



MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) hereby amends its rules of practice and procedure to clarify that parties have a right to discovery under the MSPB's existing discovery procedures in compliance proceedings.

DATES: This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Submit written comments concerning this interim final rule on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments concerning this interim final 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 concerning the MSPB's interim final rule. The MSPB asks that commenters use email to submit comments if possible. Submission of comments by email will assist the MSPB to process comments and speed publication of a final rule.

Fax: (202) 653-7130. Comments submitted by fax should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's interim final rule.

Mail or other commercial delivery: Comments submitted by mail should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419.

Hand delivery or courier: Comments submitted by 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, the MSPB requests that commenters use email to submit comments, if possible. All comments received will be made available online at the Board's Web site, 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 commenter's 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 of a comment.

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

SUPPLEMENTARY INFORMATION:

This interim final rule is necessary because in Bernard v. Dep't of Agric., 788 F.3d 1365, 1367-70 (Fed. Cir. 2015), the United States Court of Appeals for the Federal Circuit held that the MSPB's regulations provide no clear guarantee that parties are authorized to undertake discovery in enforcement proceedings. This interim final rule amends the MSPB's regulations to address this holding and make clear that the parties have a right to discovery in such cases under the Board's existing discovery procedures.

Amendments made by this interim final rule.

A new provision, section 1201.183(a)(9), is inserted to make clear that discovery may be undertaken in enforcement matters. This new provision makes clear that the Board's regular discovery procedures apply in enforcement matters and sets a deadline by which initial discovery requests must be filed. As in other Board cases, this deadline may be changed by the judge.

Justification for use of interim final rule.

Ordinarily, the Administrative Procedure Act (APA) requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. 553(b) and (c). However, section 553(b) of the APA

specifically provides that the notice and comment requirements do not apply:

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The APA also requires the publication of any substantive rule at least thirty days before its effective date, 5 U.S.C. 553(d), except where the rule is interpretive, where the rule grants an exception or relieves a restriction, or “as otherwise provided by the agency for good cause found and published with the rule.” Id.

The Board finds that use of an immediately effective interim final rule instead of notice and comment rulemaking is appropriate here because the amendments contained herein merely reflect the decision of the Federal Circuit in Bernard and are necessary to avert any further confusion regarding the Board’s practice and procedures governing the right to discovery in compliance cases. Under these

circumstances, notice and comment rulemaking is unnecessary and not required by any public interest.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. 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.

2. Section 1201.183 is amended by adding paragraph (a)(9) to read as follows:

§ 1201.183 Procedures for processing petitions for enforcement.

(a) * * *

(9) Discovery may be undertaken in accordance with the Board's regular discovery procedures (§§ 1201.71 through 1201.75 of this part), except that unless otherwise directed by the judge, initial discovery requests must be served no later than 15 days after the

alleged noncomplying party files a response to the petition for enforcement as required under paragraph (a)(1) of this section.

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William D. Spencer

Clerk of the Board

[Billing Code 7400-01-P]

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