

Merit Systems Protection Board Regulations

Part 1201—Practices and Procedures

Subpart B—Procedures for Appellate Cases

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General

1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These

regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case. It is the Board's policy that these rules will be applied in a manner that ensures the fair and efficient processing of each case.

§ 1201.12 Revocation, amendment, or waiver of rules.

The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

§ 1201.13 Appeals by Board employees.

Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

§ 1201.14 Electronic filing procedures.

(a) *General.* This section prescribes the rules and procedures by which parties and representatives to proceedings within the MSPB's appellate and original jurisdiction may file and receive documents in electronic form.

(b) *Matters subject to electronic filing.* Subject to the registration requirement of paragraph (e) of this section, parties and representatives may use electronic filing (e-filing) to do any of the following:

- (1) File any pleading, including a new appeal, in any matter within the MSPB's appellate jurisdiction (§ 1201.3);
- (2) File any pleading in any matter within the MSPB's original jurisdiction (§ 1201.2);

- (3) File a petition for enforcement of a final MSPB decision (§ 1201.182);
- (4) File a motion for an attorney fee award as a prevailing party (§ 1201.203);
- (5) File a motion for compensatory or consequential damages (§ 1201.204);
- (6) Designate a representative, revoke such a designation, or change such a designation (§ 1201.31); or
- (7) Notify the MSPB of a change in contact information such as address (geographic or electronic mail) or telephone number.

(c) *Matters excluded from electronic filing.* Electronic filing may not be used to:

- (1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);
- (2) Serve a subpoena (§ 1201.83); or
- (3) File a pleading with the Special Panel (§ 1201.173);
- (4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520);
- (5) File a pleading that contains classified information (32 CFR part 2001); or
- (6) File a request to participate as an amicus curiae or file a brief as amicus curiae pursuant to § 1201.34 of this part.

(d) *Internet is sole venue for electronic filing.* Following the instructions at e-Appeal Online, the MSPB's e-Appeal site (<https://e-appeal.mspb.gov>), is the only method allowed for filing electronic pleadings with the MSPB. The MSPB will not accept pleadings filed by electronic mail (e-mail).

(e) *Registration as an e-filer.* (1) Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the MSPB. Except when filing a new appeal within the MSPB's appellate jurisdiction (§ 1201.3), no party or representative may file an electronic pleading with the MSPB unless he or she has registered with the MSPB as an e-filer.

- (2) With the exception of a designation of a representative by a party who is an individual, the exclusive means for a party or representative to register as an e-filer

during an MSPB proceeding is to follow the instructions at e-Appeal Online (<https://e-appeal.mspb.gov>).

- (3) When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as an e-filer. For example, an appellant may file and receive pleadings and MSPB documents by non-electronic means, even though his or her representative has registered as an e-filer. When a party has more than one representative, however, all representatives must choose the same method of service.
- (4) A party or representative may withdraw his or her registration as an e-filer. Such withdrawal means that, effective upon the MSPB's receipt of this withdrawal, pleadings and MSPB documents will no longer be served on that person in electronic form. A withdrawal of registration as an e-filer may be filed at e-Appeal Online, in which case service is governed by paragraph (j) of this section, or by non-electronic means, in which case service is governed by § 1201.26(b).
- (5) Registration as an e-filer applies only to a single MSPB appeal or proceeding. If an appeal is dismissed without prejudice, however, and is later refiled, an election of e-filing status will remain in effect. An election of e-filing status will also remain in effect for purposes of filing a petition for enforcement under Subpart F of this part, or filing a motion for an attorney fee award or compensatory or consequential damages under Subpart H of this Part.
- (6) Each e-filer must notify the MSPB and other participants of any change in his or her e-mail address. When done via e-Appeal Online, such notification is done by selecting the "Pleading" option.

(f) *e-Filing not mandatory for e-filers.* A party or representative who has registered as an e-filer may file any pleading by non-electronic means, i.e., via postal mail, fax, or personal or commercial delivery.

(g) *Form of electronic pleadings*—(1) Options for e-filing. An appellant or representative using e-Appeal Online to file a new appeal within the MSPB's appellate jurisdiction (§ 1201.3) must complete the

structured interview at that site (<https://e-appeal.mspb.gov>). For all other pleadings, the e-filer has the option of uploading an electronic file or entering the text of the pleading online. Regardless of the means of filing a particular pleading, the e-filer will be allowed to submit supporting documentation such as attachments, in either electronic or paper form, as described in paragraphs (g)(2), (g)(3), and (h) of this section.

(2) *Electronic formats allowed.* The MSPB will accept numerous electronic formats, including word-processing and spreadsheet formats, Portable Document Format (PDF), and image files (files created by scanning). A list of formats allowed can be found at e-Appeal Online. All electronic documents must be formatted so that they will print on standard 8 1/2 inch by 11 inch paper.

(3) *Requirements for pleadings with 3 or more electronic attachments.* An e-filer who uploads 3 or more supporting documents, in addition to the document that constitutes the primary pleading, must identify each attachment, either by filling out the table for such attachments at e-Appeal Online, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. Each attachment must be designated with a brief descriptive label, which will include exhibit numbers or letters where appropriate or required, e.g., "Exh. 4b, Decision Notice."

(h) *Hybrid pleadings that include both electronic and paper documents.* An e-filer may file a hybrid pleading in which part of the pleading is submitted electronically, and part of the pleading consists of one or more paper documents filed by non-electronic means. All components of a hybrid pleading are subject to applicable time limits. If one or more parts of a hybrid pleading are untimely filed, the judge or the Clerk may reject the untimely part or parts while accepting timely filed parts of the same pleading.

(i) *Repository at e-Appeal Online.* All notices, orders, decisions, and other documents issued by the MSPB, as well as all pleadings filed via e-Appeal Online, will be made available to parties and their representatives for viewing and downloading at the Repository at e-Appeal Online. In addition, most pleadings filed at the petition for review stage of adjudication, and some pleadings

filed at the regional office level, will be available at the Repository. Also available at the Repository will be an electronic “docket sheet” listing all documents issued by the MSPB to the parties, as well as all pleadings filed by the parties, including those pleadings that are not available for viewing and downloading in electronic form. Access to appeal documents at the Repository will be limited to the parties and representatives of the appeals in which they were filed.

(j) *Service of electronic pleadings and MSPB documents.* (1) When MSPB documents are issued, e-mail messages will be sent to e-filers that notify them of the issuance and that contain links to the Repository where the documents can be viewed and downloaded. Paper copies of these documents will not ordinarily be served on e-filers. Pleadings submitted via e-Appeal Online will be available to parties and representatives at the e-Appeal Online Repository, and the MSPB will send e-mail messages to other e-filers notifying them of each pleading, with a link to the Repository. When using e-Appeal Online to file a pleading, e-filers will be notified of all documents that must be served by non-electronic means, and they must certify that they will serve all such documents no later than the first business day after the electronic submission.

(2) Delivery of e-mail can encounter a number of failure points. If the MSPB is advised of non-delivery, it will attempt to redeliver and, if that is unsuccessful, will deliver by postal mail or other means. E-filers are responsible for ensuring that e-mail from @mspb.gov is not blocked by filters.

(3) E-filers are responsible for monitoring case activity at the Repository at e-Appeal Online to ensure that they have received all case-related documents.

(k) *Documents requiring a signature.* Electronic documents filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, or 1209 of this chapter that requires a signature.

(l) *Affidavits and declarations made under penalty of perjury.* Registered e-filers may submit electronic pleadings in the form of declarations made under penalty of perjury under 28 U.S.C. 1746, as described in Appendix IV to this part. If the declarant is someone other than the e-filer, a physically signed affidavit or declaration should be

uploaded as an image file, or submitted separately as a non-electronic document under paragraph (h) of this section.

(m) *Date electronic documents are filed and served.* (1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20.

(2) MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission.

(n) *Authority of a judge or the Clerk to regulate e-filing.* (1) In the event that the MSPB or any party encounters difficulties filing, serving, or receiving electronic documents, the judge or the Clerk of the Board may order one or more parties to cease filing pleadings by e-filing, cease serving documents in electronic form, or take both these actions. In such instances, filing and service shall be undertaken in accordance with § 1201.26. The authority to order the cessation of the use of electronic filing may be for a particular submission, for a particular time frame, or for the duration of the pendency of a case.

(2) A judge or the Clerk of the Board may require that any document filed electronically be submitted in non-electronic form and bear the written signature of the submitter. A party receiving such an order from a judge or the Clerk of the Board shall, within 5 calendar days, serve on the judge or Clerk of the Board by postal mail, by fax, or by commercial or personal delivery a signed, non-electronic copy of the document.

(o) *MSPB reserves the right to revert to traditional methods of service.* The MSPB may serve documents via traditional means—postal mail, fax, personal or commercial delivery—at its discretion. Parties and their representatives are responsible

for ensuring that the MSPB always has their current postal mailing addresses, even when they have registered as e-filers.

(p)(1) Except as provided in paragraphs (p)(2) and (3) of this section, all pleadings (including the initial appeal) except those containing classified information or Sensitive Security Information filed with the Washington Regional Office (WRO) and the Denver Field Office (DEFO) by agencies or attorneys must be e-filed. Agencies and attorneys in proceedings in the WRO and the DEFO must register as e-filers pursuant to paragraph (e) of this section.

(2) Agencies or attorneys who believe that e-filing would create an undue burden on their operations may request an exemption from the administrative judge for a specific appeal and/or pleading. Such a request shall include a specific and detailed explanation why e-filing would create an undue burden.

(3) Except in unusual circumstances, exemptions granted under this section shall apply only to pleadings that include scanned material. All other pleadings except those containing classified information or Sensitive Security Information must be e-filed. The administrative judge may periodically revisit the need for an exemption granted under this subsection, and revoke the exemption as appropriate.

Appeal of Agency Action; Pleadings

§ 1201.21 Notice of appeal rights.

When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(b) A copy, or access to a copy, of the Board's regulations;

(c) A copy of the MSPB appeal form available at the Board's Web site (<http://www.mspb.gov>), and

(d) Notice of any right the employee has to file a grievance or seek corrective action under

subchapters II and III of 5 U.S.C. chapter 12, including:

(1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board;

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and

(4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.

(e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302.

(f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.

§ 1201.22 Filing an appeal and responses to appeals.

(a) *Place of filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this part.

(b) *Time of filing.* (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative

dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with § 1201.23 of this part.

(2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests.

(3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is properly addressed and sent to the appellant's address via postal or commercial delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative, or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule:

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

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

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

(c) *Timeliness of appeals.* If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

(d) *Method of filing an appeal.* Filing of an appeal must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

(e) *Filing a response.* Filing of a response must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

1201.23 Computation of time.

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

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

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

§ 1201.24 Content of an appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly

substituted under § 1201.35 may file an appeal. Appeals may be in any format, including letter form. An appeal may be filed in electronic form provided that the requirements of § 1201.14 have been satisfied. All appeals must contain the following:

- (1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;
- (2) A description of the action the agency took and its effective date;
- (3) A request for hearing if the appellant wants one;
- (4) A statement of the reasons why the appellant believes the agency action is wrong;
- (5) A statement of the action the appellant would like the judge to order;
- (6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;
- (7) Where applicable, a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF-50 or similar notice of personnel action. No other attachments should be included with the appeal, as the agency will be submitting the documents required by 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. An appellant should not miss the deadline for filing merely because he or she does not currently have all of the documents specified in this section.
- (8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter; and
- (9) The signature of the appellant or, if the appellant has a representative, of the representative. If the appeal is electronically filed, compliance with § 1201.14 and the directions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>) satisfy the signature requirement.

(b) An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. An appellant may not raise a new claim or

defense after that time, except for good cause shown. However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.

(c) *Use of Board form or electronic filing.* An appellant may comply with paragraph (a) of this section, and with § 1201.31, by completing MSPB Form 185, or by completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>).

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

(e) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

§ 1201.25 Content of agency response.

The agency response to an appeal must contain the following:

- (a) The name of the appellant and of the agency whose action the appellant is appealing;
- (b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;
- (c) All documents contained in the agency record of the action;
- (d) Designation of and signature by the authorized agency representative; and
- (e) Any other documents or responses requested by the Board.

§ 1201.26 Number of pleadings, service, and response.

(a) *Number.* The appellant must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14.

(b) *Service—(1) Service by the Board.* The appropriate office of the Board will mail a copy of the appeal to each party to the proceeding other than the appellant. It will attach to each copy a

service list, consisting of a list of the names and addresses of the parties to the proceeding or their designated representatives.

(2) *Service by the parties.* The parties must serve on each other one copy of each pleading, as defined by § 1201.4(b), and all documents submitted with it, except for the appeal. They may do so by mail, by facsimile, by commercial or personal delivery, or by electronic filing in accordance with § 1201.14. Documents and pleadings must be served upon each party and each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names, or addresses on the service list.

(c) *Paper size.* Pleadings and attachments must be filed on 8 1/2 by 11-inch paper, except for good cause shown. This requirement enables the Board to comply with standards established for U.S. courts. All electronic documents must be formatted so that they will print on 8 1/2 by 11-inch paper.

[54 FR 53504, Dec. 29, 1989; 55 FR 548, Jan. 5, 1990, as amended at 58 FR 36345, July 7, 1993; 68 FR 59862, Oct. 20, 2003; 69 FR 57629, Sept. 27, 2004]

§ 1201.27 Class appeals.

(a) *Appeal.* One or more employees may file an appeal as representatives of a class of employees. The judge will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties. When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.

(b) *Procedure.* The judge will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 30 days after the date of receipt of the decision denying the request to be heard as a class appeal. Each individual

appellant is responsible for either filing an individual appeal within the original time limit, or keeping informed of the status of a class appeal and, if the class appeal is denied, filing an individual appeal within the additional 35-day period.

(c) *Standards.* In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

(d) *Electronic filing.* A request to hear a case as a class appeal and any opposition thereto may not be filed in electronic form. Subsequent pleadings may be filed and served in electronic form, provided that the requirements of § 1201.14 are satisfied.

1201.28 Case suspension procedures.

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

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

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

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

§ 1201.29 Dismissal without prejudice.

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

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

the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.

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

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

Parties, Representatives, and Witnesses

§ 1201.31 Representatives.

(a) *Procedure*. A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading.

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

(c) The judge, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.

(d) As set forth in paragraphs (d) and (e) of section 1201.43 of this part, a judge may exclude a representative from all or any portion of the

proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.

§ 1201.32 Witnesses; right to representation.

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony.

§ 1201.33 Federal witnesses.

(a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when ordered by the judge to do so. When providing those statements or appearing at a deposition or at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). When a desired witness is employed by an agency who is not a party to the Board proceeding, the requesting party may avail itself of the provisions of sections 1201.81 to 1201.85 of this part regarding subpoenas to ensure the attendance of the witness. In addition, the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations governing the production of Federal employees in matters in litigation.

(b) A Federal employee who is denied the official time required by paragraph (a) of this section may file a written request that the judge order the employing agency to provide such official time. The judge will act on such a request promptly and, where warranted, will order the agency to comply with the requirements of paragraph (a) of this section.

(c) An order obtained under paragraph (b) of this section may be enforced as provided under subpart F of this part.

§ 1201.34 Intervenors and amicus curiae.

(a) *Explanation of Intervention*. 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. Intervenors as a "matter of right" are those parties who have a statutory right to participate. "Permissive" intervenors are those parties who may

be permitted to participate if the proceeding will affect them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the judge.

(b) *Intervenors as a matter of right.* (1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(c) *Permissive intervenors.* (1) Any person, organization or agency may, by motion, ask the judge for permission to intervene. The motion must explain the reason why the person, organization or agency should be permitted to intervene.

(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A judge's denial of a motion for permissive intervention may be appealed to the Board under § 1201.91 of this part.

(d) *Role of intervenors.* Intervenors have the same rights and duties as parties, with the following two exceptions:

(1) Intervenors do not have an independent right to a hearing; and

(2) Permissive intervenors may participate only on the issues affecting them. The judge is responsible for determining the issues on which permissive intervenors may participate.

(e) *Amicus curiae.* (1) An amicus curiae is a person or organization who, although not a party to

an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The Board may solicit amicus briefs on its own motion.

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

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

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

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

§ 1201.35 Substituting parties.

(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will only be completed upon substitution of a proper party. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.

(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event, except for good cause shown.

(c) In the absence of a timely substitution of a party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

§ 1201.36 Consolidating and joining appeals.

(a) *Explanation.* (1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or

similar issues. For example, individual appeals rising from a single reduction in force might be consolidated.

(2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent removal if the same appellant filed both appeals.

(b) *Action by judge.* A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:

- (1) Expedite processing of the cases; and
- (2) Not adversely affect the interests of the parties.

(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

§ 1201.37 Witness fees.

(a) *Federal employees.* Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be in official duty status and will not receive witness fees.

(b) *Other witnesses.* Other witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) *Payment of witness fees and travel costs.* The party requesting the presence of a witness must pay that witness' fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness appears voluntarily, at the time of appearance. A Federal agency or corporation is not required to pay or offer witness fees in advance.

(d) A witness who is denied the witness fees and travel costs required by paragraphs (b) and (c) of this section may file a written request that the judge order the party who requested the presence of the witness to provide such fees and travel costs. The judge will act on such a request promptly and, where warranted, will order the party to comply with the requirements of paragraphs (b) and (c) of this section.

(e) An order obtained under paragraph (d) of this section may be enforced as provided under subpart F of this part.

Judges

§ 1201.41 Judges.

(a) *Exercise of authority.* Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) *Authority.* Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges' powers include, but are not limited to, the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas under § 1201.81 of this part;
- (3) Rule on offers of proof and receive relevant evidence;
- (4) Rule on discovery motions under § 1201.73 of this part;
- (5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:
 - (i) To resolve an important issue of credibility;
 - (ii) To ensure that the record on significant issues is fully developed; or
 - (iii) To otherwise ensure a fair and just adjudication of the case;
- (6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;
- (7) Exclude any person from all or any part of the proceeding before him or her as provided under § 1201.31(d) of this part;
- (8) Rule on all motions, witness and exhibit lists, and proposed findings;
- (9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;

- (10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;
- (11) Impose sanctions as provided under § 1201.43 of this part;
- (12) Hold prehearing conferences for the settlement and simplification of issues;
- (13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;
- (14) Issue any order that may be necessary to protect a witness or other individual from harassment and provide for enforcement of such order in accordance with subpart F;
- (15) Issue initial decisions; and
- (16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

(c) *Settlement*—(1) *Settlement discussion*. The judge may initiate attempts to settle the appeal informally at any time. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, and they may agree to any limits on the waiver.

(2) *Agreement*. If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the judge will dismiss the appeal with prejudice.

(i) If the parties offer the agreement for inclusion in the record, and if the judge approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement.

(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

§ 1201.42 Disqualifying a judge.

(a) If a judge considers himself or herself disqualified, he or she will withdraw from the case,

state on the record the reasons for doing so, and another judge will be promptly assigned.

(b) A party may file a motion asking the judge to withdraw on the basis of personal bias or other disqualification. This motion must be filed as soon as the party has reason to believe there is a basis for disqualification. The reasons for the request must be set out in an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.)

(c) If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under § 1201.91 of this part. Failure to request certification is considered a waiver of the request for withdrawal.

§ 1201.43 Sanctions.

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

(a) *Failure to comply with an order*. When a party fails to comply with an order, the judge may:

- (1) Draw an inference in favor of the requesting party with regard to the information sought;
- (2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
- (3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
- (4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) *Failure to prosecute or defend appeal*. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) *Failure to make timely filing*. The judge may refuse to consider any motion or other pleading that

is not filed in a timely fashion in compliance with this subpart.

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

(e) *Cancellation, suspension, or termination of hearing.* A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for contumacious conduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.

Hearings

§ 1201.51 Scheduling the hearing.

(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.

(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.

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

§ 1201.52 Public hearings.

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

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

§ 1201.53 Record of proceedings.

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

(b) *Transcripts.* A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts.

(c) *Copies.* Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Non-parties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulation. A non-party may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington,

DC, as appropriate. Non-parties may also make FOIA requests online at <https://foia.mspb.gov>.

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

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

§ 1201.55 Motions.

(a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the judge or the Board, as appropriate, and must be served upon all other parties in accordance with § 1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) *Objection.* Unless the judge provides otherwise, any objection to a written motion must be filed within 10 days from the date of service of the motion. Judges, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

(c) *Motions for extension of time.* Motions for extension of time will be granted only on a showing of good cause.

(d) *Motions for protective orders.* A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during the Special Counsel's investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

§ 1201.56 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof—(1) Agency:* Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:

- (i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or
- (ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

- (1) Shows harmful error in the application of the agency's procedures in arriving at its decision;
- (2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or
- (3) Shows that the decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

- (1) *Substantial evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.
- (2) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
- (3) *Harmful error.* Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

§ 1201.57 Order of hearing.

- (a) In cases in which the agency has taken an action against an employee, the agency will present its case first.
- (b) The appellant will proceed first at hearings convened on the issues of:
 - (1) Jurisdiction;
 - (2) Timeliness; or
 - (3) Office of Personnel Management disallowance of retirement benefits, when the appellant applied for those benefits.
- (c) The judge may vary the normal order of presenting evidence.

§ 1201.58 Closing the record.

(a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.

(b) If the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for the receipt or filing of submissions of the parties.

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

- (1) The party submitting it shows that the evidence or argument was not readily available before the record closed; or
- (2) It is in rebuttal to new evidence or argument submitted by the other party just before the record closed.

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

Evidence

§ 1201.61 Exclusion of evidence and testimony.

Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

§ 1201.63 Stipulations.

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

§ 1201.64 Official notice.

Official notice is the Board's or judge's recognition of certain facts without requiring evidence to be introduced establishing those facts. The judge, 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.

Discovery

§ 1201.71 Purpose of discovery.

Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention. Discovery requests and responses thereto are not to be filed in the first instance with the Board. They are only filed with the Board in connection with a motion to compel discovery under 1201.73(c) of this part, with a motion to subpoena discovery under 1201.73(d) of this part, or as substantive evidence to be considered in the appeal.

[77 FR 62367, Oct. 12, 2012]

§ 1201.72 Explanation and scope of discovery.

(a) *Explanation.* Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise provided. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.

(b) *Scope.* Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) *Methods.* Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written

interrogatories to parties, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

(d) *Limitations.* The judge may limit the frequency or extent of use of the discovery methods permitted by these regulations. Such limitations may be imposed if the judge finds that:

- (1) The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or
- (3) The burden or expense of the proposed discovery outweighs its likely benefit.

1201.73 Discovery procedures.

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

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

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

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

- (i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72;
- (ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201); and
- (iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty, and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

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

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

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

in the request for deposition or in the subpoena, unless the parties agree on another time or place.

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

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

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

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

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

§ 1201.74 Orders for discovery.

(a) *Motion for an order compelling discovery.* Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(1) and (d)(3). An administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 CFR 1201.73(c)(1) and (d)(3).

(b) *Content of order.* Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or

other individual or entity from undue expense, embarrassment, or oppression;

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the judge sets.

(c) *Noncompliance.* The judge may impose sanctions under § 1201.43 of this part for failure to comply with an order compelling discovery.

§ 1201.75 Taking depositions.

Depositions may be taken by any method agreed upon by the parties. The person providing information is subject to penalties for intentional false statements.

Subpoenas

§ 1201.81 Requests for subpoenas.

(a) *Request.* Parties who wish to obtain subpoenas that would require the attendance and testimony of witnesses, or subpoenas that would require the production of documents or other evidence under 5 U.S.C. 1204(b)(2)(A), should file their motions for those subpoenas with the judge. The Board has authority under 5 U.S.C. 1204(b)(2)(A) to issue a subpoena requiring the attendance and testimony of any individual regardless of location and for the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico or the District of Columbia. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses.

(b) *Form.* Parties requesting subpoenas must file their requests, in writing, with the judge. Each request must identify specifically the books, papers, or testimony desired.

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

(d) *Rulings.* Any judge who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Judges who have the authority to

rule on these requests themselves will do so directly.

§ 1201.82 Motions to quash subpoenas.

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

§ 1201.83 Serving subpoenas.

(a) Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. The means prescribed by applicable state law are sufficient. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena.

(b) A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country.

§ 1201.84 Proof of service.

The person who has served the subpoena must certify that he or she did so:

(a) By delivering it to the witness in person,

(b) By registered or certified mail, or

(c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

§ 1201.85 Enforcing subpoenas.

(a) If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the judge or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear

before the judge, must submit an affidavit or sworn statement under 28 U.S.C. 1746 (see appendix IV) describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

(b) Upon application by the Special Counsel, the Board may seek court enforcement of a subpoena issued by the Special Counsel in the same manner in which it seeks enforcement of Board subpoenas, in accordance with 5 U.S.C. 1212(b)(3).

Interlocutory Appeals

§ 1201.91 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. The judge may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal. In addition, the judge, on his or her own motion, may certify an interlocutory appeal to the Board. If the appeal is certified, the Board will decide the issue and the judge will act in accordance with the Board's decision.

§ 1201.92 Criteria for certifying interlocutory appeals.

The judge will certify a ruling for review only if the record shows that:

- (a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and
- (b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.

§ 1201.93 Procedures.

(a) *Motion for certification.* A party seeking the certification of an interlocutory appeal must file a motion for certification within 10 days of the date of the ruling to be appealed. The motion must be filed

with the judge, and must state why certification is appropriate and what the Board should do and why. The opposing party may file objections within 10 days of the date of service of the motion, or within any other time period that the judge may designate.

(b) *Certification and review.* The judge will grant or deny a motion for certification within five days after receiving all pleadings or, if no response is filed, within 10 days after receiving the motion. If the judge grants the motion for certification, he or she will refer the record to the Board. If the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued, in accordance with §§ 1201.113 and 1201.114 of this part.

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

Ex Parte Communications

§ 1201.101 Explanation and definitions.

(a) *Explanation.* An ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate. Not all ex parte communications are prohibited. Those that involve the merits of the case, or those that violate rules requiring submissions to be in writing, are prohibited. Accordingly, interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board. Parties may not ask about matters such as what defense they should use or whether their evidence is adequate, and they may not make a submission orally if that submission is required to be made in writing.

(b) *Definitions for purposes of this section—(1) Interested party includes:*

- (i) Any party or representative of a party involved in a proceeding before the Board; and
 - (ii) Any other person who might be affected by the outcome of a proceeding before the Board.
- (2) *Decision-making official* means any judge, officer or other employee of the Board designated to hear and decide cases except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge.

§ 1201.102 Prohibition on ex parte communications.

Except as otherwise provided in § 1201.41(c)(1) of this part, ex parte communications that concern 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 know that the Board may consider the matter until the time the Board has issued a final decision on the matter.

§ 1201.103 Placing communications in the record; sanctions.

- (a) Any communication made in violation of § 1201.102 of this part will be made a part of the record. If the communication was oral, a memorandum stating the substance of the discussion will be placed in the record.
- (b) If there has been a violation of § 1201.102 of this part, the judge or the Clerk of the Board, as appropriate, will notify the parties in writing that the regulation has been violated, and will give the parties 10 days to file a response.
- (c) The following sanctions are available:
 - (1) *Parties.* The offending party may be required to show why, in the interest of justice, the claim or motion should not be dismissed, denied, or otherwise adversely affected.
 - (2) *Other persons.* The Board may invoke appropriate sanctions against other offending parties.

Final Decisions

§ 1201.111 Initial decision by judge.

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

(b) Each initial decision will contain:

- (1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;
- (2) The reasons or bases for those findings and conclusions;
- (3) An order making final disposition of the case, including appropriate relief;
- (4) A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part;
- (5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and
- (6) A statement of any further process available, including, as appropriate, a petition for review under § 1201.114 of this part, a petition for enforcement under § 1201.182, a motion for attorney fees under § 1201.203, a motion to initiate an addendum proceeding for consequential damages or compensatory damages under § 1201.204, and a petition for judicial review.

(c) *Interim relief.* (1) Under 5 U.S.C. 7701(b)(2), if the appellant is the prevailing party, the initial decision will provide appropriate interim relief to the appellant effective upon the date of the initial decision and remaining in effect until the date of the final order of the Board on any petition for review, unless the judge determines that the granting of interim relief is not appropriate. The agency may decline to return the appellant to his or her place of employment if it determines that the return or presence of the appellant will be unduly disruptive

to the work environment. However, pay and benefits must be provided.

- (2) An initial decision that orders interim relief shall include a section which will provide the appellant specific notice that the relief ordered in the decision must be provided by the agency effective as of the date of the decision if a party files a petition for review. If the relief ordered in the initial decision requires the agency to effect an appointment, the notice required by this section will so state, will specify the title and grade of the appointment, and will specifically advise the appellant of his right to receive pay and benefits while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

§ 1201.112 Jurisdiction of judge.

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

- (1) Correct the transcript; when one is obtained;
- (2) Rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages under subpart H of this part;
- (3) Process any petition for enforcement filed under subpart F of this part;
- (4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review, even if the settlement agreement is not received until after the date when the initial decision becomes final under § 1201.113 of this part.

(b) Nothing in this section affects the time limits prescribed in § 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

§ 1201.113 Finality of decision.

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

(a) *Exceptions.* The initial decision will not become the Board's final decision if within the time limit for

filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record.

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

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

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

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