

Merit Systems Protection Board

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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; 65 FR 48886, Aug. 10, 2000]

§§ 1207.171–1207.999 [Reserved]

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

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

SOURCE: 65 FR 5412, Feb. 4, 2000, unless otherwise noted.

Subpart A—Jurisdiction and Definitions

§ 1208.1 Scope.

This part governs appeals filed with the Board under the provisions of 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, as amended, or under the provisions of 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (VEOA), Public Law 105-339. With respect to USERRA appeals, this part applies to any appeal filed with the Board on or after October 13, 1994, without regard as to whether the alleged violation occurred before, on, or after October 13, 1994. With respect to VEOA appeals, this part applies to any appeal filed with the Board which alleges that a violation occurred on or after October 31, 1998.

§ 1208.2 Jurisdiction.

(a) *USERRA*. Under 38 U.S.C. 4324, a person entitled to the rights and benefits provided by chapter 43 of title 38, United States Code, may file an appeal with the Board alleging that a Federal agency employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with a provision of that chapter (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees). In general, the provisions of chapter 43 of title 38 that apply to Federal employees guarantee various reemployment rights following

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a period of service in a uniformed service, provided the employee satisfies the requirements for coverage under that chapter. In addition, chapter 43 of title 38 prohibits discrimination based on a person's service—or application or obligation for service—in a uniformed service (38 U.S.C. 4311). This prohibition applies with respect to initial employment, reemployment, retention in employment, promotion, or any benefit of employment.

(b) *VEOA*. Under 5 U.S.C. 3330a, a preference eligible who alleges that a Federal agency has violated his rights under any statute or regulation relating to veterans' preference may file an appeal with the Board, provided that he has satisfied the statutory requirements for first filing a complaint with the Secretary of Labor and allowing the Secretary at least 60 days to attempt to resolve the complaint.

§ 1208.3 Application of 5 CFR part 1201.

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

§ 1208.4 Definitions.

(a) *Appeal*. "Appeal" means a request for review of an agency action (the same meaning as in 5 CFR §1201.4(f)) and includes a "complaint" or "action" as those terms are used in USERRA (38 U.S.C. 4324) and a "complaint" or "appeal" as those terms are used in VEOA (5 U.S.C. 3330a).

(b) *Preference eligible*. "Preference eligible" is defined in 5 U.S.C. 2108.

(c) *USERRA appeal*. "USERRA appeal" means an appeal filed under 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Reemployment Rights Act of 1994 (Public Law 103-353), as amended. The term in-

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cludes an appeal that alleges a violation of a predecessor statutory provision of chapter 43 of title 38, United States Code.

(d) *VEOA appeal*. "VEOA appeal" means an appeal filed under 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (Public Law 105-339).

Subpart B—USERRA Appeals

§ 1208.11 Choice of procedure under USERRA; exhaustion requirement.

(a) *Choice of procedure*. An appellant may file a USERRA appeal directly with the Board under this subpart or may file a complaint with the Secretary of Labor under 38 U.S.C. 4322.

(b) *Exhaustion requirement*. If an appellant files a complaint with the Secretary of Labor under 38 U.S.C. 4322, the appellant may not file a USERRA appeal with the Board until the Secretary notifies the appellant in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint. An appellant who seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint with the Secretary under 38 U.S.C. 4322 is not subject to the exhaustion requirement of this paragraph.

(c) *Appeals after exhaustion of Department of Labor procedure*. When an appellant receives notice from the Secretary of Labor in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint, the appellant may file a USERRA appeal directly with the Board or may ask the Secretary to refer the complaint to the Special Counsel. If the Special Counsel agrees to represent the appellant, the Special Counsel may file a USERRA appeal directly with the Board. If the Special Counsel does not agree to represent the appellant, the appellant may file a USERRA appeal directly with the Board.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.12 Time of filing.

Under chapter 43 of title 38, United States Code, there is no time limit for filing a USERRA appeal with the Board. However, the Board encourages appellants to file a USERRA appeal as

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soon as possible after the date of the alleged violation or, if a complaint is filed with the Secretary of Labor, as soon as possible after receiving notice from the Secretary in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint, or, if the Secretary has referred the complaint to the Special Counsel and the Special Counsel does not agree to represent the appellant, as soon as possible after receiving the Special Counsel's notice.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.13 Content of appeal; request for hearing.

(a) *Content.* A USERRA appeal 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) Evidence or argument that the appellant has performed service in a uniformed service, including the dates of such service (or, where applicable, has applied for or has an obligation to perform such service), and that the appellant otherwise satisfies the requirements for coverage under chapter 43 of title 38, United States Code;

(3) A statement describing in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38, United States Code, allegedly violated if possible.

(4) If the appellant filed a complaint with the Secretary of Labor under 38 U.S.C. 4322(a), evidence of notice under 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); and

(5) If the appellant's complaint was referred to the Special Counsel and the appellant has received notice that the Special Counsel will not represent the appellant before the Board, evidence of the Special Counsel's notice (a copy of the Special Counsel's notice satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the USERRA appeal, or within any other time period the judge sets. A

hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established. The judge may also order a hearing if necessary to resolve issues of jurisdiction. The appellant has the burden of proof with respect to issues of jurisdiction (5 CFR 1201.56(a)(2)(i)).

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board and that the Special Counsel has agreed to represent the appellant will be accepted as the written designation of representative required by 5 CFR 1201.31(a).

[65 FR 49896, Aug. 16, 2000]

§ 1208.15 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency employer or the Office of Personnel

Management has not complied with a provision or provisions of chapter 43 of title 38, United States Code (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees), the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the Federal agency employer or the Office of Personnel Management, as applicable, to comply with such provision(s) and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of such lack of compliance. Under 38 U.S.C. 4324(c)(3), any compensation received by the appellant pursuant to the Board's order shall be in addition to any other right or benefit provided for by chapter 43 of title 38, United States Code, and shall not diminish any such right or benefit.

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(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board has discretion to order payment of reasonable attorney fees, expert witness fees, and other litigation expenses under 38 U.S.C. 4324(c)(4). The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

§ 1208.16 Appeals under another law, rule, or regulation.

Nothing in USERRA prevents an appellant who may appeal an agency action to the Board under any other law, rule, or regulation from raising a claim of a USERRA violation in that appeal. The Board will treat such a claim as an affirmative defense that the agency action was not in accordance with law (5 CFR 1201.56(b)(3)).

Subpart C—VEOA Appeals

§ 1208.21 VEOA exhaustion requirement.

Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation and allow the Secretary at least 60 days from the date the complaint is filed to attempt to resolve the complaint.

§ 1208.22 Time of filing.

(a) Unless the Secretary of Labor has notified the appellant that the Secretary's efforts have not resolved the VEOA complaint, a VEOA appeal may not be filed with the Board before the 61st day after the date on which the appellant filed the complaint under 5 U.S.C. 3330a(a) with the Secretary.

(b) If the Secretary of Labor notifies the appellant that the Secretary's efforts have not resolved the VEOA complaint and the appellant elects to appeal to the Board under 5 U.S.C. 3330a(d), the appellant must file the VEOA appeal with the Board within 15 days after the date of receipt of the Secretary's notice. A copy of the Secretary's notice must be submitted with the appeal.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

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§ 1208.23 Content of appeal; request for hearing.

(a) *Content.* A VEOA appeal 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) Evidence or argument that the appellant is a preference eligible;

(3) A statement identifying the statute or regulation relating to veterans' preference that was allegedly violated, an explanation of how the provision was violated, and the date of the violation;

(4) Evidence that a complaint under 5 U.S.C. 3330a(a) was filed with the Secretary of Labor, including the date the complaint was filed; and

(5)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or

(ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the VEOA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established and it has been determined that the appeal is timely. The judge may also order a hearing if necessary to resolve issues of jurisdiction or timeliness. The appellant has the burden of proof with respect to issues of jurisdiction and timeliness (5 CFR 1201.56(a)(2)(i) and (ii)).

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

§ 1208.24 Election to terminate MSPB proceeding.

(a) *Election to terminate.* At any time beginning on the 121st day after an appellant files a VEOA appeal with the Board, if a judicially reviewable Board decision on the appeal has not been

issued, the appellant may elect to terminate the Board proceeding as provided under 5 U.S.C. 3330b and file a civil action with an appropriate United States district court. Such election must be in writing, filed with the Board office where the appeal is being processed, and served on the parties. The election is effective immediately on the date of receipt by the Board office where the appeal is being processed.

(b) *Termination order.* Following receipt by the Board of an appellant's written election to terminate the Board proceeding, a termination order will be issued to document the termination of the proceeding. The termination order will state that the proceeding was terminated as of the date of receipt of the appellant's written election. Such an order is neither an initial decision under 5 CFR 1201.111 nor a final Board decision and is not subject to a petition for review in accordance with subpart C of part 1201, a petition for enforcement in accordance with subpart F of part 1201, or a petition for judicial review.

§ 1208.25 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency has violated the appellant's VEOA rights, the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the agency to comply with the statute or regulation violated and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of the violation. If the Board determines that the violation was willful, it will order the agency to pay the appellant an amount equal to back pay as liquidated damages.

(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board will order payment of reasonable attorney fees, expert witness fees, and other litigation expenses. The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

§ 1208.26 Appeals under another law, rule, or regulation.

(a) The VEOA provides that 5 U.S.C. 3330a shall not be construed to prohibit a preference eligible from appealing directly to the Board from any action that is appealable under any other law, rule, or regulation, in lieu of administrative redress under VEOA (5 U.S.C. 3330a(e)(1)). An appellant may not pursue redress for an alleged violation of veterans' preference under VEOA at the same time he pursues redress for such violation under any other law, rule, or regulation (5 U.S.C. 3330a(e)(2)).

(b) An appellant who elects to appeal to the Board under another law, rule, or regulation must comply with the provisions of subparts B and C of 5 CFR part 1201, including the time of filing requirement of 5 CFR 1201.22(b)(1).

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

Subpart A—Jurisdiction and Definitions

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Subpart B—Appeals

- 1209.5 Time of filing.
- 1209.6 Content of appeal; right to hearing.
- 1209.7 Burden and degree of proof.

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.

Subpart E—Referrals to the Special Counsel

- § 1209.13 Referral of findings to the Special Counsel.

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