U.S. Merit Systems Protection Board

Judges' Handbook

JUDGES' HANDBOOK

MERIT SYSTEMS PROTECTION BOARD

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MERIT SYSTEMS PROTECTION BOARD

CHAPTER 1 - PURPOSE AND DEFINITIONS

1. PURPOSE.

The Board is authorized generally by 5 U.S.C. § 1204(a)(1) to hear and adjudicate appeals.

The Board's regulations set forth at 5 C.F.R. part 1201 provide the basic framework for the processing of appeals. With the enactment of the Whistleblower Protection Act (WPA), as amended, the Board promulgated additional regulations in 5 C.F.R. part 1209 that govern whistleblower appeals. The regulations have also been supplemented with procedures applicable to appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA), which are located at 5 C.F.R. part 1208. Although 5 C.F.R. part 1210 was added to address the processing of appeals of removals and transfers of members of the Senior Executive Service at the Department of Veterans Affairs, this part has been superseded by 38 U.S.C. § 713, which provides no Board appeal rights for such actions. Different appeal rights for non-SES employees of the DVA were enacted as 38 U.S.C. § 714, but MSPB regulations addressing such appeals have not yet been completed.

This Handbook is designed to provide supplemental guidance to the Board's regulations. The procedures in this Handbook are not mandatory, and adjudicatory error is not established solely by failure to comply with a provision of this Handbook.

2. 120-DAY STANDARD.

The Board's policy is to adjudicate all appeals within 120 days of receipt by the Regional Office (RO) except for good cause shown.

The 120-day standard alone, however, is not sufficient reason (at least in a non-mixed case) to deny a continuance in the face of good cause. Due process and fairness considerations are paramount in determining good cause. Caseloads and the circumstances of the RO or Administrative Judge (AJ) are also factors for consideration. For example, the 33,000+ furlough appeals that were filed in the spring and summer of 2013, and the backlog of older cases left in their wake, meant that for several years following 2013 the 120-day goal could not be met in many cases that would otherwise have been timely decided. Reassignments among AJs or ROs may be used to reconcile due process factors and the Board's 120-day goal to the maximum extent possible.

3. LIST OF ACRONYMS.

Administrative Judge—AJ

Administrative Law Judge—ALJ

Case Management System—CMS

Chief Administrative Judge—CAJ; as used in this Handbook, the term "CAJ" refers to a Regional Director overseeing a Regional Office or the CAJ designee of a Field Office.

Chief Administrative Law Judge—CALJ

Electronic Case File--ECF

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Equal Employment Opportunity—EEO

Field Office—FO

Initial Decision—ID

Individual Right of Action—IRA

Mixed Case—Otherwise appealable matter with an allegation of prohibited discrimination.

Nonprecedential Final Order – NPFO; the Board also issues NPROs (Nonprecedential Remand Orders) and NPOs (Nonprecedential Orders).

Office of Appeals Counsel—OAC

Office of Personnel Management—OPM

Office of the Clerk of the Board—OCB

Office of the General Counsel—OGC

Office of Regional Operations—ORO

Office of Special Counsel—OSC

Opinion and Order—O&O

Otherwise Appealable Action—OAA

Petition for Appeal—PFA

Petition for Enforcement—PFE

Petition for Review—PFR

Prohibited Discrimination—Discrimination on the basis of any factor listed at 5 U.S.C. § 2302(b)(1).

Prohibited Personnel Practice—PPP; Any practice listed at 5 U.S.C. § 2302(b).

Regional Director—RD

Regional Office—RO

Special Counsel—SC

Time Limits—Counted in calendar days with the day after receipt being the first day. (Any exceptions to this policy are specifically noted in this Handbook).

Uniformed Services Employment and Reemployment Rights Act of 1994—USERRA

Veterans' Employment Opportunities Act of 1998—VEOA

Whistleblower Protection Act of 1989—WPA

Whistleblower Protection Enhancement Act of 2012–WPEA

CHAPTER 2 - REVIEWING THE APPEAL

1. RECEIPT OF THE APPEAL.

a. Record of Receipt. When an appellant files an appeal, the receiving office must date stamp the appeal on receipt. Appeals filed through e-Appeal are automatically date and time stamped.

b. Geographic Jurisdiction. The RO must ascertain whether it has geographic jurisdiction over the appeal. In appeals from OPM reconsideration decisions and from adverse suitability determinations, the appellant's residence at the time the appeal is filed controls. For other appeals, the location of the appellant's duty station when the action was taken generally controls. *See* 5 C.F.R. § 1201.4(d). A possible exception to this principle is an appeal involving a directed reassignment, in which geographic jurisdiction may be based on the appellant's previous duty station. Appeals filed by applicants for appointment or promotion, under the WPA/WPEA, the VEOA, or the USERRA, may be directed to the office with jurisdiction over the area in which the appellant lives or to the office with the closest ties to the case, but because the circumstances of each case may vary widely there is no rule as to the appropriate office for these appeals set out in the Board's regulations.

If the office has geographic jurisdiction, the appeal must be docketed and entered into the Case Management System (CMS) within 3 workdays. Except when the appeal is rejected for premature filing or some other deficiency, the docket date of the appeal is the date of receipt. If the office does not have geographic jurisdiction, the appeal must not be docketed. Instead, it must be transferred within 3 workdays to the office which has geographic jurisdiction. The sending office is to use express mail or accountable mail when sending the appeal if it was filed in hard copy. The receiving office will docket the appeal; for internal purposes the docket date is the date the second RO receives the appeal. The office transferring the appeal must notify the appellant of the transfer in writing. Consistent with the guidance concerning rejected appeals in section 3 of this chapter, in determining timeliness, the appeal is generally considered to have been filed as of the date of filing with the first office.

2. REVIEW OF THE APPEAL.

a. Content. The CAJ (or designee) must review the appeal to ensure that it contains the information required by 5 C.F.R. § 1201.24(a). Deficiencies in the appeal may be cause for its rejection. Some bases for rejecting an appeal appear on the Board's public website under the file tab "The Appeal Process, Appeal Rejection Reasons":

1. The appeal is premature because the Board received the appeal prior to the effective date of the action being appealed or prior to the agency issuing a final decision concerning the appellant's performance, conduct, or reduction-in-force status. *5 C.F.R. §1201.22(b). But see* subsection d. Premature Appeals, below, concerning appeals that will become ripe for review within 10 days.

2. The appeal is filed by someone other than the appellant, his or her representative, or a party properly substituted under § 1201.35. *5 C.F.R. § 1201.24(a).*
3. The appeal does not contain the appellant's name, address, and telephone number, and/or does not identify the name and address of the agency that took the action being appealed. *5 C.F.R. §1201.24(a)(1).*
4. The appeal does not contain a description of the agency's action and its effective date. *5 C.F.R. § 1201.24(a)(2).*
5. If the appeal is not electronically filed, it lacks the signature of the appellant or, if the appellant has a representative, of the representative. *5 C.F.R. § 1201.24(a)(9).*
6. If the appeal is not electronically filed, the appellant did not file two copies of the appeal and all attachments with the appropriate Board office. *5 C.F.R. § 1201.26(a)*.
7. Pleadings and attachments were not filed on 8.5 by 11-inch paper, or electronic documents were not formatted so that they could be printed on that size paper, and no good cause was provided. *5 C.F.R. §1201.26(c).*
8. The appellant checked multiple actions being appealed, and indicated only one effective date or no effective date at all for the appealed actions. *5 C.F.R. § 1201.24(a)(2)*.
9. The appellant filed a stay request but did not submit evidence that the employing agency was served a copy of the request. *5 C.F.R. §1209.8(c).*

b. Incomplete Appeals. When the appeal and its attachments, although incomplete, provide enough information that the appeal can be docketed, it should be docketed based on that information. When the appeal lacks sufficient information essential to proper docketing, such as the name of the agency or a reasonable statement of the matter being appealed, or a necessary copy of the decision being appealed, efforts appropriate to the situation should be made to contact the appellant and/or the appellant's representative by telephone, e-mail, or fax to get the required information. If the agency is known, it may also be contacted. In any case, if the office can learn the essential information by phone, fax, or e-mail from either party, it can be docketed immediately. You need not wait to receive it by regular mail delivery, since issues such as timeliness and jurisdiction can be addressed after the initial acknowledgment order is sent and once the missing information is received in a more official form.

Generally you need not document for the record such informal contacts with the parties. Rather, the appeal and acknowledgment order can be placed at Tabs 1 and 2 of the record, respectively, as would normally be done, and if the appellant or representative submits something in writing, it can be appended to the otherwise incomplete appeal under Tab 1, even if there may then be documents with two different dates under the same tab. If the agency supplies a missing document, however, that submission should be placed under a separate tab, which would be

Tab 2 if the document is the first information the office receives after the appeal itself, or Tab 3 if the acknowledgment order has already been issued. If the office cannot docket the appeal, and cannot reach a party or representative by phone, fax, or e-mail, or if it requests but does not receive the information necessary to docket the appeal within 2-3 business days, the appeal may be rejected using the standard notice listing the specific deficiency. That notice would be sent to the appellant and, if represented, the appellant's representative. If this happens, the rejection letter is Tab 1, and when the necessary information is received, the complete appeal then becomes Tab 2.

If the appeal is not formally rejected, the receipt date of the incomplete submission is the date of receipt of the appeal for purposes of determining timeliness. Even if an appeal must be rejected despite efforts to complete the information needed to docket it, the date of the original filing remains the filing date of the appeal for purposes of its timeliness. *See, e.g., Taylor v. Office of Personnel Management,* 73 M.S.P.R. 142, 143 (1997) (wherein the FO returned the appellant's submission to her because it was technically deficient, the date that the appellant made her original, deficient submission rather than the date of resubmission is the filing date of the appeal).

c. Timeliness of the Appeal. The CAJ (or designee) must review the appeal to determine if it was timely filed under 5 C.F.R. § 1201.22(b). If the appeal appears untimely, the appropriate timeliness language, tailored to the situation when necessary, must be included in the acknowledgment or show cause order (*see also c*hapter 3, section 8). An appellant should be told what the timeliness issue is, and what must be shown to establish either that the appeal is timely or that there is good cause to waive the time limit. *Lacy v. Department of the Navy,* 78 M.S.P.R. 434 (1998). Pursuant to *Lacy,* if the appellant asserts that an untimely filing was due to a medical condition, he or she should be told that to establish that an untimely filing was the result of an illness, the party must: (1) identify the time period during which the party suffered from the illness; (2) submit medical evidence showing that the alleged illness affected that party during that time period; (3) in the absence of medical evidence, the party must submit other supporting evidence and explain why medical evidence is not available; and (4) explain how the illness prevented him or her from timely filing the appeal or a request for an extension of time. In the absence of direct evidence, the AJ should inform the appellant of the date that the document that triggers the running of the appeal period will be presumed to have been received, and order both parties to produce whatever evidence they possess on the issue. *Williams v. Equal Employment Opportunity Commission,* 75 M.S.P.R. 144 (1997). Similarly, the AJ must notify the appellant of the date on which the appeal is presumed to have been filed when no postmark provides proof and of the postmark date when one does appear. For special considerations in determining the timeliness of retirement appeals sent from the Philippines, *see* chapter 3, section 8(a) of this Handbook.

Note that if the appeal was filed by e-Appeal, the time that is automatically recorded

on it is Eastern Time. Timeliness of a pleading will be determined based on the time zone from which the pleading was submitted, so Board offices in other time zones must adjust for the time difference in determining whether the appeal was timely filed. *See* 5 C.F.R. § 1201.14(m).

d. Premature Appeals. The CAJ (or designee) must review the appeal to determine if it was prematurely filed. If it is premature by 10 days or less, the office should docket the case as a new appeal, using the receipt date of the premature appeal. The appeal then becomes timely on the effective date of the appealed action or on the first work day following that date. When the case becomes timely, the office should enter event "Appeal is Perfected." This event will reset the appeal processing time to begin on the date the appeal is perfected. The first document received in the case, 250 Initial Appeal, will continue to show the original receipt date because that is the receipt date of the document. (The date for the 250 is not used for calculating case processing time.) If the appeal is more than 10 days premature, the CAJ must reject the appeal using the appropriate standard form. This procedure also applies to premature compliance appeals and attorney fee motions.

e. Jurisdiction. The CAJ (or designee) must review the appeal to determine whether it appears to be within the Board's jurisdiction. If the appeal appears to fall outside the Board's jurisdiction, the appropriate jurisdiction paragraphs, tailored to the situation when necessary, must be included in the acknowledgment or show cause order.

   Although it is true in all appeals wherein jurisdiction may be an issue, it is particularly true in IRA appeals that the AJ must adequately instruct the appellant regarding the burden to show both the exhaustion of administrative remedies before the OSC and the burden to make a nonfrivolous allegation that the alleged protected disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Kukoyi v. Department of Veterans Affairs,* 111 M.S.P.R. 404, 408 ¶ 12 (2009). The appellant must receive "explicit information on what is required to establish an appealable jurisdictional issue," including the means by which the appellant may show that the exhaustion requirement had been satisfied. *Id.* at 409, ¶ 14.

f. Mootness. The Board's jurisdiction is determined by the nature of an agency's action at the time an appeal is filed with the Board. *Hagan v. Department of the Army*, 99 M.S.P.R. 313, ¶ 6 (2005). An agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture or the agency completely rescinds the action being appealed. *Id*. For the appeal to be deemed moot following the cancellation or rescission of the appealed action, the employee must have received all of the relief that he could have received "if the matter had been adjudicated and he had prevailed." *Fernandez v. Department of Justice*, 105 M.S.P.R. 443, ¶ 5 (2007). Thus, restoration of the appellant to the status quo ante, or placement in the position he would have been in if the action had never occurred, may not be sufficient to moot the appeal. *Id.* at 446, n.1. Statements by a representative that

the agency has provided relief or is in the process of doing so do not constitute evidence that the appeal has been rendered moot. *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 21 (2007). An appeal may not be dismissed as moot until the agency provides acceptable evidence showing that it has actually afforded the appellant all of the relief he could have received if the matter had been adjudicated and he had prevailed. *Id*., ¶ 22. An appellant's statement that the agency has not paid all appropriate back pay constitutes a nonfrivolous allegation that the appeal is not moot. *Fernandez*, 105 M.S.P.R. 443, ¶ 12.

Although an outstanding claim for attorney fees does not preclude dismissal for mootness of an appeal brought under chapter 75, a request for fees in an IRA appeal is a claim for corrective action. *Vick v. Department of Transportation,* 118 M.S.P.R. 68, ¶ 5 (2012). Another consideration when the issue of mootness is raised in an IRA appeal is the requirement that after providing sufficient notice an AJ must afford an appellant a specific opportunity to raise a claim for consequential damages (and compensatory damages if the appeal is under the WPEA) before dismissing an IRA appeal as moot. *Id.*

When an appellant has an outstanding claim of discrimination and has raised what appears to be a further claim for compensatory damages before the Board, the agency's complete rescission of the action appealed does not afford him all of the relief he could have received if the matter had been adjudicated and he had prevailed; thus, the appeal is not rendered moot. *Antonio v. Department of the Air Force*, 107 M.S.P.R. 626, ¶ 13 (2008). In fact, an appellant who has raised a claim of discrimination must be informed of the right to request compensatory damages before the appeal may be dismissed. *See, e.g., Harris v. Department of the Air Force*, 96 M.S.P.R. 193, ¶ 11 (2004). If an appeal is not truly moot despite cancellation of the action under appeal, the proper remedy is for the Board to retain jurisdiction and to adjudicate the appeal on the merits. *Antonio*, 107 M.S.P.R. 626, ¶ 12. The matter cannot be dismissed as moot with the caveat that the appellant may file a petition for enforcement if all of the relief is not provided, since there is then no final order to enforce. *Haskins*, 106 M.S.P.R. 616, ¶ 18.

Retirement cases distinguished. Because the Board's jurisdiction in a retirement appeal is based on OPM's final decision, rescission of such a decision may lead to a dismissal for lack of jurisdiction, not mootness. In *Rorick v. Office of Personnel Management*, 109 M.S.P.R. 597, ¶ 5 (2008), the Board explained that if OPM completely rescinds a reconsideration decision, its rescission divests the Board of jurisdiction over the appeal in which that reconsideration decision is at issue, and the appeal must be dismissed. Nonetheless, for an appeal to be deemed moot, the employee must have received all of the relief that he could have received "if the matter had been adjudicated and he had prevailed," citing *Harris*, above. When OPM had rescinded its decision and planned to issue a new final decision, the appeal was removed from the Board's jurisdiction but was not moot. *Id.* Such an appeal must be dismissed without prejudice to its refiling after the issuance of the new final

decision. *Id.*, ¶ 6.

(*See also* chapter 3, section 8).

3. REJECTION OF THE APPEAL.

Whenever an appeal is rejected, the standard rejection notice must be used. If the appeal was filed electronically, the appellant should be informed that it has been deleted from the repository and the actions necessary to accomplish that must be done.

a. Filing Date for Rejected Appeals. If the appeal is initially rejected, the filing date of the rejected appeal will be used to determine the timeliness of the refiled appeal. The date of the filing will be included in the rejection notice.

b. Docket Date for Rejected Appeals. The date the refiled appeal is received will be the docket date.

c. Untimely Refiling of Rejected Appeals. Whenever the appellant submits an untimely response to the standard rejection notice, it must be treated similarly to an untimely appeal by accepting it and issuing an acknowledgment order that requires the appellant to explain the untimeliness. Because the Board applies different criteria to determine good cause for an untimely refiling, the order must use the standard paragraphs specific to untimely refiled appeals. *See Nelson v. U.S. Postal Service*, 113 M.S.P.R. 644, ¶ 8 (2010).

d. Untimely Appeals and Untimely Refiling of Rejected Appeals. If both the original appeal and the refiled appeal appear to be untimely, the acknowledgment order must contain the appropriate standard paragraphs to cover both situations.

4. SUBSTITUTION OF PARTIES.

Since the right to file an appeal is a personal right, normally only an appellant or his or her representative may file. Decisions that reject attempts to file an appeal by someone other than the affected employee or annuitant refer to 5 C.F.R. § 1201.35 to state that while the regulations permit a properly substituted party to pursue the appeal of an appellant who dies or is otherwise unable to pursue an appeal, they do not provide for substitution of a party before the appeal is filed. *See, e.g., Estate of Pyc v. Department of Veterans Affairs*, 73 M.S.P.R. 326 (1997). Such decisions, however, do not mention the potentially conflicting statement in 5 C.F.R. § 1201.24(a) that "Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file an appeal." Thus, the rule seems to remain that the appeal right is personal to the affected employee or annuitant. Nonetheless, after an appeal is filed, if an appellant dies or becomes incapacitated, and the individual's interest in the appeal has not terminated, the appeal may be processed upon the substitution of a proper party. *See Manangan v. Office of Personnel Management,* 58 M.S.P.R. 51, 53 (1993). The representative or the proper party must file a motion for substitution within 90 days of the death or other incapacitating event, except for good cause shown. 5 C.F.R. § 1201.35(b). In the absence of a timely substitution, processing of the appeal may continue if the interests of the proper party will not be prejudiced. 5 C.F.R. § 1201.35(c).

5. PSEUDONYMOUS APPEALS (JOHN DOE APPEALS -- WHEN THE APPELLANT SEEKS ANONYMITY).

a. Generally. An AJ may be requested to allow an appellant to proceed anonymously in his or her appeal before the Board. In addition, an AJ may, on his or her own motion, require the appellant's anonymity in the interest of a third party's privacy. *See* chapter 17, section 3. The AJ should also be aware that there may be instances when an appellant establishes a need to proceed anonymously for national security reasons.

b. Procedure. An appellant's request to proceed anonymously should be treated as a motion. If the request is not in the proper form of a motion, the appellant should be given the opportunity to perfect it. Furthermore, if the case record does not already contain a separate statement or appeal with identifying information, including the appellant's name and address, phone number, etc., the AJ must require the appellant to submit such identifying information to establish the appeal's res judicata or collateral estoppel (law of the case doctrine) effect, as well as for other tracking and historical purposes. *See Roe v. Ingram,* 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

Because of the need for a ruling on the motion very early in the Board's proceedings, an expedited procedure such as this should be invoked:

c. When an Appellant Should Be Allowed to Proceed Anonymously.

(1) Threat of Actual Physical Harm. An appellant should be allowed to proceed anonymously when a threat of actual physical harm is present. *See, e.g., Doe v. U.S. Postal Service,* 8 M.S.P.R. 128 (1981) (a threat to the appellant's physical safety because he was in hiding from organized crime).

(2) Matters of a Sensitive or Highly Personal Nature. Fear of financial or professional injury does not justify allowing an appellant to proceed anonymously. *See Southern Methodist University Association v. Wynne & Jaffe,* 599 F.2d 707 (5th Cir. 1979). However, the Board has allowed anonymity to prevent an unwarranted invasion of a third party's personal privacy. *See, e.g., Doe v. National Security Agency,* 6 M.S.P.R. 555 (1981) (removal based on charges of sexual acts performed with a minor daughter), *aff'd sub nom. Stalans v. National Security Agency,* 678 F.2d 482 (4th Cir. 1982).

(3) Criteria to Be Used by the AJ. As stated in *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, (2007):

> The Board has not adopted a rigid, mechanical test for determining whether to grant anonymity, but instead applies certain general principles in making such determinations. *Ortiz v. Department of Justice,* 103 M.S.P.R. 621, ¶ 10 (2006). Those factors include whether identification creates a risk of retaliatory physical or mental harm, whether anonymity is necessary to preserve privacy in a matter of a sensitive and highly personal nature, or whether the anonymous party is compelled to admit his intention to engage in illegal acts, thereby risking criminal

prosecution. *Id.*, ¶ 8 (citing *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000)). The Board also considers whether anonymity is necessary to prevent a clearly unwarranted invasion of the privacy of a third party or whether anonymity is necessary to preserve the appellant's physical safety. *Id.*, ¶ 9. Other potentially relevant factors include whether the appellant requested anonymity when the proceedings began before the Board or immediately after the need for anonymity became apparent, and which party placed the sensitive matter in question at issue in the appeal. *Id.*, ¶ 12.

A party seeking anonymity must overcome the presumption that parties' identities are public information. *Id.*, ¶ 10. Anonymity should be granted to litigants before the Board only in unusual circumstances, and the determination whether to grant anonymity must depend on the particular facts of each case. *Id.* An appellant seeking anonymity before the Board must present evidence establishing that harm is likely, not merely possible, if his name is disclosed. Even when some harm is likely, the Board grants anonymity only when the likelihood and extent of harm to the appellant significantly outweighs the public interest in the disclosure of the parties' identities. *Id.*

The Board no longer grants "Jane Doe" status. Rather, cases in which a request for anonymity is granted, regardless of the appellant's gender, are titled "John Doe." While the above remains true, it appears that the Board has been more liberal in granting Doe status in recent years.

d. Sealing the Record, Freedom of Information Act (FOIA), and Privacy Act. The Board has denied an appellant's request to seal all or part of the record, even when it has granted a request for John Doe status based on the medical evidence in the record of the appeal. In so doing, it stated that the case files from appeals are not available to the public by e-Appeal Online or the Board's website, and that medical records are exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b)(6). *Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R.579, n.5 (2012). Also, pursuant to the Privacy Act, *see* 5 U.S.C. § 552a, the appellant's medical records cannot be disclosed by the Board without the appellant's express written consent. Thus, the Board held that granting the appellant's request to seal her records would not provide her with any additional privacy protection. *Id*. Other types of information, however, may well be subject to FOIA, and sealing will not assure that the information is not made available to others.

e. Nonparty Anonymity. Increasingly, the Board affords anonymity to nonparties to appeals, including witnesses, agency officials, and others who were involved in the development of the case or the facts that led the agency to take action. Such persons are often referred to by their initials, their job titles, or as Witness 1, 2, etc., or by some other designation that does not make their name apparent to a reader unfamiliar with the facts of the case. In many such cases the person has not requested that the AJ or the Board allow anonymity. While the Board does not have case law or a specific policy on this matter, AJs may, at the request of a person involved in a case that is before them, or on their own motion if they believe it

appropriate, keep confidential the identity of such individuals by referring to them in such a way in the initial decision. The names of comparators in discrimination and penalty analyses are generally appropriate for anonymity.

6. REPRESENTATION.

The Board's regulations governing representation are set out at 5 C.F.R. § 1201.31. A party to an appeal may be represented in any matter related to the appeal. The parties must designate their representatives in writing and also must inform the Board and all other parties of any subsequent changes in their representation in writing. If a party has more than one representative, generally only one of the representatives must be served with a copy of the appeal documents, but when documents are served electronically there is no need to limit service this way. (At a hearing, generally only one of the representatives will be allowed to question each witness. *See* chapter 10, section 7b.) The AJ may reject submissions from represented appellants which are not sent by their designated representatives.

A party may choose any representative who is willing and available to serve. The other party or parties may challenge the designation on the grounds that it involves a conflict of interest or a conflict of position. Any party who challenges a designation of representative must do so by filing a motion with the AJ within 15 days after the date of service of the notice of designation or 15 days after a party becomes aware of the conflict. 5 C.F.R. § 1201.31(b). The AJ may disqualify a representative for the same reasons on the AJ's own motion. The AJ must rule on the motion before considering the merits of the appeal, and if the AJ disqualifies a party's representative, the AJ must give that party a reasonable time to obtain another one.

The Board lacks a process allowing for the general disqualification of representatives, but in an individual case, an AJ may exclude or limit the participation of a representative or other person for contumacious conduct or conduct prejudicial to the administration of justice. As discussed later, *see* chapter 4, section 11, the AJ may impose lesser sanctions as well.

7. PRO SE APPELLANTS.

The MSPB's policy is to make special efforts to accommodate pro se appellants. These efforts may include the following: the AJ may schedule a status conference early in the process to explain what will be required of the pro se appellant and to advise that the pro se appellant may contact the RO or FO with questions regarding procedural matters. Generally, the AJ should not reject filings by pro se appellants for failing to comply with technical requirements, unless the violations are repeated after a clear warning. The AJ ordinarily should not impose sanctions for failing to comply with an order unless the record establishes that the pro se appellant received instructions that a reasonable person, unfamiliar with Board procedures, would have understood. The AJ may allow greater latitude to the pro se appellant in questioning witnesses and in giving testimony. The AJ may allow some leading questions, and may need to instruct the pro se appellant regarding the correct method of questioning. The Board has stated, in this regard, that AJs "should provide more guidance to pro se appellants and interpret their arguments in the most favorable light." *Miles v. Department of Veterans Affairs*, 84 M.S.P.R. 418, 421 (1999).

8. INCOMPETENCE.

In a retirement case in which the appellant bears the burden of proving entitlement to annuity benefits, if the appellant is, or appears to be, incompetent, the AJ must follow the requirements set out in *French v. Office of Personnel Management*, 37 M.S.P.R. 496 (1988). In essence, *French*, a disability retirement appeal, requires an AJ to make diligent efforts to assist such an appellant in obtaining representation. The Board has extended the *French* process to other types of retirement appeals. *See, e.g., Brown v. Office of Personnel Management*, 94 M.S.P.R. 331, ¶ 10 (2003). It has not, however, extended the *French* requirements to questions of the appellant's competence in adverse action appeals. *See Marbrey v. Department of Justice*, 45 M.S.P.R. 72 (1990).

Nonetheless, in cases such as *Jones v. Department of Housing & Urban Development*, 87 M.S.P.R. 269 (2000), the Board has noted an agency's obligation to file a disability retirement application on behalf of an employee it has removed, under the similar circumstances set forth at 5 C.F.R. §§ 844.302 and 831.1205. If the agency has such an obligation, procedures such as those required by *French* are to be employed. The AJ's responsibility and authority in that situation were detailed in *Dixon v. U.S. Postal Service*, 89 M.S.P.R. 148, 151, ¶ 5 (2001).

Specifically, the AJ should monitor the progress of the application, including setting reasonable time limits where appropriate, to ensure that the agency complies with its duty to prosecute the application in good faith and to ensure that OPM complies with its duty to process the application expediently and in good faith. The AJ may join OPM as a party to the appeal, or initiate procedures to request pro bono representation for the appellant, if he determines that such steps are appropriate or necessary. Additionally, the AJ has the authority to vacate the ID to the extent necessary to facilitate any settlement agreement that the parties and OPM may reach. When OPM issues a decision, the AJ is to ensure that the appellant and any representative understand the options, including requesting reconsideration and appealing to the Board.

9. CONGRESSIONAL INQUIRIES AND REFERRALS.

a. Initial Inquiries. The referral of a constituent's complaint or inquiry by a Member of Congress or other individual is not an appeal unless it is accompanied by an appeal form or other documents sufficient to meet the requirements of 5 C.F.R. § 1201.24. If the Congressional referral does not meet these requirements, the CAJ should respond to the referral in writing, or at the CAJ's discretion, by telephone, explaining that the forwarded documents are not an appeal, that the employee/retiree or his or her designated representative must personally file, and that the appellant or the representative must sign an appeal. If the Congressional referral meets the filing requirements, the response should indicate that, although generally only an appellant or his or her designated representative may file an appeal, because the material forwarded by the Member meets the Board's filing requirements, including correspondence raising an appeal, signed by the individual (or representative), the Board will treat the correspondence as an appeal. A copy of the referral and any written response should be sent to the potential appellant with a blind copy to the

Board's Legislative Counsel in OGC and to OCB. Finally, the RO should retain a copy of the referral and response so that the AJ assigned to the appeal is aware of it in deciding any potential timeliness issues.

b. Subsequent Submissions. If a Member of Congress, not designated as a representative of an individual, submits evidence or argument on behalf of a constituent after the Board's processing of an appeal has begun, such a submission should not be routinely entered into the record. It should be treated as an ex parte communication and handled as required by 5 C.F.R. § 1201.101. The AJ should make the communication part of the record, notify the parties in writing of the communication, and give the parties 10 days to file a response. If the agency has no objection to the submission, the AJ may still reject the submission as evidence on the basis of relevance, materiality, or repetitiousness. The CAJ should inform the Member of Congress (or staff member) of the disposition of the submission and advise the Member, for future reference, of the Board's requirements for the designation of representatives and for accepting submissions. A blind copy of any such correspondence with a Member of Congress should be sent to OCB and the Legislative Counsel.

10. VEXATIOUS PLEADINGS.

In a very small number of cases, often involving individuals with apparent mental or emotional issues, the individual will develop a longstanding pattern of filing multiple vexatious pleadings regarding matters that have already been resolved in a final decision of the Board or that are clearly not within the Board's jurisdiction. Such pleadings generally use abusive or threatening language. While AJs and support personnel may expect to have to endure some degree of inappropriate behavior from filers, in such rare cases they need not endure continuing and sustained abuse. Under those circumstances, the problem should be brought to the attention of ORO for discussion of the possibility of barring the person from filing additional pleadings or communicating further with the Board unless he or she seeks and obtains prior approval from OCB. A requirement for prior approval is consistent with Federal law permitting adjudicatory authorities to bar a vexatious litigant from filing further complaints unless he or she receives prior approval. *See, e.g., Molski v. Evergreeen Dynasty Corporation,* 500 F.3d 1047, 1057 (9th Cir. 2007); *Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1986). Although this form of sanction is reserved for the most difficult situations, it is a possible recourse when lesser actions have failed to stop the abusive behavior.

CHAPTER 3 - INITIAL PROCESSING

1. ASSIGNMENT TO ADMINISTRATIVE JUDGE.

The CAJ (or designee) assigns cases to the AJs. In making case assignments (or reassignments), the CAJ considers the AJs' respective workloads, the geographical location if there is likely to be a hearing that may be held in-person, the complexity of the appeal, and other factors as appropriate.

The CAJ and AJ should also consider whether consolidation, joinder, class action, or intervenor issues are present. Prior to acknowledgment, an AJ may informally request that an appeal be reassigned on the basis of personal bias or other disqualifying reason. After acknowledgment, the procedure in section 2 should be followed. When a former employee of an RO or FO has filed an appeal, it has been deemed appropriate to assign the appeal to an AJ who was not employed at the RO or FO at the same time as was the appellant, or to reassign the appeal to a different office.

2. DISQUALIFICATION OF ADMINISTRATIVE JUDGE.

The AJ may recuse himself or herself on the motion of a party or on the AJ's own motion. A party may file a motion asking the AJ to withdraw on the basis of personal bias or other disqualifying reason. If an AJ considers himself or herself disqualified, the AJ will withdraw from the case, state on the record the reasons for doing so, and another AJ will be assigned to the case. The CAJ must immediately notify ORO of an AJ's recusal. *See* 5 C.F.R. § 1201.42. Bases for the disqualification of an AJ include:

a. A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ; or

b. Personal bias or prejudice of the AJ.

   Although the regulation requires that a party request that the AJ certify an interlocutory appeal to avoid waiver of the issue, absent extraordinary circumstances, a recusal motion is unlikely to warrant certification under the requirements of 5 C.F.R. § 1201.92 (*see* chapter 6, *infra*) because the law as to recusal for bias is settled. *See, e.g.*, *Bieber v. Department of the Army,* 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (an AJ's conduct during the course of a Board proceeding warrants a new adjudication only if the AJ's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible") (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

3. CONSOLIDATION AND JOINDER.

See generally 5 C.F.R. § 1201.36.

a. Concurrent Processing. Once appeals are consolidated or joined, they are processed concurrently. Generally, only one hearing is held. As appropriate, one or more decisions may be issued in a consolidated appeal.

b. 120-Day Deadline. For case-tracking purposes, the 120-day deadline is computed from the receipt date of whichever appeal was received last by the RO.

c. Organization of Files in Consolidated and Joined Cases. The MSPB Records Manual is being revised, so cannot be relied on as final until the amended version is available. While a single case file has always been used for a joined or consolidated appeal to keep paperwork to a minimum and the record, whether electronic or not, more manageable, the processes necessitated by the furlough appeals filed in 2013 have changed things. Rather than making one of the appellants the lead, a "dummy" name and docket number are assigned to the consolidation, and while each case is then consolidated under the dummy, each appellant also has an individual docket number. This allows for independent action by each appellant without major changes to the consolidation. For example, under the old system if the lead appellant chose to withdraw his or her appeal, the docket number and name of the case would be adversely affected. Under the current system, any appellant's withdrawal will not have that effect, and the decision of fewer than all appellants to file a PFR also does not create a burden as to the entire consolidation.

d. Multi-Region Consolidated Appeals. When the CAJ identifies an appeal as part of a potential multi-region consolidation, he or she must immediately notify ORO. The CAJ must provide information concerning the approximate number of appellants in the consolidation, the agency's identity, and the name(s) of the appellants' representative(s). The Board or its designee may rule on a nationwide consolidation. *See* section 4d., below, for more on such consolidations.

e. Mass Appeals (RIFs or Furloughs). In addition to the organizational change noted in subsection c, above, the following procedures may be used to adjudicate appeals from a large-scale agency action such as an extensive reduction in force (RIF) or furlough. The ROs may modify these procedures when warranted. In fact, the more than 33,000 furlough appeals received in 2013 were processed using new and innovative methods, as well as these tried and true methods.

(1) Group Appeals. Group the appeals by categories for which acknowledgment orders might be tailored, e.g.:

(a) Appeals having common substantive issues, such as

i. (e.g., RIF appeals) (1) the bona fides of the RIF; (2) competitive area, competitive level, performance, or subgroup determinations; (3) assignment rights to specific positions; and (4) transfer of function issues;

ii. (e.g., furlough appeals) (1) the bona fides of the furlough; (2) same official duty station and proposing and deciding officials; (3) common agency file to be used for all appellants.

(b) Appeals having common jurisdiction or timeliness issues;

(c) Appeals having a common representative; and

(d) Appeals by pro se appellants.

While whether the appellant requested a hearing generally had been considered an appropriate basis for consolidation, the furlough appeals taught that because

of the likelihood of a party changing his mind after checking the box on the appeal form saying that he wants a hearing, the utility of that basis may be limited.

(2) Issue Acknowledgment Orders Appropriate to the Consolidation. The CAJ or designee may modify the standard acknowledgment orders to address changes in the processing of mass appeals. Because of the special circumstances presented by group appeals, normal time limits for issuance of acknowledgment orders may be modified by the CAJ (or designee). Service requirements may be altered to eliminate service on represented appellants. In processing the 2013 furlough appeals, ORO developed standard acknowledgment orders and other documents specifically tailored to the situation. Should any similar circumstances develop in the future, it may be appropriate to tailor a new acknowledgment and/or other order.

(3) Issue an Order of Consolidation. After receiving the agency files, ROs or, if appropriate, ROs in conjunction with ORO, must make decisions regarding appropriate consolidations as soon as practicable. Prehearing conferences may be used to determine which appeals should be consolidated. When the appropriate consolidations have been decided, the AJ should issue the order of consolidation. While the size and make-up of a consolidation may be changed later during the processing of the appeals, it is preferable to make the effort to properly consolidate cases based on the information presently available at the earliest point when such a determination is possible.

(4) Develop and Maintain Appeal Files. The AJ may accept submissions only from a designated representative or a pro se appellant. PII concerning an individual appellant must go only in that appellant's individual file; information relevant to the entire consolidation goes into the consolidated dummy file. If it is discovered that, either through a party's pleading or an AJ's Order, PII of an appellant was shared with any other appellant, action must be taken immediately to remove the PII from the record and OCB must be notified so that the extent of the exposure may be determined and the appropriate notice sent.

(5) Conduct Prehearing Conferences. The AJ may require that some or all prehearing conferences be conducted formally and be recorded. The AJ also may require that prehearing conferences be conducted by video conference or telephone.

(6) Use Bifurcated Hearings. Bifurcated hearings may be held on common issues. A panel of AJs may sit to hear the evidence regarding the common issue(s), or the CAJ/ORO may assign one AJ to hear and decide the common issues. After there is a final decision regarding the common issues, the remaining issues of the individual cases or consolidations would be heard.

4. CLASS ACTIONS.

See 5 C.F.R. § 1201.27.

a. Initial Processing. The initial processing of a class action appeal is identical to that of an individual appeal. The appeal is acknowledged and the file requested from the agency. However, the 3-workday time limit for issuing the acknowledgment order may be waived for efficiency in grouping appeals from potential class members. The agency must be asked specifically, either in a modification of the acknowledgment order or in a separate order, to respond to a request to have the appeal processed as a class action. The Board's e-filing system may not be used to file a request to hear a case as a class appeal or any opposition thereto. 5 C.F.R. § 1201.14(c)(1). Thus, any appeal filed electronically that requests class certification may be rejected, using the procedures noted above in chapter 2.

b. Standards. The Board's regulations state that the AJ should be guided, but not controlled, by the Federal Rules of Civil Procedure in deciding whether to handle an appeal as a class action. However, it remains true that the class representative must be able to fairly and adequately protect the interest of the class without a conflict of interest.

c. Processing of Appeals Certified as a Class Action. The procedures for individual appeals set forth in the Board's regulations and in this Handbook generally must be followed. However, the procedures, including time limits, may be modified as they are for mass consolidations. The Federal Rules of Civil Procedure and related case law should also be consulted for guidance concerning additional processing steps and requirements such as the following:

(1) Identification of all members of the class.

(2) Notification to all class members of the following: the AJ will remove a member from the class upon his or her request; a decision, favorable or not, will include all members who do not request exclusion; and any member of the class who does not request exclusion may participate in the proceeding.

(3) Notification to each class member of any hearing scheduled.

(4) Notification to class members of the initial decision. The decision should describe the factors that render particular appellants members of the class, and should include information concerning the right of class members to seek individual relief where appropriate.

d. Multi-Region Class Action Appeals.

(1) When the CAJ identifies an appeal as a potential multi-region class action, he or she must immediately notify ORO. The CAJ must provide the name of the representative of the potential class, the approximate number in the class, and the agency's identity based on the evidence then available.

(2) A copy of the appeal, request for certification, and any other relevant document must be sent to ORO as expeditiously as possible, by overnight mail if the day of ORO's receipt will be a workday, by fax, or a scanned copy by e-mail. As noted above, a request for class action status may not be e-filed.

(3) ORO will notify all ROs and may direct that affected appeals be held in abeyance pending further notice.

(4) ORO will notify OCB, OGC, the Director of OAC, and the Chief Counsels to the Board of the pending action.

(5) Cases may be assigned to an ALJ, an AJ, or the Board for ruling on a motion for certification of a class action.

(6) Following a ruling, regions shall advise the parties of any reassignment of cases and forward appeals to the designated AJ(s).

5. INTERVENTION.

See generally 5 C.F.R. § 1201.34.

a. Intervenors as a Matter of Right. The Director of OPM and the OSC may intervene as a matter of right in a proceeding before the Board, but OSC 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 and § 7702 without the consent of the individual.

(1) Before Intervention. If a representative of OPM or the OSC asks to review a file to determine whether to intervene, the request must be granted, subject to the caveat as to OSC in section 5.a., above. The CAJ or AJ should invite the representative to visit the RO to conduct the review. The fact of the review will be documented (by a memorandum placed in the file), as required by the Privacy Act. A request by OPM or OSC for a copy of the appeal file, or a portion thereof, to decide whether to intervene should be granted unless compliance would constitute an undue hardship on the resources of the RO. That may not generally be a problem, though, because most files are available in electronic form, regardless of whether they are designated as Electronic Case Files (ECFs).

(2) After Intervention. When OPM or OSC has intervened in an appeal, it may have access to the file. Upon request, copies of documents in the file are to be provided to OPM and/or the OSC. Also after intervention, the intervenor must be added to the certificate of service.

b. Permissive Intervenors. The AJ is delegated the authority to rule on motions for permissive intervention. The AJ must invite any person directly affected by the outcome of the proceeding to intervene, especially in retirement cases involving competing beneficiaries. Any employee alleged to have committed a prohibited personnel practice may, upon request, be granted status as an intervenor. Once a motion for intervention has been granted, the AJ must provide copies of the specific documents requested and/or all or that part of the appeal file that concerns the issue(s) affecting the intervenor. Because permissive intervenors may only participate on the issues affecting them, it may not be necessary or appropriate to provide a copy of the entire file, depending on the circumstances.

c. Amicus curiae. Any person or organization, including those who do not qualify as intervenors, may be granted permission to file a brief as an amicus curiae, in the discretion of the AJ. *See also* chapter 10, section 7, *infra*. E-filing may not be used

to file a request to participate as an amicus curiae or file a brief as amicus curiae. 5 C.F.R. § 1201.14(c)(6).

6. SENSITIVE APPEALS.

In screening and processing appeals, the CAJ and AJ should determine if they present or might develop "sensitive" issues.

a. Criteria. An appeal is sensitive if it meets any of the following criteria:

(1) The appellant occupies a key agency position or manages a controversial program in which there is substantial public interest;

(2) OPM or the OSC has intervened;

(3) It involves media interest, other publicity, or substantial Congressional interest; or

(4) It is determined to be sensitive by the CAJ on other grounds, including that the appellant made a very significant whistleblower disclosure.

b. Reporting Requirement. The RO must promptly report a sensitive case to ORO by e-mail or by fax. The report should fully explain the reasons that the appeal is considered sensitive. When in the CAJ's judgment additional material (e.g., appeal, newspaper articles, letter of charges, etc.) may be necessary to explain the sensitivity of the case, a copy of such materials should be faxed or e-mailed.

ORO will forward the region's sensitive case report to the Chairman; Vice Chairman; Member; Chief Counsel to each Board Member; the General Counsel; Director, OAC; and OCB.

The processing of a sensitive case is not to be delayed because of this additional procedure. Significant developments that occur during the processing of the case should be reported to ORO.

CAJs may wish to take a somewhat broad view of the "sensitive appeals" criteria to assure that all cases of which ORO and the Board should be aware are reported.

7. ACKNOWLEDGMENT AND SHOW CAUSE ORDERS.

Prior to the assignment of an appeal, the CAJ (or designee) should make every effort to ensure that the parties receive clear and relevant information related to MSPB's processing of the appeal. A special effort should be made to inform the parties of the burdens and standards of proof applicable to their appeal because an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985). Further, the Board requires that even beyond jurisdiction, the AJ must explain the burdens and methods of proof of any claim as to which the appellant has some or all of the burden of proof or production in an appeal:

> [W]hen an appellant raises an affirmative defense in an appeal either by checking the appropriate box in an appeal form, identifying an affirmative defense by name such as "race discrimination," "harmful procedural error," etc., or by alleging facts that reasonably raise such an affirmative defense, the AJ must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. If an appellant expresses the intention to withdraw such an affirmative defense, in the close of record order or prehearing conference order the AJ must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give an appellant an opportunity to object to withdrawal of the affirmative defense. *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶ 10 (2010).

Where a standard acknowledgment order is available in HotDocs, it should be used. In the absence of such standard language, the AJ should provide the necessary information. If there are repetitive situations which an AJ, CAJ, or RD believes should be covered by a standard acknowledgment order, ORO should be notified.

a. Time Requirement. If the CAJ (or designee) determines that the appeal may be processed by the RO, an acknowledgment or show cause order must be issued to the parties within 3 workdays of receipt of the appeal except as provided above with respect to premature and consolidated appeals.

b. Tailoring of Standardized Orders. The standardized acknowledgment orders are a general guide to language that may be applicable to a specific case. These orders were designed to provide notice of the general procedures that will apply to the adjudication of the appeal. They cover a wide range of possibilities including information on hearings, discovery, settlement, designation of representative, issues of timeliness and jurisdiction, general instructions and forms (Privacy Act statements and designation of representative forms), and schedules. The AJ should modify the standard order, only if necessary, to adjust it to the circumstances of the appeal. Regarding timeliness and jurisdiction issues, tailoring may require inclusion of specific dates or jurisdictional issues in question (e.g., *see* chapter 2, section 2b). As noted above, any applicable substantive law should be set out in the acknowledgment or subsequent show cause orders to avoid a remand based on a finding that the parties had not been provided explicit instructions regarding their burdens and responsibilities.

   The AJ must provide the necessary notice. The various possibilities for an initial order range from a show cause order addressing timeliness and/or jurisdiction to a complete acknowledgment order covering all aspects of guidance including information on hearings, discovery, etc. Sometimes, follow-up orders may be necessary to clarify issues or to provide guidance not provided in the previous order before the matters being appealed became clear. In any event, any time an issue is raised that may be acceptable for consideration, the AJ must provide the appropriate notice to the appellant. Even when the potentially jurisdictional matter cannot properly be addressed in the current appeal, the appellant should be informed of the possible appealability of the issue as a separate case.

c. Attachments (Schedules). Any documents attached to the acknowledgment order must be included in the appeal file.

8. SPECIAL PROCEDURES FOR RETIREMENT APPEALS FROM THE PHILIPPINES.

a. Untimely Appeals. While Postal service to the Philippines has improved over time, and the number of appeals filed by its residents has diminished, all untimely appeals from retirement-related actions received from the Philippines must still be processed under the following procedures:

(1) Issue a show cause order requiring the appellant to explain the delay. Allow 30 days for the appellant to file a response.

(2) Liberally construe "good cause" for appeals filed within 6 months from the date of the OPM reconsideration decision.

(3) Consider a showing of good cause to include a claim of late mail delivery, unless the claim is countered by specific evidence of timely receipt.

b. Close of Record.

(1) In cases involving retirement appeals received from the Philippines, including those that raise issues of jurisdiction and timeliness, the record must not be closed before the 60th day.

(2) Close of record orders and all other orders requiring and/or allowing submissions will provide for a minimum of 30 days for filing the submissions.

c. Issuance of Initial Decisions. IDs should not be issued before the 75th day. In all cases, the ID should not be issued until at least 15 days after the close of record date.

9. OBLIGATION TO FURNISH OPM WITH INFORMATION.

The Board is required to notify OPM of cases in which the interpretation of any civil service law, rule, or regulation under OPM's jurisdiction is at issue. *See* 5 U.S.C. § 7701(d)(2). This requirement is met by sending OPM copies of the IDs issued by the RO. OPM will rarely intervene before an AJ, but as noted above, it is entitled to do so.

10. ORGANIZATION OF THE APPEAL FILE.

Instructions for the proper organization of initial appeal case files are found in chapter 4 of the Board's *Records Manual*. As noted earlier, the *Records Manual* is undergoing revision and all references to it therefore are subject to change.

While the Board's *Records Manual* is being revised and has not been reissued, in general it is required that all case-related documents, including the hearing record whether stored on tapes, as a paper transcript, or as ESI (electronically stored information), if any, be included in the case file. Documents to be excluded from the case file are Congressional, FOIA, and Privacy Act correspondence. The file documents are kept in chronological order with the most recent document on top. The documents are tabbed, and there is an index clearly describing each document in the file. If a paper file exceeds approximately 2 inches in thickness, a new volume should be created and copies of the index included in each file

volume. If a submission is too large to fit within the volume where it would normally be placed, it may be kept separately, marked with the tab number it would have had if it had been placed in the chronological volume. When this is done, the submission should be given a separate volume number(s) and a tab should be placed in the chronological volume indicating its location. If because of changes in Board procedures initiated since the *Records Manual* was last updated (such as e-Appeal, e-filing, recordation of hearings on DVD or electronically, etc.) or other reasons, the *Records Manual* does not cover the specific situation presented, it should be adapted as appropriate to the facts with which the office is dealing. Seeking the advice of the records specialist in OCB is often appropriate.

Note that although the Board now directs the parties to number the pages within all tabs of each submission, the RO or FO should not undertake to do so for them if they fail to comply, since documents in the record should remain as they were when the parties submitted them. Any statement to the contrary in the *Records Manual* should not be applied to the original submission, but may of course be followed when marking up a copy of it.

11. FAX SUBMISSIONS.

A faxed copy of a document qualifies as an "official record" when it is the first copy of a submission received by the RO. Therefore, absent legibility problems with the fax, a duplicate paper copy received by a different form of delivery need not be kept. In addition to legibility, however, the disposition of any duplicate copies should depend on timeliness and completeness. That is, before disposing of any copy of a submission, the office must ascertain that the second document is, in fact, a duplicate of the fax, and that the fax is fully legible. Because there may also be instances when a fax, although received first, was filed late, but the original document later received by mail is postmarked as timely, it is important to save evidence of timely filing. If there are no problems with timeliness, legibility, or completeness, the office may keep either the faxed copy or the original in the record, and must save the evidence of the earliest filing date (fax cover sheet and identification of the faxed document, postmarked envelope, etc.). More than one copy of the document itself need not be kept in the record.

12. SUSPENDING CASES FOR DISCOVERY OR SETTLEMENT.

The Board's regulations provide the AJ with discretion to issue an order suspending the processing of an appeal for up to 30 days. *See* 5 C.F.R. § 1201.28. No more than two suspension periods of up to 30 days each are permitted. Restrictions on when a request to suspend a case must be filed have been eliminated. The revised regulation clarifies that when an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are automatically suspended until the mediator returns the case to the AJ. 5 C.F.R. § 1201.28(d). This provision is particular to MAP and does not apply if the parties enter into other forms of alternative dispute resolution. A MAP suspension is not counted as one of the 30-day suspension periods allowed by the regulations.

CHAPTER 4 - HEARINGS, SCHEDULING AND ARRANGING

1. HEARING REQUESTS.

A hearing must be held if the appellant requests one and the appeal is timely filed and within the Board's jurisdiction. While case law and aspects of the Board's regulations have changed over time, the rules concerning the burdens and degree of proof necessary to support jurisdiction, merits, and affirmative defense determinations are set out at 5 C.F.R. §§ 1201.56, 1201.57. When it is unchallenged that an appeal is within the Board's jurisdiction, the appellant has the right to a hearing if he requests one. When jurisdiction is at issue, the regulations provide that for all but four types of appeals the appellant bears the burden of proof by a preponderance of the evidence as defined at 5 C.F.R. § 1201.4(q) before entitlement to an appeal is established. As to (1) IRA appeals, (2) appeals under VEOA, (3) USERRA, and (4) restoration to duty appeals following military service or recovery from a compensable injury, except for proving exhaustion of a required statutory complaint process and standing to appeal (*see* 5 C.F.R. §§ 1201.57(c)(1) and (c)(3)), to establish jurisdiction, an appellant who initiates such an appeal must make nonfrivolous allegations concerning the substantive jurisdictional elements applicable to the particular type of appeal. The definition of nonfrivolous allegation is found in 5 C.F.R. § 1201.4(s).

As to all types of appeals, timeliness must ultimately be established by a preponderance of the evidence but an appellant who raises a nonfrivolous allegation as to the timeliness of an appeal is also entitled to a hearing if there is a material factual question involved. *See Meyer v. U.S. Postal Service,* 79 M.S.P.R. 667 (1998). In addition, the AJ has the discretion to grant a request for a hearing on a motion for attorney fees or a petition for enforcement, and in VEOA appeals (in USERRA appeals, the appellant has a right to a hearing after jurisdiction is established). *See, e.g., Popham v. U.S. Postal Service,* 50 M.S.P.R. 193 (1991) (threshold timeliness and jurisdictional determinations); *Dodd v Department of Interior,* 48 M.S.P.R. 582, 584 (1991) (the appellant has the right to a hearing; the agency and the AJ do not, except as provided in 5 C.F.R. § 1201.45(b)(5)); 5 C.F.R. §§ 1208.13(b), 1208.23(b). The hearing may be in person, or within the limitations discussed below, by telephone, or by video conference.

Just as it is the appellant's right to have a hearing, the Board has held that if the appellant chooses to waive that right, the AJ may not require that a hearing be held. *See, e.g., Grimes v. General Services Administration,* 84 M.S.P.R. 244 (1999). Nor does the agency have a right to a hearing when the appellant rejects the opportunity to have one. *Johnson v. Department of the Interior,* 87 M.S.P.R. 359 (2000). Of course, the AJ retains the right to have the parties develop the record on issues that must be decided, but despite 5 C.F.R. § 1201.41(b)(5), which states that an AJ may order a hearing on his or her initiative, the cases listed here render that provision moot.

2. CONDITIONAL OR AMBIGUOUS REQUESTS.

If the appellant makes a conditional or ambiguous request for a hearing, the AJ must issue an order granting the appellant a specific time to make an unequivocal election. The appellant must be advised that if the right to a hearing is waived, an opportunity to submit written evidence and argument will be provided. This information may also be provided by

means of a telephonic conference with subsequent documentation. In any event, the waiver must be clear and unequivocal, and the record must reflect that it is.

3. USE OF HEARING NOTICE.

When a hearing is scheduled, the AJ must issue a written hearing notice and should use the standardized HotDocs hearing order (ON/15), which also provides for scheduling status and prehearing conferences. If the hearing is rescheduled, notice will usually be given to the parties in writing even if it is to confirm oral instructions, using the HotDocs ON/20 template. If the AJ considers the case appropriate for a bench decision (discussed in chapter 12, section 5 of this Handbook), or it is even a possibility, in order to comply with chapter 9, section 2e and chapter 12, section 5a, the AJ should notify the parties of this possibility by adding the appropriate paragraph to the hearing order.

4. ADVANCE NOTICE.

The hearing may not be scheduled earlier than 15 days from the date of the notice unless the parties agree to an earlier date. 5 C.F.R. § 1201.51. Any such agreement must be documented. This requirement does not apply when a hearing is rescheduled. However, to give parties the opportunity to conduct discovery, prepare their cases, and discuss settlement, the AJ should usually provide 30 to 60 days' notice of the hearing date. Optimally, the hearing will be held within 75 days of the date of receipt of the appeal, although given case suspensions, lengthy discovery requests, drawn out settlement discussions, etc., this may not always be possible or advisable. As noted above, the parties should be provided advance notice of the possibility of a bench decision in the appeal.

5. DISTRIBUTION OF NOTICE; COURT REPORTER CONTRACT.

a. Notice. The hearing notice must be sent to the appellant, designated representatives, and intervenors. The RO is responsible for timely securing court reporting services. Accordingly, it is a good practice for the RO to send hearing notices or a copy of the office's hearing calendar to the court reporter in addition to any other notice required under the specific Court Reporting Services General Requirements agreement. The RO is also responsible for notifying the court reporter of any cancellation or postponement of a hearing to avoid incurring appearance fees.

b. Court Reporting Services General Requirements Agreement. To carry out its statutory responsibility, 5 U.S.C. § 7701(a)(1), the Board has established a series of contracts with court reporting services. Those contracts provide a specific statement of work and requirements covering all aspects of the services provided, including inspection and acceptance of the tapes and/or transcripts or CDs, damages, and other recourse if the work is not completed properly. Use of such contract services is advantageous to the Board and the parties that appear before it, and it is Board policy that all recording and reporting services that are not done by the AJ are to be provided under contracts established by these requirements except in exceptional circumstances, such as when a hearing is to be held in a location where no contract court reporting service is available. The administrative staffs of each office are therefore expected to use contract firms when arranging for court reporting services.

Any RO or FO that may on occasion use any less formal source of recording and reporting services should instead assure that all such services are provided according to contracts. If, because of the remote location of any overseas hearing or for any other reason, an office has found it is not possible to procure these services on its own, it should make arrangements with the Board's Financial and Administrative Division, through ORO, to seek assistance so that conforming contracts can be established in advance of any specific need. Only in extraordinary circumstances, with the concurrence of ORO, may services be provided by others, such as agencies, and only after appropriate arrangements for payment and accountability have been made. *See also* chapter 10, section 18, *infra,* concerning recording, erasing, and correcting a hearing tape and compact diskette (CD).

6. HEARING LOCATION.

If a hearing is to be held in person, it will generally be held in a city designated as an approved fixed site, as listed on the Board's website, www.mspb.gov. Since these sites are approved rather than required sites, it is within the discretion of the AJ, subject to review by the CAJ, to schedule the hearing at nondesignated sites. 5 C.F.R. § 1201.51(d). Some factors to consider before scheduling a hearing at a nondesignated site are the following: (1) availability of suitable facilities; (2) the distance from the agency's location to the designated hearing site and the alternative hearing site; (3) accessibility of the hearing sites to the AJ and witnesses; and (4) the travel expenses for the Board and the parties.

An AJ may require the agency to provide appropriate hearing space. The AJ is not required to accept inadequate facilities.

If a party objects to the hearing site set by the AJ, the objecting party should be asked to provide a basis for the objection. The AJ should consider changing the hearing site if the objecting party shows that a different location will be more advantageous to all parties and to the Board. The AJ should make the parties aware that there is no statutory or regulatory right to a neutral hearing site. Rather, 5 U.S.C. § 7701(a)(1) merely provides that the appellant has a right to a hearing. In general, if the appellant objects to the use of agency facilities, for example, by asserting possible prejudice to the case, alternate facilities near the agency should be considered.

While the improving technology of video hearings has reduced the number of in-person hearings held, for all out-of-town hearings requiring travel, special effort should be made to group cases so that more than one hearing will be conducted on each trip.

7. TELEPHONE HEARINGS.

See chapter 10, section 6, concerning the limited circumstances in which a telephone hearing may be held.

8. VIDEO HEARINGS.

See chapter 10, section 6, concerning video hearings.

9. MOTIONS FOR POSTPONEMENT OF THE HEARING.

a. Form of Request. Motions for postponement must be made in writing and must be supported by an affidavit or be submitted in accordance with 28 U.S.C. § 1746, which generally provides that, when there is a requirement for providing a supporting affidavit, the requirement may be satisfied by an unsworn declaration made under penalty of perjury. The AJ should refer the party to Appendix IV to part 1201 of the Board's regulations for a sample sworn statement. When there is inadequate time for a written request for postponement, an oral request during a conference call can suffice. An affidavit in support of an oral request is not necessary if the AJ notes in his or her written summary of the conference that postponement was ordered based on good cause shown.

b. Good Cause Requirement. Before the AJ grants a motion for postponement of the hearing, the party making the motion must make a showing of good cause. 5 C.F.R. § 1201.51(c). Events within the control of the parties, such as poor planning, lack of foresight, or actions of the parties which, if taken expeditiously, would have avoided the need for a postponement, are not likely to meet this requirement. The AJ should consider, inter alia, the requirements of due process, objection or lack thereof by the opposing party, and the requirements of expeditious case processing.

   In determining whether good cause exists to grant a party's request for a continuance, the AJ should consider the specific reasons for the request. Where a witness's unavailability is the reason, this includes why the party considers the witness' testimony essential and how long the party was aware that the witness would be unavailable before the AJ and the other party were informed of the need for a delay, whether the party could have anticipated the delay and preserved the testimony through a deposition or an affidavit, the availability to the party of alternative sources of proof, the length of the delay sought, the extent of the financial burden placed on the other party by the delay, and whether the testimony may be obtained by alternate means.

   Alternatives to postponement should always be considered. For example, if a witness is unavailable on a scheduled hearing date, consideration should be given to taking the testimony by means of a sworn statement, interrogatories, a deposition, an affidavit, telephone, or a stipulation. A videotaped deposition may be appropriate if there is a credibility issue. It may be useful to have a single unavailable witness testify by video at a different time, while holding the majority of the hearing on schedule.

10. DISMISSAL WITHOUT PREJUDICE.

a. When good cause is shown for an indefinite or a lengthy postponement, a dismissal without prejudice to refile may be appropriate. This procedural option allows for the dismissal and subsequent refiling of an appeal by a certain date. Dismissal without prejudice may be granted on the AJ's own motion or upon request by either party. 5 C.F.R. § 1201.29(b). Dismissal may be granted when the interest of fairness, due process and administrative efficiency outweigh any prejudice to either party. *Id.*

Except in certain USERRA appeals under part 1208 involving the use of military leave, an AJ's decision dismissing an appeal without prejudice should include a date certain by which the appeal must be refiled. 5 C.F.R. § 1201.29(c). A time limit for refiling need not be set, though when the appellant suffers from a mental incapacity and will not cooperate with the adjudication of his appeal under *French* procedures. *Brown v. Office of Personnel Management*, 94 M.S.P.R. 331 (2003). In those circumstances, because the time line for the appellant's recovery may be uncertain, it would not be appropriate to set a refiling deadline. An AJ should determine whether the appeal must be refiled by the appellant or whether it will be refiled automatically by a specified date. *Id.* When the appellant must refile a dismissed appeal, requests for waiver of a late filing based upon good cause will be liberally construed. 5 C.F.R. § 1201.29(d). When a dismissal without prejudice is issued over the objection of the appellant, the appeal will be automatically refiled by a date specified by the AJ. 5 C.F.R. § 1201.29(c).

The Board in *Milner v. Department of Justice*, 87 M.S.P.R. 660 (2001), set a special rule for USERRA appeals. It specified that a USERRA appeal that has been dismissed without prejudice "will be considered automatically refiled by the date set forth in the dismissal order, unless there is evidence that the appellant has abandoned the case." *Id*., ¶ 13. The Board later set the same rule for VEOA appeals. *Gingery v. Department of the Treasury*, 111 M.S.P.R. 134, ¶ 13 (2009).

b. Pending Criminal Prosecution. The processing of an appeal is not automatically terminated (and is never suspended indefinitely) because the appellant is involved in a criminal prosecution. However, such appeals may be dismissed without prejudice pending resolution of the criminal matter under the following circumstances:

(1) At the request of the prosecuting authority or when it appears that going forward with the appeal would hinder the prosecution;

(2) At the request of the appellant or the agency when the trial verdict could have a material effect on the appeal;

(3) When the appellant reasonably asserts that the defense in the criminal action could be jeopardized by the Board proceeding;

(4) When relevant information concerning the appeal is not available or cannot be obtained because of the pending prosecution; or

(5) For other sufficient reasons, such as conserving Board resources (e.g., when the parties agree to be bound by the results of a court case).

The event triggering the need to refile should be set out with precision so that a party is not late in refiling as a result of any ambiguity in the dismissal order. For example, if the appellant may exhaust some or all appeals beyond the trial level before refiling, the dismissal order should specify at exactly which stage to refile.

c. Ruling on a Motion for Postponement. The decision on the motion must be made in writing and must document the reasons for the ruling. If the motion was made at the hearing, a ruling on the record is sufficient.

d. Late refiling. When an appeal that must be refiled by the appellant is refiled late, the standard good cause considerations that apply to a late-filed initial appeal are modified when determining whether to accept the late refiling. *See Gaddy v. Department of the Navy*, 100 M.S.P.R. 485, ¶ 13 (2005), stating that the Board has identified the following factors as supporting a finding of good cause for waiving the refiling deadline: the appellant's pro se status, timely filing of the initial appeal, intent throughout the proceedings to file an appeal, minimal delay in refiling, and any confusion; the small number of dismissals without prejudice; an arbitrary refiling deadline; the agency's failure to object to the dismissal without prejudice; and the lack of prejudice to the agency in allowing the refiled appeal.

11. PUBLIC HEARINGS.

Generally, the Board's hearings are open to the public. However, the AJ may order a hearing or any part of a hearing closed when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. *See* 5 C.F.R. § 1201.52. *See also* chapter 10, section 3 of this Handbook. If an AJ closes a hearing or a part of it, the AJ or court reporter must annotate the hearing transcript or CD to indicate that the testimony was taken during a closed hearing. A brief explanation setting forth the basis for closing the hearing should be included in the record. Any objections to the order should be made part of the record as well. In *Wallace v. Department of Health & Human Services*, 89 M.S.P.R. 178 (2001), the Board held that the AJ's authority to close all or part of a hearing and to offer other methods of assuring privacy renders invalid a claim that a witness was not called because of privacy concerns. Thus, such a witness's written statement in lieu of testimony is assigned little probative value. The AJ, therefore, should inform a party who interposes an objection based on privacy of the option of closing the hearing during that witness's testimony.

If a hearing is open but the appeal has attracted the public's attention, the AJ may be able to avoid the possibility of disruption by having the public attendees view the hearing on video from another room at the RO or FO, if one is available.

Absent express approval from the AJ, no electronic device such as cell phones, text devices, or any other two-way communications device may be operated and/or powered on in the hearing room. 5 C.F.R. § 1201.52(b). Further, cameras, recording devices and/or transmitting devices are not to be operated, operational and/or powered on in the hearing room without the consent of the AJ. Absent the AJ's approval, all such electronic devices must be turned off in the hearing room. *Id.*

12. CONDUCT OF PARTIES - SANCTIONS.

An AJ may exclude any person, including a party or representative, from all or any portion of a Board proceeding because of the person's contumacious conduct, lack of decorum, or other disruptive behavior. *See* 5 C.F.R. §§ 1201.31(d), 1201.41(b), 1201.43. The AJ may exercise such authority at a hearing or at any other point in a proceeding, such as a settlement conference or prehearing conference. The reasons for the exclusion must be documented in the record. If a representative is excluded, the represented party should be given reasonable time to obtain new representation.

In one situation, *Smets v. Department of the Navy*, 117 M.S.P.R. 164 (2011), the Board affirmed the AJs finding that the representative and the appellant had been repeatedly disrespectful and unprofessional in their course of conduct, culminating in their appearance at the hearing only to request a decision on the record. The Board affirmed the AJ's decision to invoke as a sanction disallowing the appellant from introducing evidence in support of a recently raised allegation of disability discrimination.

In another case involving the same representative, the Board agreed with the AJ that the appellant's representative had been proceeding in bad faith, but he and the appellant showed up for the hearing, albeit to press for reconsideration of long-decided matters, then insisted on a decision on the record rather than go forward with the hearing when his motion to reconsider was denied. The AJ also denied the motion to dispense with the hearing, at which point the agency moved for the appeal to be dismissed with prejudice, which the AJ took under advisement, then granted. The Board affirmed the ID, finding that the appellant and her representative had proceeded in bad faith. *Davis v. Department of Commerce*, 120 M.S.P.R. 34 (2013).

Despite these situations, dismissal of the appeal as a sanction remains rare and generally should only be invoked if lesser sanctions are insufficient to achieve compliance with the rules and appropriate conduct.

13. FAILURE OF A PARTY OR REPRESENTATIVE TO APPEAR.

a. Appellant. If the appellant and the appellant's designated representative (if any) fail to appear for the scheduled hearing, the hearing cannot proceed. The AJ should try to call the appellant, and if unsuccessful in making contact, wait a reasonable time before cancelling the hearing in case the appellant is merely tardy.

If neither the appellant nor the appellant's representative appears, the AJ must issue a show cause order that requires the appellant to show good cause for his or her absence. The AJ must then follow up with a second order either rescheduling the hearing if the appellant establishes good cause, or setting the date for the close of the record if the appellant fails to respond to the order or if the response fails to show good cause. In the latter instance, the appeal must be adjudicated on the basis of the written record only. *See Callahan v. Department of the Navy,* 748 F.2d 1556 (Fed. Cir. 1984).

If the show cause order has informed the appellant that failure to respond may result in the dismissal of the appeal for failure to prosecute, the AJ may also consider dismissing the appeal on that basis. However, because a single failure to comply with an AJ's order is not a sufficient reason to dismiss an appeal, dismissal should only be considered if the failure to appear at the hearing is part of a broader pattern of neglect by the appellant and the dismissal is based on the entire pattern of that behavior. *Cf. Talbot v. Department of the Interior,* 83 M.S.P.R. 325 (1999) (then-Vice Chair Slavet dissenting), which upheld the cancellation of the hearing and

the ultimate dismissal of the appeal for the appellant's failure to prosecute it, based on his several failures to comply with the AJ's prehearing orders and to show good cause for such failures.

b. The Appellant's Representative. If the appellant fails to appear for the hearing, but the appellant's representative does appear, the AJ must inform the representative that the following alternatives are available: (1) proceeding with the hearing; (2) having a decision on the written record; or (3) requesting a continuance. *See Sparks v. U.S. Postal Service*, 32 M.S.P.R. 422 (1987). The appellant's representative must show good cause to obtain a continuance.

c. Agency or Intervenor. If either the agency or an intervenor fails to appear, the hearing, absent extraordinary circumstances, will proceed as scheduled after the AJ has waited a reasonable time for the absent representative to appear and has attempted to contact him or her.

MERIT SYSTEMS PROTECTION BOARD

CHAPTER 5 - MOTIONS

1. FORM OF MOTIONS.

Motions must be in writing, unless they are made in a prehearing or status conference or at a hearing.

2. RULING ON MOTIONS.

a. Time Limits for Rulings. Although the Board's regulations contain no time limits for ruling on motions, an AJ should dispose of motions as quickly as possible. Accordingly, an AJ should take only a minimum number of motions under advisement.

b. Due Process Considerations. The AJ should not rule on substantive, controversial or complex motions without allowing the opposing party an opportunity to object. The AJ may initiate a conference call with the parties both to discuss the motion and to make an oral ruling. A conference call is especially appropriate when more facts are needed or the matter is time-sensitive. Frequently, the issue may be resolved without a ruling. If a ruling is needed, however, the AJ may rule orally and subsequently must memorialize his or her ruling or, rarely, take the motion under advisement for a later written ruling. Alternatively, if the opposing party files a written response or fails to timely respond to the motion, the AJ may rule on the motion in a written order. In either case, the AJ should rule promptly.

   Motions that are clearly without merit, inexplicably late, or clearly noncontroversial, may be ruled on without seeking input from the opposing party. If an objection is received after a ruling is made, the AJ, according to the circumstances, may treat the objection as a motion for reconsideration of that ruling and, after consideration of the response, issue a new ruling either affirming the first or concluding differently.

3. MEMORIALIZATION OF RULINGS.

For every motion filed, the record must show a written disposition, i.e., GRANTED, DENIED, or WITHDRAWN. Thus, oral rulings and discussions must be memorialized in a written order reiterating the rulings made, compromises reached, or other dispositions of the motion. That order should be served on all the parties as soon as possible after the conference call, after receipt of a written response to the motion, or after the expiration of the deadline for responding to the motion. However, when the disposition of the motion is recorded on the official tape, CD, or transcript, including any official tape recording or CD of a prehearing or status conference, the requirement for a written disposition is met by the tape or transcript. It is important to assure that the record contains a clear ruling on all motions that may be significant so that the record reflects fully the AJ's actions and decisions.

If the motion is noncontroversial, has not been objected to, and is granted, the AJ's order need not contain reasons for the ruling. Otherwise, the order must describe the motion and the AJ's reasons for granting or denying the motion.

CHAPTER 6 - INTERLOCUTORY APPEALS

1. INTRODUCTION.

An interlocutory appeal is an appeal to the Board of a ruling made by an AJ during the processing of the case. The Board's regulations governing interlocutory appeals are set out at 5 C.F.R. §§ 1201.91-.93.

2. CRITERIA FOR CERTIFYING INTERLOCUTORY APPEALS.

Under the Board's regulations, an AJ will certify an interlocutory appeal from a ruling only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion and an immediate decision will materially advance the completion of the proceeding, or the denial of an immediate decision will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92.

a. Criteria Met. Certain rulings, in appropriate circumstances, might meet the criteria for certification. Examples are:

(1) Denial of a motion to dismiss for lack of jurisdiction, particularly when the jurisdictional issue is precedential (unlike granting the motion, which can quickly bring the case to the Board's attention through a PFR, its denial will lead to adjudication of the appeal and to potentially unnecessary expense and inconvenience for the parties, witnesses, and the AJ);

(2) Denial or grant of a motion certifying a class action;

(3) Denial of a motion for permissive intervention;

(4) Denial or grant of a motion to disqualify a designated representative;

(5) Denial of a motion for production of evidence for which a privilege is claimed; and

(6) Denial of a stay request under 5 C.F.R. § 1209.10(b).

b. Criteria Not Met. Certain rulings, by their very nature, generally do not meet the criteria for an interlocutory appeal. Examples are:

(1) Denial of a motion for a continuance;

(2) Denial of a motion to amend a transcript;

(3) Denial or grant of a motion concerning the production of witnesses;

(4) Denial or grant of a motion concerning the introduction of evidence (other than those rulings specified in a.5., above); and

(5) Denial of a motion to disqualify an AJ.

3. PROCEDURES.

a. Ruling. The AJ must rule on motions for interlocutory appeals from his or her own rulings, as well as from rulings on the AJ's case made by other Board officials. The Board has noted that the interlocutory appeal regulations contemplate that the AJ

will make a "ruling" and not merely certify a "question"; further, that an interlocutory appeal by its very nature does not deal with dispositive issues on the merits. *Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169 (2002). Thus, AJs should avoid certifying such matters to the Board.

b. Opportunity to Object. Before ruling on the motion, the AJ must allow the opposing party the opportunity to object to certification. As with other prehearing motions, the AJ should consider initiating a conference call with all parties to discuss the merits of the motion and any objections.

c. Own Motion. The AJ may also certify an issue to the Board on his or her own motion if it meets the regulatory criteria.

d. Submission of Record to the Board. If the motion is granted, or the AJ certifies the issue on his or her own motion, the AJ must send the record by standard overnight delivery to the OCB, within two workdays, except if the appeal has been designated an ECF.

4. STAYS PENDING INTERLOCUTORY APPEALS.

Pursuant to 5 C.F.R. § 1201.93(c), the AJ may stay all proceedings pending Board resolution of the certified issue or may choose to proceed with processing the appeal. The choice is committed to the AJ's sound discretion and may depend on whether any progress was made during the period while the interlocutory appeal is pending with the Board and may be undone by the Board's decision. The certification to the Board must clearly indicate which course of action the AJ is taking. The passage of time during any stay granted under this section is separate and distinct from the case suspension procedures under § 1201.28. If the AJ does not stay the processing of the appeal, the Board may do so while an interlocutory appeal is pending with it. *Id.*

CHAPTER 7 - WITNESSES, SUBPOENAS AND SWORN STATEMENTS

1. REQUESTS FOR WITNESSES.

The parties are required by the standard hearing notices to provide the AJ with a list of witnesses and a brief summary of their expected testimony. The AJ must rule on all requests for witnesses. The request must be approved if the AJ finds that the expected testimony of the witness appears to be relevant, material, and not unduly repetitious. Generally, the rulings will be made prior to the hearing.

2. OBTAINING WITNESSES FOR HEARINGS AND DEPOSITIONS.

a. Witnesses Employed by the Respondent Agency. The agency must arrange for the appearance of its employees as witnesses when ordered to do so by the AJ. If the AJ's order is not effective, the AJ should consider imposing sanctions under 5 C.F.R. § 1201.43.

b. Nonparty Federal Agency Witnesses. The AJ may issue an order to the personnel officer of the nonparty agency that employs the witness. The order should state the following: a) the necessity of the employee's appearance; b) the date, time and location of the hearing; and c) the agency's obligation to provide the witness pursuant to 5 C.F.R. § 1201.33. If the AJ's order is not effective, granting a subpoena to the party who requested the witness, rather than imposing sanctions, is the appropriate course of action, since that agency is not subject to the Board's direction, as a party would be. *See Porter v. Department of the Navy*, 6 M.S.P.R 301, 303 n.1 (1981).

   Whether the witness is employed by the agency that is a party to the appeal or another Federal agency, the witness is entitled to be in official duty status and to the pay and benefits that come with that status, including travel and per diem when necessary. 5 C.F.R. § 1201.33(a).

c. Witnesses Who Are Not Federal Employees. The requesting party is responsible for securing the appearance of witnesses who are not Federal employees. A party may request the Board to issue a subpoena to accomplish that end. If granted, the AJ should advise the requesting party that he or she is responsible for service and payment of any costs.

3. SUBPOENAS--REGULATORY CITATION; EXCEPTIONS.

See generally 5 C.F.R. §§ 1201.81-.85. Parties requesting the AJ to issue a subpoena must show that the evidence sought is "directly material to the issues involved in the appeal." 5 C.F.R. § 1201.81(c). This standard, therefore, requires more of a showing than mere relevance; rather, to be "material" means to have probative weight, i.e., testimony or evidence that is reasonably likely to influence the AJ in making a determination required to be made.

While AJs may grant or deny subpoena requests according to each circumstance, it is wise to consult with OGC on cases of special sensitivity before granting a subpoena since if enforcement is required, it is OGC that will have that task. OGC's assessment of whether

courts are likely to enforce such subpoenas and of the policy considerations at play is valuable information to have in making your ruling. Two examples of when it is not generally appropriate to grant a subpoena are for Federal employees who serve in positions similar to the AJ position, such as OWCP Claims Examiners, and for the statements of witnesses interviewed by OSC during an investigation, who are all promised confidentiality.

Further, a heightened showing of need may be appropriate for high level appointees at agencies. Factors such as the following are likely to be considered by a Federal district court when addressing this issue: 1) is the official's testimony necessary to obtain relevant information that is not available from another source? 2) does the official have first-hand information that cannot be reasonably obtained from other sources? 3) is the testimony essential to the case at hand? 4) would the deposition significantly interfere with the ability of the official to perform his government duties? and 5) is the evidence sought available through less burdensome means or alternative sources? *See Thomas v. Cate*, 2010 WL 1343789, *1 (E.D. Cal. April 5, 2010) (citing *U.S. v. Sensient Colors, Inc*., 649 F. Supp. 2d 309, 320 (D.N.J. 2009)). Thus, before a subpoena is granted for such an official, the record should address each of these matters so that both the AJ and OGC have a clearer idea of the likelihood of success.

Service of a subpoena through use of the Board's e-filing system is prohibited. 5 C.F.R. § 1201.14(c)(2).

4. TIMELY OBJECTIONS TO A SUBPOENA.

The Board's regulations do not specifically limit the time allowed for objecting to a motion for a subpoena. Although a party generally is limited to 10 days to object to a motion, such a limit is not strictly applicable here since a party can object not only when the request is filed, but also after the subpoena is issued.

5. MOTIONS TO QUASH OR LIMIT.

See 5 C.F.R. § 1201.82. An AJ may have delegated authority to rule on objections to subpoenas. The AJ should rule promptly on objections. The AJ should also ensure that the person receiving the subpoena is made aware of both the objection--assuming he or she did not file the objection--and the AJ's ruling. Meeting these responsibilities is essential since there is no legal obligation to comply with a subpoena as long as an objection is outstanding or the recipient is unaware of its disposition. *See generally* Fed. R. Civ. P. 45.

6. MOTIONS FOR ENFORCEMENT.

a. Requirements. If a person has received a subpoena but fails or refuses to comply, the party requesting the subpoena may apply to the Board in writing for enforcement in U.S. District Court. When noncompliance relates to discovery, the party seeking enforcement must file (a) the return of service, documenting proper service, and (b) an affidavit describing the witness's failure or refusal to obey the subpoena. When noncompliance relates to the hearing, the party need file only (a), while the AJ must document noncompliance. A motion for enforcement may be made verbally at hearing. 5 C.F.R. § 1201.85(a).

b. Referral to OGC. After consultation with the CAJ, the AJ must immediately refer the motion for enforcement to OGC by calling Attorney Jeff Gauger at (202) 254-4488 or (202) 653-6772, extension 4488. The AJ should be prepared to discuss the matter, and a copy of the motion must be sent to OGC by overnight delivery, e-mail, or fax as soon as possible. Where enforcement of subpoenas in multiple jurisdictions may be involved, the AJ should coordinate with OGC, which will want to consolidate the enforcement actions when that is an option, to minimize travel. The CAJ should keep ORO advised of all developments. The AJ must notify the parties that the motion has been referred to OGC and must continue processing the appeal. If it becomes necessary, the AJ should consider proceeding to hearing without a ruling on the motion and allowing the record to remain open pending the ruling. DWOP may be appropriate if there is likely to be a very lengthy delay.

7. PROTECTIVE ORDERS.

During an investigation by the OSC or during the pendency of any proceeding before the Board, including nonwhistleblower cases, the AJ may issue an order to protect a witness or other individual from harassment. An agency (other than OSC) cannot request a protective order from the Board during the OSC investigation. *See* 5 U.S.C. § 1204(e)(1)(B)(i); 5 C.F.R. §§ 1201.55(d), 1201.41(b)(14). Enforcement of a protective order is governed by 5 U.S.C. § 1204(e)(1)(B)(ii) and subpart F of the Board's regulations.

8. REQUIREMENTS FOR SWORN STATEMENTS.

Any time an AJ requires an affidavit or sworn statement from a party, he or she should refer the party to Appendix IV to part 1201 of the Board's regulations for a sample declaration under 28 U.S.C. § 1746, which substantially requires:

a. If executed outside the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executive on (date). (Signature)".

b. If executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executive on (date). (Signature)".

CHAPTER 8 - DISCOVERY

1. GENERAL.

Board regulations on discovery are set out at 5 C.F.R. §§ 1201.71-.75. Discovery regulations have changed substantially during the Board's existence; thus, earlier case law in this area may not apply under current regulations. Discovery may progress from voluntary cooperation when the parties informally request information from each other to required cooperation when the Board orders compliance. *See* 5 C.F.R. § 1201.73. Discovery requests to nonparties and nonparty Federal agencies are limited to information that appears "directly material" to the issues involved in the appeal. *See* 5 C.F.R. § 1201.72(b). AJs should encourage parties to voluntarily comply with discovery requests, because discovery is intended to be a process that the parties use to obtain information relative to an appeal, and it is expected to be conducted with minimum Board intervention. 5 C.F.R. § 1201.71, .72.

2. FEDERAL RULES OF CIVIL PROCEDURE.

If after reviewing the regulations, precedent, and this chapter, the AJ is still unsure how to rule on a discovery matter, he or she should consult Rules 26-37 of the Federal Rules of Civil Procedure for guidance. Although the rules are not controlling, an AJ is likely to be on solid ground by observing them since they represent conventional thought on acceptable procedures. 5 C.F.R. § 1201.72(a); *see also Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 285 n.7 (1988).

Rule 26(b)(1) of the Federal Rules of Civil Procedure was changed as of December 1, 2015. Instead of the language that evidence "reasonably calculated" to lead to admissible evidence is discoverable, the Rule now contains a proportionality limitation. It now states --

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The Notes of Federal Rule of Civil Procedure 26(b)(1) state that the primary reason for the change is e-discovery: "The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available."

3. FORMS OF DISCOVERY.

a. Document Production. A party may request documents in the possession or control of another. The party or person in possession of the requested documents may either provide copies of the documents or make the documents available for photocopying, subject to the discretion of the AJ to rule on an objection to the method selected.

b. Interrogatories. Parties may ask each other or a nonparty to answer a series of written questions. (Note that while 5 C.F.R. § 1201.72(c) refers only to interrogatories "to parties," § 1201.73(e) refers to interrogatories to both parties and nonparties.) These questions must be answered in writing under oath or affirmation. Absent prior approval by the AJ, interrogatories served upon a party or a nonparty "may not exceed 25 in number, including all discrete subparts." 5 C.F.R. § 1201.73(e)(1). Requests to exceed the interrogatory limitations may be granted at the discretion of the AJ. 5 C.F.R. § 1201.73(e)(3). In considering such requests, the AJ shall consider the factors identified in 5 C.F.R. § 1201.72(d).

Note that the Federal Rules of Civil Procedure do not allow for interrogatories to nonparties. *See* Fed. R. Civ. P. 33. Although when the regulations were amended in 2008, the Board made explicit its intention to limit the submission of interrogatories to other parties, *see* 73 F.R. 18149 (2008), the regulations as revised in 2012 once again allow for service of interrogatories on nonparties.

c. Depositions. Parties may ask each other or potential witnesses written or oral questions to be answered under oath or affirmation. The questions and answers are recorded (at the expense of the requesting party) before a person authorized to administer oaths and not interested in the outcome of the proceedings, such as a court reporter. *See* Fed. R. Civ. P. 28 and 30. Opportunity for cross-examination is afforded.

Pursuant to 5 C.F.R. § 1201.75, depositions may be taken by any method on which the parties agree. Accordingly, AJs should not hold the parties to strict compliance with the Federal Rules of Civil Procedure if (1) the parties have agreed on the method by which the deposition is taken, and (2) the person providing the information in the deposition is subject to penalties for intentional false statements.

The record of a deposition may be used to substitute for the hearing testimony of a witness who is otherwise unavailable. *See* Fed. R. Civ. P. 32. AJs may also admit depositions in the interests of efficiency to save hearing time or travel costs. Absent prior approval by the AJ or agreement by the parties, each party may not take more than 10 depositions. 5 C.F.R. § 1201.73(e)(2). Requests to exceed the deposition limitations may be granted at the discretion of the AJ. 5 C.F.R. § 1201.73(e)(3). In considering such requests, the AJ shall consider the factors identified in 5 C.F.R. § 1201.72(d).

d. Request for Admissions. A request for admissions is a request that the other party admit in writing, the truth of certain matters "relating to (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described

documents" concerning the appeal. *See* Fed. R. Civ. P. 36(a). The purpose of this procedure is to establish facts so that there is no need to present evidence to prove them at the hearing.

4. VOLUNTARY DISCOVERY.

a. Parties' Responsibility. Voluntary discovery is a policy designed to conserve Board resources by giving the parties control over discovery. The parties should be encouraged to cooperate in exchanging information concerning the appeal.

b. AJ's Responsibility. The AJ should send out the acknowledgment order and hearing notice to the parties as soon as possible so that they can pace their discovery efforts. The AJ should also inquire about discovery during early conferences, and if it becomes necessary, offer informal direction. This enables the AJ to learn the status of voluntary discovery efforts and identify potential problems that might delay the process. To facilitate the process, an AJ may assist in negotiating the reasonableness of the request during the early stages of discovery.

5. DISCOVERY REQUESTS.

a. Contents. All discovery requests must specify time limits for responding. 5 C.F.R. § 1201.73(a). A notice of deposition must specify the date, time, and place of the deposition. The parties may agree to reschedule or postpone discovery during the voluntary stage. Deposition witnesses must give their testimony at the designated time and place stated in the request for deposition or in the subpoena unless the parties agree on another time or place. 5 C.F.R. § 1201.73(d)(2).

b. Service. A party must serve a copy of each discovery request on the representative of the other party or on the party if there is no representative. 5 C.F.R. § 1201.73(a).

6. PREMATURE FILINGS.

The AJ must not accept for filing any requests for discovery, responses to discovery requests, and/or objections unless such information is submitted in support of a motion to compel or opposition to a motion to compel. Instructions to the parties regarding this prohibition are included in the acknowledgment order. Any material gained in discovery that a party wishes to enter into the record must be submitted as an exhibit or in connection with a pleading.

7. TIME LIMITS FOR DISCOVERY.

See generally 5 C.F.R. § 1201.73(d).

a. Initial Discovery Requests. Discovery requests must be initiated within 30 days after the date of issuance of the acknowledgment order (in compliance cases, within 15 days of the filing of the response to the petition for enforcement).

b. Responses to Discovery Requests. A party or nonparty must file a response to a discovery request promptly, but not later than 20 days (15 in compliance cases) after the date of service of the discovery request.

c. Supplemental Requests. If the requesting party finds it necessary to make additional requests based on the responses it receives, these supplemental requests must be served within 10 days after the date of service of the prior responses unless otherwise directed by the AJ.

d. Responses to Supplemental Requests. The time limit for responding to a supplemental request for discovery is also 20 days.

e. Completion of Discovery. Discovery should be completed within the time designated by the AJ. 5 C.F.R. § 1201.73(d)(4). If no such period is designated, discovery must be completed no later than the prehearing or close of record conference. *Id.* The AJ must ensure that due process requirements are met.

f. Computation of Time. In computing the number of days allowed for complying with any deadline, 5 days are added to a party's deadline for responding to a document served by mail unless a different deadline is specified by the AJ. 5 C.F.R. § 1201.23.

8. MOTIONS TO COMPEL.

When a party fails or refuses to respond in full to a discovery request (e.g., by objections, lapse of time, repeated delay, nonresponsive answers, etc.), the requesting party may ask for the Board's assistance by filing a motion to compel. Parties must file motions to compel within 10 days of the date of service of objections or the expiration of the time limit for response, when no response has been received. 5 C.F.R. § 1201.73(d)(3).

a. Contents.

(1) The motion must be accompanied by a copy of the original discovery request and a copy of the response or, if no response was received, an affidavit or sworn statement to that effect. *See* 5 C.F.R. § 1201.73(c)(1)(i), (ii).

(2) The motion must explain the relevance and materiality of the information sought. 5 C.F.R. § 1201.73(c)(1)(i).

b. Opposition. The recipient of a discovery request may respond to the motion to compel either by complying or by explaining the failure to comply. The recipient or a party has 10 days from the date of service to respond or object to a motion to compel. 5 C.F.R. § 1201.73(d)(3). Processing problems could arise if the AJ waited for this 10-day period to elapse (plus 5 days to allow for mailing) before ruling on the motion. The AJ has a choice of two courses of action to prevent delays, as explained below.

c. Preventing Delay. Upon receipt of a motion to compel, the AJ should promptly initiate a conference call with the parties to determine the nature of opposition and to attempt to resolve it before ruling on the motion. The AJ should be prepared to grant requests for more time to respond from the opposing party due to the short time frames involved. When the motion is deniable on its face, the AJ should rule on the motion without waiting for a response.

d. Formal Action by the AJ. After a motion to compel is filed, the AJ must examine it and the underlying discovery requests to ensure that they meet all regulatory time

limits and requirements. An AJ has broad discretion in rejecting motions to compel due to untimely discovery requests. *See Esparza v. Department of the Air Force*, 22 M.S.P.R. 186 (1984). Motions to compel must be ruled on promptly to enable the parties ample time to complete discovery.

9. ADMINISTRATIVE JUDGE'S DISCOVERY AUTHORITY.

a. An AJ has authority to order parties, including agency employees, to respond to discovery motions. *See* 5 C.F.R. § 1201.41(b)(4). AJs may have delegated authority to do the following: (1) Issue subpoenas for the appearance of witnesses and production of documentary or other evidence; (2) order the taking of depositions; and (3) order responses to written interrogatories and requests for admissions.

b. An AJ's broad authorities concerning discovery matters are illustrated by the Board's decision in *Montgomery v. Department of the Army*, 80 M.S.P.R. 435, 438-42 (1998). In that case, the Board: made clear that an AJ's discovery-related rulings would be reviewed under an abuse of discretion standard; supported the AJ's decision to require the agency to produce documents for his in camera inspection, even when a claim of privilege might allow the agency to withhold the documents from the appellant; held that records need not be subject to mandatory disclosure, as under the Privacy Act, before an AJ may order discovery as to them; affirmed that the parties may not place conditions on documents released by a discovery order; ruled that even if an AJ had erred in disseminating discovery information, that error would not allow a party to refuse to comply with any remaining portion of the order; and upheld AJs' authority to impose sanctions for a party's failure to comply with discovery orders.

10. SUSPENDING CASES FOR DISCOVERY.

An AJ may suspend a case two times for up to 30 days each. 5 C.F.R. § 1201.28. Among the reasons commonly given for such a suspension is to allow the parties to complete discovery. *See* chapter 3, section 12 for details.

CHAPTER 9 - PREHEARING AND STATUS CONFERENCES

1. PURPOSES OF CONFERENCES.

The purposes of the prehearing and status conferences are to do the following:

a. Explain Board procedures to the parties;

b. Facilitate discovery;

c. Identify, narrow, and define the issues;

d. Obtain stipulations;

e. Discuss the possibility of settlement;

f. Rule on witnesses; and

g. Rule on exhibits.

2. ISSUANCE OF STANDARD ORDERS – "*BURGESS*" NOTICE.

a. In hearing cases, the AJ must send out the appropriate standardized Order and Notice of Hearing and Prehearing Conference (HEARREG or HEAROPM).

b. In cases decided without a hearing, the AJ must send out the appropriate standardized Order Closing the Record (CLOSEREG or CLOSEOPM).

c. HotDocs includes many inserts and stand-alone documents that are intended to inform the parties of the requirements for proof of jurisdiction and/or the merits on the type of appeal filed and the affirmative defenses associated with it. Such notices satisfy the parties' right to a fair process and are known as *Burgess* orders because of the decision in *Burgess v. Merit Systems Protection Board,* 758 F.2d 641 (Fed. Cir. 1985), which requires such notice before an adverse ruling may be made. To the extent necessary or appropriate, AJs may and should modify these standard orders to more precisely fit the circumstances of any individual appeal, but should not delete information from standard documents that is designed to meet *Burgess* notice requirements. In many situations where it appears that an appellant has not raised an issue, subsequent events may indicate that he believed that he had done so. If the standard document was sent out, then the issue can be addressed without further delay later in the appeal and the Board, on review, will see that the record shows that the appellant was fully informed of the burdens and standards of proof of the claim, thereby perhaps avoiding a remand.

d. Video conference hearing. If a hearing is to be held by video conference, the agency may be directed to locate and make available a video conference site. For guidance regarding video conference hearings, *see* chapters 4 and 10 of this Handbook.

e. Bench decision. An AJ must notify the parties of the possibility of and the procedures for requesting a bench decision in the hearing order. *See* chapter 4, section 3, and chapter 12, section 5a of this Handbook.

3. NUMBER OF CONFERENCES REQUIRED.

At least one prehearing conference or one status conference must be held in every case. Exceptions to this policy are the following:

a. Cases that are obviously untimely or not within the Board's jurisdiction;

b. Cases in which the appellants have not provided their telephone numbers and the numbers cannot readily be obtained; and

c. Certain overseas cases -- such as Filipino retirement cases -- when an attempt to hold such conferences would be impractical.

d. Addendum cases which, in the discretion of the AJ, do not require a conference.

4. METHOD OF CONFERENCES.

Prehearing or status conferences may be held by telephone, video conference, or in person. The agency, with the possible exception of OPM in retirement cases, may be required to make the arrangements for a telephonic or video conference.

5. RECORD OF CONFERENCES.

The AJ must prepare, or have a party prepare, a prehearing or status conference summary when any rulings were made or agreements were reached on issues (including affirmative defenses), witnesses, exhibits, stipulations, etc. In the alternative, the AJ may memorialize the prehearing conference by using the telephone system to record the conversation, from which a CD can be made and placed into the electronic record as an audio file. Otherwise, an audio tape or CD may be made of the conference and included in the record or, before the hearing begins, a summary of the prehearing or status conference may be read into the hearing record. However accomplished, the goal is to assure that all issues raised and all rulings made are preserved for the record. 'Prehearing conferences may be recorded either by audio taping or video taping only after the AJ informs all parties that the conference is being recorded, and that all parties' consent to electronic recording may be required under some state privacy statutes. *See, e.g.*, Cal. Pen. C. § 632. The former is a matter of policy that the Board may properly determine, but whether the Board is subject to the various state laws concerning consent to electronic recording is less clear. The matter has not been addressed in a published Board decision. Until it is, or until more definitive guidance is provided, the AJ should direct that a party (who raises a claim that the conference may not be recorded) fully brief the issue, including whether the Board is subject to any state-imposed restrictions.

The Board, of course, must rely on the record when a PFR is filed. In the absence of a complete summary of all conference rulings, etc., it may find no support for a statement or action of the AJ that is reflected in the ID or the proceedings leading to it. Thus, inadequate documentation of prehearing rulings may lead to unnecessary reversals or remands. *See, e.g., Conant v. Office of Personnel Management*, 79 M.S.P.R. 148 (1998) (AJ's statement that the appellant withdrew her hearing request found inadequate proof of waiver where circumstances of the withdrawal were not fully described and record was not documented to show that she had been informed of her options). For this reason, and to help avoid the

possibility that memories will differ between the parties and the AJ, even when there were no rulings made or agreements reached, it is preferable to issue a summary so stating.

The conference record must identify all issues that the AJ has accepted for adjudication, and the parties must be informed that they will be limited to those issues cited (unless a party can establish that the issue belatedly being raised could not have been previously known despite due diligence). When the AJ rejects an issue, any objection to the AJ's ruling should be addressed in the conference record. If there are no material differences in the parties' statements of facts and issues, the conference record may incorporate the parties' statements by reference.

Except when the prehearing conference is recorded or read into the hearing record, the AJ should advise the parties that, if they believe the conference record inaccurately summarizes the prehearing conference, they should call the AJ to arrange a conference call to resolve the alleged inaccuracies before the hearing or submit exceptions to the conference record in writing. When a written memorandum summarizing the conference is prepared, the AJ (or the party given the task of preparing the summary) must serve the memorandum on the parties and provide a specific number of days, normally at least 5, for filing corrections or objections to the memorandum. *See* *Miles v. Department of Veterans Affairs*, 84 M.S.P.R. 418 (1999) (citing this Handbook for its holding); *but see* chapter 1 of this Handbook, cautioning that "adjudicatory error is not established solely by failure to comply with a provision of this handbook." If a party is designated to prepare the summary, the AJ must annotate the party's memorandum or otherwise show his or her agreement with its accuracy before it is placed in the record. *Id*.

If no rulings are made or agreements reached, a summary is not required. Memorializing that fact, however, with notice to the parties, will help prevent a later claim that a matter was ruled on at the otherwise undocumented conference. Rulings such as the changed date of a status conference do not require documentation in a separate order; rather, the change in date should be identified in the summary of the conference when it is held.

6. TREATMENT OF AFFIRMATIVE DEFENSES DURING PREHEARING AND STATUS CONFERENCES.

An AJ must observe the following procedures whenever an appellant raises an affirmative defense in a case in which such a defense may be advanced. This excludes IRA, USERRA, and VEOA appeals. *See* *Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), *and modified on other grounds by* *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 323 n.13 (1994) (IRA); *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285, 291-92, ¶ 15 (2001) (USERRA); *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, 401, ¶ 12 (2001) (VEOA). The Board lacks authority to hear affirmative defenses under both USERRA and VEOA. *See* *Davis v. Department of Defense*, 105 M.S.P.R. 604 (2007).

a. Enforcement of the Prehearing Order. The AJ will enforce the prehearing order, which directs the parties to submit separate statements of facts and issues.

   If an appellant fails to submit a statement of facts and issues, the AJ must require the appellant to state all defenses, including affirmative defenses, during the

prehearing conference. The AJ must inform the appellant that he or she is limited to those issues raised, except for good cause shown.

Those defenses and the AJ's admonition must then be incorporated in the prehearing conference record.

b. Addition or Waiver of Affirmative Defenses. The AJ will review the appeal for any affirmative defense that appears to be alleged but is not included in an appellant's statement of facts and issues, and bring the omission to the appellant's attention. The AJ must give the appellant the opportunity to add the omitted defense to the statement of facts and issues, or obtain an explicit waiver of the omitted defense. The result must be memorialized in the prehearing conference record, as the Board will not assume that the AJ's failure to address it in the ID means that the appellant waived or abandoned the issue. Further, if a pleading filed by or on behalf of the appellant makes a claim that, if fully developed, may constitute an affirmative defense, the AJ must provide the appellant an opportunity to affirm or disavow that such an issue is part of the appeal. Before determining whether the appellant intended to raise such a claim, the AJ must assure that the record shows that the appellant was informed of the showing necessary to the presentation and proof of such an issue. As the Board stated in *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146 (2010):

> We now make clear that when an appellant raises an affirmative defense in an appeal either by checking the appropriate box in an appeal form, identifying an affirmative defense by name such as "race discrimination," "harmful procedural error," etc., or by alleging facts that reasonably raise such an affirmative defense, the AJ must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. If an appellant expresses the intention to withdraw such an affirmative defense, in the close of record order or prehearing conference order the AJ must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give an appellant an opportunity to object to withdrawal of the affirmative defense. The record in this appeal simply does not establish that the appellant abandoned or withdrew the affirmative defenses he had raised in his appeal. As explained below, in the absence of evidence establishing the appellant had withdrawn or abandoned his affirmative defenses, it was incumbent on the AJ to advise the appellant of applicable burdens of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden.

An appellant is entitled to a decision on the merits of his discrimination claim under the procedures set forth at 5 U.S.C. § 7701; this is true regardless of whether the appellant has made a nonfrivolous claim or established a prima facie case of discrimination. *See Currier v. U.S. Postal Service*, 79 M.S.P.R. 177, 180-82 (1998); *Bennett v. National Gallery of Art*, 79 M.S.P.R. 285, 289-95 (1998) (then-Member Marshall dissenting). The allegation must be one of "prohibited" discrimination.

Thus, where an appellant's alleged disorder was statutorily excluded from the definition of disability, the AJ's striking of the appellant's claim was not harmful error because the appellant failed to allege prohibited discrimination. *Browder v. Department of the Navy,* 81 M.S.P.R. 71, 76 (1999), *aff'd*, 250 F.3d 763 (Fed. Cir. 2000) (Table). The appellant is entitled to a hearing at which he or she may submit evidence pertaining to the claim of prohibited discrimination. *See Owens v. Department of the Army*, 82 M.S.P.R. 279, ¶ 7 (1999). However, the AJ retains the authority to rule on the admissibility of evidence and its relevance. *Brown v. U.S. Postal Service,* 81 M.S.P.R 16, 21, n.4 (1999).

The appellant also has the right to be heard on the affirmative defenses even when the agency cancelled the action after the appellant filed the appeal, unless the Board could not grant any additional relief. This requires the AJ to notify the appellant that he or she may claim compensatory or consequential damages where no such claim has yet been raised, and that if the appellant does so, the AJ will hear and rule on the affirmative defense so that the damages claim can also be decided, if appropriate. *See, e.g.*, *Roach v. Department of the Army*, 82 M.S.P.R. 464 (1999) (consequential damages); *Hodge v. Department of Veterans Affairs*, 72 M.S.P.R. 470 (1996) (compensatory damages). To the contrary, however, the Board has held that an outstanding claim for attorney fees does not prevent an appeal from being dismissed as moot. *See, e.g., Uhlig v. Department of Justice*, 83 M.S.P.R. 29 (1999). Moreover, in *Sacco v. Department of Justice*, 90 M.S.P.R. 37 (2001), the Board followed the rule of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), which precludes a fee award under the catalyst theory based on the cancellation of an appealed matter. Thus, in these circumstances, a request for fees will not prevent an appeal from being dismissed as moot.

Whistleblower claims are analyzed differently. Although an outstanding claim for attorney fees does not preclude dismissing an appeal brought under chapter 75 as moot as in *Currier*, the Board has held that a request for attorney fees in an IRA appeal is a claim for corrective action. *Vick v. Department of Transportation,* 118 M.S.P.R. 68, 69-70, ¶ 5 (2012); *Santos v. Department of Energy,* 99 M.S.P.R. 475, ¶ 7 (2005). In OAA appeals where whistleblower retaliation is raised as an affirmative defense, the appellant can proceed with a claim of retaliation for whistleblowing activity when he can articulate some possible, effective relief that can be granted by the Board under 5 U.S.C. § 1221(b), which, in relevant part, gives an employee the right to seek corrective action from the Board when the employee can appeal directly to the Board under any law, rule, or regulation. *Lamberson v. Department of Veterans Affairs*, 80 M.S.P.R. 648, 654-55, ¶ 14 (1999).

c. Limitation of Issues The parties will be bound to the issues defined in the AJ's conference record, except in cases of good cause shown.

This means, for example, that when an appellant waits until the hearing to raise discrimination as a defense, the AJ must require the appellant to explain the delay,

and if justified, must afford the agency or intervenors, if any, an opportunity to show that considering that issue would unduly prejudice its rights.

d. Failure to Introduce Evidence. Any failure to introduce evidence in support of an affirmative defense will be treated like any other matter before the trier of fact. That is, if the appellant fails to introduce evidence on an affirmative defense, then he or she would fail to meet the burden of proof. *See Brown v. Department of the Air Force*, 67 M.S.P.R. 500, 508 (1995); *Thomas v. Office of Personnel Management*, 47 M.S.P.R. 369 (1991).

7. RETIREMENT CASES.

In retirement cases, the AJ must inform appellants of their burden of proof and of the kind of evidence they need to provide the Board for the adjudication of their appeals. The Board has found that because the appellant has the burden of proof in a retirement appeal, both OPM and the AJ have a special burden to assure that the appellant is not disadvantaged, especially when pro se. This extends to requiring that when the AJ knows that the appellant's proof is insufficient, the AJ must so inform the appellant and assure that he or she is made aware of the type of evidence that must be submitted to support the claim. *See, e.g., Goodnight v. Office of Personnel Management*, 49 M.S.P.R. 184, 188 (1991) (AJ's burden); *Lubag v. Office of Personnel Management*, 88 M.S.P.R. 484, 488, ¶ 10 (2001) (finding that OPM had a "special duty" to the appellant to determine why, under the circumstances presented, the annuitant had elected a specific option). When such appellants are unrepresented, or their representatives are not attorneys, the AJ must assure that this information is presented in a form that is appropriate to the listener's level of knowledge and expertise. If the appellant is, or appears to be, incompetent, the AJ must follow the requirements set out in *French v. Office of Personnel Management*, 37 M.S.P.R. 496, 499 (1988). *See* chapter 2, section 8, of this Handbook for further information. *See also Dixon v. U.S. Postal Service*, 89 M.S.P.R. 148 (2001), concerning the application of *French*-like procedures in removal appeals in which the appellant appears to be incompetent. The decision sets out the specific authorities of the AJ in such a situation. While it is rare that an agency is required to file a disability retirement on the appellant's behalf, *see* 5 C.F.R. §§ 831.1205, 844.202, when such circumstances are present, the AJ must assure that the regulatory requirements and those in the Board's case law are met. The right to such procedures does not extend to adverse action appeals, *Marbrey v. Department of Justice*, 45 M.S.P.R. 72 (1990); nor is there a right to appointment of counsel in IRA appeals. *See Taylor v. Merit Systems Protection Board,* 527 F. App'x 970 (Fed. Cir. 2013).

However, certain affirmative defenses may be raised in some retirement appeals. In this regard, the Board has held that when OPM's decision involved an exercise of discretion, defenses such as discrimination could be raised, but that if OPM was bound by the law to make a specific determination, they could not. *See Wrighten v. Office of Personnel Management*, 89 M.S.P.R. 163, 167, ¶ 11 (2001). Thus, the rules discussed above concerning the AJ's authority and obligations as to affirmative defenses apply to appropriate retirement appeals, as well.

Because of workload or related issues, OPM at times has been slow in providing records needed for proper adjudication. Because a default judgment cannot be issued in such cases since benefits that are not properly earned cannot be granted, the AJ must be tenacious in requesting the agency file and other related information needed for adjudication. In an effort to accommodate OPM, however, AJs may hold conferences with the appellant alone, after notice to OPM that such a conference will occur with or without its participation, and will not require OPM to arrange such conferences. Especially difficult problems with responsiveness on the part of OPM should be reported to ORO, which will attempt to resolve the issue through discussions with management in OPM's retirement division. After OPM's repeated failure to respond, in appropriate circumstances it may be proper to base a decision on the record, which will be entirely, or almost entirely, made up of the appellant's evidence. In such a case, OPM must be warned that a decision on the record will be made. If the appellant contends that evidence in OPM's possession to which he has no access, will meet his burden of proof, however, a decision without that evidence should not be made.

8. MOTIONS FOR ATTORNEY FEES, COMPENSATORY, LIQUIDATED AND/OR CONSEQUENTIAL DAMAGES, AND PETITIONS FOR ENFORCEMENT.

The provisions of this chapter also apply to cases involving motions for attorney fees and compensatory damages, and to petitions for enforcement. *See* chapter 13 for further guidance on processing such cases.

CHAPTER 10 - THE HEARING AND ITS RECORD

1. ROLE AND CONDUCT OF ADMINISTRATIVE JUDGE.

a. Responsibility of Administrative Judge. The AJ is responsible for conducting a fair and impartial hearing and taking all necessary action to ensure adequate development of the record and to avoid delay. An AJ's specific powers and authority are set forth at 5 C.F.R. § 1201.41.

b. Demeanor of Administrative Judge. Hearings are to be conducted in a dignified and orderly manner. The Federal Circuit will require a new hearing, held by a different AJ, only when the original AJ's conduct violated a party's right to due process, and a due process violation will be found only when the standard set by the Supreme Court has been violated. *See Bieber v. Department of the Army,* 287 F.3d 1358 (Fed. Cir. 2002). That standard, stated in *Liteky v. United States,* 510 U.S. 540, 555 (1994), is that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Needless to say, however, the Board expects and requires its AJs to exhibit much more exemplary judicial conduct than is necessary simply to defeat a motion for recusal or a finding of bias. Rather, the behavior of the AJ must be characterized by fairness, impartiality, courtesy, decisiveness, and patience. That the *Liteky* standard is not met does not prevent the Board from reassigning a case when the AJ conducted himself or herself inappropriately or was seen to favor one party or the other so that the appearance of partiality would color the proceedings. *See, e.g., Gallagher v. Department of the Air Force*, 84 M.S.P.R. 441, 443, ¶ 7 (1999).

c. Special Circumstances.

(1) Assistance for Disabled; Discrimination Complaints. If the appellant, a witness, or a representative is disabled, the AJ must follow 5 C.F.R. part 1207, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Merit Systems Protection Board, requiring that reasonable accommodations be made to ensure that disabled individuals have meaningful access to the Board's programs and activities. Under section 1207.170(b):

(a) When a party believes he or she has been subjected to discrimination on the basis of disability in the AJ's adjudication of the case, the party may raise the allegation in a pleading filed with the AJ and served on all other parties in accordance with 5 C.F.R. § 1201.26(b)(2).

(b) An allegation of discrimination in the adjudication of a Board case must be raised within 10 days of the alleged act of discrimination or within 10 days from the date the complainant should reasonably have known of the alleged discrimination. If the complainant does not submit a complaint within that

time period, it will be dismissed as untimely filed unless a good reason for the delay is shown.

(c) The AJ to whom the case is assigned shall decide the merits of any timely allegation that is raised at this stage of adjudication, and shall make findings and conclusions regarding the allegation either in an interim order or in the initial decision, recommended decision, or recommendation. Any request for reconsideration of the AJ's decision on the disability discrimination claim must be filed under the requirements of 5 C.F.R. §§ 1201.114 and 1201.115.

This procedure keeps the discrimination complaint and the appeal proceeding on the same track, so that they will be presented to the Board for decision at the same time. Thus, while no standards have been set for either the complaint or the decision on it, the prerequisites for the filing of a formal complaint, such as counseling, are not required. Nor would the decision seem to require more formality than would be associated with a proper ruling on a motion - a holding supported by the AJ's reasoning for it, sufficient for the Board to review on PFR. As required by the regulation, too, if the complaint is not timely submitted, it should be dismissed on that basis unless the appellant shows good cause for the delay.

(2) Foreign Languages. The Board's policy on requests for language interpreters when parties or witnesses to a proceeding do not speak English has not been set forth in a finalized document, but the draft Limited English Proficiency accessibility plan promulgated by the EEO Office, pursuant to Department of Justice policy guidance, discusses such matters. If issues arise that cannot be handled efficiently in accordance with this paragraph, the RD or CAJ should contact ORO or the Board's EEO Office directly for assistance. The AJ may direct the parties to select a qualified interpreter acceptable to both, or the AJ may select an interpreter from a list of qualified interpreters compiled by the parties or maintained by the U.S. District Court pursuant to 28 U.S.C. § 1827(c)(1). However, the AJ must ensure that the record includes sufficient evidence to establish that the interpreter is qualified by knowledge, skill, experience, training or education, and should administer an oath or affirmation to make a true translation.

(3) Appellant's Right to Abandon or Cancel Hearing. An appellant may withdraw his or her request for a hearing at any time. If this occurs, the agency has no right to insist on a hearing. *See, e.g., Callahan v. Department of the Navy,* 748 F.2d 1556, 1559 (Fed. Cir. 1984); *Kirkpatrick v. Department of the Interior,* 49 M.S.P.R. 316, 318 (1991); *Dodd v. Department of the Interior,* 48 M.S.P.R. 582, 584 (1991). The parties, however, must be given the opportunity to supplement the record with evidence and argument before the ID is issued, and the appellant should be so informed before the withdrawal is effected. *See Schucker v. Federal Deposit Insurance Corporation,* 401 F.3d 1347 (Fed. Cir. 2005), holding that the Board has a longstanding policy to allow parties an opportunity to submit rebuttal evidence, and that because it did not allow for

rebuttal evidence in this case, and did not explain its change in policy, it acted arbitrarily when earlier in the appeal the agency had presented "only superficial arguments." The court held in that circumstance that the appellant was not required to have submitted her specific and detailed rebuttal evidence prior to the agency's submission of its more specific evidence. As noted earlier, despite 5 C.F.R. § 1201.41(b)(5), an AJ also does not have a right to order a hearing.

(4) Agency Request for Hearing. The agency has no statutory right to a hearing, and the Board's regulations do not provide for consideration of an agency's request for a hearing. *See Thomas v. Department of Veterans Affairs*, 51 M.S.P.R. 218, 220 (1991); 5 C.F.R. § 1201.24(d).

(5) Intervenors. Intervenors, who may participate only as to issues affecting them, do not have an independent right to a hearing. 5 C.F.R. § 1201.34(d)(1). They retain the other rights of a party, however.

2. PRELIMINARY CONFERENCE.

The AJ may wish to convene a brief preliminary conference immediately preceding the hearing, attended only by the parties and their representatives, to ensure the orderly and expeditious progress of the hearing. When the hearing begins, the AJ must summarize briefly what occurred at the preliminary conference, and ask both parties to state any objections concerning the accuracy of the summary. The summary made of such prehearing rulings must comport with the requirements for rulings made at earlier telephonic (or other) conferences, to assure a complete documented record. *See* chapter 9, section 5 of this Handbook.

3. PUBLIC HEARINGS.

a. In general. The AJ has wide discretion to conduct the hearing as appropriate. The public's right to know must be balanced against the appellant's right to privacy. The public and the media may be excluded from the hearing when necessary to protect the appellant's privacy or for other reasons, e.g., disclosure of trade secrets or national security information. The record of the hearing can be obtained by filing a FOIA request, however. *See* 5 C.F.R. § 1201.53 and chapter 17, section 1c of this Handbook.

b. Sensitive Security Information (SSI). SSI is sensitive but unclassified information controlled by the Department of Homeland Security (DHS), obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Transportation Security Administration (TSA) has determined would be detrimental to the security of transportation. Contrary to the general rule, absent good cause shown, all hearings in which SSI may be disclosed must be closed to the public. Only "covered persons" under 49 C.F.R. § 1520.7 may have access. Federal employees, including employees of the OSC and MSPB, are covered persons. 49 C.F.R. § 1520.11(b)(1). Current and former TSA employees and their designated representatives are covered persons under 49 C.F.R. §§ 1520.7(k)-(j) and 1520.11(a)(5). In addition, covered persons include court reporters who are under contract to a covered person and who sign a DHS Non-Disclosure Agreement

provided by the agency representative. Paralegals and other support staff assisting appellant's representative are not covered persons and may not be given access to SSI. At any MSPB hearing held by video conference or telephone, the AJ shall require each participant to certify that he or she is in a location providing privacy, i.e., away from the public when there is no risk of being overheard.

E-filing may not be used to file a pleading that contains SSI (49 C.F.R. parts 15 & 1520) or classified information (32 C.F.R. part 2001). 5 C.F.R. § 1201.14(c)(4)-(5).

4. USE OF TWO-WAY COMMUNICATIONS DEVICES; BROADCAST OF HEARINGS.

As discussed below, the Board must be concerned about the many forms of instant and broadcast communications that are readily available. In addition to the fact that it is only the Board's record of a hearing that is the official record, broadcasting and some instant communications may be disruptive of the proceedings. Further, the use of instant communication devices raises the possibility that the testimony of witnesses as it is being given will be transmitted to witnesses who have not yet testified, thereby unfairly advantaging one party over the other.

a. Two-Way Communications Devices.

(1) Absent the AJ's express approval, no two-way communications devices may be operated and/or powered on in the hearing room or in space adjacent or accessible to it. All cell phones, text devices, and all other two-way communications devices shall be powered off in those areas. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on. Streaming live video of the hearing as it proceeds and blogging, tweeting, etc. live from the hearing are prohibited. The parties are informed of this prohibition in the standard acknowledgment order.

(2) Because 5 C.F.R. § 1201.53(a) provides that a verbatim record made under the supervision of the AJ will be the sole official record of the proceeding, absent extraordinary circumstances, no tape, digital, or other recording should be allowed at the hearing. *See* section 18 of this chapter.

b. Broadcast of Hearings.

(1) Relevant Factors for Consideration. The Board is under no legal obligation to grant permission to broadcast its proceedings. The public's right of access and the parties' due process rights are satisfied by an open hearing and do not include a right to broadcast coverage. In deciding whether to permit coverage, an AJ must weigh any additional benefit to the public against any adverse impact that such coverage might have on the conduct of the proceeding, or under the totality of circumstances in a particular case, on the due process rights of the parties. Cases involving media attention should be the subject of a sensitive case report. *See* chapter 3, section 6. In no instance should the media, including television, radio, internet, or print, be permitted to record a hearing or any portion of it for broadcast or other distribution before the hearing has ended.

Factors to consider include the following:

- Intimidation of timid or reluctant witnesses;
- "Grandstanding" or posturing for the media by participants or others in or near the hearing room, with resulting delays in the proceedings;
- Heightened risk of audience disruption;
- The distracting nature of media representatives and equipment; and
- The administrative problems involved in making arrangements for and controlling coverage.

Harm to some potential privacy interests must also be considered in deciding whether to permit broadcast coverage. A party who objects to broadcast coverage should be asked to explain why the electronic media would constitute a greater threat to privacy than would ordinary press coverage.

c. Guidelines and Conditions for Coverage. Coverage of a Board hearing by the media is subject to the authority of the AJ to control the conduct of the proceedings, to ensure decorum and prevent distractions, and to ensure the fair administration of justice. AJs must make sure that media coverage will be unobtrusive, will not distract participants, and will not otherwise interfere with the administration of the hearing. If the hearing takes place in borrowed facilities, the host agency should be informed of the prospective coverage and its own rules regarding the media must be followed.

(1) Conferences of Counsel. Broadcasting or recording of bench conferences is not permitted.

(2) Admissibility. None of the film, videotape, still photographs, or audio reproductions developed during or by broadcast coverage of a Board proceeding constitutes the official record in the case in which it is taken. Generally, it should not be admitted as evidence in that or any subsequent Board proceeding unless it constitutes relevant, material evidence that is otherwise unavailable.

(3) Instructions. If media coverage is permitted, the AJ should have copies of an instruction sheet that explains the terms and conditions of the media's presence at the hearing. *See* Appendix A for a model instruction sheet.

5. SIZE OF AND ACCESS TO THE HEARING ROOM.

If the AJ is aware of substantial public interest in a particular case, he or she should make arrangements for a hearing room that will accommodate a reasonable number of persons.

6. TELEPHONIC OR VIDEO CONFERENCE HEARINGS.

a. Hearing method. Years ago, the Board established a rule was that an appellant had a fundamental right to an in-person hearing on the merits if there was a genuine dispute as to any material fact, and when the appellant had such a right, the AJ had no authority to order a telephonic hearing over the appellant's objection. *See, e.g., McGrath v. Department of Defense*, 64 M.S.P.R. 112, 115-17 (1994); *Evono v. Department of Justice*, 69 M.S.P.R. 541, 545 (1996). The same rule was later

applied to hearings held by video conference. Subsequently, relying in part on Rule 43(a) of the Federal Rules of Civil Procedure, the Board held that when an appellant in an appeal requiring the AJ to make credibility determinations requested an in-person hearing, that request could not be denied in the absence of a showing of good cause. *Crickard v. Department of Veterans Affairs,* 92 M.S.P.R. 625 (2002). However, *Crickard* and similar cases were overruled in *Koehler v. Department of the Air Force,* 99 M.S.P.R. 82 (2005). There, the Board held that while 5 U.S.C. § 7701(a)(1) gives appellants before the Board "the right ... to a hearing for which a transcript will be kept," nonetheless "there is no statutory mandate for an unlimited entitlement to an in-person hearing." *Id.,* ¶ 10. The Board stated as follows:

> We therefore hold today that, in conjunction with the broad discretion afforded them to control proceedings at which they officiate, 5 C.F.R. § 1201.41(b), AJs may hold video conference hearings in any case, regardless of whether the appellant objects. [Footnote omitted.] To the extent that *Crickard* and other such cases hold that, in an appeal where the AJ is required to make credibility determinations, he may not convene a video conference hearing over the appellant's objection in the absence of a showing of good cause, those cases are hereby overruled. [Footnote omitted.]

Id., ¶ 13.

In light of *Koehler*, video hearings are allowed in all circumstances. Of course, it remains in the discretion of the AJ, subject to the approval of the CAJ, to determine whether the circumstances surrounding any given case are such that holding an in-person hearing would be preferable.

As to telephone hearings, there is no new law since *Koehler*, which stated that "we need not, nor do we, extend this holding to telephone hearings." *Id.,* n.3. Accordingly, the rule set by *McGrath* and *Evono* remains in effect, so only when material facts are not in dispute and the sole purpose of the hearing is to allow the parties to make oral arguments, do telephone hearings satisfy an appellant's entitlement. The appeals in which such a presentation can be held in lieu of a full hearing tend to be retirement appeals, which are not brought before the Board under 5 U.S.C. § 7701. *See Carew v. Office of Personnel Management,* 878 F.2d 366, 367-68 (Fed. Cir. 1989). Indeed, even when there is no dispute of material facts and it appears that the appellant fails to meet the legal requirements for the benefit sought, the right to a hearing remains, although a telephone hearing may be all that is required. *See, e.g., Gowan-Clark v. Office of Personnel Management*, 84 M.S.P.R. 116, ¶ 5 (1999).

In *Robertson v. Department of Transportation*, 113 M.S.P.R. 16 (2009), the Board held that "[w]here an administrative judge improperly holds a telephonic hearing, the Board will undertake a careful review of the record to determine whether the error had a potential adverse effect on the appellant's substantive rights." Since the appellant testified contrary to the testimony of the witness heard by phone, but the

AJ relied on the witnesses' testimony, which she found credible, the Board found that the error in accepting testimony over the telephone regarding disputed factual matters did have a potential adverse effect on the appellant's substantive rights. Thus, any testimony where credibility may be at stake continues to require an in-person presentation. That is true even when, as in *Robertson*, most witnesses were heard live, and just two were telephonic.

b. Recording. If a telephone hearing is appropriate, in most instances the AJ should record the hearing using the phone's Record-a-Call feature, which may eliminate the need for a reporter. ShoreTel has two features that allow you to record calls, 1) ShoreTel SA100 Web Conference, which is the preferred method, and 2) ShoreTel Communicator – Record. The first method allows for a recording as long as 8 hours when used in a "Reservation-less" conference, while a "Scheduled" conference allows you to set a specific date, time and duration for the conference. The Communicator method is to be used to record only those conferences that will last less than 30 minutes, not hearings. Training and assistance in these methods is available through IRM.

   As noted in section 18.b of this chapter, when the hearing is recorded by telephone, then transferred to a CD, to create an index, it will be necessary to keep track of the amount of time elapsed between witnesses so that the index can indicate the approximate point, by time since the start of the hearing, at which each witness's testimony begins. This task may be done by the AJ or by the support staff who transfers the hearing to the CD and certifies the recording as audible and accurate. Video conference hearings, too, are recorded on CD or other recording medium by a court reporter, who should usually be present with the AJ. The AJ also may record the hearing without the assistance of a court reporter when the hearing will be short and the AJ will be able to concentrate on the proceedings even without a reporter. The AJ must, however, be certain that any recording equipment is in good working order and properly set up to assure good sound quality; thus, testing the equipment a day in advance is recommended.

7. HEARING PARTICIPANTS.

a. A Witness as Representative. Parties should be discouraged from assigning a prospective witness as their representative, although there is no specific prohibition against this practice. The AJ should arrange for this witness to testify first and explain that the witness generally will not be permitted to provide rebuttal testimony.

b. Multiple Representatives. If a party appears with more than one representative, the AJ must determine the precise role of each to ensure the orderly progress of the hearing. For example, the AJ should require that only one representative speak for the party for such time as a given witness is on the stand.

c. Technical Advisors. Occasionally, parties will have technical advisors. It is within the AJ's discretion to determine the permissible number of technical advisors. Technical advisors are not representatives, and should not be allowed to speak for the parties.

If a technical advisor begins to comment aloud, or question a witness, the AJ should remind the advisor of his or her limited role at the hearing. If the technical advisor persists in inappropriate behavior, the AJ may take appropriate action, including ejecting the advisor.

d. Intervenors and Amicus Curiae. *See* 5 C.F.R. § 1201.34.

(1) Intervenors. Intervenors are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervention, both as of right and permissive, is discussed in greater detail in chapter 3, section 5, of this Handbook.

(2) Amicus Curiae. An amicus curiae is any person or organization who, in the discretion of the AJ or the Board, may be granted leave to file briefs containing advice or suggestions regarding an appeal.

8. SECURITY.

The Board has held that an AJ's decision to have a security presence (e.g., two Federal Protective Service Officers) at a hearing "is a procedural matter related to the [AJ's] broad discretion in conducting hearings and not a matter that must be argued, justified, and explained." *Groshans v. Department of the Navy*, 67 M.S.P.R. 629, 641 (1995). The AJ may request such a presence on the motion of a party or on the AJ's own initiative, based on the exercise of sound discretion. A party's request to the AJ that security be present is not a prohibited ex parte contact since it does not address the merits of the appeal. *Id*. Moreover, the mere presence of security guards outside the hearing room would rarely constitute intimidation, although a party may rightly complain about the manner in which a security matter was carried out. *Id*. Regardless of whether the security presence is requested by a party or the AJ, to maintain security and the appearance of fairness, all parties, representatives, and witnesses should be subject to the same measures.

Along these lines, while there is no law on the matter, if a party, witness or observer wears a gun and the AJ is not comfortable with the presence of the weapon, it would seem to be within the AJ's discretion to require the person to store it in a safe location outside the hearing room, and if the individual does not comply, he may be ejected from the hearing.

9. ORDER OF BUSINESS.

See generally 5 C.F.R. § 1201.58.

a. Opening Statements. Given adequate prehearing processing, an AJ should generally not permit oral opening statements at the hearing.

b. Case-in-Chief. The party having the burden of proof usually presents its case first. The other party then presents its case, including any affirmative defenses. When the agency has the burden of proof, the AJ may require it to address the appellant's affirmative defenses, if any, during the agency's case-in-chief, with the possibility of also making a rebuttal presentation, if appropriate. While in most cases this means the agency presents its case first, in an IRA, VEOA, or USERRA appeal, it is the appellant who has the burden of proof and presents his or her case first.

If an intervenor is participating in the hearing, the intervenor's presentation should immediately follow the presentation of the party with whom the intervenor's interests are allied. If the intervenor is not allied with either party, the AJ must determine if the intervenor should go first so that the parties will have the opportunity to address the intervenor's position in their presentations, or go last so that the intervenor can consider the evidence presented by other parties.

c. Rebuttal and Surrebuttal. The AJ may permit the party with the burden of proof to present rebuttal evidence at the conclusion of the opposing party's case, followed by the opposing party's surrebuttal, if any.

d. Closing Statements. Because closing statements may provide a strong clue to the parties' most significant interests in the case, AJs have the discretion to allow oral or written closing statements. *See also* section 15(a) of this chapter.

10. DISPOSITION OF MOTIONS AND OBJECTIONS.

Motions made during the course of a hearing may be oral or written. 5 C.F.R. § 1201.55. All other parties are given an opportunity to object to a motion on the record. The AJ must promptly rule on the motion and may reverse a ruling, if appropriate, at a later time. Motions and objections should generally not be taken under advisement. If a motion is made, discussed, or ruled upon when the parties have gone off the record, the AJ must assure that the tape or transcript properly documents any such off the record discussions or rulings. *See* chapter 9, section 5, above.

11. SANCTIONS.

The AJ may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, situations when a party fails to comply with a Board order, fails to prosecute or defend an appeal, fails to make a timely filing, and/or engages in contumacious conduct or conduct prejudicial to the administration of justice. 5 C.F.R. § 1201.43. An AJ may exclude a party, a representative, or other person from all or any portion of a case proceeding for contumacious conduct or conduct prejudicial to the administration of justice. 5 C.F.R. §§ 1201.31(d), 1201.41(b)(7), and 1201.43. When the AJ excludes a party's representative, the AJ will afford the party a reasonable time to obtain another representative before proceeding with the case. 5 C.F.R. § 1201.43(d).

a. Disruption by the Appellant. If the behavior of an appellant or the appellant's representative impedes the progress of the hearing (e.g., repeated discourteous or disrespectful conduct or continued failure to abide by the AJ's rulings or directions), the AJ may eject the offender, or suspend or terminate the hearing. If the AJ does suspend a hearing, the parties must be notified when the hearing will be continued. If the hearing is terminated, the AJ must set a reasonable time during which the record will be kept open for written submissions. In only the most extreme cases of bad faith may the AJ dismiss the appeal based on counsel's actions. *See* subsection (f) (below).

b. Disruption by Agency or Intervenor. If the agency representative or an intervenor is ejected from the hearing, the AJ must continue with the hearing. The absence of the

agency or intervenor must not be permitted to operate to the detriment of the appellant.

c. Disruption by Other Participants. If another participant to the proceeding, such as a witness, engages in disruptive conduct, the AJ may eject the offender or suspend the hearing, but cannot use the participant's conduct to deprive the appellant of his or her right to a hearing.

d. Documentation. When an AJ excludes a person from participation in a proceeding, the AJ shall document the reasons for the exclusion in the record. *See* 5 C.F.R. §§ 1201.31 & 1201.43. Usually, the first time a participant disrupts the proceedings, the AJ should explain the appropriate and expected behavior of hearing participants and the AJ's responsibility to maintain order. The participant must be warned not to continue the misconduct and of the possible consequences if the misconduct is continued. If the misbehavior or misconduct persists, the AJ should issue a second warning similar in nature to the first, and add that a third instance of misbehavior will result in an appropriate sanction, up to and including exclusion. Board decisions addressing obstreperous conduct by hearing participants include the following: *Roberts v. Federal Aviation Administration*,23 M.S.P.R. 112 (1984), *aff'd,* 795 F.2d 1014 (Fed. Cir. 1986) (Table); *Allen v. Veterans Administration*, 22 M.S.P.R. 204 (1984); *Blanton v. Department of Transportation*, 15 M.S.P.R. 605 (1983); and *Snowden v. Department of State*, 12 M.S.P.R. 487 (1982).

e. Proceeding Not to Be Delayed. A proceeding will not be delayed because the AJ excludes a person from the proceeding, except that when the AJ excludes a party's representative, the AJ will give the party a reasonable time to obtain another representative. *See* 5 C.F.R. § 1201.43.

f. Cancellation, Suspension or Termination of Hearing. An AJ 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. 5 C.F.R. § 1201.43(e). If the hearing is suspended, the parties must be given notice as to when the hearing will resume. If the hearing is cancelled or terminated, the AJ must set a reasonable time during which the record will be kept open for receipt of written submissions. *Id. But see, Davis v. Department of Commerce,* 120 M.S.P.R. 34, 40, ¶¶ 18-19 (2013) (holding that the dismissal of the appeal with prejudice was an appropriate sanction when the appellant through her representative showed bad faith in prosecuting the appeal by repeatedly ignoring the AJ's orders, pursuing long-denied motions on the morning of the hearing and then withdrawing the hearing request at the hearing under the threat of sanctions, when the request for a decision on the written record should have been made long before the parties went to the expense of preparing for and appearing at the hearing); *see also Smets v. Department of the Navy*, 117 M.S.P.R. 164 (2011) (approving AJ's dismissal of the appellant's disability discrimination defense when her representative's conduct was unprofessional and disrespectful).

12. WITNESSES.

a. Witness Instruction. Witnesses should be instructed to spell their full names on the record. The recording system and the need for oral, audible responses should also be explained. The AJ may provide the witnesses with written instructions explaining their role in the hearing. A sample of such written instructions is included at Appendix B of this Handbook.

b. Administering the Oath. Each witness must be sworn in by the AJ or court reporter but because certain individuals may object to taking an oath based on religious grounds, before swearing in each witness the AJ should ask if he or she has an objection to taking an oath. If not, then the oath or affirmation may be worded: "Do you solemnly swear (or affirm) that the testimony you give in this proceeding will be the truth, the whole truth, and nothing but the truth so help you God (or so help you)?" If recalled, a witness need not be resworn, but should be reminded that he or she is still under oath or affirmation. The oath for an interpreter may be worded: "Do you solemnly swear (or affirm) that you will provide a true and accurate translation of the testimony given by this (these) witness(es) so help you God (or so help you)?" If the witness has objected to taking an oath, the AJ can have the witness affirm. If the witness objects to affirming, the AJ could have the witness state the following: "I understand that I must accurately state the facts. I agree to testify under penalty of perjury. I understand that if I testify falsely, I may be subject to criminal prosecution."

c. Order of Witnesses. Generally, the parties determine the order in which witnesses will be called. The AJ may require the parties to identify the order of witnesses. The AJ may permit or direct a change in the order of presentation.

d. Cross-Examination. Each witness is subject to cross-examination.

e. Witnesses' Representatives. A witness is entitled to have a representative while testifying, but the representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony. *See* 5 C.F.R. § 1201.32.

f. Sequestration. It is good practice to routinely sequester witnesses and to caution them not to discuss their testimony with other witnesses during the hearing. *See generally* 5 C.F.R. § 1201.41(b)(6). Experience has shown that many witnesses frequently ignore this instruction. Therefore, they should be reminded that failure to heed this cautionary requirement could lead to sanctions against one or the other of the parties, if that party has participated in the discussion, or that it could cause prejudice to a party, especially when the witness discusses testimony with a person who will later provide testimony in the same or a related proceeding.

g. Witness Fees. Although witness fees are considered nonrecoverable costs and therefore are not reimbursable as a part of attorney fees, a non-Federal employee witness has the right to "the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States." The party requesting the witness's appearance must pay the fee and allowances pursuant to 28 U.S.C.

§ 1821(b). *See In re Maisto*, 28 M.S.P.R. 436, 439 (1985). The party must offer payment at the time the subpoena is served, or if the witness appears voluntarily, then at the time of the appearance. 5 C.F.R. § 1201.37(c). Absent such tender or payment, the Board has denied enforcement of a subpoena. *Alejandro v. Department of Transportation*, 13 M.S.P.R. 463, 464 (1982); *cf. Swafford v. Tennessee Valley Authority*, 30 M.S.P.R. 130 (1986) (subpoena for a local deposition was not defective when the appellant was ordered to appear and did not claim that she did not appear because of the failure to proffer travel expenses). Federal employees "will be in official duty status and will not receive witness fees." 5 C.F.R. § 1201.37(a). This includes compensation for time spent traveling to and from hearings, time spent waiting to testify, and for the travel expenses incurred; compensation for time spent on a hearing could be ordered at an overtime rate if a witness appeared at the hearing during nonduty hours. *See In re Douglas,* 32 M.S.P.R. 389, 391 (1987). The Board's compliance and enforcement authority, however, is limited to final decisions issued under its appellate jurisdiction, and a nonparty seeking enforcement of a final Board order must file both a petition for enforcement and a motion to intervene under 5 C.F.R. § 1201.34(c). *See* 5 C.F.R. § 1201.182(a), (c). While the Board "apparently" lacks authority to address witness fees prior to a final decision, *Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 197 (1997), it has waived its regulation and held that on remand, the AJ may consider the witness's claim that the agency denied him compensation for the time and expenses incurred in his participation as a nonparty witness at the hearing. *Id*. However, the Board has declined to interpret 5 U.S.C. § 7521 as requiring agencies to allow appellants official time and resources to pursue their appeals in the absence of any agency regulation specifically providing such a right. *White v. Social Security Administration*, 76 M.S.P.R. 447, 466-67 (1997). While section 7521 relates to appeals of ALJs, nothing in the statutes or regulations applicable to appellate jurisdiction cases appears to change that result.

13. OFF-THE-RECORD DISCUSSIONS.

Substantive discussions off the record should be rare. Any disputes as to a procedure or evidence should be preserved on the record in the event of review. The AJ must summarize the discussion and ask the parties to confirm the accuracy of the summary. Related to this, if a hearing is stopped for any reason, such as an equipment failure, the AJ should assure that the court reporter does not continue to record the proceedings during that time unless all parties can hear what is occurring and something of substance is being discussed.

14. PRESENTATION OF EVIDENCE.

a. Admissibility.

(1) Admission of Evidence. While it is desirable that no irrelevant testimony be introduced in hearings, occasionally some testimony is sought that is of questionable relevance. The AJ must exercise judgment in deciding whether to admit the testimony.

Since admitting the evidence puts the opposing party in the position of having to defend against it, an AJ should make definite rulings on the admissibility of evidence as often as possible to avoid overly prolonging hearings to receive doubtfully relevant evidence. Do not routinely accept doubtfully relevant evidence "for what it's worth."

(2) Affidavits and Depositions. Affidavits and depositions may be accepted into evidence at a hearing, despite objections, upon a reasonable showing by the offering party of the unavailability of the affiant to testify. There is generally no need to play recorded or videotaped depositions at the hearing unless one of the parties wishes the AJ to rule on an objection made at the deposition.

(3) Microfilm and Other Non-Original Records. Microfilm records or reproductions of any memorandum, writing, entry or representation, or combination thereof, of any act, transaction, occurrence, or event that have been kept or recorded in the regular course of business are admissible into evidence if satisfactorily identified. Such a reproduction is as admissible as the original itself, whether or not the original is in existence.

a. Offers of Proof. When an objection to a question is sustained by the AJ and the testimony of the witness is therefore not admitted, the party asking the question, at the discretion of the AJ, may make an offer of proof on the question.

b. Production of Evidence by Order of the AJ. An AJ may order the parties to produce evidence and witnesses whose testimony would be relevant, material, and nonrepetitious. *See* 5 C.F.R. § 1201.41(b)(10).

c. Production of Statements. After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the AJ may exclude the evidence given in the Board proceeding. *See* 5 C.F.R. § 1201.62.

d. Stipulations. The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

e. Official Notice. Official notice is the Board's or AJ's recognition of certain facts without requiring evidence to be introduced establishing those facts. The AJ, on his or her own motion or on the motion of a party, may take official notice of matters of common knowledge or matters that can be verified. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact. *See* 5 C.F.R. § 1201.64.

f. Exhibits.

(1) General. All documents offered for introduction into the record are first marked for identification as an exhibit for the party (e.g., Appellant's Exhibit A, Agency's Exhibit 1, etc.). This procedure applies whether or not the exhibit is received into evidence. Generally, the parties should be required to mark and index their own exhibits before the hearing. The AJ may choose another method of marking the

exhibits if it is more efficient. The relevance and admissibility of the exhibits should have already been determined during the prehearing conferences. Parties must provide each other with copies of their exhibits. Evidence introduced solely at the direction of the AJ must be identified and numbered as an exhibit of the AJ.

(2) Ruling on Exhibits. The AJ must state on the record that the exhibit has been marked as (insert identification of party's) exhibit number or letter (insert number or letter) and that it has been admitted into evidence.

(3) Rejected Exhibits. Except under extraordinary circumstances, physical objects (tools, weapons, drugs, or other contraband, etc.) should not be received into evidence. When physical objects are of such probative value as to be material or relevant to a party's burden of proof, the party seeking to admit the physical object into evidence should use an alternative method (photographs, verbal descriptions, stipulations, etc.). Particularly as the Board moves closer to all-electronic records, what might otherwise be a physical exhibit must be entered into the record in an electronic format, through description, testimony, photograph, etc. If a physical object is proffered and rejected by the AJ on evidential grounds other than its suitability for inclusion in the record, the AJ should verbally describe the object on the record immediately following the ruling on admissibility. All other rejected exhibits must be maintained in a "Rejected Exhibit" section of the appeal file, properly tabbed and identified as such. When a rejected exhibit is too voluminous or bulky or is otherwise unsuitable for enclosure in a "Rejected Exhibit" section of the file, the AJ should describe the rejected exhibit on the record, immediately following the ruling on admissibility, and substitute a brief verbal description for inclusion in the "Rejected Exhibit" section of the appeal file. Exhibits that are rejected as duplicates of material already contained in the appeal file may simply be returned to the proffering party and need not be included in the "Rejected Exhibit" section of the appeal file.

(4) Withdrawn Exhibits. The AJ must state that the exhibit (identifying party and number or letter) is withdrawn, and then return the withdrawn material to the party who originally submitted it. The AJ may retain exhibits when controversy is likely or removal from the record may cause confusion.

15. WRITTEN SUBMISSIONS IN ADDITION TO HEARING.

a. Briefs and Written Arguments. After the hearing ends, the AJ may order or permit the parties to submit post-hearing briefs or written arguments. 5 C.F.R. §§ 1201.41(b)(9) and .59(a). Parties sometimes ask to review the transcript or tape of the hearing before submitting a brief or written argument. It is within the AJ's discretion to grant or deny such a request. If the parties are allowed to submit briefs or written arguments, the date by which that material must be received must be specified in the record. Responsive briefs should rarely be permitted since the parties should already be aware of all factual and legal issues. The record is closed

at the end of the hearing except for the submission of the requested written material.

b. Exhibits. When an exhibit was going to be introduced into the record but is still outstanding at the conclusion of the hearing, arrangements must be made for its subsequent receipt. The document should be identified and assigned an exhibit number or letter, and when it is submitted, provided to the other party for inspection and written comment, if appropriate.

16. CLOSING THE RECORD.

a. Notification of Parties. The parties must be notified of the close of record date in all cases. *See* 5 C.F.R. § 1201.59(a) and (b).

b. Reopening the Record. Once the record is closed, no additional evidence or argument may be accepted into the record except upon a showing that new and material evidence has become available that despite due diligence was not readily available prior to the closing of the record. Of course, the AJ may reopen the record on his or her own motion prior to issuing the initial decision. For example, when a party has raised new issues or new evidence in a timely, but last-minute submission, the AJ must reopen the record to afford the other party(ies) an opportunity to respond. *See Schucker v. Federal Deposit Insurance Corporation, supra,* chapter 10, section 1c(3); 5 C.F.R. § 1201.59(c). After the initial decision is issued, requests for reopening may not be granted. The AJ retains only the very limited authorities set forth in 5 C.F.R. § 1201.112(a).

17. BENCH DECISIONS.

At the close of the hearing, if the issues have been clearly delineated and addressed, and the AJ is confident they can be decided without further review of the record, the AJ may announce his or her findings and conclusions in a bench decision. For guidance and procedures, *see* chapter 12, section 5.

18. VERBATIM RECORD OF THE HEARING.

A verbatim record made under the supervision of the AJ must be kept of every hearing and will be the sole official record of the proceeding. 5 C.F.R. § 1201.53(a). The hearing tape, CD, or other recording medium used by the court reporter or the AJ is the official verbatim record and must be retained with the file notwithstanding receipt of a transcript. Upon receipt of hearing tapes, the RO is responsible for ensuring that the recording prevention tabs have been removed from the audio tape cassettes. If the Board has received an electronic transcript either because it purchased one or because one of the parties did, the transcript will become part of the electronic record/repository in all cases, regardless of whether the parties are e-filers. Verbatim recordings when available electronically, are also made part of the case record.

a. Requests for Copies of Audio Tapes, CDs, or other recording medium. This section applies whether the recording was produced by a court reporter or the Board. Although the policy of making hearings in all formats part of the electronic record cuts down on the need for additional procedures, upon request for copies of the

recording, the regions have the options of (a) copying it in-house, (b) having the court reporter copy it, or (c) sending it to OCB to be copied. Costs are determined and charged following this guideline:

(1) From a Party. Pursuant to 5 C.F.R. § 1201.53(c), "[c]opies of recordings or existing transcripts will be provided upon request to parties free of charge." Such requests must be filed with the AJ if the appeal is still pending in the office, or with OCB if the ID has been issued.

(2) From Anyone, under FOIA. The Board can charge the individual making the request for both search time and photocopying, as set forth in 5 C.F.R. § 1204.12(e).

(3) Lowest Cost to All. It is a good policy to provide copies at the lowest cost to the requester, and to the RO, considering the availability of staff and adequacy of equipment to do the copying task. The regulations regarding waiver and FOIA rates, as applicable, must be followed. Although OCB will produce copies for all ROs, local sources may save time and mailing costs. Moreover, directing anyone who wishes to have a tape, CD, etc., other than an appellant for whom fees will be waived, to the court reporter will save the resources of the office and of OCB and will accord with the Court Reporting Services General Requirements Agreement. *See* chapter 4, section 5b.

b. Hearings Recorded by Board Employees. The Board employee taping the hearing is responsible for the preparation of a speaker tape index. This index shows the approximate location of the witnesses' testimony on the hearing tape or CD. At the beginning of the hearing, the AJ must inform the parties of the procedure for requesting a copy of the hearing tape(s) or CD(s) and the requirement that the requesting party pay a fee for the reproduction. If the hearing is held by telephone and recorded by the phone, then the recording is transferred to a CD, in order to create an index, it will be necessary to keep track of the amount of time elapsed between witnesses so that the index can indicate the approximate point, by time since the start of the hearing, at which each witness's testimony begins. This task may be done by the AJ or by the support staff who transfers the hearing to the CD and certifies the recording as audible and accurate.

c. Defective Tape Recordings or other Recording Media - Responsibility. The AJ is responsible for checking the recordings to be sure they are audible and complete. If a court reporter provides an AJ with inaudible, incomplete, or defective recordings, the following procedure should be followed:

(1) The CAJ (or designee) must notify the reporter that the recordings are defective.

(2) The reporter is given 7 days to have the defective product enhanced or corrected. If the replacements are acceptable, the reporter is notified by telephone and the replacements are accepted into the record.

(3) If the replacements are unacceptable and the court reporter is unable to produce an acceptable copy, the AJ must notify the parties that the recordings are

defective. The AJ should ask the parties whether they would agree to either of the following alternatives or if they can jointly and with the agreement of the AJ arrive at a resolution of the matter: 1) Stipulating as to the content of the affected testimony; or 2) retaking the testimony through alternative means (affidavit, etc.). If the parties will not agree to either of these methods, the AJ must arrange for a rehearing. The rehearing may be conducted by telephone only if that would have been an appropriate method in the first instance.

Pursuant to the contract, the reporter, without additional charge to the Board, will again record such part of the proceeding as is necessary to provide an acceptable record.

If the reporter fails to record the rehearing, the RO will obtain services from a substitute. The original reporter is liable for all loss, damage, and expense occasioned by the reporter's failure to perform, and the CAJ (or designee) must make demand from the reporter for the amount necessary to reimburse the Board. Should the Board be unable to determine the actual damages, the CAJ (or designee) may elect to demand liquidated damages in the amount stated in the Court Reporting Services General Requirements Agreement. Prior to taking action for damages, the CAJ must notify ORO in writing of the reasons for such action.

(a) Recording of Proceedings by Individuals. At the discretion of the AJ, if special circumstances appear to warrant it, participants may be permitted to record the hearing. However, they must be advised in writing or on the record at the hearing that their recording is not an official record. In light of the Board's general policy that electronic devices are not to be operated during hearings, such exceptions should be rare.

(b) Correction of Hearing Media. Although the court reporter or AJ's recording is the official verbatim record of the proceeding and its integrity must be protected at all times, certain limited situations may arise when material may be erased from the hearing tapes or other medium. For example, detailed settlement discussions or material inadvertently recorded by the court reporter after the AJ indicated that the hearing would go off the record may be erased from the hearing record. Any time the AJ has anything erased, the AJ shall state on the record exactly what is being deleted and why, and shall provide the parties an opportunity to object to the erasure on the record.

(c) Hearing Record and AJ Decorum. As a general rule, the AJ should assume that anything said in the hearing room is subject to recording and inclusion in the verbatim record. Thus, even when the AJ believes that the proceeding is not on the record or that the parties cannot hear the AJ, the AJ is expected to maintain appropriate judicial conduct and impartiality.

19. TRANSCRIPTS.

The parties or the AJ, with the approval of the CAJ and ORO, may request an official transcript of the hearing, along with a searchable electronic version on a CD, if available.

The procedures for ordering a transcript and for waiver of costs are set forth in subsection d, below.

a. Status of Transcripts. Even if the CAJ and ORO approved a request from the AJ to have the tape(s) or CD of the hearing transcribed or the RO received a courtesy copy of the official transcript from the court reporter, the official record of the hearing remains the tape(s) or CD as recorded by the court reporter. In any conflict between a hearing tape, the CD, and the hearing transcript, the tape or CD is authoritative.

b. Consideration of Partial Transcripts. Sometimes an AJ may find it necessary to have a portion or all of the hearing transcribed. If the parties have not ordered transcripts and the Board has not received a courtesy copy from the reporting service, the AJ should first consider requesting a partial transcript with only the witnesses' testimony that is likely to be cited in or necessary to the ID. As stated previously, the AJ must obtain permission from the CAJ and from ORO before ordering a partial or a complete transcript.

c. Transcript of a Hearing Recorded by a Board Employee. If either party wants an official written transcript of a hearing recorded by a Board employee, the party must contact the R.O.'s Supervisory Paralegal. The Supervisory Paralegal will arrange with a contracted reporter for transcription of the tapes. Because the Board must maintain control over the hearing tapes or CD, transcription will be done only by a court reporter who is subject to the Court Reporting Services General Requirements Agreement. Therefore, parties cannot use a court reporter of their choice, unless the reporter of choice is also subject to the Agreement. The transcript will be paid for by the requesting party. Before the tapes or CD are sent to the reporter for transcription, the Board employee who recorded the hearing must certify them in the following manner:

Authentication and Certification
"This is to certify that the proceedings before
[Administrative Judge], of the Merit Systems Protection Board
[name of] Region, in the matter of:
***** v. *****, MSPB Docket No. *****
were held on [date(s)], as herein recorded, and
that this is (these are) the original monitored recording(s)
of that hearing."

Date_____
Name_____
(Recording Monitor)

d. Requests for Copies of Transcripts. Under the Court Reporting Services General Requirements Agreement, the Board is to receive a courtesy copy of a transcript if a party orders one, and in appropriate cases, the Board orders its own transcript. Upon receiving a request for a copy of a transcript in a Board file, the regions may either (a) copy the transcripts in-house; (b) have the court reporter create a duplicate transcript; or (3) send them to an outside photocopier or OCB to be copied.

Costs are determined and charged following the guideline below. Electronic transcripts are placed into the repository in e-Appeal.

(1) From a Party. The Board can charge the party (a) what the court reporter charges; (b) $0.20 per page using the amount cited in the Board's FOIA/Privacy Act regulations. Because the first 100 pages are free, and Board policy waives the next $100.00 of costs, computation of costs would normally start at page 601. *See* 5 C.F.R. § 1204.12(e)(4) for costs for other types of media. The Board may also waive costs for good reason (the AJ or Supervisory Paralegal usually decides). *See* 5 C.F.R. § 1204.12(f).

(2) From Anyone, under FOIA. MSPB can charge the party (a) what the court reporter charges, or (b) $0.20 per page using the amount cited in the Board's FOIA/Privacy Act regulations, under which the first 100 pages are free. Costs are computed starting at page 601, as set forth in subsection (d)(1), immediately above.

e. As to either tapes or transcripts, any money collected must be deposited according to the Board's Office of Financial and Administrative Management guidelines. Finally, as stated above in connection with tapes or other audio record, the Board's FOIA regulations must be followed, and it is generally a good policy to provide transcripts at the lowest cost to the requester, keeping in mind, however, the burden to the office and/or OCB, and the Court Reporting Services General Requirements Agreement.

f. Correcting the Transcript. *See* 5 C.F.R. §§ 1201.53(d) and .112.

(1) Authority of the Administrative Judge. The AJ retains jurisdiction over a case following issuance of a decision to the extent necessary to correct the transcript. 5 C.F.R. § 1201.112.

(2) Errors of Substance. Corrections of the transcript will be permitted only when substantive errors are involved. Generally, these are errors which, if corrected in the manner proposed by the moving party, would give a different meaning to testimony or statements in the transcript.

(3) Documenting the Record. If the AJ approves correction of the transcript, he or she must issue an order explaining the reasons for the approval and listing the corrections that have been made.

(4) Motions Filed after Case is Petitioned to the Board. If a motion for correction of the transcript is filed with the AJ after the ID has been issued and a PFR has been filed, the AJ must notify OCB of his or her receipt and disposition of the motion.

20. CERTIFICATION OF THE HEARING RECORD.

The Court Reporting Services General Requirements Agreement requires a signed authentication and certification page for a "hard copy transcript, diskette or CD." It includes the language the reporters are to use. Upon receipt of the transcript, tape, or CD, each office should check to assure that the court reporter signed the certification and that it is accurate, to limit concerns about the authenticity and completeness of the product. If the

certification form is missing or not signed, or fails to contain the required language, the reporter should be contacted immediately to correct the problem.

CHAPTER 11 - SETTLEMENT

1. POLICY.

The Board favors settlements that are consistent with law, equity, and public policy. The Board encourages creative use of alternative dispute resolution. The method used by the AJ, however, must comport with the requirements of due process.

2. TIMING.

A case may be settled at any time before an ID becomes final under 5 C.F.R. § 1201.113. An AJ may vacate an ID to accept a settlement agreement into the record when the settlement agreement is filed by the parties prior to the deadline for filing a PFR, even if it is not received by the Board until after the date the ID becomes final. *See* 5 C.F.R. § 1201.112 (a)(4). The ID will not become the Board's final decision if any party timely files a PFR or requests that the ID be vacated to accept a fully executed settlement agreement into the record. 5 C.F.R. § 1201.113(a).

3. DISMISSALS ON THE BASIS OF SETTLEMENT.

Before an appeal may be dismissed on the basis of a settlement agreement, the AJ must find that (1) the parties reached a settlement, (2) they understood the terms of the agreement, and (3) they agreed whether it is to be entered into the record for enforcement purposes. *See Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146 (1988).

4. ACCEPTANCE INTO THE RECORD.

The AJ must review a settlement agreement that is offered into the record to determine that the agreement is lawful on its face and that it was freely entered into by the parties. Where the settlement involves a "last chance agreement" in which the appellant waives the right to bring a future appeal to the Board, the AJ must also review the agreement to determine whether it was fair. *See McCall v. U.S. Postal Service,* 839 F.2d 664 (Fed. Cir. 1988); *O'Neal v. U.S. Postal Service*, 39 M.S.P.R. 645, *aff'd,* 887 F.2d 1095 (Fed. Cir. 1989) (Table); *Ferby v. U.S. Postal Service*, 26 M.S.P.R. 451 (1985).

When an appellant raises a nonfrivolous factual issue regarding the agency's compliance with a last chance settlement agreement, that issue must be resolved before the scope and applicability of the appeal rights waiver is addressed. *See Stewart v. U.S. Postal Service,* 926 F.2d 1146 (Fed. Cir. 1991).

While a substantive jurisdictional finding had, for many years, been necessary to the Board's exercise of both its power to enforce and its authority to award attorney fees, *Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989), the requirement that the AJ find jurisdiction before accepting a settlement into the record was overturned in *Delorme v. Department of the Interior*, 124 M.S.P.R. 123 (2017). Thus, settlements of constructive adverse actions, IRAs, probationary appeals, etc. may be accepted for enforcement without the need for potentially lengthy proceedings to determine jurisdiction.

5. AUTHORITY.

As just discussed, the Board may now accept into the record settlement agreements for appeals over which no determination of jurisdiction has been made. Of course, if they choose to do so, the parties may still settle the case and the appellant withdraw the appeal without submitting the agreement to the Board. As to issues of timeliness, it has been held that objections on the basis of the untimeliness of the appeal are considered waived when the appeal is settled, so that an AJ may accept a settlement without ruling on the issue of timeliness. *See McNamee v. Veterans Administration,* 39 M.S.P.R. 530 (1989). In any event, it is not proper to dismiss an appeal as settled but not take it into the record for enforcement when the agreement states that it will be enforced. As is true of any issue during the crafting of a settlement, both parties must agree on whether the agreement is to be made enforceable. If they do not, there is no agreement and the parties must either renegotiate the enforcement term or continue litigating the appeal.

6. ENFORCEMENT.

If the settlement agreement is entered into the record, the Board retains jurisdiction to enforce the agreement. If it is not entered into the record, the Board has no enforcement authority and the parties must be so advised prior to the dismissal of the appeal.

7. ORAL AGREEMENTS.

An AJ must require that the terms of an oral settlement agreement be either tape recorded or reduced to writing if they are to be enforceable. The AJ should question the parties carefully to find out precisely what they intend whenever an oral agreement later is to be reduced to writing. The key question is whether the parties merely intend the writing to memorialize their agreement or whether they intend not to be bound until the agreement has been reduced to writing and executed. *See Mahboob v. Department of the Navy,* 928 F.2d 1126 (Fed. Cir. 1991). If the agreement is recorded, the AJ should record the agreement on tape or a CD, or if reached at hearing, the court reporter should assure it is recorded. This will facilitate future review, if necessary. In lieu of signatures, the parties' consent to be bound must be stated clearly. The parties must be made aware that, absent an agreement to be bound only by a written agreement, the oral settlement is final and binding on the terms agreed upon.

8. SUSPENDING CASES FOR THE MEDIATION APPEALS PROGRAM.

A case and all remaining deadlines must be suspended when an appeal is accepted into the Board's Mediation Appeals Program. 5 C.F.R. § 1201.28(d). *See* chapter 3, section 12 for details.

9. SETTLEMENT OPTIONS.

The Board offers the parties three avenues to discuss possible settlement of their cases.

a. First is discussion of settlement with the adjudicating AJ. AJs should seek to get a waiver of ex parte communications from each party to assist in the process so that they can talk individually to the parties about the merits of the case. Through his or her review of the evidence filed by the parties, the AJ becomes thoroughly familiar with the case and is in the best position to discuss its strengths and weaknesses, as

well as to evaluate not just the likelihood of success but also the validity of settlement offers made by the parties, and to suggest proposals for their consideration. The AJ should assure the parties that any settlement discussions with the AJ will have no effect on the ultimate outcome of the appeal if the case does not settle. Although some parties may be hesitant to discuss the merits of the case with the AJ, an AJ's honest assessment of the strengths and weaknesses of a case is not indicative of bias. *See, e.g., Brown v. Department of the Interior*, 86 M.S.P.R. 546 (2000).

b. Second is the option to obtain a Settlement Judge. Like an adjudicating AJ, the Settlement Judge is an AJ and is fully capable of evaluating the parties' evidence and arguments. A Settlement Judge is generally from the same regional office as the adjudicating AJ and offers one way to get an AJ's trained view on the merits of the case without revealing concerns about one's position to the adjudicating AJ if the case does not settle. A Settlement Judge will only be appointed if both parties express a genuine interest in settlement, and because of the resources involved, the CAJ or RD must approve before a Settlement Judge will be appointed.

c. Finally, there is an option for mediation, the Mediation Appeals Program (MAP). This is a voluntary, confidential process in which the parties meet with a trained mediator in a nonlitigious, nonadversarial setting. The mediator may be an AJ or another MSPB employee familiar with Board law and regulations. Both parties must agree to mediation, and the adjudicating AJ must concur that it could be beneficial, given the circumstances of the case and of the parties. Mediations are generally held in person at a location convenient to the parties, but in some situations may be accomplished by video or telephone. MAP is a confidential process, and the parties are required to sign an agreement pledging confidentiality and agreeing to certain other rules stated therein. Only after the parties sign the agreement will a mediator be appointed. If the case does not settle, the mediator will not discuss what occurred in MAP with the adjudicating AJ. AJs who believe the parties might benefit from MAP should direct them to the Board's website, www.mspb.gov, Appeals tab, Mediation Appeals Program subtab, for more information on mediation.

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CHAPTER 12 - INITIAL DECISIONS

1. GENERAL.

a. When a Decision Is Required. Once a case has been docketed as an appeal, it must be closed by issuance of a decision. A rare exception to this rule is when the case has been erroneously docketed and has been deleted from the CMS. Paralegals should contact the Board's Office of Information Resources Management if they believe a case should be deleted.

b. Who May Issue. The ID is issued by the AJ assigned to that case. *See* 5 C.F.R. § 1201.111(a). On an exceptional basis, however, in the AJ's absence, because the authority to adjudicate appeals is delegated from the Board through the RD or CAJ to the AJ, the RD or CAJ may sign the decision "for" the AJ (or the decision may be signed with the name of the AJ "by" the RD or CAJ), even if the AJ has held a hearing on appeal. The delegation of signature authority does not extend beyond this to, for example, a fellow AJ or paralegal.

c. Time Frames. Ideally, an ID should be issued within 120 days of the receipt of the appeal by the RO except for good cause shown. As noted previously, due process and fairness are paramount in determining good cause. Caseloads and the circumstances of the RO or AJ are also factors for consideration. In many instances, such factors can be ameliorated by shifting cases among AJs or between ROs. Also, as a result of the suspension provisions in the Board's regulations, *see* 5 C.F.R. § 1201.28 and chapter 3, section 12 of this Handbook, the parties may seek extended times for settlement and thereby move the case forward more quickly once it is returned to adjudication or as settled.

d. Citation to Transcripts, Tapes, CDs, and/or the Record. The AJ must support his or her findings and conclusions in the ID with appropriate citations to the hearing tape(s)/CD(s). When an official transcript is available, the AJ may cite the transcript. If materials in the record are relied upon, the ID must cite them by tab number and, when the parties have complied with the direction in the acknowledgment order, by page number as well.

2. ORGANIZATION OF THE DECISION.

The ID should usually be divided into the following sections, with a liberal use of headings and subheadings to help the reader navigate the ID with ease. The following headings are suggestions and are not mandatory in every ID.

a. Introduction. This section must identify the following: The filing date of the petition, the agency (if not clear from the caption of the decision), the action appealed, the effective date of the action (or an indication that the appeal was timely filed), and the disposition of the appeal.

If the original appeal was rejected as defective, the original filing date will be in the main text of the introduction. The refiling date can be referenced in the main text or in a footnote.

b. Jurisdiction and/or Timeliness.

(1) Jurisdiction. If the appeal is clearly within the Board's jurisdiction, the ID must contain a brief statement to that effect, citing to appropriate authority, but it is not necessary to have a separate jurisdiction section of the ID.

The ID must contain a full jurisdictional analysis under the following circumstances: (a) the appeal is not within the Board's jurisdiction; (b) the appeal is found to be within the Board's jurisdiction but involves an issue of first impression or one in which jurisdiction is unclear or contested; or (c) the appeal involves a question of the voluntariness of a resignation, retirement, etc.

(2) Timeliness. Timeliness need not be addressed in detail unless the appeal presents a significant question about its timeliness. When the AJ has informed the parties of a question as to the timeliness of the appeal and sought their response, the ID should resolve the matter, even if the responses clearly show that the appeal was timely. If the record is sufficiently developed on the issue of timeliness or other grounds to show that an appeal should be dismissed on other than a jurisdictional basis, the AJ can properly determine, by assuming arguendo that the appeal is within the Board's jurisdiction, that dismissal of the appeal is warranted. Of course, such determination would be without actually making fact findings and conclusions of law on the jurisdictional issue. *See Popham v. U.S. Postal Service*, 50 M.S.P.R. 193 (1991). An appeal may not be dismissed as untimely before a finding of jurisdiction is made in constructive action appeals. In such cases, the agency is required to have notified the appellant of appeal rights only if it knew or should have known the appellant considered the apparently voluntary action to be involuntary. In such cases, the jurisdictional and timeliness issues are "inextricably intertwined;" that is, that resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *See Romine v. U.S. Postal Service*, 64 M.S.P.R. 68, 72-73 (1994); *Popham, supra,* at 198 n.5.

c. Background. A background section is used to explain the background of the case, unusual case processing, or prior appellate history. It should not analyze contested facts.

d. Analysis and Findings. This section includes a description of the parties' burdens of proof and a definition of the relevant legal standards. It also contains findings of fact and conclusions together with a thorough analysis explaining the reasons for these findings and conclusions. 5 C.F.R. § 1201.111(b)(1) and (2); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587 (1980). When an appeal presents material credibility issues, the AJ must address them under the Board's guidance in *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). All material allegations raised by the parties, even if they are not reviewable by the Board, must be mentioned in the ID. The AJ must adjudicate all allegations of discrimination, as well as all other prohibited personnel practices, within the Board's jurisdiction (identified in 5 U.S.C. § 7702(a)(1)(B)) even if the case is to be reversed on other grounds. *See Morey v.*

Department of the Navy, 38 M.S.P.R. 14 (1988); *Marchese v. Department of the Navy*, 32 M.S.P.R. 461 (1987). As stated above, in chapter 9, section 6b, all affirmative defenses that are raised must be addressed, whether on the merits or to note that they were withdrawn and will not be addressed further, or to find that they may not be addressed because the appeal is being dismissed.

All elements of each party's burden of proof must also be addressed. In an adverse action case, for example, the AJ must make findings regarding whether the agency's penalty was reasonable and whether its action promoted the efficiency of the service.

e. Decision. This section sets forth the AJ's order as to the final disposition of the case, including appropriate relief. 5 C.F.R. § 1201.111(b)(3). Appendix B, Code Table 8a, of the CMS Users Guide contains a complete list of decision closings for initial decisions, addendum cases, stays, and protective orders.

f. Order. If appropriate, the AJ must specify the corrective action to be taken by the agency and the timeframe within which it must be completed.

g. Finality Date. The AJ or the support person who closes out the case must include in the ID the specific finality date. Although the notice of the parties' rights informs them of the 35-day deadline for filing a PFR, a specific date is less ambiguous, and therefore less subject to misinterpretation, especially by a pro se appellant. *See* 5 C.F.R. § 1201.111(b)(5). Although the failure to include a finality date may in certain circumstances be deemed to be harmless error, *see Upshaw v. Department of Defense*, 56 M.S.P.R. 94, 97 (1992), *aff'd*, 5 F.3d 1502 (Fed. Cir. 1993) (Table), the absence of a finality date, combined with other factors, may be good cause for waiver of the PFR filing deadline. *See Hamner v. Department of Housing & Urban Development*, 93 M.S.P.R. 84, ¶¶ 8-9 (2002).

h. Interim Relief. If the appellant in an appeal governed by 5 U.S.C. § 7701 is the prevailing party, the ID should provide interim relief, if appropriate, effective upon the date of the ID and remaining in effect until the date of the final order of the Board on any PFR. *See* 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(b)(4) and (c). Interim relief rarely is granted in retirement cases. *See Steele v. Office of Personnel Management*, 57 M.S.P.R. 458 (1993), *aff'd*, 50 F.3d 21 (Fed. Cir. 1995) (Table). If the AJ has determined that interim relief should not be granted, the ID should contain a concise statement of his or her reasoning.

i. Signature. Each ID must be signed by the AJ (or by the RD or CAJ for the AJ), as discussed in section 1b, above. The signature must be preceded by the phrase, "For the Board:" in either event.

In cases in which the parties are served electronically, the ID, as well as any Order, Notice, or other document sent by the AJ should be "signed" /s/. For an actual signature to be transmitted electronically, the signed document would have to be scanned, making the electronic file larger and the document more difficult to deal with. While it is anticipated that e-signatures will be used at some point, for now the technology to make them a reality is lacking. Nonetheless, the copy of the

document that goes into the paper record, if the official record is paper, should be signed in the usual manner.

j. Review Rights. Each ID must contain the appropriate standardized closing paragraphs. This includes notice of both the parties' right to file a petition for review with the Board and the appellant's right to seek judicial review. While the standard notice of judicial review rights used to inform the appellant of only mixed or non-mixed appeal rights, and whistleblower or non-whistleblower rights, current practice is to set out a summary of all available appeal rights, but not provide legal advice on which option is most appropriate for any individual case or specify how courts will rule regarding which cases fall within their jurisdiction. Thus, all decisions now contain the same notice, regardless of the issues that were raised on appeal.

k. Referral to Special Counsel. In IRA appeals, the case must be referred to OSC if whistleblower retaliation has been found. 5 U.S.C. § 1221(f)(3). However, the referral will be done by OCB so that the ROs have no obligation to track the finality of any such cases. *See* chapter 15, section 8 of this Handbook.

l. Sensitive Security Information (SSI). Decisions that may contain SSI may be issued to the parties but must not be distributed beyond them until they have been cleared by the Department of Homeland Security. Further, they may not be served by e-Appeal. *See* chapter 17, sections 4-5. The AJ must follow the internal procedures for SSI. Cases involving similar types of information that the agency may wish to keep out of general circulation should be raised to OCB, and ORO simultaneously should be informed, although secrecy cannot be guaranteed absent a legal prohibition on dissemination.

3. QUALITY REVIEW OF DECISIONS.

a. Pre-Issuance Review. Each ID written by an AJ at the GS-14 grade level or below must be reviewed prior to issuance by the CAJ (or designee). IDs written by GS-15 AJs in complex cases must be reviewed prior to issuance by the CAJ (or designee). Other IDs written by GS-15 AJs must be reviewed post-issuance. In addition, Insta-Cite of citations contained in the ID must be completed in accordance with the policy of the RD.

b. Erratum Notices. After an ID is issued, an AJ's authority to alter the decision is severely circumscribed. The Board's regulation at 5 C.F.R. § 1201.112 specifies that an AJ retains jurisdiction only to (1) correct the transcript; (2) rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages; (3) process a petition for enforcement; and (4) vacate an initial decision before it becomes final in order to accept a settlement agreement into the record. However, an AJ may correct a nonsubstantive mistake, one that is simply editorial in nature, by issuance of an Erratum notice. A few examples of such mistakes include: a misspelling of the appellant's name or other mistake in the caption (e.g., a wrong docket number); an incorrect case citation; the omission of a word; a mathematical miscalculation; a misstatement of the nature of the action or of the penalty imposed; a wrong or missing closing paragraph; or an incorrectly computed finality date.

The regulation provides that the AJ's authority to take the four specified actions does not affect the finality of the ID or the PFR filing period. Nevertheless, if the AJ believes that the correction might be cause for the appellant to file a PFR (e.g., a $50,000.00 payment was corrected to read $50.00, or that the insertion of the word "no" made a significant outcome difference, etc.), then it should be brought to the appellant's attention that the Erratum notice might be good cause for a late PFR filing or amendment.

4. DISTRIBUTION OF DECISIONS. .

a. To Interested Parties. Copies of the decision must be mailed—or e-mailed to e-filers—to the following:

(1) Appellant;

(2) Appellant's Representative;

(3) Agency's Representative;

(4) Intervenors; and

(5) OPM. Electronic copies of IDs will be made available to OPM on the Board's Extranet list serv.

b. To MSPB Headquarters. AJs must save the ID in the Document Management System (DMS) so that it can be distributed electronically both within and outside of the Board by OCB. AJs are responsible for proper distribution of the ID to the parties. OCB is responsible for proper distribution of the ID to all other entities as required (e.g., OPM, OSC, etc.). An issuance date should not be filled in until the ID is, indeed, ready for issuance, to avoid premature release of a document that may be changed before issuance.

c. Certification of Service. Each ID must be accompanied by the appropriate standardized certificate of service. The certificate will contain each party's postal mailing address but must indicate the method by which service was actually accomplished, i.e., Regular Mail, Electronic Mail, etc.

d. Federal Circuit Notice. The Clerk of the U.S. Court of Appeals for the Federal Circuit has prepared notices that must be served with every ID on appellants who appeared pro se before the Board.

5. BENCH DECISIONS.

a. The AJ's hearing order or other notice will have put the parties on notice that the AJ may issue a bench decision at the conclusion of the hearing, and that either party may request such a decision. In addition, the Board has held that when an appellant moves for judgment at the close of the agency's presentation of its case-in-chief, the AJ must decide the motion on the basis of whether the action is supported by the requisite degree of proof. In making this ruling, the AJ should carefully consider the weight and credibility of the agency's evidence and must consider whether the agency has established an unimpeached prima facie case in its case-in-chief. If the

AJ determines that the agency has made such a showing, the appellant's motion must be denied. *See McKenzie v. Department of the Interior*, 16 M.S.P.R. 397, *vacated on other grounds*, 18 M.S.P.R. 377, 380 (1983). If the AJ grants the motion, the AJ is still required to announce his or her findings and conclusions, sufficient to comply with the requirements of *Spithaler*, and the following subparagraphs covering bench decisions. Further, because it is the appellant who has the burden of proof on his or her affirmative defenses, in a case where such defenses have been raised and not withdrawn, the case cannot end after the agency's presentation.

b. At the close of the hearing, if the issues have been clearly delineated and addressed, and the AJ is confident he or she can decide them without further review of the record, the AJ may announce his or her findings and conclusions in a bench decision.

(1) Guidance on Types of Cases Appropriate for Bench Decisions. The following are general guidelines. The AJ has discretion to issue a bench decision outside of these guidelines if other factors justify it.

(a) Types of cases or situations in which an AJ might consider issuing a bench decision.

(i) When the parties have stipulated to the basic facts and/or charges;

(ii) When only penalty issues are involved;

(iii) Certain jurisdictional cases, such as last-chance agreement questions;

(iv) RIF cases where there is little factual dispute, such as a simple competitive level disagreement; and

(v) Legal retirement issues (i.e., any retirement case except those involving disability or overpayment).

(b) Cases generally not appropriate for bench decisions:

(i) IRA appeals and "otherwise appealable action" cases;

(ii) Cases with discrimination issues;

(iii) Complex adverse actions; and

(iv) Chapter 43 appeals (performance cases).

(2) Communication of and Issuance Date of the Bench Decision. The bench decision will be communicated to the parties at the conclusion of the hearing and transcribed by a court reporter. The official issuance of a written decision will take place from 1 to 3 work days after the hearing, which is the approximate time it will take to receive a partial transcript (*see* subparagraph (3)(c) below) from the court reporter. The AJ may make editorial changes to the bench decision before its issuance**,** and the revised transcript will then be part of the official record. The official date of the bench decision will be the date placed on the bench decision before it is mailed, generally the date on which it is served on the parties by mail.

(3) Format and Content of Bench Decisions. Bench decisions must comply with the requirements of the Board's ID regulation, 5 C.F.R. § 1201.111. To meet the criteria for the perfection of the record, a written bench decision must include the following:

(a) a clear statement that the AJ is issuing an ID and including: a summary of issues; an explanation of reasons for the AJ's findings and conclusions, including interim relief, if applicable; and a statement of the finality date. The document will include a caption and parties list, which are standard for Board decisions.

(b) a complete statement of standard appeal rights;

(c) reference to an "attached" transcript of the decision. For documentation purposes, the AJ need request only that part of the hearing transcript that constitutes the decision. In the case of a telephonic hearing held without benefit of a court reporter, the AJ can either transcribe the decision or send the tape to a court reporter for transcription. When desirable (e.g., the decision is very brief), the AJ may document the decision language directly in the written document in lieu of attaching a partial transcript. Templates for both types of decisions are available to all AJs.

(d) as with other types of decisions, copies of PFR guidance and pro se guidance issued by the U.S. Court of Appeals for the Federal Circuit will be mailed with the decision.

(4) Quality Review of Bench Decisions. Review criteria for bench decisions, both pre- and post-issuance, are the same as for other types of decisions. The CAJs in each RO/FO will establish local procedures that satisfy this requirement.

(5) Administrative Considerations.

(a) Case Tracking–Bench Decisions. During close-out of the bench decision, the case tracker will be required to answer the following question: Is this a Bench Decision? (Y or N). This will be sufficient for tracking these cases.

(b) DMS Decision Copy. Bench decisions will have some form of documentation (*see* (3)(c) above) that transmits the decision and/or transcript. This documentation must be placed in DMS with other decisions.

6. RULES OF CITATION.

An AJ generally must follow the "Blue Book" rules of citation, except when citing those Board decisions that contain paragraph numbers by including those numbers rather than the pages on which they appear. Board policy is that nonprecedential Final Orders and Remand Orders, IDs, and unpublished court opinions are not precedential. The Federal Circuit's nonprecedential decisions may be cited for their persuasive authority. Brief orders that summarily deny the petition but also summarily rule on timeliness questions or pending motions also are not precedential. Accordingly, these decisions and opinions generally should not be cited as authority in an ID. However, an AJ may cite to and follow a Board nonprecedential decision, as the Board cites to the Federal Circuit's nonprecedential

decisions, if the AJ finds its analysis persuasive. An AJ may not cite as controlling cases when a majority of the Board does not vote to adopt the analysis of an O&O.

7. STYLE.

The AJ must maintain a dignified, judicial tone in the decision and avoid ad hominem attacks on any persons discussed in the ID.

8. SANITIZATION OF INITIAL DECISIONS.

a. Generally. Sanitization of IDs when public disclosure would endanger the privacy of persons named in the decision may be done at the request of a party, at the request of the persons named or their representatives, or at the discretion of the AJ.

FOIA authorizes an agency, "to the extent required to prevent a clearly unwarranted invasion of personal privacy," to delete or sanitize identifying details from agency opinions made available to the public. 5 U.S.C. § 552(a)(2).

Generally, greater privacy interests are considered to attach to third parties named in Board decisions than to appellants. This is because appellants waive some of their interest in privacy by appealing to the Board. Appellants' identities should also be sanitized, however, in cases where disclosure of the appellant's identity poses a danger to the appellant, other persons, or governmental interests.

A "clearly unwarranted" invasion of the personal privacy of a third party would tend to exist when the decision reveals intimate personal details concerning the private life of the third party. Certain kinds of cases, particularly off-duty misconduct cases, may require sanitization of third-party identifying information. The kinds of cases in which AJs and CAJs should be especially alert to the possibility of sanitization include those in which the underlying facts relate or refer to:

- Allegedly criminal behavior;
- Alcohol or drug abuse;
- Mental illness;
- Personal finances; or
- Sexual behavior

This does not mean that a case involving any of the above kinds of privacy-sensitive facts automatically requires sanitization. Neither does it mean that the need for sanitization could not arise in other types of privacy-sensitive cases. Rather, the above list is intended to provide a sense of the kinds of intimate facts or details from a person's private life the revelation of which in a decision should trigger the consideration of sanitization.

b. Method of Analysis. The decision whether to sanitize involves the two-step analysis underlying the application of FOIA Exemption 6 (privacy). 5 U.S.C. § 552(b)(6). In summary, this analysis requires: (1) determining there is a strong possibility that

the use of the third party's name would constitute an invasion of a protectable privacy interest; and (2) balancing the individual privacy concerns and the public interest in disclosure of the third party's identity. This two-step analysis is similar to the analysis used in ruling on motions by an appellant to proceed anonymously in his or her appeal before the Board. *See* chapter 2, section 5, subparagraph c(3).

c. Alternatives to Sanitizing. The necessity for sanitizing the identity of a third party in a decision is eliminated if the AJ, in drafting the decision, recognizes the sensitivity of the material involved in the case and identifies the third party as "Mr. A.," "Ms. A," "Witness A," etc. It must remain clear to the parties and reviewers who is represented by such designations. This is an effective and efficient approach and should be used when appropriate. Often use of the person's initials or job title is appropriate when considering comparator evidence on penalty, or referring to a witness or fellow-employee of the appellant.

9. CLOSING AND CODING CASES.

When cases are closed, it is important for the accuracy of Board records to assure that all issues are properly accounted for and that their correct disposition is recorded. The CMS Users Guide contains the definitive list of closing codes and actions. While paralegals do the majority of the entries into DMS, it is the AJ who is mainly responsible for the accuracy of the information that goes into CMS because the AJ is more familiar with the issues that were raised, abandoned, and decided, and with the nature of the decision on all issues in the case. Board records are largely the basis for its Annual Reports as well as its Annual Performance Reports, and for the information Congress seeks, either when it drafts a statute (such as the WPEA, which requires that certain statistical information be tracked) or when it more informally makes information requests of the agency. Other agencies, such as the Government Accountability Office, have often made requests for information that require reliance on CMS as well. Therefore, AJs must invest the time and thought necessary to allow for the correct tracking of the disposition of every case and each issue in it.

CHAPTER 13 - ADDENDUM DECISIONS

1. GENERAL.

In general, the requirements of chapter 12 apply to addendum decisions. Special requirements for addendum decisions are set forth in this chapter.

2. ATTORNEY FEES.

See 5 C.F.R. §§ 1201.201-.203; 1201.205.

a. Who May File. While anyone may file a motion for attorney fees, an award may not be granted to an agency. *See Lewis v. Department of the Army*, 31 M.S.P.R. 476 (1986). Under 5 U.S.C. § 7701, the appellant must be the prevailing party and must have had an attorney-client relationship with his or her representative to receive an award of attorney fees, but may recover attorney fees for consultation with an attorney who was not eventually hired, even as to proceedings that preceded the appeal to the Board. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413 (2002) ("[t]he cardinal point in establishing an attorney-client relationship is in the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice"). In all but WPA/WPEA appeals, the payment itself must be made to the attorney, not the appellant. *Bonggat v. Department of the Navy*, 59 M.S.P.R. 175 (1993); it is the appellant who is entitled to the fees in whistleblower appeals under 5 U.S.C. § 1221. *Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

   Representation by a non–lawyer does not meet the requirement of an attorney-client relationship. However, expenses personally incurred by an appellant can be awarded under 5 U.S.C. §§ 1221(g) and 7701(g)(2). *See Bonggat, supra*; *Chin v. Department of the Treasury*, 55 M.S.P.R. 84 (1992).

b. Time and Place of Filing. A request for payment of attorney fees will be decided in an addendum proceeding before an AJ after issuance of a final decision in the proceeding on the merits, including a decision accepting the parties' settlement of the case. *See* 5 C.F.R. § 1201.203(b). The request 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. *See* 5 C.F.R. § 1201.203(d). Usually, a request for attorney fees must be filed with the same RO or FO that issued the decision on the merits of the case. When the initial or only decision in the proceeding on the merits was issued by the Board or an AJ at headquarters, the request must be filed with OCB. *See* 5 C.F.R. § 1201.203(c).

c. Form and Content of Request. A request for payment of 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. *See* 5 C.F.R. § 1201.203(a).

d. Applicable Law and Exceptions. The Board early on established the law with respect to prevailing party, interest of justice, and reasonableness, and little of that has changed concerning appeals under section 7701, where attorney fees may be awarded under subsection 7701(g)(1). However, several exceptions to the general § 7701 rules are detailed below.

USERRA: Regarding appeals brought under USERRA, *see* chapter 18 of this Handbook, the Board and the court have held that it is not section 7701 that provides the authority for an attorney fees award. Rather, it is USERRA itself, which states at 38 U.S.C. § 4324(c)(4), "If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board … that such person is entitled to an order [to comply with the law and compensate the employee for any loss of wages or benefits], the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses." Thus, the rules concerning prevailing party and interest of justice do not apply to USERRA attorney fee requests. *See Jacobsen v. Department of Justice,* 500 F.3d 1376 (Fed. Cir. 2007), stating that "Congress left the decision whether to award reasonable attorney fees, expert witness fees, and other litigation expenses to the Board's discretion." Accordingly, the court affirmed the Board's reliance on the appellant's limited degree of success to deny a fee award. While *Jacobsen* and similar Board cases have all been based on *Butterbaugh*-type appeals (involving improper charges for military leave), neither the Board nor the Federal Circuit has indicated that the rule would differ under another provision of USERRA or as to a different section 4311(a) appeal. Neither the Board nor the court has issued any precedential attorney fees cases under other provisions of VEOA.

WPA/WPEA: As noted above, appeals finding whistleblower retaliation are also subject to different rules, so that there is no interest of justice requirement to be met in such cases, and the appellant is the one entitled to the award. *See Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

Discrimination: Under 5 U.S.C. § 7701(g)(2), "[i]f an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of ... title [V], the payment of attorney fees shall be in accordance with the standards prescribed of section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))." Therefore, in mixed cases, when the appellant is the prevailing party by a finding of discrimination or reprisal in violation of 5 U.S.C. 2302(b)(1), the entirety of the substantive law developed under subsection (g)(1) also does not apply.

Rescission: One issue that often arises in connection with attorney fee requests is the effect of the agency's cancellation of the action prior to adjudication. When the agency fully cancels and restores the appellant to the status quo ante, resulting in the dismissal of the merits appeal as moot, the appellant may not be awarded attorney fees. The "catalyst theory" that previously allowed for an award in such circumstances is no longer valid. *Buckhannon Board and Care Home, Inc. v.*

West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001); *Sacco v. Department of Justice*, 90 M.S.P.R. 225 (2001). Because the appellant does not qualify as a prevailing party, attorney fees may not be granted. That is not true, however, when the parties have settled the case. There, the appellant is a "prevailing party" eligible for an award of attorney fees, where he obtained enforceable relief through settlement agreement. *Griffith v. Department of Agriculture*, 96 M.S.P.R. 251 (2004). In most cases, however, the parties will also settle the attorney fees question, and an agreement that specifies that additional fees will not be paid controls.

Enforcement: Similarly, an appellant is the prevailing party on PFE even if the agency eventually complies, based on "the Board's oversight of the parties' compliance efforts." *Mynard v. Office of Personnel Management*, 108 M.S.P.R. 58 (2008). It reasoned that in a PFE AJs have the authority to oversee the parties' efforts to secure compliance, and the Board has express authority to order corrective action when a party has not complied, so that "the Board's oversight of the parties' compliance efforts provides the PFE process with sufficient Board imprimatur to allow an appellant to qualify as a 'prevailing party' under 5 U.S.C. § 7701(g)(1) even in the absence of a Board order finding the agency in noncompliance or an agreement executed by the parties to settle compliance matters." *Id*.

3. PROCESSING MOTIONS FOR ATTORNEY FEES.

a. Acknowledgment Order. The standard acknowledgment order (ACKFEE) must be sent to the parties within 3 workdays of receipt of a motion for attorney fees. The Order may have to be modified to cover any of the above-mentioned types of cases if no separate order appears in HotDocs.

b. Discovery and Hearing. Generally discovery is not granted and a hearing is not held on a motion for attorney fees. However, it is within the AJ's discretion to allow both. Because, as discussed in section d below, the Board does not reconsider the merits of the underlying appeal during an attorney fees proceeding, any discovery or hearing would, of necessity, be limited to addressing issues specific to the fee claim and not to the merits, such as proof of counsel's hourly rate, community rate, etc.

c. Settlement. The Board's policy is to encourage the settlement of attorney fees disputes.

d. Decision. The decision on a fee petition should be made by the AJ who wrote the merits ID, even if the final decision of the Board reversed or modified the outcome the AJ reached. In any event, though, the findings in the final decision must not be revised or second-guessed when ruling on the fee petition. *See, e.g., Gensburg v. Department of Veterans Affairs*, 80 M.S.P.R. 187 (1998); *Capeless v. Department of Veterans Affairs*, 78 M.S.P.R. 619 (1998). Before disallowing fees or costs that are not adequately explained, the AJ must notify the appellant of the AJ's intention to do so and provide a fair opportunity to address the deficiencies. *Wilson v. Department of Health & Human Services*, 834 F.2d 1011 (Fed. Cir. 1987). Further, while the Board may award fees for the proceedings before it, it lacks authority to

award them for Federal Circuit or other judicial appeals. *See* *Manley v. Department of the Air Force*, 78 M.S.P.R. 673 (1998). The Equal Access to Justice Act, 28 U.S.C. § 2412, is inapplicable to attorney fee proceedings before the Board.

4. COMPLIANCE.

See 5 C.F.R. §§ 1201.181-.183.

a. Petition for Enforcement. 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 a provision within a settlement agreement that was entered into the record for enforcement purposes in an order or decision under the Board's appellate jurisdiction, by filing the petition with the RO or FO that issued the ID. *See* 5 C.F.R. § 1201.182(a). A party may also file a PFE seeking rescission of a settlement agreement upon a finding of material breach. Any party seeking enforcement of a final Board decision or order issued under the Board's original jurisdiction, or for enforcement of a provision within a settlement agreement that was entered into the record for enforcement purposes in an order or decision under the Board's original jurisdiction, may file a petition with OCB. *See* 5 C.F.R. § 1201.182(b). In addition, an employee who is not a party but is aggrieved by any other employee's failure to comply with a Board order may file a PFE if granted the status of a permissive intervenor. *See* 5 C.F.R. § 1201.182(c).

   PFEs of interim relief are not to be docketed as compliance cases; rather, they are to be referred to OCB for treatment as part of the PFR process. *See* *Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62 (1992).

   The PFE must specify reasons why the petitioning party believes there is noncompliance and must include the date and results of any communications between the parties regarding compliance. A copy of the PFE must be served on the other party or that party's representative. The agency does not have the burden of showing compliance with a Board order until after a PFE has been filed.

b. Time Limits for Filing. The petition must be filed promptly with the RO or FO that issued the ID, and if it is filed more than 30 days after the date of service of the agency's notice that it has complied, the PFE must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing. *See* 5 C.F.R. § 1201.182(a). Determining timeliness differs when the issue is compliance with a settlement agreement, rather than with a Board-ordered determination. Where there has been a settlement, because the Board does not direct the parties to inform each other of the date on which they have complied, the issue is whether the PFE was filed within a reasonable time of the alleged breach. *Chudson v. Environmental Protection Agency*, 71 M.S.P.R. 115 (1996), *aff'd*, 132 F.3d 54 (Fed. Cir. 1997) (Table).

5. PROCESSING PETITIONS FOR ENFORCEMENT.

a. Acknowledgment Order. The appropriate standard acknowledgment order (ACKCOMA or ACKCOMB) must be sent to the parties within 3 workdays of receipt of the PFE. If the agency is the alleged noncomplying party, it must submit the name, title, grade, and address of the agency official charged with complying with the Board's order. 5 C.F.R. § 1201.183(a)(2). The agency must inform this 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 is asserting that it has fully complied. *Id.* The agency must advise the Board of any change to the identity or location of this official during the course of any compliance proceeding. Absent this information, the Board will presume that the agency official responsible for compliance and all of the consequences thereof is the highest ranking, appropriate agency official who is not appointed by the President with the consent of the Senate. *Id.* Either the CAJ or an AJ may adjudicate a PFE.

When an appellant files a PFE seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board's order by a preponderance of the evidence. 5 C.F.R. § 1201.183(d). Any party filing a PFE seeking compliance with terms of a settlement agreement, or its rescission, has the burden of proving the other party's breach of the agreement by a preponderance of the evidence. *Id.* The acknowledgment order clarifies that the parties have a right to discovery on PFE, so AJs must provide time for discovery when requested and must rule on any disputes that arise and cannot be resolved by the parties, as would be true in a merits proceeding. Cases holding to the contrary have been overruled by 5 C.F.R. § 1201.183(a)(9), which allows discovery but requires that it be initiated within a shortened time compared to discovery in a merits appeal.

b. Hearing. Although a hearing is not required, it remains within the AJ's discretion to grant. A hearing is highly recommended in cases involving issues of credibility.

c. Settlement. The Board's policy is to encourage the settlement of compliance disputes.

d. Initial Decision Finding Compliance. When the AJ finds that the agency is in compliance or is making a good faith effort to take all actions required to be in compliance with the final decision, the AJ will issue an ID finding compliance or essential compliance. This ID is treated like other IDs, and becomes final 35 days after issuance unless a party files a PFR with the Board. As is true with attorney fee petitions, the Board does not reconsider the merits of an appeal in a compliance proceeding. *See Coffey v. U.S. Postal Service*, 86 M.S.P.R. 632 (2000).

e. Initial Decision Finding Full or Partial Noncompliance. Unlike earlier versions of the process for deciding compliance matters, the AJ will issue an ID whether the ultimate finding is compliance or noncompliance. If the AJ finds that the agency has not made a good faith effort to comply in whole or in part and is not in full compliance with the final decision, the ID must resolve all issues raised in the PFE and identify the specific actions the noncomplying party must take to be in compliance with the

Board's final decision. 5 C.F.R. § 1201.183(a)(5). In addition to the standard service copies on the appropriate parties and/or their representatives, a copy of this ID must be served on the agency official charged with complying with the Board's order under 5 C.F.R. § 1201.183(a)(5). The ID finding noncompliance must also advise the parties that proof of compliance with the ID must be submitted to OCB within the time limit for filing a PFR under 5 C.F.R. § 1201.114(e), to the extent the party decides to take the actions required in the ID. 5 C.F.R. § 1201.183(a)(6)(i). To the extent the party decides not to take all of the actions required by the ID, the party must file a PFR pursuant to 5 C.F.R. §§ 1201.114-115. The complying party may file evidence and argument in response to any submission described in 5 C.F.R. § 1201.183(a)(6) by filing opposing evidence and argument with OCB within 20 days of the date such submission is filed. 5 C.F.R. § 1201.183(a)(8).

The file, along with all other files related to the appeal, must be forwarded to OGC within 3 workdays of the date the ID is issued.

6. CONSEQUENTIAL, LIQUIDATED, AND COMPENSATORY DAMAGES.

See 5 C.F.R. §§ 1201.201-.202; 1201.204-.205.

a. Time for Making Request. A request for damages should be made as early as possible in the proceeding on the merits, no later than the conferences held to define the issues in the case, subject to the AJ's authority to waive untimeliness for good cause shown. The Board may also waive the time limit for good cause shown when a request is made for the first time on PFR of a merits decision. In such a case, or where there has been no prior proceeding before an AJ, it may send the case to an AJ for adjudication. *See* 5 C.F.R. § 1201.204(a), (h).

b. Merits Proceeding or Addendum Proceeding. Because AJs may waive the application of any Board regulation not required by law, the AJ or the Board may consider and rule on the request in the decision on the merits, if such action is in the interest of the parties and will promote efficiency and economy in adjudication. Normally, however, the AJ or the Board will defer a decision on the request for an addendum proceeding. *See* 5 C.F.R. § 1201.204(d), (h)(1).

7. PROCESSING REQUESTS FOR DAMAGES.

a. Addendum Proceedings. If the AJ defers a decision on a request for consequential, liquidated, or compensatory damages for an addendum proceeding as described above in section 6b, the AJ will schedule the proceeding after issuance of an initial decision that becomes final or a final Board decision. It is within the AJ's discretion to allow discovery during the processing of the damages proceeding (although, as noted above, there is a right to appropriate discovery in a compliance proceeding).

b. Hearing. The AJ may hold a hearing on a request for consequential, liquidated, or compensatory damages and may apply appropriate provisions of 5 C.F.R. subpart B to the addendum proceeding. *See* 5 C.F.R. § 1201.204(f).

c. Settlement. The Board's policy is to encourage the settlement of disputes involving legal damages.

d. Authority. The Board has addressed the limits of its authority regarding requests for damages under certain circumstances. For compensatory damages, the Board's earliest and still lead decision is *Markiewicz-Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58 (1997), which sets the basic rules applicable to such appeals; *Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375 (2001) (compensatory damages are not available for disparate impact discrimination); *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189 (2000) (compensatory damages are not available for age discrimination or EEO-based retaliation); *Phillips v. Department of the Air Force*, 84 M.S.P.R. 580 (1999) (compensatory damages are not available for a PFE of a settlement agreement); *Spencer v. Department of the Navy*, 82 M.S.P.R. 149 (1999) (compensatory damages may not be awarded for disability discrimination based on the failure to accommodate if the agency has made good faith efforts to accommodate, but they are available for perceived discrimination because the appellant needs no accommodation). *See also Jones v. Department of the Army,* 75 M.S.P.R. 115, 121-22 (1997)(neither compensatory damages nor back pay can be awarded in cases in which a finding of mixed-motive discrimination has been made and the agency has established that it would have taken the same action absent the discriminatory motive); *Garrison v. Department of the Navy*, 88 M.S.P.R. 389, 392-93, ¶ 7 (2001) (in mixed-motive cases, if the agency proves that it would have taken the same action in the absence of unlawful discrimination or reprisal, the appellant is not entitled to reinstatement or back pay). The Board's more recent decision in *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶¶ 48-51 (2015), suggests the same result would obtain under the revised analysis of discrimination claims it establishes.

An amount equal to back pay shall be awarded as liquidated damages under 5 U.S.C. § 3330c of VEOA when the Board or a court determines that an agency willfully violated an appellant's veterans' preference rights. 5 C.F.R. §§ 1201.201(e) & 1201.202(d). A violation is "willful" if the agency either knew or showed reckless disregard for the matter of whether its conduct was prohibited by VEOA. *Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶ 8 (2007). An award of liquidated damages, therefore, may be made only if there is an entitlement to an award of back pay, and "in calculating damages, the AJ "will make findings regarding several outstanding issues, including when, if at all, the appellant would have been entitled to grade, step and/or pay increases after the retroactive starting date. The [AJ] shall also instruct the appellant to provide records of his income, if any, and his efforts to obtain other employment during the relevant time period, as well as proof of any relevant expenses that should be offset in an award of lost wages or benefits." *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 18 (2011). Note, however, that "lost wages or benefits" has since been interpreted to mean lost wages *and* benefits. *See Weed v. Social Security Administration*, 124 M.S.P.R. 171, ¶ 14 (2016).

As for consequential damages, *see, e.g., Bohac v. Department of Agriculture*, 239 F.3d 1334 (Fed. Cir. 2001) (nonpecuniary damages, such as for pain and suffering, may not be awarded under the WPA and instead are limited to out-of-pocket costs); *Reams v. Department of the Treasury*, 91 M.S.P.R. 447 (2002) (consequential damages do not extend to reimbursing the appellant for annual leave he or she used in prosecuting the appeal under the WPA); *Pastor v. Department of Veterans Affairs*, 87 M.S.P.R. 609 (2001) (consequential damages include not just medical expenses that the appellant has already incurred, but also future medical expenses that can be proven with reasonable certainty). For a review of several types of losses that may or may not be awarded as consequential damages, *see King v. Department of the Air Force*, 122 M.S.P.R. 531, ¶¶ 8-14 (2015).

CHAPTER 14 - EX PARTE COMMUNICATIONS

1. GENERAL.

See 5 C.F.R. §§ 1201.101-.103.

a. Definition of Ex Parte Communication. Ex parte communications are oral or written communications between decision-making officials of the Board and an interested party to a proceeding, made without providing the other parties a chance to participate. Not all ex parte communications are prohibited, only those that involve the merits of the case or those that violate other rulings requiring submissions to be in writing.

Interested parties may make inquiries about such matters as the status of a case, when it will be heard, and the method for transmitting evidence to the Board. Inquiries about the availability of witnesses also are not prohibited. *See Stec v. Office of Personnel Management*, 22 M.S.P.R. 213 (1984). Parties may not inquire about such matters as what defense they should use or whether their evidence is adequate, and the parties may not make a submission orally that is required to be in writing. Thus, if a party calls to ask for a postponement or continuance, the AJ should not rule on the request or participate in a discussion beyond informing the party that such a request should be in the form of a written motion. *See* 5 C.F.R. § 1201.55, requiring motions for postponements to be in writing and to be preceded by contact with the other party to determine if there is an objection.

b. Interested Party. The term interested party includes the following:

(1) Any party or representative of a party involved in a proceeding before the Board; or

(2) Any other person who might be affected by the outcome of a proceeding before the Board.

Note: A Member of Congress or a Congressional staff person who attempts to discuss at length the merits of a constituent's appeal pending with the Board and/or engages in intense advocacy on the constituent's behalf may be considered an interested party. The contact should then be treated as an ex parte communication in accordance with section 3 of this chapter. The CAJ may wish to contact the Congressional Member's office to determine whether the Member intends to act as a representative in the appeal.

c. Decision-making Official. Pursuant to 5 C.F.R. § 1201.101(b)(2), a "decision-making official" is "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."

2. SPECIFIC PROHIBITIONS/APPROVALS.

a. Time period. Ex parte communications concerning the merits of any matter before the Board for adjudication or that otherwise violate rules requiring written

submissions are prohibited from the time the persons involved have knowledge that the matter may be considered by the Board until the Board has rendered a final decision. *See* 5 C.F.R. § 1201.102.

b. Examples. Certain communications with Board decision-making officials have been ruled not to be prohibited ex parte communications. In this category are discussions between two AJs hearing two separate appeals filed by the same appellant, *Edwards v. Department of Justice*, 87 M.S.P.R. 518 (2001); the reports of a psychologist and psychiatrist to the AJ concerning the appellant's mental condition during the course of the appeal of a removal for medical disqualification, *Wyse v. Department of Transportation*, 39 M.S.P.R. 85 (1988); contacts between the AJ and the appellant's Congressional representative that did not involve the merits and were not required to be in writing, *Lynch v. Department of Justice*, 32 M.S.P.R. 33 (1986); and legal memoranda sent by the Board's OGC to the AJ addressing the penalty in an adverse action appeal, *Eng v. Department of Transportation*, 18 M.S.P.R. 220 (1983). In each of these decisions, the Board found no violation because the communication with the AJ was not by an "interested party" in the appeal. The Board has also found that while the parties' waiver of the rule against prohibited ex parte communications will allow settlement negotiations to occur outside the presence of all parties, absent such a waiver, a settlement discussion with an appellant without the presence of his own representative and that of the agency is prohibited. *Young v. Department of Veterans Affairs*, 83 M.S.P.R. 187 (1999).

c. Test. In each instance when a prohibited ex parte communication occurred, the Board has, of course, required that the communication be made a matter of record in accordance with its regulations, see below, but the ultimate test as to whether the communication required any additional proceedings or corrective action has been to determine whether the appellant's substantive rights have been prejudiced. If they were not, placement in the record constitutes the appropriate corrective action.

3. PLACEMENT IN THE RECORD/SANCTIONS.

a. Requirement of Placement in Record. Any communication made in violation of the rule against prohibited ex parte communications must be made a part of the record and an opportunity for rebuttal allowed. If the communication was oral, a memorandum stating the substance of the discussion must be placed in the record.

b. Notice of Violation. The AJ or OCB, as appropriate, will give the parties written notification that the regulation has been violated and 10 calendar days to file a response.

c. Sanctions. The following sanctions are available:

(1) Parties. The offending party may be required to show cause why, in the interest of justice, his/her claim, interest or motion should not be dismissed, denied, or otherwise adversely affected.

(2) Board Personnel. Offending Board personnel will be treated in accordance with the Board's standards of conduct.

(3) Other Persons. The Board may invoke such sanctions against offending parties, if warranted. .

4. AVOIDANCE OF PROHIBITED EX PARTE COMMUNICATIONS.

a. AJ's Responsibility. When contacted by an interested party, an AJ cannot anticipate what questions may be asked or what information may be presented during the conversation. This does not, however, alter the nature of the ex parte contact once prohibited information has been communicated, nor does it relieve the AJ of the responsibility of controlling the conversation and ensuring compliance with the Board's regulations.

b. Waiver of the Rule against Prohibited Ex Parte Communications. The parties may agree to waive the rule against prohibited ex parte communications in order to obtain the AJ's active involvement in the settlement process. This is permissible. Of course, such an agreement should be documented. A party may also waive the prohibition by not taking part in a scheduled teleconference as provided, for example, in the HotDocs document HEAROPM.

5. DUE PROCESS GUARANTEE AT THE AGENCY LEVEL.

A body of case law exists that addresses ex parte communications at the agency level prior to the decision on a personnel action. *See, e.g., Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999); *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); *Lopes v. Department of the Navy*, 116 M.S.P.R. 470 (2011). Consistent with these decisions, sometimes the Board or the court may find that a due process denial resulted from an ex parte communication on the merits that was not reflected in the charges. Such case law, however, is not directly applicable to an ex parte communication with a Board official during the appeal stage, which is the subject of this chapter. Board case law on ex parte communications with its officials has not addressed the extent to which the court's decisions may be applicable by analogy.

CHAPTER 15 - WHISTLEBLOWER APPEALS

1. GENERAL.

A whistleblower appeal involves claim(s) under 5 U.S.C. § 2302(b)(8) that a personnel action was threatened, proposed, taken, or not taken as a result of any disclosure of information that is reasonably believed to evidence a violation of law, rule, or regulation or to evidence gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* relevant statutory and regulatory provisions at 5 U.S.C.A. §§ 1201 note; 1211-1219; 1221-1222; 2302 (West Supp. 1992); 5 C.F.R. part 1209. As discussed more specifically below, under the WPEA certain activities, not just disclosures, are also protected.

The procedures for processing whistleblower appeals are those set forth in 5 C.F.R. part 1201, subparts A, B, C, E, F, and G and part 1209. Subpart H of part 1201 applies to requests for attorney fees and consequential and compensatory damages arising from these appeals. *See* 5 C.F.R. § 1209.3.

2. OTHERWISE APPEALABLE ACTION APPEALS.

See 5 C.F.R. § 1209.2(b)(2). "Otherwise appealable action" appeals are those within the Board's regular appellate jurisdiction, as described in 5 C.F.R. § 1201.3, in which the appellant raises an affirmative defense of retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8) and now most of (b)(9) as well. No whistleblower or other affirmative defense, however, may be raised in an appeal under VEOA or USERRA. It is not necessary for an appellant in an OAA to first request corrective action from OSC. However, when an appellant does first raise an OAA to the OSC before appealing to the Board, the Board will find that if the choice was knowingly made, the appellant has elected his remedy. *See Agoranos v. Department of Justice*, 119 M.S.P.R. 498 (2013). This constitutes a statutorily-required change from prior law, *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993), under which the Board treated the appeal as an OAA for purposes of determining its scope of review. *Massimino* is no longer good law.

3. INDIVIDUAL RIGHT OF ACTION (IRA) APPEALS.

See 5 C.F.R. § 1209.2(b)(1). IRA appeals are an extension of the Board's jurisdiction pursuant to 5 U.S.C. § 1221(a). If the personnel action in question is not within the Board's regular appellate jurisdiction, the appellant must first seek corrective action from OSC before appealing to the Board. 5 U.S.C. § 1214(a)(3); *Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623 (Fed. Cir. 1992). An appellant may not bring a different allegation of whistleblowing before the Board than he or she brought before OSC. *See Ward v. Merit Systems Protection Board,* 981 F.2d 521 (Fed. Cir. 1992).

4. ELECTION OF REMEDIES.

Under 5 U.S.C. § 7121(g)(2), a person covered by a collective bargaining agreement who claims to have been the victim of reprisal for whistleblowing may elect only one of three remedies--a Board appeal of an OAA, a grievance, or a complaint to OSC. *See Thurman v.*

Department of Defense, 77 M.S.P.R. 598 (1998). If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from OSC before appealing to the Board. 5 C.F.R. § 1209.2(b)(1). Filing a complaint with OSC first will allow the appellant to later file an IRA appeal with the Board under the time limits set forth below. Filing a grievance or appeal first will foreclose any other avenue. *See, e.g., Sabersky v. Department of Justice*, 91 M.S.P.R. 210, 213, ¶ 8 (2002) (an appellant who previously appealed a removal action to the Board without raising an affirmative defense of whistleblower retaliation and received a valid final judgment on the merits may not later file an IRA appeal claiming that the removal was the result of such retaliation). In an IRA 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 disclosures. 5 C.F.R. § 1209.2(c). In an IRA appeal, the appellant is precluded from raising any other affirmative defenses, such as claims of discrimination or harmful procedural error. *Id.* When taking an OAA, the agency is required to advise employees of their options under 5 U.S.C. § 7121(g) and the consequences of their election, including the fact that seeking corrective action from OSC before filing with the Board will result in forgoing important rights to raise other affirmative defenses. 5 C.F.R. § 1201.21.

The Board has held that the employee's election of remedies must be "knowing and informed." *Agoranos v. Department of Justice,* 119 M.S.P.R. 498, 505-06 (2013) (finding that elections under section 7121(d), (e) & (g) must be knowing and informed and overruling *Feiertag v. Department of the Army,* 80 M.S.P.R. 264 (1998) "to the extent it applied a different rule to all elections under § 7121(g)"). An employee's decision based on misinformation provided by the agency, whether intentionally, unintentionally, negligently, inadvertently, or even innocently, is not binding on the employee as a matter of fundamental fairness and due process. *Covington v. Department of Health & Human Services,* 750 F.2d 937, 942 (Fed. Cir. 1984); *Salazar v. Department of the Army,* 115 M.S.P.R. 296, 301-02 (2010).

5. TIME LIMITS FOR APPEALING TO THE BOARD.

See 5 U.S.C. § 1214(a)(3). The time limits for filing an OAA appeal with the Board are set forth at 5 C.F.R. § 1201.22(b). However, if the appellant chooses to first seek corrective action from OSC, the time limits are those set forth at 5 C.F.R. § 1209.5. The time limits for filing an IRA appeal depend on the action taken by OSC. *See* 5 C.F.R. § 1209.5(a), discussed below. The right to file an IRA appeal is not conditioned on an appellant's exhaustion of his or her EEO administrative remedies after filing a formal EEO complaint on the underlying personnel action. *See Horton v. Department of the Navy,* 47 M.S.P.R. 475 (1991). Thus, filing an IRA appeal before receiving a final agency decision on an EEO complaint does not render the IRA appeal premature. The EEO issue may not be heard in the IRA appeal.

a. Termination of OSC Investigation. The IRA appeal must be filed no later than 65 days after the date of issuance of the written notification by OSC to the appellant

that its investigation has been terminated. 5 C.F.R. § 1209.5(a)(1). If the appellant shows the OSC letter terminating its investigation into the allegations was received by the appellant more than 5 days after the date of issuance, the appeal must be filed within 60 days after the date the appellant received the OSC letter. In addition, the filing deadline for IRA appeals is extended to the following business day for deadlines that fall on the weekend or Federal holidays. *See Pry v. Department of the Navy*, 59 M.S.P.R. 440 (1993).

b. Equitable tolling. The Board cannot waive the statutory time limit for filing an IRA appeal. *See Wood v. Department of the Air Force*, 54 M.S.P.R. 587 (1992). However, the deadline for filing an IRA appeal with the Board may be subject to the doctrine of equitable tolling, depending on the circumstances. 5 C.F.R. § 1209.5(b). *See Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 96, (1990) (Federal courts have typically extended equitable relief sparingly, including those situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass; it does not extend to a claim of excusable neglect). Thus far, at least, the Board has cited only the *Irwin* factors as possible bases for equitable tolling. *See also Pacilli v. Department of Veterans Affairs,* 113 M.S.P.R. 526, ¶ 11 (2010). Equitable tolling generally will not apply where there is a failure to exercise due diligence to preserve one's legal rights. *Brown v. U.S. Postal Service,* 110 M.S.P.R. 381, ¶ 10 (2009).

c. Expiration of 120 Days. If the appellant has not received notification from OSC of the termination of the investigation and 120 days have elapsed since he or she sought corrective action from OSC, the appellant may file an appeal with the Board. 5 U.S.C. § 1214(a)(3)(B); 5 C.F.R. § 1209.5(a)(2). After the 120-day period has expired, there is no limit to the time within which an appellant must file with the Board while the investigation is pending with OSC. When the OSC investigation concludes, the time limits in section 5(a) of this chapter apply.

See also chapter 16 concerning the time limits when a stay is requested.

6. ESTABLISHING JURISDICTION AND BURDENS AT HEARING.

An employee must occupy a covered position in a covered agency to bring a claim under the WPA, as amended. For example, the U.S. Postal Service is not a covered agency. *See Booker v. Merit Systems Protection Board,* 982 F.2d 517 (Fed. Cir. 1992), *cert. denied*, 510 U.S. 862 (1993); *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617 (1991). FBI Employees cannot file an IRA appeal because their agency has specific procedures established for the internal adjudication of whistleblower retaliation claims. *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514, ¶ 9 (2013). In that decision, the Board also held that an FBI employee also may not raise an affirmative defense of whistleblower retaliation. Although the Federal Circuit originally ruled, to the contrary, that FBI employees may raise an affirmative defense of reprisal for whistleblowing on appeal of an OAA, *Parkinson v. Department of Justice*, 815 F.3d 757 (Fed. Cir. 2016), the court's later en banc decision fully affirmed the Board's rulings. *Parkinson v. Department of Justice*, 874 F.3d 710 (Fed. Cir. 2017). There the court held that the Board may not hear a whistleblower reprisal claim

filed by an FBI preference eligible because the FBI was specifically exempt from protections set forth in the prohibited personnel practices statute and there is a separate review process for claims of whistleblower reprisal for both preference-eligible and non-preference-eligible FBI employees.

7. ANALYSIS.

The Board follows the Federal Circuit's analysis for establishing Board jurisdiction over an IRA appeal to establish the right to a requested hearing on a whistleblower claim. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365, ¶ 4 (2013). The Board has jurisdiction over an IRA appeal if the appellant has exhausted the administrative remedies before OSC and makes nonfrivolous allegations of facts that, if proven, could show that: (1) the appellant engaged in whistleblowing activity by making a protected disclosure; and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action. *Yunus,* 242 F.3d at 1371; *Mudd,* 120 M.S.P.R. at 368, ¶ 4. *See also* 5 C.F.R. § 1201.57.

a. Exhaustion. Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from the OSC before seeking corrective action from the Board where the personnel action at issue is not directly appealable to the Board. *Briley v. National Archives & Records Administration,* 236 F.3d 1373, 1377 (Fed. Cir. 2001); *Coufal v. Department of Justice,* 98 M.S.P.R. 31, ¶ 14 (2004). The Board may only consider charges of whistleblowing that the appellant raised before OSC. *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Coufal,* 98 M.S.P.R. 31, ¶¶ 14, 18. To satisfy the exhaustion requirement, the appellant must have informed OSC of the precise ground of each charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. The appellant's complaint to OSC must raise "with reasonable clarity and precision the basis for his request for corrective action." *Ellison,* 7 F.3d at 1036; *Coufal,* 98 M.S.P.R. 31, ¶ 14. He need not, however, correctly label the category of wrongdoing he believes he has disclosed because OSC would be expected to properly categorize the matter. Moreover, as whistleblower protections have been increased by Congress, it appears that courts have also taken a more expansive view of whether a matter has been exhausted, so that the degree of specificity required before OSC may have been lessened if the record could be deemed to support the appellant's claim that he had, in fact, raised an issue. An appellant may demonstrate exhaustion of the OSC remedies through the initial OSC complaint, and evidence of amending or supplementing the initial OSC complaint, including but not limited to OSC's determination letter and other letters from OSC referencing the appellant's amended allegations, and the appellant's written responses to OSC referencing OSC's discussion of the amended allegations. *Mudd,* 120 M.S.P.R. at 371, ¶ 12; *Kuyoki v. Department of Veterans Affairs,* 111 M.S.P.R. 404, ¶ 13 (2009).

b. Protected Disclosure. Protected whistleblowing occurs when an appellant makes a disclosure that she reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or

a substantial and specific danger to public health and safety. *Mudd,* 120 M.S.P.R. at 369, ¶ 5; *Mason v. Department of Homeland Security,* 116 M.S.P.R. 135, ¶ 17 (2011); *see* 5 U.S.C. § 2302(b)(8). The proper test for determining whether an employee had a reasonable belief that her disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Mudd,* 120 M.S.P.R. at 369, ¶ 5.

Alleged disclosures contained in a grievance pursuant to a negotiated grievance procedure under a collective bargaining agreement are not protected under section 2302(b)(8). Reprisal for exercising a grievance right is a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8). *See*, *e.g., Serrao v. Merit Systems Protection Board,* 95 F.3d 1569, 1576 (Fed. Cir. 1996); *Mudd,* 120 M.S.P.R. at 369, ¶ 6; *Davis v. Department of Defense,* 103 M.S.P.R. 516, ¶ 11 n.2 (2006); *Fisher v. Department of Defense,* 47 M.S.P.R. 585, 587–88 (1991) (section 2302(b)(8) does not extend to reprisal for filing grievances, which is protected by section 2302(b)(9)). However, as discussed below, in section 11 of this chapter, the WPEA expanded the scope of whistleblower appeals to include most claims under 5 U.S.C. § 2302(b)(9).

Under the WPA, as amended, the appellant is not required to identify the particular statutory or regulatory provision that the agency allegedly violated. The question is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set out in 5 U.S.C. § 2302(b)(8). *Groseclose,* 111 M.S.P.R. 194, ¶ 22 (citing *Lachance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999)).

Alleged protected disclosures of an abuse of authority or gross mismanagement should follow the guidance outlined in Board precedent. *See, e.g., Wheeler v. Department of Veterans Affairs,* 88 M.S.P.R. 236, ¶ 13 (2001) (an abuse of authority occurs when there is an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons); *White v. Department of the Air Force,* 63 M.S.P.R. 90, 95 (1994) (gross mismanagement means a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission). As to the disclosure of a substantial and specific danger to public health or safety, *see Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008):

> A variety of factors guide the application of the statutory language, helping determine when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA. One such factor is the likelihood of harm resulting from the danger. If the disclosed danger could only result in harm

under speculative or improbable conditions, the disclosure should not enjoy protection. Another important factor is when the alleged harm may occur. A harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future. Both of these factors affect the specificity of the alleged danger, while the nature of the harm—the potential consequences—affects the substantiality of the danger.

c. Contributing Factor. To satisfy the contributing factor criterion, an appellant must raise nonfrivolous allegations that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Atkinson v. Department of State,* 107 M.S.P.R. 136, ¶ 15 (2007) (citing *Santos v. Department of Energy,* 102 M.S.P.R. 370, ¶ 10 (2006)). One way to establish the contributing factor element is through the knowledge/timing test of 5 U.S.C. § 1221(e)(1), where the disclosure is shown to have been a contributing factor through circumstantial evidence such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Carey v. Department of Veterans Affairs,* 93 M.S.P.R. 676, ¶ 11 (2003); *see Wadhwa v. Department of Veterans Affairs,* 110 M.S.P.R. 615, ¶ 12, *aff'd,* 353 F. App'x 435 (Fed. Cir. 2009). While the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard, it is "one of the many possible ways" to satisfy the standard. *Carey,* 93 M.S.P.R. 676, ¶ 11. When the appellant has not specifically alleged that an official knew of the disclosure at issue, the appellant may make nonfrivolous allegations under a "cat's paw" theory that the protected disclosure was a contributing factor by alleging that the official was influenced by an individual with actual knowledge of the disclosure. *See Marchese v. Department of the Navy,* 65 M.S.P.R. 104, 108 (1994).

d. Personnel action. An IRA appeal must be based on one of the 12 "personnel actions," as that term is detailed in 5 U.S.C. § 2302(a)(2)(A). A voluntary action is not a personnel action and cannot form the basis for an IRA appeal. Thus, an employee's claim that he or she resigned or retired involuntarily can form the basis for an IRA appeal only if the employee proves that his or her facially voluntary action was actually coerced by the agency or otherwise rendered involuntary under the standards applied in chapter 75 appeals of such actions. *See Koury v. Department of Defense*, 84 M.S.P.R. 219, ¶ 10 (1999). Further, if the agency actions that form the basis for the involuntariness claim suffice to constitute a hostile environment, the creation of such an environment is a personnel action. *Colbert v. Department of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 12 (2014). Conversely, a termination during probation is a personnel action, but not generally considered an appealable matter. Thus, if an appellant first files an OAA (315H) appeal based on a termination during probation that is ultimately found not to be within the Board's jurisdiction, the appellant can then file an IRA appeal without being held to his initial election of a direct appeal, since he had no right to make such an election. *Shannon v. Department of Homeland Security*, 100 M.S.P.R. 629, ¶ 17 (2005).

e. Threats. To establish Board jurisdiction, the appellant must make nonfrivolous allegations that a person with authority took, failed to take, or threatened to take or fail to take, a personnel action. What constitutes a "threat" is often not clear, but a simple belief that the appellant will face discipline does not constitute a threat. *See Rebstock Consolidation v. Department of Homeland Security*, 122 M.S.P.R. 661, ¶¶ 10-12 (2015). The term "threaten" should be interpreted broadly and, thus, a counseling memorandum warning of possible future discipline, *Campo v. Department of the Army,* 93 M.S.P.R. 1, ¶¶ 7–8 (2002), and a supervisor stating that an employee should not expect the same performance rating he had received the year before, *Special Counsel v. Hathaway*, 49 M.S.P.R. 595 (1991), were deemed threatened personnel actions. In *Rebstock* the Board stated that "[a]bstract concerns about possible disciplinary action, without any evidence that the agency actually has threatened or suggested it would take such action, do not constitute nonfrivolous allegations that the agency threatened to take a personnel action." Rather, "the agency must take some action signifying its intent to take a personnel action."

f. Burdens at Hearing. Federal agencies are prohibited from taking, failing to take, or threatening to take, a personnel action against an employee in a covered position because of the disclosure of information that the employee reasonably believes to be evidence of a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 2302(a)(2), (b)(8); *see Jenkins v. Environmental Protection Agency,* 118 M.S.P.R. 161, ¶ 16 (2012). To establish a prima facie case of whistleblower reprisal in an IRA appeal, the appellant must prove by preponderant evidence that he or she made a protected disclosure and that the disclosure was a contributing factor in a personnel action. 5 U.S.C. § 1221(e)(1); *Jenkins,* 118 M.S.P.R. 161, ¶ 16. If the appellant makes out a prima facie claim of whistleblower reprisal, the agency is given an opportunity to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Jenkins,* 118 M.S.P.R. 161, ¶ 16. In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider the following factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Mattil v. Department of State,* 118 M.S.P.R. 662, 669-70, ¶¶ 11-12 (2012); *Jenkins,* 118 M.S.P.R. 161, ¶ 16.

Generally, an AJ should not bifurcate the hearing on the merits of an IRA appeal, that is, first take evidence on whether the agency met its clear and convincing evidence burden because the AJ must give full and fair consideration to the appellant's claim through adjudication of both the merits of the prima facie case of whistleblower retaliation as well as the agency's affirmative defense. *Mattil,*

118 M.S.P.R. 662, 668-69, ¶¶ 11-12 (holding that the decision to bifurcate the hearing was unwarranted under the particular circumstances of the appeal when the substance of one of the disclosures at issue was intertwined with the appellant's claim that the immediate supervisor was concerned with the effect of that disclosure on his own career). In light of the Federal Circuit's decision in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) (evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion; a complete evaluation of the facts is necessary in every case), it seems likely that bifurcation usually should not be done.

Because the appellant has the burden of proof in an IRA appeal, it is the appellant who presents his or her case first, even when the underlying matter is an appealable action that the appellant chose to bring to OSC. In an OAA, of course, that would not be true.

In addition, one who is perceived as a whistleblower is entitled to the protections of the WPA, even if she has not made protected disclosures. *Jensen v. Department of Agriculture*, 104 M.S.P.R. 379, ¶ 11 n.3 (2007); *Juffer v. United States Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998); *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278-80 (1990). To make such a claim, the appellant must show: (1) that she exhausted her remedies with OSC on the issue of whether the agency perceived her as a whistleblower; and (2) that the agency's perception of her as a whistleblower was a contributing factor in its decision to take or not take the personnel action at issue, which she may do through the knowledge/timing test. If the appellant meets these burdens, the agency may still prevail if it can show by clear and convincing evidence that it would have taken the personnel action at issue absent its perception of the appellant as a whistleblower. *King v. Department of the Army*, 116 M.S.P.R. 689 (2011). The Board later extended the "perceived-as" rule under the WPEA to each of the activities it covers. *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417 (2016).

8. REFERRAL TO THE OFFICE OF SPECIAL COUNSEL (OSC).

Pursuant to 5 U.S.C. § 1221(f)(3), when "under this section", the Board "determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215." The responsibility to provide such notification now rests with OCB, both if the ID becomes final in the absence of a PFR and if the Board on PFR agrees with the decision. A Law Manager report lists all cases making such a finding and their finality dates. OCB will consult that list to keep track of finality dates and send the notice, so that the regions are relieved of the obligation. Thus, there is no need for the RO or FO to notify OCB when a decision is issued that might call for the issuance of such a referral.

9. ATTORNEY FEES.

The prevailing party test enunciated in *Cuthbertson v. Merit Systems Protection Board,* 784 F.2d 370 (Fed. Cir. 1986), for attorney fees claims under the Civil Service Retirement Act also applies to attorney fees claims under the WPA. *Hamel v. President's Commission on Executive Exchange,* 987 F.2d 1561 (Fed. Cir.), *cert*. *denied*, 510 U.S. 931 (1993). An appellant who prevails on a WPA claim is entitled to an award of costs he incurred directly, in addition to reimbursement for attorney fees. *Bonggat v. Department of the Navy,* 59 M.S.P.R. 175 (1993) (reversing *Wiatr v. Department of the Air Force,* 50 M.S.P.R. 441 (1991)). *See also* chapter 13, section 2 of this Handbook, noting that there is no interest of justice requirement to be met in appeals finding whistleblower retaliation, and that it is the appellant, not the attorney, who is entitled to the award. *See Rumsey v. Department of Justice*, 123 M.S.P.R. 502, ¶¶ 7-8 (2016), rev'd on other grounds, *Rumsey v. Department of Justice*, 866 F.3d 1375 (Fed. Cir. 2017).

10. CONSEQUENTIAL AND COMPENSATORY DAMAGES.

The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages as authorized by 5 U.S.C. § 1221(g)(1)(A)(ii), when the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. § 1221 applies. 5 C.F.R. § 1201.202(b). The Board may not award nonpecuniary damages for mental distress under the consequential damages provision, however. *Kinney v. Department of Agriculture*, 82 M.S.P.R. 338, ¶ 10 (1999). It may, though, award compensation for future medical expenses which are the result of the retaliation and can be proven with reasonable certainty, under its authority to reimburse for "medical costs incurred." *See Pastor v. Department of Veterans Affairs,* 87 M.S.P.R. 609 (2001). *See also* chapter 13, sections 6 and 7 of this Handbook. Under the WPEA, compensatory damages may also be awarded. While there is little law on such damages in the context of whistleblower retaliation, *see King v. Department of the Air Force*, 119 M.S.P.R. 663 (2013) (the compensatory damages provision does not apply retroactively), there is a good bit of precedent on such damages in the context of EEO reprisal, much of which is likely to be appropriate in this context as well. Unlike EEO reprisal, however, note that the $300,000.00 limitation is missing from the WPEA.

Consequential damages represent an award that the appellant might be entitled to, if he meets the requirements of the statute. For this reason, the cancellation of the appealed action does not moot an IRA appeal or the appeal of an OAA that includes a whistleblower claim, if the appellant has requested consequential damages or has not yet been informed of his right to do so. After providing sufficient notice, the AJ must afford an appellant a specific opportunity to raise a claim for consequential damages before deciding if it is appropriate to dismiss the appeal as moot. *Vick v. Department of Transportation,* 118 M.S.P.R. 68, 69-70, ¶ 5 (2012); *Gilbert v. Department of the Interior*, 101 M.S.P.R. 238, ¶ 6 (2006). Thus, in situations where the agency may have rescinded the personnel action(s) at issue, the appellant's outstanding claim for consequential damages will preclude dismissal of the whistleblower claim as moot. *Vick,* 118 M.S.P.R. 70, ¶ 5.

Because consequential damages constitute an award beyond *status quo ante* relief, the appellant would not be eligible for such damages in a case that does not include a WPA

claim. *See Daniels v. Department of Veterans Affairs,* 105 M.S.P.R. 248 (2007) (noting that "[t]he WPA affords to a person who prevails on an allegation of reprisal for whistleblowing relief that exceeds *status quo ante* relief, including medical costs incurred, travel expenses, and other reasonably foreseeable consequential damages."). The appellant therefore will not have received all the relief to which he may be entitled in the WPA appeal even if he receives all the relief to which he is entitled in the OAA case that does not have a whistleblower affirmative defense claim under the WPA.

The Board has applied a similar rule to an arbitrator's decision in a situation where the appellant filed a grievance of his removal under chapter 75, but an appeal of the agency's action in removing him, on the same date, under chapter 43. *Dey v. Nuclear Regulatory Commission,* 106 M.S.P.R. 167 (2007). Because the appellant had raised a claim of whistleblower retaliation in his chapter 43 appeal, and requested consequential damages if he prevailed on that claim, the AJ could not properly dismiss the appeal without prejudice to await the result of the arbitration of the chapter 75 action. *Id*. Even if the appellant loses the arbitration, and therefore remains separated from the agency and so ineligible for back pay as a result of the chapter 43 appeal, the appeal is not moot because of the consequential damages claim, inasmuch as he is not eligible for such damages in his arbitration, which did not raise such a claim.

11. WHISTLEBLOWER PROTECTION ENHANCEMENT ACT (WPEA).

As a result of the WPEA, 5 U.S.C. § 2302(b)(9) protects not just disclosures, but also certain actions:

> (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
>
> (i) with regard to remedying a violation of paragraph (8); or
>
> (ii) other than with regard to remedying a violation of paragraph (8).
>
> (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
>
> (C) cooperating with or disclosing information to the Inspector General of an agency, or to the Special Counsel, in accordance with applicable provisions of law, or
>
> (D) for refusing to obey an order that would require the individual to violate a law, rule or regulation. [Note that "rule or regulation" was added by the Follow the Rules Act, not the WPEA.]

While (b)(9) pre-existed the WPEA, it did not then distinguish between (A)(i) and (ii) or provide for the filing of an IRA appeal based on the activities protected by the section. What the WPEA did was to extend the Board's IRA appeal jurisdiction to claims arising under all of (b)(9) except for (b)(9)(A)(ii). WPEA § 101(b)(1)(A). Thus, to the extent the appellant alleges that the agency took, failed to take or threatened to take a personnel action in reprisal for exercising a grievance, complaint, or appeal right, the AJ will need to determine if the Board has jurisdiction to consider such allegations in the context of the IRA appeal by determining whether that grievance, complaint, or appeal was filed to remedy a (b)(8) violation. If it was, then an IRA appeal is viable. *Clay v. Department of the Army*,

123 M.S.P.R. 245 (2016) (the appellant's claim of retaliation for his earlier Board appeal that included a whistleblower issue comes within (b)(9)(A)(i) and is to be analyzed under 5 U.S.C. § 1221(e)).

Although (b)(9)(A) protects against reprisal only for those appeals, complaints, and grievances filed by the appellant that were aimed at remedying a (b)(8) violation, as (b)(9)(B) suggests, an IRA appeal may now be filed by any employee who assisted another individual with that person's appeal, complaint, or grievance regardless of whether it involved a (b)(8) claim. *See Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446 (2014). Union stewards and others who file such actions on behalf of other employees are, of course, covered, as are individuals who were witnesses or were otherwise of assistance to a complainant, appellant, or grievant. The same burden-shifting analysis applicable to (b)(8) claims is also applicable to (b)(9), meaning that in a chapter 75 case where jurisdiction is established, the appellant must prove by preponderant evidence that he or she engaged in the protected disclosure and that it was a contributing factor to the personnel action at issue. The burden then shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent that protected activity. *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶¶ 12-14 (2015). In IRA appeals based on (b)(9), the appellant must prove he exhausted as to the specific protected action at issue.

The WPEA also expanded the scope of protected disclosures to comport with what Congress stated it had intended all along. Thus, under 5 U.S.C. § 2302(f)(1), a disclosure is not excluded because it was made to the wrongdoer or his supervisor; it revealed information that had previously been disclosed; it was not made in writing; or it was made while off duty. The motive for making the disclosure and the amount of time that has passed since the occurrence of the events described in the disclosure also provide no basis for exclusion. Pursuant to 5 U.S.C. § 2302(f)(2), "if a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure." The Board has not yet fully analyzed the provision but in *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428, ¶ 15 (2014), stated that "[i]n explaining this new provision in the Act, the Senate Report stated that disclosures made in the course of one's duties are protected only if the employee also proves that the agency took the personnel action with an improper retaliatory motive. S.Rep. No. 112-155, 5-6, reprinted in 2012 U.S.C.C.A.N. 589, 593-94. Accordingly, when an appellant has made a protected disclosure in the normal course of her duties, the statute now requires her to prove that the personnel action taken was in retaliation for the disclosure."

Despite the Board's expanded jurisdiction under the WPEA, vague, nonspecific allegations of wrongdoing and simple policy disagreements remain unprotected. *See Salerno v. Department of the Interior*, 123 M.S.P.R. 230 (2016).

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As a result of the WPEA and the All-Circuit Review Act, all IRAs and OAAs that involve (b)(8) and (b)(9) (except (b)(9)(a)(ii)) issues may be appealed to the US Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The Board has not yet addressed how it will deal with any split between the circuits that may arise.

CHAPTER 16 - STAY REQUESTS

1. GENERAL.

Stay requests may be granted only when raised in connection with a whistleblower appeal, defined broadly to include those activities protected by 5 U.S.C. § 2302(b)(8) and (b)(9), except (b)(9)(A)(ii), either an IRA appeal or an OAA. *See* 5 U.S.C. § 1221(a)-(c); 5 C.F.R. §§ 1209.8-.11 5 U.S.C. §§ 1221(c)(1), 1221(i). All stay requests must be entered in the CMS as separate cases even if the stay request is not within the Board's jurisdiction. The appellant may request a stay of a personnel action that has already been effected. *Visconti v. Environmental Protection Agency*, 78 M.S.P.R. 17, 22 (1998).

2. TIME OF FILING.

An appellant may request a stay at any time after becoming eligible to file an appeal with the Board but no later than the time limit set for the close of discovery in the appeal. Within those constraints, a stay request may be filed prior to, simultaneous with, or after the filing of an appeal. *See* 5 C.F.R. § 1209.8(a). Board regulations provide no limitation on the number of times an appellant may file a stay request within these time frames.

3. PROCEDURES FOR RULING ON STAY REQUESTS.

a. General. Within 10 days of receipt of a stay request, an AJ must issue an Order ruling on the request, and set forth the factual and legal bases for the ruling. *See* 5 C.F.R. § 1209.10(b). While the statute, 5 U.S.C. § 1221(c)(2), requires only that a stay that is granted be completed within 10 days, by its regulation the Board has extended the 10-day requirement to denied stays as well. If a sufficient analysis cannot be completed within 10 days it may be appropriate for the AJ to issue a decision in the manner of a bench ruling, followed by an Opinion containing the reasons for the ruling as soon as possible, certainly within 10 additional days. The Board's original interim part 1209 regulations specified that such a procedure was acceptable. That statement was later deleted as unnecessary, however. No Board decisions have commented on use of the procedure, so it is not entirely clear what the Board's current view of it is. Given *Spithaler* and similar decisions, it may be preferable to bifurcate the ruling process than to issue an Opinion that does not meet the Board's quality standards.

b. Service of the Stay Request. Upon receipt of the stay request, the AJ should ensure that the appellant has served it on the agency as the regulations require. *See* 5 C.F.R. § 1209.8(c). Depending on the circumstances, the AJ may wish to consider issuing an acknowledgment order reminding the agency of the short time requirements for response as well as the required content of the response. *See* 5 C.F.R. § 1209.9(c).

c. Unperfected Stay Requests. The AJ must determine whether the appellant has made the requisite jurisdictional allegations for a whistleblower action before ruling on any stay request. If the appellant has not made nonfrivolous allegations on all elements of a whistleblower claim, the AJ should issue a show cause order on the jurisdictional issues. Where the appellant has failed to establish the Board's jurisdiction over the

initial stay request, the time limit for adjudicating the stay request begins on the date the record closes on the jurisdictional issue.

4. MERITS ISSUES CONCERNING STAYS.

Proof requirements. To establish entitlement to a stay under the WPA, an appellant must produce, inter alia, evidence or argument showing that there is a substantial likelihood of prevailing on the merits of the claim that reprisal for a disclosure under 5 U.S.C. § 2302(b)(8) or activity under (b)(9) was a contributing factor in the proposed, threatened, or taken personnel action. *See Eilinsfeld v. Department of the Navy*, 79 M.S.P.R. 537, 542 (1998); 5 C.F.R. §§ 1209.9(a)(6)(ii), 1209.4(c). The agency must submit evidence or argument on the same issue, as well as on whether a stay would result in extreme hardship. *Visconti,* 78 M.S.P.R. at 2. Although the appellant has the burden of proof, the burden of going forward with the evidence shifts to the agency if the appellant shows a substantial likelihood that the disclosures are a contributing factor in the personnel actions at issue. *Id*. at 23. As is true of proof of the affirmative defense in general, the appellant may meet that burden by either direct or circumstantial evidence.

5. APPEAL RIGHTS FROM A RULING ON A STAY REQUEST.

An order granting or denying a stay request is not a final order and therefore cannot be the subject of a PFR. *See Weber v. Department of the Army,* 47 M.S.P.R. 130, 132-33 (1991). Therefore, no review rights notice should be included. An interlocutory appeal, 5 C.F.R. §§ 1201.91-.93, is the only means for securing immediate review of an order regarding a stay request. The AJ has discretion to certify an interlocutory appeal of an order regarding a stay request in accordance with 5 C.F.R. § 1201.92. However, once the AJ denies a request for certification of an interlocutory appeal, the party that sought certification may raise the matter at issue in a PFR filed after the ID is issued. 5 C.F.R. § 1201.93(b). *McCarthy v. International Boundary and Water Commission: U.S. & Mexico,* 116 M.S.P.R. 594, 604 (2011).

CHAPTER 17 - SPECIAL RECORDS PROCEDURES

1. SEALED CASES.

a. Purpose. To protect the confidentiality of certain documents, an AJ may be requested to seal an appeal file or a portion thereof. *See generally* *Social Security Administration v. Doyle*, 45 M.S.P.R. 258 (1990) (factors considered in ruling on motion to seal record). The decision to seal an appeal file, in whole or in part, is within the discretion of the AJ. The law favors public access to governmental records unless access is specifically restricted. *See* the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. National security information is handled as described in section 2 below.

b. Form of Request. The request that a file, or a portion of the file, be sealed must come in the form of a motion. The motion must clearly identify the portions of the record sought to be sealed and show good cause for sealing.

c. Significance of Sealing. Unlike judicial practice, sealing by the Board is not necessarily a permanent action. Under the FOIA, all documents filed in Board proceedings are records available to the public if they cannot be withheld under any of the nine exemptions of FOIA. A subsequent FOIA request for sealed material requires that the material be reviewed anew and that a determination be made as to any FOIA exemptions that apply. AJs should inform the party requesting sealing that even though the Board may grant the request to seal the file or portions of the file, it may be subject to release if a FOIA request is made. Likewise, the parties should also be made aware that because of the privacy protections available under Board regulations, e.g., a closed hearing, the use of incomplete or fictitious names in the ID, and the sealing of records, where a witness is not called due to privacy concerns, the existing protections mean he is "available" to testify at the hearing, so that the Board will assign his hearsay statement little probative value. *Wallace v. Department of Health & Human Services*, 89 M.S.P.R. 178, ¶ 6 (2001).

d. Alternatives to Sealing. The AJ may suggest alternatives to the submission of documents requested for sealing, such as the filing of summaries of the documents containing the confidential information or the submission of affidavits and stipulations as to their contents.

e. Standard for Sealing. The reasons advanced by courts for sealing judicial records are generally consistent with the nine categories of information exempt from disclosure under FOIA. If a document may be withheld under FOIA, it may be appropriate to seal the document. On the other hand, mere applicability of one of these exemptions should not constrain an AJ to seal. Because sealing interferes with normal case-handling procedures, sealing should be used sparingly.

Any Board decision concerning public access to Board records must comport with the substantive requirements of FOIA. The exemptions from disclosure under FOIA are briefly summarized as follows:

(1) *Exemption 1* - matters authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy that are properly classified under the applicable Order (*See* section 2, National Security (Classified) Information, later in this chapter);

(2) *Exemption 2* - matters related solely to the internal personnel rules and practices of an agency;

(3) *Exemption 3* - matters specifically exempted from disclosure by a statute that allows no discretion or sets specific withholding criteria;

(4) *Exemption 4* - trade secrets and commercial or financial information;

(5) *Exemption 5* - inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) *Exemption 6* - personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) *Exemption 7* - records or information compiled for law enforcement purposes that meet certain specified criteria;

(8) *Exemption 8* - matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; and

(9) *Exemption 9* - geological and geophysical information and data, including maps, concerning wells.

The statute provides, however, that where an exemption applies, "any reasonably segregable portion of the record" must nonetheless be provided after deletion of the exempt portion.

The AJ also may decide to seal all or part of a file for good cause other than the FOIA exemptions. In addition, the Privacy Act restricts an agency from disclosing a Privacy Act record to any person other than the subject of the record without the written consent of the subject, except in narrow, specific circumstances as recognized by the Privacy Act. *See* 5 U.S.C. § 552a(b). Among the exceptions are FOIA disclosures.

f. Procedures for Sealing Files.

(1) Documents that are the subject of a sealing request should be identified and designated as such at the time of filing or submission. All parties to the appeal should be permitted to object to a motion to seal the record in whole or in part. As noted, however, sealing is not favored, so any reasonable actions that may alleviate the need for it should be taken in advance of developing the record and issuing the ID.

(2) If the AJ determines that an appeal file should not be sealed, the AJ must issue an order (in writing or on the record during the hearing or a recorded prehearing conference) that denies the motion to seal and includes specific reasons for the denial. The party requesting that material be sealed must be permitted to file objections to the denial of the motion, and any objections must be made a part of the record.

(3) If the AJ determines that an appeal file should be sealed, the AJ must issue an order (in writing or on the record as discussed above) that grants the motion to seal. The order must contain sufficient analysis to support its granting of the motion to seal.

As previously discussed, the AJ's order should also advise the moving party of the potential risk of disclosure under a FOIA request. The AJ may advise the moving party that, to protect the material, the moving party may attach a statement to the motion for sealing that sets forth the FOIA exemptions he or she believes may apply.

For paper records, the document(s) must be placed in a marked envelope bearing the notation "SEALED BY ORDER OF THE MERIT SYSTEMS PROTECTION BOARD, (date)." The envelope must be labeled with the appeal caption, appeal file tab number, and a brief description of the document. The sealed envelope must be placed in the appeal file. The cover of the appeal file volume and the index must be marked to signal that the file contains sealed material.

The volume of the appeal file containing the sealed material must be placed in a red-striped jacket, MSPB Form 13. The label required above is to be placed over the "Immediate Attention" label on the jacket. If the appeal file contains more than one volume, the first volume of the file is also to be placed in a labeled, red-striped jacket.

If an appeal file containing sealed material is requested by another office of the Board, the requesting office must be notified by electronic mail that the file contains such material. The RO must request the name of the person to whom the file should be mailed, and the file should be directed to that individual's attention. The sealed material should be wrapped, taped securely, and clearly marked "TO BE OPENED BY ADDRESSEE ONLY."

If an AJ grants a motion to seal in a case where the official record is electronic, in the absence of a finalized Records Manual, the AJ should check with OCB's records expert to determine the appropriate approach to take. Password protection is an obvious step. This applies to the electronic DMS record of a case where the official record is paper, as well.

Regardless of actions taken concerning the documents in the file, a serious question exists as to whether a final decision may be sealed. Promises that the

decision will be sealed should be avoided and every effort should be made to write the decision in such a way as to avoid including sensitive information in the document. If there is no apparent way to satisfy the parties' genuine need for sealing, the AJ must check with ORO and ORO will raise the matter with OGC.

2. NATIONAL SECURITY (CLASSIFIED) INFORMATION.

a. Definition. Classified information is information that needs protection, in the interest of national security, from unauthorized disclosure. Executive Order 12356 and Information Security Oversight Office (ISOO) Directive No. 1 govern classification. The protection of classified information is the responsibility of each individual who possesses or has knowledge of such information, regardless of how it is obtained. There is no current Board order or directive that sets forth policy and procedures for handling classified information.

b. The AJ's Responsibility When a Party to an Appeal Attempts to Introduce Classified Information into the Record. When a party attempts to introduce classified information into the record, the AJ must immediately make a ruling on its admissibility. If one or both parties agree that classified information will be necessary for the proper adjudication of an appeal, or if the AJ cannot determine its relevance without having knowledge of the classified material, the AJ must immediately notify ORO, which will locate an employee with the appropriate level of security clearance and provide for the adjudication of the appeal if it appears that classified information will be introduced or examined in camera. Given the government-wide trend of limiting the number of security clearances, an AJ with the requisite level of clearance may not be available. Further, the Board lacks the facilities necessary to handle classified information, such as secured phone lines, locked storage areas, etc. All support staff who assist a properly cleared AJ must also have the necessary level of clearance. Therefore, it is important for the AJ to determine if the appeal may proceed without the introduction of classified information, both documentary and testimonial. If it cannot, ORO will attempt to assign the case to an AJ but if no one is available, the appeal may be assigned to a properly cleared ALJ from outside the MSPB. Thus, it is important to determine as early in the proceedings as possible whether there is a likelihood that classified information will have to be introduced.

3. SANITIZATION OF INITIAL DECISIONS.

a. Generally. Sanitization of IDs where public disclosure would endanger the personal privacy of persons named in the decision may be done at the request of a party, at the request of the persons named or their representatives, or at the discretion of the AJ.

FOIA authorizes an agency, "to the extent required to prevent a clearly unwarranted invasion of personal privacy," to delete or sanitize identifying details from agency opinions made available to the public. 5 U.S.C. § 552(a)(2).

Generally, greater privacy interests are considered to attach to third parties named

in Board decisions than to appellants. This is because appellants waive some of their interest in privacy by appealing to the Board. Appellants' identities should also be sanitized, however, when disclosing the appellant's identity poses danger to the appellant, other persons, or governmental interests.

A "clearly unwarranted" invasion of the personal privacy of a third party would tend to exist when the decision reveals intimate personal details concerning the private life of the third party. Certain kinds of cases, particularly off-duty misconduct cases, may require sanitization of third-party identifying information. The kinds of cases in which AJs and CAJs should be especially alert to the possibility of sanitization include those in which underlying facts relate or refer to:

- Allegedly criminal behavior;
- Alcohol or drug abuse;
- Mental illness;
- Personal finances; or
- Sexual behavior

This does not mean that a case involving any of the above kinds of privacy-sensitive facts automatically requires sanitization. Neither does it mean that the need for sanitization could not arise in other types of privacy-sensitive cases. Rather, the above list is intended to provide a sense of the kinds of intimate facts or details from a person's private life where revelation in a decision should trigger the consideration of sanitization.

b. Method of Analysis. The decision whether to sanitize involves the two-step analysis underlying the application of FOIA Exemption 6 (privacy). 5 U.S.C. § 552(b)(6). In summary, this analysis requires: (1) determining there is a strong possibility that the use of the third party's name would constitute an invasion of a protectable privacy interest; and (2) balancing the individual privacy concerns and the public interest in disclosure of the third party's identity. This two-step analysis is also the analysis used in ruling on motions by an appellant to proceed anonymously in his or her appeal before the Board. *See* chapter 2, section 5, subparagraph c(3).

c. Alternatives to Sanitizing. The necessity for sanitizing the identity of a third party in a decision is eliminated if the AJ, in drafting the decision, recognizes the sensitivity of the material involved in the case and identifies the third party as "Mr. A." "Ms. A," "Witness A," etc. It must remain clear to the parties and reviewers who is represented by such designations. Appellants themselves may be referred to as John Doe (regardless of gender) in appropriate cases. This is an effective and efficient approach and should be used when appropriate.

4. THIRD-PARTY REQUESTS UNDER FOIA; APPELLANT REQUESTS; PRIVACY ACT.

The Board's procedures for handling FOIA requests, the nature of the information that can be released, and fee assessments are found in 5 C.F.R. part 1204, Availability of Official Information. Beginning December 2016, responsibility for FOIA responses was centralized

in OCB, although the regions retain responsibility for providing documents requested by OCB that will allow it to respond. As to FOIA requests from appellants, *see* *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 596 n.1 (2001). There, the appellant requested that the Board issue its Opinion and Order as an unpublished decision, withhold it from electronic dissemination, restrict access to all appeal-related documents in its control, and restrict from distribution and publication all such documents in the control of both the agency and the RO or FO. The Board found that the FOIA circumscribes its consideration of the appellant's requests, that she failed to show that those records are exempt from mandatory disclosure under the law, and that the law also requires that the Board make its final decisions available to the public and that it do so electronically. It noted, though, that if a third party requested access to any of the records of the appellant's appeal, that request would be addressed in accordance with the Board's regulations at 5 C.F.R. part 1204.

The Board does not have jurisdiction to adjudicate Privacy Act claims. *Calhoon v. Department of the Treasury*, 90 M.S.P.R. 375, ¶ 15 (2001) (the federal district courts, not the Board, are the appropriate forum for adjudication of a Privacy Act matter); 5 U.S.C. § 552a(g)(1) (an individual may bring a civil action in the district courts of the United States against an agency for a violation of the Privacy Act). The Board has, however, considered issues involving the Privacy Act where the Act is implicated in matters over which the Board has jurisdiction. *See, e.g., Gill v. Department of Defense*, 92 M.S.P.R. 23, ¶¶ 21-24 (2002).

5. SENSITIVE SECURITY INFORMATION.

SSI is a category of sensitive but unclassified information. It is governed by 49 C.F.R. parts 15 and 1520. As defined at 49 C.F.R. § 1520.5, SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which would be detrimental to the security of transportation. The "MSPB SSI Directive" (2011) sets out the steps the Board must take to safeguard such information and names OCB as the Board's authority concerning SSI issues as well as the source of SSI answers when questions arise. AJs must comply with the requirements of the Directive whenever they have a case that either they or one of the parties believes may contain SSI. Among those requirements, hearings, or portions thereof, in which SSI may be disclosed, must be closed to the public, and at hearings held by telephone or video, the AJ must require each participant to certify that he or she is in a location providing privacy; the entire record may be sealed (and must be sealed in the case of a Transportation Security Officer IRA appeal), but in any event, an SSI document cover sheet must be placed on top of any document that contains SSI; an SSI caption sheet should be used to identify boxed files containing SSI; a standard distribution limitation statement shall be applied to all documents that contain SSI by use of a macro button labeled "SSI" that is on the "Legal" toolbar in Microsoft Word; and the files should be placed in a yellow expandable folder. All electronic documents containing SSI must be password protected.

The Board's e-Appeal Online filing system may not be used to file any document that contains SSI. Nor may the e-Appeal Online automated distribution system for e-filers be used for Board documents that contain SSI, and additional rules apply regarding how SSI documents may be transmitted. Cases that would otherwise be all electronic files can no longer be electronic until such time as OCB develops a procedure that will allow for that.

Decisions and orders containing SSI may not initially be released beyond the parties. OCB is responsible for transmitting the decision to the Transportation Security Administration's SSI office, where any necessary redactions will be accomplished. After that process has been completed, full distribution of the document may be accomplished. Special Rules also apply to FOIA requests, media inquiries, and Congressional requests involving SSI. AJs and paralegals must check the Directive any time they work on a case that may contain SSI.

6. OTHER UNCLASSIFIED BUT SENSITIVE INFORMATION.

Although it is rare, the Board has received appeals involving other types of material that are not classified but are considered sensitive, specifically Unclassified Controlled Nuclear Information (UCNI) and Unclassified Naval Nuclear Propulsion Information (UNNPI). Both have required the development of procedures to accommodate the processing of the appeals involving these issues. If another appeal arises involving these types of issues, the AJ should contact ORO because the same or a similar process may work in the case under review. ORO will work with the AJ and OGC if other processes are needed or if additional types of unclassified but sensitive information are involved in an appeal.

CHAPTER 18 - USERRA AND VEOA APPEALS

1. THE STATUTES.

a. USERRA. The most commonly brought claim under USERRA is that a person was denied a "benefit of employment by an employer on the basis of ... membership, application for membership, performance of service, application for service, or obligation" with respect to a uniformed service. 38 U.S.C. § 4311(a). As explained below, however, two other provisions of the law can also form the basis for a USERRA appeal. The Board has jurisdiction over appeals from any action taken by a Federal employer contrary to the requirements of the law. 38 U.S.C. § 4324.

b. VEOA. Pursuant to 5 U.S.C. § 3330a, the Board's jurisdiction under VEOA extends to the appeal of a preference eligible who alleges that, on or after October 31, 1998, there was a violation of any statute or regulation relating to veterans' preference with respect to Federal employment. *See* 5 U.S.C. § 3330a(d)(1). The law also provides jurisdiction as to certain claims of denial of the opportunity to compete for positions, as more fully discussed below.

The procedures applicable to cases brought under these laws are set out at 5 C.F.R. part 1208. In addition, except as expressly provided in that part, the Board will apply subparts A, B, C, and F of part 1201. According to 5 C.F.R. § 1208.3, it will also apply the provisions of subpart H of part 1201 regarding attorney fee awards. However, subsequent case law suggests that, at least for the most part, this statement has been rendered incorrect. *See* chapter 13, section 2.d of this Handbook, discussing *Jacobsen v. Department of Justice,* 500 F.3d 1376 (Fed. Cir. 2007), which states that "Congress left the decision whether to award reasonable attorney fees, expert witness fees, and other litigation expenses to the Board's discretion," so that the rules developed under § 7701 may not fully apply.

2. JURISDICTION.

a. USERRA. Three separate claims may be brought under USERRA.

(1) 38 U.S.C. § 4311(a) provides that "[a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." To establish Board jurisdiction over an appeal alleging a violation of 38 U.S.C. § 4311(a), the appellant must show that he performed, applied to perform, or was obligated to perform duty in a uniformed service of the United States; and make nonfrivolous allegations that: (1) he was not separated from uniformed service with a dishonorable or bad conduct discharge or under other than honorable conditions, and was not dismissed under 10 U.S.C. § 1061(a) or dropped from the rolls pursuant to 10 U.S.C. § 1161(b); (2) he lost a benefit of employment or any of the rights protected by USERRA; and (3) the performance,

application to perform, or obligation to perform duty in the uniformed service was a substantial or motivating factor in the loss of the right or benefit. Nonetheless, an appellant need not explicitly invoke USERRA to raise a valid claim under the law. *McAfee v. Social Security Administration,* 88 M.S.P.R. 4 (2001). A claim should be "broadly and liberally" construed in determining whether it is nonfrivolous. *Perkins v. U.S. Postal Service*, 85 M.S.P.R. 545 (2000). Although the appellant has the burden of proof, once he has presented a prima facie case, the agency may then attempt to avoid relief by showing that it would have taken the same action despite the appellant's military service. A claim may not be raised relating to benefits under the Thrift Savings Plan. 38 U.S.C. § 4322(f).

(2) 38 U.S.C. § 4311(b) provides for redress as to a claim of discrimination or retaliation because a person "(1) has taken an action to enforce a protection afforded any person under [38 U.S.C. chapter 43], (2) has testified or otherwise made a statement in or in connection with any proceeding under [that] chapter, (3) has assisted or otherwise participated in an investigation under [that] chapter, or (4) has exercised a right provided for in [that] chapter." In a USERRA discrimination or retaliation appeal, the agency's intent must be proven. Unlike section 4311(a), this prohibition against retaliation applies regardless of whether the person has performed service in the uniformed services. 38 U.S.C. § 4311(b). To establish Board jurisdiction over an appeal alleging a violation of this provision of USERRA, the appellant must make nonfrivolous allegations that: (1) he took action to enforce a protection afforded any person under chapter 43 of title 38 of the U.S. Code, gave testimony or made a statement in or in connection with any proceeding under that chapter, rendered assistance or otherwise participated in an investigation under that chapter, or exercised a right provided for in that chapter; and (2) his action was a substantial or motivating factor in the agency action that he claims is discrimination or retaliation. The agency may then attempt to show that it would have taken the same action absent the appellant's protected action. An appellant claiming that he was discriminated against based on a disability arising from his military service will not establish Board jurisdiction over a USERRA appeal. *Mims v. Social Security Administration,* 120 M.S.P.R. 213, 225 (2013); *McBride v. U.S. Postal Service,* 78 M.S.P.R. 411, 415 (1998).

(3) 38 U.S.C. §§ 4312-4318 grant certain reemployment rights after uniformed service. A person who claims that the agency failed to meet its reemployment obligations must not have been separated from uniformed service with a dishonorable or bad conduct discharge or under other than honorable conditions, dismissed under 10 U.S.C. § 1061(a), or dropped from the rolls pursuant to 10 U.S.C. § 1161(b); further, in most instances, "the person [must have] given advance written or verbal notice of such service to such person's employer." 38 U.S.C. § 4312(a)(1). A person claiming a right to reemployment under 38 U.S.C. §§ 4312-4318 also must show that he was not absent in excess of five years after the December 12, 1994 effective date of 38 U.S.C. § 4312(a)(2) and did not abandon his civilian employment in favor of a military career. The 5-year

period, however, may be extended for the several reasons set out in 38 U.S.C. § 4312(c). Unlike USERRA discrimination cases, it is the agency that bears the burden of proof in reemployment cases.

As to all USERRA appeals, the claim should be broadly and liberally construed in determining whether it is nonfrivolous. *Tindall v. Department of the Army*, 84 M.S.P.R. 230, ¶ 6 (1999). The weakness of the assertions in support of the claim is not a basis to dismiss the USERRA appeal for lack of jurisdiction. *Id*. "Rather, if the appellant fails to develop his contentions, his USERRA claim should be denied on its merits." *Id.*

Butterbaugh appeals - a subset of section 4311(a) appeals involves claims based on improperly charged military leave. Prior to the 2000 amendment to 5 U.S.C. § 6323, the government's standard practice was to charge guard and reserve members military leave for every day they were away on guard or military training duty, even if they were not scheduled to work some of those days. However, in *Butterbaugh v. Department of Justice,* 336 F.3d 1332 (Fed. Cir. 2003), the court held that this practice was contrary to section 6323 and constituted the denial of a benefit of employment in violation of USERRA. In *Garcia v. Department of State*, 101 M.S.P.R. 172 (2006), the Board held that it has jurisdiction under USERRA, as amended by the Veterans Programs Enhancement Act of 1998, to adjudicate allegations of improper military leave charges by employing agencies, even if they concern military leave denials predating the enactment of USERRA. It limited relief, though, to reimbursement for any civilian leave that the appellant was required to use as a result of an improper charge of military leave. However, because military leave afforded by 5 U.S.C. § 6323(a) is a benefit of employment, the court in *Pucilowski v. Department of Justice*, 498 F.3d 1341 (Fed. Cir. 2007), reversed the Board's holding that it lacked the authority to order the correction of records to reflect a proper accounting of the appellant's military leave. Nonetheless, the Board still imposes strict proof requirements on the appellant in these cases, which the court has upheld. In doing so, though, the court has stated that "while not legally obligated to do so, agencies may resolve claims for improper military leave charges by providing more compensation than an individual has been able to prove." *Pucilowski*, 498 F.3d at 1345. Because agencies are now aware of the legal requirements concerning their charging of leave, few *Butterbaugh* cases are filed, and those that are may be subject to settlement in light of the requirements of that decision.

b. VEOA. Two separate claims may be brought under VEOA.

(1) 5 U.S.C. § 3330a(a)(1)(A) provides that a jurisdictional claim under the VEOA is one that a Federal agency violated a preference eligible's rights under any statute or regulation relating to veterans' preference. To establish VEOA jurisdiction over an appeal concerning a complaint filed under 5 U.S.C. § 3330a(a)(1)(A), the appellant must establish that he exhausted his Department of Labor remedy and

make nonfrivolous allegations that (i) he is a preference eligible within the meaning of the VEOA, (ii) the actions at issue occurred on or after the October 30, 1998 enactment date of the VEOA, and (iii) the agency violated his rights under a statute or regulation related to veterans' preference. "Preference eligible" is defined at 5 U.S.C. § 2108(3). Although 5 C.F.R. § 1208.23(a)(3) states that the appellant must also identify the statute or regulation that allegedly was violated, explain how it was violated, and state the date of the violation, the Board has stated that an appeal should not be dismissed for the sole reason that the appellant fails to identify a specific law or regulation relating to veterans' preference that he or she believes was violated. *See Young v. Federal Mediation and Conciliation Service*, 93 M.S.P.R. 99 (2002).

(2) 5 U.S.C. § 3304(f)(1) states that preference eligibles and, contrary to the general VEOA rule, veterans, *see* 5 U.S.C. § 2108(1), who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures. That the agency did not, in fact, consider any external candidates does not defeat the claim to consideration. *Boctor v. U.S. Postal Service*, 110 M.S.P.R. 580 (2009). Such persons have the right to file a complaint with the Secretary of Labor under 5 U.S.C. § 3330a(a)(1)(B) and subsequently file an appeal with the Board. To establish the Board's VEOA jurisdiction over an appeal concerning a complaint filed under 5 U.S.C. § 3330a(a)(1)(B), the appellant must establish that he exhausted his Department of Labor remedy and make nonfrivolous allegations that (i) he is a veteran described in 5 U.S.C. § 3304(f)(1) or a preference eligible, (ii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce, and (iii) the denial occurred on or after the December 10, 2004 enactment date of the law that provides this right. *See Styslinger v. Department of the Army*, 105 M.S.P.R. 223 (2007); *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104 (2007).

Subsection 4, below, addresses the exhaustion and timeliness requirements that are also prerequisites to VEOA appeals. *See Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208 (2001); *Smyth v. U.S. Postal Service*, 89 M.S.P.R. 219 (2001), *aff'd*, 41 F. App'x 475 (Fed. Cir. 2002).

3. AFFIRMATIVE DEFENSES.

The Board has held that it lacks authority, under both USERRA and VEOA, to hear any affirmative defense where the jurisdictional basis for the appeal is USERRA or VEOA itself. *See Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285 (2001) (USERRA); *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396 (2001) (VEOA). Although the Federal Circuit's decision in *Kirkendall v. Department of the Army* 479 F.3d 830 (Fed. Cir. 2007), discusses the applicability of 5 U.S.C. § 7701 to USERRA and VEOA appeals, in *Davis v. Department of Defense*, 105 M.S.P.R. 604 (2007), the Board reaffirmed the conclusions in *Metzenbaum*

and *Ruffin* and held that it continues to lack jurisdiction to consider claims of prohibited personnel practices in cases brought under both statutes.

4. TIME LIMITATIONS, TIMELINESS, AND EXHAUSTION.

a. USERRA. The law applies to any appeal filed on or after October 14, 1994, without regard to whether the alleged violation occurred before, on, or after that date. However, the substantive provisions of USERRA are not retroactive beyond October 14, 1994, i.e., they do not make illegal any act or conduct that was not prohibited prior to that date, but when an agency's action violated a substantive provision that was in effect prior to that date, the claim is cognizable under USERRA. *Williams v. Department of the Army*, 83 M.S.P.R. 109 (1999). Under the law, the appellant may file an appeal directly with the Board or may first seek relief from the Secretary of Labor. If the appellant chooses the latter course, that remedy must be exhausted by awaiting notification from the Secretary that the complaint has not been resolved. Whether the appellant files directly with the Board or goes first to the Secretary of Labor, there is no time limit for filing a Board appeal. 5 U.S.C. § 4324(b); 5 C.F.R. § 1208.12. The Board has also held that if the appeal raising the USERRA issue concerns an "otherwise appealable matter" but it is untimely under 5 U.S.C. § 7701, it should be treated strictly as a USERRA appeal to avoid the time limit. *Holmes v. Department of Justice*, 92 M.S.P.R. 377 (2002).

b. VEOA. The law applies only to violations of veterans' preference rights that happened on or after October 31, 1998. Unlike USERRA, VEOA contains specific exhaustion and timely filing requirements. The exhaustion provisions of VEOA require the appellant first to seek a remedy from the Secretary of Labor, within 60 days of the date of the alleged violation, and to allow the Secretary at least 60 days to resolve the complaint. 5 U.S.C. § 3330a(a); 5 C.F.R. § 1208.21. Then the Secretary of Labor must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or at least 60 days must have elapsed from the date the complaint was filed if no written notification had yet been issued. In the latter situation, the appellant must have provided written notification to the Secretary of Labor of the intent to file an appeal with the Board to have exhausted the administrative remedies with DOL. If the appellant has received notice from the Secretary, the appeal must be filed within 15 days from receipt. 5 U.S.C. § 330a(d)(1)(B).

The Board had previously held that the time limit for filing an appeal under VEOA may not be waived for good cause shown; that the Board cannot consider a VEOA appeal when it is undisputed that the appellant submitted his complaint to the Department of Labor beyond the 60-day statutory deadline and Labor rejected the complaint as untimely without considering its substance; and that it lacks the authority to determine whether the Secretary of Labor should have waived the deadline. However, in *Kirkendall*, the court held that the time limits under VEOA, both to file with the Secretary of Labor and to file an appeal with the Board from the decision of the Secretary, are subject to equitable tolling. Thus, the Board's regulations now provide that in extraordinary circumstances, both the appellant's

60-day deadline for filing with the Secretary of Labor and the 15-day deadline for filing an appeal with the Board are subject to the doctrine of equitable tolling when, despite having diligently pursued his or her appeal rights, the appellant was unable to make a timely filing with the Board due to deception by the opposing party or where the appellant filed a defective pleading during the statutory period. 5 C.F.R. §§ 1208.21(b), 1208.22(c).

c. For both USERRA and VEOA appeals that are dismissed without prejudice, case law mandates that refiling be done automatically by the RO or FO rather than burden the appellant with the timeliness concern. *See Milner v. Department of Justice*, 87 M.S.P.R. 660, ¶ 13 (2001) (USERRA); *Gingery v. Department of the Treasury*, 111 M.S.P.R. 134, ¶ 13 (2009) (VEOA).

5. REPRESENTATION.

Under USERRA, the Special Counsel may represent the appellant. The appellant must first have requested that the Secretary of Labor refer the complaint to OSC. Any written statement that the Secretary did so, and that the Special Counsel agreed to be the representative, will be accepted as the written designation of representative required by 5 C.F.R. § 1201.31(a). *See* 5 C.F.R. § 1208.14.

6. HEARING.

a. USERRA: Here, too, *Kirkendall* has changed the law. While the Board had previously stated that the AJ may grant a hearing request once jurisdiction over the appeal is established, the court held that a USERRA appellant has the right to a hearing, so that "any veteran who requests a hearing shall receive one." Thus, the Board lacks authority to deny a hearing request on a complaint filed under USERRA once the appellant has established Board jurisdiction over the appeal. Indeed, the AJ may grant a hearing to resolve disputed jurisdictional issues. *See* 5 C.F.R. § 1208.13(b).

b. VEOA: The rule that a hearing is required does not apply to VEOA. Here, the court did not discuss the Board's regulation specifying that if the appellant requests a hearing, the AJ may grant the request once jurisdiction over the appeal is established. 5 C.F.R. § 1208.23(b). The Board then held in *Davis v. Department of Defense*, 105 M.S.P.R. 604 (2007), that it retains the authority to grant or deny a hearing in a VEOA appeal even after the court's decision "once the Board's jurisdiction over the appeal is established and it has been determined that the appeal is timely." 5 C.F.R. § 1208.23(b). Although the regulation does not set out requirements for the hearing, the Board has held that if the appellant establishes a genuine dispute of material fact, he is entitled to a hearing under VEOA. Therefore, if the appellant requests a hearing, when there are significant factual issues that must be resolved, when it appears that the resolution of those issues can best be accomplished through the testimony of witnesses who will be subject to examination and cross-examination, and when there are likely to be issues of credibility to resolve in deciding the merits issues, the AJ should likely grant a hearing. The Board has stated that if the written submissions show that there is "a factual dispute material to the appellant's VEOA claims," a hearing should be granted, but that a hearing

is not appropriate when the only VEOA issues to be resolved are legal matters. *See Sherwood v. Department of Veterans Affairs*, 88 M.S.P.R. 208, ¶ 11 (2001). If there is no hearing in an appeal when any of those factors may apply, the AJ should document the record explaining why the hearing is not necessary, so that the Board will know the bases for the AJ's exercise of discretion if a party files a PFR.

7. BURDENS OF PROOF.

a. USERRA. If the claim at issue is under section 4311(a), the appellant must show by preponderant evidence that his uniformed service was a substantial or motivating factor in the agency's decision to take the action in question. The exception to this rule is that if it is undisputed that the agency took the challenged action only because of the appellant's military service, for example, by denying leave for a military obligation, he must show instead that he was denied a benefit of employment under 38 U.S.C. § 4311(a).

For claims under section 4311(b), the appellant must show that his protected activity under 38 U.S.C. chapter 43 was a substantial or motivating factor in the alleged discrimination or retaliation. Then, the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status. Thus, the burden of proof is not that of title VII of the Civil Rights Act, but that set forth in *National Labor Relations Board v. Transportation Management Corporation,* 462 U.S. 393, 401 (1983). *See Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001); *Fox v. U.S. Postal Service*, 88 M.S.P.R. 381 (2001).

In contrast, a USERRA reemployment claim under 38 U.S.C. §§ 4312-4318 does not depend on the agency's motivation, and it is the agency that bears the burden of proving by a preponderance of the evidence that it met its statutory obligations.

b. VEOA. See section 2b of this chapter, above. In the context of a VEOA appeal when the appellant claimed that the agency violated 5 U.S.C. § 2302(b)(11), which proscribes certain acts if they would violate a veterans' preference requirement, that to establish that the agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(11), the appellant would have to show that an agency employee knowingly took, recommended, or approved, or knowingly failed to take, recommend, or approve, a personnel action that violated a veterans' preference requirement. *Villamarzo v. Environmental Protection Agency*, 92 M.S.P.R. 159 (2002). Section 2302(e)(1) lists several statutes that constitute a "veterans' preference requirement" for purposes of 5 U.S.C. § 2302(b)(11), which makes it a prohibited personnel practice to take, fail to take, or recommend certain actions in violation of a "veterans' preference requirement."

8. ELECTIONS TO TERMINATE.

Under VEOA, an appellant may, at any time beginning on the 121st day after filing a Board appeal, and in the absence of a judicially reviewable Board decision, elect to terminate the Board proceeding. In lieu of the Board appeal, the appellant may file a civil action in an

appropriate U.S. District Court. The termination, which is effective immediately on receipt, must be filed with the AJ and served on the other parties. 5 C.F.R. § 1208.24(a).

Despite its automatic effective date, a termination order must be issued to document the termination, and to specify its effective date. Because the Board does not consider it to be either an initial or final Board decision, it is subject to neither a PFR nor a PFE, and is also not appropriate for judicial review by the Federal Circuit. 5 C.F.R. § 1208.24(b). Thus, the normal review rights that accompany IDs should not be provided.

No similar provision for short-cutting the appellate process is available under USERRA.

9. ADDITIONAL APPEALS.

a. USERRA. Nothing in the statute prevents the filing of a claimed violation of USERRA in an appeal under any other law, rule, or regulation. Rather than being the cause of action, though, the Board will treat the claim as an affirmative defense that the agency's action was not in accordance with the law. *See Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). Although this decision was overruled in part by *Fox, supra*, as to the burden of proof issue, its rulings concerning the manner in which USERRA as an affirmative defense will be treated remain valid.

Looked at differently, in *Russell v. Equal Employment Opportunity Commission*, 104 M.S.P.R. 14 (2006), the Board noted that while 5 U.S.C. § 7121(g) generally requires an employee to elect between filing a grievance under a CBA, filing a Board appeal, or seeking corrective action from the Special Counsel under 5 U.S.C. § 1221, 38 U.S.C. § 4302(b) prohibits "any contract, agreement … or other matter" limiting an appellant's right to bring a USERRA claim before the Board. The Board concluded that the exclusivity provision of section 7121(g) must fall in the face of the USERRA requirement as, essentially, an "other matter." USERRA supersedes the CBA and permits the appellant to bring an appeal of a matter that is not otherwise appealable outside of USERRA, i.e., one concerning the location at which she was reemployed after her military service ended. However, in *Pittman v. Department of Justice*, 486 F.3d 1276 (Fed. Cir. 2007), the Federal Circuit addressed a question the Board specifically left open, and held that where the appellant filed a grievance of his removal, which was an otherwise appealable matter under 5 U.S.C. chapter 75, he was barred by 5 U.S.C. § 7121(e) from bringing the same claim to the Board under USERRA. The court concluded that the appellant's USERRA claims as to his removal under 38 U.S.C. §§ 4311(a) and 4316(c) are "similar matters which arise under other personnel systems" that he had previously elected to raise under the negotiated grievance procedure. 5 U.S.C. § 7121(e). In its nonprecedential decision in *Russell*, *Russell v. Merit Systems Protection Board,* 324 F. App'x 872, 875 (Fed. Cir. 2008), the court discussed both of those decisions and found that while *Pittman* involved a case where the appellant could elect to file a grievance, *Russell* was bound by the CBA to file a grievance but that the "CBA grievance procedure mechanisms clearly fall within the meaning of a 'contract, agreement … or other matter' that cannot 'reduce, limit, or eliminate' a petitioner's right to bring a USERRA reemployment claim at the Board. Thus, as required by the plain language of

section 4302(b), Russell's statutory right to appeal the reemployment matter to the Board is not affected by the CBA's requirement that she file a grievance because the CBA cannot impose a requirement that the employee grieve a USERRA matter. USERRA's legislative history also confirms this result. *See* H.R. Rep No. 103-65, at 20 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2453.' "

b. VEOA. The statute specifies that, as an alternative to filing an appeal under VEOA, an appellant may pursue redress in a direct appeal to the Board from any action that is appealable under any other law, rule, or regulation. The appellant may not, however, pursue both an appeal under such other law, rule, or regulation and one under VEOA at the same time. 5 U.S.C. §§ 3330a(e)(1), (2). In *Sears v. Department of the Navy*, 88 M.S.P.R. 31, 34, ¶¶ 5, 6 (2001), the Board explained that this provision means that a preference eligible who is separated by RIF may pursue a claimed violation of his or her preference rights through the 5 U.S.C. § 3330a process, but cannot also pursue the claimed violation through a RIF appeal to the Board. On the contrary, however, in the same case, the Board found preclusion was inapplicable when the appellant was pursuing both a VEOA appeal claiming that his veterans' preference rights were violated when the agency separated him to hire a nonveteran, and a USERRA appeal, in which he claimed that he had been separated because of his veteran status. Only the former alleged a violation of a veterans' preference statute, so both appeals could progress simultaneously. Nonetheless, the Board recognized that the outcome of one appeal could affect the other, and it joined the appeals before remanding them for adjudication.

APPENDIX A - MODEL INSTRUCTIONS FOR BROADCAST COVERAGE

Information for Reporters

While the U.S. Merit Systems Protection Board has several statutory functions dealing with the protection of the Federal personnel service, or merit systems, the Board's role as adjudicator of Federal employee appeals relating to job actions taken against those employees is its main responsibility. In fact, this is by far the largest part of the Board's work in terms of workload and resources applied. The Board is a quasi-judicial agency. Appeals from the Board's decisions in non-mixed appeals go to the U.S. Court of Appeals for the Federal Circuit, except that appeals involving whistleblowing currently may be appealed to any U.S. court of appeals. Non-mixed appeals are those that do not include an allegation of discrimination prohibited by section 717 of the Civil Rights Act of 1964, section 6(d) of the Fair Labor Standards Act of 1938, section 501 of the Rehabilitation Act of 1973, or sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (i.e., race, color, religion, sex, national origin, age, or disability). Appeals from mixed cases, those which do include such a claim, go to a U.S. district court for a trial de novo.

Coverage of a Board hearing by the electronic media and still photography are subject at all times to the authority of the administrative judge (AJ) to control the conduct of the proceedings, to ensure decorum and prevent distractions, and to ensure the fair administration of justice. The media must act at all times as if they were in a court room and must show the AJ and the parties the respect appropriate to that setting. The following guidelines set forth conditions and limitations that must as a general rule be observed by the media if coverage is to be permitted. AJs may modify or allow exceptions to these requirements, but must make sure that the media coverage will be unobtrusive, will not distract participants, and will not otherwise interfere with the administration of the hearing.

Questions to the AJ concerning the case are inappropriate. The Board will try to make someone else who is knowledgeable available to you to answer general questions and to provide appropriate background material for you. However, it would still be inappropriate to ask that person, or anyone at the Board, questions that might require judgments on issues involved in the hearing.

Sometimes a hearing may need to be closed, although the vast majority of Board hearings are open to the public and press. Circumstances in which we would close a hearing include the following noncomprehensive list:

a. When either party presents convincing arguments for closing a hearing with which the AJ agrees;

b. When issues of national security are involved;

c. When minor children are involved.

Specific Instructions for Hearing Coverage.

1. Conferences of Counsel. There must be no audio recordings or broadcast of conferences between counsel, between counsel and the parties, and between counsel and the AJ held at the bench.

2. Impermissible Use. Generally, none of the film, video tape, still photographs, or audio reproductions developed during or by coverage of a Board proceeding shall be admissible as evidence in that or any subsequent Board proceeding. Moreover, no coverage of the testimony taken at the hearing may be made available to the parties or the public before the hearing is closed, to avoid influencing witnesses who have not yet testified.

3. Equipment and Personnel. The AJ will not permit more than one portable television camera or video tape electronic camera and its operator and one still photographer in the hearing at one time. Audio pickup must be accomplished from existing audio systems present in the hearing room. If no suitable audio system exists, microphones and wiring essential for media purposes must be unobtrusive and located in places designated or approved by the AJ. Pooling arrangements are the sole responsibility of the media. The AJ generally will not resolve any disputes and will exclude all contesting media personnel from the hearing.

4. Sound and Light. Only television photographic and audio equipment and still camera equipment which do not produce distracting sound or light may be used. No artificial lighting is allowed. Media personnel must demonstrate to the AJ that their equipment meets these sound and light criteria.

5. Location and Movement. The AJ designates the position for television equipment and still camera photographers. The designated area will provide reasonable access to coverage. Photographic or audio equipment may only be placed in the hearing room, or removed from it, when the hearing is not in session. While the hearing is in session, broadcast media representatives are not permitted to move about and must not change film, video tape, or lenses. Still camera photographers may move about to obtain photographs only if specifically authorized by the AJ.

6. Review of an Order Excluding Coverage. Review of an AJ's order excluding the electronic media from access to a hearing or excluding coverage of a particular participant may be requested from the Regional Director of the office processing the case.

7. Further Information. Our Regional Director is _____. Should you have any problems or questions concerning this hearing that have not been answered, please contact him or her. If you have any question about the Board's Washington headquarters operations or other Board matters, please contact the Office of the Clerk of the Board at (202) 653-7200 or mspb@mspb.gov. Additional information may also be obtained at the Board's website, www.mspb.gov. Any request for documents from the case file must be made in writing and meet the requirements of the Freedom of Information Act (FOIA). FOIA requests may be submitted electronically via https://www.mspb.gov/foia/request.htm, or sent to the attention of the FOIA Officer, Office of the Clerk, 1615 M Street, N.W., Washington, D.C. 20419.

Admission of the press is at the discretion of the AJ adjudicating the case. The Board's general policy is that all cell phones, text devices, and all other two-way communications

devices shall be powered off in the hearing room, and that no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room. Thus, your presence at the hearing represents a departure from the usual process in return for which your complete cooperation is required.

APPENDIX B - MODEL INSTRUCTIONS FOR WITNESSES

Information for Witnesses

You have been requested to testify in an appeal hearing before Administrative Judge _____ of the Merit Systems Protection Board.

As a prospective witness, you must remain outside the hearing room until you are called to testify. When you are called, go to the witness chair and remain standing until you are sworn in by the Administrative Judge or court reporter. If you have religious convictions against giving testimony under oath, you will be permitted to affirm to the truthfulness of your testimony.

You will be asked questions first by the representative of the party who requested your appearance and then by the other representative. The Administrative Judge may have questions for you as well. Please answer the questions fully but do not volunteer information not asked for. If you do not understand a question, you may ask for clarification. If an objection is raised to a question, wait to answer until after the Administrative Judge has ruled on the objection. Please answer the questions verbally and do not respond by gestures, such as nodding. Speak up so that the other people present can hear your answers because the microphone is for recording your testimony, not for amplification.

Following your testimony, you will be excused unless one of the parties requests that you remain as a potential rebuttal witness. In that case, you will be advised to return to the witness waiting area. Whether or not you are designated a potential rebuttal witness, you must not discuss your testimony with the other witnesses in this appeal until after the hearing has concluded entirely.

Unless otherwise announced, the hearing is open to the public. If you are not requested to remain available as a rebuttal witness or are not obligated to return to your regular work, you may quietly observe the remainder of the hearing as a member of the public.

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