Changes in the Final Rule

1200.4 Petition for Rulemaking.

* This new regulation sets forth procedures for filing and MSPB review of rulemaking petitions filed pursuant to 5 U.S.C. § 553(e).

* The MSPB anticipates that this amendment will generate additional suggestions for improving MSPB regulations. The MSPB will post all rulemaking petitions on its website.

1201.3 Appellate Jurisdiction.

* Explains that section 1201.3 is not a source of Board jurisdiction and directs parties to consult the cited laws and regulations need to determine the nature of the Board's jurisdiction.

* Cautions that jurisdiction depends on the appellant's status, e.g., the type of employment held, as well as the nature of the action or decision being appealed.

* List of appealable actions in subsection (a) has been revised to make it more understandable to laypersons.

1201.4 General definitions.

* The definition of "date of service" has been modified to clarify that the phrase refers to when a document is sent out, not when it is received.

1201.21 Notice of appeal rights.

* Requires agencies to provide notification regarding elections between the IRA process and the regular appeal process when an allegation is made that an otherwise appealable action was taken in retaliation for protected whistleblowing. See 1209.2 regarding elections under 5 U.S.C. § 7121(g).

* Requires agencies to give appellants notice of their options regarding claims of discrimination (EEOC mixed case complaint, Board appeal, or grievance).

1201.22 Filing an appeal and responses to appeals.

* States that a decision notice sent to the appellant's address of record is "presumed to have been duly delivered to the addressee." This is a rebuttable presumption.

* Provides that an appellant "may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service," and provides examples of how the regulation will be applied.

1201.23 Computation of time.

* Provides that "[u]nless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail" to redress perceived inequities resulting from a party serving a pleading on the other party by regular mail.

1201.24 Content of an appeal; right to a hearing.

* Reduces the scope of requested attachments from any relevant documents" to a copy of the notice of proposed action, the agency decision and, if available, the SF-50 or similar notice of personnel action. The Board believes that these are all that is necessary in order to docket a new appeal and issue appropriate acknowledgment and jurisdictional orders. This amendment will limit duplicative filings of the same documents.

* The language regarding the right to a hearing was clarified to state that an appellant "generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal."

1201.28 Case Suspension procedures.

* The revised regulation allows for two suspension periods of up to 30 days each, instead of the current single suspension period. Suspensions are most often used by the parties to complete discovery and explore settlement.

1201.29 Dismissals without prejudice.

* This new regulation largely codifies existing case law and should be helpful to litigants, especially pro se appellants.

1201.43 Sanctions.

* The provisions regarding sanctions for contumacious conduct by parties and representatives were moved from section 1201.31 to this section.

* Gives explicit authority for suspending or terminating a hearing that has begun and deletes the requirement of a show cause order in favor a general requirement that, before imposing a sanction, the judge must provide a prior warning and document the reasons for any sanction.

* Eliminates the provision for the automatic approval of a request for an interlocutory appeal of a sanction for contumacious behavior. The MSPB feels review of sanctions of this nature via petition for review should be sufficient and delaying the entire proceeding to adjudicate the appropriateness of a sanction is not warranted.

1201.51 Scheduling the hearing (and Appendix III, Hearing Locations).

* In an effort to increase flexibility to hold hearings on locations where the travel costs will be lowest, the comprehensive list of fixed hearing locations in Appendix III has been deleted in favor of a statement in section 1201.51 that the Board "has established certain approved hearing locations, which are listed on the Board's public website (www.mspb.gov).

* Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board."

1201.53 Record of proceedings.

* Clarifies the distinction between recordings (oral) and transcripts (written).

* Provides that the Board will provide recordings and already existing transcripts free of charge.

* Deletes provision in proposed rule that would have allowed MSPB to order an agency to pay for a partial or complete hearing transcript.

1201.56 Burden and degree of proof for establishing jurisdiction.

* The proposed rule attempted to clarify the burdens of proof for establishing jurisdiction and address conflict with Board case law that provides for

establishing some jurisdictional elements by making nonfrivolous allegations. The proposed rule is withdrawn. MSPB plans to address this regulation in a rulemaking in the spring or summer of 2013.

1201.73 Discovery procedures.

* Eliminates the initial disclosure requirement of § 1201.73(a).

* Eliminates the separate provisions that governed discovery from a party from those governing discovery from a nonparty, other than the remedy when there are problems with discovery. When a party alleges that another party has failed to comply with its obligations, the appropriate procedure would be a motion to compel. When a party alleges that a nonparty has failed to comply, the appropriate procedure would be a motion to issue a subpoena.

* Time limit for initial discovery requests has been increased from 25 days to 30 days after the date on which the judge issues the Acknowledgment Order.

1201.81 Requests for subpoenas.

* Revised to provide that a request for a subpoena to a nonparty "must be supported by a showing that the evidence sought is directly material to the issues involved in the appeal."

Subpart C: Petitions for Review.

* Reorganized so that:

  Section 1201.114 contains all the rules governing the content and procedures for pleadings on review, including some matters that were covered in 1201.115;

  section 1201.115 is now limited to the criteria for granting petitions and cross petitions for review; and

  section 1201.116 contains the rules governing compliance with interim relief orders, including those that were previously located at 1201.115(b) and (c).

1201.114 Petition and cross petition for review – content and procedure.

* Institutes length limits on PFR pleadings: 30 pages or 7500 words for PFRs and cross-PFRs and responses to either of those documents; and 15 pages or 3750 words for a reply to a response to a PFR or cross-PFR.

* Provides for a reply to a response to a PFR, but limits such a reply to the factual and legal issues raised by the other party in the response to the PFR, and provides that no other pleadings will be allowed.

1201.115 Criteria for granting petition or cross petition for review.

* Rewritten to conform the regulation to the broader criteria by which the Board has actually reviewed PFRs, including situations where the Board has denied a PFR but "reopened" the appeal "on its own motion" to address a petitioner's arguments or vacate, modify, or reverse an initial decision.

* States that the Board will grant a PFR or cross-PFR when:
(a) The initial decision contains erroneous findings of material fact;
(b) the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case;
(c) the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion; and,
(d) the petitioner has new and material evidence or legal argument that was not available when the record closed despite the petitioner's due diligence.

1201.118 Board reopening of final decisions.

* Makes clear that the Board will exercise its discretion to reopen only in unusual or extraordinary circumstances, and only within a reasonably short period of time.

* Revised to make clear that "reopening" only applies to, and is reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law.

* Changes the previous Board practice of reopening an appeal on the Board's own motion under 5 C.F.R. § 1201.118 when a party's petition for review is denied, but the Board deems it appropriate to issue an Opinion and Order for some reason.

1201.155 Requests for review of arbitrators' decisions.

* Provides that, "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." This overturns a longstanding Board practice, based on Jones v. Department of the Navy, 898 F.2d 133 (Fed. Cir. 1990), wherein appellants were allowed to raise discrimination claims for the first time when requesting Board review of an arbitration decision.

* Provides that 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." The reasoning behind this was that remand to the arbitrator would not be practical or feasible in most cases. Arbitration is a matter of contract and, once the arbitrator has issued an award, the contract has been performed and the arbitrator has been paid. The arbitrator could not become involved with the case on remand unless the union and the agency agreed to create a new contract.

1201.182 Petition for enforcement.

* Clarifies that the Board's enforcement authority under 5 U.S.C. § 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of enforcement, as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

1201.183 Procedures for processing petitions for enforcement.

* Changes the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision. The goal is to ensure, to the extent feasible, that all relevant evidence is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues.

* Provides that the "responsible agency official" whose pay may be suspended should a finding of noncompliance become the Board's final decision will be served with a copy of any initial decision finding the agency in noncompliance.

* New paragraph (d) codifies existing case law regarding the different burdens of proof that apply in enforcement actions depending on whether

the Board is adjudicating a petition to enforce relief ordered by the Board (typically status quo ante relief when the Board has not sustained an agency action), or a petition to enforce a settlement agreement that a party is alleging that the other party breached.

1208.21 VEOA exhaustion requirement.

* Clarifies what is required to establish exhaustion in a VEOA appeal. .

* New paragraph (b) provides that the deadline for filing a claim with DOL can be excused under the doctrine of equitable tolling.

Equitable tolling: *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (federal courts have typically extended equitable relief sparingly, including those situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass; it does not extend to what is at best a "garden variety" claim of excusable neglect).

1208.22 Time of filing .

* Paragraph (c) has been added to address the possibility of excusing an untimely appeal under the doctrine of equitable tolling.

1208.23 Content of VEOA appeal.

* New paragraph added to provide that a VEOA appeal must include evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary.

1209.2 Jurisdiction in IRA appeals.

* The revised regulation overrules a significant body of Board case law. Starting with its decision in Massimino v. Department of Veterans Affairs, 58 M.S.P.R. 318 (1993), the Board had consistently maintained the position that an individual who claims that an otherwise appealable action was taken against him in retaliation for making whistleblowing disclosures, and who seeks corrective action from the Special Counsel before filing an appeal with the Board, retains all the rights associated with an otherwise appealable action in the Board appeal. In 1994, the year after Massimino was issued, Congress amended 5 U.S.C. § 7121 to add paragraph (g). Subsection (g)(3) provides that an employee affected by a prohibited

personnel practice "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. § 7701; (B) a negotiated grievance under § 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (§ 1214), which can be followed by an IRA appeal filed with the Board (§ 1221). Under subsection (g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first. A plain reading of § 7121(g) indicates that, contrary to Massimino, an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses.