

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

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

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 59992, Nov. 6, 1997]

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 date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. A cross petition for review must be filed within 25 days of the date of service of the pe-

tion 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; 62 FR 59992, Nov. 6, 1997]

§ 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 a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance

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with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(c) Nothing in paragraph (b) 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.

(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; 62 FR 43631, Aug. 15, 1997; 64 FR 27900, May 24, 1999]

§ 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 reopening.

(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

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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

SOURCE: 62 FR 48451, Sept. 16, 1997, unless otherwise noted.

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GENERAL

§ 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

(a) *Scope.* The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.

(b) *Application of subparts B, F, and H.* (1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.

(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.

(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by part 1208 of this title.

[62 FR 48451, Sept. 16, 1997, as amended at 62 FR 66815, Dec. 22, 1997; 65 FR 5409, Feb. 4, 2000]