



**Questions and Answers About
Whistleblower Appeals**

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U.S. MERIT SYSTEMS PROTECTION BOARD

Questions and Answers About Whistleblower Appeals

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Introduction

Whistleblowing means disclosing information that you reasonably believe is evidence of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

On July 9, 1989, the Whistleblower Protection Act of 1989 (Public Law 101-12) became effective. Congress enacted this law to strengthen protections for Federal employees, former employees, and applicants for employment who claim that they have been subjected to personnel actions because they made whistleblowing disclosures. The 103rd Congress further expanded whistleblower protections by enacting Public Law 103-424, which became effective October 29, 1994, making additional personnel actions subject to coverage and extending whistleblower protections to employees of Government corporations and to employees in the Veterans Health Administration.

The Board's regulations governing appeals generally are contained in Title 5 of the Code of Federal Regulations, Chapter II, Part 1201. Additional regulations that apply only to whistleblower appeals are contained in Part 1209. Because the Part 1209 regulations contain only the special provisions applying to whistleblower appeals, they must be used in conjunction with Part 1201.

This publication covers the unique provisions of the law and the Board's regulations that apply to whistleblower appeals. *The discussion of whistleblower appeals in this publication is not all-inclusive, nor is the information regulatory in nature.* Such appeals are governed by the pertinent statutes, regulations, and case law.

Further information about filing whistleblower claims, an appeal form to complete when filing an initial appeal, and the Board's regulations covering whistleblower claims are available on the MSPB website (www.mspb.gov). You can send email to the Board at mspb@mspb.gov.

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You may not file an appeal by email. To file an appeal electronically, go to U.S. MSPB e-Appeal Online. (<https://e-appeal.mspb.gov/>)

Information on procedures that apply to all appeals to the Board is contained in a separate MSPB publication entitled [Questions & Answers About Appeals](#), which is available on the MSPB website or at any MSPB office.

Please see [MSPB at Your Fingertips](#) at the end of this publication to find out how to locate Board decisions, case summaries, press releases, addresses of MSPB regional and field offices, and other information about the Board.

Whistleblowing and Whistleblower Appeal Rights

It is a prohibited personnel practice for an agency to take, threaten to take, propose, or not take a personnel action because of whistleblowing activities. You are protected if you make such a disclosure to the Special Counsel, the Inspector General of an agency, or another employee designated by an agency head to receive such disclosures. You are also protected if you make such a disclosure to any other individual or organization (e.g., a congressional committee or the media), provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs.

The Office of Special Counsel has jurisdiction over prohibited personnel practice complaints with respect to a broad range of personnel actions, including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. A whistleblower may file a complaint with the Special Counsel with respect to most personnel actions allegedly based on whistleblowing. Prior to the Whistleblower Protection Act, if a whistleblower filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board, no further recourse was available, unless the action was directly appealable to the Board.

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Even before the passage of the Whistleblower Protection Act, a federal employee who was subjected to a personnel action that is directly appealable to the Board could assert, as an affirmative defense, that the action was taken in reprisal for engaging in whistleblowing. That has not changed. Personnel actions that are directly appealable to the Board include adverse actions (removals, suspensions that exceed 14 days, reductions in grade or pay, and furloughs for 30 days or less), performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force actions, and denials of restoration or reemployment rights. The WPA provided additional protection to whistleblowers by adding the right to file an individual right of action (IRA) appeal with the Board if an agency has retaliated against the whistleblower by taking, threatening to take, proposing, or not taking any of several other types of personnel actions that are not directly appealable to the Board:

- (1) an appointment;
- (2) a promotion;
- (3) other disciplinary or corrective action that does not rise to the level of an adverse action;
- (4) a detail, transfer, or reassignment;
- (5) a reinstatement;
- (6) a restoration;
- (7) a reemployment;
- (8) a performance evaluation under Chapter 43 of Title 5, United States Code;
- (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;
- (10) a decision to order psychiatric testing or examination; or

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- (11) any other significant change in duties, responsibilities, or working conditions.

Before an employee or applicant for employment can file an IRA appeal with respect to a personnel action that is not directly appealable to the Board, he or she must first seek corrective action from the Office of Special Counsel.

Two Kinds of Whistleblower Appeals

There are two kinds of whistleblower appeals. The principal difference between the two is in the way they reach the Board.

Otherwise Appealable Action: In the first kind of case, the individual is subject to a personnel action that is directly appealable to the Board, and the individual claims that the action was taken because of whistleblowing. This kind of case is referred to by the Board as an "otherwise appealable action," and the individual may file an appeal directly with the Board after the action has been taken.

Individual Right of Action: The second kind of case was created by the Whistleblower Protection Act and is referred to as an "Individual Right of Action." In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of whistleblowing, but the action is not one that is directly appealable to the Board. In this kind of case, the individual can appeal to the Board only if he files a complaint with the Special Counsel first and the Special Counsel does not seek corrective action on the individual's behalf.

An individual who is subject to a personnel action that is directly appealable to the Board and who claims that the action was taken because of whistleblowing, may choose to file a complaint with the Special Counsel rather than appeal to the Board. If the Special Counsel does not seek corrective action on his behalf, the individual may then appeal to the Board. While this is considered an "otherwise appealable action," the time limits for filing are the same as for an "individual right of action."

Questions and Answers

1. What must I do before I can file an individual right of action appeal with the MSPB?

Before you can file an *individual right of action appeal* with the MSPB, you must first seek corrective action with the Office of Special Counsel (OSC), as required by 5 U.S.C. § 1214(a)(3). This is done by filing a complaint with OSC. OSC's Complaint Form and further information about their procedures are available at the OSC website (<http://www.OSC.gov>). For time limits on filing an appeal with the MSPB after seek corrective action from OSC see Question 4 below.

In an otherwise appealable action, you have the option of first seeking corrective action with the Special Counsel as described above, or you can file an appeal with the Board without first seeking corrective action from OSC.

2. How and when do I seek correction action from the Office of the Special Counsel.

An employee or applicant for employment seeks corrective action from OSC by filing a complaint of a prohibited personnel practice, including retaliation for whistleblowing, by completing Form OSC-11 (Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity). OSC requires that this form be used. For more information, visit OSC's website: <http://www.osc.gov/>. There is no specific time limit for filing a complaint with OSC.

3. Who may file whistleblower appeals with the Board?

A Federal employee's right to file an individual right of action appeal with the Board is determined by whether he or she occupies a "covered position" under the "Prohibited Personnel Practices" statute (Title 5 of the United States Code, section 2302) to file a complaint with the Special Counsel alleging that a personnel action was taken because of whistleblowing. Covered employees include:

- Competitive service employees;
- Most excepted service employees in Executive agencies;

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- Employees of Government corporations;
- Employees of the Government Printing Office; and
- Former employees of and applicants for employment with covered agencies.

Employees specifically *excluded* from coverage are those in the General Accountability Office, the FBI, and various intelligence agencies. *A covered employee who files a whistleblower complaint with the Special Counsel becomes eligible to file an individual right of action appeal with the Board only if the Special Counsel does not seek corrective action on his or her behalf or 120 days pass after the complaint was received by the Special Counsel.*

In the case of an *otherwise appealable* action, any employee eligible to appeal the particular action can appeal directly to the Board. The regulations applying to the particular action being appealed govern who may appeal that action. In general, competitive service and preference-eligible employees (e.g., veterans with a service-connected disability) have Board appeal rights with respect to most appealable actions. Most excepted service employees may appeal adverse actions and performance-based actions. Former employees and applicants for employment can appeal some actions.

If there is any question as to whether you come under the jurisdiction of the Special Counsel with respect to complaints of personnel actions allegedly based on whistleblowing, or under the Board's jurisdiction with respect to actions that may be appealed directly to the Board, you should file your complaint or appeal with the Board in order to preserve your appeal rights.

4. How do I file a whistleblower appeal with the Board?

You must file your timely appeal in writing with the Board's regional or field office serving the area where your duty station was located when the action was taken. This requirement applies to all whistleblower appeals, both otherwise appealable actions and individual right of action appeals.

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Your appeal must contain the following:

- All of the information required by the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1201, for other types of appeals, including the signature of the appellant or the appellant's representative. and a certificate of service stating how and when a copy of the appeal was served on the agency.
- A description of the whistleblowing disclosure and a chronology of facts concerning the personnel action--including the name and position of the person(s) taking the action.
- An explanation as to why you believe the personnel action is in reprisal for whistleblowing and any supporting evidence you have.
- In the case of a threatened action not yet taken, the specific indications giving rise to your apprehensions.
- If you have sought corrective action from the Special Counsel first, evidence that your appeal is being filed within the required time limits.
- A form for filing an appeal and a listing of addresses of all MSPB regional and field offices are available on the MSPB Website.

Appeals may be filed by mail, by facsimile, by commercial overnight delivery, by personal delivery, or electronically by using the Board's online process at MSPB e-Appeal Online (<https://e-appeal.mspb.gov/>). The date of filing by mail is considered to be the postmark date. The date of filing by facsimile is the date of the facsimile. The date of filing by commercial overnight delivery is the date you deliver the appeal to the commercial overnight delivery service. The date of filing by e-Appeal is the date of electronic submission.

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5. What are the required time limits for filing a whistleblower appeal?

The time limits are different for an otherwise appealable action and for an individual right of action appeal.

Otherwise Appealable Action: You must file within 30 calendar days of the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later. (If the filing deadline falls on a Saturday, Sunday, or Federal holiday, the filing deadline is extended to the next working day.) However, if you have been subjected to an otherwise appealable action and you choose to seek corrective action from the Special Counsel first, the time limits for appealing to the Board are the same as for an individual right of action appeal.

Individual Right of Action: The time limits for filing an individual right of action appeal depend on what the Special Counsel does with your complaint.

- If the Special Counsel notifies you that the office is terminating its investigation of your complaint, you have 65 days from the date of the Special Counsel's written notice, or 60 days from your receipt of the notice, whichever is later, to file an individual right of action appeal with the Board.
- If 120 days pass after you file a complaint with the Special Counsel and that office has not notified you that it will seek corrective action on your behalf, you may file an individual right of action appeal with the Board anytime thereafter.

6. What is a "stay" and how does it apply to whistleblower appeals?

A stay orders the agency to suspend the personnel action being appealed. You may file a stay request with the Board in connection with either kind of whistleblower appeal--an otherwise appealable action or an individual right of action appeal. You may file a stay request at any time after you become eligible to file your appeal, but no later than the time limit the judge sets for close of discovery in the appeal. You may file a stay request before, at the same time

as, or after you file your appeal. If you file the stay request first, you must file your appeal within 30 days after the judge rules on the stay request.

7. How do I file a stay request with the Board?

You file a stay request in writing with the same Board regional or field office where you file your appeal. Appeals may be filed by mail, by facsimile, by commercial overnight delivery, by personal delivery, or electronically by using the Board's online process at MSPB e-Appeal Online (<https://e-appeal.mspb.gov/>). The date of filing by mail is considered to be the postmark date. The date of filing by facsimile is the date of the facsimile. The date of filing by commercial overnight delivery is the date you deliver the appeal to the commercial overnight delivery service. The date of filing by e-Appeal is the date of electronic submission.

Your stay request must contain the following information:

- Your name and the names and addresses of the agency and your representative, if you have one.
- A chronology of the facts, including a description of the whistleblowing disclosure and the personnel action that the agency has threatened, taken, or failed to take.
- An explanation as to why you believe the personnel action is based on whistleblowing. You should support your explanation with documentary proof because a stay will be granted only if you show a "substantial likelihood" that your appeal will succeed.
- An explanation as to how long the stay should remain in effect and whether the stay will cause a hardship on the agency.
- If you first sought corrective action from the Special Counsel, evidence that the request is timely filed.

8. How does the Board decide a stay request?

After you have filed your stay request, the administrative judge will allow the agency an opportunity to comment and submit evidence.

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After considering all the arguments and evidence, the administrative judge will either grant or deny your request.

If your stay request is granted, the administrative judge will specify the time period during which the agency must suspend the personnel action. A typical stay order will suspend the personnel action indefinitely, until it is later modified or vacated by another Board order.

If your stay request is not granted, you may file a written request with the administrative judge asking that he refer your request and his decision denying your request to the Board members in Washington, D.C. for their review. This is called "petitioning" the administrative judge to "certify" his decision as an "interlocutory appeal." The Board's regulations regarding interlocutory appeals are found at Title 5 of the Code of Federal Regulations, Part 1201, sections 1201.91 to 1201.93.

Please see MSPB at Your Fingertips at the end of this publication for information about obtaining the Board's regulations.

9. What are the burdens of proof in whistleblower appeals?

In whistleblower appeals, you have the *burden of proving by a preponderance of the evidence* that whistleblowing was a contributing factor in the personnel action threatened, taken, or not taken against you. You may demonstrate that whistleblowing was a contributing factor by showing that the official taking the action knew about the whistleblowing and that the action occurred within a time period such that a reasonable person would conclude that the whistleblowing was a contributing factor in the personnel action.

If you establish by preponderant evidence that whistleblowing was a contributing factor, the Board will order corrective action unless *the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing*. The clear and convincing standard of proof is a higher standard than the preponderance of the evidence.

10. If I file a whistleblower appeal with the Board after the Special Counsel has terminated an investigation of my complaint, will that termination influence the Board's decision?

No. Under the Whistleblower Protection Act, when the Board considers your appeal, it may not take into account the Special Counsel's decision to terminate an investigation of your complaint. Moreover, if you file your appeal because 120 days have passed without your being notified that the Special Counsel will seek corrective action on your behalf, the Special Counsel may not proceed to seek corrective action without your permission. Furthermore, the Special Counsel may not intervene in your appeal before the Board without your permission.

11. What can I do if I am not satisfied with the administrative judge's decision on my whistleblower appeal?

As is the case with other decisions on appeals to the Board, you have the right to ask the 3-member Board in Washington to review the initial decision of the administrative judge. You do this by filing a *petition for review* in accordance with the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1201, Subpart C. *If no party files a petition for review, the initial decision of the administrative judge becomes final 35 days after it is issued.* If a petition for review is filed, the decision issued by the Board becomes the final decision.

You may request *judicial review of a final Board decision* on your whistleblower appeal--either an initial decision of an administrative judge that has become final or the Board's decision on a petition for review--by the U.S. Court of Appeals for the Federal Circuit. *The court must receive your request for review within 60 days of your receipt of the Board's final decision.* The court normally will not waive this time limit and filings that do not meet the deadline will be dismissed.

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MSPB At Your Fingertips

Regional and Field Offices

A listing of MSPB regional and field offices is available at the MSPB Website (www.mspb.gov). You may contact those offices to file an appeal or if you have questions or need additional information.

Headquarters

For information on filing a petition for review with the Board, you may contact the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419-0001. You may send e-mail to Board Headquarters at mspb@mspb.gov, or by calling (202) 653-7200. You also may call, toll free, and leave a message at 1-800-209-8960.

Board Regulations

The Board's regulations are located in Title 5 of the Code of Federal Regulations (CFR) at 5 CFR, Chapter II, Parts 1200 through 1210 (5 CFR Part 1200). They are available on the MSPB website (www.mspb.gov) as well as at any Board office, agency libraries, agency personnel or administrative offices, and most public libraries. Part 1201 describes the Board's appellate procedures and requirements. Part 1208 describes the special provisions applying to USERRA and VEOA cases, and Part 1209 describes the special provisions applying to "whistleblower" cases.

How to Access Information about the Board on its Website

Board decisions, Board regulations, forms for filing appeals or petitions for review, Office of Policy and Evaluation reports, a listing of regional and field offices and their geographic jurisdictions, and background information about the MSPB are available on the MSPB Website.

Customer Service Standards

MISSION I -- Adjudication of Appeals

1. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
2. We will issue decisions in initial appeals and on petitions for review within the time standards stated in our annual Performance Plan.
3. We will issue readable decisions based on consistent interpretation and application of law and regulation.
4. We will make our regulations easy to understand and our procedures easy to follow.
5. We will promptly and courteously respond to customer inquiries.
6. We will facilitate the settlement of appeals.
7. We will make our decisions readily available to our customers.

MISSION II -- Oversight of the Federal Merit Systems

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.
2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.
3. We will enhance the constructive impact of our studies and reports through outreach efforts.

We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if you have comments or suggestions concerning our service, we invite you to provide feedback at any time to the Board through the Clerk of the

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Board, at 1615 M Street, NW, Washington, DC 20419, telephone **(202) 653-7200**, FAX number **(202) 653-7130**.

Electronic mail may be sent over the Internet to mspb@mspb.gov. TTY users, please use the Federal Relay Service at **1-800-877-8339** to contact the Clerk of the Board.

The Board's telephone number for complaints concerning fraud, waste, and mismanagement in agency programs is **(800) 424-9121**.

Because the Board is prohibited by law from giving advisory opinions, Board personnel may not discuss with you the merits of any appeal you or another party may bring to the Board. However, Board personnel will be pleased to answer any questions you may have about Board procedures and the processing of appeals.

U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001, (202) 653-7200, Toll Free 1-800-209-8960, V/TDD 1-800-877-8339 (Federal Relay Service)
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