

## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Parts 1200, 1201, 1203, 1208, and 1209

#### Practices and Procedures

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Final rule.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board), following an internal review of MSPB regulations, publication of a proposed rule, and consideration of comments received in response to the proposed rule, hereby amends its rules of practice and procedure in order to improve and update the MSPB's adjudicatory processes.

**DATES:** Effective November 13, 2012.

**FOR FURTHER INFORMATION CONTACT:** William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419; (202) 653-7200, fax: (202) 653-7130 or email: [mspb@mspb.gov](mailto:mspb@mspb.gov).

**SUPPLEMENTARY INFORMATION:** On June 7, 2012, the Merit Systems Protection Board (MSPB or Board) proposed numerous amendments to its regulations. 77 FR 33663. In response to publication of this proposed rule, the MSPB received 105 pages of comments from 25 commenters. The comments received by the MSPB are available for review by the public at [www.mspb.gov/regulatoryreview/index.htm](http://www.mspb.gov/regulatoryreview/index.htm).

#### Comments and Summary of Changes to the Proposed Rule

Set forth below is a short summary of the changes proposed by the MSPB, a discussion of the comments addressing the proposed rule, and a summary of the changes the MSPB is making to the proposed rule. Readers desiring a more detailed summary of the amendments proposed by the MSPB should consult the proposed rule at 77 FR 33663.

This Final Rule will become effective 30 days after publication in the **Federal Register**. The MSPB is aware that changes to its adjudicatory procedures may pose special problems in cases that are pending on the date this Final Rule takes effect. In any such case, judges have authority under 1201.12 to waive a regulation for good cause, except where a statute requires application of the regulation.

#### Section 1200.4 Petition for Rulemaking

The MSPB proposed adding this new regulation to set forth procedures for filing petitions for rulemaking under 5

U.S.C. 553(e). Numerous commenters objected to this proposed regulation on the grounds that the MSPB should always employ notice and comment rulemaking due to its unique mission as an adjudicative body and the regulation could be read as authorizing the MSPB to publish a direct final rule not authorized under the Administrative Procedure Act (APA). However, the APA does not require notice and comment in all instances of agency rulemaking. 5 U.S.C. 553(b). While the MSPB does have a unique mission, publication of a direct final rule remains an important tool to quickly implement minor technical amendments. However, in an effort to address the concerns raised by these commenters, the MSPB has added a requirement to the regulation that final rules will be issued "consistent with the Administrative Procedure Act."

A commenter suggested that the MSPB, either by regulation or practice, should post petitions for rulemaking and responses thereto on the MSPB's Web site. The MSPB agrees that this proposal has merit and will undertake in the future to post such information on its Web site. A commenter suggested that the regulation include advice concerning a petitioner's right to judicial review. The MSPB has chosen not to amend the regulation as requested. Finally, a commenter suggested that the MSPB include a procedure for seeking reconsideration of a denial of a petition for rulemaking. The regulation presently gives each petitioner a full opportunity to present his or her petition to the Board. No further procedures for reconsideration will be included in the final rule.

#### Section 1201.3 Appellate Jurisdiction

The amendments proposed by the MSPB explained that this regulation is not a source of MSPB jurisdiction and that jurisdiction depends on the nature of the employment or position held by the employee as well as the nature of the action taken. The proposed regulation also revised the listing of appealable actions within the MSPB's appellate jurisdiction.

A commenter suggested several editorial changes to paragraph (a) and, in response, the MSPB has amended this regulation. A commenter pointed out that the MSPB has jurisdiction over "suitability actions," not "suitability determinations." The MSPB has amended the proposed regulation to address this comment.

A commenter recommended that the regulation should be amended to include more specific information concerning what constitutes a suitability

determination and how a suitability determination is made. In response, the MSPB has included changes to paragraph (a)(9).

A commenter suggested that the statement in paragraph (a)(3) of the proposed rule that appeals of probationary terminations "are not generally available to employees in the excepted service" is insufficient for pro se appellants. The commenter further suggested that the regulation should be revised to clearly identify when an excepted service employee has the right to appeal such an action by listing any exceptions to the general rule. In response, the MSPB notes that one such exception to the general rule exists for Veterans Readjustment Act appointments. While appointments under this authority are excepted service appointments, because they are positions that would otherwise be in the competitive service, many competitive service rules apply to them, including those at 5 CFR part 315, subpart H. See *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 11 (2006); 5 CFR 307.103-104. The MSPB therefore believes the use of the term "generally" is justified. In addition, given the possibility that the MSPB might overlook an exception that ought to be included in such a list or that the list could become outdated at some future point, the MSPB is satisfied that the use of the term "generally" is appropriate. Finally, MSPB administrative judges are required to identify jurisdictional elements to the parties after an appeal is filed and, therefore, there is no need to amend this regulation as requested.

The MSPB has also made several minor changes in the proposed rule. First, in paragraph (a)(10), we changed the citation to authority for this grant of jurisdiction. There is no longer any Subpart E to 5 CFR Part 752. The correct sources of jurisdiction are 5 U.S.C. 7543(d) and 5 CFR 752.605. Second, in paragraph (a)(11), we pluralized "right" in the first grant of jurisdiction and broke out the particular grants of jurisdiction into separate paragraphs (a)(11)(i) through (a)(11)(vii).

#### Section 1201.4 General Definitions

The MSPB proposed revising subsection (a) to eliminate the phrase "attorney-examiner" and revising subsection (j) due to a concern that the term "date of service" was unclear.

In response to a concern expressed by a commenter that the term "grievance" should be defined, the MSPB has added a new paragraph (o) defining a "grievance" as "[a] complaint by an employee or labor organization under a negotiated grievance procedure covered

by 5 U.S.C. 7121.” While this definition was not included in this regulation in the proposed rule, the MSPB believes it is appropriate to include this new material here because the MSPB did propose to amend 1201.153 to substitute the term “under a negotiated grievance procedure” for the word “grievance.” The new definition of “grievance” is intended simply to recognize the need to clarify the meaning of the term “grievance” throughout the MSPB’s regulations.

A commenter objected to the current definition of “date of service” in paragraph (j) as circular and suggested that it should take the form of a narrative definition without reference to “date of filing.” The MSPB rejects this suggestion as the date of service and date of filing are intended to be identical.

A commenter suggested that the MSPB delete “calendar” as a description of days in paragraph (j) because days is already a defined term in paragraph (h). The final rule adopts this suggestion.

Several commenters suggested that language authorizing that 5 extra days will be provided when a pleading is filed by mail should be moved to 1201.23 or that a reference to 1201.23 should be added to the proposed language in paragraph (j). A commenter also suggested that the MSPB amend the language of paragraph (j). In response to these suggestions, the MSPB has amended the language of paragraph (j) and moved the language providing 5 extra days when a pleading is filed by mail to 1201.23.

A commenter expressed a concern that the MSPB’s definition of “date of service” is flawed because it fails to recognize that irradiation of mail delays receipt of mail by Federal agencies. The MSPB is aware that when an appellant files via regular mail, and the agency representative is located in Washington, DC, the pleading will go to an irradiation center and it may take more than 5 days for the agency to receive it. While this is a valid concern, the MSPB does not think it justified a special provision in the regulations. If irradiation has caused a significant delay that adversely impacts an agency’s opportunity to submit a responsive pleading, the agency can ask for additional time or seek to excuse a late response, and there is no reason to believe our judges will not deal with such matters appropriately.

A commenter suggested that the MSPB amend the definition of “judge” in paragraph (a) to add “any member of the Merit Systems Protection Board” to the listing of persons who can be a judge

and further amend the regulation to make clear that only individuals “experienced in hearing appeals” may hear an appeal of a removal action. We have revised the regulation to include Members of the Board in the definition of the word “judge.” The MSPB is cognizant of the requirement in 5 U.S.C. 7701(b)(1) that a removal case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The MSPB ensures that cases are assigned to experienced judges in accordance with the statutory requirement.

#### *Section 1201.14 Electronic Filing Procedures*

The MSPB proposed adding new language to reflect current MSPB policy and procedures regarding Sensitive Security Information (SSI) and classified information. The MSPB proposed to revise paragraph (m) to make the regulation consistent with the intent expressed by the Board when it originally published this provision at 73 FR 10127, 10128 (2008). Finally, additional language was added to provide that amici are not permitted to e-file.

A commenter suggested that the MSPB should change the restriction on SSI so that it applies only when a document has been marked by the agency as containing SSI. The MSPB believes the current language concerning filing of SSI and classified information is more appropriate in so far as it contemplates additional scenarios in which a party other than the agency submits a pleading containing information that it knew or should have known contains SSI. A commenter objected to the MSPB’s restrictions on filing pleadings containing SSI as overly broad. However, these restrictions are compelled by the fact that SSI and classified information require security beyond that available in the MSPB e-filing system. A commenter questioned the continued exclusion of class appeal-related filings and requests to appear as amici from the MSPB’s e-appeal system. As the MSPB noted in the proposed rule, we considered the option of reconfiguring e-Appeal Online to address Privacy Act concerns and allow amici to file using e-Appeal Online but determined that the cost of such a systemic change outweighed the benefit of e-filing by amici. A commenter observed that the MSPB should adjust its e-filing system to account for regional time differences rather than address this issue in a regulation. While the e-filing system of the Federal judiciary may accommodate such

difference, the MSPB remains concerned that such a change to its e-filing system risks compromising the reliability and integrity of its filing process.

#### *Section 1201.21 Notice of Appeal Rights*

The MSPB proposed to change longstanding jurisprudence concerning allegations of reprisal for whistleblowing under 5 U.S.C. 2302(b)(8) where an employee has been subjected to an otherwise appealable action. Subsection (g)(3) of 5 U.S.C. 7121 provides that an individual who has been subjected to an otherwise appealable action and who alleges retaliation for whistleblowing must elect one of 3 actions: (A) an appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an Individual Right of Action appeal filed with the Board (5 U.S.C. 1221). Subsection (g)(4) provides that an election is deemed to have been made based on which of the 3 actions the individual files first. The proposed regulation would require agencies to fully notify employees of their rights in these situations so that they can make an informed choice among the available 3 options. Paragraph (e) was added to require notice in mixed cases.

A commenter suggested that the MSPB should define what constitutes a grievance. In response to this comment, the MSPB has added a new definition in a new paragraph (o) in 1201.4.

Several commenters suggested that the MSPB clarify its proposed regulation and/or provide “model” language for agencies to use with respect to the Board’s requirements in paragraphs (d) and (e) relating to elections between different forums that employees are required to make with respect to claims of retaliation for protected whistleblowing disclosures or claims of unlawful discrimination. The Board does not believe that detailed model language is required, as the regulations at 5 CFR 1209.2 and 29 CFR 1614.301 and .302 provide adequate guidance.

A commenter pointed out that while the proposed regulation would require agencies to give notice of rights under 5 U.S.C. 7121(g), it failed to require notice of rights under 5 U.S.C. 7121(c)(1) and (d). The MSPB believes these concerns are already addressed in paragraphs (d) and (e) of the regulation. We revised paragraph (e) to add the phrase “or to grieve allegations of unlawful discrimination” and added

references to 5 U.S.C. 7121(d) and 29 CFR 1614.301 to clarify the notice that must be provided regarding discrimination claims.

A commenter urged the MSPB to make clear that an appellant may make separate elections of remedies for a proposed decision and a final decision. This issue is presently addressed in Example 4 in 1209.2.

Commenters also were concerned that increasing the amount of information already included in notices was unreasonable and that the exact parameters of the notice required may not be clear at the time an action is taken against a probationary employee. The complexity of notices is a product of the complexity of the law governing Federal employees. With regard to notices given to probationary employees, when an agency takes an action against a probationary employee, it must inform the employee of the circumstances in which such terminations are appealable to the Board.

The MSPB has made two other amendments to this regulation. We revised paragraph (e) because it only referred to elections between the MSPB and the EEOC under 29 CFR 1614.302. This paragraph now also addresses election of the negotiated grievance process for claims of prohibited discrimination. In response to other comments regarding this regulation, the MSPB also added a new paragraph (f) requiring agency decision notices to include 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. This minor change will help ensure proper service of the MSPB's Acknowledgment Order, thereby expediting the processing of appeals.

Readers also should review the discussion of comments under 5 CFR 1209.2.

#### *Section 1201.22 Filing an Appeal and Responses to Appeals*

The MSPB proposed to revise this regulation to include a new section stating the MSPB's general rule about constructive receipt and included several illustrative examples.

A commenter objected to the use of the terms "relative" and "of suitable age and discretion" as overly vague. The MSPB does not use the word "relative" in this regulation. The use of the term "persons of suitable age and discretion" is taken from Rules 4 and 5 of the Federal Rules of Civil Procedure.

A commenter asked the MSPB to modify the regulation to clarify that, in cases where the appellant and his or her

representative receive a document on different dates, the date of the representative's receipt should control. The MSPB has elected not to make this change as the present rule is adequate and this proposal will introduce further complexity.

A commenter objected to the use of examples because such examples might be read as determinative in circumstances where they might be misleading. The MSPB disagrees and views these examples as an effective means to explain the rule to pro se litigants. However, the MSPB will note in the examples that the cited circumstances in each example "may" establish the contested issue.

A commenter proposed that the MSPB require an agency to provide contact information for the agency official designated to receive notice of a change in an appellant's address. The MSPB has added a new paragraph (f) in 1201.21 that will require the agency to supply contact information for a responsible agency official in all decision notices.

#### *Section 1201.23 Computation of Time*

The MSPB proposed to amend this regulation so that it will apply to all situations in which a deadline for action is set forth in the MSPB's regulations or by a judge's order, including discovery requests and responses between the parties.

A commenter requested the MSPB to incorporate constructive receipt language from 1201.22 in this regulation. The MSPB will not implement this suggestion because 1201.23 concerns solely with how time is computed, not when receipt is effective. A commenter recommended a change in wording to shorten the description of the 5 extra days provided when a pleading is filed by mail. The commenter also recommended moving this language from 1201.4 to 1201.23. The MSPB agrees with these suggestions. The final rule contains a modified version of this commenter's suggested language. The MSPB deleted the word "calendar" as a description of days because it is already a defined term in paragraph (h) of 1201.4.

#### *Section 1201.24 Content of an Appeal; Right to Hearing*

The MSPB proposed to change the scope of requested attachments to an initial appeal from "any relevant documents" to a request for the proposal notice, decision notice, and for the SF-50 if available. The MSPB also proposed to amend the definition of "right to hearing" in paragraph (d) to state that, "in an appeal under 5 U.S.C.

7701, an appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal."

A commenter objected to the limitations on the amount of material an appellant may submit with an appeal on the grounds that this change will increase the time it takes an agency to assess the case and provide an appropriate response. While the proposed amendment might limit the initial receipt of relevant material in some cases, in many others it will serve to curtail the submission of extraneous material, while ensuring that the MSPB receives information necessary to identify the nature of an appellant's claims.

A commenter agreed that evidence on jurisdiction should be filed in response to Board orders but only if the Board would hold in abeyance the agency's narrative response to the appeal until the question of jurisdiction is resolved. The MSPB will not make any changes in response to this suggestion since this issue can be addressed on a case-by-case basis in acknowledgment of other orders issued by an administrative judge.

A commenter objected to the proposed amendment on the grounds that it disadvantages appellants and precludes the appellant from submitting additional information that may be relevant. The MSPB disagrees with this comment because the amendment to this regulation concerns only the timing of submissions by an appellant and does not ultimately limit the scope of what an appellant may submit.

A commenter suggested that in subparagraph (a)(7), the MSPB should require that appellants in Veterans Employment Opportunities Act (VEOA) and Individual Right of Action (IRA) cases submit relevant documents, as these documents are almost always exclusively in the appellant's possession. The MSPB believes that under current practice jurisdictional and show-cause orders adequately address requirements for appellants to show exhaustion in VEOA and IRA appeals.

A commenter suggested that the MSPB should develop a mechanism for summary judgment and amend paragraph (d) to add information concerning an appellant's right to a hearing where summary judgment is granted. The Court of Appeals for the Federal Circuit has found that the MSPB lacks authority to order summary judgment. *Crispin v. Department of Commerce*, 732 F.2d 919, 924 (Fed. Cir. 1984). Therefore, we cannot make the suggested changes.

A commenter objected to the word “generally” in paragraph (d) since 5 U.S.C. 7701 includes a right to a hearing. The MSPB has removed the reference to 5 U.S.C. 7701 from this regulation because there are other appeals that lack a right to a hearing.

#### *Section 1201.28 Case Suspension Procedures*

The MSPB proposed to overhaul its case suspension procedures to allow for more than a single 30-day suspension period, eliminate current restrictions on when a request must be filed, and remove separate paragraphs for unilateral requests and joint requests.

A commenter suggested that the MSPB should grant its administrative judges the power to initially suspend case processing for up to 60 days instead of 30 in order to facilitate settlement. The MSPB believes that further expansion of the initial suspension period to 60 days is unwarranted because the proposed rule ultimately allows for suspension up to 60 days and allowing an initial suspension period of 60 days could negatively affect the time it takes to issue a decision in an initial appeal. However, in light of this comment, and another comment seeking to amend the regulation to suspend a case referred to the MSPB’s Mediation Appeals Program (MAP), the MSPB has added a new paragraph (d) suspending the processing of an appeal that is accepted into MAP. This amendment reflects the MSPB’s current practice.

Several commenters suggested that suspension sought jointly by the parties should be granted automatically. The MSPB disagrees and believes that its judges need to retain control of case processing and will exercise suitable discretion in acting upon jointly filed suspension requests.

A commenter asked the MSPB to consider amending the regulation to specify that adjudication of a motion to compel discovery does not require termination of the suspension period. The regulation states that a judge may terminate the suspension period when the parties request the judge’s assistance and the judge’s involvement is likely to be extensive but does not require termination. We believe that leaving such matters to the judge’s discretion preserves the maximum flexibility for efficient and effective case processing.

#### *Section 1201.29 Dismissal Without Prejudice*

The MSPB proposed adding this new regulation that codified existing case law on the subject of dismissals without prejudice.

A commenter suggested that there was a typographical error in paragraph (a) and that the correct reference should be to 1201.22, not 1201.12. The reference to 1201.12 was intentional because we wanted to allow for certain exceptions where the Board’s reviewing court has held that the MSPB should not specify a date certain for refiling. The MSPB has modified paragraph (c) to specify the exception.

A commenter suggested that the MSPB should rewrite paragraph (c) to provide that a waiver of a late refiling will be granted where an appellant establishes good cause for the untimely filing. The MSPB believes that requiring judges to liberally construe such requests is more appropriate. See 5 CFR 1201.29(d).

A commenter suggested that the MSPB revise the regulation to require that a judge notify the parties and give them an opportunity to object before dismissing an appeal without prejudice. While the MSPB agrees with this suggestion in principle, we remain convinced that the current provision must be retained in order to allow a judge to dismiss a case without prejudice *sua sponte* in exceptional circumstances, such as when a hurricane closes a regional office for an extended period.

A commenter recommended allowing the judge to set the refiling deadline based on an applicable triggering event instead of a date certain. Board case law does not allow judges to set the refiling date based solely on a subsequent triggering event, without also providing an alternate date certain.

A commenter recommended requiring that judges set a refiling date within 6 months of the order dismissing the appeal and that the MSPB mandate that an appeal may not be dismissed without prejudice for more than two 6-month periods. Administrative judges are in the best position to set a refiling date. Based upon experience, the MSPB believes that a 12-month period may not be sufficient in all circumstances.

A commenter expressed a preference for the automatic refiling of all cases dismissed without prejudice, especially retirement cases. Automatic refiling is not practical in all cases. In many cases, refiling is neither necessary nor desired because the matter has been fully resolved. For example, when an adverse action has been dismissed without prejudice so that the appellant can pursue an application for disability retirement, if the application is granted, no further action is required.

A party suggested that the proposed regulation should be revised and reorganized. In response, we have made

non-substantive revisions to the organization and language of the regulation.

#### *Section 1201.31 Representatives*

The MSPB proposed to add the phrase “or after 15 days after a party becomes aware of the conduct” at the end of the third sentence in 5 CFR 1201.31(b) to acknowledge that a representative’s conflict of interest may not be readily apparent to a party wishing to challenge the designation of a representative. The MSPB also proposed to move provisions governing exclusion and other sanctions for contumacious behavior by parties and representatives to 5 CFR 1201.43. Readers are advised to review comments under 1201.43.

A commenter suggested that the MSPB should offer appellants the option to obtain an interlocutory appeal of a disqualification of his or her representative. One reason for the change from the current regulation is the practical consideration that allowing an automatic interlocutory appeal, as the current regulation does, would unnecessarily delay the processing of the appeal. Another is that the revised regulation does not prohibit a request for an interlocutory appeal in these circumstances; it simply does not provide for the automatic certification of an interlocutory appeal that does not meet the requirements of section 1201.92(b), including that the matter in question “involves an important issue of law or policy about which there is substantial ground for difference of opinion.” A party affected by the exclusion of a representative who believes that an interlocutory appeal would meet the requirements of 1201.92 remains free to seek one.

#### *Section 1201.33 Federal Witnesses*

The MSPB proposed adding language to clarify that an agency’s responsibility under this regulation includes producing witnesses at depositions as well as at hearings.

A commenter observed that “to appear at a deposition” appears in the first sentence of (a), but not in the second sentence. This issue has been addressed in the final rule.

Several commenters asked the MSPB to amend the regulation to clarify that the employing agency is responsible for pay and benefit costs resulting from the production of witnesses not employed by the responding agency. Other commenters objected that the proposed amendment appears to make party agencies responsible for ensuring the appearance of individuals employed by nonparty agencies. The proposed regulation is not intended to apportion

these costs, which are for the involved agencies to resolve. However, we have revised the regulation to indicate that the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations such as those issued pursuant to *United States, ex rel. v. Touhy*, 340 U.S. 462, 467 (1951) regarding the production of evidence from Federal employees in matters in litigation.

A commenter recommended adding a provision requiring that the nonparty agency be served with any order requiring testimony of one of its employees. This commenter further suggested that the nonparty agency be given an opportunity to object or seek modification of such an order before it becomes effective. The Board is disinclined at this time to formalize such a process in this regulation in order to minimize the risk of collateral litigation. However, administrative judges currently have the authority to resolve any such objections.

A party recommended that the MSPB eliminate the possibility of an adverse inference against a respondent agency with respect to non-appearance of any employee not under its control. Under the MSPB's regulations, when a party fails to comply with an order, the judge may draw an inference in favor of the requesting party with regard to the information sought. The existing regulation does not provide for such a sanction against a party when a nonparty violates an MSPB order.

A commenter suggested that the MSPB amend the regulation to "permit a witness, who is a nonparty Federal employee, to provide telephonic or video testimony at the hearing upon the agency's request." Such a request may be submitted to the judge, but the MSPB cannot tie the judge's hands with a blanket rule that gives the agency power to decide whether a witness will testify in-person or by video or telephone.

A commenter suggested that the MSPB should amend this regulation to require agencies to pay for travel to depositions and that depositions should be taken in the local commuting area where the witness resides, if possible, or where there are videoconferencing capabilities. The parties to an MSPB appeal are free to make such arrangements to control costs and present the issue to the judge when the parties cannot agree on such cost control measures.

A party suggested that the MSPB review and clarify its regulations regarding third party discovery. The MSPB is willing to consider any specific suggestions to improve its regulations

and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.34 Intervenor and Amicus Curiae*

The MSPB proposed to amend this regulation to address the fact that it receives motions to file amicus briefs for the first time on petition for review and provide further explanation as to what an amicus is permitted to do. The proposed amendment also included general guidelines indicating when requests to file amicus briefs will be granted or denied.

A commenter generally approved of the proposed amendments but suggested that the MSPB should reference its recent practice of soliciting amicus briefs through **Federal Register** notices if it intends to continue using this practice. The MSPB has revised the final regulation to include a provision stating that the MSPB may solicit amicus briefs on its own motion.

A commenter suggested that the MSPB should include a provision stating that, when the Board solicits amicus briefs on its own initiative, the Board will serve the amicus briefs on the parties. The MSPB currently serves the amicus briefs on the parties and sees no need to include this level of detail in the regulation.

A commenter suggested that the MSPB add to the regulation a provision stating that an amicus curiae is not entitled to receive service of any pleadings or submit replies to briefs filed by the parties. As currently drafted, subparagraph (e)(5) of the regulation states that amici are not parties and may not participate in hearings but does not explicitly say that amici should not be served with copies of pleadings. However, the MSPB will not make the suggested change as the draft regulation makes clear that amici are not parties and, as such, plainly implies that they need not be served with copies of pleadings.

A party recommended that the MSPB should require that requests for participation as an amicus be served on the parties, assuming the identity of the parties is known to the amicus. This issue was not addressed in the MSPB's proposed rule. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.36 Consolidating and Joining Appeals*

The MSPB proposed to substitute "removal" for "dismissal" as the latter is not a term used by the Board to describe an employee's separation from employment for disciplinary reasons. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.41 Judges*

The MSPB proposed to amend this regulation to reflect the language used in the MSPB Strategic Plan. The MSPB received no negative comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.42 Disqualifying a Judge*

The MSPB proposed to amend this regulation to reflect the fact that under current MSPB practice a judge who considers himself or herself disqualified notifies the Regional Director, not the Board. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.43 Sanctions*

The MSPB proposed moving its regulation regarding exclusion of parties and representatives for contumacious behavior from 5 CFR 1201.31 to this regulation. The MSPB further proposed to provide judges with explicit authority to suspend or terminate a hearing already underway and to delete the requirement of a show cause order, substituting instead a requirement that judges provide adequate prior warning before imposing a sanction and document the reasons for any such sanction. The MSPB proposed to eliminate the provision for an interlocutory appeal of a sanction for contumacious behavior and allow a judge to limit participation by a representative without excluding the representative from the case entirely. Finally, the proposed rule deleted the term "appellant's representative" and instead substitutes the term "party's representative."

A commenter observed that it was unclear whether the MSPB was expanding a judge's authority for sanctioning contumacious behavior to include witnesses or other persons rather than just parties or representatives. MSPB judges had authority to exclude persons other than parties from participation in a proceeding prior to publication of the proposed rule under 1201.31(d), and the

proposed rule continues to include this authority.

A commenter suggested that the MSPB amend the regulation to state that, when the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative. The proposed and final rules include this provision in paragraph (d).

A commenter suggested that the MSPB revise the first sentence of this regulation to state that the Board or a judge may impose sanctions "for good cause shown, and as necessary to serve the ends of justice." The MSPB will not amend the regulation as suggested because the definition of "judge" now expressly includes the Board and the addition of the phrase "for good cause shown" does not usefully add to the proposed standard, "as necessary to serve the ends of justice."

Three commenters urged the MSPB to maintain the interlocutory appeal process in cases where a sanction is imposed. The proposed change recognizes, however, that providing for an automatic interlocutory appeal, as the current regulation does, may unnecessarily delay the processing of an appeal. Moreover, the revised regulation does not prohibit a request for an interlocutory appeal of an imposed sanction. A sanctioned party who believes an interlocutory appeal would meet the requirements of 1201.92 remains free to seek one. In making proposed amendments to our regulations, the Board did not propose changes to the substantive criteria in 1201.92 for granting interlocutory appeals. It would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.51 Scheduling the Hearing*

The MSPB proposed to delete the current list of approved hearing sites contained in Appendix III, in favor of a posting of such sites on the Board's Web site, thereby facilitating greater flexibility in the selection of cost effective locations.

Several commenters expressed the concern that this section appears to be aimed at saving the MSPB travel expenses but is likely to result in greater costs for the responding agency. These commenters suggested that the regulation should be amended to

maximize savings to the Federal Government as a whole. The MSPB's intent in proposing this amendment was not to minimize MSPB travel expenses at the expense of the parties, however, but rather to ensure that hearing site locations can be flexibly adjusted in response to ongoing changes in the relative costs of travelling to particular sites. Parties may request a change in an approved site if lower costs can be achieved in a particular case.

A commenter recommended that the last sentence should be modified to state that rulings on motions requesting a different hearing location should "be based on a showing that a different location will result in lower cost to the government as a whole." The MSPB does not believe that this suggestion accounts for the costs borne by appellants and therefore will not adopt the commenter's proposal.

A commenter approved of the proposed regulation but recommended that the MSPB expressly authorize telephonic or video hearings and direct parties to its Web site for resources. The MSPB did not address the question of expressly authorizing telephonic or video hearings in its regulations and therefore the MSPB will not address this issue herein, except to say that this has been noted and may be considered in the future.

Finally, a commenter reported that in his experience judges have displayed poor judgment by scheduling hearing and prehearing deadlines far before the completion of discovery, unilaterally setting hearing dates for personal convenience, and denying unopposed motions to reschedule hearings. This commenter also suggested that the MSPB has seemingly taken the approach of cutting short discovery to meet the prehearing dates selected by the judge. Parties may request a suspension under 1201.28 when additional time is needed for discovery. Concerns that a judge is improperly managing a particular case should be directed to the appropriate Regional Director or Chief Administrative Judge.

#### *Section 1201.52 Public Hearings*

The MSPB proposed to amend this regulation to give administrative judges express authority to control the use of electronic devices at a hearing.

A commenter suggested that this regulation should be broken out into two parts, one addressing closure of a hearing and the other addressing use of electronic devices. The MSPB agrees that this proposed change will improve the regulation, and the final rule has been amended accordingly.

A commenter objected to language in this regulation allowing a judge to close hearings and recommended that such authority be limited to appeals involving classified information or in the case of a pseudonymous or anonymous appeal. Another commenter suggested that the MSPB replace the second sentence with: "However, the judge may order a hearing or any part of a hearing closed when [Sensitive Security Information (SSI)] or classified information will be discussed, and/or when doing so would be in the best interests of the appellant, a witness, the public or any other person affected by the proceeding." A different commenter suggested that the MSPB amend this regulation to state that all or part of a hearing may be closed when doing so is in the best interests of a party, instead of limiting the inquiry to the best interests of an appellant. The MSPB has amended this regulation to substitute "interests of a party" for "interests of an appellant" since a respondent may offer good reasons to close a hearing, including the possible disclosure of classified information or SSI. The MSPB otherwise declines to further restrict when a hearing may be closed to the public, based on the foreseeability of circumstances where the closure of a hearing may be justified and necessary.

A commenter recommended clarifying that the section's reach extends to devices which have electronic recording and two-way communication functionality, even if those are not the device's primary functions. A commenter suggested that, because cell phones are often used as clocks, a representative should be allowed to keep a cell phone in silent mode or a laptop with them during the hearing. This commenter further observed that an administrative judge can issue an order at the outset of the hearing that requires representatives to comply with all terms and sanction any party for not complying. Another commenter observed that the MSPB should reasonably control the use of cellphones during a hearing rather than deny such use. The proposed rule gives the administrative judge sufficiently broad flexibility to address the concerns raised in these comments on a case-by-case basis.

#### *Section 1201.53 Record of Proceedings*

The MSPB proposed to make several changes to the regulation. The term "tape recording" was replaced by the word "recording" and the term "written transcript" was replaced by "transcript." The MSPB also proposed to allow a judge or the Board to order

the agency to pay for a transcript in certain circumstances.

A commenter objected to the proposed deletion of paragraph (e), which specifies the contents of the official record of the appeal. The deletion of this paragraph was unintentional. The paragraph has been reinserted into the final rule with minor amendments.

Several commenters argued that the MSPB lacks the authority to require that agencies pay for transcripts as proposed in paragraph (b). While not conceding that it lacks authority to take such action, the MSPB is removing this provision from the final rule.

A commenter offered a complete rewrite of this regulation to correct what it viewed as redundant and internally inconsistent provisions. In response, the MSPB has deleted a sentence in paragraph (a) that is duplicative of language in paragraph (c). The matter identified as inconsistent related to the requirement that an agency procure a transcript and has been addressed by the deletion of that provision.

#### *Section 1201.56 Burden and Degree of Proof; Affirmative Defenses*

The Board proposed to amend this regulation in an attempt to reconcile the existing regulation with a significant body of Board case law holding that some jurisdictional elements may be established by making nonfrivolous allegations. The MSPB received numerous helpful comments concerning the proposed amendments to this regulation. Commenters suggested that the regulation's discussion of the varying degrees of proof would be confusing to pro se appellants and the phrase "jurisdictional hearing" should be substituted with the word "hearing," to avoid any suggestion that a hearing with respect to a jurisdictional element confers any fewer rights with respect to discovery and other elements of MSPB due process, in a hearing on the merits. Other commenters recommended that the MSPB revise the definition of a "nonfrivolous allegation" and insert a sentence stating that a judge may dismiss a case for not meeting the nonfrivolous allegation standard. Finally, a commenter suggested that the MSPB offer further clarification of the burden that IRA appellants must meet to establish jurisdiction so as to avoid the dismissal of meritorious IRA appeals at the jurisdictional stage.

Considering these comments, and after additional internal review, the Board has determined that it is appropriate to withdraw the proposed amendments to this regulation. We agree with many of the comments and

conclude that it would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. The MSPB plans to reconsider the current regulation in its entirety and, if amendments are determined to be necessary, offer proposed amendments to this regulation in a future rulemaking.

#### *Section 1201.58 Closing the Record*

The MSPB proposed amending this regulation to conform with case law indicating that, notwithstanding an order setting the date on which the record will close, a party must be allowed to submit evidence or argument to rebut new evidence submitted by the other party just prior to the close of the record.

A commenter generally agreed with the proposed amendment but was concerned that the addition of the words "or argument" could be interpreted to allow a party to add additional arguments that they had failed to raise before the filing deadline. The final rule revises the proposed language in 1201.58(c) to address this concern and clarifies that the regulation is intended to allow new evidence or argument that is offered in rebuttal of new evidence or argument submitted by the other party just before the record closed.

A party observed that acknowledgment orders often include conflicting provisions that theoretically allow for discovery but close the record on issues of jurisdiction or timeliness before discovery can be completed. This commenter suggested that this regulation should be amended to require judges to properly address the relationship between the closing of the record on a particular issue and the close of discovery. This complaint was aired by more than one commenter. The MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.62 Producing Prior Statements*

The MSPB proposed to delete this regulation in its entirety as it has virtually never been invoked or applied and is believed to be unnecessary. The MSPB received no comments concerning its proposed deletion of this regulation and the final rule makes the proposed deletion.

#### *Section 1201.71 Purpose of Discovery*

The MSPB proposed an amendment adding a sentence stating that discovery requests and discovery responses

should not ordinarily be filed with the Board, as is currently done in standard orders.

A commenter voiced complaints about the current rule requiring that a motion to compel be filed within 10 days. This commenter instead suggested that such motions should be filed within a reasonable time prior to the prehearing conference or the current standard should be changed to allow the parties to agree upon a longer period of time in which to file the motion to compel. This area of discovery practice was not addressed in the proposed rule. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.73 Discovery Procedures*

The MSPB proposed to eliminate the initial disclosure requirement of subsection (a), eliminate unnecessary distinctions between discovery on parties and nonparties, increase the time period in which initial discovery requests must be served, revise subparagraph (d)(4) to clarify that, if no other deadline has been specified, discovery must be completed no later than the prehearing or close of record conference, and amend subparagraph (c)(i) to reflect the MSPB's view that a motion to compel must contain a statement showing that the request was not only for relevant and material information, but that the scope of the request was reasonable. The proposed amendment also makes several other minor changes in the regulation.

A commenter queried why certain text in paragraph (c) was absent from the proposed regulation. The changes proposed in the comprehensive rewrite of this regulation were explained in the supplementary information section of the proposed rule.

A commenter suggested that the MSPB should address the application of (d)(1) and (d)(4) to matters refiled following a dismissal without prejudice by stating that the time for conducting discovery should restart on the date the judge issues an order reinstating the appeal. The MSPB believes that this change would be unwise and prefers to allow judges to address this matter in specific cases.

A commenter proposed to add the word "final" before the phrase "prehearing or close of the record conference." The MSPB will not make this change as there are not multiple prehearing or close of the record conferences in a case.



A commenter suggested that the MSPB replace “file” with “serve” in the first sentence of paragraph (d)(2) so it is clear that discovery responses should not be filed with the Board unless in connection with a motion to compel. The MSPB has amended paragraph (d)(2) by substituting the word “serve” for the word “file” to clarify that responses to discovery requests are served on the other party.

A commenter suggested that the MSPB should require that all discovery requests made upon nonparties be served on the opposing party. A party can request in discovery that such requests be disclosed.

A commenter agreed with the elimination of initial disclosures for agencies but objected to the elimination of initial disclosure requirements for appellants because the agency will lack key information about the appellant’s witnesses if it must affirmatively ask for this information through discovery. The MSPB believes that removing the initial disclosures requirements for one party but not the other would be unfair.

A commenter recommended adding limits on discovery and interrogatory requests, including subparts, consistent with those under the Federal Rules of Civil Procedure. Such limits are set forth in paragraph (e) of the proposed rule.

A commenter suggested that the MSPB add a requirement similar to FRCP 26(b)(5), which requires a party to produce a privilege log when it asserts a privilege as the basis for withholding otherwise discoverable information. In making proposed amendments to our regulations, the Board did not propose changes to this area of discovery practice. It would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

A commenter suggested that the MSPB should set prehearing deadlines to accommodate the completion of discovery instead of limiting discovery to meet prehearing dates. The scheduling of a prehearing conference must be left to the discretion of the judge. If a party believes insufficient time is available for discovery, he or she may seek a suspension under 1201.28.

A commenter suggested that the MSPB include a provision mandating an automatic stay of all discovery deadlines if the Board’s jurisdiction is called into question, with the stay

remaining in effect until the jurisdictional issues are adjudicated. The MSPB has determined that adding such a provision is inadvisable because it would add significant delay to the adjudication of cases ultimately found to be within its jurisdiction. A party is free to ask for such a stay in an individual case.

A commenter opposed the requirement of (c)(1)(i) that the party moving to compel discovery produce “a statement showing that the information is relevant and material and the scope of the request is reasonable” as contrary to the proper standard for discovery—that the information sought is likely to lead to the discovery of admissible evidence. In response to this comment and the differing scopes of discovery that apply to parties and nonparties (see § 1201.72(a) and (b)), the MSPB has modified paragraph (c)(1)(i), to refer back to 1201.72.

#### *Section 1201.81 Requests for Subpoenas*

The MSPB did not offer any amendments to this regulation in the proposed rule. However, in light of the amendment in the final rule to 1201.73(c)(1)(i) regarding motions to compel or issue a subpoena, the MSPB also deemed it appropriate to amend 1201.81(c) so that it is consistent with the standard described in section 1201.72(b): “Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.”

#### *Section 1201.93 Procedures*

The MSPB proposed to replace “hearing” with the word “appeal” because there may or may not be a pending hearing in a case where an interlocutory appeal has been certified to the Board. The MSPB also proposed to use the term “stay the processing of the appeal” in lieu of the term “stay the appeal” to avoid any ambiguity.

A party observed that the proposed rule allows a stay during an interlocutory appeal, but it is unclear whether this stay is charged against the 60-day aggregate limit on case suspensions. We agree and have revised the regulation to clarify that a stay granted in response to an interlocutory appeal is not related to a case suspension under 1201.28 and therefore any time the case is subject to such a stay is not counted against the time allowed for case suspensions under 1201.28.

#### *Section 1201.101 Explanation and Definitions*

The MSPB proposed an amendment to clarify that Mediation Appeals Program (MAP) mediators and settlement judges may discuss the merits of an MSPB case with a party without running afoul of the prohibition on ex parte communication. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.111 Initial Decision by the Judge*

The MSPB proposed to delete language about serving the Office of Personnel Management (OPM) and the Clerk of the Board with initial decisions to conform with longstanding Board practice under which OPM has access to all of the Board’s initial and final decisions via the MSPB Extranet.

A party recommended against deleting all reference to the Board’s responsibility to serve OPM, as this is a statutory duty under 5 U.S.C. 7701(b)(1). The MSPB has amended the proposed rule to address this comment.

#### *Section 1201.112 Jurisdiction of the Judge*

The MSPB proposed an amendment that would allow an administrative judge to vacate an initial decision to accept a settlement agreement into the record when the settlement agreement is filed by the parties prior to the deadline for filing a petition for review but is not received until after the date when the initial decision would become the Board’s final decision by operation of law. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.113 Finality of Decision*

The MSPB proposed to amend paragraph (a) to conform this regulation to the proposed revision to 5 CFR 1201.112(a)(4) described above. The MSPB proposed to add paragraph (f) to indicate that the Board will make a referral to OSC to investigate and take any appropriate disciplinary action whenever the Board finds that an agency has engaged in reprisal against an individual for making a protected whistleblowing disclosure.

A commenter suggested that the MSPB address the difficulty that arises when a judge orders compliance with an initial decision on a date prior to the date the initial decision becomes final. Except for orders granting interim relief, compliance should not be ordered before the finality date and the MSPB’s standard orders are formatted to avoid



this from occurring. The MSPB sees no need to address this situation in its regulations.

Several commenters pointed out a typographical error in the opening sentence. The MSPB has corrected this error.

A commenter noted that the proposed language places no restriction on the timeframe for a final decision. There is no time limit within which the Board must issue a decision on a pending petition for review, but the Board attempts to resolve cases as quickly as it can.

A commenter objected to the “reason to believe” standard for referral of a prohibited personnel practice to OSC as too low and vague. The commenter further suggested that referral to OSC should remain limited to IRA appeals in which the Board found that the agency retaliated against the appellant and that such a referral divests the agency of its responsibility to address the issue internally. In the MSPB’s view, the reasonable belief standard is neither too vague nor too low. In any event, the “reason to believe” standard is prescribed by statute, 5 U.S.C. 1221(f)(3), and the Board is not free to modify it. The Board has an obligation to make such a referral whenever it makes a finding that an appellant in a Board proceeding suffered retaliation for protected whistleblowing in violation of 5 U.S.C. 2302(b)(8). In our view, a referral by the Board to OSC does not in any way prevent the agency in question from taking appropriate disciplinary action. The Board proceeding focuses on whether the appellant suffered such retaliation; it does not focus on who was responsible for the retaliation, whether such official(s) should be disciplined, and, if so, what the extent of such discipline should be. OSC is the agency charged with making those determinations.

#### *Section 1201.114 Petition and Cross Petition for Review—Content and Procedure*

The MSPB proposed page limitations for pleadings on petition for review, to allow for replies to responses to petitions for review, and to define petitions for review and cross petitions for review. Paragraph (b) was amended to specify that a petition or cross petition for review must include “all of the party’s legal and factual arguments.”

A commenter noted that the references in (a)(1), (2), (4), and (5) to “a party” are incomplete to the extent they do not include OPM and the Special Counsel. The phrase “a party” includes both of these agencies. See 5 CFR 1201.4(e).

A commenter asked the MSPB to clarify in its regulations whether a reply to a response to a petition for review is permitted. The proposed regulations clearly indicate that such a pleading is authorized.

Commenters recommended spacing limits and/or word limits, in addition to page limits and set forth the consequences of noncompliance. In response to this comment, the MSPB has modified paragraph (h) to include alternate word count requirements (in addition to page limits) and modified other language slightly. Paragraph (l) was added to address the consequences of noncompliance.

A commenter noted that paragraph (f) only allows a party to file an extension “before the date on which the petition for review is due” and that the MSPB should provide for extenuating circumstances that may arise on the date of filing. This comment was addressed in a minor amendment to paragraph (f).

A commenter recommended that the MSPB, when the timeliness of a petition for review is at issue, should address the timeliness issue of a petition for review before the agency is required to submit its response on the merits. While this suggestion has some merit, it is impractical for the MSPB to adopt this suggestion given the number of petitions for review it receives. In addition, adopting this suggestion would inevitably delay the resolution of those petitions for review ultimately found to have been timely filed.

A commenter was unsure of the value of a reply brief and suggested that the MSPB allow the filing of such brief on a trial basis. The MSPB does not plan to implement this change as a trial project. If this new pleading proves unhelpful, the MSPB may address it in a future rulemaking.

A commenter noted that the provisions on extensions of time and late filings seem to provide that an extension request made prior to the filing deadline serves as an extension without a formal ruling by the Board, at least until such a formal ruling is made and suggested that the automatic extension created by the filing of an extension request should be made explicit in the paragraph addressing extensions of time to file. The proposed rule does not provide that an extension request made on or before the filing deadline serves as an extension without a formal ruling by the Board.

#### *Section 1201.115 Criteria for Granting Petition or Cross Petition for Review*

The MSPB proposed an amendment to address the criteria for granting petitions and cross petitions for review.

A commenter objected that the use of the phrase “including but not limited to” when describing situations in which the MSPB may grant a petition or cross petition for review left the MSPB’s authority too open-ended. The MSPB’s intent in using this language was to give the MSPB the authority in other rare circumstances, either not foreseen in the regulation or inadvertently left out of the regulation, to grant such a petition. The general intent of the regulation is to grant a petition for review whenever the petitioner shows that: (1) The case was incorrectly decided based on the existing record; (2) new and material evidence indicates that the outcome should be different than in the initial decision; or (3) the petitioner did not get a full and fair adjudication process. As written, the regulation tries to capture the most common situations in which these conditions are present, but it could not capture all such circumstances.

A commenter suggested amending paragraph (e) to be clearer and preserve the power to reopen in 1201.118. We modified the wording of paragraph (e) to convey the meaning more clearly.

A commenter suggested that the MSPB adopt a 30-day time limit for reopening appeals. The MSPB believes such a rule lacks sufficient flexibility.

A commenter objected to the inclusion of “or legal argument” in the discussion in paragraph (d) concerning reliance upon new evidence or legal argument at the petition for review level. The MSPB’s intent in this regulation is to allow parties to raise new legal arguments arising from the discovery of new evidence, not any new legal argument a party wishes to raise belatedly. In addition, this language anticipates situations in which governing law has changed since the initial decision was issued.

#### *Section 1201.116 Compliance With Orders for Interim Relief*

The MSPB proposed to amend this regulation to combine the existing contents of 5 CFR 1201.116 with the provisions of 5 CFR 1201.115(b) and (c).

A commenter suggested that this regulation should be revised to provide an agency the opportunity to seek a stay of interim relief while its petition for review is pending. Another commenter expressed the concern that under paragraph (g) an appellant could be granted full interim relief although he or she is not the prevailing party in the final Board order. The Board declines to adopt these suggestions because stays of interim relief undermine the very purpose of granting such relief and risk engendering collateral litigation. The

MSPB sees no value in creating a separate system of reviewing this aspect of an initial decision while the petition for review is being considered.

A commenter suggested that the language of (d) should state that “[i]f the agency files a petition for review or a cross petition for review *or* has not provided required interim relief \* \* \*.” The MSPB will not implement this change as the dismissal of a petition or cross petition for review for failure to provide required interim relief is only possible in cases where such a pleading has been filed.

A commenter suggested that the regulation was unclear and asked if it is intended to give the appellant a discretionary opportunity to request dismissal of an agency petition for review for lack of proper interim relief under (d) and to provide another opportunity to challenge the completeness of interim relief under (g) in the event the agency petition for review is granted. The commenter’s interpretation of the proposed rule is correct, and the proposed rule is unambiguous.

#### *Section 1201.117 Procedures for Review or Reopening*

The MSPB proposed to amend subparagraph (a)(1) to reflect the significant revision to 5 CFR 1201.118, which would restrict “reopening” to situations in which the Board members have previously issued a final order or the initial decision has become the Board’s final order by operation of law.

A commenter requested that the MSPB reconsider its distinction between nonprecedential final orders and precedential opinions and orders as the commenter failed to see the characterization of a decision as “non-precedential” as meaningful. As the commenter noted, this request concerns an issue not addressed in the proposed rule. Therefore, while the MSPB has taken note of this comment, no amendment to the MSPB’s regulations is contemplated in this final rule. The MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

#### *Section 1201.118 Board Reopening of Final Decisions*

The MSPB proposed to amend this regulation to state that “reopening” only applies to, and should be reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board’s final decision by operation of law. The MSPB

also amended this regulation to incorporate well-established case law addressing the rare and limited circumstances in which the Board will reopen a final decision.

A commenter objected to the MSPB’s proposed amendment on the grounds that it would establish a very high standard that will make it difficult for OPM or other Federal agencies to successfully seek relief from an erroneous decision. The Board thinks the proposed standard is an appropriate general standard for reopening an appeal and believes that the concern that OPM will have difficulty seeking reopening is unwarranted as OPM can seek reconsideration under 5 U.S.C. 7701(e) and 1201.119.

A commenter observed that the amended regulation includes no time limit on the Board’s authority to reopen a case. The MSPB does not believe that a preset time limit for filing a request to reopen an appeal is appropriate and is confident that that current language stating that such a request must generally be filed within a short time after the decision becomes final is sufficient to guard against late-filed requests.

A commenter was concerned that the proposed regulation would severely limit the MSPB’s authority to reopen and reconsider cases on its own motion and appears to conflict with the broad authority granted the MSPB under 5 U.S.C. 7701(e)(1). The Board believes that reopening or reconsidering a final decision must be confined to rare and limited circumstances and that nothing in the proposed regulation conflicts with the grant of authority given to the MSPB under 5 U.S.C. 7701(e)(1).

A commenter requested clarification of the impact of the proposed amendments on petitions for review. The proposed rule has no effect on petitions for review.

#### *Section 1201.119 OPM Petition for Reconsideration*

The MSPB proposed to make minor wording changes in this regulation in light of the language used in 5 CFR 1201.117 and 1201.118, and to eliminate any confusion between “Final Order” as the document title of a particular type of final Board decision and the generic term “final decision,” which applies to any type of final decision, whether it is an Opinion and Order or a “Final Order.”

The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.122 Filing Complaint; Serving Documents on Parties*

This proposed rule was intended to correct an oversight in the MSPB’s regulations relating to the use of e-Appeal in original jurisdiction actions. The MSPB also proposed to amend paragraph (a) to require OSC to file a single copy of the complaint. Paragraphs (d) and (e) were deleted as unnecessary.

The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.128 Filing Complaint; Serving Documents on Parties*

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.134 Deciding Official; Filing Stay Request; Serving Documents on Parties*

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.137 Covered Actions; Filing Complaint; Serving Documents on Parties*

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. A commenter recommended that the MSPB eliminate the requirement in paragraph (c) that the agency file two copies of the complaint on the MSPB. The MSPB has made this change in the proposed rule.

#### *Section 1201.142 Actions Filed by Administrative Law Judges*

The MSPB proposed to correct a typographical error in this regulation. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.143 Right to Hearing; Filing Complaint; Serving Documents on Parties*

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. A minor technical amendment has been made to paragraph (c) to be consistent with requirements for filing new appeals under the Board’s appellate jurisdiction. Section 1201.26(a) provides

that the appellant “must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14. Unlike the original jurisdiction appeals under 1201.122, .128, and .134, the MSPB needs a second copy for service on the opposing party.

#### *Section 1201.153 Contents of Appeal*

The MSPB proposed to amend (a)(2) to clarify that not all discrimination matters may be raised with the Board and substitute the term “under a negotiated grievance procedure” for the word “grievance” to reflect that these are the only types of grievances covered under the mixed cases regulations. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.154 Time for Filing Appeal; Closing Record in Cases Involving Grievance Decisions*

The MSPB proposed to incorporate by reference the rules governing constructive receipt as proposed in 5 CFR 1201.22(b)(3). The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.155 Requests for Review of Arbitrators' Decisions*

The MSPB proposed to remove the existing regulation as unnecessary and put in its place a new regulation addressing requests for review of arbitrators' decisions. The proposed rule also removed the existing regulation at 5 CFR 1201.154(d) and moved it into 5 CFR 1201.155. The MSPB has noted that the instructions in the proposed rule did not actually delete paragraph (d) from section 1201.154; nor did it delete paragraph (e), which also relates to review of arbitrators' decisions, from section 1201.155. In addition, the MSPB had neglected to incorporate language from paragraph (d) as to when a request for review of an arbitrator's decision must be filed. The final rule corrects these oversights. The requirement as to when a request for review must be filed is now paragraph (b) in section 1201.155, and what had been proposed as paragraphs (c) through (e) have become paragraphs (d) through (f).

Several commenters objected to a provision in paragraph (d) (now paragraph (e)) allowing an issue to be given to a judge for development of the record. These commenters stated that where a remand is necessary, the matter should be returned to the arbitrator, that the MSPB's proposed rule conflicts with

the collective bargaining process, and that it would be prejudicial to the agency to allow the claim to be raised for the first time upon the MSPB's review of an arbitrator's award. We were concerned that remand to the arbitrator is not practical or feasible in most cases. Arbitration is a matter of contract and, once the arbitrator has issued an award, the contract has been performed and the arbitrator has been paid. The arbitrator could not become involved with the case on remand unless the union and the agency agreed to create a new contract. We felt it would be more practical and efficacious to forward such cases to MSPB judges where further development of the record is required.

A commenter objects to paragraph (b), which would limit review to cases in which the employee's claim of discrimination was raised in the negotiated grievance procedure as inconsistent with the “notwithstanding” clause of 5 U.S.C. 7702. The Board does not believe this change is inconsistent with the “notwithstanding” clause of section 7702, and does not construe the Federal Circuit's decision in *Jones* as compelling a contrary conclusion. An appellant who raises a discrimination claim to the arbitrator in addition to the Title 5 or other employment claim will be entitled to an adjudication of both. All the Board is doing is specifying when the claim of discrimination must be raised. We note that section 7121(d) provides for Board review of “the final decision [of the arbitrator] pursuant to section 7702 of this title \* \* \*.” If the Board were to adjudicate a claim of discrimination that could have been but was not raised to the arbitrator, it would not be reviewing the arbitrator's final decision with respect to that claim; it would be adjudicating the claim *de novo*.

#### *Section 1201.181 Authority and Explanation*

The MSPB proposed non-substantive changes to this regulation that merely reordered the information and added descriptive labels to each paragraph. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.182 Petition for Enforcement*

The MSPB proposed to amend this regulation to clarify that the Board's enforcement authority under 5 U.S.C. 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of

enforcement as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

A commenter observed that few agencies inform the appellant when they believe that compliance is complete and therefore the time limit for filing an enforcement petition will rarely be triggered by the issuance of a notice of compliance by the agency. This commenter suggested that the Board should provide a deadline for an agency to issue a compliance notice and, if the compliance notice is issued, provide the appellant 30 days to file an enforcement petition. The commenter further suggested that, if the agency does not file a compliance notice, the regulation should give the appellant a reasonable period of time to file his or her petition after such notice should have been filed by the agency. The MSPB recognizes and appreciates the concerns raised by the commenter but believes that the current rule is more appropriate, especially in light of the complicated issues that sometimes arise in an agency's attempt to comply with an MSPB order, such as when compliance with a Board order requires the involvement of another agency.

#### *Section 1201.183 Procedures for Processing Petitions for Enforcement*

The MSPB proposed amendments to this regulation to change the nature of an administrative judge's decision in a compliance proceeding from a “recommendation” to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The proposed regulation provided that the “responsible agency official,” whose pay may be suspended should a finding of noncompliance become the Board's final decision, will be served with a copy of any initial decision finding the agency in noncompliance. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. The MSPB also proposed in paragraph (c) to codify the different burdens of proof that apply in these enforcement actions.

Commenters observed that the proposed rule, which eliminates the “good faith” consideration in evaluating a party's compliance with a final decision, establishes a stricter standard than that provided for under Rule 70 of the Federal Rules of Civil Procedure and arguably establishes a strict liability standard. These commenters recommended that the good faith

element be re-inserted into the regulation as there are occasions when an agency, even if it acted with diligence in attempting to comply with an order, cannot do so within the time frame specified by the order. The objective behind the change to this regulation is threefold: (1) To get the agencies to take their obligations seriously during the regional office proceeding; (2) to get the judges to actually resolve and make concrete what the agency's obligations are; and (3) to the maximum feasible extent, get actual compliance at the regional office level. Under this new framework, it is irrelevant whether the agency has made a good faith attempt to comply with its obligations. What is required is full and complete compliance. Retaining the "good faith" provision would run counter to these purposes.

A commenter recommended that the regulation be amended to require that a copy of the initial decision finding noncompliance be served not only on the responsible agency official, but also on all other parties on the certificate of service. The MSPB will not make this proposed amendment as nothing in the regulation suggests that the requirement to serve the responsible agency official will affect service on any other person.

A commenter pointed out that the Board stated in the notice of proposed rulemaking that an initial decision finding noncompliance would become final if neither party petitioned for review, but paragraph (b) of the proposed regulation stated that, "[f]ollowing review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance." This seemed to imply that initial decisions would not become final if no pleadings were filed. New paragraph (b) clarifies this issue by providing that the initial decision will become the Board's final compliance decision if the noncomplying party files neither a petition for review nor a statement of compliance, and that the matter will then be processed further under the enforcement provisions of the regulation.

#### *Heading of Subpart H*

The Board proposed to revise the heading for Subpart H of Part 1201 to reflect that the subpart addresses attorney fees and related costs, consequential damages, compensatory damages, and liquidated damages. The MSPB received no comments concerning this proposed amendment and is adopting the proposed change as previously published.

#### *Section 1201.201 Statement of Purpose*

The MSPB proposed to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1202.202 Authority for Awards*

The MSPB proposed to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1201.204 Proceedings for Consequential, Liquidated, and Compensatory Damages*

The MSPB proposed to change "3-member Board" to "the Board" in order to cover situations in which there are only two Board members. In addition, because requests for "liquidated damages" in VEOA appeals are also handled in addendum proceedings, the MSPB proposed to modify this regulation to include requests for such damages. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Appendix III to Part 1201*

The MSPB proposed to remove and reserve Appendix III. See earlier discussion regarding proposal to amend 5 CFR 1201.51(d).

#### *Section 1203.2 Definitions*

The MSPB proposed to revise this regulation to acknowledge that there are now 12 prohibited personnel practices. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1208.3 Application of 5 CFR Part 1201*

The MSPB proposed to amend this section to reflect the references to liquidated damages in section 5 CFR 1201.204. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1208.21 VEOA Exhaustion Requirement*

The MSPB proposed to amend paragraph (a) to clarify and codify an appellant's burden of proving exhaustion in a VEOA appeal. The MSPB proposed in paragraph (b) to add a section addressing equitable tolling.

The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1208.22 Time of Filing*

The MSPB proposed to add paragraph (c) to address the possibility of excusing an untimely filed appeal under the doctrine of equitable tolling.

A commenter stated that by providing examples of circumstances that could support equitable tolling, the MSPB may be limiting the circumstances that will be described by appellants and recommended that the MSPB change the language from "examples include" to "examples include, but are not limited to." The MSPB sees no need to make this change as the phrase "examples include" clearly indicates that the stated examples are not an exclusive list of all available circumstances that could support a claim of equitable tolling.

#### *Section 1208.23 Content of a VEOA Appeal; Request for Hearing*

The MSPB proposed to amend this regulation to reflect the fact that it will scrutinize the exhaustion issue in a VEOA appeal in the same way that it scrutinizes the exhaustion issue in an IRA appeal. The proposed amendment therefore added a new subparagraph between current 5 CFR 1208.23(a)(4) and (5), stating that a VEOA appeal must contain evidence to identify the specific claims that the appellant raised before the Department of Labor. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### *Section 1209.2 Jurisdiction*

The MSPB proposed to change the reference in paragraph (a) from 5 U.S.C. 1214(a)(3) to 5 U.S.C. 1221(a). In addition, in light of a 1994 amendment to 5 U.S.C. 7121 adding paragraph (g), the MSPB proposed to overrule a significant body of Board case law and amend this regulation to provide that an employee affected by a prohibited personnel practice "may elect not more than one" of 3 remedies: (A) An appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). The proposed amendment also made clear that an election is deemed to have been made based on which of the 3 actions the individual files first. The proposed rule further stated that when taking an otherwise

appealable action, agencies would be required, per revised 5 CFR 1201.21, to advise employees of their options under 5 U.S.C. 7121(g) and the consequences of such an election.

Several commenters object to the new election of remedies provision contained in paragraph (d). These commenters argue that the election requirement in paragraph (d) is not required under 5 U.S.C. 7121(g) because that statute applies only to employees covered by collective bargaining agreements. As explained in the supplementary information section of the proposed rule, the MSPB is convinced that a plain reading of 5 U.S.C. 7121(g) indicates that an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal and is limited to the rights associated with such an appeal. The proposed rule therefore adopted the plain language reading of 5 U.S.C. 7121(g) and proposed to overrule *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993) and its progeny.

An employee who is not covered by a negotiated grievance procedure does not have all three of the options listed in subsection 7121(g)(3), as he or she cannot elect the negotiated grievance procedure. That does not mean, however, that the statute therefore contemplates that such an individual may elect both of the other two options; it simply means that the individual has to select one or the other of those two options. We note in this regard that the term “employee” in 5 U.S.C. chapter 71 is not limited to those covered by negotiated grievance procedures. See 5 U.S.C. 7103(a)(2).

Several commenters expressed concern about the relationship between elections following proposed and effected personnel actions. One commenter noted that when an employee has filed a complaint with OSC at the proposal notice stage and thereafter wants to file a direct appeal once an action has been taken, the employee will be required to withdraw the OSC complaint regarding the proposal notice in order to get full direct appeal rights as to the removal. The MSPB does not agree that the new election provision would require this result. In the MSPB’s view, an employee would be able to make separate elections for both the proposed and effected actions and pursue the remedy selected for each action. The MSPB understands that there remain practical concerns when an individual wants to pursue with OSC the claim that a

proposal notice was retaliation for whistleblowing, while pursuing a direct appeal with the Board for the effected adverse action. In particular, there would be the possibility that the adverse action appeal might proceed toward the issuance of an initial decision before OSC has the opportunity to investigate the claim and pursue corrective action on the individual’s behalf. We note in this regard that the appellant in the adverse action appeal could seek a stay under section 1201.28 or a dismissal without prejudice under section 1201.29, to ensure that OSC has an opportunity to complete its investigation and seek corrective action.

A commenter agreed that the MSPB had no choice but to reconcile its regulations regarding election of remedies with the requirements of 5 U.S.C. 7121(g) but argued that the MSPB should not apply the new election provision retroactively as retroactive application is not favored in the law and would lead to confusion and increased litigation. The new election of remedies provision does not address whether it may be applied retroactively. However, with regard to this issue, it must be noted that Congress amended 5 U.S.C. 7121 to add paragraph (g) in 1994. Public Law 103–424, section 9(b), 108 Stat. 4361, 4365–66 (1994). There would be difficult interim questions concerning cases that are already in the pipeline. One issue would be whether, despite the seemingly clear language and consequences of § 7121(g), the appellant should be deemed to have made a valid and binding election. An argument might be made that an election is not binding unless it constitutes a knowing and informed decision. *Cf. Atanus v. Merit Systems Protection Board*, 434 F.3d 1324, 1326–27 (Fed. Cir. 2006) (concluding that the appellant made a knowing and informed, and therefore binding, election under § 7121(e)). The proposed regulation does not resolve this question, which would be resolved in particular appeals. If the Board were to hold that some elections were not binding, a related question would be whether the Board should excuse the untimely filing of the Board appeal, which would be filed well after the 30-day deadline of 5 CFR 1201.22(b)(1). Again, this would be resolved in particular appeals.

#### Section 1209.4 Definitions

The MSPB proposed to amend the definition of “whistleblowing.” The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### Section 1209.5 Time of Filing

The MSPB proposed to amend this regulation to eliminate the distinction between IRA appeals and otherwise appealable actions in light of the change made to 5 CFR 1209.2, and to revise the language regarding equitable tolling consistent with the changes made in sections 5 CFR 1208.21 and .22.

A commenter stated that by providing examples of circumstances that could support equitable tolling, the MSPB may be limiting the circumstances that will be described by appellants and recommended that the MSPB change the language from “examples include” to “examples include, but are not limited to.” The MSPB sees no need to make this change as the phrase “examples include” clearly indicates that the stated examples are not an exclusive list of all available circumstances that could support a claim of equitable tolling.

#### Section 1209.6 Content of Appeal; Right to Hearing

As in the modification to 5 CFR 1201.24(d), the MSPB proposed to clarify that an appellant does not automatically have a right to a hearing in every Board appeal and that such a right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

#### Comments Beyond the Scope of the Proposed Rule

The MSPB solicited comments on any other aspect of its adjudicatory regulations in its proposed rule. The MSPB received a number of comments on such matters and appreciates the thoughtfulness with which the commenters made their views known. The MSPB has reviewed these submissions and will consider each of the commenters’ ideas as it continues to strive to improve its adjudicatory regulations.

One comment received by the MSPB addressed two issues that the commenter, after noting that the two issues were beyond the scope of matters addressed in the proposed rule, asked the MSPB to consider as a petition for rulemaking. In keeping with the MSPB’s proposed rule regarding petitions for rulemaking and the MSPB’s commitment to post such requests on its Web site, the MSPB will shortly post this request on its Web site with a request for comments from interested parties. The petition asks the MSPB to replace the definition of

“preponderance of the evidence” in 5 CFR 1201.56(c)(2) and correct a perceived error regarding the burdens of proof in a case under 5 U.S.C. 4303 in its holding in *Griffin v. Department of the Army*, 23 M.S.P.R. 657 (1984).

#### **List of Subjects in 5 CFR Parts 1200, 1201, 1203, 1208, and 1209**

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR parts 1200, 1201, 1203, 1208, and 1209 as follows:

#### **PART 1200—[AMENDED]**

- 1. The authority citation for 5 CFR part 1200 continues to read as follows:

**Authority:** 5 U.S.C. 1201 et seq.

- 2. Add § 1200.4 as follows:

##### **§ 1200.4 Petition for Rulemaking.**

(a) Any interested person may petition the MSPB for the issuance, amendment, or repeal of a rule. For purposes of this regulation, a “rule” means a regulation contained in 5 CFR parts 1200 through 1216. Each petition shall:

(1) Be submitted to the Clerk of the Board, 1615 M Street NW., Washington, DC 20419;

(2) Set forth the text or substance of the rule or amendment proposed or specify the rule sought to be repealed;

(3) Explain the petitioner’s interest in the action sought; and

(4) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) No public procedures will be held on the petition before its disposition. If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate under the Administrative Procedure Act. If the Board finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Board may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

#### **PART 1201—PRACTICES AND PROCEDURES**

- 3. The authority citation for 5 CFR part 1201 continues to read as follows:

**Authority:** 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

- 4. In § 1201.3, revise paragraph (a) to read as follows:

##### **§ 1201.3 Appellate Jurisdiction.**

(a) *Generally.* The Board’s appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The Board’s jurisdiction does not depend solely on the label or nature of the action or decision taken or made but may also depend on the type of Federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board’s jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:

(1) *Adverse Actions.* Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511–7514; 5 CFR part 752, subparts C and D);

(2) *Retirement Appeals.* Determinations affecting the rights or interests of an individual under the Federal retirement laws (5 U.S.C. 8347(d)(1)–(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);

(3) *Termination of Probationary Employment.* Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));

(4) *Restoration to Employment Following Recovery from a Work-Related Injury.* Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);

(5) *Performance-Based Actions Under Chapter 43.* Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432);

(6) *Reduction in Force.* Separation, demotion, or furlough for more than 30 days, when the action was effected

because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011);

(7) *Employment Practices Appeal.* Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);

(8) *Denial of Within-Grade Pay Increase.* Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410);

(9) *Suitability Action.* Action based on suitability determinations, which relate to an individual’s character or conduct that may have an impact on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a));

(10) *Various Actions Involving the Senior Executive Service.* Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or Furlough of a career appointee (5 CFR 359.805); and

(11) *Miscellaneous Restoration and Reemployment Matters.*

(i) Failure to afford reemployment priority rights pursuant to a Reemployment Priority List following separation by reduction in force (5 CFR 330.214);

(ii) Full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 302.501);

(iii) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508);

(iv) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);

(v) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);

(vi) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707); or

(vii) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807).

■ 5. In § 1201.4 revise paragraphs (a) and (j) and add new paragraph (o) to read as follows:

**§ 1201.4 General definitions.**

(a) *Judge*. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including the Board or any member of the Board, or an administrative law judge appointed under 5 U.S.C. 3105 or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge.

(j) *Date of service*. “Date of service” has the same meaning as “date of filing” under paragraph (l) of this section.

(o) *Grievance*. A complaint by an employee or labor organization under a negotiated grievance procedure covered by 5 U.S.C. 7121.

■ 6. In § 1201.14 revise paragraphs (c) and (m)(1) to read as follows:

**§ 1201.14 Electronic Filing Procedures.**

(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.

(m) \* \* \*

(1) As provided in § 1201.4(l) 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.

■ 7. In § 1201.21 revise paragraphs (d) introductory text, (d)(2), (d)(3) and add new paragraphs (d)(4), (e) and (f) to read as follows:

**§ 1201.21 Notice of appeal rights.**

(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:

(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 an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.

■ 8. In § 1201.22, add paragraph (b)(3) to read as follows:

**§ 1201.22 Filing an appeal and responses to appeals.**

(b) \* \* \*

(3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is properly addressed and sent to the appellant's address via postal or commercial

delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule:

*Example A:* An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.

*Example B:* An appellant who did not receive his or her mail while in the hospital may overcome the presumption of actual receipt.

*Example C:* An appellant may be deemed to have received an agency decision received by his or her roommate.

■ 9. Revise § 1201.23 to read as follows:

**§ 1201.23 Computation of time.**

In computing the number of days allowed for complying with any deadline, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date. Unless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail.

*Example 1:* If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.

*Example 2:* The judge orders the appellant to file a response to a jurisdictional order no later than October 15, 2012, and that the agency's response is due 10 days after the filing of the appellant's pleading. If the appellant serves the agency with a pleading via regular mail on October 15, the agency's deadline for filing a response will be October 30, not October 25.

■ 10. In § 1201.24, revise paragraphs (a)(7) and (d) to read as follows:

**§ 1201.24 Content of an appeal; right to hearing.**

(7) Where applicable, a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF-50 or similar notice of



personnel action. No other attachments should be included with the appeal, as the agency will be submitting the documents required by 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. An appellant should not miss the deadline for filing merely because he or she does not currently have all of the documents specified in this section.

\* \* \* \* \*

(d) *Right to hearing.* An appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.

\* \* \* \* \*

■ 11. Revise § 1201.28 to read as follows:

**§ 1201.28 Case suspension procedures.**

(a) *Suspension period.* The judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days.

(b) *Early termination of suspension period.* The administrative judge may terminate the suspension period upon joint request of the parties or where the parties request the judge's assistance and the judge's involvement is likely to be extensive.

(c) *Termination of suspension period.* If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall resume as of the first business day following the expiration of the period.

(d) *Mediation.* Whenever an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the judge. This provision does not apply where the parties enter into other forms of alternative dispute resolution.

■ 12. Add § 1201.29 as follows:

**§ 1201.29 Dismissal without prejudice.**

(a) *In general.* Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal.

(b) *Procedure.* Dismissal without prejudice may be granted on the judge's own motion or upon request by either party. The decision whether to dismiss an appeal without prejudice is committed to the sound discretion of the judge, and may be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.

(c) *Refiling.* Except in certain USERRA appeals under Part 1208 involving the use of military leave, a decision dismissing an appeal without prejudice will include a date certain by which the appeal must be refiled. The judge will determine whether the appeal must be refiled by the appellant or whether it will be automatically refiled by the judge as of a date certain. When a dismissal without prejudice is issued over the objection of the appellant, the appeal will be automatically refiled as of a date certain.

(d) *Waiver.* When a dismissed appeal must be refiled by the appellant, requests for waiver of a late filing based upon good cause will be liberally construed.

■ 13. In § 1201.31, revise paragraphs (b) and (d) as follows:

**§ 1201.31 Representatives.**

\* \* \* \* \*

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation or 15 days after a party becomes aware of the conflict. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

\* \* \* \* \*

(d) As set forth in paragraphs (d) and (e) of § 1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.

\* \* \* \* \*

■ 14. In § 1201.33, revise paragraph (a) to read as follows:

**§ 1201.33 Federal witnesses.**

(a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when ordered by the judge to do so. When providing those statements or appearing at a deposition or at the

hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). When a desired witness is employed by an agency who is not a party to the Board proceeding, the requesting party may avail itself of the provisions of sections 1201.81 to 1201.85 of this part regarding subpoenas to ensure the attendance of the witness. In addition, the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations governing the production of Federal employees in matters in litigation.

\* \* \* \* \*

■ 15. In § 1201.34, revise paragraph (e) to read as follows:

**§ 1201.34 Intervenor and amicus curiae.**

\* \* \* \* \*

(e) *Amicus curiae.* (1) An amicus curiae is a person or organization who, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The Board may solicit amicus briefs on its own motion.

(2) A request to file an amicus curiae brief must include a statement of the person's or organization's interest in the appeal and how the brief will be relevant to the issues involved.

(3) The request may be granted, in the discretion of the judge or the Board, if the person or organization has a legitimate interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof.

(4) The amicus curiae shall submit its brief within the time limits set by the judge or the Board and must comply with any further orders by the judge or the Board.

(5) An amicus curiae is not a party to the proceeding and may not participate in any way in the conduct of the hearing, including the presentation of evidence or the examination of witnesses. The Board, in its discretion, may invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.

■ 16. In § 1201.36, revise paragraph (a)(2) to read as follows:

**§ 1201.36 Consolidating and joining appeals.**

(a) \* \* \*

(2) Joinder occurs when one person has filed two or more appeals and they

are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent removal if the same appellant filed both appeals.

\* \* \* \* \*

■ 17. In § 1201.41, revise the first sentence of paragraph (b) as follows:

**§ 1201.41 Judges.**

\* \* \* \* \*

(b) *Authority.* Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. \* \* \*

\* \* \* \* \*

■ 18. In § 1201.42, revise paragraph (a) to read as follows:

**§ 1201.42 Disqualifying a Judge.**

(a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and another judge will be promptly assigned.

\* \* \* \* \*

■ 19. In § 1201.43, revise the introductory paragraph and add new paragraphs (d) and (e) to read as follows:

**§ 1201.43 Sanctions.**

The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), (c), (d), and (e) of this section. Before imposing a sanction, the judge shall provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document the reasons for any resulting sanction in the record.

\* \* \* \* \*

(d) *Exclusion of a representative or other person.* A judge may exclude or limit the participation of a representative or other person in the case for contumacious conduct or conduct prejudicial to the administration of justice. When the judge excludes a party's representative, the judge will afford the party a reasonable time to obtain another representative before proceeding with the case.

(e) *Cancellation, suspension, or termination of hearing.* A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for contumacious conduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the

hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.

■ 20. In § 1201.51, revise paragraph (d) to read as follows:

**§ 1201.51 Scheduling the hearing.**

\* \* \* \* \*

(d) The Board has established certain approved hearing locations, which are listed on the Board's public Web site ([www.mspb.gov](http://www.mspb.gov)). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

■ 21. Revise § 1201.52 to read as follows:

**§ 1201.52 Public hearings.**

(a) *Closing the hearing.* Hearings are generally open to the public; however, the judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of a party, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.

(b) *Electronic devices.* Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room without the consent of the judge.

■ 22. Revise § 1201.53 to read as follows:

**§ 1201.53 Record of proceedings.**

(a) *Recordings.* A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically.

(b) *Transcripts.* A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board

as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts.

(c) *Copies.* Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Nonparties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulations. A nonparty may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. Nonparties may also make FOIA requests online at <https://foia.mspb.gov>.

(d) *Corrections to transcript.* Any discrepancy between the transcript and the recording shall be resolved by the judge or the Clerk of the Board, as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board, as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge or by the Clerk of the Board, as appropriate.

(e) *Official record.* Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 CFR parts 1204 and 1205.

■ 23. In § 1201.58, revise paragraph (c) and add paragraph (d) to read as follows:

**§ 1201.58 Closing the record.**

\* \* \* \* \*

(c) Once the record closes, additional evidence or argument will ordinarily not be accepted unless:

(1) The party submitting it shows that the evidence or argument was not readily available before the record closed; or

(2) It is in rebuttal to new evidence or argument submitted by the other party just before the record closed.

(d) The judge will include in the record any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

#### **§ 1201.62 [Removed]**

■ 24. Remove § 1201.62.

■ 25. Amend § 1201.71 by adding two new sentences at the end of the section to read as follows:

#### **§ 1201.71 Purpose of discovery.**

\* \* \* Discovery requests and responses thereto are not to be filed in the first instance with the Board. They are only filed with the Board in connection with a motion to compel discovery under 1201.73(c) of this part, with a motion to subpoena discovery under 1201.73(d) of this part, or as substantive evidence to be considered in the appeal.

■ 26. Revise § 1201.73 to read as follows:

#### **§ 1201.73 Discovery procedures.**

(a) *Initiating discovery.* A party seeking discovery must start the process by serving a request for discovery on the representative of the party or nonparty, or, if there is no representative, on the party or nonparty themselves. The request for discovery must state the time limit for responding, as prescribed in 1201.73(d) of this part, and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to the official or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) *Responses to discovery requests.* A party or nonparty must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and nonparties may respond to discovery requests by electronic mail if authorized by the requesting party.

(c) *Motions to compel or issue a subpoena.* (1) If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. If a nonparty fails

or refuses to respond in full to a discovery request, the requesting party may file a motion for the issuance of a subpoena directed to the individual or entity from which the discovery is sought under the procedures described in 1201.81 of this part. The requesting party must serve a copy of the motion on the other party or nonparty. Before filing any motion to compel or issue a subpoena, the moving party shall discuss the anticipated motion with the opposing party or nonparty, and all those involved shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include:

(i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72;

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201); and

(iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

(2) The party or nonparty from whom discovery was sought may respond to the motion to compel or the motion to issue a subpoena within the time limits stated in paragraph (d)(3) of this section.

(d) *Time limits.* (1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

(2) A party or nonparty must serve a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed by the judge. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.

(3) Any motion for an order to compel or issue a subpoena must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any

pleading in opposition to a motion to compel or subpoena discovery must be filed with the judge within 10 days of the date of service of the motion.

(4) Discovery must be completed within the time period designated by the judge or, if no such period is designated, no later than the prehearing or close of record conference.

(e) *Limits on the number of discovery requests.* (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts.

(2) Absent prior approval by the judge or agreement by the parties, each party may not take more than 10 depositions.

(3) Requests to exceed the limitations set forth in paragraphs (e)(1) and (e)(2) of this section may be granted at the discretion of the judge. In considering such requests, the judge shall consider the factors identified in § 1201.72(d) of this part.

■ 27. In 1201.81, revise paragraph (c) to read as follows:

#### **§ 1201.81 Requests for subpoenas.**

\* \* \* \* \*

(c) *Relevance.* The request must be supported by a showing that the evidence sought is directly material to the issues involved in the appeal.

\* \* \* \* \*

■ 28. In § 1201.93, revise paragraph (c) to read as follows:

#### **§ 1201.93 Procedures.**

\* \* \* \* \*

(c) *Stay of Appeal.* The judge has the authority to proceed with or to stay the processing of the appeal while an interlocutory appeal is pending with the Board. The passage of time during any stay granted under this section is not deemed, or accounted for, as a case suspension under § 1201.28 of this part. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.

■ 29. In § 1201.101, revise paragraph (b)(2) to read as follows:

#### **§ 1201.101 Explanation and definitions.**

\* \* \* \* \*

(b) \* \* \*

(2) *Decision-making official* means any judge, officer, or other employee of the Board designated to hear and decide cases except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge.

■ 30. In § 1201.111, revise paragraph (a) to read as follows:

**§ 1201.111 Initial decision by judge.**

(a) The judge will prepare an initial decision after the record closes and will serve that decision on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right. The Board satisfies its legal obligation under 5 U.S.C. 7701(b)(1) by making electronic copies of initial decisions available to the Office of Personnel Management.

\* \* \* \* \*

- 31. In § 1201.112, revise paragraph (a)(4) to read as follows:

**§ 1201.112 Jurisdiction of judge.**

(a) \* \* \*

(4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review but is not received until after the date when the initial decision becomes final under 1201.113 of this part.

\* \* \* \* \*

- 32. In § 1201.113, revise the introductory text, paragraph (a) and add paragraph (f) to read as follows:

**§ 1201.113 Finality of decision.**

The initial decision of the judge will become the Board's final decision 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become the Board's final decision if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record.

\* \* \* \* \*

(f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

\* \* \* \* \*

- 33. Revise § 1201.114 as follows:

**§ 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 the party submitting it shows that the evidence 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.

■ 34. Revise § 1201.115 to read as follows:

#### **§ 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.

■ 35. Revise § 1201.116 to read as follows:

#### **§ 1201.116 Compliance with orders for interim relief.**

(a) *Certification of compliance.* If the appellant was the prevailing party in the initial decision and the decision granted the appellant interim relief, any petition or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim

relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(b) *Challenge to certification.* If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(c) *Allegation of noncompliance in petition or cross petition for review.* If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(d) *Request for dismissal for noncompliance with interim relief order.* If the agency files a petition or cross petition for review and has not provided the required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit.

(e) *Effect of failure to show compliance with interim relief order.* Failure by an agency to provide the certification required by paragraph (a) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraphs (b), (c), or (d) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(f) *Back pay and attorney fees.* Nothing in this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

(g) *Allegations of noncompliance after a final decision is issued.* If the initial decision granted the appellant interim

relief, but the appellant is not the prevailing party in the final Board order disposing of a petition for review, and the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under 1201.182 of this part. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order disposing of a petition for review, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under 1201.183 of this part.

■ 36. In § 1201.117, revise paragraph (a)(1) to read as follows:

**§ 1201.117 Board decisions; procedures for review or reopening.**

(a) \* \* \*  
(1) Issue a decision that decides the case;

\* \* \* \* \*

■ 37. Revise § 1201.118 to read as follows:

**§ 1201.118 Board reopening of final decisions.**

Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final.

**§ 1201.119 [Amended]**

■ 38. In § 1201.119(a), (b), and (d), remove the words "final order" and add, in their place, the words "final decision".

■ 39. In § 1201.122, revise paragraph (b) and remove paragraphs (d) and (e) to read as follows:

**§ 1201.122 Filing complaint; serving documents on parties.**

(a) \* \* \*  
(b) *Initial filing and service.* The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party and the party's

representative, as shown on the certificate of service.

\* \* \* \* \*

■ 40. In § 1201.128, revise paragraph (b) and remove paragraphs (d) and (e) to read as follows:

**§ 1201.128 Filing complaint; serving documents on parties.**

\* \* \* \* \*

(b) *Initial filing and service.* The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought.

\* \* \* \* \*

■ 41. In § 1201.134, revise paragraph (d) and remove paragraphs (f) and (g) to read as follows:

**§ 1201.134 Deciding official; filing stay request; serving documents on parties.**

\* \* \* \* \*

(d) *Initial filing and service.* The Special Counsel must file a copy of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

\* \* \* \* \*

■ 42. In § 1201.137, revise paragraph (c) and remove paragraphs (e) and (f) to read as follows:

**§ 1201.137 Covered actions; filing complaint; serving documents on parties.**

\* \* \* \* \*

(c) *Initial filing and service.* The agency must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party and the party's representative, as shown on the certificate of service.

\* \* \* \* \*

■ 43. Revise § 1201.142 to read as follows:

**§ 1201.142 Actions filed by administrative law judges.**

An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and service requirements of § 1201.137 of this part apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

■ 44. In § 1201.143, revise paragraph (c) and remove paragraphs (e) and (f) to read as follows:

**§ 1201.143 Right to hearing; filing complaint; serving documents on parties.**

\* \* \* \* \*

(c) *Initial filing and service.* Except when filed electronically under 1201.14, the appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

\* \* \* \* \*

■ 45. In § 1201.153, revise paragraph (a)(2) to read as follows:

**§ 1201.153 Contents of appeal.**

(a) \* \* \*

(2) The appeal must state whether the appellant has filed a grievance under a negotiated grievance procedure or a formal discrimination complaint with any agency regarding the matter being appealed to the Board. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

\* \* \* \* \*

■ 46. In § 1201.154, revise the section heading and introductory paragraph, and remove paragraph (d) and (e) to read as follows:

**§ 1201.154 Time for filing appeal.**

For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3) of this part. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

\* \* \* \* \*

■ 47. Revise § 1201.155 to read as follows:

**§ 1201.155 Requests for review of arbitrators' decisions.**

(a) *Source and applicability.* (1) Under paragraph (d) of 5 U.S.C. 7121, an employee who believes he or she has been subjected to discrimination within the meaning of 5 U.S.C. 2302(b)(1), and who may raise the matter under either a statutory procedure such as 5 U.S.C. 7701 or under a negotiated grievance procedure, must make an election between the two procedures. The election of the negotiated grievance procedure "in no manner prejudices" the employee's right to request Board review of the final decision pursuant to 5 U.S.C. 7702. Subsection (a)(1) of section 7702 provides that, "[n]otwithstanding any other provision of law," when an employee who has been subjected to an action that is appealable to the Board and who alleges that the action was the result of discrimination within the meaning of 5 U.S.C. 2302(b)(1), the Board will decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701.

(2) This section does not apply to employees of the Postal Service or to other employees excluded from the coverage of the Federal labor management laws at chapter 71 of title 5, United States Code.

(b) *When filed.* The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that he or she received the decision more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision.

(c) *Scope of Board Review.* If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. If the negotiated grievance procedure does not permit allegations of discrimination to be raised, the appellant may raise such claims before the Board.

(d) *Contents.* The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to

relevant documents and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or recording of the hearing.

(e) *Development of the Record.* The Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing.

(f) *Closing of the Record.* The record will close upon expiration of the period for filing the response to the request for review, 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 the party submitting it shows that the evidence was not readily available before the record closed.

■ 48. Revise § 1201.181 to read as follows:

**§ 1201.181 Authority and explanation.**

(a) *Authority.* Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction and the authority to enforce compliance with its orders and decisions. The Board's decisions and orders, when appropriate, will contain a notice of the Board's enforcement authority.

(b) *Requirements for parties.* The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. Agencies must promptly inform an appellant of actions taken to comply and must inform the appellant when it believes compliance is complete. Appellants must provide agencies with all information necessary for compliance and should monitor the agency's progress towards compliance.

■ 49. In § 1201.182, revise paragraphs (a) and (b) as follows:

**§ 1201.182 Petition for enforcement.**

(a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction, or for enforcement of the terms of a settlement agreement that has been entered into the record for the purpose of enforcement in an order or decision under the Board's appellate jurisdiction. The petition must



be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.

(b) *Original jurisdiction.* Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

\* \* \* \*

■ 50. In § 1201.183, revise paragraphs (a)(2), (a)(5) through (a)(7), (b), (c), (d), and add paragraphs (a)(8), (e), and (f) as follows:

**§ 1201.183 Procedures for processing petitions for enforcement.**

(a) \* \* \*

(2) If the agency is the alleged noncomplying party, it shall submit the name, title, grade, and address of the agency official charged with complying with the Board's order, and inform such official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. 1204(a)(2) and (e)(2)(A), even if the agency asserts it has fully complied. The agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.

\* \* \* \*

(5) If the judge finds that the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for

enforcement and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. A copy of the initial decision will be served on the responsible agency official.

(6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in noncompliance must do the following:

(i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under § 1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision.

(ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§ 1201.114 and 1201.115 of this part.

(iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading.

(7) If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2) of this section.

(8) The complying party may file evidence and argument in response to any submission described in paragraph (a)(6) of this section by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed.

(b) *Final Decision of noncompliance.* If a party found to be in noncompliance under paragraph (a)(5) of this section does not file a timely pleading with the Clerk of the Board as required by paragraph (a)(6) of this section, the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section.

(c) *Consideration by the Board.* (1) Following review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency and the responsible agency official to appear before the Board to show why sanctions should not be imposed under 5 U.S.C.

1204(a)(2) and 1204(e)(2)(A). The Board also may require the agency and the responsible agency official to make this showing in writing, or to make it both personally and in writing. The responsible agency official has the right to respond in writing or to appear at any argument concerning the withholding of that official's pay.

(2) The Board's final decision on the issues of compliance is subject to judicial review under 1201.120 of this part.

(3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part.

(d) *Burdens of proof.* If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence.

(e) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order.

(f) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

■ 51. Revise the heading of Subpart H of part 1201 to read as follows:

**Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)**

\* \* \* \*

■ 52. In § 1201.201, revise paragraph (a) and add a new paragraph (e) as follows:

**§ 1201.201 Statement of purpose.**

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, compensatory damages, and liquidated damages.

\* \* \* \*

(e) An award equal to back pay shall be awarded as liquidated damages under 5 U.S.C. 3330c when the Board or a court determines an agency willfully violated an appellant's veterans' preference rights.

■ 53. In § 1201.202, redesignate paragraph (d) as paragraph (e), and add new paragraph (d) to read as follows:

**§ 1201.202 Authority for awards.**

\* \* \* \* \*

(d) *Awards of liquidated damages.* The Board may award an amount equal to back pay as liquidated damages under 5 U.S.C. 3330c when it determines that an agency willfully violated an appellant's veterans' preference rights.

\* \* \* \* \*

■ 54. In § 1201.204:

■ a. Remove the words "consequential damages or compensatory damages" wherever they appear, and add in their place, the words "consequential, liquidated, or compensatory damages", and;

■ b. Revise paragraph (h) introductory text to read as follows:

**§ 1201.204 Proceedings for consequential, liquidated, and compensatory damages.**

\* \* \* \* \*

(h) *Request for damages first made in proceeding before the Board.* Where a request for consequential, liquidated, or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

\* \* \* \* \*

**Appendix III to Part 1201 [Removed and Reserved]**

■ 56. Remove and reserve Appendix III to Part 1201.

**PART 1203—PROCEDURES FOR REVIEW OF RULES AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT**

■ 57. The authority citation for 5 CFR part 1203 continues to read as follows:

**Authority:** 5 U.S.C. 1204(a), 1204(f), and 1204(h).

■ 58. In § 1203.2, revise paragraph (e) to read as follows:

**§ 1203.2 Definitions.**

\* \* \* \* \*

(e) Prohibited personnel practices are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(12).

\* \* \* \* \*

**PART 1208—PRACTICES AND PROCEDURES FOR APPEALS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND THE VETERANS EMPLOYMENT OPPORTUNITIES ACT**

■ 59. The authority citation for 5 CFR part 1208 continues to read as follows:

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

■ 60. Revise § 1208.3 to read as follows:

**§ 1208.3 Application of 5 CFR part 1201.**

Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)) of 5 CFR part 1201 regarding awards of attorney fees and liquidated damages to appeals governed by this part.

■ 61. Revise § 1208.21 to read as follows:

**§ 1208.21 VEOA exhaustion requirement.**

(a) *General rule.* Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation. In addition, either the Secretary must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or, if the Secretary has not issued such notification and at least 60 days have elapsed from the date the complaint was filed, the appellant must have provided written notification to the Secretary of the appellant's intention to file an appeal with the Board.

(b) *Equitable tolling; extension of filing deadline.* In extraordinary circumstances, the appellant's 60-day deadline for filing a complaint with the Secretary 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.

■ 62. In § 1208.22, add a new paragraph (c) to read as follows:

**§ 1208.22 Time of filing.**

\* \* \* \* \*

(c) *Equitable tolling; extension of filing deadline.* In extraordinary circumstances, the appellant's 60-day deadline for filing an appeal with the MSPB 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.

■ 63. In § 1208.23, revise paragraphs (a)(5) and (a)(6) to read as follows:

**§ 1208.23 Content of a VEOA appeal; request for hearing.**

(a) \* \* \*

(5) Evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary; and

(6)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or

(ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement).

\* \* \* \* \*

**PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING**

■ 64. The authority citation for 5 CFR part 1208 continues to read as follows:

**Authority:** 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

■ 65. Revise § 1209.2 to read as follows:

**§ 1209.2 Jurisdiction.**

(a) Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) *Individual right of action (IRA) appeals.* These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

*Example 1:* Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

*Example 2:* As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days and because he testified on behalf of a co-worker in an EEO proceeding. The Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for filing a Board appeal would constitute a different prohibited personnel practice, 5 U.S.C. 2302(b)(9), retaliation for having exercised an appeal, complaint, or grievance right granted by any law, rule, or regulation. Similarly, retaliation for protected EEO activity is a prohibited personnel practice under subsection (b)(9), not under subsection (b)(8).

*Example 3:* Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Y files a complaint with OSC alleging that the proposed removal was initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of Federal law and regulation. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal.

(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. (Examples of such otherwise

appealable actions are listed in 5 CFR 1201.3(a).) An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.

*Example 4:* Same as Example 3 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if so, whether the agency can prove by clear and convincing evidence that it would have removed Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Y can raise any affirmative defenses she might have.

(c) *Issues before the Board in IRA appeals.* In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure(s). The appellant may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), i.e., that its action is taken "only for such cause as will promote the efficiency of the service." However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure(s).

(d) *Elections under 5 U.S.C. 7121(g).*

(1) Under 5 U.S.C. 7121(g)(3), an employee who believes he or she was subjected to a covered personnel action in retaliation for protected

whistleblowing "may elect not more than one" of 3 remedies: An appeal to the Board under 5 U.S.C. 7701; a negotiated grievance under 5 U.S.C. 7121(d); or corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with the Special Counsel (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under 5 U.S.C. 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

(2) In the case of an otherwise appealable action as described in paragraph (b)(2) of this section, an employee who files a complaint with OSC prior to filing an appeal with the Board has elected corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC, which can be followed by an IRA appeal with the Board. As described in paragraph (c) of this section, the IRA appeal in such a case is limited to resolving the claim(s) of reprisal for whistleblowing activities.

■ 66. In § 1209.4, revise paragraph (b) as follows:

#### § 1209.4 Definitions.

\* \* \* \* \*

(b) *Whistleblowing* is the making of a protected disclosure, that is, a disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or 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 the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

\* \* \* \* \*

■ 67. In § 1209.5, revise paragraphs (a) and (b) as follows:

#### § 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.

(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.

\* \* \* \* \*

■ 68. In § 1209.6, revise paragraph (b) to read as follows:

**§ 1209.6 Content of appeal; right to hearing.**

\* \* \* \* \*

(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.

\* \* \* \* \*

**William D. Spencer,**

*Clerk of the Board.*

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