDED]

1. The authority citation for 5 CFR part 1200 continues to read as follows:

Authority: 5 U.S.C. 1201 et seq.

2. Add § 1200.4 as follows:

§ 1200.4 Petition for Rulemaking.

(a) Any interested person may petition the MSPB for the issuance, amendment, or repeal of a rule. For purposes of this regulation, a "rule" means a regulation contained in 5 CFR parts 1200 through 1214. Each petition shall:

(1) Be submitted to the Clerk of the Board, 1615 M Street, N.W., Washington, D.C., 20419;

(2) Set forth the text or substance of the rule or amendment proposed or specify the rule sought to be repealed;

(3) Explain the petitioner's interest in the action sought; and

(4) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) No public procedures will be held on the petition before its disposition. If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. If the Board finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Board may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

PART 1201—PRACTICES AND PROCEDURES

3. The authority citation for 5 CFR part 1201 continues to read as follows:

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

4. Revise paragraph (a) of § 1201.3 to read as follows:

§ 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 nature of the action 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 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) *Negative Suitability Determination*. Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.501). Suitability determinations relate to an individual's character or conduct that may have an impact on the integrity or efficiency of the service;

(10) *Various Actions Involving the Senior Executive Service*. Removal or suspension for more than 14 days (5 U.S.C. 7511-7514; 5 CFR part 752, subparts E and F); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or Furlough of a career appointee (5 CFR 359.805); and

(11) *Miscellaneous Restoration and Reemployment Matters*. Failure to afford reemployment priority right pursuant to a Reemployment Priority List following separation by reduction in force, or full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 330.214, 302.501); Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508); Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209); Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313); Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR

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

* * * * *

5. In § 1201.4 revise paragraphs (a) and (j) to read as follows:

§ 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 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.

* * * * *

(j) *Date of service*. "Date of service" has the same meaning as "date of filing" under paragraph (l) of this section. Unless a different deadline is specified by the administrative judge or other designated Board official, whenever a regulation in this part bases a party's deadline for filing a pleading on the date of service of some previous document, and the previous document was served on the party by mail, the filing deadline will be extended by 5 calendar days.

* * * * *

6. In § 1201.14 revise paragraphs (c) and (m) as follows:

§ 1201.14 Electronic Filing Procedures

* * * * *

(c) *Matters excluded from electronic filing*. Electronic 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 (§ 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 participate as an amicus curiae or file a brief as amicus curiae pursuant to § 1201.34 of this part.

* * * * *

(m) *Date electronic documents are filed and served*.

(1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online 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 Online 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) * * *

* * * * *

7. In § 1201.21 revise paragraph (d) and add a new paragraph (e) as follows:

§ 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:

* * * * *

(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) * * *

(2) Whether both an appeal to the Board and a grievance may be filed on 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 1201.154(d) 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, consistent with the provisions of 29 CFR 1614.302.

8. In § 1201.22 revise paragraph (b) by adding a new subparagraph (3) as follows:

§ 1201.22 Filing an appeal and responses to appeals.

* * * * *

(b) *Time of filing*. * * *

(1) * * *

(2) * * *

(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 is deemed to have received the agency decision.

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

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

* * * * *

9. Revise § 1201.23 to read as follows:

§ 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.

10. In §1201.24 revise subparagraph (a)(7) and paragraph (d) to read as follows:

§ 1201.24 Content of an appeal; right to hearing.

(a) * * *

(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.

* * * * *

(d) *Right to hearing*. In an appeal under 5 U.S.C. 7701, 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.

* * * * *

11. Revise § 1201.28 to read as follows:

§ 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.

12. Add § 1201.29 as follows:

§ 1201.29 Dismissal without prejudice.

(a) *In general*. A dismissal of an appeal without prejudice is a dismissal which allows for the refiling of the appeal in the future. A dismissal without prejudice is a procedural option committed to the judge's sound discretion, and is appropriate when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party. A dismissal without prejudice may be granted at the request of either party or by the judge on his or her own

motion. Subject to the provisions of section 1201.12 of this part, a decision dismissing an appeal without prejudice shall include a date certain by which the appeal must be refiled.

(b) *Objection by appellant*. Where a dismissal without prejudice is issued over the objection of the appellant, the appeal will be automatically refiled as of a date certain.

(c) *Reinstatement of Appeal*. Depending on the type of case, the judge will determine whether a dismissal without prejudice must be refiled by the appellant or whether it will be automatically refiled as of a certain date. When the dismissed appeal must be refiled by the appellant and is refiled late, requests for a waiver of the late filing based upon good cause will be liberally construed.

13. In § 1201.31 revise paragraphs (b) and (d) as follows:

§ 1201.31 Representatives.

* * * * *

(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.

* * * * *

(d) As set forth in paragraphs (d) and (e) of section 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.

* * * * *

14. In § 1201.33 revise paragraph (a) to read as follows:

§ 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 ordered by the judge to do so. When providing those statements or appearing 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).

* * * * *

15. In § 1201.34 revise paragraph (e) to read as follows:

§ 1201.34 Intervenors and amicus curiae.

* * * * *

(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.

(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 may, in its discretion, invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.

16. In § 1201.36 revise paragraph (a) to read as follows:

§ 1201.36 Consolidating and joining appeals.

(a) *Explanation.*(1) * * *

(2) Joinder occurs when one person has filed two or more appeals and they 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.

* * * * *

17. In § 1201.41, revise the first sentence of paragraph (b) as follows:

§ 1201.41 Judges.

* * * * *

(b) *Authority*. Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. * * *

* * * * *

18. In § 1201.42 revise paragraph (a) to read as follows:

§ 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.

* * * * *

19. In § 1201.43 revise the introductory paragraph and insert new paragraphs (d) and (e) to read as follows:

§ 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.

* * * * *

(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.

20. In § 1201.51 revise paragraph (d) to read as follows:

§ 1201.51 Scheduling the hearing.

* * * * *

(d) The Board has established certain approved hearing locations, which are listed on the Board's public website (www.mspb.gov). The judge will advise parties of these hearing sites as appropriate. 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.

21. Revise § 1201.52 to read as follows:

§ 1201.52 Public hearings.

Hearings are 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 the appellant, 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. Absent express approval from the judge, no two-way communications devices may be operated and/or powered on 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 express approval of the judge.

22. Revise § 1201.53 to read as follows:

§ 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. Copies of recordings will be provided to parties without charge upon request.

(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. In the absence of a request by a party, and upon determining that a transcript would significantly assist in the preparation of a clear, complete, and timely decision, the judge or the Board may direct the agency to purchase a full or partial transcript from the court reporter, and to provide copies of such a transcript to the appellant and the Board. 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. Non-parties 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 regulation. A non-party 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. Non-parties 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.

23. Revise § 1201.56(a) to read as follows:

§ 1201.56. Burden and degree of proof; affirmative defenses.

(a) Burden and degree of proof.

(1) *Agency*. The agency has the burden of proving:

(i) A performance-based action brought under 5 U.S.C. 4303 or 5335 by substantial evidence; and

(ii) All other agency actions by a preponderance of the evidence.

(2) *Appellant*.

(i) Jurisdiction. The appellant has the burden of establishing Board jurisdiction. Unless otherwise specified in Parts 1201, 1208, and 1209 of the Board's regulations, the jurisdictional elements for a particular type of appeal are established by the Board's case law. The Board will explicitly inform the appellant as to the requirements for establishing jurisdiction in a given case.

(A) The appellant must establish the following jurisdictional elements by preponderant evidence: whether the appellant is a person entitled to bring the sort of appeal authorized by the law, rule, or regulation that gives the Board jurisdiction; whether the agency action or decision being challenged is of a type covered by the law, rule, or regulation that gives the Board jurisdiction; and whether the appellant has exhausted a required administrative remedy before filing a Board appeal. An appellant who makes a nonfrivolous allegation of a jurisdictional element under this paragraph is entitled to a jurisdictional hearing to establish the element by preponderant evidence. A nonfrivolous allegation is an allegation of facts that, if proven, would establish the jurisdictional element in question.

(B) Otherwise, jurisdiction is established by making nonfrivolous allegations of fact that, if proven, would entitle an appellant to relief.

(ii) Timeliness, affirmative defenses, and retirement matters. The appellant has the burden of proof, by preponderant evidence, with respect to:

(A) The timeliness of the appeal;

(B) Affirmative defenses as described in paragraph (c) of this section; and

(C) Entitlement to retirement benefits (where an appellant's application for such benefits has been denied by a reconsideration decision of the Office of Personnel Management).

(iii) Overpayments. The appellant has the burden of proof, by substantial evidence, with respect to eligibility for waiver or adjustment of an overpayment from the Civil Service Retirement and Disability Fund.

* * * * *

24. In § 1201.58 revise paragraph (c) to read as follows:

§ 1201.58 Closing the record.

* * * * *

(c) Once the record closes, additional evidence or argument will ordinarily not be accepted unless the party submitting it shows that the evidence or argument was not readily available before the record closed. Notwithstanding the close of the record, however, a party must be allowed to submit evidence or argument to rebut new evidence or argument submitted by the other party just before the close of the record. 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.

25. Remove § 1201.62.

26. Amend § 1201.71 by adding two new sentences at the end as follows:

§ 1201.71 Purpose of discovery.

* * * 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.

27. Revise § 1201.73 to read as follows:

§ 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 relevant and material and that the scope of the request is reasonable;

(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 file 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 (g)(1) and (g)(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.

28. In § 1201.93. revise paragraph (c) to read as follows:

§ 1201.93 Procedures.

* * * * *

(c) *Stay of Appeal*. The judge has the authority to proceed with or to stay the processing of the appeal while an interlocutory appeal is pending with the Board. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.

29. In § 1201.101 revise subparagraph (b)(2) to read as follows:

§ 1201.101 Explanation and definitions.

* * * * *

(b) * * *

(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.

30. In § 1201.111 revise paragraph (a) ro read as follows:

§ 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.

.* * * * *

31. In § 1201.112 revise subparagraph (a)(4) to read as follows:

§ 1201.112 Jurisdiction of judge.

(a) * * *

(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, but is not received until after the date when the initial decision becomes final under 1201.113 of this part.

* * * * *

32. In § 1201.113 revise paragraphs (a) and (f) to read as follows:

§ 1201.113 Finality of decision.

The initial decision of the judge will become the Board's final 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.

* * * * *

(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), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

* * * * *

33. Revise § 1201.114 as follows:

§ 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 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 for review 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 for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. 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 or cross 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 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) 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:

(1) The reasons for failing to request an extension before the deadline for the submission; and

(2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence.

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 or cross petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages. A reply to a response to petition for review shall be limited to 15 pages. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins. The length limitation shall be 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 therefore as well as the desired length of the pleading, and are granted only in exceptional circumstances or if the Board in specific cases changes the length limitation.

(i) Redesignate paragraph (g) as paragraph (i).

(j) Redesignate paragraph (h) as paragraph (j)

(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 the party submitting it shows that the evidence was not readily available before the record closed.

34. Revise § 1201.115 to read as follows:

§ 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 identify or reconsider any issue in an appeal before it.

35. Revise § 1201.116 to read as follows:

§ 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 for review 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 for review or a cross petition for review and has not provided 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.

36. In § 1201.117 revise subparagraph (a)(1) to read as follows:

§ 1201.117 Procedures for review or reopening.

(a) * * *

(1) Issue a decision that decides the case;

* * * * *

37. Revise § 1201.118 to read as follows:

§ 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.

38. In § 1201.119(a), (b) and (d) remove the words "final order" and add, in their place, the words "final decision".

39. In § 1201.122 revise paragraph (b) and delete paragraphs (d) and (e) of as follows:

§ 1201.122 Filing complaint; serving documents on parties.

(a) * * *

(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 or the party's representative, as shown on the certificate of service.

(c) * * *

40. In § 1201.128 revise paragraph (b) and delete paragraphs (d) and (e) as follows:

§ 1201.128 Filing complaint; serving documents on parties.

(a) * * *

(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) * * *

41. In § 1201.134 revise paragraph (d) and delete paragraphs (f) and (g) as follows:

§ 1201.134 Deciding official; filing stay request; serving documents on parties.

* * * * *

(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) * * *

42. In §1201.137 revise paragraph (c) and delete paragraphs (e) and (f) as follows:

§ 1201.137 Covered actions; filing complaint; serving documents on parties.

* * * * *

(c) Initial filing and service. The agency must file two copies 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 agency must serve a copy of

the complaint on each party or the party's representative, as shown on the certificate of service.

(d) * * *

43. Revise § 1201.142 to read as follows:

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

44. In § 1201.143 revise paragraph (c) and delete paragraphs (e) and (f) as follows:

§ 1201.143 Right to hearing; filing complaint; serving documents on parties.

* * * * *

(c) Initial filing and service. 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 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) * * *

45. In § 1201.153 revise subparagraph (a)(2) as follows:

§ 1201.153 Contents of appeal.

(a) * * *

(1) * * *

(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.

* * * * *

46. In§ 1201.154 revise the introductory paragraph as follows:

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

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) * * *

* * * * *

47. Revise § 1201.155 to read as follows:

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

(c) *Contents*. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or recording of the hearing.

(d) *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.

(e) *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.

48. Revise § 1201.181 to read as follows:

§ 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.

49. In § 1201.182 revise paragraphs (a) and (b) as follows:

§ 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.

* * * * *

50. In § 1201.183 revise paragraphs (a)(2) and (a)(5) through (a)(7), (b)(1), (b)(2), and (c), and redesignate paragraphs (c) and (d) as (d) and (e) as follows:

§ 1201.183 Procedures for processing petitions for enforcement.

(a) *Initial Processing*. (1) * * *

(2) If the agency is the alleged noncomplying 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.

* * * * *

(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 noncompliance 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 section 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 sections 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.

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).

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

(b) *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.

(3) * * *

(c) *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.

(d) Redesignate paragraph (c) as paragraph (d).

(e) Redesignate paragraph (d) as paragraph (e).

51. Revise the heading of Subpart H of part 1201 to read as follows:

Subpart H - - Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), and Damages (Consequential, Liquidated, and Compensatory)

52. In § 1201.201 revise paragraph (a) and add a new paragraph (e) as follows:

§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.

* * * * *

(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 individual's veterans' preference rights.

53. In § 1201.202 insert a new paragraph (d) and redesignate existing paragraph (d) as paragraph (e).

§ 1201.202 Authority for awards.

* * * * *

(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) Redesignate paragraph (d) as paragraph (e)

54. In § 1201.204 remove the words "consequential damages or compensatory damages" and add, in their place, the words ""consequential, liquidated, or compensatory damages."

55. Amend § 1201.204 by revising paragraph (h) to read as follows:

§ 1201.204 Proceedings for consequential, liquidated, and compensatory damages.

* * * * *

(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) * * *

* * * * *

56. Remove and reserve Appendix III to Part 1201.

Appendix III to Part 1201 [Reserved]

PART 1203—PROCEDURES FOR REVIEW OF RULES AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

57. The authority citation for 5 CFR part 1203 continues to read as follows:

Authority: 5 U.S.C. 1204(A), 1204(f), and 1204(h).

58. In §1203.2 revise paragraph (e) to read as follows:

§1203.2 Definitions.

* * * * *

(e) Prohibited personnel practices are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(12).

* * * * *

PART 1208—PRACTICES AND PROCEDURES FOR APPEALS UNDER THE UNIFORMED SERVISES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND THE VETERANS EMPLOYMENT OPPORTUNITIES ACT

59. The authority citation for 5 CFR part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204(h), 3330a, 3330b; 38 U.S.C. 4331.

60. Revise § 1208.3 to read as follows:

§ 1208.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), and Damages (Consequential, Liquidated, and Compensatory)) of 5 CFR part 1201 regarding awards of attorney fees and liquidated damages to appeals governed by this part.

61. Revise § 1208.21 to read as follows:

§ 1208.21 VEOA exhaustion requirement.

(a) *General rule*. Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation. In addition, either the Secretary must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or, if the Secretary has not issued such notification and at least 60 days have elapsed from the date the complaint is filed, the appellant must have provided written notification to the Secretary of the appellant's intention to file an appeal with the Board.

(b) *Equitable tolling; extension of filing deadline*. In extraordinary circumstances, the appellant's 60-day deadline for filing a complaint with the Secretary is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

62. Amend § 1208.22 by adding a new paragraph (c) as follows:

§ 1208.22 Time of filing.

* * * * *

(c) *Equitable tolling; extension of filing deadline*. In extraordinary circumstances, the appellant's 60-day deadline for filing an appeal with the MSPB is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

63. In § 1208.23 revise subparagraph (a)(5) and redesignate paragraph (a)(5) as paragraph (a)(6) as follows:

§ 1208.23 Content of a VEOA appeal; request for hearing.

(a) * * *

(1) * * *

* * * * *

(5) Evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary; and

(6) Redesignate paragraph (a)(5) as paragraph (a)(6).

* * * * *

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

64. The authority citation for 5 CFR part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

65. Revise paragraph of §1209.2 to read as follows:

§ 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1*) Individual right of action (IRA) appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example 1: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

Example 2: As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days, and because he testified on behalf of a co-worker in an EEO proceeding. The Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for filing a Board appeal would constitute a different prohibited personnel practice, 5 U.S.C. 2302(b)(9), retaliation for having exercised an appeal, complaint, or grievance right granted by any law, rule, or regulation. Similarly, retaliation for protected EEO activity is a prohibited personnel practice under subsection (b)(9), not under subsection (b)(8)

Example 3: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Y files a complaint with OSC alleging that the proposed removal was initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of federal law and regulation. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal.

(2) *Otherwise appealable action appeals*. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3(a).) An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.

Example 4: Same as Example 3 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board, or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if so, whether the agency can prove by clear and convincing evidence that it would have removed Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Y can raise any affirmative defenses she might have.

(3) * * *

(c) *Issues before the Board in IRA appeals*. In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure(s). The appellant may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), i.e., that its action is taken "only for such cause as will promote the efficiency of the service." However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has

demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure(s).

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

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

66. In §1209.4 revise paragraph (b) as follows:

§ 1209.4 Definitions.

* * *

(b) *Whistleblowing* is the making of a protected disclosure, that is, a disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is

disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

* * * * *

67. In §1209.5 revise paragraphs (a) and (b) as follows:

§ 1209.5 Time of filing.

(a) *General rule*. The appellant must seek corrective action from the Special Counsel before appealing to the Board unless the action being appealed is otherwise appealable directly to the Board and the appellant has elected a direct appeal. (See § 1209.2(d) regarding election of remedies under 5 U.S.C. 7121(g)). Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or,

(2) At any time after the expiration of 120 days, if the Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action,.

(b) *Equitable tolling; extension of filing deadline*. The appellant's deadline for filing an individual right of action appeal with the Board after receiving written notification from the Special Counsel that it was terminating its investigation of his or her allegations is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

(c) * * *

68. In § 1209.6 revise paragraph (b) to read as follows:

§ 1209.6 Content of appeal; right to hearing.

* * *

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

* * * * *

William D. Spencer
Clerk of the Board
[Billing Code 7400-01-P]

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