The New Regulations at the U.S. Merit Systems Protection Board

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U.S. Merit Systems Protection Board

Statutory Functions of MSPB

1. To adjudicate adverse action appeals of Federal employees, annuitants, veterans, applicants and whistleblowers in our jurisdiction.
2. To conduct studies on the health and well-being of the Federal civil service.
3. To review OPM actions/regulations.

Regulation Review

- This initiative began in January 2011 and included suggestions for revisions from MSPB staff, an internal MSPB working group, and input on their recommendations and the Notice of Proposed Rulemaking from a wide range of stakeholder agencies, organizations, and individuals.
- This was the first significant reconsideration of the Board's regulations since the MSPB was established in 1979.

No Change to 5 C.F.R. § 1201.12

- A Board Judge may waive any of the regulations for good cause unless a statute requires its application.
- The Judge must give the parties notice that the regulation is waived, but is not required to allow the parties an opportunity to respond.

5 C.F.R. § 1201.3 Jurisdiction

- Revised the list of appealable actions to make it more understandable, but explains that the regulations are not a source of Board jurisdiction.
- Directs parties to consult MSPB case law and the regulations.
- Cautions that jurisdiction depends on the appellant's status, e.g., the type of employment held, as well as the nature of the action or decision being appealed.

5 C.F.R. § 1201.14 Electronic Filing

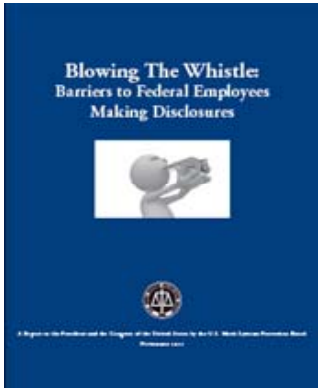
- The timeliness of an electronic pleading will be determined by the time zone where the pleading is filed even though e-Appeal uses an Eastern time zone date stamp.
- Excludes from electronic filing using e-Appeal:

  (4) A pleading that contains Sensitive Security Information (SSI);

  (5) A pleading that contains classified information;

  (6) A request to participate as an amicus curiae or to file an amicus brief.

Whistleblower Appeals



- Federal employees and applicants are protected from retaliation if they make a protected disclosure. 5 U.S.C. § 2302(b)(8).
- There are two avenues by which an individual may pursue alleged whistleblowing at MSPB:

  1) an appellant may raise a whistleblower claim in the context of an <u>otherwise appealable action</u> or

  2) in an <u>Individual Right of Action</u> appeal pursuant to the Whistleblower Protection Enhancement Act (WPEA) after exhausting remedies with OSC.

  5 U.S.C. § 1221(a).

5 C.F.R. § 1209.2 (d)(1)
Elections Under 5 U.S.C. § 7121(g)

- 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 three remedies:
  1. An appeal to the Board under 5 U.S.C. § 7701;
  2. A negotiated grievance under 5 U.S.C. § 7121(d); or
  3. A complaint with OSC seeking corrective action, *see* 5 U.S.C. § 1214, which can be followed by a Board IRA appeal. 5 U.S.C. § 1221.
- Where the individual files first is deemed the election. 5 U.S.C. § 7121(g)(4).

5 C.F.R. § 1201.21 Notice of Appeal Rights

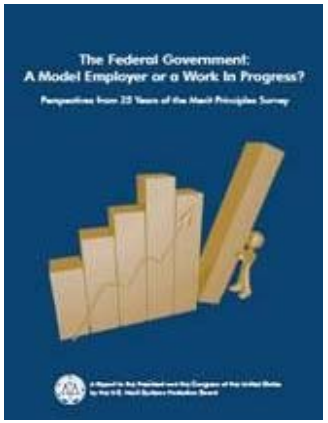
(d) Requires agencies to provide notification regarding elections between MSPB, the Office of Special Counsel (OSC) on a whistleblower complaint (potential Individual Right of Action appeal), and negotiated grievance, and the consequences of such elections. 5 C.F.R. § 1209.2 regarding elections under 5 U.S.C. § 7121(g).

(e) Requires agencies to give notice of all available options regarding claims of discrimination (*i.e.*, an EEOC mixed case complaint, Board appeal, or grievance).

(f) Agency decision must include the name, title, address, email, phone and fax number of the agency official to whom the Board should send the acknowledgment order.

5 C.F.R. § 1209.2 IRA Appeals

- Overrules longstanding Board law, including *Massimino v. VA*, 58 M.S.P.R. 318 (1993), that had allowed an employee to file an OSC complaint of his removal (appealable action) and exhaust before OSC, yet file with the Board under Chapter 75 procedures after that exhaustion.



5 C.F.R. § 1209.2 (c)
Issues Before The Board In IRA Appeals

- In an IRA appeal, the only merits issues before the Board are those listed in 5 U.S.C. § 1221(e):
- Whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions.
- 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 such as claims of discrimination or harmful procedural error. *Douglas v. VA,* 5 M.S.P.R. 280 (1981) does not apply.

IRA Appeals are Limited to Whistleblowing

- In an IRA appeal involving an otherwise appealable adverse action, like a removal, the agency need not prove its charges, nexus, or the reasonableness of the penalty, *i.e.*, that its action is taken "only for such cause as will promote the efficiency of the service."
- 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).

Agoranus v. Justice, 2013 MSPB 41 (2013)

- *Feiertag v. Army*, 80 M.S.P.R. 264 (1998) held an election under 7121(g) is binding regardless of whether an employee is aware of his options and their effect. Board overruled *Feiertag* and held that a 7121 election must be knowing and informed, and if it is not, it will not be binding on the employee.
- The agency did not inform appellant of his right to file an OSC complaint on the removal, or of its effect. Board found he was not precluded from filing an appeal of the removal and was not restricted to the issues within the scope of an IRA appeal.

5 C.F.R. § 1201.22 Filing an Appeal

- An appellant is required to keep the agency informed of his or her current home address.
- Decisions properly addressed and sent via Postal or commercial service are presumed duly delivered.
- The appellant is presumed to have received the decision if received by a representative or person of "suitable" age residing with the appellant.
  - Cannot avoid delivery at a Post Office Box.
  - An employee in the hospital can overcome the presumption of receipt.
  - Roommates can receive decisions.

5 C.F.R. § 1201.28 Case Suspension

- The judge may suspend a case for two periods of up to 30 days each.
- The restrictions were eliminated on when a request must be filed and whether the suspension must be for settlement or discovery.

5 C.F.R. §1201.29 Dismissal Without Prejudice

- Case law was codified to allow for the Judge to dismiss an appeal without prejudice to refiling at a later date upon the Judge's own motion or at the request of a party.
- The decision to dismiss without prejudice is left to the discretion of the Judge when the interest of fairness, due process, and administrative efficiency outweigh the prejudice to either party.

5 C.F.R. § 1201.33 Federal Witnesses

- The agency must produce Federal employee witnesses not only at hearing, but also for deposition in official duty status.

5 C.F.R. § 1201.43 Sanctions

- Before imposing a sanction, the Judge must provide "appropriate prior warning, allow a response to the actual or proposed sanction, and document the reasons" for the sanction.
- The revised regulation gives explicit authority for a Judge to cancel, suspend, or terminate a hearing for contumacious conduct or conduct prejudicial to the administration of justice.
- Eliminates the automatic interlocutory appeal for excluding a representative.

5 C.F.R. § 1201.51 Hearings

- The Board eliminated the fixed hearing site list from the Appendix. Instead the Board will list hearing locations on its public website.
- This allows MSPB to adjust fixed hearing sites according to budgetary constraints and court reporter costs without changing the regulations.

5 C.F.R. § 1201.52 Public Hearings

- Electronic Devices: Absent express approval from the Judge, no two-way communication devices may be operated in the hearing.
  - Cell phones should be powered off
  - No cameras
  - No recordings
  - No transmittal devices

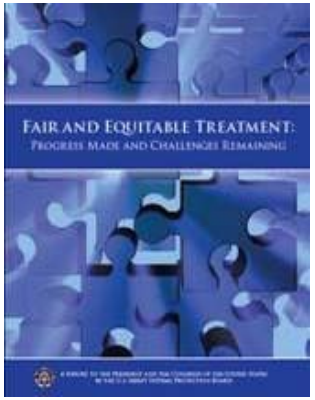
5 C.F.R. § 1201.53 Record

- Check the e-Appeal Repository.
- Provides that copies of already existing recordings or existing transcripts (sometimes in electronic form) contained in the Board's record will be provided to the parties free of charge.

  Example: If the MSPB court reporting contract provides that the Judge will receive a transcript, this transcript is a part of the record and can be provided to the parties.

5 C.F.R. §1201.73 Discovery

- Eliminates the initial disclosure requirement.
- Time limit for initial discovery requests has been increased from 25 days to 30 days after the date on which the judge issues the Acknowledgment Order.
- Agency File is still due within 20 days of the Acknowledgment Order. The increase of time to 30 days should ensure that appellants receive the Agency File before they initiate discovery.



5 C.F.R. § 1201.114 Petition for Review

- For PFRs and cross-PFRs and responses to those: 30-page or 7500-word limit.
- For a reply to a response: 15-page or 3750-word limit.
- Replies are limited to the factual and legal issues raised by the other party in the response to the PFR, and provides that no other pleadings will be allowed.
- Non-conforming pleadings will be rejected.

5 C.F.R. § 1201.11 Criteria

- The regulation has been extensively rewritten to give criteria for which a petition for review may be granted:
  - Initial Decision contains erroneous findings of material fact.
  - Initial Decision based on erroneous law.
  - New and material evidence or argument.
  - Board may reopen any other issue deemed important.

QUESTIONS???