

Merit Systems Protection Board Regulations

Part 1201—Practices and Procedures

Subpart E—Procedures for Cases Involving Allegations of Discrimination

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§ 1201.151 Scope and policy.

(a) *Scope.* (1) The rules in this subpart implement 5 U.S.C. 7702. They apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.

(2) "Prohibited discrimination," as that term is used in this subpart, means discrimination prohibited by:

- (i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(a));
- (ii) Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);

(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a); or

(v) Any rule, regulation, or policy directive prescribed under any provision of law described in paragraphs (a)(2) (i) through (iv) of this section.

(b) *Policy.* The Board's policy is to adjudicate impartially, thoroughly, and fairly all issues raised under this subpart.

§ 1201.152 Compliance with subpart B procedures.

Unless this subpart expressly provides otherwise, all actions involving allegations of prohibited discrimination must comply with the regulations that are included in subpart B of this part.

§ 1201.153 Contents of appeal.

(a) *Contents.* An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions:

- (1) The appeal must state that there was discrimination in connection with the matter appealed, and it must state specifically how the agency discriminated against the appellant; and
- (2) The appeal must state whether the appellant has filed a grievance under a negotiated grievance procedure or a formal discrimination complaint with any agency regarding the matter being appealed to the Board. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

(b) *Use of Board form or Internet filing option.* An appellant may comply with paragraph (a) of this section by completing MSPB Form 185, or by

completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>).

§ 1201.154 Time for filing appeal.

For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3) of this part. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

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

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days. Once the agency resolves the matter or issues a final decision on the formal complaint, an appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

1201.155 Requests for review of arbitrators' decisions.

(a) *Source and applicability.* (1) Under paragraph (d) of 5 U.S.C. 7121, an employee who believes he or she has been subjected to discrimination within the meaning of 5 U.S.C. 2302(b)(1), and who may raise the matter under either a statutory procedure such as 5 U.S.C. 7701 or under a negotiated grievance procedure, must make an election between the two procedures. The election of the negotiated grievance procedure "in no manner prejudices" the employee's right to request Board review of the final decision pursuant to 5 U.S.C. 7702. Subsection (a)(1) of section 7702 provides that, "[n]otwithstanding any other provision of law," when an employee who has been subjected to an action that is appealable to the Board and who alleges that the action was the result of discrimination within the meaning of 5 U.S.C. 2302(b)(1), the Board will decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701.

(2) This section does not apply to employees of the Postal Service or to other employees excluded from the coverage of the Federal labor management laws at chapter 71 of title 5, United States Code.

(b) *When filed.* The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that he or she received the decision more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision.

(c) *Scope of Board Review.* If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. If the negotiated grievance procedure does not permit allegations of discrimination to be raised, the appellant may raise such claims before the Board.

(d) *Contents.* The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

- (3) Arguments in support of the stated grounds that refer specifically to relevant documents and that include relevant citations of authority; and
- (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or recording of the hearing.

(e) *Development of the Record.* The Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing.

(f) *Closing of the Record.* The record will close upon expiration of the period for filing the response to the request for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

§ 1201.156 Time for processing appeals involving allegations of discrimination.

(a) *Issue raised in appeal.* When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) *Issue not raised in appeal.* When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) *Discrimination issue remanded to agency.* When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

§ 1201.157 Notice of right to judicial review.

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's

decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in § 1201.120 of this part.

Review of Board Decision

§ 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.

(a) *Time limit for determination.* In cases in which an appellant petitions the Equal Employment Opportunity Commission (Commission) for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of the petition, whether it will consider the decision.

(b) *Judicial review.* The Board's decision will become judicially reviewable on:

- (1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or
- (2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) *Commission processing and time limits.* If the Commission decides to consider the decision of the Board, within 60 days after making its decision it will complete its consideration and either:

- (1) Concur in the decision of the Board; or
- (2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:
 - (i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or
 - (ii) The evidence in the record as a whole does not support the decision involving that provision.

(d) *Transmittal of record.* The Board will transmit a copy of its record to the Commission upon request.

(e) *Development of additional evidence.* When asked by the Commission to do so, the Board or a judge will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if necessary in order to comply with the Commission's request.

(f) *Commission concurrence in Board decision.* If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the appellant may file suit in an appropriate United States district court.

§ 1201.162 Board action on the Commission decision; judicial review.

(a) *Board decision.* Within 30 days after receipt of a decision of the Commission issued under 1201.161(c)(2), the Board shall consider the decision and:

- (1) Concur and adopt in whole the decision of the Commission; or
- (2) To the extent that the Board finds that, as a matter of law:
 - (i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive, or
 - (ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) *Judicial review.* If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

Special Panel

§ 1201.171 Referral of case to Special Panel.

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5

days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:

- (a) The factual record compiled under this section, which will include a transcript of any hearing;
- (b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and
- (c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

§ 1201.172 Organization of Special Panel; designation of members.

- (a) A Special Panel is composed of:
 - (1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;
 - (2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;
 - (3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.
- (b) *Designation of Special Panel members—*(1) *Time of designation.* Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.
 - (2) *Manner of designation.* Letters designating the Panel members will be served on the Chairman of the Panel and on the parties to the appeal.

§ 1201.173 Practices and procedures of Special Panel.

- (a) *Scope.* The rules in this subpart apply to proceedings before a Special Panel.
- (b) *Suspension of rules.* Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.

(c) *Time limit for proceedings.* In accordance with 5 U.S.C. 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to the Special Panel.*

(1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.

(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.

(e) *Maintaining the official record.* The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.

(h) *Oral argument.* The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) *Postargument submission.* Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

(k) *Electronic filing.* Pleadings in matters before the Special Panel may not be filed or served in electronic form.

§ 1201.174 Enforcing the Special Panel decision.

The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in subpart F of this part.

§ 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.

(a) *Place and type of review.* The appropriate United States district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. 7702. Those cases include appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of

the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

(b) *Time for filing request.* Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.