

5 CFR Parts 1200, 1201, 1203, 1208, & 1209 PROPOSED RULE COMMENTS

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PAGE	Paragraph	PROVISION	COMMENT	RECOMMENDATION
33672	1200.4	Petition for Rule Making	The regulation should provide for a guaranteed public comment period prior to issuance of a final rule resulting from a petition under this section.	Replace the language in subparagraph (b) with the following: 1200.4(b): “There will be a public comment period prior to issuance of a final rule resulting from a petition filed pursuant to 1200.4(a).”
33672	1201.3(a)(9)	Appellate Jurisdiction—Negative Suitability Determination	Suggest revising to accurately reflect 5 CFR 731.501(a). Clarify that MSPB has jurisdiction to review only suitability actions.	Delete 1201.3(a)(9) and replace with “ <i>Suitability Actions</i> . Suitability actions taken against an applicant or appointee. (5 CFR 731.501(a)). Suitability actions are defined as cancellation of eligibility; removal; cancellation of reinstatement eligibility; and debarment. (5 CFR 731.203(a)).
33673	1201.14(c)(4)	Matters Excluded from E-filing (SSI)	There is a need to ensure clarity of E-filing exclusions. Otherwise, there may be disputes between the parties regarding whether an agency violated this e-filing rule. In addition, it would be appropriate to note hearings containing SSI will be closed to the public. See recommended edit to section 1201.52 Public hearings	Delete 1201.14(c)(4) and replace with: “File a pleading that contains information which has been marked as “Sensitive Security Information” (SSI) by the Agency.” § 1201.52 Public hearings. Replace the second sentence in the paragraph with: “However, the judge may order a hearing or any part of a hearing closed when SSI or classified information will be discussed, and/or when doing so would be in the best interests of the appellant, a witness, the public or any other person affected by the proceeding.”
33673	1201.14(c)(5)	Matters Excluded from E-filing (Classified)	See above comment regarding clarification of E-filing exclusion and apply same rationale to the Classified designation.	Delete 1201.14(c)(5) and replace with “File a pleading that contains information which has been marked as

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				“Classified” by the Agency.”
33673	1201.24	Content of an Appeal	Limiting what an Appellant must produce will have the effect of decreasing the speed with which agencies will be able to assess the case and provide appropriate responses to MSPB.	Maintain established requirements for appellant to provide relevant documentation.
33674	1201.29(c)	Dismissal Without Prejudice	Concern regarding language indicating that a judge must “liberally construe” the good cause standard for failing to timely re-file an appeal. The appellant should be required to meet his burden to show good cause why he could not meet the re-filing deadline.	Delete last sentence in 1201.29(c) and replace with “When the dismissed appeal must be refiled by the appellant and is refiled late, the judge will grant a waiver for the late filing if the appellant establishes good cause for the untimely filing.
33674	1201.33(a)	Federal Witnesses	There is concern about which agency, the party or non-party federal agency is required to pay for the non-party federal employee witness’ pay and benefits. In addition, there is concern about cost impact to non-party agencies.	Add following sentence to end of 1201.33(a): “As clarifying note, the employing agency of non-party witnesses is responsible for covering pay and benefits costs of its employees. The judge will permit a witness, who is a non-party Federal employee, to provide telephonic or video testimony at the hearing upon the Agency’s request.”
33675	1201.51	Scheduling of Hearing	While we appreciate MSPB being cost conscious, the goal should be an overall reduction in the cost to the Government, and taxpayers, as a whole.	Recommend the last sentence of paragraph 1201.51 be modified as follows: Delete the last sentence and substitute the following language: Rulings on those motions will be based on a showing that a different location will result in lower cost to the government as a whole.
33675	1201.53(b)	Record of Proceedings (Transcripts)	We don’t see anything in Chapter 77 of Title 5 which gives the MSPB the authority	Maintain previous language regarding transcripts.

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			<p>to order an Agency to pay for transcription. The burden is on the MSPB to record the hearings.</p> <p>It has been our past experience that court reporters for arbitrations do not permit the parties to share one purchased copy of the transcript. CBP recommends that the regulations explicitly state that the Board will arrange for a court reporter who does not charge an additional fee when the purchaser is ordered to provide a copy of the transcript to other parties.</p>	<p>Alternatively, if the above recommendation is rejected and MSPB institutes the requirement for agencies to pay for transcripts, the following is provided:</p> <p>Insert before last sentence in 1201.53(b): “The MSPB will arrange for a court reporter who does not charge an additional fee for “sharing” one purchased transcript when the agency is directed by the judge to purchase the transcript and provide copies to both the judge and appellant.”</p>
33675	1201.56	Burden and Degrees of Proof	Although the fact that a judge may dismiss a case can be inferred, recommend stating so for purposes of clarity.	Insert the following sentence: “A Judge may dismiss a case for not meeting the nonfrivolous allegation standard.”
33676	1201.73	Discovery Procedures	There should be limits, subject to judicial discretion for expansion.	Recommend adding limits set on discovery and interrogatories consistent with those typically mandated by Federal courts. Additionally, with respect to interrogatories, the limits should encompass both parts and subparts.
33677	1201.114(g))	Petition and Cross Petition for Review—Late Filings	It is in the interest of government efficiency for the MSPB to issue a decision regarding whether an untimely petition for review will be considered <u>before</u> the Agency is required to submit its response to the substance of the untimely petition for review.	Delete second paragraph in 1201.114(g)(2) and replace with “Within 10 days of receipt, a party must file a response to the petitioner’s motion to excuse the late filing. The party will be required to file a response to the substance of the petition for review or a cross petition for review

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				within 25 days of receiving the Board's decision granting a waiver for the late filing."