

## Merit Systems Protection Board

## § 1209.7

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 the appellant receives 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; 62 FR 59993, Nov. 6, 1997]

### § 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 each 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 whistleblowing disclosure, as described in § 1209.4(b) of this part.

(6) An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of this section by filing with the appeal a copy of *Part 2: Reprisal For Whistleblowing* of the complaint form submitted to the Office of Special Counsel (Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.

(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.

[55 FR 28592, July 12, 1990, as amended at 65 FR 67608, Nov. 13, 2000]

### § 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.