

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

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AUTHORITY: 5 U.S.C. 1204, 1221, 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D), 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 or other protected activity 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 whis-

tblowing or other protected activity, and requests for stays of personnel actions allegedly based on whistleblowing or other protected activity.

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§ 1209.2 Jurisdiction.

(a) *Generally.* Under 5 U.S.C. 1221(a), 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 or other protected activity.

(b) *Appeals authorized.* The Board exercises jurisdiction over:

(1) *Individual right of action (IRA) 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 or other protected activity. 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 1: An agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Employee X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Employee X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Employee X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

Example 2: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Employee X believes that the agency has rated him "minimally satisfactory" because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days. Whether the Board would have jurisdiction to review Employee X's performance rating as an IRA appeal depends on whether his previous Board appeal involved a claim of retaliation for whistleblowing. If it did, the Board could review the performance evaluation in an IRA appeal because the employee has alleged a violation of 5 U.S.C. 2302(b)(9)(A)(i). If the