Rules and Regulations

Federal Register

Vol. 65, No. 159

Wednesday, August 16, 2000

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1208

Practices and Procedures for Appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is publishing final regulations to describe its practices and procedures with respect to appeals filed under the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, and the Veterans Employment Opportunities Act of 1998. The Uniformed Services Employment and Reemployment Rights Act permits a person covered by the Act to appeal to the Board if a Federal agency employer or the Office of Personnel Management fails or refuses to provide an employment or reemployment right or benefit to which the person is entitled under the Act. The Veterans Employment Opportunities Act permits a person entitled to veterans' preference to appeal to the Board if a Federal agency violates the person's rights under any statute or regulation relating to veterans' preference. While both of these laws are intended to provide protections for veterans, and while there are similarities in the procedures and remedies under each of the laws, there are significant differences as well. The purpose of these regulations is to provide guidance to parties and their representatives on how to proceed in cases filed under these laws.

EFFECTIVE DATE: August 16, 2000.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653–7200.

SUPPLEMENTARY INFORMATION: On Februry 4, 2000, the Board published a new part 1208 of its regulations in title 5, Code of Federal Regulations (CFR), as an interim rule with request for comments (65 FR 5409). The new part describes the Board's practices and procedures with respect to appeals filed under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103–353, as amended, and the Veterans Employment Opportunities Act of 1998 (VEOA), Public Law 105–339. The Board allowed 60 days, until April 4, 2000, for receipt of public comments. The Board received comments from the Department of Labor, Office of the Assistant Secretary for Veterans' Employment and Training (DOL/VETS), and from one local of a national employee organization representing postal workers (union local).

In addition to suggesting certain changes in the regulatory language, DOL/VETS asked that certain statements in the preamble to the interim rule be clarified. The **SUMMARY** section of the interim rule included a statement that a USERRA appellant may appeal to the Board ''if a Federal agency employer or the Office of Personnel Management fails or refuses to provide an employment or reemployment right or benefit to which the person is entitled *after service in a uniformed service*'' (emphasis added). DOL/VETS noted that certain provisions of USERRA also protect persons who apply for service, have an obligation to perform service, or assist in an investigation, regardless of whether the person has actually performed service in a uniformed service. In response to the DOL/VETS suggestion, the comparable statement in the **SUMMARY** section of this final rule refers to ''an employment or reemployment right or benefit to which the person is entitled *under the Act*'' (emphasis added).

The first paragraph of the **SUPPLEMENTARY INFORMATION** section of the interim rule stated that USERRA and VEOA extended the Board's jurisdiction to include ''complaints filed by covered persons, *principally veterans,* under each of these laws'' (emphasis added). DOL/VETS pointed out that the majority of USERRA cases opened by that office in the past several years have been filed by current members of the National Guard and Reserve, rather than by veterans. Without deciding who are the principal filers under USERRA, the Board agrees that the restrictive language referring to veterans could have been confusing to members of the National Guard and Reserve and was unnecessary. As noted in the **SUMMARY**, the Board's VEOA jurisdiction, however, is limited to complaints filed by persons entitled to veterans' preference.

Under the heading, ''Termination of Proceeding,'' in the **SUPPLEMENTARY INFORMATION**; section of the interim rule, the Board distinguished USERRA from VEOA by pointing out that USERRA does not provide for termination of a Board proceeding before it has concluded with the issuance of a decision. VEOA does provide for such termination, if the Board has not issued a judicially reviewable decision within 120 days after the appeal was filed, where the appellant elects to file a civil action in an appropriate United States district court. DOL/VETS suggested that the statement about USERRA, in order to make the distinction between the two laws clearer, should have said that USERRA does not permit a person to terminate a Board proceeding and file a civil action in an appropriate United States district court before the Board proceeding has concluded with the issuance of a decision. Although the Board believes the original statement was clear, it notes that with the additional phrase suggested by DOL/VETS, the statement is more specific.

With respect to the regulatory language of the interim rule, DOL/VETS asked that sections 1208.11(b) and (c), 1208.12, 1208.13(a)(4), 1208.22(a) and (b), and 1208.23(a)(5)(i) each be amended to replace the words, ''the Secretary has been unable to resolve the complaint,'' with ''the Secretary's efforts have not resolved the complaint.'' DOL/VETS stated that the use of the word ''unable'' suggests that the Secretary attempts to resolve all complaints filed with DOL. According to DOL/VETS, if the Secretary does not believe that the action alleged in a USERRA or VEOA complaint occurred, the Secretary will not attempt to resolve the complaint. Instead, the Secretary will notify the claimant of the results of the investigation and advise him that the

case is being closed, at which point he may file an appeal with MSPB. The Board agrees that the change suggested by DOL/VETS should be made and amends each of the sections referenced above in this final rule.

DOL/VETS also suggested that section 1208.26(a) be expanded to clarify how the Board will interpret the VEOA provision regarding appeals to the Board under any other law, rule, or regulation in lieu of administrative redress under VEOA (5 U.S.C. 3330a(e)), including an example of how the provision would operate where an appellant makes claims covered by both USERRA and VEOA. The Board recognizes that this VEOA provision raises several questions of interpretation. Until such time as the Board and its reviewing court can interpret the provision through decisions in actual cases, however, the Board believes that it is best simply to restate the statutory provision in its regulation implementing the provision. Accordingly, the Board has not adopted this suggestion of DOL/VETS in the final rule.

The union local suggested that section 1208.13(a)(3), which requires a USERRA appellant to identify the provision of chapter 43 of title 38, United States Code, that was allegedly violated, be amended so that submission of this information would be permissive rather than mandatory. The local argued that requiring an appellant to identify the statutory provision that was allegedly violated ''is burdensome on pro se litigants.'' The local also cited to the Federal Circuit ruling in *Yates* v. *MSPB,* 145 F.3d 1480, 1485 (Fed. Cir. 1998) and to Board rulings, relying on *Yates,* in *Martir* v. *Department of the Navy,* 81 M.S.P.R. 421 (1999) and *Johnson* v. *United States Postal Service,* 85 M.S.P.R. 1 (1999). The essence of these rulings is that to invoke the Board's jurisdiction under USERRA, an appellant need not specifically cite USERRA. It is sufficient, for example, for an appellant to show that he performed service in a uniformed service, that he was denied a right or benefit guaranteed by chapter 43 of title 38, and that the right or benefit was denied because of his uniformed service.

The intent of section 1208.13(a)(3) was to assist an appellant in establishing Board jurisdiction over his USERRA appeal. The only basis for the Board's jurisdiction over such an appeal is a failure or refusal by a Federal agency employer or the Office of Personnel Management to provide a right or benefit guaranteed by chapter 43 of title 38 (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees). In order to determine whether it has jurisdiction over a particular USERRA appeal, the Board must know what right or benefit guaranteed by chapter 43 of title 38 the appellant alleges an agency failed or refused to provide. To the extent that the interim rule requires that a USERRA appellant provide a statutory citation to the provision(s) allegedly violated or that USERRA be cited by name to invoke the Board's jurisdiction, however, it is inconsistent with the cases cited above. The Board, therefore, is amending § 1208.13(a)(3) in this final rule to require a USERRA appellant to describe in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38 allegedly violated if possible.

The Board is making one other change to the interim rule with respect to a matter not addressed in the public comments. Section 1208.14, Representation by Special Counsel, permits satisfaction of the Board's requirements for designation of a representative by submitting a copy of a USERRA appellant's written request to the Secretary of Labor that the complaint be referred to the Special Counsel for litigation before the Board. Because the Special Counsel can decline to represent a USERRA appellant before the Board, however, the appellant's written request to the Secretary, standing alone, is not sufficient to show that the Special Counsel has agreed to represent the appellant. Therefore, the Board is amending § 1208.14 to require submission of a written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint be referred to the Special Counsel for litigation before the Board and that the Special Counsel has agreed to represent the appellant. Such statement will satisfy the Board's designation of representative requirements at 5 CFR 1201.31(a).

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h), 5 U.S.C. 3330a, 5 U.S.C. 3330b, and 38 U.S.C. 4331.

List of Subjects in 5 CFR Part 1208

Administrative practice and procedure, Government employees, Veterans.

Accordingly, the Board adopts the interim rule published at 65 FR 5409 (February 4, 2000) as final, with the following changes:

PART 1208—[AMENDED]

1. The authority citation for part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204(h), 3330a, 3330b; 38 U.S.C. 4331.

§§ 1208.11, 1208.12, 1208.13, 1208.23 [Amended]

2. Amend sections 1208.11(b) and (c), 1208.12, 1208.13(a)(4), and 1208.23(a)(5)(i) by removing ''the Secretary has been unable to resolve the complaint'' each place it appears and by adding in its place ''the Secretary's efforts have not resolved the complaint''.

3. Amend § 1208.13 by revising paragraph (a)(3) to read as follows:

§ 1208.13 Content of appeal; request for hearing.

(a) * * *

(3) A statement describing in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38, United States Code, allegedly violated if possible.

* * * * *

4. Revise section 1208.14 to read as follows:

§ 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board and that the Special Counsel has agreed to represent the appellant will be accepted as the written designation of representative required by 5 CFR 1201.31(a).

§ 1208.22 [Amended]

5. Amend §§ 1208.22(a) and (b) by removing ''the Secretary has been unable to resolve the appellant's VEOA complaint'' each place it appears and by adding in its place ''the Secretary's efforts have not resolved the VEOA complaint''.

Dated: August 10, 2000.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 00–20736 Filed 8–15–00; 8:45 am]

BILLING CODE 7400–01–U