

§ 1209.5

5 CFR Ch. II (1–1–23 Edition)

lead to an appointment, promotion, performance evaluation, or other personnel action;

(10) A decision to order psychiatric testing or examination;

(11) The implementation or enforcement of any nondisclosure policy, form, or agreement; and

(12) Any other significant change in duties, responsibilities, or working conditions.

(b) *Whistleblowing* is the making of a protected disclosure, that is, a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a 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 Congress, the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Other protected activity* means any of the following:

(1) The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of 5 U.S.C. 2302(b)(8), *i.e.*, retaliation for whistleblowing;

(2) Testifying for or otherwise lawfully assisting any individual in the exercise of any right granted by any law, rule, or regulation;

(3) Cooperating with or disclosing information to Congress, the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(4) Refusing to obey an order that would require the individual to violate a law.

(d) *Contributing factor* means any disclosure that affects an agency's decision to threaten, propose, take, or not

take a personnel action with respect to the individual making the disclosure.

(e) *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).

(f) *Reasonable belief*. An employee or applicant may be said to have a reasonable belief when a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence the violation, mismanagement, waste, abuse, or danger in question.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997; 77 FR 62374, Oct. 12, 2012; 78 FR 39547, July 2, 2013]

Subpart B—Appeals

§ 1209.5 Time of filing.

(a) *General rule*. The appellant must seek corrective action from the Special Counsel before appealing to the Board unless the action being appealed is otherwise appealable directly to the Board and the appellant has elected a direct appeal. (See § 1209.2(d) regarding election of remedies under 5 U.S.C. 7121(g)). 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 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) At any time after the expiration of 120 days, if the 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.

Merit Systems Protection Board

§ 1209.7

(b) *Equitable tolling; extension of filing deadline.* The appellant's deadline for filing an individual right of action appeal with the Board after receiving written notification from the Special Counsel that it is terminating its investigation of his or her allegations is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

(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; 77 FR 62374, Oct. 12, 2012]

§ 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 or other protected activity 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 or other protected activity, 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 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 generally has a right to a hearing if the appeal has been timely filed and the Board has jurisdiction over the appeal.

(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) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

[55 FR 28592, July 12, 1990, as amended at 65 FR 67608, Nov. 13, 2000; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004; 77 FR 62375, Oct. 12, 2012; 78 FR 39548, July 2, 2013]

§ 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) or (b)(9)(A)(i), (B), (C), or (D), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that the disclosure or other protected activity was a contributing factor in the personnel action that was threatened, proposed,