U.S. Merit Systems Protection Board

Judges' Handbook

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JUDGES' HANDBOOK

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), 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.

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 are paramount in determining good cause. Caseloads and the circumstances of the RO or administrative judge (AJ) are also factors for consideration. Reassignments among AJs or ROs may be used to reconcile due process factors and the Board's 120-day requirement.

3. COMMON ABBREVIATIONS, ACRONYMS, AND DEFINITIONS.

a. Administrative Judge—AJ;

b. Administrative Law Judge—ALJ;

c. Case Management System—CMS;

d. Chief Administrative Judge—CAJ; As used in this handbook, the term "CAJ" refers to the regional director or the CAJ designee of a field office.

e. Chief Administrative Law Judge—CALJ;

f. Equal Employment Opportunity—EEO;

g. Initial Decision—ID;

h. Individual Right of Action—IRA;

i. Mixed case—Otherwise appealable matter with an allegation of prohibited discrimination;

j. Office of Appeals Counsel—OAC;

k. Office of Personnel Management—OPM;

l. Office of the Clerk of the Board—OCB;

m. Office of the General Counsel—OGC;

n. Office of Regional Operations—ORO;

o. Office of Special Counsel—OSC;

p. Opinion and Order—O&O;

q. Otherwise Appealable Action Appeal—OAA

r. Petition for Appeal—PFA;

s. Petition for Enforcement—PFE;

t. Petition for Review—PFR;

u. Prohibited Discrimination—Discrimination on the basis of any factor listed at 5 U.S.C. § 2301(b)(1)

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

w. Regional Director—RD;

x. Regional Office—RO;

y. Field Office—FO;

z. Special Counsel—SC;

aa. 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);

bb. Uniformed Services Employment and Reemployment Rights Act of 1994—USERRA

cc. Veterans' Employment Opportunities Act of 1998—VEOA

dd. Whistleblower Protection Act of 1989, Pub. L. No. 101-12—WPA.

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.

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 all other appeals, the location of the appellant's duty station when the action was taken 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, 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 CMS within 3 workdays. Except where the appeal is premature or deficient, 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. The receiving office will docket the appeal; 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.

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. In instances where 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. There is no need to 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.

There is generally no need to 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 appeal has already been acknowledged based on oral information.

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.

In any case in which 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) (where the field office 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* Chapter 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 where no postmark provides proof, and of the postmark date where 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.

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 and use 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

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

3. REJECTION OF THE APPEAL.

Whenever an appeal is rejected, the standard rejection notice must be used.

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.

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 in the same fashion as an untimely appeal by accepting it and issuing an acknowledgment order that contains the standard paragraph tdef or tdefos.

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. After an appeal is filed, if an appellant dies or becomes disabled and his or her 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 disabling event, except for good cause shown. 5 C.F.R. § 1201.35. 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 (JANE AND JOHN DOE APPEALS -- WHERE 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 where an appellant establishes a need to proceed anonymously for national security reasons.

The Federal Rules of Civil Procedure do not explicitly authorize, nor do they absolutely prohibit, the use of fictitious names for parties in pleadings. Generally, the courts have held that the use of fictitious names for either party is against public

policy, since the public has a legitimate interest in the facts of a lawsuit, including the names of the parties. *See Doe v. Stegall,* 653 F.2d 180 (5th Cir. 1981).

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 social security number, the AJ must require the appellant to submit such identifying information for the purpose of establishing the appeal's res judicata effect. *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, the following expedited procedure should be invoked:

(1) The AJ or CAJ should identify the agency's representative within 3 workdays (including the day of receipt of the request for anonymity, even if the request is not yet perfected) and inform the agency's representative of the request telephonically or by any other rapid method available.

(2) The AJ, or whoever has been designated to handle urgent matters in the AJ's absence, should arrange for a telephone conference between the parties and the AJ to determine if the agency has any objection to the Board's granting such a motion. The telephone conference should take place within 7 days of the date the RO or FO received the motion. Note: The agency must also file a written response to the motion (memorializing its oral response).

(3) The AJ should rule on the motion within 10 days of the date on which the motion to proceed anonymously is received, in accordance with the criteria discussed below.

c. Circumstances Where an Appellant Should Be Allowed To Proceed Anonymously.

(1) Threat of Actual Physical Harm. An appellant should be allowed to proceed anonymously where 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 Ass'n. 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. In ruling on a request by an appellant to proceed anonymously, the AJ should employ an analysis similar to that underlying the application of the privacy exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6). This inquiry involves the following two-step analysis:

Step 1. Would disclosure of the appellant's identity raise an actual, not merely possible, threat to the appellant's protectable privacy interest? An invasion of a protectable privacy interest could occur if disclosure exposed the appellant to lifelong embarrassment, disgrace, loss of employment, or loss of friends. *Department of the Air Force v. Rose,* 425 U.S. 352, 377 (1976).

Step 2. If there is a protectable privacy interest, where is the balance between that interest and the public interest in disclosure of the appellant's identity? The

"public interest" in this regard must genuinely be the interest of the overall public, not individuals who will be interested in the identity of the appellant for personal reasons. If the AJ or CAJ finds that the balance favors the privacy element, the AJ or CAJ should grant the motion to proceed anonymously. If the AJ or CAJ finds that the interests are approximately equal, the AJ or CAJ should deny the motion and require the appellant to proceed under his or her real name.

d. Appellants Identified in Criminal Proceedings. Appellants should not be allowed to proceed anonymously where they have already been publicly identified in a criminal proceeding concerning the "privacy interest" matter.

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. 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 opposing party may challenge the designation on the grounds that it involves a conflict of interest or a conflict of position. In addition, the AJ may disqualify a representative for the same grounds on the AJ's own motion. A motion to challenge an opponent's representative must be filed within 15 days of the date of service of the notice of designation. 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.

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* requires an AJ to make diligent efforts to assist such an appellant in obtaining representation. The Board has not 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, he 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. He 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, he 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, he is to ensure that the appellant and her representative, if she is represented at that time, understand her 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 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 is not filed in compliance with 5 C.F.R. § 1201.26(b)(2), and it 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.

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 work loads, the geographical location if there is likely to be a hearing, the complexity of the appeal, and such other factors as he or she considers appropriate.

The CAJ and AJ should also consider whether consolidation, joinder, class action, or intervenor issues are present. Prior to docketing, an AJ may informally request that an appeal be reassigned on the basis of personal bias or other disqualification. After docketing, the procedure in paragraph 2 should be followed.

2. DISQUALIFICATION OF ADMINISTRATIVE JUDGE.

A party may file a motion asking the AJ to withdraw on the basis of personal bias or other disqualification. The AJ may recuse himself or herself on the motion of a party or on his or her own motion. The CAJ must immediately notify ORO of his or her 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 administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the judge'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. *See* MSPB Records Manual, Chapter 4, Initial Appeal Case Files. Section 3 of this chapter of the Records Manual permits a single case file for a joined or consolidated appeal.

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.

e. Mass Appeals (RIFs or Furloughs). 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 as the circumstances of the appeals warrant.

(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 (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;

(b) Appeals having common jurisdiction or timeliness issues;

(c) Appeals having a common representative; and

(d) Appeals by pro se appellants.

(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.

(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.

(4) Develop and Maintain Appeal Files. The AJ may accept submissions only from a designated representative or a pro se appellant. The RO is not required to keep separate case files for each appellant in a consolidation.

(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 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 with regard to 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.

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, 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.

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, or by fax.

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

(4) ORO will notify the Clerk of the Board, the General Counsel, 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) in accordance with the

requirements of the Privacy Act. A request by OPM or OSC for a copy of the appeal file, or a portion thereof, for the purpose of deciding whether to intervene should be granted unless compliance would constitute an undue hardship on the resources of the RO.

(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 provided to OPM and/or the Special Counsel. 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*.

6. SENSITIVE APPEALS.

In screening and processing appeals, the CAJ and AJ should determine if they present or 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 considered sensitive by the CAJ.

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. Where 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.

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

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.

Although this Handbook previously required that "Public Interest Appeals" also be reported, those requirements have been eliminated. CAJs, therefore, may wish to take a slightly broader view of the "sensitive appeals" criteria in order 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 provide an explanation of 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. Where a standard Acknowledgment Order has been approved by the Board, 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, as necessary, to adjust it to the circumstances of the appeal. In regard to 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, however, any applicable substantive law set out in the standard acknowledgment orders should be provided to the parties in order to avoid a remand based on a finding that the parties had not been put on notice of their burdens and responsibilities.

   The AJ is responsible for ensuring that the necessary notice is provided. The various possibilities for an initial order range from a brief show cause order addressing only a timeliness or jurisdiction issue, to a complete acknowledgment order covering all aspects of guidance including information on hearings, discovery, etc. In some circumstances, follow-up orders may be necessary to clarify issues or to provide guidance not provided in the previous order. 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 where 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. All untimely appeals from retirement-related actions received from the Philippines must be processed in accordance with 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. Initial decisions should not be issued before the 75th day. In all cases, the decision 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.

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.

In general, the Records Manual requires that all case-related documents and hearing tapes, 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 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, etc.) or other reasons, the Manual does not cover the specific situation presented, it should be adapted as appropriate to the facts with which the office is dealing.

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. The 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 fax qualifies as an "official record" when it is the first copy of a submission received by the RO. Therefore, if there are no 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 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.

On September 18, 2003, the Board amended its regulations to change the amount of time for which a case may be suspended from 60 days to 30 days. *See* 5 C.F.R. § 1201.28. The revised regulation states that "[n]o case may be suspended for more than 30 days under the provisions of this section." 5 C.F.R. § 1201.28(f). Thus, whether the request is submitted by one or both parties, and whether it is filed timely or not, only a single 30-day suspension may be granted.

a. Basic Procedure. Should the agency and the appellant jointly agree that additional time is necessary to pursue discovery or settlement, additional time will be granted for a period up to 30-days and case processing will be suspended. A request that the adjudication of the appeal be suspended must be filed with the presiding administrative judge within 45 days of the date of the acknowledgment order (or within 7 days of the appellant's receipt of the agency file, whichever date is later). Should the parties contact the AJ during the period of suspension for assistance relative to discovery or settlement, and if the AJ's involvement is likely to be extensive, the AJ will notify the parties that it will be necessary to take the case off suspension and return it to standard processing.

b. Unilateral Requests. Either party may submit a unilateral request for additional time for discovery, up to 30 days. Such a request may be granted for good cause shown, at the discretion of the judge.

c. Requests Made After the Initial 45 Days. The presiding administrative judge may consider a suspension requested filed after the time set out in paragraph 12a, above. Such a request may be granted at the discretion of the judge.

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. Further, the Federal Circuit has held that "non-frivolous jurisdictional allegations supported by affidavits or other evidence confer Board jurisdiction." *Dick v. Department of Veterans Affairs,* 290 F.3d 1356, 1364 (Fed. Cir. 2002). Thus, while the court has affirmed that there is no right to an evidentiary hearing on jurisdiction (because "whether allegations are 'non-frivolous' is determined by the written record," *Dick,* 290 F.3d at 1361), standing alone this ruling would mean that a hearing on the merits must be held on what traditionally may have been considered to be jurisdictional issues when the appellant raises such supported nonfrivolous allegations of fact. However, in *Lloyd v. Small Business Administration,* MSPB Docket No. NY-0752-03-0018-I-1 (July 15, 2004), the Board found that panel decisions such as *Dick* are inconsistent with the *en banc* decision in *Cruz v. Department of the Navy,* 934 F. 2d 1240 (Fed. Cir. 1991), with respect to appeals of alleged involuntary retirements and resignations. While it found that individual right of action appeals arising under the Whistleblower Protection Act are subject to the "well-pleaded complaint" rule adopted in cases like *Dick,* it distinguished the two types of cases on the basis that "5 U.S.C. § 1221 confers jurisdiction over a certain kind of *claim,* while appeals governed by 5 U.S.C. § 7701 are within the Board's jurisdiction only if the appellant is affected by an *action* that is appealable to the Board under some law, rule, or regulation." *Lloyd,* ¶ 13 (emphasis in original.) Until the *en banc* court addresses this distinction, therefore, appeals under section 7701 require proof of jurisdiction, not just a nonfrivolous allegation.

An appellant who raises a nonfrivolous allegation as to the timeliness of the 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 USERRA and VEOA appeals. *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) (appellant has the right to a hearing; the agency and the AJ do not); 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 videoconference.

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 where the appellant rejects the opportunity to have one. *Johnson v. Department of the Interior,* 87 M.S.P.R. 359 (2000).

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.

3. USE OF HEARING NOTICE.

When a hearing is scheduled, the AJ must issue a written hearing notice and may use one of the two standardized hearing notices (HEARREG or HEAROPM) or one of the applicable Word processing macros available for this purpose. If the hearing is rescheduled, notice will usually be given to the parties in writing even if it is to confirm oral instructions. If the AJ considers the case appropriate for a bench decision (discussed in Chapter 12 of this

handbook), and in every case in order to comply with Chapter 9, Section 2d and Chapter 12, Section 5a, the AJ should place the parties on notice of this possibility by adding an appropriate paragraph to the hearing notice.

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. 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 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 (Contract). 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 in the areas in which hearings are held. 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, 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 administrative judge are to be provided under contracts established in accordance with these requirements. The administrative staffs of each office are therefore expected to use contract firms when arranging for court reporting services.

   Any regional or field office 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 Financial and Administrative Division, through the Office of Regional Operations, to seek assistance so that conforming contracts can be established in advance of any specific need. Only in extraordinary circumstances, approved in advance on a case-by-case basis by the Office of Regional Operations, 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 recordation, erasures, and correction of hearing tapes.

6. HEARING LOCATION.

Hearings are generally held in the cities designated as approved fixed sites. 5 C.F.R. Part 1201, Appendix III. Since these sites are approved rather than required sites, it is within the discretion of the AJ, with the approval of the CAJ, to schedule the hearing at non-designated sites. 5 C.F.R. § 1201.51(d). Some factors to consider before scheduling a

hearing at a non-designated 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. 5 C.F.R. § 1201.51. 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 in the location of the agency should be considered.

For all out-of-town hearings, 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 the limited circumstances in which a video hearing may be held.

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, where 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. Where 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.

   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 video-taped deposition may be appropriate if there is a credibility issue.

   When good cause is shown for an indefinite or a lengthy postponement, a dismissal without prejudice to refile may be appropriate. When such a dismissal is granted,

the AJ must set a date certain by which the appeal must be refiled. However, an AJ should not grant an agency's request for a dismissal without prejudice when the appellant objects. Instead, a continuance should be granted if good cause exists, and the agency should be required to set a date certain by which it can proceed with the appeal. 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, including 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 affidavit, the availability to the party of alternative sources of proof, the length of the delay sought, and the extent of the financial burden placed on the other party by the delay.

The Board's policy on dismissals without prejudice is set out in *Milner v. Department of Justice*, 87 M.S.P.R. 660 (2001), which notes among other points, that a dismissal without prejudice to avoid going over the 120-day time goal places an "unnecessary burden" on appellants. Id., ¶ 12. That decision also sets a special rule for USERRA appeals; it specifies 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. Although this case does not require it, in light of the "unnecessary burden" language, the AJ may want to consider invoking the same automatic refiling rule in non-USERRA appeals where the dismissal without prejudice sets a specific refiling date.

c. 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 any of 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 so specify.

d. 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.

10. 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 tape cassette(s) 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. 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.

11. CONDUCT OF PARTIES.

An AJ may exclude any person, including a party or representative, from all or any portion of a Board proceeding before him or her 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 should be documented in the record. In cases where a representative is excluded, the represented party should be given reasonable time to obtain new representation.

12. 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 resetting 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 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 personally and the dismissal is based on the entire pattern. *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.

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 where 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 non-controversial, 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.

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, where the disposition of the motion is recorded on the official tape or transcript, including any official tape recording of a prehearing or status conference, the requirement for a written disposition is met by the tape or transcript.

If the motion is non-controversial, has not been objected to, and is granted, the AJ's order need not contain reasons for the ruling. In all other circumstances, however, 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 (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 Office of the Clerk of the Board, within two workdays.

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 the hearing. The certification to the Board must clearly indicate which course of action the AJ is taking.

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 pursuant to 5 C.F.R. § 1201.41.

b. Non-party Federal Agency Witnesses. The AJ may issue an order to the personnel officer of the non-party 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, obtaining a subpoena, 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).

c. Witnesses Who Are Not Federal Employees. It is the responsibility of the requesting party to secure 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.

See generally 5 C.F.R. §§ 1201.81-.85.

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 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.

b. Referral to OGC. After consultation with the CAJ, the AJ must immediately refer the motion for enforcement to OGC by calling that office at (202) 653-6772, extension 1290. The AJ should be prepared to discuss the matter with an OGC staff attorney. A copy of the motion must be sent to OGC by overnight delivery 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, where 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 the Board's ruling on the motion and allowing the record to remain open pending the ruling.

7. PROTECTIVE ORDERS.

During an investigation by the OSC or during the pendency of any proceeding before the Board, including non-whistleblower 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). Enforcement of a protective order is governed by 5 U.S.C. § 1204(e)(1)(B)(ii).

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.

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 where the parties informally request information from each other to required cooperation where the Board orders compliance. 5 C.F.R. § 1201.73. Discovery requests to nonparties are limited to information that appears directly material to the issues involved in the appeal. *See* 5 C.F.R. § 1201.72(b). Whenever the opportunity arises, the AJ 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 of the proper course of action 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).

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. These questions must be answered in writing under oath or affirmation. Absent prior approval by the AJ, interrogatories served upon either a party or a nonparty "may not exceed 25 in number, including all discrete subparts." 5 C.F.R. § 1201.73(e)(1).

   Note: The Federal Rules of Civil Procedure do not allow for interrogatories to nonparties. AJs should be aware of this before they declare their intention to follow the Federal Rules. *See* Fed. R. Civ. P. 33.

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 judge, parties may not take more than 10 depositions." 5 C.F.R. § 1201.73(e)(2).

d. Request for Admissions. A request for admissions is a request that the other party admit, in writing, the truth of certain matters concerning the appeal. Such matters include "statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." 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 hearing notices to the parties as soon as possible so that the parties 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. An AJ may assist in negotiating the reasonableness of the request during the early stages of discovery, thereby preempting the need for formal discovery and orders to comply.

5. DISCOVERY REQUESTS.

a. Contents. All discovery requests must specify time limits for responding. 5 C.F.R. § 1201.73(a). For example, 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. Caveat: If the parties agree to postpone or to change the location of a deposition effected by a subpoena, another subpoena may have to be issued and served unless the AJ orders the change.

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 requests for discovery, responses to discovery requests, and/or objections during the voluntary discovery stage.

7. TIME LIMITS FOR DISCOVERY.

See generally 5 C.F.R. § 1201.73(d).

a. Initial Discovery Requests. Discovery requests must be initiated within 25 days after the date of issuance of the acknowledgment order.

b. Responses to Discovery Requests. A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the request's date of service.

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 made within 7 days after the date of service of the related response 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)(5). The AJ must ensure that due process requirements are met.

8. MOTIONS TO COMPEL.

When the recipient of a request fails or refuses to respond in full to a discovery request (by objections or lapse of time), 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, where no response has been received. 5 C.F.R. § 1201.73(d)(4).

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)(2)(i), (ii).

(2) The motion must explain the relevance and materiality of the information sought. 5 C.F.R. § 1201.73(c)(2)(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)(4). Processing problems could arise if the AJ waited for this 10-day period to elapse (plus 7 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 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. AJ'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). By the delegation of authority from the Board to the RDs, through ORO, an AJ 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.

b. The broad authorities an AJ has with respect to 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 where 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 pursuant to 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.

Board regulations provide for the suspension of a case for discovery. *See* Chapter 3, paragraph 13 for details.

CHAPTER 9 - PREHEARING AND STATUS CONFERENCES

I. 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.

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. To the extent necessary or appropriate, AJs may and should modify these standard orders to more precisely fit the cirumstances 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 Baord, on review, will see that the record shows that the appellant was fully informed of the burdens and standards of proof of the claim.

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. The parties must be put on notice 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 - where 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 summary of the prehearing or status conference 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 audio taping or video taping the conference and including the tape in the record or, prior to the commencement of the hearing, reading into the hearing record a summary of the prehearing or status conference. It has been the Board's position that 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 one of the parties may recall the occurrence of something that did not, in fact, happen, even when there were no rulings made or agreements reached it is preferred practice 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 does not accept 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 in the case where the prehearing conference is memorialized by audio taping 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 reaffirmed that it lacks authority to hear affirmative defenses under both USERRA and VEOA, despite some discussion of the applicability of Chapter 71 to those cases in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007). *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 alleged but 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.

   The Board has held that an appellant is entitled to have a Board decision on the merits of his discrimination claim in accordance with 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). Note that 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's right

includes entitlement 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). Moreover, where an appellant timely raises a claim of discrimination, the AJ must apprise him or her of the relevant burden and elements of proof. *See* *Clarke v. Office of Personnel Management*, 73 M.S.P.R. 435, 442 (1997).

The appellant also has the right to be heard on the affirmative defenses even where the agency cancelled the action after the appellant filed the appeal, unless the Board could not grant any additional relief. The Board has held that 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). However. the Board has not again addressed the issue since the decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 531 U.S. 1004 (2001), which precludes a fee award under the catalyst theory based on the cancellation of an appealed matter.

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 him or her 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* *Thomas v. Office of Personnel Management*, 47 M.S.P.R. 369 (1991); *Brown v. Department of the Air Force*, 67 M.S.P.R. 500, 508 (1995).

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 had the burden of proof in a retirement appeal, both OPM and the AJ have a special burden to assure that he or she is not disadvantaged, especially where pro se. This extends to requiring that where 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). Where 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.

The Board has clarified that certain affirmative defenses may be raised in some retirement appeals. In this regard, it has held that where OPM's decision involved an exercise of discretion, defenses such as discrimination can be raised, but that if OPM is bound by the law to make a specific determination, they may 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.

8. MOTIONS FOR ATTORNEY FEES, COMPENSATORY DAMAGES, 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 where the original AJ's conduct violated a party's right to due process, and a due process violation will be found only where the standard set by the Supreme Court has been met. *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 where the AJ conducted himself or herself inappropriately or is seen to favor one party or the other so that the appearance of partiality will 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. Pursuant to interim section 1207.170(b),

(a) When a party to a case pending before any of the Board's judges believes he or she has been subjected to discrimination on the basis of disability in the adjudication of the case, the party may raise the allegation in a pleading filed with the judge and served on all other parties in accordance with 5 CFR 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 judge 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 administrative judge's decision on the disability

discrimination claim must be filed in accordance with the requirements of 5 CFR 1201.114 and 1201.115.

The stated purpose of this procedure is to keep 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, it would appear that 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 petition for review. 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 in instances where parties or witnesses to a proceeding do not speak English is set forth in the Limited English Proficiency accessibility plan promulgated by the EEO Office, pursuant to Department of Justice policy guidance. If issues arise that cannot be handled efficiently in accordance with this paragraph, the RD or CAJ should contact ORO or the 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 both 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 where 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.

(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.

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.

4. BROADCAST OF HEARINGS.

a. 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.

Factors to consider include the following:

- Intimidation of timid or reluctant witnesses;
- "Grandstanding" or posturing for the media by participants, 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 interest 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.

b. 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.

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

(2) Admissibility. None of the film, videotape, still photographs, or audio reproductions developed during or by virtue of 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.

Board precedent for many years was that an appellant has a fundamental right to an in-person hearing on the merits if there is a genuine dispute as to any material fact, and that when the appellant has such a right, the AJ has 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 videoconference. 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 requests an in-person hearing, that request may 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,* DA-0752-03-0530-I-2 (June 28, 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 set forth its holding 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 videoconference 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 videoconference hearing over the appellant's objection in the absence of a showing of good cause, those cases are hereby overruled. [Footnote omitted.]

Id., ¶ 13.

Koehler was specific to a videoconference hearing, and the Board specified that "we need not, nor do we, extend this holding to telephone hearings. *Id.,* n.3. As stated above, the law as to telephone hearings up to *Koehler* has been as set forth in *McGrath* and *Evono.* Where, though, the material facts are not in dispute, the sole purpose of the hearing is to allow the parties to make oral arguments, so that telephone hearings satisfy an appellant's entitlement if the hearing may be appropriately managed without the physical presence of the AJ. 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, the Board has held that even where 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).

The extent to which such precedent continues to be valid in light of *Koehler* is undecided. Because the law as to videoconference hearings is now set, cases involving disputes of material fact should probably be heard by videoconference or in-person, but there appears to be no reason to believe that the rule allowing telephone hearings in cases involving no such disputes are no longer valid precedent.

If a telephone hearing is appropriate, the court reporter should usually be present with the AJ. The AJ also has the option of recording the hearing without the assistance of a court reporter. Videoconference hearings, too, are recorded on audio tape by a court reporter, who should usually be present with the AJ. The AJ also has the option of recording the hearing without the assistance of a court reporter.

7. HEARING PARTICIPANTS.

a. A Witness as Representative. Parties should be discouraged from assigning a prospective witness as the 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 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 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 is discussed in detail in Chapter 3, Section 5, of this handbook.

(2) Amicus Curiae. An amicus curiae is defined as any person or organization who, in the discretion of the administrative judge 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 his or her 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, in order to maintain security and the appearance of fairness, all parties, representatives, and witnesses should be subject to the same measures.

9. ORDER OF BUSINESS.

See generally 5 C.F.R. § 1201.57.

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. Where 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.

   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 discussions or rulings. *See* Chapter 9, Section 5, above.

11. CONTUMACIOUS CONDUCT OR MISBEHAVIOR.

The AJ may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious conduct or misbehavior that obstructs the hearing. 5 C.F.R. § 1201.31(d)(1).

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.

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 other 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, he or she shall document the reasons for the exclusion in the record. *See* 5 C.F.R. § 1201.31(d)(2). 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, 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 where 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. § 1201.31(d)(3).

12. WITNESSES.

a. Witness Instruction. Witnesses should be instructed to spell their full names on the record. The taping 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. 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)."

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* 5 C.F.R. § 1201.41(b)(7). 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 where the witness discusses testimony with a person who will later provide testimony in the same or a related proceeding.

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.

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 must make definite rulings on the admissibility of evidence as often as possible to avoid overly prolonging hearings for the receipt of 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.

b. 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.

c. Production of Evidence by Order of the AJ. An AJ has the authority to 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).

d. 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 administrative judge may exclude the evidence given in the Board proceeding. *See* 5 C.F.R. § 1201.62.

e. 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.

f. 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.

g. 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 he or she believes 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.). If a physical object is proffered and rejected by the AJ on evidential grounds, other than its suitability for inclusion in the record, it should be verbally described by the AJ 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. Where 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 has the discretion to retain exhibits where controversy is likely or where removal from the record may cause confusion.

15. WRITTEN SUBMISSIONS IN ADDITION TO HEARING.

a. Briefs and Written Arguments. At the conclusion of the hearing, 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 .58(a). Parties sometimes ask to review the transcript or tape of the hearing prior to the submission of 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 is 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 at the time 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. § 1201.58(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, where 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. FDIC, supra,* section 1c(3). After the initial decision is issued, requests for reopening may be granted only pursuant to the very limited purposes 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. TAPED 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 tapes are the official verbatim record and must be retained with the file notwithstanding receipt of a transcript. Upon receipt of the hearing tapes, the RO is responsible for ensuring that the recording prevention tabs have been removed from the audio tape cassettes.

a. Requests for Copies of Audio Tapes. This section applies whether the tape was produced by a court reporter or the MSPB. Upon request for copies of tapes, the regions have the options of (a) copying the tapes in-house, (b) having the court reporter copy them, or (c) sending them to OCB to be copied. Costs are determined and charged following this guideline:

(1) From a Party. MSPB can charge the party (a) what the court reporter charges, or (b) direct costs, up to $15.00 per tape, using the amount cited in the Board's FOIA/PA regulations. Note that, as a general practice, the Board does not bill agencies, and rarely bills appellants, because costs under $100.00 are waived. The Board can also waive costs for good reason (the AJ or Supervisory Paralegal usually decides). *See* 5 C.F.R. § 1201.53(c). The motion must be filed with the AJ if the appeal is still pending in the office, or with OCB if the ID has been issued, and must set out the factual allegations supporting it in an affidavit or statement made under penalty of perjury.

(2) From Anyone, Under FOIA. MSPB can charge the individual making the request (a) what the court reporter charges or (b) direct costs up to $15.00 per tape, using the amount cited in the Board's FOIA/PA regulations. The Board does require payment of costs over $100.00.

(3) Lowest Cost to All. It is a good policy to provide copies at the lowest cost to the requester, and to the regional office, 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 regional offices, local sources may save time and mailing costs. Moreover, directing anyone who wishes to have a tape, other than an appellant for whom fees will be waived, to the court reporter will save the resources of the office and of the Clerk and will accord with the General Requirements.

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. At the beginning of the hearing, the AJ must inform the parties of the procedure for requesting a copy of the hearing tape(s) and the requirement that the requesting party pay a fee for the reproduction.

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

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

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

(3) If the replacements are unacceptable, the AJ must notify the parties that the tapes 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, if appropriate.

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.

d. Recording of Proceedings by Individuals. At the discretion of the AJ, participants may be permitted to record the hearing. However, they must be advised that theirs is not an official record.

e. Correction of Hearing Tapes. Although the hearing tapes are the official verbatim record of the proceeding and the integrity of the tapes must be protected at all times, certain limited situations may arise where material may be erased from the hearing tapes. For example, detailed settlement discussions or material inadvertently recorded by the court reporter after the AJ indicated to go off the record may be erased from the hearing tapes. Any time the AJ has anything erased from the hearing tapes, the AJ should state on the record exactly what is being

deleted and why, and shall provide the parties an opportunity to object to the erasure.

f. Hearing Tapes 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, may request an official transcript of the hearing tapes. 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 approved a request from the AJ to have the audio tape(s) 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 audio tape(s). In any conflict between a hearing tape and the hearing transcript, the tape is authoritative.

b. Consideration of Partial Transcripts. There may be circumstances under which an AJ believes it is necessary to have a portion or all of the hearing tapes 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 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 AO. The AO will arrange with a contracted reporter for transcription of the tapes. Because the Board must maintain control over the cassette tapes, transcription will be done only by a court reporter who is subject to the Board's Requirements Agreement. Therefore, parties will not be given the option of using 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 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
**********, of the Merit Systems Protection Board
(Administrative Judge)
********** Region, in the matter of:
******** v. **********, MSPB Docket No. **********
were held on **********, as herein recorded, and
that this is (these are) the original monitored tape(s)
of that hearing."

Date_____
Name_____
(Tape Monitor)

d. Requests for Copies of Transcripts. Under the Requirements Agreement, MSPB is to receive a courtesy copy of a transcript if a party orders one, and in rare cases, the

MSPB orders its own transcript. Upon receiving a request for a copy of a transcript in a Board file, the regions have the options of (a) copying the transcripts in-house; (b) having the court reporter create a duplicate transcript; or (3) sending them to an outside photocopier or OCB to be copied. Costs are determined and charged following the guideline below.

(1) From a Party. MSPB can charge the party (a) what the court reporter charges; (b) $0.20 per page using the amount cited in the Board's FOIA/PA 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. As noted above in connection with copies of requests for hearing tapes, as a general practice, the Board does not bill agencies, and rarely bills appellants, because costs under $100.00 are waived. The Board may also waive costs for good reason (the AJ or Supervisory Paralegal usually decides).

(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/PA 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 FAMD guidelines. Finally in this regard, as stated above in connection with tapes, 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 the Office of the Clerk, and the 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 errors of substance 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 decision 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 the Clerk of his or her receipt and disposition of the motion.

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 initial decision becomes final under 5 C.F.R. § 1201.113.

3. DISMISSALS ON THE BASIS OF SETTLEMENT.

Before an appeal may be dismissed on the basis of a settlement (whether it is to be accepted into the record or not), 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. United States Postal Service,* 839 F.2d 664 (Fed. Cir. 1988); *O'Neal v. U.S. Postal Service*, 39 M.S.P.R. 645 (1989), *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).

A substantive jurisdictional finding is necessary to the Board's exercise of both its power to enforce and its authority to award attorney fees. *See Adkins v. U.S. Postal Service*, 92 M.S.P.R. 88 (2002); *Cimilluca v. Department of Defense*, 77 M.S.P.R. 256 (1998) (enforcement of a settlement.); *Auker v. Department of Defense*, 86 M.S.P.R. 468, 474 ¶ 15 (2000) (award of attorney fees). Although an earlier Board decision, *Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989), originally reached that result, some cases have held to the contrary over the years and are no longer good law. *See, e.g., Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997).

The date the initial decision becomes final is the last day that the AJ may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112 (a)(5).

5. AUTHORITY.

As just discussed, the Board cannot accept into the record settlement agreements for appeals over which the Board has no jurisdiction. Of course, this does not prevent the parties from settling the case and the appellant withdrawing the appeal without submitting the agreement to the Board. As to issues of timeliness, however, 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 before ruling on the issue of timeliness. *See McNamee v. Veterans Administration,* 39 M.S.P.R. 530 (1989).

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. *See Mahboob v. Department of the Navy,* 928 F.2d 1126 (Fed. Cir. 1991). If the agreement is taped, the AJ should record the agreement on a separate tape to facilitate future review if necessary. 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 SETTLEMENT.

The Board's regulations allow the suspension of a case for settlement discussions. *See* Chapter 3, paragraph 12 for details.

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. An exception to this rule is when the case has been erroneously docketed and has been deleted from the CMS.

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, he or she 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. The decision 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 now 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 discovery without the case growing older on the Board's docket.

d. Citation to Transcripts, Tapes, and/or the Record. The AJ must support his or her findings and conclusions with appropriate citations to the hearing tape(s). When an official transcript is available, the AJ may cite the transcript. If materials in the record are relied upon, the decision must cite them by tab number and, where 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 decision 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 decision 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 is 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. Where the AJ has informed the parties of a question as to the timliness 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).

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 analytical explanation of 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 in accordance with 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 any and 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)) raised by the appellant 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).

In an adverse action case, for example, the AJ must also 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). Book II, Appendix B, Code Table 8a, of the CMS Manual 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.

g. Finality Date. The AJ or the support person who closes out the case must assure that the ID's finality date is filled in. 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 Board has held that the failure to include a finality date may 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), it has also found the absence of the date, combined with other factors, to 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 may also be granted in retirement cases, but under more limited circumstances. *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.

j. Review Rights. Each ID must contain the appropriate standardized closing paragraphs. Mixed case review rights must be included in merits cases where discrimination or retaliation for EEO activity has been raised, even when the allegations of discrimination or retaliation for EEO activity are essentially unsupported. Mixed case review rights should not be included when claims of discrimination or retaliation for EEO activity are specifically withdrawn or abandoned or when the appeal is dismissed for lack of jurisdiction or timeliness.

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 Regional Director.

b. Erratum Notices. It is in the interest of judicial efficiency to have an easy mechanism for correcting simple errors in decisions. If any post-issuance review of an initial or addendum decision discloses to an AJ an easily correctable mistake, the AJ should issue an Erratum notice to correct the mistake. 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 the word “no”; 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. (These examples are not intended to be all inclusive.) Although Erratum notices will typically occur during the period shortly after the issuance of the initial decision and before the filing of a petition for review, an AJ's authority to issue an Erratum notice extends to such time as the Board loses control of the appeal.

If the AJ believes that the correction might be cause for the appellant to file a petition for review (e.g., a $50,000.00 back payment was corrected to read $50.00, or that a "no" made a significant outcome difference, etc.), then it should be brought to the appellant’s attention that the erratum might be good cause for a late PFR filing or amendment.

4. DISTRIBUTION OF IDs.

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). Office of Personnel Management

OPM's copy must be sent to:

Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

b. To MSPB Headquarters. The requirement for weekly submission of paper copies of IDs to OCB has been eliminated. In lieu of that procedure, AJs must now assure that the ID is placed on the DMS, or the appropriate office share of the LAN, so that it can be distributed electronically both within and outside of the Board. The prior requirement that certain IDs be mailed to OSC weekly is also eliminated in this way. All copies, to publishers, OSC, and interested others (with the exception of the parties) are electronically distributed by OCB.

c. Certification of Service. Each ID must be accompanied by the appropriate standardized certificate of service. If an MSPB Headquarters official is to be served with a copy of the ID for policy or review purposes, the official's name must not appear on the certificate of service.

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

5. BENCH DECISIONS.

a. The hearing order or another notice provided by the AJ will have put the parties on notice of the possibility of and the procedures for requesting a bench decision. The Board has held that where 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 sub-paragraphs covering Bench Decisions.

b. In addition, 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) Where the parties have stipulated to the basic facts and/or charges;

(ii) Where 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 dispute; 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's (performance cases).

(2) Communication of and Issuance Date of the Bench Decision. The bench decision will be communicated 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* paragraph (3)(c) below) from the court reporter. The AJ may make editorial changes to the decision before its issuance**,** and the revised transcript will then be part of the official record. The official date of the decision will be the date placed on the decision document before it is mailed, generally the date on which it is served on the parties by mail.

(3) Format and Content of Bench Decisions. MSPB bench decisions must comply with the requirements of the Board's initial decision 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 initial decision and including: a summary of issues; an explanation of reasons for AJ findings and conclusions, including interim relief, if applicable; and an indication of the finality date. The document will include a caption and parties list, which are standard for MSPB decisions.

(b) a complete statement of standard appeal rights tailored to the decision;

(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. Where desirable (e.g., the decision is very brief), the AJ has the option of documenting the decision language directly in the written document in lieu of attaching a partial transcript.

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

(4) Quality Review of Bench Decisions. Bench decision pre- and post-issuance review criteria are the same as for other types of decisions. Each region/field office Chief Administrative Judge 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) LAN Decision Copy. Bench decisions will have some form of documentation (*see* (3)(c) above) that transmits the decision and/or transcript. This documentation should be placed on the LAN with other decisions.

6. RULES OF CITATION.

An AJ must follow the "Blue Book" rules of citation, except that it is Board practice to cite to those Board decisions that contain paragraph numbers by including those numbers in addition to specific page(s) on which they appear. Board policy is that short-form orders, IDs, and unpublished court opinions are not precedential. 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 should not be cited as authority in an ID. In addition, an AJ may not cite as controlling cases where a majority of the Board does not vote to adopt the analysis of an O&O. These cases are identified by an explanatory footnote.

AJs should note that a modified O&O (i.e., a decision entitled an O&O but that does fully addresses only one or some of the issues raised and summarily denies the PfR as to the rest) is precedential to the extent that it addresses legal issues.

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 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 MSPB decisions than to appellants. This is because appellants waive some of their interest in privacy by appealing to the MSPB. Appellants' identities should also be sanitized, however, in cases where disclosure of 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 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 whose 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 similar to the analysis utilized 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 where appropriate.

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"). 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).

   Representation by a non-attorney 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 a judge 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). Where an initial decision in the proceeding on the merits was issued by a judge in an MSPB regional or field office, a request for attorney fees must be filed with the regional or field office that issued the decision. Where 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 the Clerk of the Board. *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. The Board early on established the law with respect to prevailing party, interest of justice, and reasonableness, and little of that has changed with respect to appeals under section 7701, where attorney fees may be awarded under subsection 7701(g)(1). However, with respect to 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 in a USERRA appeal. Rather, it is USERRA itself, which provides 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,* No. 2007-3006 (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, neither the Board nor the court has indicated that the rule would differ under another provision of USERRA or with respect to a different section 4311(a) appeal. Neither the Board nor the court has issued any precedential attorney fees cases under VEOA.

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, where the appellant is the prevailing party by virtue of a finding of discrimination or reprisal in violation of 5 U.S.C. 2302(b)(21), the entirety of the substantive law developed under subsection (g)(1) also does not apply.

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. Where 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 (1994); *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, where the parties have settled the case. In such an appeal, 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).

Similarly, the Board has ruled that an appellant is the prevailing party on petition for enforcement even if the agency eventually complies, based on "the Board's oversight of the parties' compliance efforts." 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." *Mynard v. Office of Personnel Management*, DA-0831-06-0436-A-1, 2008 MSPB 23 (Jan. 31, 2008). In dissent, Chairman McPhie would have held that a prevailing party finding is still required, which can be met by a showing that the relief received was causally related to the filing of the PfE.

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.

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 those 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 give the appellant notice of his or her 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).

4. COMPLIANCE.

See 5 C.F.R. §§ 1201.181-.183.

a. Petition for Enforcement. Any party to an appeal may file a PFE of a final decision by filing the petition with the RO that issued the ID. *See* 5 C.F.R. § 1201.182(a). In addition, an employee who is not a party but is aggrieved by the failure of any other employee 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 set forth specific 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 a PFE has been filed.

b. Time Limits for Filing. The petition must be filed promptly with the RO 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). The Board has held, though, that the determination of timeliness differs where the issue is compliance with a settlement rather than with a Board-ordered determination. There, 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. Either the CAJ or an AJ may adjudicate a PFE.

b. Hearing. Although discovery and a hearing are not required, they remain within the AJ's discretion to grant. A hearing is highly recommended in cases involving issues of credibility. Similarly, there is no right to discovery, but granting it is a matter within the AJ's broad discretion . *Vidal v. U.S. Postal Service*, 84 M.S.P.R. 395 (1999).

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

d. Initial Decision Finding Compliance. Where 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. Recommendation Finding Full or Partial Noncompliance. If the AJ finds that the agency has not made a good faith effort to comply in whole or in part, the AJ must issue a Recommendation, not a decision. The Recommendation must include a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final decision. *See* 5 C.F.R. § 1201.183(a)(5). The Recommendation must also advise the parties that proof of compliance or a brief supporting the noncomplying party's nonconcurrence with the Recommendation must be filed with OCB in accordance with 5 C.F.R. § 1201.183(a)(6). The file, along with all other files related to the appeal, must be forwarded to OGC within 3 workdays of the date the Recommendation is issued.

6. CONSEQUENTIAL AND COMPENSATORY DAMAGES.

See 5 C.F.R. §§ 1201.201-.202; 1201.204-.205. Although in *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), the court held that EEOC lacked authority to award compensatory damages, the Board specifically rejected *Gibson* in its decision in *Crosby v. U.S. Postal Service*, 78 M.S.P.R. 263 (1998), based on its limited authority to disagree with EEOC under the statute. Moreover, the Supreme Court later reversed the 7th Circuit's decision, *sub nom. West v. Gibson*, 527 U.S. 212 (1999). Since that time, there has been no question about the Board's authority to award compensatory damages.

a. Time for Making Request. A request 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 where a request is made for the first time on petition for review 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. The judge or the Board may consider the request during the proceeding on the merits 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, or defer a decision on the request for an addendum proceeding. *See* 5 C.F.R. § 1201.204(d), (h)(1).

7. PROCESSING REQUESTS FOR CONSEQUENTIAL AND COMPENSATORY DAMAGES.

a. Addendum Proceedings. If the AJ defers a decision on a request for consequential or compensatory damages for an addendum proceeding as described above in paragraph 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.

b. Hearing. The AJ may hold a hearing on a request for consequential 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 issued several decisions concerning compensatory and consequential damages that define the limits of its authority with respect to requests for such damages. Among those that address 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 petition for enforcement 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). With respect to 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); *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).

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 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."

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 Office of General Counsel 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 where 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 the Clerk of the Board, 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 as may be appropriate under the circumstances.

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 HEAROPM.

5. DUE PROCESS GUARANTEE AT THE AGENCY LEVEL.

There is a body of case law 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). In accordance with these decisions, the Board or the court may find that a due process denial resulted from an ex parte comunication on the merits that was not reflected in the charges under certain circumstances. Such case law, however, is not directly aplicable 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 yet addressed the extent to which the court's decisions may be applicable by analogy.

CHAPTER 15 - WHISTLEBLOWER APPEALS

1. GENERAL.

A whistleblower appeal involves a claim 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.

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 damages arising from these appeals. *See* 5 C.F.R. § 1209.3.

2. OAA APPEALS.

See 5 C.F.R. § 1209.2(b)(2). These are appeals 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). 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 treat the appeal as an OAA for purposes of determining the Board's scope of review. *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993).

3. 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. ELECTIONS.

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, a grievance, or a complaint to OSC. *See Thurman v. Department of Defense*, 77 M.S.P.R. 598 (1998). Filing of a complaint with OSC, of course, if it is the first avenue of redress elected, will allow the appellant to 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. Justice*, 91 M.S.P.R. 210, 213 ¶ 8 (2002) (an appellant who previously appealed a matter to the Board without raising a defense of whistleblower retaliation (here, the appellant's removal) 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); *Feiertag v. Department of the Army*, 80 M.S.P.R. 264, 266, ¶ 4 (1998) (by electing to grieve a suspension using the negotiated grievance procedure under the applicable collective bargaining agreement, the appellant was precluded from pursuing an IRA appeal).

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 those 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 the same as those for an IRA. *See* 5 C.F.R. § 1209.5(b); *Massimino, supra*. The time limits for filing an IRA appeal depend on the action taken by OSC. *See* 5 C.F.R. § 1209.5(a). The right to file an IRA 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).

a. Termination of OSC Investigation. If OSC notifies the appellant that its investigation has been terminated, the appellant must file the appeal with the Board within 60 days of receiving that notification. 5 U.S.C. § 1214(a)(3)(A). The Board's regulation provides a 65-day time limit from the date of issuance of OSC's notification. *See* 5 C.F.R. § 1209.5(a)(1). The Board lacks the authority to 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). In addition, the filing deadline for IRAs 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. Expiration of 120 Days. If the appellant has not received notification 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). After the expiration of the 120-day period, there is no limit to the time in which an appellant must file with the Board while the investigation is pending with OSC. When the OSC investigation concludes, the time limits in paragraph 5(a) of this chapter apply.

6. JURISDICTION vs. MERITS.

An employee must occupy a covered position in a covered agency to bring a claim under the WPA. For example, the Board has held that the USPS 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). Moreover, an appellant's complaint to OSC must raise "with reasonable clarity and precision the basis for his request for corrective action." *See Ellison v. Merit Systems Protection Board,* 7 F.3d 1031 (Fed. Cir. 1993). When the appeal is brought to the Board, because the Board cannot address the merits unless it has jurisdiction over the matter appealed, the AJ may not generally assume jurisdiction in order to resolve the case on a merits basis. *See Schmittling v. Department of the Army*, 219 F.3d 1332 (Fed. Cir. 2000). However, if it is clear that the Board has jurisdiction over the appeal, the Federal Circuit will not remand the case as a prerequisite to making its own decision on the merits. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001).

Until recently, the Board had applied the test for jurisdiction over an IRA appeal that it had developed in *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994). The Federal Circuit had applied a different test, however, and the Board has now adopted it. See Yunus, supra; *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002). Accordingly, the now-established test is that the Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes non-frivolous allegations that: (1) He or she 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 a personnel action. Yunus, 242 F.3d at 1371. Thus, as stated in Yunus and reiterated several times since, see, e.g., Dick v. Department of Veterans Affairs, 290 F.3d 1356, 1361 (Fed. Cir. 2002), Board jurisdiction is established by making non-frivolous allegations of jurisdiction, supported by affidavits or other evidence. An evidentiary hearing

into the issue of jurisdiction is unnecessary because whether allegations are non-frivolous is determined by the written record. Id.

As a result, any additional inquiries beyond the two identified in Yunus are on the merits; indeed, the same two issues become merits determinations, but the quantum of proof then required is greater. Thus, any hearing into them must be deemed one on the merits. If the appellant met the non-frivolous allegation burden, it would appear that the rule of *Barton v. Department of Justice*, 985 F.2d 547 (Fed. Cir. 1993), would remain valid (a determination that the documents considered do not contain protected disclosures is a determination that the appeal failed to state a claim upon which relief could be granted). As the Board noted in *Rusin*, 92 M.S.P.R. 298, ¶ 10 and n.2, because the causal connection between the alleged whistleblowing and the personnel action is a merits element, the Board no longer has to consider "merits" claims where the alleged retaliatory personnel action occurred before the disclosure. The appellant's burden at that hearing, then, is to prove the elements, i.e., the facts supporting the nonfrivolous allegations, by preponderant evidence. See, e.g., Langer v. Department of the Treasury, 265 F.3d 1259, 1265 (Fed. Cir. 2001). Moreover, while case law such as Schmittling, supra, does not allow a decision to ignore the issue of jurisdiction and decide the appeal in favor of the agency on the basis that it met its clear and convincing evidence burden of proof, because case law previously allowing it has not been overruled, it would appear to remain acceptable practice to find jurisdiction on the basis of the appellant's nonfrivolous allegations, and then skip over the appellant's burden on the merits to decide that the agency satisfied its burden. See, e.g., Dick v. Department of Veterans Affairs, 290 F.3d at 1364 ("in a case arising under the WPA where the government employee makes non-frivolous allegations that he was terminated in retaliation for making protected disclosures, an administrative judge could properly hold an initial hearing limited to the question of whether the employee would have been properly terminated absent the disclosures").

7. ANALYSIS.

The Board has held that there are three steps in a complete analysis of an employee's whistleblower defense to an adverse personnel action: First, is the employee's disclosure a protected whistleblowing activity under 5 U.S.C. § 2302(b)(8)? Second, was the disclosure a contributing factor in the personnel action? Third, can the agency prove by clear and convincing evidence that it would have taken the same personnel action absent the disclosure? *See Sanders v. Department of the Army*, 64 M.S.P.R. 136 (1994), *aff'd*, 50 F.3d 22 (Fed. Cir. 1995) (Table). Again, assuming that the *Yunus* test for jurisdiction has been met, nothing in *Yunus* or *Rusin* questions that mode of analysis.

The administrative judge should decide on the basis of all the evidence whether the appellant proved Steps 1 and 2 by a preponderance of the evidence and whether the agency proved Step 3 by clear and convincing evidence -- it is the overall burden of persuasion each side must carry with regard to its separate issue that is the subject of the different standards of proof, not the weight of any specific factual evidence placed upon the scale. An employee may demonstrate that a disclosure was a contributing factor in a personnel action 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. *See Scott v. Department of Justice,* 69 M.S.P.R. 211 (1995), *aff'd,* 99 F.3d 1160 (Fed. Cir. 1996) (Table). To determine whether the agency met its burden of proof by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity, the Board considers the strength of the evidence in support of the personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not

whistleblowers, but who are otherwise similarly situated. *See Caddell v. Department of Justice*, 66 M.S.P.R. 347 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996). The rule in *Schmittling, supra*, requiring the AJ to address the issues in specific order, does not apply once jurisdiction is established. Therefore, if the evidence shows that the agency met its burden of proof, the AJ may address that issue in lieu of discussing the appellant's burden. *See Yunus*, 242 F.3d at 1372; *Dick*, 290 F.3d at 1364.

8. REFERRAL TO 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." Therefore, when, in an IRA appeal, an AJ makes a finding of retaliation for whistleblowing, the HotDocs optional paragraph that informs the parties of the referral should be added to the initial decision. The referral itself will only be made if the initial decision becomes final, so that the case must be calendared for further action in the absence of a petition for review. If a petition is filed, and the Board agrees with the AJ's finding, it will send the appropriate notice to OSC, but in the absence of a petition, the AJ must assure that referral is made, and should do so by using the HotDocs OD/8 referral letter.

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 CSRA 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 3 of this Handbook.

10. CONSEQUENTIAL 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), where 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, however, 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.

Consequential damages represent an award that the appellant might be entitled to, if he meets the requirements of the statute, and for this reason, the cancellation of the appealed action does not moot an IRA appeal or the appeal of an otherwise appealable action that includes a whistleblower claim, if the appellant has requested consequential damages or has not yet been informed of his right to do so. 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." He 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 otherwise appealable action case that does not have the WPA claim.

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). There, the Board held that 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. 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.

CHAPTER 16 - STAY REQUESTS

1. GENERAL.

Stay requests may be granted only when raised in connection with a whistleblower appeal, either an IRA or an OAA. *See* 5 C.F.R. §§ 1209.8-.11. 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 the appellant becomes 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). MSPB 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 U.S.C. § 1221(c)(2); 5 C.F.R. § 1209.10(b). In instances where a sufficient analysis cannot be completed within 10 days it may be appropriate for the AJ to issue adecision in the manner of a bench ruling, followed 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. Since the requirement to rule within 10 days is statutory, that limit should not be exceeded; 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 the stay request on the agency as the regulations require. *See* 5 C.F.R. § 1209.8(c). Depending on the circumstances of the case, 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 that he or she will prevail on the merits of the claim that reprisal for a disclosure under 5 U.S.C. § 2302(b)(8) 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). 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 22. 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 action 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 petition for review. *See Weber v. Department of the Army*, 47 M.S.P.R. 130 (1991). 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.

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, 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, 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 Freedom of Information Act (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. As a complementary matter, the parties should also be made aware that because of the privacy protections available under Board regulations, including 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 (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.

(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.

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 labelled, 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."

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. MSPB Order 1550.2 (September 7, 1994) sets forth Board 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 to an appeal attempts to introduce classified information into the record, the AJ must immediately make a ruling on its admissibility. If the AJ cannot make a determination as to 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.

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 MSPB decisions than to appellants. This is because appellants waive some of their interest in privacy by appealing to the MSPB. Appellants' identities should also be sanitized, however, in cases where disclosure of 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 whose 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 whose 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 utilized 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 where appropriate.

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

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, and in the MSPB Records Manual chapter entitled "How to Process Requests for Records." With respect to appellant requests, *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 field office. 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.

CHAPTER 18 - USERRA AND VEOA APPEALS

1. THE STATUTES.

a. USERRA. The most commonly brought claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4333 (1994 & Supp. II 1996)) (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 the Veterans Employment Opportunities Act of 1998 (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 with respect 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.

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, re-employment, 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 non-frivolous 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 non-frivolous. *Perkins v. U.S. Postal Service*, 85 M.S.P.R. 545 (2000). 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." 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 non-frivolous 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.

(3) 38 U.S.C. §§ 4312-4318 grant certain re-employment rights after uniformed service. A person who claims that the agency failed to meet its re-employment 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 re-employment 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.

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,* No. 2006-3388 (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, slip op. at 2.

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 non-frivolous 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, 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. 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 with respect to 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 non-frivolous 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 Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104 (2007); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223 (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 Fed. Appx. 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 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 where 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. Thus, the appellant may not file a Board appeal prior to 61 days after filing with the Secretary of Labor in cases where the Secretary has not given earlier notification that the complaint was not resolved. The appellant must file with the appeal proof of notification to the Secretary, in writing, of his or her intention to bring the appeal to the Board. If the appellant has received notice from the Secretary, the appeal must be filed within 15 days from receipt. The Board originally held that the time limit for filing an appeal to the Board under VEOA may not be waived for good cause shown; that it cannot consider a VEOA appeal where 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 v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007), 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. Note, though, that the Solicitor General filed a petition for *certiorari* seeking review of the Federal Circuit's holding that the 15-day time limit for filing a VEOA appeal is subject to equitable tolling, but is not challenging the other holdings in the case. No decision has yet been announced on the petition. At least until there is a decision on the petition, AJs should apply the rule announced in *Kirkendall*.

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, and the AJ cannot rely on 5 C.F.R. § 1208.13(b), which stated the pre-*Kirkendall* rule.

b. VEOA: The rule differs with respect 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. 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. The AJ may also order a hearing on jurisdiction and timeliness. Therefore, if the appellant requests a hearing, where there are significant factual issues that must be resolved, where 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 where there are likely to be issues of credibility to resolve in deciding the merits issue, 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 where the only VEOA issues to be resolved are legal matters. *See Sherwood*, 88 M.S.P.R. 208, ¶ 11. If there is no hearing in an appeal where any of those factors may apply, the AJ should document the record with the reasons why he or she believes that a 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 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. At that point, 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 Corp.*, 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 re-employment 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. The Board has not directly addressed the burden of proof issues, beyond the rulings noted above in section 2b, with respect to VEOA appeals. It has stated, however, in the context of a VEOA appeal where 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 violation of 5 U.S.C. § 2302(b)(11), the appellant would have had to establish 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). The Board also noted there that section 2302(b)(11) 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*, with respect 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 re-employed after her military service ended. However, in Pittman v. Department of Justice, 486 F.3d 1276 (Fed. Cir. 2007), the court 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).

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 where the appellant was pursuing both a VEOA appeal claiming that his veterans' preference rights were violated when the agency separated him in order 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 at the same time. 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 Merit Systems Protection Board has several statutory functions dealing with the protection of the Federal personnel service, or Merit System, the Board's role as adjudicator of Federal employee appeals relating to job actions taken against those employees is very important. 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. 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 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 administrative judge 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. Administrative judges 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 administrative judge 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.

There are circumstances that may require us to close a hearing, although the vast majority of Board hearings are open to the public and press. Circumstances in which we would be forced to close a hearing include the following non-comprehensive list:

a. When either party presents convincing arguments for closing a hearing with which the administrative judge 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 parties, and between counsel and the administrative judge held at the bench.

2. Impermissible Use. Generally, none of the film, video tape, still photographs, or audio reproductions developed during or by virtue of coverage of a Board proceeding shall be admissible as evidence in that or any subsequent Board proceeding.

3. Equipment and Personnel. The administrative judge 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 administrative judge. Pooling arrangements are the sole responsibility of the media. The administrative judge 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 administrative judge that their equipment meets these sound and light criteria.

5. Location and Movement. The administrative judge 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 administrative judge.

6. Review of an Order Excluding Coverage. Review of an administrative judge'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, the Board's Public Affairs Officer may be reached at (202) 653- 6772, extension 1171. 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 must be made to the attention of the FOIA Officer, Office of the Clerk, 1615 M Street, N.W., Washington D.C. 20419.

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 the Administrative Judge has ruled on the objection. Please answer the questions orally 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 observe the remainder of the hearing as a member of the public.

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