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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to: Implement the compensatory damages provision of the Civil Rights Act of 1991, Public Law 102-166, with respect to MSPB cases where certain kinds of discrimination are found; implement the attorney fee provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353; implement the attorney fee, consequential damages, and choice of procedures provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994); and amend its rules governing requests for attorney fees to change the time limit for filing and incorporate an evidentiary requirement from the Board's case law. The purpose of these amendments is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed with respect to requests for attorney fees, consequential damages, and compensatory damages, and to inform them of the statutory requirement regarding choice of procedures in cases involving both an appealable action and a prohibited personnel practice other than discrimination. The Board is also removing an obsolete section of its rules governing mixed cases and making technical changes to its mixed case and enforcement rules to correct a citation. The Board is implementing other provisions of Public Law 103-424 through an amendment to its rules at 5 CFR part 1209, which is being

published simultaneously with this amendment.

EFFECTIVE DATE: August 3, 1998.

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

SUPPLEMENTARY INFORMATION: The Board previously published an interim rule to: Implement the compensatory damages provision of the Civil Rights Act of 1991, Public Law 102-166, with respect to MSPB cases where certain kinds of discrimination are found; implement the attorney fee provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353; implement the attorney fee, consequential damages, and choice of procedures provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994); amend its rules governing requests for attorney fees to change the time limit for filing and incorporate an evidentiary requirement from the Board's case law; and make a technical change to its rules governing mixed cases (62 FR 17041, April 9, 1997). The interim rule requested public comments and allowed 60 days, until June 9, 1997, for receipt of such comments.

Public Comments

Comments were received from two Federal agencies. One commenter made the following recommendations for revisions in the interim rule:

- (1) That § 1201.3(c)(1) be amended to reflect the choices among statutory and negotiated grievance procedures involving agencies other than MSPB;
- (2) That § 1201.201 be amended to further define "consequential damages" and "compensatory damages;" and
- (3) That § 1201.204(a)(1) be amended to require that a request for damages be raised before an arbitrator as early as possible.

The recommendation numbered (1) above asks the Board to amend its regulation at § 1201.3(c)(1), which deals with the choice of procedure for bargaining unit employees between an appeal to MSPB and a grievance under a negotiated grievance procedure (NGP), to specify the additional choices that may be made between a grievance under a NGP and the statutory procedures of an agency other than MSPB, such as filing an equal employment opportunity (EEO) complaint under the Equal Employment Opportunity Commission's

regulations or a complaint alleging a violation of 5 U.S.C. 2302(b)(1) with the Special Counsel. While providing this additional information could be useful, it appears to go beyond the scope of the Board's regulatory authority, which is limited to matters within its jurisdiction (5 U.S.C. 1204(h) and 7701(k), and 38 U.S.C. 4331). It is appropriate for the Board's regulations to advise potential appellants where there is a choice between the Board's appellate procedures and another procedure, such as the NGP. It does not appear appropriate, however, for the Board to address choices to be made between a grievance under a NGP and the statutory procedures of another agency.

The recommendation numbered (2) above asks the Board to amend its regulation at § 1201.201 (c) and (d) to further define the terms, "consequential damages" and "compensatory damages." The Board has determined that such definitions should be made through case-by-case adjudication. It believes that the scope of damage awards should be made in the context of an appeal, where the matter can be fully considered in the light of arguments from the parties.

The recommendation numbered (3) above asks the Board to amend its regulation at § 1201.204(a)(1) to include a requirement that a request for damages be raised before an arbitrator as early as possible. Such an amendment, which would involve the Board imposing a requirement on a proceeding before an arbitrator pursuant to a negotiated grievance procedure, would clearly be beyond the scope of the Board's regulatory authority.

After review of these comments, the Board has determined that none of the revisions recommended by this commenter should be made.

The other commenter recommended that in § 1201.203(b)(2) of the interim rule (now § 1201.202(d)(1) in the final rule), the word "appeal" be changed to "action" to conform to the language of 38 U.S.C. § 4324. The Board notes that in chapter 43 of title 38 (Uniformed Services Employment and Reemployment Rights Act, or USERRA), the terms "action" and "complaint" are both used to describe a matter that may be raised before MSPB. The Board's regulations in part 1201 define "appeal" as "(a) request for review of an agency action" (5 CFR 1201.4(f)), and the

regulations use the term "appeal" in a manner that can be applied to any matter processed under the Board's appellate jurisdiction procedures. Furthermore, in its interim rule implementing other provisions of USERRA (62 FR 66813, December 22, 1997), the Board uses the term "appeal" throughout to describe a matter that can be raised before the Board under USERRA. To maintain consistency in its regulations, therefore, the Board has determined that the revision recommended by this commenter should not be made.

Changes to Subpart H

Following an internal review, the Board has determined that several changes should be made in subpart H of part 1201, as added by the interim rule, to simplify and streamline the procedures for deciding requests for consequential damages or compensatory damages and to clarify certain other provisions. These changes are as follows:

(1) The introductory language of § 1201.202(a), which sets forth various authorities for the Board to award attorney fees and, where applicable, costs, expert witness fees, and litigation expenses, is revised to clarify that the listed authorities do not constitute an exclusive list. As explained in the preamble to the interim rule (62 FR 17041-17042, April 9, 1997), some of the newer authorities overlap earlier authorities. Other authorities may be enacted in new legislation. As a result, appellants in certain kinds of cases may be able to proceed with a request for attorney fees under more than one authority.

(2) Section 1201.202(a)(5) is revised by adding 5 U.S.C. 7701(g)(1) as an authority for the Board to award attorney fees in a Special Counsel complaint for corrective action under 5 U.S.C. 1214. This addition reflects the court ruling in *Frazier versus MSPB*, 672 F.2d 150, 168-170 (D.C. Cir. 1982), that 5 U.S.C. 7701(g)(1) permits the Board to award attorney fees in a Special Counsel corrective action. Although Public Law 103-424 added a specific authority for an award of attorney fees in such cases in a new provision at 5 U.S.C. 1214(g)(2), an award could also be made under 5 U.S.C. 7701(g)(1), so both of these authorities are cited in the revised § 1201.202(a)(5).

(3) A new paragraph (d) is added to § 1201.202 to provide definitions of a "proceeding on the merits" and an "addendum proceeding." The definition of a "proceeding on the merits" at § 1201.202(d)(1) is the same as that contained in § 1201.203(b)(2) in the

interim rule. The definition of an "addendum proceeding" at § 1201.202(d)(2) is based on language that was in §§ 1201.203(b)(1) and (b)(3) in the interim rule. Because these definitions apply to subpart H as a whole, they are more appropriately placed in § 1201.202 than in the attorney fee provisions of § 1201.203.

(4) With the addition of the definitions at § 1201.202(d), § 1201.203(b) is revised to state simply that a request for attorney fees will be decided in an addendum proceeding.

(5) Section 1201.203(c) is revised to clarify where a motion for attorney fees must be filed. Following the publication of the interim rule, the Board published a change in its part 1201 regulations governing procedures for original jurisdiction cases to allow initial decisions to be issued by a judge in the Board's headquarters (62 FR 48449, September 16, 1997). Section 1201.203(c) is revised by replacing the term "decision" in the first sentence with "initial decision." This clarifies that a motion for attorney fees must be filed with the regional or field office where the initial decision in the merits proceeding was issued. The second sentence is revised to clarify that a motion for attorney fees must be filed with the Clerk of the Board where the initial decision was issued at the Board's headquarters, as well as when the only MSPB decision in the merits proceeding is a final decision of the Board.

(6) Section 1201.203(d) in the interim rule is divided into two sections, 1201.203(d), "Time of filing," and 1201.203(e), "Service." Accordingly, § 1201.203 (e) and (f) in the interim rule are redesignated § 1201.203 (f) and (g), respectively. In addition, "Initial decision" is added to the heading of the redesignated § 1201.203(g).

(7) Section 1201.204(a)(1) is revised to conform the time limit for making a request for consequential damages or compensatory damages to the time limit established by § 1201.24(b) for raising a claim or defense not included in the appeal. The time limit may be waived for good cause shown. Under the interim rule, a claim for damages could have been made as late as the time the first pleading with the 3-member Board was filed.

(8) A new provision, "Form and content of request," is added as § 1201.204(b). This provision, which parallels the "Form and content of request" provision for a request for attorney fees at § 1201.203(a), establishes that a request for damages must include both the amount of damages sought and the reasons why,

under the applicable statutory standard, an award of damages should be made. Section 1201.204(b) in the interim rule is redesignated § 1201.204(c).

(9) Sections 1201.204(d) and (e) in the final rule replace sections §§ 1201.204(c) through (e) in the interim rule. The new provisions, which parallel the provisions for deciding a request for attorney fees in section § 1201.203 to the extent possible, are intended to provide a more uniform and streamlined procedure for deciding a request for consequential damages or compensatory damages. Section 1201.204(d) provides that a request for damages will be decided in an addendum proceeding. A judge, however, may waive this requirement and consider a request for damages in a merits proceeding where such action is in the interest of the parties and will promote economy and efficiency in adjudication. Section 1201.204(e) prescribes the procedures for initiation of an addendum proceeding on a request for damages after there is a final decision in the merits proceeding. The time limit for filing, place of filing, service, and response requirements are the same as for a request for attorney fees under § 1201.203. A conforming change is made to § 1201.111, as amended by the interim rule.

(10) Section 1201.204(g) is revised by adding "Initial decision" to the heading; by revising the text to state that the judge will issue an initial decision in the addendum proceeding, which shall be subject to a petition for review by the Board; and by removing the language regarding a recommended decision issued by an administrative law judge (§ 1201.204(g)(2) in the interim rule). Under the Board's revised procedures for original jurisdiction cases (62 FR 48449, September 16, 1997), a recommended decision will be issued only in certain Hatch Act cases involving Federal or District of Columbia government employees. Because neither consequential damages nor compensatory damages are available in such cases, there is no longer a need for the language regarding recommended decisions.

(11) Section 1201.204(h) is a new provision that prescribes procedures for consideration of a request for consequential damages or compensatory damages in the first instance by the 3-member Board. Such consideration would occur where a request 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, or where a request is made in a case where the only MSPB proceeding is before the 3-member

Board, as in a request to review an arbitration decision under 5 U.S.C. 7121(d). In such situations, the regulation provides that the Board may: (1) Consider both the merits of the case and the request for damages and issue a final decision; (2) remand the case to the judge for a new initial decision, either on the request for damages only or on both the merits and the request for damages; or (3) where there has been no prior proceeding before a judge, forward the request for damages to a judge for hearing and a recommendation to the Board, after which the Board will issue a final decision on both the merits and the request for damages.

(12) Section 1201.204(h) in the interim rule is redesignated § 1201.204(i).

For the convenience of its customers, the Board is republishing subpart H in its entirety.

Technical Changes

The following changes of a technical nature are also made in this final rule:

(1) The amendments to sections §§ 1201.121 and 1201.131 made by the interim rule were subsequently superseded by amendments made by interim rules issued on September 16, 1997 (62 FR 48449), and December 22, 1997 (62 FR 66813). Therefore, the amendments made to sections §§ 1201.121 and 1201.131 by the interim rule are not adopted in this final rule.

(2) The interim rule made technical amendments to § 1201.163. The Board has since determined that this provision, governing mixed cases that were filed under Reorganization Plan No. 1 of 1978, is obsolete, because all such cases have been completed. Therefore, in lieu of the technical amendments made by the interim rule, § 1201.163 is removed in its entirety.

(3) As a result of the renumbering of § 1201.119 as § 1201.120 by an earlier amendment to the Board's regulations (59 FR 30863, June 16, 1994), three citations to this provision in the Board's regulations have been rendered incorrect. Therefore, the Board is amending §§ 1201.157, 1201.183(a)(4), and 1201.183(b)(3) to change "1201.119" to read "1201.120."

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

Accordingly, the Board adopts as final its interim rule published at 62 FR 17041, April 9, 1997, with the following changes:

1. Section 1201.111(b)(6), as amended by the interim rule, is revised to read as follows:

§ 1201.111 [Amended]

* * * * *

(b) * * *

(6) A statement of any further process available, including, as appropriate, a petition for review under § 1201.114 of this part, a petition for enforcement under § 1201.182, a motion for attorney fees under § 1201.203, a motion to initiate an addendum proceeding for consequential damages or compensatory damages under § 1201.204, and a petition for judicial review.

* * * * *

2. The amendments made to §§ 1201.121(b) and 1201.131 by the interim rule are not adopted. Those sections continue to read as revised by 62 FR 48449, September 16, 1997, and further amended by 62 FR 66813, December 22, 1997.

§ 1201.157 [Amended]

3. Section 1201.157 is amended by removing "§ 1201.119" and by adding in its place "§ 1201.120."

§ 1201.163 [Removed]

4. In lieu of the amendments made by the interim rule, section 1201.163 is removed.

§ 1201.183 [Amended]

5. Section 1201.183 is amended at paragraphs (a)(4) and (b)(3) by removing "§ 1201.119" in each paragraph and by adding in its place "§ 1201.120."

6. Subpart H, as added by the interim rule, is revised to read as follows:

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

Sec.

1201.201	Statement of purpose.
1201.202	Authority for awards.
1201.203	Proceedings for attorney fees.
1201.204	Proceedings for consequential damages and compensatory damages..
1201.205	Judicial review.

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

§ 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, and compensatory damages.

(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by § 1201.202(a)(1). There are, however, other attorney fee provisions that apply

only to specific kinds of cases. For example, § 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202(a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.

(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.

(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex, national origin, or disability. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

§ 1201.202 Authority for awards.

(a) Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable). The Board is authorized by various statutes to order payment of attorney fees and, where applicable, costs, expert witness fees, and litigation expenses. These statutory authorities include, but are not limited to, the following authorities to order payment of:

(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;

(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);

(3) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the

Board's decision is based on a finding of a prohibited personnel practice;

(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;

(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2) or 5 U.S.C. 7701(g)(1), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;

(6) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215; and

(7) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4).

(b) *Awards of consequential damages.* The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(c) *Awards of compensatory damages.* The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

(d) *Definitions.* For purposes of this subpart:

(1) A *proceeding on the merits* is a proceeding to decide an appeal of an agency action under 5 U.S.C. section 1221 or 7701, an appeal under 38 U.S.C. 4324, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. section 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(2) An *addendum proceeding* is a proceeding conducted after issuance of

a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under § 1201.113 of this part or a final decision of the Board.

§ 1201.203 Proceedings for attorney fees.

(a) *Form and content of request.* A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney's services; and

(4) An established attorney-client relationship.

(b) *Addendum proceeding.* A request for attorney fees will be decided in an addendum proceeding.

(c) *Place of filing.* Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

(d) *Time of filing.* A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.

(e) *Service.* A copy of a motion for attorney fees must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding,

which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

§ 1201.204 Proceedings for consequential damages and compensatory damages.

(a) *Time for making request.* (1) A request for consequential damages or compensatory damages must be made during the proceeding on the merits, no later than the end of the conference(s) held to define the issues in the case.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown. The time limit will not be waived if a party shows that such waiver would result in undue prejudice.

(b) *Form and content of request.* A request for consequential damages or compensatory damages must be made in writing and must state the amount of damages sought and the reasons why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard.

(c) *Service.* A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made.

A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(d) *Addendum proceeding.* (1) A request for consequential damages or compensatory damages will be decided in an addendum proceeding.

(2) A judge may waive the requirement of paragraph (d)(1), either on his or her own motion or on the motion of a party, and consider a request for damages in a proceeding on the merits where the judge determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication.

(e) *Initiation of addendum proceeding.* (1) A motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board.

(2) A copy of a motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(h) *Request for damages first made in proceeding before the Board.* Where a request for consequential damages 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 3-member Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

(1) Consider both the merits and the request for damages and issue a final decision;

(2) Remand the case to the judge for a new initial decision, either on the request for damages only or on both the merits and the request for damages; or

(3) Where there has been no prior proceeding before a judge, forward the request for damages to a judge for hearing and a recommendation to the Board, after which the Board will issue a final decision on both the merits and the request for damages.

(i) *EEOC review of decision on compensatory damages.* A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

§ 1201.205 Judicial review.

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

Dated: July 28, 1998.

Robert E. Taylor,
Clerk of the Board.

[FR Doc. 98-20447 Filed 7-31-98; 8:45 am]

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1209

Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure for whistleblower appeals to implement the provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994) that: Added a new personnel action and amended another in the statutory provisions governing prohibited personnel practices; and added a requirement that the Board refer its findings to the Special Counsel when it determines in a whistleblower proceeding that a current Federal employee may have committed a prohibited personnel practice. The Board is also amending its rules of practice and procedure for whistleblower appeals to include a cross-reference to subpart H of part 1201 regarding awards of attorney fees and consequential damages. The purpose of these amendments is to provide guidance to the parties to MSPB cases and their representatives regarding the new and amended personnel actions, to refer parties and their representatives to subpart H of part 1201 for the procedures governing requests for attorney fees and consequential damages, and to provide public notice of the requirement that the Board refer certain prohibited personnel practice findings to the Special Counsel. The Board is implementing other provisions of Public Law 103-424 through an amendment to its rules at 5 CFR part 1201, which is being published simultaneously with this amendment.

EFFECTIVE DATE: August 3, 1998.

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

SUPPLEMENTARY INFORMATION: The Board previously published an interim rule to: Implement the provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994) that added a new personnel action and amended another in the statutory provisions governing prohibited personnel practices and added a requirement that the Board refer its findings to the Special Counsel when it determines in a whistleblower

proceeding that a current Federal employee may have committed a prohibited personnel practice, and to include a cross-reference to subpart H of part 1201 regarding awards of attorney fees and consequential damages (62 FR 17047, April 9, 1997). The interim rule requested public comments and allowed 60 days, until June 9, 1997, for receipt of such comments.

Comments were received from one Federal agency suggesting that the Board amend part 1209 to impose a time limit for bringing an action to the Special Counsel as a pre-condition for later bringing an individual right of action (IRA) appeal to the Board. Although the recommendation does not address any of the changes made by the interim rule, the Board will address it.

The Board has concluded that imposing such a time limit would not be a proper exercise of its regulatory authority. That authority is limited to matters within the Board's jurisdiction (5 U.S.C. 1204(h) and 7701(k), and 38 U.S.C. 4331).

Under 5 U.S.C. 7121(g)(2), an employee who has been affected by a prohibited personnel practice (other than discrimination) may elect among three specified remedies: (1) An appeal to MSPB under 5 U.S.C. 7701, (2) a grievance under a negotiated grievance procedure, or (3) an action under subchapters II and III of chapter 12 of title 5. Subchapter II concerns Special Counsel actions (which may lead to corrective action complaints before the Board), and subchapter III covers IRA appeals. Because the conjunctive is used with regard to the Special Counsel and IRA processes, it appears that Congress intended, without limits other than those specified, to allow complainants to go to the Special Counsel and bring IRA appeals to the Board on the same matter. By limiting the matters that can be brought to the Board under subchapter III to only "timely-raised" matters brought to OSC under subchapter II, as suggested by the commenter, the Board would be adding a limitation to the IRA appeal choice that is not contained in the statute.

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

Accordingly, the Board adopts as a final rule, without change, its interim rule published at 62 FR 17047, April 9, 1997.

Dated: July 27, 1998.

Robert E. Taylor,
Clerk of the Board.

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