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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

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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

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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

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this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

§ 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;
- (10) A decision to order psychiatric testing or examination; or
- (11) Any other significant change in duties, responsibilities, or working conditions.

(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

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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).

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

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, if the appellant shows that the Special Counsel’s notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel’s notification; 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 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

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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.

(d) *Internet filing option.* An appeal may be filed electronically by using the Board's Internet filing option available at the Board's Web site (<http://www.mspb.gov/e-appeal.html>).

[55 FR 28592, July 12, 1990, as amended at 65 FR 67608, Nov. 13, 2000; 68 FR 59865, Oct. 20, 2003]

§ 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. The request 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 delivery.

(e) *Internet filing option.* An appeal may be filed electronically by using the Board's Internet filing option available at the Board's Web site (<http://www.mspb.gov/e-appeal.html>).

(f) *Electronic mail option.* A stay request, made after the filing of an appeal, may be filed by electronic mail after the filing of the appeal, provided the requirements in § 1201.5 of this chapter are satisfied.

[55 FR 28592, July 12, 1990, as amended at 58 FR 36345, July 7, 1993, 59 FR 65243, Dec. 19, 1994; 68 FR 59865, Oct. 20, 2003]

§ 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;

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(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.

Subpart E—Referrals to the Special Counsel

§ 1209.13 Referral of findings to the Special Counsel.

When the Board determines in a proceeding under this part that there is reason to believe that a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

[62 FR 17048, Apr. 9, 1997]