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GPO

Subpart C—Petitions for Review of Initial Decisions

§ 1201.114 Petition and cross petition for review—content and procedure.

(a) *Pleadings allowed.* Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review.

(1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.

(2) A cross petition for review has the same meaning as a petition for review but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review.

(3) A response to a petition for review and a cross petition for review may be contained in a single pleading.

(4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new allegations of error.

(5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading.

(b) *Contents of petition or cross petition for review.* A petition or cross petition for review states a party's objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation of why the evidence or argument was not presented before the record below closed (see § 1201.58 of this part). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board.

(c) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition or cross petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(d) *Place for filing.* All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 1201.14 of this part.

(e) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3) of this part, pertaining to an appellant's receipt of a final agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition or cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review.

(f) *Extension of time to file.* The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or before the date on which the petition or other

pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(g) *Late filings.* Any pleading described in paragraph (a) of this section that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (f) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: The reasons for failing to request an extension before the deadline for the submission, and a specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (e) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(h) *Length limitations.* A petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

(i) *Intervention.* (1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (i)(2)(ii) of this section. The notice of intervention is timely filed if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an

appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors*. Any person, organization, or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization, or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(j) *Service*. A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26.

(k) *Closing the record*. The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless it is new and material as defined in § 1201.115(d) and the party submitting it shows that the evidence or argument was not readily available before the record closed.

(l) *Rejection for failure to comply*. The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission. Any deadlines affected by the rejection will be addressed in the rejection letter.

[77 FR 62368, Oct. 12, 2012, as amended at 78 FR 23458, Apr. 19, 2013]

§ 1201.115 Criteria for granting petition or cross petition for review.

The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact.

(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

[77 FR 62369, Oct. 12, 2012]