

SUBCHAPTER A—ORGANIZATION AND PROCEDURES

PART 1200—BOARD ORGANIZATION

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SOURCE: 56 FR 41747, Aug. 23, 1991, unless otherwise noted.

Subpart A—General

AUTHORITY: 5 U.S.C. 1201 *et seq.*

§ 1200.1 Statement of purpose.

The Merit Systems Protection Board (the Board) is an independent Government agency that operates like a court. The Board was created to ensure that all Federal government agencies follow Federal merit systems practices. The Board does this by adjudicating Federal employee appeals of agency personnel actions, and by conducting special reviews and studies of Federal merit systems.

[56 FR 41747, Aug. 23, 1991, as amended at 59 FR 65233, Dec. 19, 1994]

§ 1200.2 Board members and duties.

(a) The Board has three members whom the President appoints and the Senate confirms. Members of the Board serve seven-year terms.

(b) The President appoints, with the Senate's consent, one member of the Board to serve as Chairman and chief executive officer of the Board. The President also appoints one member of the Board to serve as Vice Chairman. If the office of the Chairman is vacant or the Chairman cannot perform his or her duties, then the Vice Chairman performs the Chairman's duties. If both the Chairman and the Vice Chairman cannot perform their duties, then the

remaining Board Member performs the Chairman's duties.

[56 FR 41747, Aug. 23, 1991, as amended at 59 FR 65233, Dec. 19, 1994]

§ 1200.3 How the Board members make decisions.

(a) The three Board members make decisions in all cases by majority vote except in circumstances described in paragraphs (b) and (c) of this section or as otherwise provided by law.

(b) When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.

(c) When due to a vacancy, recusal or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.

(d) Decisions and orders issued pursuant to paragraphs (b) and (c) of this section shall not be precedential.

(e) This section applies only when at least two Board members are in office.

[59 FR 39937, Aug. 5, 1994]

Subpart B—Offices of the Board

AUTHORITY: 5 U.S.C. 1204(h) and (j).

§ 1200.10 Staff organization and functions.

(a) The Board's headquarters staff is organized into the following offices:

(1) Office of the Administrative Law Judge and Regional Operations.

(2) Office of Appeals Counsel.

(3) Office of the Clerk of the Board.

(4) Office of the General Counsel.

(5) Office of Policy and Evaluation.

(6) Office of Equal Employment Opportunity.

(7) Office of Planning and Resource Management Services.

(b) The principal functions of the Board's headquarters offices are as follows:

(1) *Office of the Administrative Law Judge and Regional Operations.* The Administrative Law Judge hears Hatch Act cases, disciplinary and corrective action complaints brought by the Special Counsel, actions against administrative law judges, appeals of actions taken against MSPB employees, and other cases that the Board assigns. The office also manages the appellate functions of the MSPB regional and field offices.

(2) *Office of Appeals Counsel.* The Director, Office of Appeals Counsel, prepares proposed decisions that recommend appropriate action by the Board in petition for review cases and other cases assigned by the Board.

(3) *Office of the Clerk of the Board.* The Clerk of the Board enters petitions for review and original jurisdiction cases onto the Board's docket and monitors their processing. The Clerk of the Board also does the following:

(i) Gives information on the status of cases;

(ii) Manages the Board's records, reports, and correspondence style and control programs; and

(iii) Answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters.

(4) *Office of the General Counsel.* The General Counsel provides legal advice to the Board and its headquarters and regional offices, represents the Board in court proceedings, coordinates legislative policy and performs congressional liaison, coordinates the Board's public affairs function, and plans and directs audits and investigations.

(5) *Office of Policy and Evaluation.* The Director, Policy and Evaluation, conducts special reviews and studies of Federal merit systems, including reviews of the significant actions of the Office of Personnel Management.

(6) *Office of Equal Employment Opportunity.* The Director, Office of Equal Employment Opportunity, manages the Board's equal employment programs.

(7) *Office of Planning and Resource Management Services.* The Director, Office of Planning and Resource Management Services, develops and coordinates internal management programs

and projects, conducts agencywide management reviews, and manages the Board's three administrative divisions: Financial and Administrative Management; Information Resources Management; and Human Resources Management.

(c) *Regional and Field Offices.* The Board has six regional offices and five field offices located throughout the country (See Appendix II to 5 CFR part 1201 for a list of the regional and field offices). The regional and field offices enter initial appeals onto their dockets and decide these cases as provided for in the Board's regulations.

[59 FR 65233, Dec. 19, 1994]

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AUTHORITY: 5 U.S.C. 1204, and 7701 unless otherwise noted.

SOURCE: 54 FR 53504, Dec. 29, 1989, unless otherwise noted.

Subpart A—Jurisdiction and Definitions

§ 1201.1 General.

The Board has two types of jurisdiction, original and appellate.

§ 1201.2 Original jurisdiction.

The Board's original jurisdiction includes the following cases:

(a) Actions brought by the Special Counsel;

(b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and

(c) Actions taken against administrative law judges under 5 U.S.C. 7521.

§ 1201.3 Appellate jurisdiction.

(a) *Generally.* The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:

(1) Reduction in grade or removal for unacceptable performance (5 CFR part 432; 5 U.S.C. 4303(e));

(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR part 752, subparts C and D; 5 U.S.C. 7512);

(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 CFR part 752, subparts E and F; 5 U.S.C. 7541–7543);

(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595);

(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c));

(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR parts 831, 842, and 844; 5 U.S.C. 8347(d)(1)–(2) and 8461 (e)(1));

(7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.103(d) and 731.501);

(8) Termination of employment during probation or the first year of a veterans readjustment appointment when:

(i) The employee alleges discrimination because of partisan political reasons or marital status; *or*

(ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 CFR 315.806, 38 U.S.C. 4214(b)(1)(E));

(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 CFR 315.908(b));

(10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901);

(11) Furlough of a career appointee in the Senior Executive Service (5 CFR 359.805);

(12) Failure to restore a former employee to employment following military service, or following partial or full

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recovery from a compensable injury (38 U.S.C. 4324, 5 CFR 353.211 and 304);

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.209);

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

(15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);

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

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

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

(19) 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); and

(20) Removal of a career appointee from the Senior Executive Service for failure to be recertified (5 U.S.C. 3592(a)(3), 5 CFR 359.304).

(21) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (Pub. L. 103-236, sec. 181(a)(2), to be codified at 22 U.S.C. 4011).

(b) *Appeals involving an allegation that the action was based on appellant's "whistleblowing."* Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing" [a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)], are governed by part 1209 of this title. The provisions of subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part.

(c) *Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures:*

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) Any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) *Choice of procedure.* When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

(3) *Review of discrimination grievances.* If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

[54 FR 53504, Dec. 29, 1989, as amended at 56 FR 41748, Aug. 23, 1991; 59 FR 65235, Dec. 19, 1994; 61 FR 1, Jan. 2, 1996]

§ 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 attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board.

(b) *Pleading.* Written submission setting out claims, allegations, arguments, or evidence. Pleadings include briefs, motions, petitions, attachments, and responses.

(c) *Motion.* A request that a judge take a particular action.

(d) *Appropriate regional or field office.* The regional or field office of the Board that has jurisdiction over the area where the appellant's duty station was located when the agency took the action. Appeals of Office of Personnel Management reconsideration decisions concerning retirement benefits, and appeals of adverse suitability determinations under 5 CFR part 731, must be filed with the regional or field office that has jurisdiction over the area where the appellant lives. Appendix II of these regulations lists the geographic areas over which each of the Board's regional and field offices has jurisdiction. Appeals, however, may be transferred from one regional or field office to another.

(e) *Party.* A person, an agency, or an intervenor, who is participating in a Board proceeding. This term applies to the Office of Personnel Management and to the Office of Special Counsel when those organizations are participating in a Board proceeding.

(f) *Appeal.* A request for review of an agency action.

(g) *Petition for review.* A request for review of an initial decision of a judge.

(h) *Day.* Calendar day.

(i) *Service.* The process of furnishing a copy of any pleading to Board officials, other parties, or both, either by mail, by facsimile, by personal delivery, or by commercial overnight delivery.

(j) *Date of service.* The date on which documents are served on other parties.

(k) *Certificate of Service.* A document certifying that a party has served copies of pleadings on the other parties.

(l) *Date of filing.* A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is

closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993; 59 FR 65235, Dec. 19, 1994]

Subpart B—Procedures for Appellate Cases

GENERAL

§ 1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case, with due regard to the rights of all parties.

§ 1201.12 Revocation, amendment, or waiver of rules.

The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

§ 1201.13 Appeals by Board employees.

Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not

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rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

APPEAL OF AGENCY ACTION; PLEADINGS

§ 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

- (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;
- (b) A copy, or access to a copy, of the Board's regulations;
- (c) A copy of the appeal form in appendix I of this part; and
- (d) Notice of any right the employee has to file a grievance.

§ 1201.22 Filing an appeal and responses to appeals.

- (a) *Place of filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this part.
- (b) *Time of filing.* An appeal must be filed during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date. An appeal from a final or reconsideration decision that does not set an effective date must be filed within 35 days of the date of the issuance of the decision. (Paragraphs (a) (5), (6), (7), (12), (13), (14), (15), (16), (17), and (18) of § 1201.3 of this part list actions covered by the latter rule.) A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order.
- (c) *Timeliness of appeals.* If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.
- (d) *Method of filing.* Filing must be made with the appropriate Board office by personal delivery, by facsimile, by

mail, or by commercial overnight delivery.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993; 59 FR 31109, June 17, 1994; 59 FR 65235, Dec. 19, 1994]

§ 1201.23 Computation of time.

In computing the number of days allowed for filing a submission, 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.

Example: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994]

§ 1201.24 Content of an appeal; right to hearing.

- (a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file an appeal. Appeals may be in any format, including letter form, but they must contain the following:
 - (1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;
 - (2) A description of the action the agency took and its effective date;
 - (3) A request for hearing if the appellant wants one;
 - (4) A statement of the reasons why the appellant believes the agency action is wrong;
 - (5) A statement of the action the appellant would like the judge to order;
 - (6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;
 - (7) The notice of the decision to take the action being appealed, along with any relevant documents;
 - (8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a

formal discrimination complaint with any agency regarding this matter; and

(9) The signature of the appellant or, if the appellant has a representative, of the representative.

(b) An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. An appellant may not raise a new claim or defense after that time, except for good cause shown. However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.

(c) *Use of Board form.* An appellant may comply with paragraph (a) of this section, and with §1201.31 of this part, by completing the form in Appendix I of this part.

(d) *Right to hearing.* Under 5 U.S.C. 7701, an appellant has a right to a hearing.

(e) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

§ 1201.25 Content of agency response.

The agency response to an appeal must contain the following:

(a) The name of the appellant and of the agency whose action the appellant is appealing;

(b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;

(c) All documents contained in the agency record of the action;

(d) Designation of and signature by the authorized agency representative; and

(e) Any other documents or responses requested by the Board.

§ 1201.26 Number of pleadings, service, and response.

(a) *Number.* The appellant must file two copies of both the appeal and all attachments with the appropriate Board office.

(b) *Service*—(1) *Service by the Board.* The appropriate office of the Board will mail a copy of the appeal to each party

to the proceeding other than the appellant. It will attach to each copy a service list, consisting of a list of the names and addresses of the parties to the proceeding or their designated representatives.

(2) *Service by the parties.* The parties must serve on each other one copy of each pleading, as defined by §1201.4(b), and all documents submitted with it, except for the initial appeal. They may do so by mail, by facsimile, by personal delivery, or by commercial overnight delivery to each party and to each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names or addresses on the service list.

(c) *Paper size.* Pleadings and attachments must be filed on 8 1/2 by 11-inch paper, except for good cause shown. This requirement enables the Board to comply with standards established for U.S. courts.

[54 FR 53504, Dec. 29, 1989; 55 FR 548, Jan. 5, 1990, as amended at 58 FR 36345, July 7, 1993]

§ 1201.27 Class appeals.

(a) *Appeal.* One or more employees may file an appeal as representatives of a class of employees. The judge will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties. When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.

(b) *Procedure.* The judge will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 35 days after the denial. Each individual appellant is responsible for either filing an individual appeal within the original time limit,

or keeping informed of the status of a class appeal and, if the class appeal is denied, filing an individual appeal within the additional 35-day period.

(c) *Standards.* In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994]

PARTIES, REPRESENTATIVES, AND WITNESSES

§ 1201.31 Representatives.

(a) A party to an appeal may be represented in any matter related to the appeal. The parties must designate their representatives, if any, in writing. Any change in representation, and any revocation of a designation of representative, also must be in writing. Notice of the change must be filed and served on the other parties in accordance with § 1201.26 of this part.

(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. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

(c) The judge, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.

§ 1201.32 Witnesses; right to representation.

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has

no right to examine the witness at the hearing or otherwise participate in the development of testimony.

§ 1201.33 Federal witnesses.

Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the 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).

§ 1201.34 Intervenors and amicus curiae.

(a) *Explanation of Intervention.* Intervenors are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervenors as a "matter of right" are those parties who have a statutory right to participate. "Permissive" intervenors are those parties who may be permitted to participate if the proceeding will affect them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the judge.

(b) *Intervenors as a matter of right.* (1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(c) *Permissive intervenors.* (1) Any person, organization or agency may, by motion, ask the judge for permission to

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intervene. The motion must explain the reason why the person, organization or agency should be permitted to intervene.

(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A judge's denial of a motion for permissive intervention may be appealed to the Board under §1201.91 of this part.

(d) *Role of intervenors.* Intervenors have the same rights and duties as parties, with the following two exceptions:

(1) Intervenors do not have an independent right to a hearing; and

(2) Permissive intervenors may participate only on the issues affecting them. The judge is responsible for determining the issues on which permissive intervenors may participate.

(e) *Amicus curiae.* An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to file an amicus curiae brief.

§ 1201.35 Substituting parties.

(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will only be completed upon substitution of a proper party. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.

(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event, except for good cause shown.

(c) In the absence of a timely substitution of a party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

§ 1201.36 Consolidating and joining appeals.

(a) *Explanation.* (1) Consolidation occurs when the appeals of two or more parties are united for consideration be-

cause they contain identical or similar issues. For example, individual appeals arising from a single reduction in force might be consolidated.

(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 dismissal if the same appellant filed both appeals.

(b) *Action by judge.* A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:

(1) Expedite processing of the cases; and

(2) Not adversely affect the interests of the parties.

(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

§ 1201.37 Fees.

(a) *Attorney fees.* Except as provided in paragraphs (a)(1) and (a)(2) of this section, the judge may require the agency to pay reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice.

(1) If an appellant is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the motion for an attorney fee award will be considered under the standards of section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(2) If an appellant is the prevailing party in an appeal and the decision is based on the finding of any prohibited personnel practice under 5 U.S.C. 2302(b), as provided by 5 U.S.C. 1221(g) the agency shall be liable to the appellant for payment of reasonable attorney fees and any other reasonable costs incurred.

(3) Any request for payment of attorney fees must be made by motion. The motion must be filed with the judge within 30 days of the date on which an initial decision becomes final under §1201.113 of this part or within 35 days of the date of issuance of a final decision under §1201.117. The appellant must serve a copy of the motion on the

agency. The agency may file a pleading responding to that motion within the time limit set by the judge. The motion must state why the appellant believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. That evidence must include, at a minimum:

- (i) Accurate and current time records;
- (ii) A copy of the terms of the fee agreement (if any); and
- (iii) The attorney's customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney's services. A petition for Board review of the judge's decision on the motion must be filed within 35 days of the date of that decision, and must comply with § 1201.114 of this part.

(b) *Witness fees*—(1) *Federal employees.* Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be in official duty status and will not receive witness fees.

(2) *Other witnesses.* Other witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(3) *Payment of witness fees and travel costs.* The party requesting the presence of a witness must pay that witness' fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness appears voluntarily, at the time of appearance. A Federal agency or corporation is not required to pay or offer witness fees in advance.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994; 59 FR 65235, Dec. 19, 1994]

JUDGES

§ 1201.41 Judges.

(a) *Exercise of authority.* Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) *Authority.* Judges will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges' powers include, but are not limited to, the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas under § 1201.81 of this part;
- (3) Rule on offers of proof and receive relevant evidence;
- (4) Rule on discovery motions under § 1201.73 of this part;
- (5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:
 - (i) To resolve an important issue of credibility;
 - (ii) To ensure that the record on significant issues is fully developed; or
 - (iii) To otherwise ensure a fair and just adjudication of the case;
- (6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;
- (7) Exclude any person from the hearing for good reason;
- (8) Rule on all motions, witness and exhibit lists, and proposed findings;
- (9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;
- (10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;
- (11) Impose sanctions as provided under § 1201.43 of this part;
- (12) Hold prehearing conferences for the settlement and simplification of issues;
- (13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;
- (14) Issue any order that may be necessary to protect a witness or other individual from harassment and provide

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for enforcement of such order in accordance with subpart F;

(15) Issue initial decisions; and

(16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

(c) *Settlement*—(1) *Settlement discussion*. The judge may initiate attempts to settle the appeal informally at any time. The parties may agree to waive the prohibitions against *ex parte* communications during settlement discussions, and they may agree to any limits on the waiver.

(2) *Agreement*. If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the judge will dismiss the appeal with prejudice.

(i) If the parties offer the agreement for inclusion in the record, and if the judge approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement.

(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

§ 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 immediately notify the Board of the withdrawal.

(b) A party may file a motion asking the judge to withdraw on the basis of personal bias or other disqualification. This motion must be filed as soon as the party has reason to believe there is a basis for disqualification. The reasons for the request must be set out in an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.)

(c) If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under § 1201.91 of this part. Failure to request certification is considered a waiver of the request for withdrawal.

§ 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 cir-

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cumstances set forth in paragraphs (a), (b), and (c) of this section.

(a) *Failure to comply with an order*. When a party fails to comply with an order, the judge may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and

(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) *Failure to prosecute or defend appeal*. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) *Failure to make timely filing*. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

HEARINGS

§ 1201.51 Scheduling the hearing.

(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.

(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.

(d) The Board has established certain approved hearing locations, which are published as a Notice in the FEDERAL

REGISTER. See appendix III. 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.

§ 1201.52 Public hearings.

Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, 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.

§ 1201.53 Verbatim record.

(a) *Preparation.* A verbatim record of every hearing, made under the supervision of the judge, will be kept and will be the sole official record of the proceeding.

(b) *Copies.* Upon request, and upon payment of costs, a copy of a tape recording or transcript (if one is prepared) of the hearing will be made available to the parties. Parties must direct requests for copies of tape recordings or transcripts to the official hearing reporter.

(c) *Exceptions to payment of costs.* Exceptions to the payment requirement may be granted under extenuating circumstances for good cause shown. A motion for an exception must be filed with the judge. The reasons for the request must be set out in an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.)

(d) *Corrections.* Corrections of the official transcript may be permitted on motion by a party or on the judge's own motion. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be permitted only when errors of substance are involved and only on approval of the judge.

§ 1201.54 Official record.

Exhibits and the verbatim record of testimony, if a hearing is held, together with all pleadings filed during the appellate proceedings, and all or-

ders and decisions of the judge and the Board, constitute the exclusive and official record of the case.

§ 1201.55 Motions.

(a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the judge or the Board, as appropriate, and must be served upon all other parties in accordance with § 1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) *Objection.* Unless the judge provides otherwise, and unless the motion is one for payment of attorney fees under § 1201.37(a) of this part, any objection to a written motion must be filed within 10 days from the date of service of the motion. Judges, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

(c) *Motions for extension of time.* Motions for extension of time will be granted only on a showing of good cause.

(d) *Motions for protective orders.* A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during the Special Counsel's investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

§ 1201.56 Burden and degree of proof; affirmative defenses.

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

(i) It is brought under 5 U.S.C. 3592(a)(3), 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant*. The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

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

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;

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

(3) Shows that the decision was not in accordance with law.

(c) *Definitions*. The following definitions apply to this part:

(1) *Substantial evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) *Preponderance of the evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(3) *Harmful error*. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

[54 FR 53504, Dec. 29, 1989, as amended at 56 FR 41748, Aug. 23, 1991]

§ 1201.57 Order of hearing.

(a) In cases in which the agency has taken an action against an employee, the agency will present its case first.

(b) The appellant will proceed first at hearings convened on the issues of:

- (1) Jurisdiction;
- (2) Timeliness; or

(3) Office of Personnel Management disallowance of retirement benefits, when the appellant applied for those benefits.

(c) The judge may vary the normal order of presenting evidence.

§ 1201.58 Closing the record.

(a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.

(b) If the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for the receipt or filing of submissions of the parties.

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

EVIDENCE

§ 1201.61 Exclusion of evidence and testimony.

Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

§ 1201.62 Producing prior statements.

After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the judge may exclude the evidence given.

§ 1201.63 Stipulations.

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

§ 1201.64 Official notice.

Official notice is the Board's or judge's recognition of certain facts without requiring evidence to be introduced establishing those facts. The judge, on his or her own motion or on the motion of a party, may take official notice of matters of common knowledge or matters that can be verified. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact.

DISCOVERY

§ 1201.71 Purpose of discovery.

Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.

§ 1201.72 Explanation and scope of discovery.

(a) *Explanation.* Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise provided. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.

(b) *Scope.* Discovery covers any non-privileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) *Methods.* Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

§ 1201.73 Discovery procedures.

(a) *Discovery from a party.* A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in § 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable.

When a party directs a request for discovery to an officer 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) *Discovery from a nonparty, including a nonparty Federal agency.* Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.

(c) *Responses to discovery requests.* (1) A party, or a Federal agency that is not a party, 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 or testimony 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.

(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond

in full to a Board-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:

(i) A copy of the original request and a statement showing that the information sought is relevant and material; and

(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.)

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.

(d) *Time limits.* (1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 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. 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 to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (d)(1) of this section or as the judge otherwise directs.

(4) Any motion for an order to compel discovery 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 discovery must be filed with the judge within 10 days of the date of service of the motion.

(5) Discovery must be completed within the time the judge designates.

§ 1201.74 Orders for discovery.

(a) *Motion for an order compelling discovery.* Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(2) and (d)(4).

(b) *Content of order.* Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression;

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the judge sets.

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

§ 1201.75 Taking depositions.

Depositions may be taken by any method agreed upon by the parties. The person providing information is subject to penalties for intentional false statements.

SUBPOENAS

§ 1201.81 Requests for subpoenas.

(a) *Request.* Parties who wish to obtain subpoenas that would require the attendance and testimony of witnesses, or subpoenas that would require the production of documents or other evidence under 5 U.S.C. 1204(b)(2)(A), should file their motions for those subpoenas with the judge. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses.

(b) *Form.* Parties requesting subpoenas must file their requests, in writing, with the judge. Each request must identify specifically the books, papers, or testimony desired.

(c) *Relevance.* The request must be supported by a showing that the evidence sought is relevant and that the scope of the request is reasonable.

(d) *Rulings.* Any judge who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Judges who have the authority to rule on these requests themselves will do so directly.

§ 1201.82 Motions to quash subpoenas.

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

§ 1201.83 Serving subpoenas.

(a) Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. The means prescribed by applicable state law are sufficient. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena.

(b) A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country.

§ 1201.84 Proof of service.

The person who has served the subpoena must certify that he or she did so:

(a) By delivering it to the witness in person,

(b) By registered or certified mail, or

(c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the

residence or place of business (as appropriate) of the person for whom the subpoena was intended.

The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

§ 1201.85 Enforcing subpoenas.

(a) If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the judge or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear before the judge, must submit an affidavit or sworn statement under 28 U.S.C. 1746 (see appendix IV) describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

(b) Upon application by the Special Counsel, the Board may seek court enforcement of a subpoena issued by the Special Counsel in the same manner in which it seeks enforcement of Board subpoenas, in accordance with 5 U.S.C. 1212(b)(3).

INTERLOCUTORY APPEALS

§ 1201.91 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. The judge may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal. In addition, the judge, on his or her own motion, may certify an interlocutory appeal to the Board. If

the appeal is certified, the Board will decide the issue and the judge will act in accordance with the Board's decision.

§ 1201.92 Criteria for certifying interlocutory appeals.

The judge will certify a ruling for review only if the record shows that:

(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.

§ 1201.93 Procedures.

(a) *Motion for certification.* A party seeking the certification of an interlocutory appeal must file a motion for certification within 10 days of the date of the ruling to be appealed. The motion must be filed with the judge, and must state why certification is appropriate and what the Board should do and why. The opposing party may file objections within 10 days of the date of service of the motion, or within any other time period that the judge may designate.

(b) *Certification and review.* The judge will grant or deny a motion for certification within five days after receiving all pleadings or, if no response is filed, within 10 days after receiving the motion. If the judge grants the motion for certification, he or she will refer the record to the Board. If the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued, in accordance with §§ 1201.113 and 1201.114 of this part.

(c) *Stay of hearing.* The judge has the authority to proceed with or to stay the hearing while an interlocutory appeal is pending with the Board. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it.

EX PARTE COMMUNICATIONS

§ 1201.101 Explanation and definitions.

(a) *Explanation.* An ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate. Not all ex parte communications are prohibited. Those that involve the merits of the case, or those that violate rules requiring submissions to be in writing, are prohibited. Accordingly, interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board. Parties may not ask about matters such as what defense they should use or whether their evidence is adequate, and they may not make a submission orally if that submission is required to be made in writing.

(b) *Definitions for purposes of this section.*

(1) *Interested party* includes:

(i) Any party or representative of a party involved in a proceeding before the Board; and

(ii) Any other person who might be affected by the outcome of a proceeding before the Board.

(2) *Decision-making official* means any judge, officer or other employee of the Board designated to hear and decide cases.

§ 1201.102 Prohibition on ex parte communications.

Except as otherwise provided in § 1201.41(c)(1) of this part, ex parte communications that concern the merits of any matter before the Board for adjudication, or that otherwise violate rules requiring written submissions, are prohibited from the time the persons involved know that the Board may consider the matter until the time the Board has issued a final decision on the matter.

§ 1201.103 Placing communications in the record; sanctions.

(a) Any communication made in violation of § 1201.102 of this part will be made a part of the record. If the communication was oral, a memorandum

stating the substance of the discussion will be placed in the record.

(b) If there has been a violation of § 1201.102 of this part, the judge or the Clerk of the Board, as appropriate, will notify the parties in writing that the regulation has been violated, and will give the parties 10 days to file a response.

(c) The following sanctions are available:

(1) *Parties.* The offending party may be required to show why, in the interest of justice, the claim or motion should not be dismissed, denied, or otherwise adversely affected.

(2) *Board personnel.* Offending Board personnel will be treated in accordance with the Board's standards of conduct.

(3) *Other persons.* The Board may invoke appropriate sanctions against other offending parties.

FINAL DECISIONS

§ 1201.111 Initial decision by judge.

(a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right.

(b) Each initial decision will contain:

(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

(2) The reasons or bases for those findings and conclusions;

(3) An order making final disposition of the case, including appropriate relief;

(4) A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part;

(5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and

(6) A statement of any further process available, including, as appropriate, a petition for enforcement under

§ 1201.182 of this part, a petition for review under § 1201.114, and a petition for judicial review.

(c) *Interim relief.* Under 5 U.S.C. 7701(b)(2), if the appellant is the prevailing party, the initial decision will provide appropriate interim relief to the appellant effective upon the date of the initial decision and remaining in effect until the date of the final order of the Board on any petition for review, unless the judge determines that the granting of interim relief is not appropriate. The agency may decline to return the appellant to his or her place of employment if it determines that the return or presence of the appellant will be unduly disruptive to the work environment. However, pay and benefits must be provided.

§ 1201.112 Jurisdiction of judge.

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

- (1) Correct the transcript, when one is obtained;
- (2) Rule on motions for exception to the requirement that a party seeking a transcript must pay for it;
- (3) Rule on a request by the appellant for attorney fees;
- (4) Process any petition for enforcement filed under subpart F of this part;
- (5) Vacate an initial decision before that decision becomes final under § 1201.113 in order to accept a settlement agreement into the record.

(b) Nothing in this section affects the time limits prescribed in § 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

[59 FR 22125, Apr. 29, 1994]

§ 1201.113 Finality of decision.

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

(a) *Exceptions.* The initial decision will not become final if, within 35 days after issuance of the decision, any party files a petition for review, or if the Board reopens the case on its own motion.

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final

when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

(d) *Extensions.* The Board may extend the 35-day time limit for filing a petition for good cause shown as specified in § 1201.114 of this part.

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

Subpart C—Petitions for Review of Initial Decisions

§ 1201.114 Filing petition and cross petition for review.

(a) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a 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.

(b) *Cross petition for review.* If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

(d) *Time for filing.* Any petition for review must be filed within 35 days after the initial decision is issued. 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.

(e) *Extension of time to file.* The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response 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.

(f) *Late filings.* Any petition for review, cross petition for review, or response 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 (e) 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 (d) 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.

(g) *Intervention*—(1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will

be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(h) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative as provided in § 1201.26(b)(2).

(i) *Closing the record.* The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition 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.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993]

§ 1201.115 Contents of petition for review.

(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

(b)(1) 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 evidence that the agency has provided the interim relief required, except when the agency has made a determination as described in paragraph (b)(2) of this section. The agency may comply by submitting an SF 50 or SF 52, a letter from an agency official directing the appellant to return to work and informing the appellant of his or her reinstatement as of the date of the initial decision, or an affidavit or declaration specifying the manner of the agency's compliance. The interim relief must be effected retroactively to the date of the initial decision. Cancellation of the appealed action or relief effected retroactively to the date of the action will result in dismissal of the agency's petition for mootness.

(2) Under 5 U.S.C. 7701(b)(2), if the initial decision provides interim relief which requires that the appellant be returned to his or her place of employment pending the outcome of any petition for review and the agency determines that the return or presence of the appellant will be unduly disruptive to the work environment, the agency must notify both the appellant and the judge in writing. The agency must also provide evidence of such notification to the Board at the time of filing a petition or cross petition for review. The evidence must show that the agency has provided that the appellant will receive appropriate pay, compensation, and all other benefits as terms and conditions of employment from the date of the initial decision until a final decision is issued.

(3) Nothing in paragraphs (b)(1) or (b)(2) of 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.

(4) Failure of the agency to submit evidence that it has complied with the granting of interim relief in accordance with paragraph (b)(1) of this section, or that it has provided notification that interim relief will not be granted fully in accordance with paragraph (b)(2) of this section, will result in the dismissal of the agency's petition or cross petition for review.

(c) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief, upon order of the Clerk of the Board the agency must submit evidence that it has provided the interim relief required (or, where applicable, the evidence specified in paragraph (b)(2) of this section), *and* it must submit the name of the official responsible for compliance. The agency's failure to submit acceptable evidence of compliance with the interim relief order is a basis for the Board to order the withholding of the salary of the responsible official pursuant to 5 U.S.C. 1204(e)(2)(A) and 5 CFR 1201.183(c). This sanction is in addition to the dismissal of an agency petition or cross petition for review provided for in paragraph (b)(4) of this section.

(d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or

(2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 30863, June 16, 1994]

§ 1201.116 Appellant requests for enforcement of interim relief.

(a) *Before a final decision is issued.* 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.

(b) *After a final decision is issued.* If the appellant is not the prevailing party in the final Board order, and if 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. 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, 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.

[59 FR 30864, June 16, 1994]

§ 1201.117 Procedures for review or re-opening.

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

(1) Issue a single decision that denies or grants a petition for review, reopens the appeal, and decides the case;

(2) Hear oral arguments;

(3) Require that briefs be filed;

(4) Remand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions; or

(5) Take any other action necessary for final disposition of the case.

(b) The Board may affirm, reverse, modify, or vacate the decision of the judge, in whole or in part. Where appropriate, the Board will issue a final decision and order a date for compliance with that decision.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

§ 1201.118 Board reopening of case and reconsideration of initial decision.

The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

§ 1201.119 OPM petition for reconsideration.

(a) *Criteria.* Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines:

(1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and

(2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(b) *Time limit.* The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order.

(c) *Briefs.* After the petition is filed, the Board will make the official record relating to the petition for reconsideration available to the Director for review. The Director's brief in support of the petition for reconsideration must

be filed within 20 days after the Board makes the record available for review. Any party's opposition to the petition for reconsideration must be filed within 25 days from the date of service of the Director's brief.

(d) *Stays.* If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

§ 1201.120 Judicial review.

Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review in the United States Court of Appeals for the Federal Circuit. As § 1201.175 of this part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

Subpart D—Procedures for Original Jurisdiction Cases

ACTIONS BROUGHT BY THE SPECIAL COUNSEL

§ 1201.121 Scope of jurisdiction; compliance with subpart B.

(a) *Scope.* The Board has original jurisdiction over actions brought by the Special Counsel and over the Special Counsel's requests for stays of certain personnel actions.

(b) *Compliance with subpart B.* Except as otherwise expressly provided by this subpart, the Special Counsel will comply with the regulations regarding hearing procedures that are set out in subpart B of this part in connection with all complaints or requests he or she files with the Board.

§ 1201.122 Filing complaints and requests; serving documents on parties.

(a) *Initial filing.* The Special Counsel must file two copies of each complaint or request, together with numbered and tabbed exhibits or attachments, if any, with the Clerk of the Board. In addition, he or she must file with that office, for service by the Board in accordance with paragraph (b) of this section, a sufficient number of copies of complaints or requests, together with numbered and tabbed exhibits and a certified list of parties or their representatives. The list must show the last known address of each party or representative.

(b) *Service by the Board.* The Board will mail copies of complaints and requests to the parties to the proceeding, or their representatives, at their last known addresses. It also will mail them any exhibits or attachments to the complaints and requests, along with copies of the pertinent regulations of the Board.

(c) *Subsequent filings and service.* Each party must serve on every other party one copy of each of its pleadings, as defined by § 1201.4(b). Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party on the service list previously provided by the Board. A certificate of service describing how and when service was made must accompany each pleading. All parties are responsible for notifying the Board and one another in writing of any changes in the names or addresses on the service list.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994]

§ 1201.123 Contents of complaint.

(a) If the Special Counsel determines that the Board should take any of the actions listed below, he or she must file a written complaint stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(1) Action to require an agency to correct a prohibited personnel practice

(or a pattern of prohibited personnel practices) under 5 U.S.C. 1214(b)(4);

(2) Action to discipline an employee under 5 U.S.C. 1215(a);

(3) Action with respect to other matters within the jurisdiction of the Special Counsel under 5 U.S.C. 1216; and

(4) Action to discipline an employee under the Federal Employees Flexible and Compressed Work Schedule Act, 5 U.S.C. 6101.

(b) The Board may order the Special Counsel and the responding party to file briefs, memoranda, or both in any action the Special Counsel brings before the Board.

(c) If the Special Counsel files a corrective action with the Board on behalf of an employee, former employee, or applicant for employment who has sought corrective action from the Board directly under 5 U.S.C. 1214(a)(3), the Special Counsel must provide evidence that the employee, former employee, or applicant has consented to the Special Counsel's seeking corrective action. 5 U.S.C. 1214(a)(4).

§ 1201.124 Rights of employees.

(a) When the Special Counsel files a complaint seeking corrective action under 5 U.S.C. 1214(b)(2)(B), the Board shall provide the individual alleged to have been the subject of the prohibited personnel practice the opportunity to make written comments.

(b) When the Special Counsel files a complaint proposing a disciplinary action against an employee under 5 U.S.C. 1215(a)(1), the employee has the right:

(1) To file an answer, supported by affidavits and documentary evidence;

(2) To be represented;

(3) To a hearing on the record before the Board or an administrative law judge;

(4) To a written Board decision, issued at the earliest practicable date, in which the Board states the reasons for its conclusion; and

(5) To a copy of any final order imposing disciplinary action.

§ 1201.125 Answer to complaint.

(a) *Filing and default.* A party named in a Special Counsel complaint may file an answer with the Clerk of the Board within 35 days of the date of

service of the complaint. If a party fails to answer, and does not show good cause for that failure, the failure will constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations are considered admitted and will form the basis of a recommended or final decision as appropriate.

(b) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer are considered true and may not be denied later.

§ 1201.126 Final orders of the Board.

(a) In any action seeking correction of a prohibited personnel practice, the Board may order the corrective actions it considers appropriate after providing an opportunity for the Special Counsel, the agency, and the Office of Personnel Management to comment. 5 U.S.C. 1214(b)(4)(A).

(b)(1) Subject to the provisions of paragraph (b)(2) of this section, in any case involving an alleged prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order such corrective action as the Board considers appropriate if the Special Counsel demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was taken or will be taken against the individual.

(2) Corrective action under paragraph (b)(1) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. 1214(b)(4)(B).

(c) In any action to discipline an employee, except as provided in paragraphs (e) and (f) of this section, the Board may order a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed \$1,100. 5 U.S.C. 1215(a)(3).

(d) If a State or local agency fails to remove an employee whose removal is found to be warranted by the Board under 5 U.S.C. 1505, or if it reappoints such an employee within 18 months of a Board's final order finding that removal was warranted, the Board may order the Federal agency administering loans or grants to the State or local agency, to withhold money from the agency. The amount to be withheld will not exceed two years of the offending employee's pay at the rate he or she was being paid at the time of the violation. 5 U.S.C. 1506.

(e) In any action to discipline an employee under the Federal Employees Flexible and Compressed Work Schedule Act, 5 U.S.C. 6101, a final order of the Board may impose disciplinary action consisting of:

(1) Removal from Federal employment for any period of time the Board may prescribe;

(2) Suspension; or

(3) Other discipline that the Board considers appropriate.

(f) In any action in which the Board finds that an employee has violated 5 U.S.C. 7324, the Board will order the employee's removal, unless it finds by unanimous vote that the violation does not warrant removal and imposes instead a penalty of not less than 30 days suspension without pay.

[54 FR 53504, Dec. 29, 1989, as amended at 61 FR 49049, Sept. 18, 1996]

§ 1201.127 Requesting stay of personnel action; protective orders.

Under 5 U.S.C. 1214(b)(1), the Special Counsel may ask a member of the Board to stay any personnel action if he or she determines that there are reasonable grounds to believe that the action was taken or will be taken as a result of a prohibited personnel practice.

(a) *Content of request.* The Special Counsel, or that official's representative, must sign each request, and must include the following information in the request:

(1) The names of the parties;

(2) The agency and officials involved;

(3) The nature of the action to be stayed;

(4) A concise statement of facts justifying the charge that the personnel ac-

tion was or will be the result of a prohibited personnel practice; and

(5) The laws or regulations that were violated, or that will be violated if the stay is not issued.

(b) *Filing and serving of request.* The request for a stay must be filed and served on all parties in accordance with § 1201.122 of this part.

(c) *Action on the request for stay—(1) Initial stay.* Within three days after the filing of a request, excluding Saturdays, Sundays, and Federal holidays, any member of the Board will grant a request for a stay of 45 days under 5 U.S.C. 1214(b)(1)(A) unless the Member determines that, under the facts and circumstances, the requested stay would not be appropriate. Unless the stay is denied within the 3-day period, it is considered granted by operation of law.

(2) *Extension of stay.* Upon the Special Counsel's request, the Board may extend any stay granted under 5 U.S.C. 1214(b)(1)(A) for whatever time it considers appropriate, but only after providing the Special Counsel and the agency with an opportunity to comment on the request, and only after the Board has concurred in the request of the Special Counsel. At the time he or she files a request for an extension of a stay under 5 U.S.C. 1214(b)(1)(B), the Special Counsel must also file a brief describing the facts and any relevant legal authority that the Board should consider. The agency must respond in accordance with any order of the Board.

(3) *Reports during pendency of a stay.* If the Board grants an extension of the initial stay, the Special Counsel must report to the Board, at intervals specified in the order granting extension of the stay, regarding the status of the case. Such reports will continue to be required until the Special Counsel files a corrective action with the Board or requests termination of the stay, or until the stay expires according to its terms.

(4) *Termination of stay.* The Board may terminate a stay at any time, except it may not terminate a stay:

(i) On its own motion or on the motion of an agency without first providing notice and opportunity for oral or

written comments to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) On the motion of the Special Counsel without first providing notice and opportunity for oral or written comments to the individual on whose behalf the stay was ordered.

(d) *Additional information.* At any time, the Board or, where appropriate, a member of the Board may require the Special Counsel, the agency, or both to appear and present further information or explanation regarding a request for a stay, to file supplemental briefs or memoranda, or to supply factual information that the Board needs in order to make a decision regarding a stay.

(e) *Protective orders.* The Board, during an investigation by the Special Counsel or during the pendency of any Special Counsel proceeding before the Board, may issue any order that may be necessary to protect a witness or other individual from harassment. The Special Counsel must submit any motion for a protective order to the Clerk of the Board. The motion must include a concise statement of the reasons justifying the request, together with any relevant documentary evidence. An agency, other than the Office of the Special Counsel, may not request a protective order with respect to an investigation by the Special Counsel during such investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

§ 1201.128 Administrative appeal; judicial review.

(a) A party in a Special Counsel complaint does not have the right to file an administrative appeal from an order of the Board.

(b) An employee, former employee, or applicant for employment who is adversely affected by an order of the Board resulting from a corrective action brought by the Special Counsel may obtain judicial review of the order of the Board in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c).

(c) An employee subject to a final order imposing disciplinary action under 5 U.S.C. 1215 may obtain judicial

review of the order of the Board in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1215(a)(4).

§ 1201.129 Judge; exceptions and replies to exceptions.

(a) Except for requests for stays under 5 U.S.C. 1214(b)(1), and other matters specifically reserved for hearing by the Board, an action brought by the Special Counsel is heard by an administrative law judge, who will issue a recommended decision to the Board in accordance with 5 U.S.C. 557. Unless directed otherwise, the parties must file all pleadings with the Clerk of the Board.

(b) The parties may file with the Clerk of the Board any exceptions they may have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date of service of the recommended decision.

(c) The parties may file replies to exceptions within 25 days after the date of service of the exceptions, as that date is determined by the certificate of service.

(d) No additional evidence will be accepted with a party's exceptions or with a reply to exceptions unless the party submitting it shows that the evidence was not readily available before the administrative law judge closed the record.

ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

§ 1201.131 Procedures.

When an agency proposes an action against an administrative law judge, the procedures established under subpart B will apply to the hearing, unless these regulations expressly provide otherwise. Initial and subsequent pleadings, however, must be filed and served in accordance with § 1201.122 of this subpart.

§ 1201.132 Board jurisdiction.

The jurisdiction of the Board under this section is limited to proposals to take the following actions:

- (a) Removal;
- (b) Suspension;
- (c) Reduction in grade;
- (d) Reduction in pay; and

(e) Furlough of 30 days or less.

§ 1201.133 Filing a complaint.

To initiate an action against an administrative law judge, an agency must file a complaint with the Board describing with particularity the facts that support the proposed action.

§ 1201.134 Answer to complaint.

The administrative law judge against whom the complaint is filed may file an answer to the complaint. The answer must comply with the timeliness and other requirements of § 1201.125 of this subpart.

§ 1201.135 Judge; exceptions and replies to exceptions.

(a) Unless it is specifically reserved for hearing by the Board, an action by an employing agency against an administrative law judge will be heard by an administrative law judge, who will issue a recommended decision in accordance with 5 U.S.C. 557. All pleadings in those actions must be filed with the Clerk of the Board.

(b) The parties may file with the Clerk of the Board any exceptions they have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date on which the administrative law judge issues the recommended decision.

(c) The parties may file replies to exceptions within 25 days from the date of service of the exceptions.

§ 1201.136 Requirement for finding of good cause.

The Board will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after the Board has made a finding of good cause as required by 5 U.S.C. 7521.

REMOVAL FROM THE SENIOR EXECUTIVE SERVICE

§ 1201.141 Right to hearing.

If an agency proposes to remove a career appointee from the Senior Executive Service under 5 CFR 359.502, and to place that employee in another civil service position, the appointee may request an informal hearing before an official appointed by the Board. If the ap-

pointee files the request with the Office of the Clerk at least 15 days before the effective date of the proposed removal, the request will be granted.

§ 1201.142 Hearing procedures; referring the record.

The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the Board or its designee. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the Board. The Board will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

§ 1201.143 Appeal.

There is no right under 5 U.S.C. 7703 to appeal the agency's or Board's actions in cases arising under § 1201.141 of this part. The removal action will not be delayed as a result of the hearing.

Subpart E—Procedures for Cases Involving Allegations of Discrimination

§ 1201.151 Scope and policy.

(a) *Scope.* (1) The rules in this subpart implement 5 U.S.C. 7702. They apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.

(2) "Prohibited discrimination," as that term is used in this subpart, means discrimination prohibited by:

(i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(a));

(ii) Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);

(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a); or

(v) Any rule, regulation, or policy directive prescribed under any provision of law described in paragraphs (a)(2) (i) through (iv) of this section.

(b) *Policy.* The Board's policy is to adjudicate impartially, thoroughly, and

fairly all issues raised under this subpart.

§ 1201.152 Compliance with subpart B procedures.

Unless this subpart expressly provides otherwise, all actions involving allegations of prohibited discrimination must comply with the regulations that are included in subpart B of this part.

§ 1201.153 Contents of appeal.

(a) *Contents.* An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions:

(1) The appeal must state that there was discrimination in connection with the matter appealed, and it must state specifically how the agency discriminated against the appellant; and

(2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

(b) *Use of form.* Completing the form in appendix I of these regulations constitutes compliance with paragraph (a) of this section.

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

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board within 30 days after the effective date of the agency action being appealed.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

(d) If the appellant has filed a grievance with the agency under its negotiated grievance procedure in accordance with 5 U.S.C. 7121, he or she may ask the Board to review the final decision under 5 U.S.C. 7702 within 35 days of the date of issuance of that decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

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

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

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

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

(e) The record will close upon expiration of the period for filing the response to the petition 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.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994]

§ 1201.155 Remand of allegations of discrimination.

If the parties file a written agreement that the discrimination issue should be remanded to the agency for

consideration, and if the judge determines that action would be in the interest of justice, the judge may take that action. The remand order will specify a time period within which the agency action must be completed. In no instance will that time period exceed 120 days. While the issue is pending with the agency, the judge will retain jurisdiction over the appeal.

§ 1201.156 Time for processing appeals involving allegations of discrimination.

(a) *Issue raised in appeal.* When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) *Issue not raised in appeal.* When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) *Discrimination issue remanded to agency.* When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

§ 1201.157 Notice of right to judicial review.

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in § 1201.119 of this part.

REVIEW OF BOARD DECISION

§ 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.

(a) *Time limit for determination.* In cases in which an appellant petitions

the Equal Employment Opportunity Commission (Commission) for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of the petition, whether it will consider the decision.

(b) *Judicial review.* The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) *Commission processing and time limits.* If the Commission decides to consider the decision of the Board, within 60 days after making its decision it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or

(ii) The evidence in the record as a whole does not support the decision involving that provision.

(d) *Transmittal of record.* The Board will transmit a copy of its record to the Commission upon request.

(e) *Development of additional evidence.* When asked by the Commission to do so, the Board or a judge will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if necessary in order to comply with the Commission's request.

(f) *Commission concurrence in Board decision.* If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the appellant may

file suit in an appropriate United States district court.

§ 1201.162 Board action on the Commission decision; judicial review.

(a) *Board decision.* Within 30 days after receipt of a decision of the Commission issued under 1201.161(c)(2), the Board shall consider the decision and:

(1) Concur and adopt in whole the decision of the Commission; or

(2) To the extent that the Board finds that, as a matter of law:

(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive, or

(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) *Judicial review.* If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

§ 1201.163 Mixed cases governed by Reorganization Plan No. 1 of 1978.

(a) *Definitions*—(1) *Prohibited discrimination* as used in this section means discrimination prohibited by section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–16(c)); section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791); and sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a).

(2) *Initial decision* as used in this section means a decision rendered by a judge of the MSPB pursuant to 29 CFR part 1613 or 5 CFR part 772 (as in effect prior to January 11, 1979) on an appeal in which issues of prohibited discrimination have been raised.

(3) *Preliminary decision as used in this section means:* (i) An initial decision within the meaning of § 1201.163(a)(2) which has not been reopened by a Board member or as to which no petition to reopen was filed by a party within 35 days after issuance of the decision;

(ii) A decision by the Board itself pursuant to 29 CFR part 1613 or 5 CFR

part 772, in which issues of prohibited discrimination are addressed, or a decision by the Board denying all petitions to reopen.

(b) *Contents of appeal.* An appeal raising issues of prohibited discrimination shall state there was discrimination in conjunction with the matter appealed and provide specific examples of how the appellant was discriminated against.

(c) *Procedures.* (1) Appeals under 29 CFR part 1613 shall be processed by the Board consistent with the provisions set forth in that part. Such appeals shall be filed in writing with the appropriate Board regional or field office.

(2) Appeals under the provisions of 5 CFR part 772 shall be processed as provided therein, except that under 5 CFR 772.306(b) the discrimination investigation shall be completed and the investigative file and report sent to the Board within 120 days. Except when this time has been extended upon a verified showing of good cause, the Board may impose the sanctions provided in 5 CFR 1201.43 if an agency fails to timely complete and file the result of such an investigation.

(3) An initial decision on an appeal which includes issues of prohibited personnel discrimination shall be rendered by an employee of the Board, pursuant to 29 CFR part 1613 or 5 CFR part 772, on all issues raised in the appeal.

(4) Unless a petition to reopen is filed with the Board or unless a Board member reopens on his/her own motion, within 35 days from issuance of an initial decision, the initial decision shall become the preliminary decision of the Board.

(d) *Review by Commission*—(1) *Time for filing.* A petition to review the preliminary decision of the Board on issues of prohibited discrimination shall be filed with the Commission within 35 days after the initial decision of the Board becomes the preliminary decision.

(2) *Petition filed.* In the event a petition for review is filed with the Commission, the Board decision shall become final on all issues, other than issues of prohibited discrimination, on the date the Commission's decision on these issues becomes final.

(3) *Petition not filed.* If a petition for review is not filed with the Commission, the decision of the Board shall become final on all issues. (5 U.S.C. 1204(g)).

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994]

SPECIAL PANEL

§ 1201.171 Referral of case to Special Panel.

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:

(a) The factual record compiled under this section, which will include a transcript of any hearing;

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

§ 1201.172 Organization of Special Panel; designation of members.

(a) A Special Panel is composed of:

(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;

(2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.

(b) *Designation of Special Panel members—(1) Time of designation.* Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.

(2) *Manner of designation.* Letters designating the Panel members will be

served on the Chairman of the Panel and on the parties to the appeal.

§ 1201.173 Practices and procedures of Special Panel.

(a) *Scope.* The rules in this subpart apply to proceedings before a Special Panel.

(b) *Suspension of rules.* Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.

(c) *Time limit for proceedings.* In accordance with 5 U.S.C. 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to the Special Panel.* (1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.

(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.

(e) *Maintaining the official record.* The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.

(h) *Oral argument.* The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) *Postargument submission.* Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

§1201.174 Enforcing the Special Panel decision.

The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These

regulations are set out in subpart F of this part.

§1201.175 Judicial review of cases decided under 5 U.S.C. 7702.

(a) *Place and type of review.* The appropriate United States district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. 7702. Those cases include appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

(b) *Time for filing request.* Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.

Subpart F—Enforcement of Final Decisions and Orders

§1201.181 Authority and explanation.

(a) 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 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. The Board's decisions and orders will contain a notice of the Board's enforcement authority.

(b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.

§ 1201.182 Petition for enforcement.

(a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision issued 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 Board order issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

(c) *Petition by an employee other than a party.* Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. The Board will entertain a petition for enforcement from an aggrieved employee who is not a party only if the employee seeks and is granted party status as a permissive intervenor under § 1201.34(c) of this part. The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition and motion to intervene must be filed promptly with the regional or field office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition and motion to intervene on each party or the party's representative. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the

noncompliance. The motion to intervene will be considered in accordance with § 1201.34(c) of this part.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994]

§ 1201.183 Procedures for processing petitions for enforcement.

(a) *Initial Processing.* (1) When a party has filed a petition for enforcement of a final decision, the alleged noncomplying party must file one of the following within 15 days of the date of service of the petition:

(i) Evidence of compliance, including a narrative explanation of the calculation of back pay and other benefits, and supporting documents;

(ii) Evidence as described in paragraph (a)(1)(i) of this section of the compliance actions that the party has completed, and a statement of the actions that are in process and the actions that remain to be taken, along with a reasonable schedule for full compliance; or

(iii) A statement showing good cause for the failure to comply completely with the decision of the Board.

The party that filed the petition may respond to that submission within 10 days after the date of service of the submission. The parties must serve copies of their pleadings on each other as required under § 1201.26(b)(2) of this part.

(2) If the agency is the alleged noncomplying party, it shall submit the name and address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.

(3) The judge may convene a hearing if one is necessary to resolve matters at issue.

(4) If the judge finds that there has been compliance or a good faith effort to take all actions required to be in compliance with the final decision, he or she will state those findings in a decision. That decision will be subject to the procedures for petitions for review by the Board under subpart C of this

part, and subject to judicial review under § 1201.119 of this part.

(5) If the judge finds that:

(i) The alleged noncomplying party has not taken, or has not made a good faith effort to take, any action required to be in compliance with the final decision, or

(ii) The party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decision; he or she will issue a recommendation containing his or her findings, a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final decision.

(6) If a recommendation described under paragraph (a)(5) of this section is issued, the alleged noncomplying party must do one of the following:

(i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions.

(ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.

(iii) If the party decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(6)(ii) of this section.

(7) The petitioner may file a brief that responds to the submission described in paragraph (a)(6) of this section, and that asks the Board to review

any finding in the recommendation, made under paragraph (a)(5)(ii) of this section, that the other party is in partial compliance with the final decision. The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(6) of this section.

(b) *Consideration by the Board.* (1) The Board will consider the recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the alleged noncomplying party, or that party's representative, 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 party or its representative to make this showing in writing, or to make it both personally and in writing.

(2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing.

(3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.119 of this part.

(c) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in non-compliance with the Board's order.

(d) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

Subpart G—Savings Provisions

§ 1201.191 Savings provisions.

(a) *Civil Service Reform Act of 1978 (Pub.L. 95-454)—(1) Scope.* All executive orders, rules and regulations relating to the Federal service that were in effect prior to the effective date of the Civil Service Reform Act shall continue in effect and be applied by the

Board in its adjudications until modified, terminated, superseded, or repealed by the President, Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

(3) *Explanation.* Mr. X was advised of agency's intention to remove him for abandonment of position, effective December 29, 1978. Twenty days later Mr. X appealed the agency action to the Merit Systems Protection Board. The Merit Systems Protection Board docketed Mr. X's appeal as an "old system case," i.e., one to which the savings clause applied. The appropriate regional office processed the case, applying the substantive laws, rules and regulations in existence prior to the en-

actment of the Act. The decision, dated February 28, 1979, informed Mr. X that he is entitled to judicial review if he files a timely notice of appeal in the appropriate United States district court or the United States Court of Claims under the statute of limitations applicable when the adverse action was taken.

(b) *Whistleblower Protection Act of 1989 (Pub. L. 101-12)—(1) Scope.* All orders, rules, and regulations issued by the Board and the Special Counsel before the effective date of the Whistleblower Protection Act of 1989 shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the Board or the Special Counsel, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Whistleblower Protection Act of 1989 shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

APPENDIX I TO PART 1201—MERIT SYSTEMS PROTECTION BOARD APPEAL FORM

OMB NO. 5124-0009

U.S. MERIT SYSTEMS PROTECTION BOARD	
APPEAL FORM	
INSTRUCTIONS	
<p>GENERAL: You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. 5 C.F.R. Parts 1201 and 1209. Your agency's personnel office will give you access to the regulations, and the Board will expect you to be familiar with them. You also should become familiar with the Board's key case law and controlling court decisions as they may affect your case. You must tell the Board if you are raising an affirmative defense (see Part IV), and you are responsible for proving each defense you raise.</p> <p>WHERE TO FILE AN APPEAL: You must file your appeal with the Board's regional or field office which has responsibility for the geographic area in which you are employed. See 5 C.F.R. Part 1201, Appendix II.</p> <p>WHEN TO FILE AN APPEAL: Your appeal must be filed during the period beginning with the day after the effective date of the action you are appealing and ending on the 30th day after the effective date. You may not file your appeal before the effective date of the action you are appealing. If you are appealing from a decision which does not set an effective date, you must file within 35 days of the date of the decision you are appealing. If your appeal is late, it may be dismissed as untimely. The date of the filing is the</p>	<p>date your appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt if you personally deliver it to the regional or field office.</p> <p>HOW TO FILE AN APPEAL: You may file your appeal by mail, by facsimile, by commercial overnight delivery, or by personal delivery. You must submit two copies of both your appeal and all attachments. You may supplement your response to any question on separate sheets of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper. Your appeal must contain your or your representative's signature in block 6. If it does not, your appeal will be rejected and returned to you. If your representative signs block 6, you must sign block 11 or submit a separate written designation of representative.</p> <p>WHISTLEBLOWING APPEAL/STAY REQUEST: If you believe the action you are appealing was threatened, proposed, taken, or not taken because of whistleblowing activities, you must complete Part VII of this form. If you are requesting a stay, you must complete Part VIII of this form.</p>
<p><i>Privacy Act Statement: This form requests personal information which is relevant and necessary to reach a decision in your appeal. The U.S. Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the U.S. Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.</i></p> <p><i>The U.S. Merit Systems Protection Board is authorized under provisions of Executive Order 9397, dated November 22, 1943, to request your Social Security number, but providing your Social Security number is voluntary and failure to provide it will not result in the rejection of your appeal. Your Social Security number will only be used for identification purposes in the processing of your appeal.</i></p> <p><i>You should know that the decisions of the U.S. Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a data base for program statistics.</i></p> <p><i>Public Reporting Burden: The public reporting burden for this collection of information is estimated to vary from 20 minutes to 1 hour, with an average of 30 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to the Office of Planning and Resource Management Services, Merit Systems Protection Board, 1120 Vermont Ave., NW., Washington, DC 20419.</i></p>	
Part I Appellant Identification	
1. Name (last, first, middle initial)	2. Social Security Number
3. Present address (number and street, city, state, and ZIP code) You must notify the Board of any change of address or telephone number while the appeal is pending with the MSPB.	4. Home phone (include area code)
	5. Office phone (include area code)
6. I certify that all of the statements made in this appeal are true, complete, and correct to the best of my knowledge and belief.	<div style="display: flex; justify-content: space-between;"> Signature of appellant or designated representative Date signed </div>

Previous editions obsolete

Optional Form 284 (Rev. 10/94)
MSPB
5 CFR 1201 and 1209
Page 1

Part II Designation of Representative		
<p>7. You may represent yourself in this appeal, or you may choose someone to represent you. Your representative does not have to be an attorney. You may change your designation of a representative at a later date, if you so desire, but you must notify the Board promptly of any change. Where circumstances require, a separate designation of representative may be submitted after the original filing. Include the information requested in blocks 7 through 11.</p> <p>"I hereby designate _____ to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board."</p>		
<p>8. Representative's address (number and street, city, state, and ZIP code).</p>	<p>9. Representative's employer</p>	
	<p>10.a) Representative's telephone number (include area code)</p>	
	<p>10.b) Representative's facsimile number</p>	
	<p>11. Appellant's signature _____ Date _____</p>	
Part III Appealed Action		
<p>12. Briefly describe the agency action you wish to appeal and attach the proposal letter and decision letter. If you are appealing a decision relating to the denial of retirement benefits, attach a copy of OPM's reconsideration decision. If the relevant SF-50 or its equivalent is available, send it now; however, do NOT delay filing your appeal because of it. You may submit the SF-50 when it becomes available. Later in the proceeding, you will be afforded an opportunity to submit detailed evidence in support of your appeal.</p>		
<p>13. Name and address of the agency that took the action you are appealing (including bureau or other divisions, as well as street address, city, state and ZIP code)</p>		<p>14. Your position title and duty station at the time of the action appealed</p>
<p>15. Grade at time of the action appealed</p>	<p>16. Salary at the time of the action appealed</p> <p>\$ _____ per _____</p>	<p>17. Are you a veteran and/or entitled to the employment rights of a veteran?</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>18. Employment status at the time of the action appealed</p> <p><input type="checkbox"/> Temporary <input type="checkbox"/> Applicant <input type="checkbox"/> Retired</p> <p><input type="checkbox"/> Permanent <input type="checkbox"/> Term <input type="checkbox"/> Seasonal</p>	<p>19. If retired, date of retirement (month, day, year)</p>	<p>20. Type of service</p> <p><input type="checkbox"/> Competitive <input type="checkbox"/> SES</p> <p><input type="checkbox"/> Excepted <input type="checkbox"/> Postal Service</p> <p><input type="checkbox"/> Foreign Service</p>
<p>21. Length of government service</p>	<p>22. Length of service with acting agency</p>	<p>23. Were you serving a probationary or trial period at the time of the action appealed?</p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>24. Date you received written notice of the proposed action (month, day, year) (attach a copy)</p>	<p>25. Date you received the final decision notice (month, day, year) (attach a copy)</p>	<p>26. Effective date of the action appealed (month, day, year)</p>

27. Explain briefly why you think the agency was wrong in taking this action.	
28. Do you believe the penalty imposed by the agency was too harsh? <input type="checkbox"/> Yes <input type="checkbox"/> No	29. What action would you like the Board to take on this case (i.e., what remedy are you asking for)?
Part IV Appellant's Defenses	
30.a) Do you believe the agency committed harmful procedural error(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No	30.b) If so, what is (are) the error(s)?
30.c) Explain how you were harmed by the error(s).	
31.a) Do you believe that the action you are appealing violated the law? <input type="checkbox"/> Yes <input type="checkbox"/> No	31.b) If so, what law?
31.c) How was it violated?	
32.a) If you believe you were discriminated against by the agency, in connection with the matter appealed , because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true.	
32.b) Have you filed a formal discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal? <input type="checkbox"/> Yes (<i>attach a copy</i>) <input type="checkbox"/> No	
32.c) If yes, place filed (<i>agency, number and street, city, state, and ZIP code</i>)	32.d) Date filed (<i>month, day, year</i>)
	32.e) Has a decision been issued? <input type="checkbox"/> Yes (<i>attach a copy</i>) <input type="checkbox"/> No

33.a) Have you, or anyone in your behalf, filed a formal grievance with your agency concerning this matter, under a negotiated grievance procedure provided by a collective bargaining agreement? <input type="checkbox"/> Yes (attach a copy) <input type="checkbox"/> No	33.b) Date filed (month, day, year)
33.c) If yes, place filed (agency, number and street, city, state, and ZIP code)	33.d) Has a decision been issued? <input type="checkbox"/> Yes (attach a copy) <input type="checkbox"/> No
	33.e) If yes, date issued (month, day, year)
Part V Hearing	
34. You may have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit, after providing you and the agency with an opportunity to submit additional documents. Do you want a hearing? <input type="checkbox"/> Yes <input type="checkbox"/> No If you choose to have a hearing, the Board will notify you where and when it is to be held.	
Part VI Reduction In Force	
INSTRUCTIONS	
Fill out this part only if you are appealing from a Reduction in Force. Your agency's personnel office can furnish you with most of the information requested below.	
35. Retention group and sub-group	36. Service computation date
37.b) Title of position offered	37.c) Grade of position offered
37.e) Location of position offered	37.f) Did you accept this position? <input type="checkbox"/> Yes <input type="checkbox"/> No
37.a) Has your agency offered you another position rather than separating you? <input type="checkbox"/> Yes <input type="checkbox"/> No	
37.d) Salary of position offered \$ _____ per _____	
38. Explain why you think you should not have been affected by the Reduction In Force. (Explanations could include: you were placed in the wrong retention group or sub-group; an error was made in the computation of your service computation date; competitive area was too narrow; improperly reached for separation from competitive level; an exception was made to the regular order of selection; the required number of days notice was not given; you believe you have assignment [bump or retreat] rights; or any other reasons. Please provide as much information as possible regarding each reason.)	

Part VII Whistleblowing Activity	
INSTRUCTIONS	
Complete Parts VII and VIII of this form only if you believe the action you are appealing is based on whistleblowing activities.	
39.a) Have you disclosed information that evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety? <input type="checkbox"/> <i>Yes (attach a copy or summary of disclosure)</i> <input type="checkbox"/> <i>No</i>	39.b) If yes, provide the name, title, and office address of the person to whom the disclosure was made
39.c) Date the disclosure was made (<i>month, day, year</i>)	
40. If you believe the action you are appealing was... (<i>please check appropriate box</i>) <input type="checkbox"/> <i>Threatened</i> <input type="checkbox"/> <i>Proposed</i> <input type="checkbox"/> <i>Taken</i> <input type="checkbox"/> <i>Not Taken</i> ...because of a disclosure evidencing a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, provide: a) a chronology of facts concerning the action appealed; and b) explain why you believe the action was based on whistleblowing activity and attach a copy of any documentary evidence which supports your statement.	

41.a) Have you sought corrective action from the Office of Special Counsel concerning the action which you are appealing? <input type="checkbox"/> Yes (attach a copy of your request to the Office of Special Counsel for corrective action) <input type="checkbox"/> No	41.b) If yes, date(s) filed (month, day, year)		
41.c) Place filed (location, number and street, city, state, and ZIP code)			
42. Have you received a written notice of your right to file this appeal from the Office of Special Counsel? <input type="checkbox"/> Yes (attach a copy) <input type="checkbox"/> No			
43.a) Have you already requested a stay from the Board of the action you are seeking to appeal? <input type="checkbox"/> Yes (attach a copy) <input type="checkbox"/> No	43.b) If yes, date requested (month, day, year)		
43.c) Place filed (location, number and street, city, state, and ZIP code)	43.d) Has there been a decision? <input type="checkbox"/> Yes (attach a copy) <input type="checkbox"/> No		
Part VIII Stay Request			
INSTRUCTIONS You may request a stay of a personnel action allegedly based on whistleblowing at any time after you become eligible to file an appeal with the Board under 5 C.F.R. 1209.5, but no later than the time limit set for the close of discovery in the appeal. The stay request may be filed prior to, simultaneous with, or after the filing of an appeal. When you file a stay request with the Board, you must simultaneously serve it upon the agency's local servicing personnel office or the agency's designated representative. 5 C.F.R. 1209.8. If your stay request is being filed prior to filing an appeal with the Board, you must complete Parts I and II and items 41 through 43 above.			
44. On separate sheets of paper, please provide the following. Please put your name and address at the top of each page. <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> a. A chronology of facts, including a description of the disclosure and the action taken by the agency (unless you have already supplied this information in Part VII above). b. Evidence and/or argument demonstrating that the: (1) action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. 1209.4(a); and (2) action complained of was based on whistleblowing, as defined in 5 C.F.R. 1209.4(b) (unless you have already supplied this information in Part VII above). c. Evidence and/or argument demonstrating that there is a </td> <td style="width: 50%; vertical-align: top;"> substantial likelihood that you will prevail on the merits of your appeal of the personnel action. d. Documentary evidence that supports your stay request. e. Evidence and/or argument addressing how long the stay should remain in effect. f. Certificate of service specifying how and when the stay request was served on the agency. g. You may provide evidence and/or argument concerning whether a stay would impose extreme hardship on the agency. </td> </tr> </table>		a. A chronology of facts, including a description of the disclosure and the action taken by the agency (unless you have already supplied this information in Part VII above). b. Evidence and/or argument demonstrating that the: (1) action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. 1209.4(a); and (2) action complained of was based on whistleblowing, as defined in 5 C.F.R. 1209.4(b) (unless you have already supplied this information in Part VII above). c. Evidence and/or argument demonstrating that there is a	substantial likelihood that you will prevail on the merits of your appeal of the personnel action. d. Documentary evidence that supports your stay request. e. Evidence and/or argument addressing how long the stay should remain in effect. f. Certificate of service specifying how and when the stay request was served on the agency. g. You may provide evidence and/or argument concerning whether a stay would impose extreme hardship on the agency.
a. A chronology of facts, including a description of the disclosure and the action taken by the agency (unless you have already supplied this information in Part VII above). b. Evidence and/or argument demonstrating that the: (1) action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. 1209.4(a); and (2) action complained of was based on whistleblowing, as defined in 5 C.F.R. 1209.4(b) (unless you have already supplied this information in Part VII above). c. Evidence and/or argument demonstrating that there is a	substantial likelihood that you will prevail on the merits of your appeal of the personnel action. d. Documentary evidence that supports your stay request. e. Evidence and/or argument addressing how long the stay should remain in effect. f. Certificate of service specifying how and when the stay request was served on the agency. g. You may provide evidence and/or argument concerning whether a stay would impose extreme hardship on the agency.		

Merit Systems Protection Board

Pt. 1201, App. III

APPENDIX II TO PART 1201—APPROPRIATE REGIONAL OR FIELD OFFICE FOR FILING APPEALS

All submissions shall be addressed to the Regional Director, if submitted to a regional office, or the Chief Administrative Judge, if submitted to a field office, Merit Systems Protection Board, at the addresses listed below, according to geographic region of the employing agency or as required by §1201.4(d) of this part. The facsimile numbers listed below are TDD-capable; however, calls will be answered by voice before being connected to the TDD. Address of Appropriate Regional or Field Office and Area Served:

1. Atlanta Regional Office, 401 West Peachtree Street, N.W., 10th floor, Atlanta, Georgia 30308-3519, Facsimile No.: (404) 730-2767, (Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee).
2. Central Regional Office, 230 South Dearborn Street, 31st floor, Chicago, Illinois 60604-1669, Facsimile No.: (312) 886-4231, (Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin).
- 2a. Dallas Field Office, 1100 Commerce Street, Room 6F20, Dallas, Texas 75242-9979, Facsimile No.: (214) 767-0102, (Arkansas, Louisiana, Oklahoma, and Texas).
3. Northeastern Regional Office, U.S. Customhouse, Room 501, Second and Chestnut Streets, Philadelphia, Pennsylvania 19106-2987, Facsimile No.: (215) 597-3456, (Delaware; Maryland—except the counties of Montgomery and Prince George's; New Jersey—except the counties of Bergen, Essex, Hudson, and Union; Pennsylvania; and West Virginia).
- 3a. Boston Field Office, 99 Summer Street, Suite 1810, Boston, Massachusetts 02110-1200, Facsimile No.: (617) 424-5708, (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont).
- 3b. New York Field Office, 26 Federal Plaza, Room 3137-A, New York, New York 10278-0022, Facsimile No.: (212) 264-1417, (New Jersey—counties of Bergen, Essex, Hudson, and Union; New York; Puerto Rico; and Virgin Islands).
4. Washington Regional Office, 5203 Leesburg Pike, Suite 1109, Falls Church, Virginia 22041-3473, Facsimile No.: (703) 756-7112, (Maryland—counties of Montgomery and Prince George's; North Carolina; Virginia; Washington, DC; and all overseas areas not otherwise covered).
5. Western Regional Office, 250 Montgomery Street, Suite 400, 4th floor, San Francisco, California 94104-3401, Facsimile No.: (415) 705-2945, (California and Nevada).
- 5a. Denver Field Office, 12567 West Cedar Drive, Suite 100, Lakewood, Colorado 80228-2009, Facsimile No.: (303) 969-5109, (Arizona, Colorado, Kansas—except Kansas City,

Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming).

- 5b. Seattle Field Office, 915 Second Avenue, Suite 1840, Seattle, Washington 98174-1056, Facsimile No.: (206) 220-7982, (Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas).

[61 FR 4586, Feb. 7, 1996]

APPENDIX III TO PART 1201—APPROVED HEARING LOCATIONS BY REGIONAL OFFICE

Atlanta Regional Office

Birmingham, Alabama
Huntsville, Alabama
Mobile, Alabama
Montgomery, Alabama
Jacksonville, Florida
Miami, Florida
Orlando, Florida
Pensacola, Florida
Tallahassee, Florida
Tampa/St. Petersburg, Florida
Atlanta, Georgia
Augusta, Georgia
Macon, Georgia
Savannah, Georgia
Jackson, Mississippi
Charleston, South Carolina
Columbia, South Carolina
Chattanooga, Tennessee
Knoxville, Tennessee
Memphis, Tennessee
Nashville, Tennessee

Central Regional Office

Chicago, Illinois
Indianapolis, Indiana
Davenport, Iowa/Rock Island, Illinois
Des Moines, Iowa
Lexington, Kentucky
Louisville, Kentucky
Detroit, Michigan
Minneapolis/St. Paul, Minnesota
Kansas City, Missouri
Springfield, Missouri
St. Louis, Missouri
Cleveland, Ohio
Cincinnati, Ohio
Columbus, Ohio
Dayton, Ohio
Milwaukee, Wisconsin

Dallas Field Office

Little Rock, Arkansas
Alexandria, Louisiana
New Orleans, Louisiana
Oklahoma City, Oklahoma
Tulsa, Oklahoma
Corpus Christi, Texas
Dallas, Texas
El Paso, Texas
Houston, Texas

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San Antonio, Texas
Temple, Texas
Texarkana, Texas

Northeastern Regional Office

Dover, Delaware
Baltimore, Maryland
Trenton, New Jersey
Harrisburg, Pennsylvania
Philadelphia, Pennsylvania
Pittsburgh, Pennsylvania
Wilkes-Barre, Pennsylvania
Charleston, West Virginia
Morgantown, West Virginia

Boston Field Office

Hartford, Connecticut
New Haven, Connecticut
Bangor, Maine
Portland, Maine
Boston, Massachusetts
Manchester, New Hampshire
Portsmouth, New Hampshire
Providence, Rhode Island
Burlington, Vermont

New York Field Office

Newark, New Jersey
Albany, New York
Buffalo, New York
New York, New York
Syracuse, New York
San Juan, Puerto Rico

Washington Regional Office

Washington, DC
Asheville, North Carolina
Charlotte, North Carolina
Raleigh, North Carolina
Jacksonville, North Carolina
Bailey’s Crossroads, Falls Church, Virginia
Norfolk, Virginia
Richmond, Virginia
Roanoke, Virginia

Western Regional Office

Fresno, California
Los Angeles, California
Sacramento, California
San Diego, California
San Francisco, California
Santa Barbara, California
Las Vegas, Nevada
Reno, Nevada

Denver Field Office

Phoenix, Arizona
Tucson, Arizona
Denver, Colorado
Grand Junction, Colorado
Pueblo, Colorado
Wichita, Kansas
Billings, Montana
Great Falls, Montana

Missoula, Montana
Omaha, Nebraska
Albuquerque, New Mexico
Bismarck, North Dakota
Fargo, North Dakota
Rapid City, South Dakota
Sioux Falls, South Dakota
Salt Lake City, Utah
Casper, Wyoming

Seattle Field Office

Anchorage, Alaska
Honolulu, Hawaii
Boise, Idaho
Pocatello, Idaho
Medford, Oregon
Portland, Oregon
Seattle, Washington
Spokane, Washington
Richland, Kennewick, and Pasco, Wash-
ton

[61 FR 4586, Feb. 7, 1996]

APPENDIX IV TO PART 1201—SAMPLE
DECLARATION UNDER 28 U.S.C. 1746

Declaration

I, _____, do hereby de-
clare:

I declare under penalty of perjury under
the laws of the United States of America
that the foregoing is true and correct.

Executed on

Date

Signature

**PART 1202—STATUTORY REVIEW
BOARD**

AUTHORITY: 5 U.S.C. 1204.

**§ 1202.1 Designating Chairman of Stat-
utory Review Board.**

At the written request of the Depart-
ment of Transportation, the Chairman
of the Board will designate a presiding
official of the Board to serve as the
Chairman of any Board of Review es-
tablished by the Secretary of Transpor-
tation under 5 U.S.C. 3383(b) to review
certain actions to remove air traffic
controllers.

[54 FR 28658, July 6, 1989]

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

GENERAL

Sec.

1203.1 Scope; application of part 1201, subpart B.

1203.2 Definitions.

PROCEDURES FOR REVIEW

1203.11 Request for regulation review.

1203.12 Granting or denying the request for regulation review.

1203.13 Filing pleadings.

1203.14 Serving documents.

1203.15 Review of regulations on the Board's own motion.

1203.16 Proceedings.

ORDER OF THE BOARD

1203.21 Final order of the Board.

1203.22 Enforcement of order.

AUTHORITY: 5 U.S.C. 1204(a), 1204(f), and 1204(h).

SOURCE: 54 FR 23632, June 2, 1989, unless otherwise noted.

GENERAL

§ 1203.1 Scope; application of part 1201, subpart B.

(a) *General.* This part applies to the Board's review, under 5 U.S.C. 1204(a)(4) and 1204(f), of any rules or regulations ("regulations") issued by the Office of Personnel Management (OPM). It applies to the Board's review of the way in which an agency implements regulations, as well as to its review of the validity of the regulations on their face.

(b) *Application of 5 CFR part 1201, subparts B and C.* (1) Where appropriate, and unless the Board's regulations provide otherwise, the Board may apply the provisions of 5 CFR part 1201, subpart B to proceedings conducted under this part. It may do so on its own motion or on the motion of a party to these proceedings.

(2) The following provisions of 5 CFR part 1201, subparts B and C do not apply to proceedings conducted under this part:

(i) Sections 1201.21 through 1201.27 which concern petitions for appeal of agency actions, and the pleadings that are filed in connection with those petitions; and

(ii) Sections 1201.111 through 1201.119 which concern final decisions of presiding officials, and petitions for Board review of those decisions.

[54 FR 23632, June 2, 1989, as amended at 54 FR 28658, July 6, 1989]

§ 1203.2 Definitions.

(a) *Invalid regulation* means a regulation that has been issued by OPM, and that, on its face, would require an employee to commit a prohibited personnel practice if any agency implemented the regulation.

(b) *Invalidly implemented regulation* means a regulation, issued by OPM, whose implementation by an agency has required an employee to commit a prohibited personnel practice. A valid regulation may be invalidly implemented.

(c) *Merit system principles* are the principles stated in 5 U.S.C. 2301(b)(1) through 2301(b)(9).

(d) *Pleadings* are written submissions containing claims, allegations, arguments, or evidence. They include briefs, motions, requests for regulation review, responses, replies, and attachments that are submitted in connection with proceedings under this part.

(e) *Prohibited personnel practices* are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(11).

(f) *Regulation review* means the procedure under which the Board, under 5 U.S.C. 1204(f), reviews regulations issued by OPM on their face, or reviews those regulations as they have been implemented, or both, in order to determine whether the regulations require any employee to commit a prohibited personnel practice.

(g) *Request for regulation review* means a request that the Board review a regulation issued by OPM.

[54 FR 23632, June 2, 1989, as amended at 54 FR 28658, July 6, 1989]

PROCEDURES FOR REVIEW

§ 1203.11 Request for regulation review.

(a) An interested person or the Special Counsel may submit a request for regulation review.

(b) Contents of request. (1) Each request for regulation review must include the following information:

(i) The name, address, and signature of the requester's representative or, if the requester has no representative, of the requester;

(ii) A citation identifying the regulation being challenged;

(iii) A statement (along with any relevant documents) describing in detail the reasons why the regulation would require an employee to commit a prohibited personnel practice; or the reasons why the implementation of the regulation requires an employee to commit a prohibited personnel practice;

(iv) Specific identification of the prohibited personnel practice at issue; and

(v) A description of the action the requester would like the Board to take.

(2) If the prohibited personnel practice at issue is one prohibited by 5 U.S.C. 2302(b)(11), the request must include the following additional information:

(i) Identification of the law or regulation that allegedly would be or has been violated, and how it would be or has been violated; and

(ii) Identification of the merit system principles at issue and an explanation of the way in which the law or regulation at issue implements or directly concerns those principles.

§ 1203.12 Granting or denying the request for regulation review.

(a) The Board, in its sole discretion, may grant or deny an interested person's request for regulation review. It will grant a request for regulation review that the Special Counsel submits. It will not, however, review a regulation before its effective date.

(b) After considering the request for regulation review, the Board will issue an order granting or denying the request in whole or in part. Orders in which the Board grants the request, in whole or in part, will identify the agency or agencies involved, if any. They also will include the following:

(1) A citation identifying the regulation being challenged;

(2) A description of the issues to be addressed;

(3) The docket number assigned to the proceedings; and

(4) Instructions covering the review proceedings, including information re-

garding the time limits for filing submissions related to the request.

[54 FR 23632, June 2, 1989, as amended at 56 FR 41749, Aug. 23, 1991]

§ 1203.13 Filing pleadings.

(a) *Place to file and number of copies.* One original and three copies of each pleading must be filed with the Office of the Clerk, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. In addition, parties to a proceeding under this part must serve their pleadings on each other in accordance with § 1203.14 of this part. The Office of the Clerk will make all pleadings available for review by the public.

(b) *Time limits.* (1) A request for regulation review may be filed any time after the effective date of the regulation.

(2) A response to a request for regulation review, whether the response supports or opposes the request, must be filed within the time period provided in the Board order granting the request for review.

(3) A reply to a response may be filed within 10 days after the response is filed. The reply may address only those matters raised in the response that were not addressed in the request for regulation review.

(4) Motions may be filed at any time during the regulation review. The filing of a motion will not delay the acting of the Board unless the Board orders a postponement. The Board may rule immediately on a motion for an extension of time or a continuance if circumstances make consideration of others' views regarding the motion impracticable.

(5) Submissions opposing motions must be filed within five days after the opposing party receives the motion.

(c) *Additional pleadings.* The Board will consider pleadings in addition to those mentioned above only if the Board requests them, or if it grants a request that it consider them.

(d) *Method and date of filing.* Documents may be filed with the Office of the Clerk either by mail, by personal delivery, by facsimile, or by commercial overnight delivery. If the document was submitted by certified mail, it is considered to have been filed on

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the mailing date. If it was submitted by regular mail, it is presumed to have been filed five days before the Office of the Clerk receives it, in the absence of evidence contradicting that presumption. If it was delivered personally, it is considered to have been filed on the date the Office of the Clerk receives it. If it was submitted by facsimile, the date of the facsimile is considered to be the filing date. If it was submitted by commercial overnight delivery, the date of filing is the date it was delivered to the commercial overnight delivery service.

(e) *Extensions of time.* The Board will grant a request for extension of time only when good cause is shown.

[54 FR 23632, June 21, 1989, as amended at 59 FR 65242, Dec. 19, 1994]

§ 1203.14 Serving documents.

(a) *Parties.* In every case, the person requesting regulation review must serve a copy of the request on the Director of OPM. In addition, when the implementation of a regulation is being challenged, the requester must also serve a copy of the request on the head of the implementing agency. A copy of all other pleadings must be served, by the person submitting the pleading, on each other party to the proceeding.

(b) *Method of serving documents.* Pleadings may be served on parties by mail, by personal delivery, by facsimile, or by commercial overnight delivery. Service by mail is accomplished by mailing the pleading to each party or representative, at the party's or representative's last known address. Service by facsimile is accomplished by transmitting the pleading by facsimile to each party or representative. Service by personal delivery or by commercial overnight delivery is accomplished by delivering the pleading to the business office or home of each party or representative and leaving it with the party or representative, or with a responsible person at that address. Regardless of the method of service, the party serving the document must submit to the Board, along with the pleading, a certificate of service as proof that the document was served on the other parties or their representatives. The certificate of service must list the

names and addresses of the persons on whom the pleading was served, must state the date on which the pleading was served, must state the method (i.e., mail, personal delivery, facsimile, or commercial overnight delivery) by which service was accomplished, and must be signed by the person responsible for accomplishing service.

[54 FR 23632, June 21, 1989, as amended at 59 FR 65242, Dec. 19, 1994]

§ 1203.15 Review of regulations on the Board's own motion.

The Board may, from time to time, review a regulation on its own motion under 5 U.S.C. 1204(f)(1)(A). When it does so, it will publish notice of the review in the FEDERAL REGISTER.

[54 FR 28658, July 6, 1989]

§ 1203.16 Proceedings.

The Board has substantial discretion in conducting a regulation review under this part. It may conduct a review on the basis of the pleadings alone, or on the basis of the pleadings along with any or all of the following:

- (a) Additional written comments;
- (b) Oral argument;
- (c) Evidence presented at a hearing; and/or
- (d) Evidence gathered through any other appropriate procedures that are conducted in accordance with law.

ORDER OF THE BOARD

§ 1203.21 Final order of the Board.

(a) *Invalid regulation.* If the Board determines that a regulation is invalid on its face, in whole or in part, it will require any agency affected by the order to stop complying with the regulation, in whole or in part. In addition, it may order other remedial action that it finds necessary.

(b) *Invalidly implemented regulation.* If the Board determines that a regulation has been implemented invalidly, in whole or in part, it will require affected agencies to terminate the invalid implementation.

(c) *Corrective action.* The Board may order corrective action necessary to ensure compliance with its order. The action it may order includes, but is not limited to, the following:

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- (1) Cancellation of any personnel action related to the prohibited personnel practice;
- (2) Rescission of any action related to the cancelled personnel action;
- (3) Removal of any reference, record, or document within an employee's official personnel folder that is related to the prohibited personnel practice;
- (4) Award of back pay and benefits;
- (5) Award of attorney fees;
- (6) Other remedial measures to reverse the effects of a prohibited personnel practice; and
- (7) The agency's submission of a verified report of its compliance with the Board's order.

§ 1203.22 Enforcement of order.

- (a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.
- (b) The Board will take all action necessary to determine whether there has been compliance with its final order. If it determines that there has been a failure to comply with the order, it will take actions necessary to obtain compliance.
- (c) Where appropriate, the Board may initiate the enforcement procedures described in 5 CFR 1201.183(c).

PART 1204—AVAILABILITY OF OFFICIAL INFORMATION

Subpart A—Purpose and Scope

- Sec.
- 1204.1 Purpose.
- 1204.2 Scope.

Subpart B—Procedures for Disclosure of Records under the Freedom of Information Act

- 1204.11 Requests for access to Board records.
- 1204.12 Fees.
- 1204.13 Denials.
- 1204.14 Requests for access to confidential commercial information.

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Subpart C—Appeals

- 1204.21 Submission.
 - 1204.22 Decisions on appeal.
- AUTHORITY: 5 U.S.C. 552 and 1204, Pub. L. 99–570 and E.O. 12600.
 SOURCE: 54 FR 28658, July 6, 1989, unless otherwise noted.

Subpart A—Purpose and Scope

§ 1204.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, by prescribing the procedures to follow when requesting information from the Board, and by stating the fees that will be charged for that information.

§ 1204.2 Scope.

- (a) For the purpose of this part, the term *information* has the same meaning as the term *records* in §552 of title 5, United States Code. All written requests for information that are not processed under part 1205 of the Board's regulations will be processed under this part. The Board may continue, without complying with the provisions of this part, to furnish the public with the information it customarily has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.
- (b) When the subject of the record, or the subject's authorized representative, requests a record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the Board retrieves the record by the subject's name or other personal identifier, the Board will handle the request under the procedures and fees applicable in 5 CFR part 1205. When a third party makes a request for access to those records, without the express written consent of the subject of the record, the Board will handle the request under this part.
- (c) When a party to an appeal requests a copy of a tape recording or transcript (if one has been prepared) of a hearing that the Board or a presiding official of the Board conducted under part 1201 or part 1209 of this chapter, the Board will handle the request under 5 CFR 1201.53. When someone

other than a party to the appeal makes this request, the Board will handle the request under this part.

(d) In accordance with 5 U.S.C. 552(a)(2), the Board's final opinions and orders (including concurring and dissenting opinions), those statements of policy and interpretations adopted by the Board and that are not published in the Federal Register, and administrative staff manuals and instructions to staff that affect a member of the public are available for public inspection and copying in the Board's Headquarters Library, Room 828, 1120 Vermont Avenue NW., Washington, DC 20419.

Subpart B—Procedures for Disclosure of Records Under the Freedom of Information Act

§ 1204.11 Requests for access to Board records.

(a) *Submission of a request.* A person may request a record of the Board under this part by writing to the office that maintains the record. If the requester has reason to believe that the records in question are located in a regional office, the request must be submitted to that office. A list of the addresses of the Board's 11 regional offices appears in appendix II of 5 CFR part 1201. Other requests must be addressed to the Clerk of the Board, 1120 Vermont Avenue NW., Washington, DC 20419. Requests submitted under this part must be clearly marked "Freedom of Information Act Request" on both the envelope and the request.

(b) *Form.* A request must describe the records sought in enough detail to enable Board personnel to locate the records with no more than a reasonable effort. Wherever possible, a request must include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request seeks records pertaining to cases decided by the Board, it must indicate the title of the case, the MSPB docket number, and the date of the decision.

(c) *Time limits and decisions.* The Board will make a decision on a request within 10 workdays after the regional office or the Office of the Clerk receives it, except under "unusual cir-

cumstances" as that term is defined at 5 U.S.C. 552(a)(6)(B). Where "unusual circumstances" exist, the Board may extend the time period for making a decision on the request by no more than 10 additional working days. When it does so, it will provide written notification of the extension to the requester. If a request or an appeal is not properly labeled or is submitted to the wrong office, the time for processing the request will begin when the proper office receives it. The Clerk of the Board or the Director of any of the Board's regional offices may make a decision on a request.

§ 1204.12 Fees.

(a) *General.* The Board will charge the requester fees for services provided in responding to and processing requests for information. Those fees will be charged according to the schedule contained in paragraph (d) of this section, and will recover the full allowable direct costs that the Board incurs. Fees may be charged for time spent searching for information, even if the Board fails to locate responsive records, and even if it determines that the information is exempt from disclosure. It will not charge the requester, however, if the fee for any request is less than \$25 (the cost to the Board of processing and collecting the fee).

(b) *Definitions.* (1) The term *direct costs* means those costs that an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Overhead expenses, such as costs of space and of heating or lighting the facility in which the records are stored, are not included in direct costs.

(2) The term *search* includes all time spent looking for material in response to a request, including page-by-page or line-by-line identification of material within documents. Searches will be done in the most efficient and least expensive manner in order to minimize

costs for both the Board and the requester. Searches may be done manually or by computer using existing programming.

(3) The term *duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Those copies can take the form of paper, microform, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided will be in a form that is reasonably usable by requesters.

(4) The term *review* includes the process of examining documents to determine whether any portion of them may be exempt from disclosure under the FOIA, when the documents have been located in response to a request that is for a commercial use. The term also includes processing any documents for disclosure, e.g., doing all that is necessary to edit them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding whether exemptions apply.

(5) The term *commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Board will determine the use the requester will make of the documents requested. Moreover, where the Board has reasonable cause to doubt the use a requester will make of the records sought, or where that use is not clear from the request itself, the Board will seek additional clarification before assigning the request to a specific category.

(6) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(7) The term *noncommercial scientific institution* means an institution that is not operated on a “commercial” basis

as that term is used above, and that is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

(8) The term *representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that concerns current events or that would be of current interest to the public.

(c) *Categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters. To be included in the category of educational and noncommercial scientific institutions, requesters must show that the request is authorized by a qualifying institution and that they are seeking the records not for a commercial use, but in furtherance of scholarly or scientific research. To be included in the news media category, a requester must meet the definition in paragraph (b)(8) of this section and the request must not be made for a commercial use. To avoid commercial use charges, requesters must show that they should be included in a category or categories other than that of commercial use requesters. The board will determine the categories in which to place requesters for fee purposes. It will make these determinations based on information provided by the requesters and information otherwise known to the Board.

(d) *Charges.* The Board will provide all requesters, except commercial use requesters as that term is defined above, the first 100 pages (paper copies of standard agency size) of duplication and the first two hours of search time without charge.

(1) When the Board receives a request:

(i) From a commercial use requester, it will assess charges that recover the full direct costs for searching for the information requested, reviewing it for release at the initial request stage, reviewing it after an appeal to determine whether other exemptions not considered prior to the appeal apply to it, and duplicating it;

(ii) From an educational and non-commercial scientific institution or, to the extent duplication exceeds 100 pages, from a representative of the news media, it will assess only charges for the cost of duplication of the requested information;

(iii) From all other requesters, to the extent reproduction exceeds 100 pages and search time exceeds 2 hours, it will assess fees to recover the full direct cost of searching for and duplicating requested records.

(2) When the Board reasonably believes that a requester or group of requesters is attempting to divide a request into a series of requests in order to evade the assessment of fees, the Board will combine the requests and charge fees accordingly. The Board will not combine multiple requests on unrelated subjects from one requester.

(3) When the Board determines that charges for a request are likely to exceed \$250, the Board will require the requester to provide an advance payment of the entire fee before continuing to process the request.

(4) When a requester has an outstanding fee charge or has failed previously to pay a fee on time, the Board will require the requester to pay any outstanding amount owed, and to make an advance payment of the full amount of the estimated fee before the Board begins to process a new or pending request from that requester, and before it applies administrative time limits for making a determination on the new or pending request.

(e) *Fee schedule.* (1) Fees for document searches for records will be charged at a rate of \$3.75 for each quarter of an hour.

(2) Fees for computer searches for records will be charged at a rate of 90 cents for each computer minute.

(3) Fees for review at the initial administrative level to determine whether records or portions of records are exempt from disclosure, and for review after an appeal to determine whether the records are exempt on other legal grounds, will be assessed, for commercial use requests, at the rate of \$8.50 an hour.

(4) Fees for paper copy duplication will represent the reasonable direct costs to the Board of making copies,

taking into account the salary of the operator, as well as the cost of the reproduction machinery. Based on these criteria, the Board has determined that the fee for photocopying records is 10 cents a page, the fee for duplicating audio tapes is \$5.75 a cassette tape, the fee for computer printouts is 10 cents a page, the fee for records produced on magnetic computer tapes is \$21 a tape, and the fee for records produced on computer diskettes is \$2.70 a diskette. When the Board estimates that duplication costs will exceed \$25, it will notify the requester of the estimated amount unless the requester has indicated in advance a willingness to pay an equal or higher amount.

(f) *Fee waivers.* (1) Upon request, the Clerk of the Board or regional director, as appropriate, will furnish information without charge or at reduced charges if it is established that disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." Factors on which this decision will be based include:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) Whether disclosure of the requested information is likely to contribute to public understanding of the subject of the disclosure; and

(iv) The significance of the contribution the disclosure would make to public understanding of government operations or activities.

(2) If information is to be furnished without charge or at reduced rates, the requester must also establish that disclosure of the information is not primarily in the commercial interest of the requester. Factors on which this decision will be based include:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

(ii) Whether the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(3) The requester has the burden of establishing eligibility for a waiver of fees or for reduced fees. The denial of a request for waiver of fees may be appealed under subpart C of this part.

§ 1204.13 Denials.

A denial of a request for reduced fees or of a request for waiver of fees, or denial of a request for a record, in whole or in part, will be made in writing, will state the reasons for the denial, and will notify the requester of the right to appeal the denial.

§ 1204.14 Requests for access to confidential commercial information.

(a) *General.* Confidential commercial information provided to the Board by a business submitter will not be disclosed in response to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or entity who provides confidential commercial information to the government. The term “submitter” includes, but is not limited to corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request encompassing its confidential commercial information whenever that action is required under paragraph (d) of this section, and except as provided in paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or will provide copies of the records or portions of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information submitted to the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information submitted to the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information submitted before January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter’s claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is in fact confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will afford a business submitter a reasonable period within which to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must demonstrate why the information is alleged to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides under this paragraph

may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to disclose information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be disclosed before determining whether to disclose confidential commercial information. Whenever the Board decides to disclose confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sufficient;

(2) A description of the confidential commercial information to be disclosed; and

(3) A specified disclosure date. The Board will forward the notice of intent to disclose the information a reasonable number of days, as circumstances permit, before the specified date upon which disclosure is expected. It will forward a copy of the disclosure notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to compel disclosure of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

(1) The Board determines that the information should not be disclosed;

(2) The information lawfully has been published or otherwise made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submit-

ted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to this section, when the submitter has an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with Board regulations appears obviously frivolous; except that, in such case, the Board must provide the submitter with written notice of any final administrative disclosure determination within a reasonable period prior to the specified disclosure date.

Subpart C—Appeals

§ 1204.21 Submission.

A person may appeal a denial by the Clerk of the Board, or by any regional director, of access to agency records, waiver of fees, or reduction of fees. The appeal must be filed with the Chairman, Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419. Any appeal must include a copy of the initial request, a copy of the letter denying the request, and a statement of the reasons why the appellant believes the denying official erred.

[55 FR 39911, Oct. 1, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

§ 1204.22 Decisions on appeal.

Decisions on an appeal will be made within 20 workdays after the appeal is received. Each decision will be in writing and, if the denial of access to records is upheld, will contain the reasons for the decision, as well as information about the appellant's right to seek judicial review of the denial.

PART 1205—PRIVACY ACT REGULATIONS

Subpart A—General Provisions

Sec.

- 1205.1 Purpose.
- 1205.2 Policy and scope.
- 1205.3 Definitions.
- 1205.4 Disclosure of Privacy Act records.

Subpart B—Procedures for Obtaining Records

- 1205.11 Access to Board records.
- 1205.12 Time limits and determinations.
- 1205.13 Identification.
- 1205.14 Granting access.
- 1205.15 Denying access.
- 1205.16 Fees.

Subpart C—Amendment of Records

- 1205.21 Request for amendment.
- 1205.22 Action on request.
- 1205.23 Time limits.

Subpart D—Appeals

- 1205.31 Submitting appeal.
- 1205.32 Decision on appeal.

AUTHORITY: 5 U.S.C. 552a and 1204

SOURCE: 54 FR 28662, July 6, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 1205.1 Purpose.

This subpart implements the Privacy Act of 1974, 5 U.S.C. 552a, (“the Act”) by prescribing the procedures by which individuals may determine the existence of, seek access to, and request amendment of Board records concerning themselves, and by stating the requirements that apply to Board employees’ use and dissemination of those records.

§ 1205.2 Policy and scope.

The Board’s policy is to apply these regulations to all records that can be retrieved from a system of records under the Board’s control by using an individual’s name or by using a number, symbol, or other means of identifying the individual. These regulations, however, do not govern the rights of parties in adversary proceedings before the Board to obtain discovery from adverse parties; those rights are governed by part 1201 and part 1209 of this chap-

ter. These regulations also are not intended to permit the alteration, either before or after the Board has issued a decision on an appeal, of evidence presented during the Board’s adjudication of the appeal.

§ 1205.3 Definitions.

The definitions of 5 U.S.C. 552a apply to this part. In addition, as used in this part:

(a) *Inquiry* means a request by an individual regarding whether the Board has a record that pertains to that individual.

(b) *Request for access* means a request by an individual to inspect or copy a record.

(c) *Request for amendment* means a request by an individual to change the substance of a particular record by addition, deletion, or other correction.

(d) *Requester* means the individual requesting access to or amendment of a record. The individual may be either the person to whom the requested record pertains, a legal guardian acting on behalf of the individual, or a representative designated by that individual.

§ 1205.4 Disclosure of Privacy Act records.

(a) Except as provided in 5 U.S.C. 552a(b), the Board will not disclose any personal record information from systems of records it maintains to any individual other than the individual to whom the record pertains, or to any other agency, without the express written consent of the individual to whom the record pertains, or his or her agent or attorney.

(b) The Board’s staff will take necessary steps, in accordance with the law and these regulations, to protect the security and integrity of the records and the personal privacy interests of the subjects of the records.

Subpart B—Procedures for Obtaining Records

§ 1205.11 Access to Board records.

(a) *Submission of request.* Inquiries or requests for access to records must be submitted to the appropriate regional office of the Board, or to the Office of

the Clerk of the Board, U.S. Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419. If the requester has reason to believe the records in question are located in a regional office, the request must be submitted to that office. Requests submitted to the region must be addressed to the regional director at the appropriate regional office listed in appendix II of 5 CFR part 1201.

(b) *Form.* Each submission must contain the following information:

(1) The name, address, and telephone number of the individual to whom the record pertains;

(2) The name, address, and telephone number of the individual making the request if the requester is someone other than the person to whom the record pertains, such as a legal guardian or an attorney, along with evidence of the relationship. Evidence of the relationship may consist of an authenticated copy of: (i) the birth certificate of the minor child, and (ii) the court document appointing the individual legal guardian, or (iii) an agreement for representation signed by the individual to whom the record pertains;

(3) Any additional information that may assist the Board in responding to the request, such as the name of the agency that took an action against an individual, or the docket number of the individual's case;

(4) The date of the inquiry or request;

(5) The inquirer's or requester's signature; and

(6) A conspicuous indication, both on the envelope and the letter, that the inquiry is a "PRIVACY ACT REQUEST".

(c) *Identification.* Each submission must comply with the identification requirements stated in §1205.13 of this part.

(d) *Payment.* Records usually will not be released until fees have been received.

§1205.12 Time limits and determinations.

(a) *Board determinations.* The Board will acknowledge the request and make a determination on it within 10 workdays after it receives the request, except under the unusual circumstances described below:

(1) When the Board needs to obtain the records from other Board offices;

(2) When it needs to obtain and examine a large number of records;

(3) When it needs to consult with another agency that has a substantial interest in the records requested; or

(4) When other extenuating circumstances prevent the Board from processing the request within the 10-day period.

(b) *Time extensions.* When unusual circumstances exist, the Board may extend the time for making a determination on the request for no more than 10 additional workdays. If it does so, it will notify the requester of the extension.

(c) *Improper request.* If a request or an appeal is not properly labeled, does not contain the necessary identifying information, or is submitted to the wrong office, the time period for processing the request will begin when the correct official receives the properly labeled request and the necessary information.

(d) *Determining officials.* The Clerk of the Board or a regional director will make determinations on requests.

§ 1205.13 Identification.

(a) *In person.* Each requester must present satisfactory proof of identity. The following items, which are listed in order of the Board's preference, are acceptable proof of the requester's identity when the request is made in person:

(1) A document showing the requester's photograph;

(2) A document showing the requester's signature; or

(3) If the items described in paragraphs (a)(1) and (2) of this section are not available, a signed statement in which the requester asserts his or her identity and acknowledges understanding that misrepresentation of identity in order to obtain a record is a misdemeanor and subject to a fine of up to \$5,000 under 5 U.S.C. 552a(i)(3).

(b) *By mail.* The identification of a requester making a request by mail must be certified by a notary public or equivalent official or contain other information sufficient to identify the requester. Sufficient information could be the date of birth of the requester

and some item of information in the record that only the requester would be likely to know.

(c) *Parents of minors, legal guardians, and representatives.* Parents of minors, legal guardians, and representatives must submit identification under paragraph (a) or (b) of this section. Additionally, they must present an authenticated copy of:

- (1) The minor's birth certificate, and
- (2) The court order of guardianship, or
- (3) The agreement of representation, where appropriate.

§ 1205.14 Granting access.

(a) The Board may allow a requester to inspect records through either of the following methods:

(1) It may permit the requester to inspect the records personally during normal business hours at a Board office or other suitable Federal facility closer to the requester; or

(2) It may mail copies of the records to the requester.

(b) A requester seeking personal access to records may be accompanied by another individual of the requester's choice. Under those circumstances, however, the requester must sign a statement authorizing the discussion and presentation of the record in the accompanying individual's presence.

§ 1205.15 Denying access.

(a) *Basis.* In accordance with 5 U.S.C. 552a(k)(2), the Board may deny access to records that are of an investigatory nature and that are compiled for law enforcement purposes. Those requests will be denied only where access to them would otherwise be unavailable under Exemption (b)(7) of the Freedom of Information Act.

(b) *Form.* All denials of access under this section will be made in writing and will notify the requester of the right to judicial review.

§ 1205.16 Fees.

(a) No fees will be charged except for making copies of records.

(b) Photocopies of records duplicated by the Board will be subject to a charge of 10 cents a page.

(c) If the fee to be assessed for any request is less than \$25 (the cost to the

Board of processing and collecting the fee), no charge will be made to the requester.

(d) Fees for duplicating audio tapes and computer records will be charged at a rate representing the actual costs to the Board, as those costs are shown below.

(1) Audio tapes will be provided at a charge of \$5.75 for each cassette tape.

(2) Computer printouts will be provided at a charge of 1 cent a page.

(3) Records reproduced on magnetic computer tapes will be provided at a charge of \$21 a tape.

(4) Records produced on computer diskettes will be provided at a charge of \$2.70 a diskette.

(e) If duplication costs exceed \$25, the Board will notify the requester of the estimated amount before copying the records.

(f) When the Board determines that charges for a request are likely to exceed \$250, it will require the requester to pay the entire fee before it continues to process the request.

(g) The Board will provide one copy of the amended parts of any record it amends free of charge as evidence of the amendment.

Subpart C—Amendment of Records

§ 1205.21 Request for amendment.

A request for amendment of a record must be submitted to the director of the appropriate regional office, or to the Office of the Clerk of the Board, U.S. Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419, depending on which office is maintaining the record. The request must be in writing, must be identified conspicuously on the outside of the envelope and the letter as a "PRIVACY ACT REQUEST," and must include the following information:

(a) An identification of the record to be amended;

(b) A description of the amendment requested; and

(c) A statement of the basis for the amendment, along with supporting documentation, if any.

§ 1205.22 Action on request.

(a) *Amendment granted.* If the Board grants the request for amendment, it will notify the requester and provide him or her with a copy of the amendment.

(b) *Amendment denied.* If the Board denies the request for amendment in whole or in part, it will provide the requester with a written notice that includes the following information:

- (1) The basis for the denial; and
- (2) The procedures for appealing the denial.

§ 1205.23 Time limits.

The regional director or the Board will rule on a request for amendment within 10 workdays of receipt of the request in the regional office or the Office of the Clerk except under the unusual circumstances described in paragraphs (a)(1) through (a)(4) of §1205.12 of this part.

Subpart D—Appeals

§ 1205.31 Submitting appeal.

(a) A partial or complete denial, by the Clerk of the Board or a regional director, of a request for amendment may be appealed to the Chairman, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419.

(b) Any appeal must be in writing, must be clearly and conspicuously identified as a Privacy Act appeal on both the envelope and letter, and must include:

- (1) A copy of the original request for amendment of the record;
- (2) A copy of the denial; and
- (3) A statement of the reasons why the original denial should be overruled.

[54 FR 28662, July 6, 1989, as amended at 55 FR 39911, Oct. 1, 1990; 59 FR 65243, Dec. 19, 1994]

§ 1205.32 Decision on appeal.

(a) The Chairman will decide the appeal within 30 working days unless that official determines that there is good cause for extension of that deadline. If an appeal is improperly labeled, does not contain the necessary information, or is submitted to an inappropriate official, the time period for processing

the appeal will begin when the Chairman receives the appeal and the necessary information.

(b) If the request for amendment of a record is granted on appeal, the Chairman will direct that the amendment be made. A copy of the amended record will be provided to the requester.

(c) If the request for amendment of a record is denied, the Chairman will notify the requester of the denial and will inform the requester of:

- (1) The basis for the denial;
- (2) The right to judicial review of the decision under 5 U.S.C. 552a(g)(1)(A); and

(3) The right to file a concise statement with the Board stating the reasons why the requester disagrees with the denial. This statement will become a part of the requester's record.

[55 FR 39911, Oct. 1, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

PART 1206—OPEN MEETINGS

Subpart A—Purpose and Policy

- Sec.
- 1206.1 Purpose.
- 1206.2 Policy.
- 1206.3 Definitions.

Subpart B—Procedures

- 1206.4 Notice of meeting.
- 1206.5 Change in meeting plans after notice.
- 1206.6 Decision to close meeting.
- 1206.7 Record of meetings.
- 1206.8 Providing information to the public.
- 1206.9 Procedures for expedited closing of meetings.

Subpart C—Conduct of Meetings

- 1206.11 Meeting place.
- 1206.12 Role of observers.

AUTHORITY: 5 U.S.C. 552b.

SOURCE: 54 FR 20367, May 11, 1989, unless otherwise noted.

Subpart A—Purpose and Policy

§ 1206.1 Purpose.

The purpose of this part is to prescribe the procedures by which the Board will conduct open meetings in accordance with the Government in the Sunshine Act (5 U.S.C. 552b) ("the Act").

§ 1206.2 Policy.

The Board will provide the public with the fullest practicable information regarding its decision-making processes, while protecting individuals' rights and the Board's ability to carry out its responsibilities. Meetings at which the Board members jointly conduct or dispose of official business are presumptively open to the public. The Board will close those meetings in whole or in part only in accordance with the exemptions provided under 5 U.S.C. 552b(c), and only when doing so is in the public interest.

§ 1206.3 Definitions.

The following definitions apply to this part:

(a) *Meeting* means deliberations of at least two Board members that determine or result in the joint conduct of official Board business.

(b) *Member* means one of the members of the Merit Systems Protection Board.

Subpart B—Procedures**§ 1206.4 Notice of meeting.**

(a) Notice of a Board meeting will be published in the FEDERAL REGISTER at least one week before the meeting. Each notice will include the following information:

- (1) The time of the meeting;
- (2) The place where the meeting will be held;
- (3) The subject and agenda of the meeting;
- (4) Whether the meeting is to be open to the public or closed; and
- (5) The name and telephone number of a Board official responsible for receiving inquiries regarding the meeting.

(b) The Board, by majority vote, may provide less than one week's notice. When it does so, however, it will provide notice of the meeting at the earliest practicable time.

§ 1206.5 Change in meeting plans after notice.

(a) After notice of a meeting has been published, the Board may change the time or place of the meeting only if it announces the change publicly at the earliest practicable time.

(b) After notice of a meeting has been published, the Board may not change either the subject matter of the meeting or the decision that the meeting will be open to the public or closed unless both of the following conditions are met:

(1) By majority, recorded vote, the Board members determine that Board business requires the change and that no earlier announcement of the change was possible; and

(2) Notice of the change, and of the individual Board members' vote, is published in the FEDERAL REGISTER at the earliest practicable time.

§ 1206.6 Decision to close meeting.

(a) *Basis.* The Board, by majority vote, may decide to close a meeting in accordance with the provisions of 5 U.S.C. 552b(c)(1) to 552b(c)(10) when closing the meeting is in the public interest.

(b) *General Counsel certification.* For every meeting that is closed to the public in whole or in part, the General Counsel will certify that closing the meeting is proper, and will state the basis for that opinion.

(c) *Vote.* Within one day after voting to close a meeting, the Board will make publicly available a record reflecting the vote of each member. In addition, within one day after any vote to close a portion or portions of a meeting to the public, the Board will make publicly available a full written explanation of its decision to close the meeting, together with a list naming all persons expected to attend the meeting and identifying their affiliation, unless that disclosure would reveal the information that the meeting was closed to protect.

§ 1206.7 Record of meetings.

(a) *Closed Meeting.* When the Board has decided to close a meeting in whole or in part, it will maintain the following record:

- (1) A transcript or recording of the proceeding;
- (2) A copy of the General Counsel's certification under § 1206.6(b) of this part;
- (3) A statement from the presiding official specifying the time and place of

the meeting and naming the persons present; and

(4) A record (which may be part of the transcript) of all votes and all documents considered at the meeting.

(b) *Open meeting.* Transcripts or other records will be made of all open meetings of the Board. Those records will be made available upon request at a fee representing the Board's actual cost of making them available.

[54 FR 20367, May 11, 1989, as amended at 54 FR 28664, July 6, 1989]

§ 1206.8 Providing information to the public.

Information available to the public under this part will be made available by the Office of the Clerk of the Board, U.S. Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. Individuals or organizations with a special interest in activities of the Board may ask the Office of the Clerk to have them placed on a mailing list for receipt of information available under this part.

§ 1206.9 Procedures for expedited closing of meetings.

Instead of following the procedures described in §§1206.4 through 1206.8 of this part, and in §§1206.11 and 1206.12, the Board may expedite the closing of its meetings under the following conditions by using the following procedures:

(a) *Finding.* (1) Most regular Board business consists of reviewing initial decisions in cases adjudicated after an opportunity for a hearing has been provided. Based on a review of this circumstance, the legislative history of the Civil Service Reform Act of 1978 (Pub. L. 95-454), the Government in the Sunshine Act (5 U.S.C. 552b), and the Board's regulations at 5 CFR part 1201, the Board finds that a majority of its meetings may properly be closed to the public under 5 U.S.C. 552b(c)(10) and 552b(d)(4).

(2) Absent a compelling public interest to the contrary, meetings or portions of meetings that can be expected to be closed under these procedures include meetings held to consider the following: Petitions for review or cases that have been or may be reopened under 5 CFR 1201.114 through 1201.117;

proposals to take action against administrative law judges under 5 CFR 1201.131 through 1201.136; and actions brought by the Special Counsel under 5 CFR 1201.129.

(b) *Announcement.* The Board will announce publicly, at the earliest practicable time, the time, place, and subject matter of meetings or portions of meetings that are closed under this provision.

(c) *Procedure for closing meetings under this section.* At the beginning of a meeting or portion of a meeting that is to be closed under this section, the Board may, by recorded vote of two of its members, decide to close the meeting or a portion of it to public observation. The Board may take this action, however, only after it receives a certification by the General Counsel under §1206.6(b) of this part.

(d) *Record Availability.* When the Board has closed a meeting or portion of a meeting under this paragraph, it will make the following available as soon as practicable:

(1) A written record reflecting the vote of each participating member of the Board with respect to closing the meeting; and

(2) The General Counsel certification under §1206.6(b).

Subpart C—Conduct of Meetings

§ 1206.11 Meeting place.

The Board will hold open meetings in meeting rooms designated in the public announcements of those meetings. Whenever the number of observers is greater than can be accommodated in the designated meeting room, however, it will make alternative facilities available to the extent possible.

§ 1206.12 Role of observers.

The public may attend open meetings for the sole purpose of observation. Observers may not participate in the meetings unless they are expressly invited to do so. They also may not create distractions that interfere with the conduct and disposition of Board business, and they may be asked to leave if they do so. Observers of meetings that are partially closed must leave the meeting room when they are asked to do so.

**PART 1207—ENFORCEMENT OF
NONDISCRIMINATION ON THE
BASIS OF HANDICAP IN PRO-
GRAMS OR ACTIVITIES CON-
DUCTED BY THE MERIT SYSTEMS
PROTECTION BOARD**

Sec.
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1207.170 Compliance procedures.
1207.171–1207.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 53 FR 25881 and 25885, July 8, 1988, unless otherwise noted.

§ 1207.101 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1207.102 Application.

This regulation (§§ 1207.101–1207.170) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 1207.103 Definitions.

For purposes of this regulation, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:
(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 1207.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 1207.104—1207.109 [Reserved]

§ 1207.110 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

§ 1207.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1207.112–1207.129 [Reserved]

§ 1207.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

- (i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;
- (ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- (iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in af-

foring equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 1207.131—1207.139 [Reserved]

§ 1207.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§ 1207.141—1207.148 [Reserved]

§ 1207.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1207.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1207.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1207.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock,

or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 1207.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of § 1207.150(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons,

including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 1207.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 1207.152–1207.159 [Reserved]

§ 1207.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall

give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §1207.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handi-

caps receive the benefits and services of the program or activity.

§§ 1207.161—1207.169 [Reserved]

§ 1207.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Equal Employment Officer shall be responsible for coordinating implementation of this section. Complaints may be sent to the Equal Employment Office, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Room 908, Washington, DC 20419.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

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(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §1207.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 25881 and 25885, July 8, 1988, as amended at 53 FR 25881, July 8, 1988]

§§ 1207.171–1207.999 [Reserved]

PART 1208—[RESERVED]

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

Subpart A—Jurisdiction and Definitions

- Sec.
- 1209.1 Scope.
- 1209.2 Jurisdiction.
- 1209.3 Application of 5 CFR part 1201.
- 1209.4 Definitions.

Subpart B—Appeals

- 1209.5 Time of filing.
- 1209.6 Content of appeal; right to hearing.
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Subpart C—Stay Requests

- 1209.8 Filing a request for a stay.
- 1209.9 Content of stay request and response.

1209.10 Hearing and order ruling on stay request.

1209.11 Duration of stay; interim compliance.

Subpart D—Reports on Applications for Transfers

1209.12 Filing of agency reports.

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

SOURCE: 55 FR 28592, July 12, 1990, unless otherwise noted.

Subpart A—Jurisdiction and Definitions

§ 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant’s whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant’s whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.

§ 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1214(a)(3), 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 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: 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 of his whistleblowing activities. 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 individual right of action appeal.

(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. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).)

Example: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board.

(3) *Stays.* Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant’s request, order an agency to suspend that action.

§ 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part.

§ 1209.4 Definitions.

(a) *Personnel action* means, as to individuals and agencies covered by 5 U.S.C. 2302:

- (1) An appointment;
- (2) A promotion;
- (3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;
- (4) A detail, transfer, or reassignment;

- (5) A reinstatement;
- (6) A restoration;
- (7) A reemployment;
- (8) A performance evaluation under chapter 43 of title 5, United States Code;
- (9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; or
- (10) A significant change in duties or responsibilities that is inconsistent with the employee’s salary or grade level.

(b) *Whistleblowing* is the 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.

(c) *Contributing factor* means any disclosure that affects an agency’s decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) *Clear and convincing evidence* is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than “preponderance of the evidence” as defined in 5 CFR 1201.56(c)(2).

Subpart B—Appeals

§ 1209.5 Time of filing.

(a) *Individual right of action appeals.* The appellant must seek corrective action from the Special Counsel before appealing to the Board. 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 Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations; or,

(2) If the Office of 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, at any time after the expiration of 120 days.

(b) *Otherwise appealable action appeals.* The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) *Appeals after a stay request.* Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date of the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown.

[55 FR 28592, July 12, 1990, as amended at 59 FR 31110, June 17, 1994]

§ 1209.6 Content of appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of the appellant's disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) Evidence or argument that:

(i) The appellant was or will be subject to a personnel action as defined in § 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the appellant's whistleblowing, as described in § 1209.4(b) of this part.

(b) *Right to hearing.* An appellant has a right to a hearing.

(c) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

§ 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

Subpart C—Stay Requests

§ 1209.8 Filing a request for a stay.

(a) *Time of filing.* An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal with the Board under § 1209.5 of this part, but no later than the time limit set for the close of discovery in the appeal. It may be filed

prior to, simultaneous with, or after the filing of an appeal.

(b) *Place of filing.* Requests must be filed with the appropriate Board regional or field office as set forth in 5 CFR 1201.4(d).

(c) *Service of stay request.* A stay request must be simultaneously served upon the Board's regional or field office and upon the agency's local servicing personnel office or the agency's designated representative, if any. A certificate of service stating how and when service was made must accompany the stay request.

(d) *Method of filing.* A stay request must be filed with the appropriate Board regional or field office by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

[55 FR 28592, July 12, 1990, as amended at 58 FR 36345, July 7, 1993, 59 FR 65243, Dec. 19, 1994]

§ 1209.9 Content of stay request and response.

(a) Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file a stay request. The request may be in any format, and must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the acting agency;

(2) The name, address, and telephone number of the appellant's representative, if any;

(3) The signature of the appellant or, if the appellant has a representative, of the representative;

(4) A chronology of facts, including a description of the appellant's disclosure and the action that the agency has taken or intends to take;

(5) Where the appellant first sought corrective action from the Special Counsel, evidence that the stay request is timely filed;

(6) Evidence and/or argument showing that:

(i) The action threatened, proposed, taken, or not taken is a personnel action, as defined in §1209.4(a) of this part;

(ii) The action complained of was based on whistleblowing, as defined in § 1209.4(b) of this part; and

(iii) There is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(7) Evidence and/or argument addressing how long the stay should remain in effect; and

(8) Any documentary evidence that supports the stay request.

(b) An appellant may provide evidence and/or argument addressing the question of whether a stay would impose extreme hardship on the agency.

(c) *Agency response.* (1) The agency's response to the stay request must be received by the appropriate Board regional or field office within five days (excluding Saturdays, Sundays, and Federal holidays) of the date of service of the stay request on the agency.

(2) The agency's response must contain the following:

(i) Evidence and/or argument addressing whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(ii) Evidence and/or argument addressing whether the grant of a stay would result in extreme hardship to the agency; and

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

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

§ 1209.10 Hearing and order ruling on stay request.

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

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

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

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

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

§ 1209.11 Duration of stay; interim compliance.

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

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

Subpart D—Reports on Applications for Transfers

§ 1209.12 Filing of agency reports.

When an employee who has applied for a transfer to another position in an Executive agency under 5 U.S.C. 3352 asks the agency head to review a rejection of his or her application for transfer, the agency head must complete the review and provide a written statement of findings to the employee and the Clerk of the Board within 30 days after receiving the request.

PART 1210—DEBT MANAGEMENT

Subpart A—Salary Offset

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- 1210.2 Definitions.
- 1210.3 Applicability.
- 1210.4 Notice requirements.
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- 1210.7 Coordinating offset with another Federal agency.
- 1210.8 Procedures for salary offset.
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- 1210.24 Claims involving criminal activity or misconduct.
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SOURCE: 54 FR 50603, Dec. 8, 1989, unless otherwise noted.

Subpart A—Salary Offset

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

§ 1210.1 Purpose and scope.

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

(b) This regulation does not apply to debts or claims arising under:

- (1) The Internal Revenue Code of 1954, as amended, 26 U.S.C. 1 *et seq.*;
- (2) The Social Security Act, 42 U.S.C. 301 *et seq.*;
- (3) The tariff laws of the United States; or
- (4) Any case where a collection of a debt by salary offset is explicitly provided for or prohibited by another statute.

(c) This regulation does not apply to any adjustment to pay arising out of an employee’s selection of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(d) This regulation does not preclude the compromise, suspension, or termination of collection action where appropriate under the standards implementing the Federal Claims Collection Act, 31 U.S.C. 3711 *et seq.* 4 CFR parts 101 through 105; 5 CFR part 1210.

(e) This regulation does not preclude an employee from requesting waiver of an overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774 or 32 U.S.C. 716 or in any way questioning the amount of validity of the debt by submitting a subsequent claim to the General Accounting Office. This regulation does not preclude an employee from requesting a waiver pursuant to other statutory provisions applicable to the particular debt being collected.

(f) Matters not addressed in these regulations should be reviewed in accordance with the Federal Claims Collection Standards at 4 CFR 101.1 *et seq.*

§ 1210.2 Definitions.

(a) *Agency.* An executive agency as is defined at 5 U.S.C. 105 including the U.S. Postal Service, the U.S. Postal Commission, a military department as defined at 5 U.S.C. 102, an agency or court in the judicial branch, an agency of the legislative branch including the U.S. Senate and House of Representatives and other independent establishments that are entities of the Federal government.

(b) *Chairman.* The Chairman of the MSPB or the Chairman's designee.

(c) *Creditor agency.* The agency to which the debt is owed.

(d) *Debt.* An amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales or real or personal property, overpayments, penalties, damages, interests, fines, forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources.

(e) *Disposable pay.* The amount that remains from an employee's Federal pay after required deductions for social security, Federal, state or local income tax, health insurance premiums, retirement contributions, life insurance premiums, Federal employment taxes, and

any other deductions that are required to be withheld by law.

(f) *Hearing official.* An individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and who renders a decision on the basis of such hearing. A hearing official may not be under the supervision or control of the Chairman of the MSPB.

(g) *Paying Agency.* The agency that employs the individual who owes the debt and authorizes the payment of his/her current pay.

(h) *Salary offset.* An administrative offset to collect a debt pursuant to 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his/her consent.

§ 1210.3 Applicability.

(a) These regulations are to be followed when:

(1) The MSPB is owed a debt by an individual currently employed by another Federal agency;

(2) The MSPB is owed a debt by an individual who is a current employee of the MSPB; or

(3) The MSPB employs an individual who owes a debt to another Federal agency.

§ 1210.4 Notice requirements.

(a) Deductions shall not be made unless the employee is provided with written notice signed by the Chairman of the debt at least 30 days before salary offset commences.

(b) The written notice shall contain:

(1) A statement that the debt is owed and an explanation of its nature, and amount;

(2) The agency's intention to collect the debt by deducting from the employee's current disposable pay account;

(3) The amount, frequency proposed beginning date, and duration of the intended deduction(s);

(4) An explanation of interest, penalties, and administrative charges, including a statement that such charges will be assessed unless excused in accordance with the Federal Claims Collections Standards at 4 CFR 101.1 *et seq.*;

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(5) The employee's right to inspect, request, or receive a copy of government records relating to the debt;

(6) The opportunity to establish a written schedule for the voluntary repayment of the debt;

(7) The right to a hearing conducted by an impartial hearing official;

(8) The methods and time period for petitioning for hearings;

(9) A statement that the timely filing of a petition for a hearing will stay the commencement of collection proceedings;

(10) A statement that a final decision on the hearing will be issued not later than 60 days after the filing of the petition requesting the hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(11) A statement that knowingly false or frivolous statements, representations, or evidence may subject the employee to appropriate disciplinary procedures;

(12) A statement of other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are contractual or statutory provisions to the contrary, a statement that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

§ 1210.5 Hearing.

(a) *Request for hearing.* (1) An employee must file a petition for a hearing in accordance with the instructions outlined in the agency's notice to offset.

(2) A hearing may be requested by filing a written petition addressed to the Chairman of the MSPB stating why the employee disputes the existence or amount of the debt. The petition for a hearing must be received by the Chairman no later than fifteen (15) calendar days after the date of the notice to offset unless the employee can show good cause for failing to meet the deadline date.

(b) *Hearing procedures.* (1) The hearing will be presided over by an impartial hearing official.

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(2) The hearing shall conform to procedures contained in the Federal Claims Collection Standards 4 CFR 102.3(c). The burden shall be on the employee to demonstrate that the existence or the amount of the debt is in error.

§ 1210.6 Written decision.

(a) The hearing official shall issue a written opinion no later than 60 days after the hearing.

(b) The written opinion will include: A statement of the facts presented to demonstrate the nature and origin of the alleged debt; the hearing official's analysis, findings and conclusions; the amount and validity of the debt, and the repayment schedule.

§ 1210.7 Coordinating offset with another Federal agency.

(a) *The MSPB as the creditor agency.* (1) When the Chairman determines that an employee of a Federal agency owes a delinquent debt to the MSPB, the Chairman shall as appropriate:

(i) Arrange for a hearing upon the proper petitioning by the employee;

(ii) Certify in writing that the employee owes the debt, the amount and basis of the debt, the date on which payment is due, the date the Government's right to collect the debt accrued, and that MSPB regulations for salary offset have been approved by the Office of Personnel Management;

(iii) Advise the paying agency of the amount or percentage of disposable pay to be collected in each installment, if collection is to be made in installments;

(iv) Advise the paying agency of the actions taken under 5 U.S.C. 5514(b) and provide the dates on which action was taken unless the employee has consented to salary offset in writing or signed a statement acknowledging receipt of procedures required by law. The written consent or acknowledgment must be sent to the paying agency;

(v) If the employee is in the process of separating, MSPB must submit its debt claim to the paying agency as provided in this part. The paying agency must certify any amounts already collected, notify the employee, and send a copy of the certification and notice of

the employee's separation to the creditor agency. If the paying agency is aware that the employee is entitled to Civil Service Retirement and Disability Fund or similar payments, it must certify to the agency responsible for making such payments the amount of the debt and that the provisions of this part have been followed; and

(vi) If the employee has already separated and all payments due from the paying agency have been paid, the Chairman may request unless otherwise prohibited, that money payable to the employee from the Civil Service Retirement and Disability Fund or other similar funds be collected by administrative offset.

(b) *MSPB as the paying agency.* (1) Upon receipt of a properly certified debt claim from another agency, deductions will be scheduled to begin at the next established pay interval. The employee must receive written notice that the MSPB has received a certified debt claim from the creditor agency, the amount of the debt, the date salary offset will begin, and the amount of the deduction(s). The MSPB shall not review the merits of the creditor agency's determination of the validity or the amount of the certified claim.

(2) If the employee transfers to another agency after the creditor agency has submitted its debt claim to the MSPB and before the debt is collected completely, the MSPB must certify the total amount collected. One copy of the certification must be furnished to the employee. A copy must be furnished the creditor agency with notice of the employee's transfer.

§ 1210.8 Procedures for salary offset.

(a) Deductions to liquidate an employee's debt will be by the method and in the amount stated in the Chairman's notice of intention to offset as provided in § 1210.4. Debts will be collected in one lump sum where possible. If the employee is financially unable to pay in one lump sum, collection must be made in installments.

(b) Debts will be collected by deduction at officially established pay intervals from an employee's current pay account unless alternative arrangements for repayment are made.

(c) Installment deductions will be made over a period not greater than the anticipated period of employment. The size of installment deductions must bear a reasonable relationship to the size of the debt and the employee's ability to pay. The deduction for the pay intervals for any period must not exceed 15 percent of disposable pay unless the employee has agreed in writing to a deduction of a greater amount.

(d) Unliquidated debts may be offset against any financial payment due to a separated employee including but not limited to final salary payment or leave in accordance with 31 U.S.C. 3716.

§ 1210.9 Refunds.

(a) The MSPB will refund promptly any amounts deducted to satisfy debts owed to the MSPB when the debt is waived, found not owed to the MSPB, or when directed by an administrative or judicial order.

(b) The creditor agency will promptly return any amounts deducted by MSPB to satisfy debts owed to the creditor agency when the debt is waived, found not owed, or when directed by an administrative or judicial order.

(c) Unless required by law, refunds under this subsection shall not bear interest.

§ 1210.10 Statute of limitations.

If a debt has been outstanding for more than 10 years after the agency's right to collect the debt first accrued, the agency may not collect by salary offset unless facts material to the Government's right to collect were not known and could not reasonably have been known by the official or officials who were charged with the responsibility for discovery and collection of such debts.

§ 1210.11 Nonwaiver of rights.

An employee's involuntary payment of all or any part of a debt collected under these regulations will not be construed as a waiver of any rights that employee may have under 5 U.S.C. 5514 or any other provision of contract law unless there are statutes or contract(s) to the contrary.

§ 1210.12 Interest, penalties, and administrative costs.

Charges may be assessed for interest, penalties, and administrative costs in accordance with the Federal Claims Collection Standards, 4 CFR 102.13. Dated: July 24, 1987.

Subpart B—Claims Collection

AUTHORITY: The authority for this part is the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. 3711 and 3716–3719; the Federal Claims Collection Standards at 4 CFR parts 101–105, as amended by 49 FR 8889, 5 U.S.C. 552a, and Office of Management and Budget Circular A–129.

§ 1210.21 Purpose and scope.

This part prescribes standards and procedures for officers and employees of the MSPB who are responsible for the collection and disposition of debts owed to the United States. The activities covered include: Collecting claims in any amount; compromising claims, or suspending or terminating the collection of claims that do not exceed \$20,000 exclusive of interest and charges; and referring debts that cannot be disposed of by the MSPB to the Department of Justice or to the General Accounting Office for further administrative action or litigation.

§ 1210.22 Definitions.

(a) *Claim* or *debt*. An amount or property owed to the United States which includes, but is not limited to: Overpayments to program beneficiaries; overpayments to contractors and grantees, including overpayments arising from audit disallowances; excessive cash advances to grantees and contractors; and civil penalties and assessments. A debt is overdue or delinquent if it is not paid by the due date specified in the initial notice of the debt (see § 1210.26) or if the debtor fails to satisfy his or her obligation under a repayment agreement.

(b) *Debtor*. An individual, organization, group, association, partnership, or corporation indebted to the United States, or the person or entity with legal responsibility for assuming the debtor's obligation.

(c) *MSPB*. The Merit Systems Protection Board.

(d) *Administrative offset*. Satisfying a debt by withholding money payable by the United States to or held by the United States for a debtor.

§ 1210.23 Other remedies.

The remedies and sanctions available to the MSPB under this part are not intended to be exclusive. The Chairman of the MSPB or his designee may impose other appropriate sanctions upon a debtor for prolonged or repeated failure to pay a debt. For example, the Chairman or his designee may place the debtor's name on a list of debarred, suspended, or ineligible contractors. In such cases the debtor will be advised of the MSPB's action.

§ 1210.24 Claims involving criminal activity or misconduct.

(a) A debtor whose indebtedness involves criminal activity such as fraud, embezzlement, theft, or misuse of government funds or property is subject to punishment by fine or imprisonment as well as to a civil claim by the United States for compensation for the misappropriated funds. The MSPB will refer these cases to the appropriate law enforcement agency for prosecution.

(b) Debts involving fraud, false claims, or misrepresentation shall not be compromised, terminated, suspended, or otherwise disposed of under this rule. Only the Department of Justice is authorized to compromise, terminate, suspend, or otherwise dispose of such debts.

§ 1210.25 Collection.

(a) The MSPB will take aggressive action to collect debts and reduce delinquencies. Collection efforts shall include sending to the debtor's last known address a total of three progressively stronger written demands for payment at not more than 30 day intervals. When necessary to protect the Government's interest, written demand may be preceded by other appropriate action, including immediate referral for litigation. Other contact with the debtor or his or her representative or guarantor by telephone, in person and/or in writing may be appropriate to demand prompt payment, to discuss the debtor's position regarding the existence, amount and repayment of the

debt, and to inform the debtor of his or her rights and effect of nonpayment or delayed payment. A debtor who disputes a debt must promptly provide available supporting evidence.

(b) If a debtor is involved in insolvency proceedings, the debt will be referred to the appropriate United States Attorney to file a claim. The United States may have a priority over other creditors under 31 U.S.C. 3713.

§ 1210.26 Notices to debtor.

The first written demand for payment must inform the debtor of the following:

(a) The amount and nature of the debt;

(b) The date payment is due, which will generally be 30 days from the date the notice was mailed;

(c) The assessment of interest under § 1210.27 from the date the notice was mailed if payment is not received within the 30 days;

(d) The right to dispute the debt;

(e) The office, address and telephone number that the debtor should contact to discuss repayment and reconsideration of the debt; and

(f) The sanctions available to the MSPB to collect a delinquent debt including, but not limited to, referral of the debt to a credit reporting agency, a private collection bureau, or the Department of Justice for litigation.

§ 1210.27 Interest, penalties, and administrative costs.

(a) Interest will accrue on all debts from the date when the first notice of the debt and the interest requirement is mailed to the last known address or hand-delivered to the debtor if the debt is not paid within 30 days from the date the first notice was mailed. The MSPB will charge an annual rate of interest that is equal to the average investment rate for the Treasury tax and loan accounts on September 30 of each year, rounded to the nearest whole per centum. This rate, which represents the current value of funds to the United States Treasury, may be revised quarterly by the Secretary of the Treasury and is published by the Secretary of the Treasury annually or quarterly in the FEDERAL REGISTER and the Treasury Financial Manual Bulletins.

(b) The rate of interest initially assessed will remain fixed for the duration of the indebtedness, except that if a debtor defaults on a repayment agreement interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(c) The MSPB shall charge debtors for administrative costs incurred in handling overdue debts.

(d) Interest will not be charged on administrative costs.

(e) The MSPB shall assess a penalty charge, not to exceed 6 percent per year on debts which have been delinquent for more than 90 days. This charge shall accrue from the date that the debt became delinquent.

(f) The Chairman or his designee may waive in whole or in part the collection of interest and administrative and penalty charges if determined that collection would be against equity or not in the best interests of the United States. The MSPB shall waive the collection of interest on the debt or any part of the debt which is paid within 30 days after the date on which interest began to accrue.

§ 1210.28 Administrative offset.

(a) The MSPB may collect debts owed by administrative offset if:

(1) The debt is certain in amount;

(2) Efforts to obtain direct payment have been, or would most likely be unsuccessful, or the MSPB and the debtor agree to the offset;

(3) Offset is cost effective or has significant deterrent value; and

(4) Offset is best suited to further and protect the Government's interest.

(b) The MSPB may offset a debt owed to another Federal agency from amounts due or payable by the MSPB to the debtor or request another Federal agency to offset a debt owed to the MSPB;

(c) Prior to initiating administrative offset, the MSPB will send the debtor written notice of the following:

(1) The nature and amount of the debt and the agency's intention to collect the debt by offset 30 days from the date the notice was mailed if neither payment nor a satisfactory response is received by that date;

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(2) The debtor's right to an opportunity to submit a good faith alternative repayment schedule to inspect and copy agency records pertaining to the debt, to request a review of the determination of indebtedness; and to enter into a written agreement to repay the debt; and

(3) The applicable interest.

(d) The MSPB may effect an administrative offset against a payment to be made to a debtor prior to the completion of the procedures required by paragraph (c) of this section if:

(1) Failure of offset would substantially prejudice the Government's ability to collect the debt; and

(2) The time before the payment is to be made does not reasonably permit completion of those procedures.

§ 1210.29 Use of credit reporting agencies.

(a) The MSPB may report delinquent accounts to credit reporting agencies consistent with the notice requirements contained in the §1210.26. Individual debtors must be given at least 60 days written notice that the debt is overdue and will be reported to a credit reporting agency.

(b) Debts may be reported to consumer or commercial reporting agencies. Consumer reporting agencies are defined in 31 U.S.C. 3701(a)(3) pursuant to 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(f). The MSPB may disclose only an individual's name, address, Social Security number, and the nature, amount, status and history of the debt and the program under which the claim arose.

§ 1210.30 Collection services.

(a) The MSPB may contract for collection services to recover outstanding debts. The MSPB may refer delinquent debts to private collection agencies listed on the schedule compiled by the General Services Administration. In such contracts, the MSPB will retain the authority to resolve disputes, compromise claims, terminate or suspend collection, and refer the matter to the Department of Justice or the General Accounting Office.

(b) The contractor shall be subject to the disclosure provisions of the Privacy Act of 1974, as amended (5 U.S.C.

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552a(m)), and to applicable Federal and state laws and regulations pertaining to debt collection practices, including the Fair Debt Collection Practices Act, 15 U.S.C. 1692. The contractor shall be strictly accountable for all amounts collected.

(c) The contractor shall be required to provide to the MSPB any data contained in its files relating to the debt account upon agency request or upon returning an account to the MSPB for referral to the Department of Justice for litigation.

§ 1210.31 Referral to the Department of Justice or the General Accounting Office.

Debts over \$600 but less than \$100,000 which the MSPB determines can neither be collected nor otherwise disposed of will be referred for litigation to the United States Attorney in whose judicial district the debtor is located. Claims for amounts exceeding \$100,000 shall be referred for litigation to the Commercial Litigation Branch, Civil Division of the Department of Justice.

§ 1210.32 Compromise, suspension and termination.

(a) The Chairman of the MSPB or his designee may compromise, suspend or terminate the collection of debts where the outstanding principal is not greater than \$20,000. MSPB procedures for writing off outstanding accounts are available to the public.

(b) The Chairman of the MSPB may compromise, suspend or terminate collection of debts where the outstanding principal is greater than \$20,000 only with the approval of, or by referral to the United States Attorney or the Department of Justice.

(c) The Chairman of the MSPB will refer to the General Accounting Office (GAO) debts arising from GAO audit exceptions.

§ 1210.33 Omissions not a defense.

Failure to comply with any provisions of this rule may not serve as a defense to any debtor.