

Merit Systems Protection Board

§ 1201.14

to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case. It is the Board's policy that these rules will be applied in a manner that ensures the fair and efficient processing of each case.

[74 FR 9343, Mar. 4, 2009]

§ 1201.12 Revocation, amendment, or waiver of rules.

The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

§ 1201.13 Appeals by Board employees.

Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

§ 1201.14 Electronic filing procedures.

(a) *General.* This section prescribes the rules and procedures by which parties and representatives to proceedings within the MSPB's appellate and original jurisdiction may file and receive documents in electronic form.

(b) *Matters subject to electronic filing.* Subject to the registration requirement of paragraph (e) of this section,

parties and representatives may use electronic filing (e-filing) to do any of the following:

(1) File any pleading, including a new appeal, in any matter within the MSPB's appellate jurisdiction (§ 1201.3);

(2) File any pleading in any matter within the MSPB's original jurisdiction (§ 1201.2);

(3) File a petition for enforcement of a final MSPB decision (§ 1201.182);

(4) File a motion for an attorney fee award as a prevailing party (§ 1201.203);

(5) File a motion for compensatory or consequential damages (§ 1201.204);

(6) Designate a representative, revoke such a designation, or change such a designation (§ 1201.31); or

(7) Notify the MSPB of a change in contact information such as address (geographic or electronic mail) or telephone number.

(c) *Matters excluded from electronic filing.* Electronic filing may not be used to:

(1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);

(2) Serve a subpoena (§ 1201.83);

(3) File a pleading with the Special Panel (§ 1201.137);

(4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520);

(5) File a pleading that contains classified information (32 CFR part 2001); or

(6) File a request to participate as an amicus curiae or file a brief as amicus curiae pursuant to § 1201.34 of this part.

(d) *Internet is sole venue for electronic filing.* Following the instructions at e-Appeal Online, the MSPB's e-Appeal site (<https://e-appeal.mspb.gov>), is the only method allowed for filing electronic pleadings with the MSPB. The MSPB will not accept pleadings filed by electronic mail (e-mail).

(e) *Registration as an e-filer.* (1) Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the MSPB. Except when filing a new appeal within the MSPB's appellate jurisdiction (§ 1201.3), no party or representative may file an electronic pleading with the MSPB unless he or she has registered with the MSPB as an e-filer.

§ 1201.14

5 CFR Ch. II (1–1–23 Edition)

(2) With the exception of a designation of a representative by a party who is an individual, the exclusive means for a party or representative to register as an e-filer during an MSPB proceeding is to follow the instructions at e-Appeal Online (<https://e-appeal.mspb.gov>).

(3) When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as an e-filer. For example, an appellant may file and receive pleadings and MSPB documents by non-electronic means, even though his or her representative has registered as an e-filer. When a party has more than one representative, however, all representatives must choose the same method of service.

(4) A party or representative may withdraw his or her registration as an e-filer. Such withdrawal means that, effective upon the MSPB's receipt of this withdrawal, pleadings and MSPB documents will no longer be served on that person in electronic form. A withdrawal of registration as an e-filer may be filed at e-Appeal Online, in which case service is governed by paragraph (j) of this section, or by non-electronic means, in which case service is governed by § 1201.26(b).

(5) Registration as an e-filer applies only to a single MSPB appeal or proceeding. If an appeal is dismissed without prejudice, however, and is later refiled, an election of e-filing status will remain in effect. An election of e-filing status will also remain in effect for purposes of filing a petition for enforcement under Subpart F of this part, or filing a motion for an attorney fee award or compensatory or consequential damages under Subpart H of this Part.

(6) Each e-filer must notify the MSPB and other participants of any change in his or her e-mail address. When done via e-Appeal Online, such notification is done by selecting the "Pleading" option.

(f) *e-Filing not mandatory for e-filers.* A party or representative who has registered as an e-filer may file any pleading by non-electronic means, *i.e.*, via postal mail, fax, or personal or commercial delivery.

(g) *Form of electronic pleadings—(1) Options for e-filing.* An appellant or representative using e-Appeal Online to file a new appeal within the MSPB's appellate jurisdiction (§ 1201.3) must complete the structured interview at that site (<https://e-appeal.mspb.gov>). For all other pleadings, the e-filer has the option of uploading an electronic file or entering the text of the pleading online. Regardless of the means of filing a particular pleading, the e-filer will be allowed to submit supporting documentation such as attachments, in either electronic or paper form, as described in paragraphs (g)(2), (g)(3), and (h) of this section.

(2) *Electronic formats allowed.* The MSPB will accept numerous electronic formats, including word-processing and spreadsheet formats, Portable Document Format (PDF), and image files (files created by scanning). A list of formats allowed can be found at e-Appeal Online. All electronic documents must be formatted so that they will print on standard 8½ inch by 11 inch paper.

(3) *Requirements for pleadings with 3 or more electronic attachments.* An e-filer who uploads 3 or more supporting documents, in addition to the document that constitutes the primary pleading, must identify each attachment, either by filling out the table for such attachments at e-Appeal Online, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. Each attachment must be designated with a brief descriptive label, which will include exhibit numbers or letters where appropriate or required, *e.g.*, "Exh. 4b, Decision Notice."

(h) *Hybrid pleadings that include both electronic and paper documents.* An e-filer may file a hybrid pleading in which part of the pleading is submitted electronically, and part of the pleading consists of one or more paper documents filed by non-electronic means. All components of a hybrid pleading are subject to applicable time limits. If one or more parts of a hybrid pleading are untimely filed, the judge or the Clerk may reject the untimely part or parts while accepting timely filed parts of the same pleading.

(i) *Repository at e-Appeal Online.* All notices, orders, decisions, and other documents issued by the MSPB, as well as all pleadings filed via e-Appeal Online, will be made available to parties and their representatives for viewing and downloading at the Repository at e-Appeal Online. In addition, most pleadings filed at the petition for review stage of adjudication, and some pleadings filed at the regional office level, will be available at the Repository. Also available at the Repository will be an electronic “docket sheet” listing all documents issued by the MSPB to the parties, as well as all pleadings filed by the parties, including those pleadings that are not available for viewing and downloading in electronic form. Access to appeal documents at the Repository will be limited to the parties and representatives of the appeals in which they were filed.

(j) *Service of electronic pleadings and MSPB documents.* (1) When MSPB documents are issued, e-mail messages will be sent to e-filers that notify them of the issuance and that contain links to the Repository where the documents can be viewed and downloaded. Paper copies of these documents will not ordinarily be served on e-filers. Pleadings submitted via e-Appeal Online will be available to parties and representatives at the e-Appeal Online Repository, and the MSPB will send e-mail messages to other e-filers notifying them of each pleading, with a link to the Repository. When using e-Appeal Online to file a pleading, e-filers will be notified of all documents that must be served by non-electronic means, and they must certify that they will serve all such documents no later than the first business day after the electronic submission.

(2) Delivery of e-mail can encounter a number of failure points. If the MSPB is advised of non-delivery, it will attempt to redeliver and, if that is unsuccessful, will deliver by postal mail or other means. E-filers are responsible for ensuring that e-mail from @mspb.gov is not blocked by filters.

(3) E-filers are responsible for monitoring case activity at the Repository at e-Appeal Online to ensure that they have received all case-related documents.

(k) *Documents requiring a signature.* Electronic documents filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, or 1209 of this chapter that requires a signature.

(l) *Affidavits and declarations made under penalty of perjury.* Registered e-filers may submit electronic pleadings in the form of declarations made under penalty of perjury under 28 U.S.C. 1746, as described in Appendix IV to this part. If the declarant is someone other than the e-filer, a physically signed affidavit or declaration should be uploaded as an image file, or submitted separately as a non-electronic document under paragraph (h) of this section.

(m) *Date electronic documents are filed and served.* (1) As provided in §1201.4(1) of this part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20.

(2) MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission.

(n) *Authority of a judge or the Clerk to regulate e-filing.* (1) In the event that the MSPB or any party encounters difficulties filing, serving, or receiving electronic documents, the judge or the Clerk of the Board may order one or more parties to cease filing pleadings by e-filing, cease serving documents in electronic form, or take both these actions. In such instances, filing and service shall be undertaken in accordance with §1201.26. The authority to order the cessation of the use of electronic filing may be for a particular submission, for a particular time

§ 1201.21

5 CFR Ch. II (1–1–23 Edition)

frame, or for the duration of the pendency of a case.

(2) A judge or the Clerk of the Board may require that any document filed electronically be submitted in non-electronic form and bear the written signature of the submitter. A party receiving such an order from a judge or the Clerk of the Board shall, within 5 calendar days, serve on the judge or Clerk of the Board by postal mail, by fax, or by commercial or personal delivery a signed, non-electronic copy of the document.

(o) *MSPB reserves the right to revert to traditional methods of service.* The MSPB may serve documents via traditional means—postal mail, fax, personal or commercial delivery—at its discretion. Parties and their representatives are responsible for ensuring that the MSPB always has their current postal mailing addresses, even when they have registered as e-filers.

(p)(1) Except as provided in paragraphs (p)(2) and (3) of this section, all pleadings (including the initial appeal) except those containing classified information or Sensitive Security Information filed with the Washington Regional Office (WRO) and the Denver Field Office (DEFO) by agencies or attorneys must be e-filed. Agencies and attorneys in proceedings in the WRO and the DEFO must register as e-filers pursuant to paragraph (e) of this section.

(2) Agencies or attorneys who believe that e-filing would create an undue burden on their operations may request an exemption from the administrative judge for a specific appeal and/or pleading. Such a request shall include a specific and detailed explanation why e-filing would create an undue burden.

(3) Except in unusual circumstances, exemptions granted under this section shall apply only to pleadings that include scanned material. All other pleadings except those containing classified information or Sensitive Security Information must be e-filed. The administrative judge may periodically revisit the need for an exemption granted under this subsection, and revoke the exemption as appropriate.

[73 FR 10129, Feb. 26, 2008, as amended at 76 FR 63538, Oct. 13, 2011; 77 FR 62364, Oct. 12, 2012]

APPEAL OF AGENCY ACTION; PLEADINGS

§ 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(b) A copy, or access to a copy, of the Board's regulations;

(c) A copy, or access to a copy, of the MSPB appeal form available at the Board's Web site (<http://www.mspb.gov>), and

(d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III of 5 U.S.C. chapter 12, including:

(1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board;

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and

(4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.

(e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302.

(f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files