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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (the Board) is amending its rules of practice and procedure to prescribe how a Federal employee witness in a Board proceeding may obtain a Board order that the employing agency grant him or her official time for participation in the proceeding. The Board is also amending its rules for enforcement proceedings to clarify that those rules apply to proceedings for enforcement of orders issued in the course of the Board's adjudicatory proceedings, such as an order that an agency provide official time to a Federal employee or a protective order to protect a witness from harassment, as well as to final Board decisions.

EFFECTIVE DATE: September 18, 1997.

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

SUPPLEMENTARY INFORMATION: The Board's current rules of practice and procedure, at 5 CFR 1201.33, provide that a Federal employee who appears as a witness in a Board proceeding, or furnishes a sworn statement in connection with such a proceeding, "will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate)." The current rules, however, provide no explicit guidance as to how a Federal employee is to proceed if his or her employing agency refuses to provide the official time required by section 1201.33.

The Board's case law has affirmed its authority to provide official time to non-

parties, but the Board has not addressed the procedures for non-parties to claim official time. *In re Maisto*, 28 M.S.P.R. 436 (1985); *In re Douglas*, 32 M.S.P.R. 389 (1987); and *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189 (1997).

The Board has the authority to order any Federal employee or agency to comply with any order or decision issued by the Board and to enforce compliance with any such order. 5 U.S.C. §1204(a)(2). The Board also has the authority to prescribe such regulations as may be necessary for the performance of its functions. 5 U.S.C. §1204(h).

The Board, therefore, is amending section 1201.33 to prescribe a specific procedure for a nonparty Federal employee who is participating as a witness in a Board proceeding to obtain from the judge an order that the employing agency comply with the official time requirements of that section. The procedure requires that the nonparty Federal employee submit the request to the judge in writing. The judge is then required to act on the request promptly and, where warranted, to order the employing agency to comply with the Board's official time regulation.

Section 1201.33 is amended further to state specifically that a judge's order that an agency provide official time as required by that section may be enforced as provided under subpart F of part 1201, i.e., in the same manner as other Board decisions and orders.

The Board also is amending its enforcement regulations at section 1201.182 to clarify that the regulations in subpart F apply to enforcement proceedings for all Board orders issued in connection with its adjudicatory proceedings, as well as to enforcement proceedings for final Board decisions. Both paragraph (a), covering decisions and orders issued under the Board's appellate jurisdiction, and paragraph (b), covering decisions and orders issued under the Board's original jurisdiction, are amended to provide that they apply to both Board orders and final decisions.

The Board is amending section 1201.182 at paragraph (c) to provide an exception to the requirement that a nonparty file a motion to intervene at the same time as a petition for enforcement where the nonparty is a Federal employee witness seeking

enforcement of a Board order for official time or an individual seeking enforcement of a protective order.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

PART 1201—[AMENDED]

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.33 is amended by redesignating the existing text as paragraph (a) and by adding paragraphs (b) and (c) to read as follows:

§ 1201.33 Federal witnesses.

* * * * *

(b) A Federal employee who is denied the official time required by paragraph (a) of this section may file a written request that the judge order the employing agency to provide such official time. The judge will act on such a request promptly and, where warranted, will order the agency to comply with the requirements of paragraph (a) of this section.

(c) An order obtained under paragraph (b) of this section may be enforced as provided under subpart F of this part.

§ 1201.182 [Amended]

3. Section 1201.182 is amended at paragraph (a) by adding "or order" after "decision" in the first sentence.

4. Section 1201.182 is amended at paragraph (b) by removing "Board order" in the first sentence and by adding in its place "final Board decision or order."

5. Section 1201.182 is amended by revising paragraph (c) to read as follows:

§ 1201.182 Petition for enforcement.

* * * * *

(c) *Petition by an employee other than a party.* (1) Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. Except for a petition filed under paragraph (c)(2) or (c)(3) of this section, the Board will

entertain a petition for enforcement from an aggrieved employee who is not a party only if the employee seeks and is granted party status as a permissive intervenor under § 1201.34(c) of this part. The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the noncompliance. The motion to intervene will be considered in accordance with § 1201.34(c) of this part.

(2) Under § 1201.33(c) of this part, a nonparty witness who has obtained an order from a judge that his or her employing agency provide the witness with official time may petition the Board for enforcement of the order.

(3) Under § 1201.55(d) of this part, a nonparty witness or other individual who has obtained a protective order from a judge during the course of a Board proceeding for protection from harassment may petition the Board for enforcement of the order.

(4) A petition for enforcement under paragraph (c)(1), (c)(2), or (c)(3) of this section must be filed promptly with the regional or field office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition on each party or the party's representative. If the petition is filed under paragraph (c)(1) of this section, the motion to intervene must be filed and served with the petition.

Dated: September 12, 1997.

Robert E. Taylor,
Clerk of the Board.

[FR Doc. 97-24750 Filed 9-17-97; 8:45 am]

BILLING CODE 7400-01-U

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

5 CFR Part 1605

Correction of Administrative Errors

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Final rule; amendment.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is publishing an amendment to final rules on correction of administrative errors affecting Thrift Savings Plan (TSP) accounts. The effect of the amendment will be that earnings on contributions made to the TSP by a person who is ineligible to participate will be returned to that person and not

used to offset TSP administrative expenses.

EFFECTIVE DATE: This amendment is effective December 27, 1996.

FOR FURTHER INFORMATION CONTACT: John J. O'Meara, (202) 942-1661.

SUPPLEMENTARY INFORMATION: A final rule governing the correction of administrative errors affecting Thrift Savings Plan accounts was published in the **Federal Register** on December 27, 1996 (61 FR 68464). That rule revised the final regulations that were published in the **Federal Register** on December 4, 1987 (52 FR 46314). In both sets of regulations the Board provided that when an individual who was not eligible to participate in the TSP nevertheless contributed funds to the TSP, the individual's contributions would be returned, but the earnings on those contributions would be forfeited and used to pay administrative expenses of the TSP. Upon review of this matter, the Board has decided that in promulgating this regulation insufficient emphasis was placed on the ineligible participant's equitable claim to these earnings.

For this reason, § 1605.9(a)(1) of the error correction regulations is being amended to provide that these earnings will be paid to the ineligible participant. Because the equity interest in these earnings by the ineligible participant is so substantial, this amendment is being given retroactive effect to the effective date (December 27, 1996) of the current error correction regulations.

Regulatory Flexibility Act

I certify that this amendment will not have a significant economic impact on a substantial number of small entities. It will only affect Thrift Savings Plan participants.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, section 201, Public Law 104-4, 109 Stat. 48, 64, the effect of these regulations on State, local, and tribal governments, and on the private sector has been assessed. This regulation will not compel the expenditure in any one year of \$100 million or more by any State, local, and tribal governments in the aggregate, or by the private sector. Therefore, a statement under section 202, 109 Stat. 48, 64-65, is not required.

Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), the Board submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States before the publication of this rule in today's **Federal Register**. This rule is not a major rule as defined in section 804(2).

List of Subjects in 5 CFR Part 1605

Administrative practice and procedure, Employee benefit plans, Government employees, Pensions, Retirement.

Roger W. Mehle,

Executive Director, Federal Retirement Thrift Investment Board.

For the reasons set forth in the preamble, part 1605 of chapter VI of title 5 of the Code of Federal Regulations is amended as follows:

PART 1605—CORRECTION OF ADMINISTRATIVE ERRORS

1. The authority citation for Part 1605 continues to read as follows:

Authority: 5 U.S.C. 8351 and 8474.

2. Section 1605.9 is amended by revising the second sentence of paragraph (a)(1) to read as follows:

§ 1605.9 Miscellaneous provisions.

(a)(1) * * * In that case, the earnings will be removed from the account and paid to the ineligible participant. * * *

[FR Doc. 97-24760 Filed 9-17-97; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 800

RIN 0580-AA56

Fees for Official Inspection and Official Weighing Services

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The Grain Inspection, Packers and Stockyards Administration (GIPSA) is implementing, effective October 1, 1997, a 12.5-percent increase in the administrative service fee for official inspection and weighing services performed in the United States under the United States Grain Standards Act (USGSA), as amended. The fee