

# Rules and Regulations

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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 is amending its rules of practice and procedure to change its time limits for filing appeals and petitions for review of initial decisions issued by MSPB judges. The amendments to the time limits for filing appeals are intended to ensure that an appellant has a full 30 days to file after the event from which the time period begins to run. The amendment to the time limit for filing a petition for review is intended to ensure that a petitioner has a full 30 days to file after the date of receipt of the initial decision issued by the judge. The purpose of these amendments is to provide guidance to the parties to MSPB cases and their representatives regarding filing requirements. The Board is simultaneously amending its rules at 5 CFR part 1209 with respect to the time limits for filing whistleblower appeals.

**EFFECTIVE DATE:** November 6, 1997.

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

**SUPPLEMENTARY INFORMATION:** The Board is authorized by 5 U.S.C. 1204(h) to promulgate regulations to carry out its functions and has used this authority since its inception to prescribe time limits for filing appeals with the Board. Prior to this amendment, the regulation at 5 CFR 1201.22(b), prescribing time limits for filing an appeal, required that an appeal of an agency action be filed no later than 30 days after the effective date of the action or, where the appeal is from a final or reconsideration decision that does not set an effective

date, no later than 35 days after the date of issuance of the agency's decision. In establishing the 35-day time limit where the appeal is from a final or reconsideration decision that does not set an effective date, the Board, in effect, was providing the same 30-day time period for filing as in an appeal of an action with an effective date by allowing 5 additional days after the date of issuance of the decision for it to be mailed and received.

Where the 35-day time limit applies and there is a delay by the agency in mailing the decision after it is issued, and/or a delay by the U.S. Postal Service that results in more than 5 days elapsing between issuance of the decision and receipt by the appellant, an appellant could have less than 30 days to file an appeal with MSPB. Should an appellant not receive the agency's decision until after the 35-day time period for filing has expired, any appeal may be dismissed as untimely.

In order to ensure that each appellant, regardless of the nature of the action or decision being appealed, has a full 30 days to file after the event from which the time period begins to run, the Board is amending its regulation at 5 CFR 1201.22(b) to require that an appeal be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later.

The Board is making corresponding amendments to 5 CFR 1201.27(b), regarding the time limit for filing individual appeals after a judge has denied a request for hearing as a class appeal, and 5 CFR 1201.154(a), regarding the time limit for filing an appeal in which discrimination is alleged (a mixed case appeal).

Prior to this amendment, the regulation at 5 CFR 1201.114(d), prescribing the time limit for filing a petition for review of a judge's initial decision, required that the petition for review be filed with the Clerk of the Board within 35 days after the initial decision is issued. This regulation was based on the statutory requirement at 5 U.S.C. 7701(e)(1)(A) that a petition for review be filed no later than 30 days after the party's receipt of the initial decision. Again, the Board was allowing in its regulation an additional 5 days from the date of issuance of the initial

decision for mailing and receipt by the parties.

To ensure that every party has a full 30 days from the date of receipt of an initial decision to file a petition for review of that decision, the Board is amending its regulation at 5 CFR 1201.114(d) to require that a petition for review be filed within 35 days after the initial decision is issued 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. The Board is making conforming amendments to 5 CFR 1201.113(a) and (d) by removing the references to a 35-day time limit for filing.

The Board is *not* amending 5 CFR 1201.113 in the material that precedes paragraph (a), which states that the initial decision of the judge will become final 35 days after issuance. Where no petition for review of an initial decision is filed, and the Board does not reopen on its own motion, there must be a date certain when the case is closed and the initial decision becomes the final decision of the Board. Such a finality date is also needed, for example, to determine when the time starts running for the filing of a petition for review of a final Board decision in a mixed case by the Equal Employment Opportunity Commission under 5 U.S.C. 7702, a petition for judicial review of a final Board decision under 5 U.S.C. 7703, or a motion for attorney fees under 5 CFR 1201.203(d).

As a result of these amendments to the petition for review provisions, initial decisions issued by MSPB judges will continue to show a finality date, which will be the date 35 days after the date of issuance of the initial decision. That date, however, will no longer be the last day on which a petition for review can be filed if the petitioner can show that the initial decision was received more than 5 days after the date it was issued. In that event, the time limit of 30 days after the date of receipt will apply.

The Board is making a corresponding amendment to the regulation at 5 CFR 1201.154(d), regarding the time limit for filing a petition for review of a final decision on a grievance in which discrimination is alleged.

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

**List of Subjects in 5 CFR Part 1201**

Administrative practice and procedure, Civil rights, Government employees.

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

**PART 1201—[AMENDED]**

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

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

**§ 1201.22 [Amended]**

2. Section 1201.22 is amended by revising paragraph (b) to read as follows:

(b) *Time of filing.* An appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. The time for filing is computed in accordance with §1201.23 of this part. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order.

**§ 1201.27 [Amended]**

3. Section 1201.27 is amended at paragraph (b) by revising the second sentence to read as follows:

(b) \* \* \* If the judge denies the request, the appellants affected by the decision may file individual appeals within 30 days after the date of receipt of the decision denying the request to be heard as a class appeal.

**§ 1201.113 [Amended]**

4. Section 1201.113 is amended by revising paragraphs (a) and (d) to read as follows:

(a) *Exceptions.* The initial decision will not become final if any party files a petition for review within the time limit for filing specified in § 1201.114 of this part, or if the Board reopens the case on its own motion.

(d) *Extensions.* The Board may extend the time limit for filing a petition for good cause shown as specified in § 1201.114 of this part.

**§ 1201.114 [Amended]**

5. Section 1201.114 is amended at paragraph (d) by revising the first sentence to read as follows:

(d) \* \* \* 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. \* \* \*

**§ 1201.154 [Amended]**

6. Section 1201.154 is amended by revising paragraph (a) and the first sentence of paragraph (d) to read as follows:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision on the appealable action, whichever is later.

(d) If the appellant has filed a grievance with the agency under its negotiated grievance procedure in accordance with 5 U.S.C. 7121, he or she may ask the Board to review the final decision under 5 U.S.C. 7702 within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision.

Dated: October 31, 1997.

**Robert E. Taylor,**

*Clerk of the Board.*

[FR Doc. 97-29311 Filed 11-5-97; 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 is amending its rules of practice and procedure for whistleblower appeals to change the time limits for filing. The amendment to the time limit for filing an individual right of action (IRA) appeal is intended to ensure that an appellant has the full 60 days required by law to file after being

provided notification by the Special Counsel that an investigation has been terminated. The amendment to the time limit for filing a whistleblower appeal after a judge's ruling on a stay request is intended to ensure that an appellant has a full 30 days to file after receipt of the ruling. The purpose of these amendments is to provide guidance to the parties to MSPB cases and their representatives regarding filing requirements. The Board is simultaneously amending its rules at 5 CFR part 1201 with respect to the time limits for filing other appeals and petitions for review.

**EFFECTIVE DATE:** November 6, 1997.

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

**SUPPLEMENTARY INFORMATION:** The provisions of the Whistleblower Protection Act of 1989 (Pub. L. 101-12) governing a whistleblower's filing of an individual right of action (IRA) appeal with the Board require that such an appeal be filed no more than 60 days after notification by the Special Counsel that an investigation into the whistleblower's allegations has been terminated. 5 U.S.C. 1214(a)(3)(A)(ii) and 1221(a). The statutory language does not specify whether the 60-day period begins to run from the date of the Special Counsel's notice or the date of the whistleblower's receipt of that notice.

Prior to this amendment, the Board's implementing regulation at 5 CFR 1209.5(a) required that an IRA appeal be filed no later than 65 days after the date of issuance of the Office of Special Counsel's written notification that it was terminating its investigation of the appellant's allegations. This established a clear date on which the time for filing began to run and allowed an additional 5 days for the notice to be mailed and received by an appellant before the 60-day statutory period began.

Delay by the Office of Special Counsel in mailing the notice and/or a delay by the U.S. Postal Service could result in an appellant having less than 60 days to file an appeal with MSPB. If an appellant did not receive the Special Counsel's notice until after the 65-day time period for filing expired, an IRA appeal might be dismissed as untimely.

To ensure that each IRA appellant has a full 60 days for filing with the Board after receipt of a notice from the Special Counsel, the Board is amending its regulation at 5 CFR 1209.5(a)(1) to require that an IRA appeal be filed no later than 65 days after the date of issuance of the Office of Special Counsel's written notification or, if the