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1210.18 Burden of proof, standard of review, and penalty.

1210.19 Bench decisions.

1210.20 Effective date of a decision issued by an administrative judge; continuing jurisdiction over certain ancillary matters.

AUTHORITY: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 713.

SOURCE: 79 FR 48943, Aug. 19, 2014, unless otherwise noted.

§ 1210.1 Authority to issue decisions under this part.

(a) Under 38 U.S.C. 713(d)(2)(A), as created by the Veterans Access, Choice and Accountability Act of 2014 (the Act), an employee covered by this part may appeal a removal from the civil service or a transfer to a General Schedule position based upon performance or misconduct to the MSPB.

(b) MSPB administrative judges have the authority to issue a decision in an appeal covered by this part. (38 U.S.C. 713(e)(1)).

(c) The administrative judge's authority under this part to issue a decision terminates following the passage of 21 days after the appeal is initially filed. (38 U.S.C. 713(e)(3)).

(d) An administrative judge's decision in an appeal filed under this part is not subject to any further appeal. (38 U.S.C. 713(e)(2)).

(e) This part applies only to the Secretary's authority to remove or transfer an employee covered under 38 U.S.C. 713 and the Board's authority to review such decisions. This authority is in addition to the authority already provided the agency in 5 U.S.C. 3592 and the authority provided the Board under 5 U.S.C. 7541, *et seq.* to take an adverse action against an employee. (38 U.S.C. 713(f)).

§ 1210.2 Definitions.

(a) The term *employee covered by this part* means an individual career appointee as that term is defined in 5 U.S.C. 3132(a)(4) or an individual who occupies an administrative or executive position and is appointed under 38 U.S.C. 7306(a) or 7401(1). (38 U.S.C. 713(a) and (g)).

(b) The term *administrative judge* means a person experienced in hearing appeals and assigned by the Board to hold a hearing and decide an appeal

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arising under this part. (38 U.S.C. 713(e)(1)).

(c) The term *response file* means all documents and evidence the Secretary of the Department of Veterans Affairs, or designee, used in making the decision to remove or transfer an employee covered by this part. It also may include any additional documents or evidence that the agency would present in support of the Secretary's determination in the event that an appeal is filed.

(d) The term *misconduct* includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. (38 U.S.C. 713(g)(2)).

(e) The term *transfer* means the transfer of an employee covered by this part to a General Schedule position. (38 U.S.C. 713(a)(1)(B)).

[79 FR 48943, Aug. 19, 2014, as amended at 79 FR 49423, Aug. 21, 2014]

§ 1210.3 Application of practices and procedures to appeals filed under this part.

(a) The following provisions of part 1201 of this chapter are inapplicable to appeals filed under this part:

(1) Section 1201.22 (inapplicable to appeals brought under this part pursuant to Public Law 113-146, section 707(b)(2));

(2) Section 1201.27 (class appeals are not allowed as such appeals cannot be adjudicated within 21 days);

(3) Section 1201.28 (case suspensions are not allowed because they are inconsistent with the requirement to adjudicate appeals under this part within 21 days);

(4) Section 1201.29 (dismissals without prejudice are not allowed because those procedures are inconsistent with the requirement to adjudicate appeals under this part within 21 days);

(5) Section 1201.56 (this regulation is not controlling; parties should refer to § 1210.18);

(6) Sections 1201.91 through 1201.93 (interlocutory appeals are not allowed because the Board lacks authority to review appeals filed under this part);

(7) Sections 1201.114 through 1201.120 (petitions for review are not allowed because the decisions in appeals filed under this part are not subject to further appeal) (38 U.S.C. 713(e)(2));

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(8) Sections 1201.121 through 1201.145 (procedures for other original jurisdiction cases are not relevant to appeals filed under this part);

(9) Sections 1201.152, 1201.153(b), 1201.154, 1201.155, 1201.156, 1201.157, and 1201.161 (these provisions are inapplicable to appeals filed under 38 U.S.C. 713).

(b) Except as modified by this part, the remaining relevant provisions of part 1201 of this chapter are applicable to appeals filed under this part.

§ 1210.4 Waiver of MSPB regulations.

The Board may waive any MSPB regulation in order to provide for the expedited review of an appeal covered by this part. Public Law 113-146, section 707(b)(3).

§ 1210.5 Determination of the Secretary effecting a removal or transfer; required notice of expedited procedures; initial disclosures.

An agency notice of a removal or transfer pursuant to 38 U.S.C. 713 must include the following:

(a) A statement identifying the action taken based on the Secretary's determination, stating the factual reasons for the charge(s), and statement setting forth the basis for the Secretary's determination that the performance or misconduct warrants removal or transfer.

(b) Notice regarding the Board's expedited procedures applicable to an appeal. Such notice shall include a copy of this part and access to the remainder of the Board's adjudicatory regulations.

(c) A copy of the materials the Secretary relied upon to remove or transfer the appellant (normally referred to as the "response file").

(d) The name and contact information of the agency's representative for any appeal filed with the MSPB under this part.

(e) Notice that MSPB appeals must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this chapter.

§ 1210.6 Electronic filing procedures; expedited filing procedures.

(a) *Required use of MSPB e-filing system.* All parties must electronically file

all pleadings and documents listed in 5 CFR 1201.14(b) by using the MSPB's e-filing system (e-Appeal Online). An attempt to file an appeal using any other method will result in rejection of the appeal and will not constitute compliance with the 7-day filing deadline under the Act, except in the limited circumstances described in § 1210.7(c).

(b) *Expedited filing and service requirements.* All documents and pleadings not otherwise covered in paragraph (a) of this section must be filed in accordance with any expedited filing and service procedures ordered by the administrative judge.

(c) The parties should frequently check the Repository on e-Appeal Online to ensure that they are aware of new pleadings, orders and submissions in a timely fashion. A party's failure to check for updates on e-Appeal Online may lead to a denial of a request to extend a deadline and/or the imposition of sanctions.

§ 1210.7 Filing an appeal and a response to an appeal.

(a) *Place for filing an appeal and a response.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this chapter.

(b) *Time for filing an appeal and agency response.* An appeal of an action taken pursuant to 38 U.S.C. 713 must be filed no later than 7 days after the effective date of the removal or transfer being appealed. (38 U.S.C. 713(d)(2)(B)). An agency response must be filed within 3 days of the filing of the appeal.

(c) *Timeliness of appeals.* If an appellant does not submit an appeal within 7 days of the effective date of the action it will be dismissed as untimely filed. This deadline cannot be extended for any reason. (38 U.S.C. 713(d)(2)(B)). However, if an appellant establishes that he or she attempted to file an appeal using e-Appeal Online within the 7-day deadline and that the filing was unsuccessful due to a problem with e-Appeal Online, the administrative judge may deem the filing to have been completed on the date it was attempted, provided the appellant took reasonable steps to immediately advise the MSPB of the failed attempt to file the appeal using e-Appeal Online. The