Changes to MSPB Regulations Contained in 2012 Notice of Final Rulemaking

The three-column table starting on the next page is designed to make it easy to see exactly what the MSPB has changed in the regulations that govern the adjudication of appeals that come before it. The first column shows the text of the regulation (or relevant portion) as it exists prior to the effective date (November 13, 2012) of the final rule issued on October 12, 2012, 77 Fed. Reg.62349; the second column shows the text of the regulation as revised; and the third column contains a brief description of and the reasons for the revisions, with links to the notice of proposed rulemaking and the notice of final rulemaking where appropriate. To assist the public in seeing exactly what revisions have been made, pertinent text is highlighted in yellow in the first two columns. It should be noted that the description of and reasons for the revisions in the third column was prepared by MSPB employees as a shorthand summary of the longer explanations provided in the notice of proposed rulemaking, 77 Fed. Reg. 33663 (June 7, 2012), and the notice of final rulemaking. Unlike those two notices, the text of the third column was not reviewed and approved by the Board members, and is provided to help the public understand the nature of the changes. Accordingly, nothing in that column should be construed to constitute an official interpretation of the revised regulations.

Contents (Links)

1200.4 Petition for Rulemaking	1201.114 Petition and cross petition for review – content and procedure
1201.3 Appellate Jurisdiction	1201.115 Criteria for granting petition or cross petition for review
1201.4 General definitions	1201.116 Compliance with orders for interim relief
1201.14 Electronic Filing Procedures	1201.117 Procedures for review or reopening
1201.21 Notice of appeal rights.	1201.118 Board reopening of final decisions
1201.22 Filing an appeal and responses to appeals	1201.122 Filing complaint; serving documents on parties
1201.23 Computation of time	1201.128 Filing complaint; serving documents on parties
1201.24 Content of an appeal; right to hearing	1201.134 Deciding official; filing stay request; serving documents
1201.28 Case suspension procedures	1201.137 Covered actions; filing complaint; serving documents on parties
1201.29 Dismissal without prejudice	1201.142 Actions filed by administrative law judges

1201.31 Representatives
1201.33 Federal witnesses
1201.34 Intervenors and amicus curiae
1201.36 Consolidating and joining appeals
1201.41 Judges
1201.42 Disqualifying a Judge
1201.43 Sanctions
1201.51 Scheduling the hearing
1201.52 Public hearings
1201.53 Record of proceedings
1201.56 Burden and degree of proof
1201.58 Closing the record
1201.71 Purpose of discovery
1201.73 Discovery procedures
1201.81 Requests for subpoenas
1201.93 Procedures
1201.101 Explanation and definitions
1201.111 Initial decision by judge
1201.112 Jurisdiction of judge
1201.113 Finality of decision
1201.143 Right to hearing; filing complaint; serving documents on parties
1201.153 Contents of appeal
1201.154 Time for filing appeal
1201.155 Requests for review of arbitrators' decisions
1201.181 Authority and explanation
1201.182 Petition for enforcement
1201.183 Procedures for processing petitions for enforcement
Subpart H - - Attorney Fees and Damages
1201.201 Statement of purpose
1201.202 Authority for awards
1201.204 Proceedings for damages
1203.2 Definitions
1208.3 Application of 5 CFR part 1201
1208.21 VEOA exhaustion requirement
1208.22 Time of filing
1208.23 Content of a VEOA appeal; request for hearing
1209.2 Jurisdiction
1209.4 Definitions
1209.5 Time of filing
1209.6 Content of appeal; right to hearing

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1200.4 Petition for rulemaking. [This is a new regulation in part 1200.]	**1200.4 Petition for rulemaking** (a) Any interested person may petition the MSPB for the issuance, amendment, or repeal of a rule. For purposes of this regulation, a "rule" means a regulation contained in 5 CFR parts 1200 through	This new regulation authorizes petitions requesting the MSPB to amend its regulations, in accordance with 5 U.S.C. 553(e), which states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	1216. Each petition shall: (1) Be submitted to the Clerk of the Board, 1615 M Street, N.W., Washington, D.C., 20419; (2) Set forth the text or substance of the rule or amendment proposed or specify the rule sought to be repealed; (3) Explain the petitioner's interest in the action sought; and (4) Set forth all data and arguments available to the petitioner in support of the action sought. (b) No public procedures will be held on the petition before its disposition. If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate under the Administrative Procedures Act. If the Board finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Board may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.	repeal of a rule." Previously, the MSPB had no procedures in place for responding to such requests. This regulation ensures that parties wishing to petition the Board for regulatory changes are aware of their right to make such a request and the MSPB's procedures for filing and responding to such requests. Numerous commenters objected that the proposed regulation does not mandate notice and comment rulemaking in every instance. The Administrative Procedure Act does not require notice and comment in all instances of agency rulemaking. 5 U.S.C. 553(b). Publication of a direct final rule remains an important tool to quickly implement minor technical amendments. However, in an effort to address the concerns raised by these commenters, the regulation states that final rules will be issued "consistent with the Administrative Procedure Act." NOPR (notice of proposed rulemaking; NOFR (notice of final rulemaking).
1201.3 Appellate jurisdiction. (a) *Generally*. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions: (1) Reduction in grade or removal for unacceptable performance (5 CFR part 432; 5 U.S.C. 4303(e));	**1201.3 Appellate jurisdiction.** (a) *Generally*. The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation. The Board's jurisdiction does not depend solely on the label or nature of the action or decision taken or made but may also depend on the type of federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible,	The revised rule explains that this regulation is not itself a source of MSPB jurisdiction and that jurisdiction depends on the nature of the employment or position held by the employee as well as the nature of the action taken. The listing of appealable actions within the MSPB's appellate jurisdiction has been revised to: (1) make the regulations easier to understand (plain English where

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR part 752, subparts C and D; 5 U.S.C. 7511-751 4); (3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 CFR part 752, subparts E and F; 5 U.S.C. 7541-754 3); (4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595); (5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c)); (6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR parts 831, 839, 842, 844, and 846; 5 U.S.C. 8347(d)(1) -(2) and 8461 (e)(1); and 5 U.S.C. 8331 note, Federal Erroneous Retirement Coverage Corrections Act) (7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.501); (8) Termination of employment during probation or the first year of a veterans readjustment appointment when: (i) The employee alleges discrimination because of partisan political reasons or marital status;	and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following: (1) *Adverse Actions*. Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511-7514; 5 CFR part 752, subparts C and D); (2) *Retirement Appeals*. Determinations affecting the rights or interests of an individual under the federal retirement laws (5 U.S.C. 8347(d)(1)-(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846); (3) *Termination of Probationary Employment*. Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38	possible); (2) give each category of appealable action a descriptive label; (3) list appealable actions in order from most common to least common; and (4) group like actions together, which resulted in a list of 11 appealable actions instead of the previous 20. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
or (ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 CFR 315.806, U.S.C. 4214(b)(1)(E)); (9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 CFR 315.908(b)); (10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); (11) Furlough of a career appointee in the Senior Executive Service (5 CFR 359.805); (12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304); (13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, CFR 330.209); (14) Failure to reinstate a former employee after	U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b)); (4) *Restoration to Employment Following Recovery from a Work-Related Injury*. Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304); (5) *Performance-Based Actions Under Chapter 43*. Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432); (6) *Reduction in Force*. Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011); (7) *Employment Practices Appeal*. Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104); (8) *Denial of Within-Grade Pay Increase*. Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410); (9) *Suitability Action*. Action based on suitability determinations, which relate to an individual's character or conduct that may have an impact	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
service under the Foreign Assistance Act of 1961 (5 CFR 352.508); (15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209); (16) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313); (17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707); (18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807); (19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104); and (20) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011). * * * * *	on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a)); (10) *Various Actions Involving the Senior Executive Service*. Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or Furlough of a career appointee (5 CFR 359.805); and (11) *Miscellaneous Restoration and Reemployment Matters*. (i) Failure to afford reemployment priority rights pursuant to a Reemployment Priority List following separation by reduction in force (5 CFR 330.214); (ii) Full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 302.501); (iii) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508); (iv) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	352.209); (v) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313); (vi) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707); or (vii) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807). [Paragraphs (b) and (c) were unchanged.]	
1201.4 General definitions. (a) *Judge*. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board. * * * * * (j) *Date of service*. The date on which documents are served on other parties. * * * * *	**1201.4 General definitions.** (a) *Judge*. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including the Board or any member of the Board, or an administrative law judge appointed under 5 U.S.C. 3105 or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. * * * * * (j) *Date of service*. "Date of service" has the same meaning as "date of filing" under paragraph (l) of this section. * * * * * (l) *Date of filing*. A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The	Paragraph (a) was revised to eliminate the phrase "attorney-examiner," and to incorporate the statutory requirement of 5 U.S.C. 7701(b)(1) that a removal case may only be heard by the Board, an administrative law judge, or an employee experienced in hearing appeals Paragraph (j) was revised to clarify that the term "date of service" refers to when a document is sent out, not when it is received. Paragraph (o) was added to clarify that the term "grievance" is limited to matters covered by a negotiated grievance procedure under 5 U.S.C. 7121. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission. * * * * * (o) *Grievance*. A complaint by an employee or labor organization under a negotiated grievance procedure covered by 5 U.S.C. 7121.	
1201.14 Electronic filing procedures. * * * * * (c) *Matters excluded from electronic filing*. Electronic filing may not be used to: (1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27); (2) Serve a subpoena (§ 1201.83); or (3) File a pleading with the Special Panel (§ 1201.173). * * * * * (m) *Date electronic documents are filed and served*. (1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading is assessed based on the time zone where the pleading is being filed. For	**1201.14 Electronic filing procedures.** * * * * * (c) *Matters excluded from electronic filing*. Electronic filing may not be used to: (1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27); (2) Serve a subpoena (§ 1201.83); (3) File a pleading with the Special Panel (§ 1201.137); (4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520); (5) File a pleading that contains classified information (32 CFR part 2001); or (6) File a request to participate as an amicus curiae or file a brief as amicus curiae pursuant	Revised subsections (c)(4) and (c)(5) reflect current MSPB policy and procedures regarding Sensitive Security Information (SSI) and classified information. Subpararaph (c)(6) was added to provide that amici are not permitted to e-file. Paragraph (m) was revised to make it consistent with the intent expressed by the Board when it originally published this provision at 73 Fed. Reg. 10127, 10128 (2008). NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Western Regional Office on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20. (2) MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission. * * * * *	to § 1201.34 of this part. * * * * * (m) * * * (1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20. * * * * *	
1201.21 Notice of appeal rights. * * * * * (d) Notice of any right the employee has to file a grievance, including: (1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board; (2) Whether both an appeal to the Board and a grievance may be filed on the same matter	**1201.21 Notice of appeal rights.** * * * * * (d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III of 5 U.S.C. chapter 12, including: (1) * * * (2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding	Paragraph (d) was revised to reflect the revision to 5 CFR 1209.2, which changes longstanding Board jurisprudence concerning allegations of reprisal for whistleblowing under 5 U.S.C. 2302(b)(8) when an employee has been subjected to an otherwise appealable action. Revised paragraph (d) requires agencies to fully notify employees of their rights in these situations so that they can make an informed choice among the available 3 options: (A) an appeal to the Board under

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and (3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).	with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; (3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and (4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board. (e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302. (f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.	5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 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 (5 U.S.C. 1214), which can be followed by an Individual Right of Action appeal filed with the Board (5 U.S.C. 1221). Paragraph (e) was added to require notice of all available options in mixed cases. Paragraph (f) was added to require agency decision notices to include the name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal should a Board appeal be filed. NOPR; NOFR.
1201.22 Filing an appeal and responses to appeals. * * * * * (b) *Time of filing*. (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed 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, whichever is later. Where an appellant and an agency mutually	**1201.22 Filing an appeal and responses to appeals.** * * * * * (b) * * * (3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is	Paragraph (b) was revised by adding a new subparagraph (3), which states the MSPB's general rule about constructive receipt of agency decisions and included several illustrative examples. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with § 1201.23 of this part. (2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests. * * * * *	properly addressed and sent to the appellant's address via postal or commercial delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative, or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule: *Example A*: An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision. *Example B*: An appellant who did not receive his or her mail while in the hospital may overcome the presumption of actual receipt. *Example C*: An appellant may be deemed to have received an agency decision received by his or her roommate. * * * * *	
1201.23 Computation of time. In computing the number of days allowed for filing a submission, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that	**1201.23 Computation of time.** In computing the number of days allowed for complying with any deadline, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first	This regulation was revised, and an example added, to redress a perceived inequity resulting when a party receives a pleading from the opposing party by regular mail, decreasing the time the party has to file a responsive pleading. NOFR

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
date. *Example*: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.	workday after that date. Unless 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. *Example 1*: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2. *Example 2*: The judge orders the appellant to file a response to a jurisdictional order no later than October 15, 2012, and that the agency's response is due 10 days after the filing of the appellant's pleading. If the appellant serves the agency with a pleading via regular mail on October 15, the agency's deadline for filing a response will be October 30, not October 25.	
1201.24 Content of an appeal; right to a hearing. (a) * * * * * All appeals must contain the following: * * * * * (7) The notice of the decision to take the action being appealed, along with any relevant documents; * * * * * (d) *Right to hearing*. Under 5 U.S.C. 7701, an appellant has a right to a hearing. * * * * *	**1201.24 Content of an appeal; right to a hearing.** (a) * * * * * All appeals must contain the following: * * * * * (7) Where applicable, a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF-50 or similar notice of personnel action. No other attachments should be included with the appeal, as the agency will be submitting the documents required by 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. An appellant should not miss the deadline for filing merely because he or she does not currently have all of the	Paragraphs (a)(7) was revised to reduce the scope of requested attachments from "any relevant documents" to "a copy of the notice of proposed action, the agency decisions being appealed and, if available, the SF-50 or similar notice of personnel action." The Board determined that these are only documents, in conjunction with the information required by § 1201.24(a)(1)-(9), that are necessary in order to docket a new appeal and issue appropriate acknowledgment and jurisdictional orders. The primary reason for making this change was to eliminate some of the filing of copies of documents that will be included in the Agency File. Paragraph (d) was revised to clarify when

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	documents specified in this section. * * * * * (d) *Right to hearing*. 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. * * * * *	an appellant has a right to a hearing. NOPR; NOFR.
1201.28 Case suspension procedures. (a) *Joint requests*. The parties may submit a joint request for additional time to pursue discovery or settlement. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the judge. (b) *Unilateral requests*. In lieu of participating in a joint request, either party may submit a unilateral request for additional time to pursue discovery as provided in this subpart. Unilateral requests for additional time of up to 30 days may be granted for good cause shown at the discretion of the judge. (c) *Time for filing requests*. The parties must file a joint request that the adjudication of the appeal be suspended 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). (d) *Untimely requests*. The judge may consider requests for suspensions that are filed after the time limit set forth in paragraph (c) of this section. Such requests may be granted at the discretion of the judge. (e) *Early termination of suspension period*. The suspension period may be terminated prior to the end	**1201.28 Case suspension procedures.** (a) *Suspension period*. The judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days. (b) *Early termination of suspension period*. The administrative judge may terminate the suspension period upon joint request of the parties or where the parties request the judge's assistance and the judge's involvement is likely to be extensive. (c) *Termination of suspension period*. If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall resume as of the first business day following the expiration of the period. (d) *Mediation*. Whenever an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the judge. This provision does not apply where the parties enter into other forms of alternative dispute resolution.	As revised, this section allows for two suspension periods of up to 30 days each, instead of the current single suspension period, eliminates restrictions on when a request must be filed, and removes separate paragraphs for unilateral requests and joint requests. Paragraph (d) was added to clarify that, when an appeal is accepted into the Board's mediation program, processing of the appeal is suspended until the mediator returns the case to the judge. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
of the agreed upon period if the parties request the judge's assistance relative to discovery or settlement during the suspension period and the judge's involvement pursuant to that request is likely to be extensive. (f) *Limitation on suspension period*. No case may be suspended for more than a total of 30 days under the provisions of this section. (g) *Termination after 30 days*. If the final day of the 30-day suspension period falls on a day on which the MSPB is closed for business, adjudication shall resume as of the first business day following the expiration of the 30-day period.		
1201.29 [There was no section 1201.29 prior to the notice of final rulemaking.]	**1201.29 Dismissal without prejudice.** (a) *In general*. Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal. (b) *Procedure*. Dismissal without prejudice may be granted on the judge's own motion or upon request by either party. The decision whether to dismiss an appeal without prejudice is committed to the sound discretion of the judge, and may be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party. (c) *Refiling*. Except in certain USERRA appeals under Part 1208 involving the use of military leave, a decision dismissing an appeal without prejudice will include a date certain by which the appeal must be refiled. The judge will determine whether the appeal must be refiled by the appellant or whether it will be automatically refiled by the judge as of a date certain. When a dismissal without prejudice is issued over the	This is a new regulation, which in large part codifies existing case law. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	objection of the appellant, the appeal will be automatically refiled as of a date certain. (d) *Waiver*. When a dismissed appeal must be refiled by the appellant, requests for waiver of a late filing based upon good cause will be liberally construed.	
1201.31 Representatives. * * * * * (b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one. * * * * * (d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice. * * * * * [The remainder of paragraph (d) was revised and moved to paragraphs (d) and (e) of section 1201.41, Sanctions.]	**1201.31 Representatives.** * * * * * (b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation or 15 days after a party becomes aware of the conflict. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one. * * * * * (d) As set forth in paragraphs (d) and (e) of section 1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.	Paragraph (b) was revised to add the phrase "or after 15 days after a party becomes aware of the conduct" at the end of the third sentence to acknowledge that a representative's conflict of interest may not be readily apparent to a party wishing to challenge the designation of a representative. The provisions governing exclusion and other sanctions for contumacious behavior by parties and representatives were moved from paragraph (d) of this section to section 1201.43, which governs sanctions generally, and revised. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1201.33 Federal witnesses. (a) Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). * * * * *	**1201.33 Federal witnesses.** (a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when ordered by the judge to do so. When providing those statements or appearing at a deposition or at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). When a desired witness is employed by an agency who is not a party to the Board proceeding, the requesting party may avail itself of the provisions of sections 1201.81 to 1201.85 of this part regarding subpoenas to ensure the attendance of the witness. In addition, the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations governing the production of Federal employees in matters in litigation. * * * * *	Paragraph (a) was revised to clarify that an agency's responsibility under this regulation includes producing witnesses at depositions as well as at hearings. Language was added to indicate that the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations such as those issued pursuant to *United States, ex rel. v. Touhy*, 340 U.S. 462, 467 (1951) regarding the production of evidence from Federal employees in matters in litigation. NOPR; NOFR.
1201.34 Intervenors and amicus curiae. * * * * * (e) *Amicus curiae*. An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to file an amicus curiae brief.	**1201.34 Intervenors and amicus curiae.** * * * * * (e) *Amicus curiae*. (1) An amicus curiae is a person or organization who, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The Board may solicit amicus briefs on its own motion.	Paragraph (e) was revised to address the fact that it receives motions to file amicus briefs for the first time on petition for review and provide further explanation as to what an amicus is permitted to do. The proposed amendment also included general guidelines indicating when requests to file amicus briefs will be granted or denied. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	(2) A request to file an amicus curiae brief must include a statement of the person's or organization's interest in the appeal and how the brief will be relevant to the issues involved. (3) The request may be granted, in the discretion of the judge or the Board, if the person or organization has a legitimate interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof. (4) The amicus curiae shall submit its brief within the time limits set by the judge or the Board and must comply with any further orders by the judge or the Board. (5) An amicus curiae is not a party to the proceeding and may not participate in any way in the conduct of the hearing, including the presentation of evidence or the examination of witnesses. The Board, in its discretion, may invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.	
1201.36 Consolidating and joining appeals. (a) *Explanation*. (1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or similar issues. For example, individual appeals rising from a single reduction in force might be consolidated. (2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might	**1201.36 Consolidating and joining appeals.** (a) * * * (2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent removal if the same appellant filed both appeals.	Paragraph (a) was revised to substitute the term "removal" for "dismissal" as the latter is not a term used by the Board to describe an employee's separation from employment for disciplinary reasons. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent dismissal if the same appellant filed both appeals. * * * * *	* * * * *	
1201.41 Judges. * * * * * (b) Judges will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. * * * * * * * *	**1201.41 Judges.** * * * * * (b) *Authority*. Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. * * * * * * * *	The first sentence of paragraph (b) was revised to reflect the language used in the MSPB Strategic Plan.
1201.42 Disqualifying a judge. (a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and immediately notify the Board of the withdrawal. * * * * *	**1201.42 Disqualifying a judge.** (a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and another judge will be promptly assigned. * * * * *	Paragraph (a) was revised to reflect the fact that under current MSPB practice a judge who considers himself or herself disqualified notifies the Regional Director, not the Board.
1201.43 Sanctions. The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), and (c) of this section. * * * * * ________________ [Text moved from § 1201.31]: * * * * *	**1201.43 Sanctions.** The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), (c), (d), and (e) of this section. Before imposing a sanction, the judge shall provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document the reasons for any resulting sanction in the record. * * * * * (d) *Exclusion of a representative or other person*. A	The introductory paragraph was revised to delete 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. The reason for this change is that a formal show-cause order is not feasible when the misconduct occurs during a hearing. Paragraphs (d) of the previous regulation at 1201.31 regarding sanctions for contumacious conduct by parties and representatives was moved to section

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice. (2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section. (3) When, after consideration of the person's response to the show cause order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the ruling, a motion that the ruling be certified	judge may exclude or limit the participation of a representative or other person in the case for contumacious conduct or conduct prejudicial to the administration of justice. When the judge excludes a party's representative, the judge will afford the party a reasonable time to obtain another representative before proceeding with the case. (e) *Cancellation, suspension, or termination of hearing*. A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for contumacious conduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.	1201.43 and revised to become paragraphs (d) and (e). The revised regulation gives explicit authority for suspending or terminating a hearing that has begun. In addition, the revised regulation eliminates the provision for the automatic approval of a request for an interlocutory appeal of a sanction for contumacious behavior, even when the requirements of § 1201.92, including that the "ruling involves an important question of law or policy about which there is substantial ground for difference of opinion," have not been satisfied. Review of sanctions of this nature via petition for review was considered to be sufficient, and that delaying the entire proceeding to adjudicate the appropriateness of a sanction is not warranted. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of §§ 1201.91 through 1201.93 of this part shall not apply. (4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that: (i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and (ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding sua sponte or on the motion of a party for a stay of the proceeding. (5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.		
1201.51 Scheduling the hearing. * * * * * (d) The Board has established certain approved hearing locations, which are published as a Notice in the *Federal Register*. See appendix III. Parties, for	**1201.51 Scheduling the hearing.** * * * * * (d) The Board has established certain approved hearing locations, which are listed on the Board's public website (www.mspb.gov). The judge will	Appendix III of the Part 1201 regulations, which contained a comprehensive list of fixed hearing locations, has been deleted. Instead, the MSPB will list approved hearing locations on its public website. The reason for this change is that the

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
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.	advise parties of these hearing sites as appropriate. 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.	current extensive list of fixed hearing sites causes administrative inefficiencies and can have adverse budgetary considerations for the MSPB and other agencies, as the cost of airfares are renegotiated by GSA each fiscal year, and the cost of court reporters varies considerably from one city to the next. Having the flexibility to change approved hearing sites from year to year by changing information on the Board's public website should improve the situation. NOPR; NOFR.
1201.52 Public hearings. Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.	**1201.52 Public hearings.** (a) *Closing the hearing*. Hearings are generally open to the public; however, the judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of a party, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record. (b) *Electronic devices*. Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room without the consent of the judge.	This regulation was revised to give administrative judges express authority to control the use of electronic devices at a hearing. NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1201.53 Record of proceedings. (a) *Preparation*. A word-for-word record of the hearing is made under the judge's guidance. It is kept in the Board's copy of the appeal file and it is the official record of the hearing. Only hearing tape recordings or written transcripts prepared by the official hearing reporter will be accepted by the Board as the official record of the hearing. When the judge assigned to the case tape records a hearing (for example, a telephonic hearing in a retirement appeal), the judge is the "official hearing reporter" under this section. (b) *Copies*. When requested and when costs are paid, a copy of the official record of the hearing will be provided to a party. A party must send a request for a copy of a hearing tape recording or written transcript to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. A request for a copy of a hearing tape recording or written transcript sent by a non-party is controlled by the Board's rules at 5 CFR part 1204 (Freedom of Information Act). Requests for hearing tape recordings or written transcripts under the Freedom of Information Act must be sent to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC. (c) Exceptions to payment of costs. A party may not have to pay for a hearing tape recording or written transcript if he has a good reason to support a request for an exception. If a party believes he has a good reason and the request is made before the judge issues an initial decision, the party must send the request for an exception to the judge. If the request is made after	**1201.53 Record of proceedings.** (a) *Recordings*. A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically. (b) *Transcripts*. A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts. (c) *Copies*. Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Non-parties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulation. A non-party may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. Non-parties may also make FOIA requests online at https://foia.mspb.gov. (d) *Corrections to transcript*. Any discrepancy between the transcript and the recording shall be	The revised regulation clarifies and updates the terminology to reflect the difference between recordings (oral) and transcripts (written). The regulation provides that the Board will provide recordings and already existing transcripts free of charge. As drafted in the notice of propose rulemaking, the regulation would have also authorized administrative judges to order the agency to order and pay for a full or partial transcript, but this provision was deleted in the notice of final rulemaking. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
the judge issues an initial decision, the request must be sent to the Clerk of the Board, who shall have authority to grant or deny such requests. The party must clearly state the reason for the request in an affidavit or sworn statement. (d) *Corrections to written transcript*. Corrections to the official written transcript may be made on motion by a party or on the judge's own motion. Motions for corrections must be filed within 10 days after the receipt of a written transcript. Corrections of the official written transcript will be made only when substantive errors are found and only with the judge's approval. (e) *Official record*. Exhibits, the official hearing record, if a hearing is held, all papers filed, and all orders and decisions of the judge and the Board, make up the official record of the case.	resolved by the judge or the Clerk of the Board as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge, or by the Clerk of the Board, as appropriate. (e) *Official record*. Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 CFR parts 1204 and 1205.	
1201.56 Burden and degree of proof; affirmative defenses.	**1201.56 Burden and degree of proof; affirmative defenses.**	The current regulation provides that appellants have the burden of proving jurisdiction by preponderant evidence. That regulation is in conflict with a fair amount of Board case law that provides for establishing some jurisdictional elements by making nonfrivolous allegations. Under the regulation in the notice of proposed rulemaking, the burden of proof would have varied depending on the type of jurisdictional element involved. The appellant would have been required to establish by preponderant evidence that he or she is a person entitled

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
		to appeal rights under applicable law, rule, or regulation, and that he or she is appealing an agency action or decision covered by applicable law, rule, or regulation. The appellant would also have been required to prove by preponderant evidence a jurisdictional requirement to exhaust a required administrative procedure before filing a Board appeal. Other types of jurisdictional elements would have been established by making a nonfrivolous allegation, which was defined as "an allegation of facts that, if proven, would establish the jurisdictional element in question." Two commenters objected to the proposed definition of a nonfrivolous allegation, with one arguing that the standard should be an allegation of facts and related legal contentions that could establish the element in question. That commenter also questioned whether the Board has in some instances incorrectly regarded merits issues as jurisdictional requirements. After considering those comments, as well as additional comments from within the MSPB, the Board has determined that it needs to reexamine the legal framework it employs to identify jurisdictional requirements and how they are established. Accordingly, the Board decided to withdraw the proposed regulation and plans to reconsider the whole subject in early 2013, and, if amendments are determined to be necessary, institute a new

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
		rulemaking procedure. NOPR; NOFR.
1201.58 Closing the record. * * * * * (c) 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. The judge will include in the record, however, any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.	**1201.58 Closing the record.** * * * * * (c) Once the record closes, additional evidence or argument will ordinarily not be accepted unless: (1) The party submitting it shows that the evidence or argument was not readily available before the record closed; or (2) It is in rebuttal to new evidence or argument submitted by the other party just before the record closed. (d) The judge will include in the record any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.	Paragraph (c) was revised to conform with case law indicating that, notwithstanding an order setting the date on which the record will close, a party must be allowed to submit evidence or argument to rebut new evidence submitted by the other party just prior to the close of the record. NOPR; NOFR.
1201.62 Producing prior statements.	________________	This regulation was eliminated, as it as it has never been invoked or applied and was believed to be unnecessary. NOPR.
1201.71 Purpose of discovery. Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected	**1201.71 Purpose of discovery.** Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected	Language was added stating that discovery requests and discovery responses should not ordinarily be filed with the Board, as is currently done in standard orders. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
to start and complete discovery with a minimum of Board intervention.	to start and complete discovery with a minimum of Board intervention. Discovery requests and responses thereto are not to be filed in the first instance with the Board. They are only filed with the Board in connection with a motion to compel discovery under 1201.73(c) of this part, with a motion to subpoena discovery under 1201.73(d) of this part, or as substantive evidence to be considered in the appeal.	
1201.73 Discovery procedures. (a) *Initial disclosures*. Except to the extent otherwise directed by order, each party must, without awaiting a discovery request and within 10 days following the date of the MSPB's acknowledgment order, provide the following information to the other party: (1) The agency must provide: (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of the agency that the agency may use in support of its claims or defenses, and (ii) The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information that the agency may use in support of its claims or defenses, identifying the subjects of such information. (2) The appellant must provide: (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of the appellant that the appellant may use in	**1201.73 Discovery procedures.** (a) *Initiating discovery*. A party seeking discovery must start the process by serving a request for discovery on the representative of the party or nonparty, or, if there is no representative, on the party or nonparty themselves. The request for discovery must state the time limit for responding, as prescribed in 1201.73(d) of this part, and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to the official or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency. (b) *Responses to discovery requests*. A party or nonparty must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and nonparties may respond to discovery requests by electronic mail if	The revised regulation eliminates the initial disclosure requirement of § 1201.73(a). It also eliminates the separate provisions that governed discovery from a party from those governing discovery from a nonparty. The only difference that remains would be 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. The 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. That Order requires the production of the Agency File within 20 days. The increase of time to 30 days should ensure that, in most cases, appellants have had the opportunity to see what is in the Agency File before they initiate discovery. Subsection (c)(1)(i) was revised the proper relevance standard for motions to

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
support of his or her claims or defenses, and (ii) The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses, identifying the subjects of such information. (3) Each party must make its initial disclosure based upon the information then reasonably available to the party. A party is not excused from making its disclosures because it has not fully completed its investigation of its case, because it challenges the sufficiency of the other party's disclosures, or because the other party has not made its disclosures. (b) *Discovery from a party*. A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in § 1201.73(f), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency. (c) Discovery from a nonparty, including a nonparty Federal agency. Parties should try to obtain voluntary	authorized by the requesting party. (c) *Motions to compel or issue a subpoena*. (1) If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. If a nonparty fails or refuses to respond in full to a discovery request, the requesting party may file a motion for the issuance of a subpoena directed to the individual or entity from which the discovery is sought under the procedures described in 1201.81 of this part. The requesting party must serve a copy of the motion on the other party or nonparty. Before filing any motion to compel or issue a subpoena, the moving party shall discuss the anticipated motion with the opposing party or nonparty and all those involved shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include: (i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72; (ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201); and (iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty, and made a good faith effort to resolve the discovery dispute and	compel discovery. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the MSPB will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any MSPB-approved discovery request and subpoena on the individual or entity, or for arranging for its service. (d) *Responses to discovery requests*. A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (f)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and non-parties may respond to discovery requests by electronic mail if authorized by	narrow the areas of disagreement. (2) The party or nonparty from whom discovery was sought may respond to the motion to compel or the motion to issue a subpoena within the time limits stated in paragraph (d)(3) of this section. (d) *Time limits*. (1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response. (2) A party or nonparty must serve a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed by the judge. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place. (3) Any motion for an order to compel or issue a subpoena must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel or subpoena discovery must be filed with the judge within 10 days of the date of service of the motion. (4) Discovery must be completed within the time	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
the requesting party. (e) *Motions to compel discovery*. (1) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a MSPB-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. Before filing any motion to compel discovery, the moving party shall discuss the anticipated motion with the opposing party either in person or by telephone and the parties shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include: (i) A copy of the original request and a statement showing that the information sought is relevant and material; and (ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201.); and (iii) A statement that the parties have discussed the anticipated motion and have made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. (2) The other party and any other entity or person from whom discovery was sought may	period designated by the judge or, if no such period is designated, no later than the prehearing or close of record conference. (e) *Limits on the number of discovery requests*. (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts. (2) Absent prior approval by the judge or agreement by the parties, each party may not take more than 10 depositions. (3) Requests to exceed the limitations set forth in paragraphs (e)(1) and (e)(2) of this section may be granted at the discretion of the judge. In considering such requests, the judge shall consider the factors identified in §1201.72(d) of this part.	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
respond to the motion to compel discovery within the time limits stated in paragraph (f)(4) of this section. (f) *Time limits*. (1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response. (2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place. (3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (f)(1) of this section or as the judge otherwise directs. (4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.		

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(5) Discovery must be completed within the time the judge designates. (g) *Limits on the number of discovery requests*. (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts. (2) Absent prior approval by the judge or agreement by the parties, each party may not take more than 10 depositions. (3) Requests to exceed the limitations set forth in paragraphs (g)(1) and (g)(2) of this section may be granted at the discretion of the judge. In considering such requests, the judge shall consider the factors identified in § 1201.72(d) of this part.		
1201.81 Requests for subpoenas. * * * * * (c) *Relevance*. The request must be supported by a showing that the evidence sought is relevant and that the scope of the request is reasonable. * * * * *	**1201.81 Requests for subpoenas.** * * * * * (c) *Relevance*. The request must be supported by a showing that the evidence sought is directly material to the issues involved in the appeal. * * * * *	To be consistent with the distinction made in § 1201.72(b) between discovery of parties and nonparties, paragraph (c) was 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."
1201.93 Procedures. * * * * * (c) *Stay of hearing*. The judge has the authority to proceed with or to stay the hearing while an interlocutory appeal is pending with the Board. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory	**1201.93 Procedures.** * * * * * (c) *Stay of Appeal*. The judge has the authority to proceed with or to stay the processing of the appeal while an interlocutory appeal is pending with the Board. The passage of time during any stay granted under this section is not deemed, or accounted for, as	Paragraph (c) was revised to replace "hearing" with the word "appeal" because there may or may not be a pending hearing in a case where an interlocutory appeal has been certified to the Board. The MSPB also substituted the phrase "stay the processing of the appeal" for "stay the appeal" to avoid any ambiguity.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
appeal is pending with it.	a case suspension under § 1201.28. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.	In addition, language was added to clarify that a stay under this provision does not count as a stay under section 1201.28. NOPR; NOFR.
1201.101 Explanation and definitions. * * * * * (b) * * * (2) *Decision-making official* means any judge, officer or other employee of the Board designated to hear and decide cases.	**1201.101 Explanation and definitions** * * * * * (b) * * * (2) *Decision-making official* means any judge, officer or other employee of the Board designated to hear and decide cases except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge.	Paragraph (b)(2) was revised to clarify that Mediation Appeals Program mediators and settlement judges may discuss the merits of an MSPB case with a party without running afoul of the prohibition on ex parte communication.
1201.111 Initial decision by judge. (a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right. * * * * *	**1201.111 Initial decision by judge.** (a) The judge will prepare an initial decision after the record closes, and will serve that decision on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right. The Board satisfies its legal obligation under 5 U.S.C. 7701(b)(1) by making electronic copies of initial decisions available to the Office of Personnel Management. * * * * *	Paragraph (a) was revised to replace language requiring judges to serve initial decisions on OPM with language indicating that the Board satisfies its legal obligation in this regard by making electronic copies available to OPM. NOPR; NOFR.
1201.112 Jurisdiction of judge. (a) * * * (4) Vacate an initial decision before that decision becomes final under § 1201.113 in order to accept a settlement agreement into the record.	**1201.112 Jurisdiction of judge.** (a) * * * (4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for	Paragraph (a)(4) was revised to allow an administrative judge to vacate an initial decision to accept a settlement agreement into the record when the settlement agreement is filed by the parties prior to the deadline for filing a petition for

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
* * * * *	review but is not received until after the date when the initial decision becomes final under 1201.113 of this part. * * * * *	review, but is not received until after the date when the initial decision would become the Board's final decision by operation of law.
1201.113 Finality of decision. * * * * * (a) *Exceptions*. The initial decision will not become final if any party files a petition for review within the time limit for filing specified in § 1201.114 of this part, or if the Board reopens the case on its own motion. * * * * *	**1201.113 Finality of decision.** * * * * * (a) *Exceptions*. The initial decision will not become the Board's final decision if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record. * * * * * (f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215. * * * * *	Paragraphs (a) was revised to conform this regulation to the revision to 5 CFR 1201.112(a)(4). Paragraph (f) was added to indicate that the Board will make a referral to OSC to investigate and take any appropriate disciplinary action whenever the Board finds that an agency has engaged in reprisal against an individual for making a protected whistleblowing disclosure. NOPR; NOFR.
Subpart C: Petitions for Review of Initial Decisions (1201.114 to 1201.120)	**Subpart C: Petitions for Review of Initial Decisions (1201.114 to 1201.120)**	Subpart C was reorganized so that: Section 1201.114 contains all the rules governing the content and procedures for pleadings on review, including some matters that had been covered in 1201.115; section 1201.115 is limited to the criteria for granting petitions and cross petitions for review; and section 1201.116 contains all the rules governing compliance with interim relief orders,

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
		including those that were previously located at 1201.115(b) and (c).
1201.114 Filing petition and cross petition for review. (a) *Who may file*. Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative. (b) *Cross petition for review*. If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review. (c) *Place for filing*. A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with § 1201.14. (d) *Time for filing*. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after	**1201.114 Petition and cross petition for review – content and procedure.** (a) *Pleadings allowed.* Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review. (1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part. (2) A cross petition for review has the same meaning as a petition for review but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review. (3) A response to a petition for review and a cross petition for review may be contained in a single pleading. (4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new allegations of error. (5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading. (b) *Contents of petition or cross petition for review.* A	The revised regulation 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. The revised regulation 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. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
the date of issuance, within 30 days after the date the petitioner received the initial decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. (e) *Extension of time to file*. The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV to part 1201.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted. (f) *Late filings*. Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under	petition or cross petition for review states a party's objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation of why the evidence or argument was not presented before the record below closed (see 1201.58 of this part). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board. (c) *Who may file*. Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition or cross petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative. (d) *Place for filing*. All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 1201.14 of this part. (e) *Time for filing*. Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
28 U.S.C. 1746. (See appendix IV to part 1201.) The affidavit or sworn statement must include: (1) The reasons for failing to request an extension before the deadline for the submission; and (2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely. (g) *Intervention*— (1) *By Director of OPM*. The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.	initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at 1201.22(b)(3) of this part, pertaining to an appellant's receipt of a final agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition or cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review. (f) *Extension of time to file*. The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(2) *By Special Counsel*. (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties. (ii) The Special Counsel 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, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed. (3) *Permissive intervenors*. Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for	(g) *Late filings*. Any pleading described in paragraph (a) that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (f) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: the reasons for failing to request an extension before the deadline for the submission; and a specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (e) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely. (h) *Length limitations*. A petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
permission to intervene. (h) *Service*. A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26. (i) *Closing the record*. The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition 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.	use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long. (i) *Intervention*— (1) *By Director of OPM*. The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties. (2) *By Special Counsel*. (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties. (ii) The Special Counsel 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, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed. (3) *Permissive intervenors*. Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene. (j) *Service*. A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26. (k) *Closing the record*. The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	review, whichever is later, 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. (l) *Rejection for failure to comply*. The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission. Any deadlines affected by the rejection will be addressed in the rejection letter.	
1201.115 Contents of petition for review. (a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record. [Paragraphs (b) and (c), which related to the provision of interim relief, have been moved to § 1201.116.] (d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that: (1) New and material evidence is available that, despite due diligence, was not available when the record closed; or (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.	**1201.115 Criteria for granting petition or cross petition for review.** The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that: (a) The initial decision contains erroneous findings of material fact; (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that	This regulation has been substantially rewritten so as 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. The regulation 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)

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing. (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. The petitioner must explain how the error affected the outcome 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 the resulting error affected the outcome of the case; (d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. (e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.	the petitioner has new and material evidence or legal argument that was not available when the record closed despite the petitioner's due diligence. Categories (b), (c), and (d) all require a showing that the error (or new evidence) affected the outcome of the case. NOPR; NOFR.
1201.116 Appellant requests for enforcement of interim relief. (a) *Before a final decision is issued*. If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant	**1201.116 Compliance with orders for interim relief.** (a) *Certification of compliance*. If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any	This section was revised to combine the contents of 5 CFR 1201.116 with what had been the provisions of 5 CFR 1201.115(b) and (c). No substantive changes were made.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit. (b) *After a final decision is issued*. If the appellant is not the prevailing party in the final Board order, and if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under § 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under § 1201.183. [Paragraphs (b) and (c) of § 1201.115 also contained provisions relating to interim relief:] (b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).	petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (b) *Challenge to certification.* If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission. (c) *Allegation of noncompliance in petition or cross petition for review*. If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (d) *Request for dismissal for noncompliance with interim relief order*. If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files	NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission. (3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B). (4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review. (c) Nothing in paragraph (b) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.	a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit. (e) *Effect of failure to show compliance with interim relief order*. Failure by an agency to provide the certification required by paragraph (a) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraphs (b), (c), or (d) of this section, may result in the dismissal of the agency's petition or cross petition for review. (f) *Back pay and attorney fees*. Nothing in this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final. (g) *Allegations of noncompliance after a final decision is issued*. If the initial decision granted the appellant interim relief, but the appellant is not the prevailing party in the final Board order disposing of a petition for review, and the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under 1201.182 of this part. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order disposing of a petition for review, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under 1201.183 of this part.	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1201.117 Procedures for review or reopening. (a) * * * (1) Issue a single decision that denies or grants a petition for review, reopens an appeal, and decides the case;	**1201.117 Board decisions; procedures for review or reopening.** (a) * * * (1) Issue a decision that decides the case;	Subparagraph (a)(1) was revised to reflect the revision to 5 CFR 1201.118, which restricts "reopening" to situations in which the Board members have previously issued a final order or the initial decision has become the Board's final order by operation of law. NOPR; NOFR.
1201.118 Board reopening of case and reconsideration of initial decision. The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.	**1201.118 Board reopening of final decisions.** Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final.	The purpose of this revision was to change 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. Under the revised regulation, "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. NOPR; NOFR.
1201.119 OPM petition for reconsideration. (a) *Criteria*. Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines: (1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and (2) That the Board's decision will have a	**1201.119 OPM petition for reconsideration.** (a) *Criteria*. Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final decision if he or she determines: (1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and (2) That the Board's decision will have a	In paragraphs (a), (b), and (d), the words "final decision" replaced the words "final order." This was done in light of the language used in 5 CFR 1201.117 and 1201.118, and to eliminate any confusion between "Final Order" as the document title of a particular type of final Board decision and the generic term "final decision," which applies to any type of final decision, whether it is an Opinion

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
substantial impact on a civil service law, rule, regulation, or policy directive. (b) *Time limit*. The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order. (c) * * * (d) *Stays*. If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.	substantial impact on a civil service law, rule, regulation, or policy directive. (b) *Time limit*. The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final decision. (c) * * * (d) *Stays*. If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final decision. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.	and Order or a "Final Order." NOPR.
1201.122 Filing complaint; serving documents on parties. (a) * * * (b) *Initial filing and service*. The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form. (c) * * * (d) *Method of filing and service*. Filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as	**1201.122 Filing complaint; serving documents on parties.** (a) * * * (b) *Initial filing and service*. The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. * * * * *	Paragraph (b) was revised to correct an oversight in the MSPB's regulations relating to the use of e-Appeal in original jurisdiction actions. Paragraphs (d) and (e) were deleted as unnecessary.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
shown on the certificate of service. (e) *Electronic filing*. All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (https://e-appeal.mspb.gov), provided the requirements of § 1201.14 are satisfied.		
1201.128 Filing complaint; serving documents on parties. * * * * * (b) *Initial filing and service*. The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative, and each person on whose behalf the corrective action is brought. The Special Counsel must serve a copy of the complaint on the agency or its representative, and each person on whose behalf the corrective action is brought, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form. (c) *Subsequent filings and service*. Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number	**1201.128 Filing complaint; serving documents on parties.** * * * * * (b) *Initial filing and service*. The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought. * * * * *	Same revisions as in section 1201.122.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
of the party or the party's representative. (d) *Method of filing and service*. A filing may be by mail, by facsimile, or by personal or commercial delivery to the office determined under paragraph (a) of this section. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service. (e) *Electronic filing*. All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (https://e-appeal.mspb.gov), provided the requirements of § 1201.14 are satisfied.		
1201.134 Deciding official; filing stay request; serving documents on parties. * * * * * (d) *Initial filing and service*. The Special Counsel must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial filing in a request for a stay may not be submitted in electronic form. (e) * * * (f) *Method of filing and service*. A filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by	**1201.134 Deciding official; filing stay request; serving documents on parties.** * * * * * (d) *Initial filing and service*. The Special Counsel must file a copy of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service. * * * * *	Same revisions as in section 1201.122.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service. (g) *Electronic filing*. All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (https://e-appeal.mspb.gov/), provided the requirements of § 1201.14 are satisfied.		
1201.137 Covered actions; filing complaint; serving documents on parties. * * * * * (c) *Initial filing and service*. The agency must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form. (d) * * * (e) *Method of filing and service*. A filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by mail, by facsimile, or by commercial or personal delivery to each party or the party's representative, as shown on the certificate of service. (f) *Electronic filing*. All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (https://e-appeal.mspb.gov/), provided the requirements of § 1201.14 are satisfied.	**1201.137 Covered actions; filing complaint; serving documents on parties.** * * * * * (c) *Initial filing and service*. The agency must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party and the party's representative, as shown on the certificate of service. * * * * *	Same revisions as in section 1201.122.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1201.142 Actions filed by administrative law judges. An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and serving requirements of 5 CFR 1201.37 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.	**1201.142 Actions filed by administrative law judges.** An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and service requirements of 1201.137 of this part apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.	This section was revised to correct a typographical error.
1201.143 Right to hearing; filing complaint; serving documents on parties. * * * * * (c) *Initial filing and service*. The appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial filing may not be submitted in electronic form. (d) * * * (e) *Method of filing and service*. A filing may be by mail, by facsimile, or by personal or commercial delivery, to the office determined under paragraph (b) of this section. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service.	**1201.143 Right to hearing; filing complaint; serving documents on parties.** * * * * * (c) *Initial filing and service*. Except when filed electronically under 1201.14, the appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service. * * * * *	The revisions to this regulation are similar to the revisions to section 1201.122. A minor technical amendment has been made to paragraph (c) to be consistent with requirements for filing new appeals under the Board's appellate jurisdiction. Section 1201.26(a) provides that the appellant "must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14. Unlike the original jurisdiction appeals under 1201.122, .128, and .134, the MSPB needs a second copy for service on the opposing party.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(f) *Electronic filing*. All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (https://e-appeal.mspb.gov/), provided the requirements of § 1201.14 are satisfied.		
1201.153 Contents of appeal. (a) * * * (2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. 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. * * * * *	**1201.153 Contents of appeal.** (a) * * * (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. * * * * *	Subparagraph (a)(2) was revised to clarify that not all discrimination matters may be raised with the Board and substitute the term "under a negotiated grievance procedure" for the word "grievance" to reflect that these are the only types of grievances covered under the mixed cases regulations.
1201.154 Time for filing appeal; closing record in cases involving grievance decisions. 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: * * * * *	**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: * * * * *	The introductory paragraph was revised to incorporate by reference the rules governing constructive receipt as proposed in 5 CFR 1201.22(b)(3).
1201.155 Remand of allegations of discrimination. The prior regulation was deleted as unnecessary. Paragraphs (d) and (e) of prior § 1201.154, which dealt with Board review of arbitration decisions, were	**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	Paragraphs (d) and (e) were moved from former section 1201.154 and revised to become new section 1201.155. Section 1201.155 contains two significant

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
revised and moved to become section 1201.155.	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	revisions. First, the regulation now 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 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. Second, paragraph (d) 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 the view 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. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	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	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	readily available before the record closed.	
1201.181 Authority and explanation. (a) Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. The Board's decisions and orders will contain a notice of the Board's enforcement authority. (b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.	**1201.181 Authority and explanation.** (a) *Authority*. Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction and the authority to enforce compliance with its orders and decisions. The Board's decisions and orders, when appropriate, will contain a notice of the Board's enforcement authority. (b) *Requirements for parties*. The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. Agencies must promptly inform an appellant of actions taken to comply and must inform the appellant when it believes compliance is complete. Appellants must provide agencies with all information necessary for compliance and should monitor the agency's progress towards compliance.	The MSPB made non-substantive changes to this regulation that merely reordered the information and added descriptive labels to each paragraph.
1201.182 Petition for enforcement. (a) *Appellate jurisdiction*. Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the	**1201.182 Petition for enforcement.** (a) *Appellate jurisdiction*. Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction, or for enforcement of the terms of a settlement agreement that has been entered into the record for the purpose of enforcement in an order or decision under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the	Paragraphs (a) and (b) were revised to clarify 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.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition. (b) *Original jurisdiction*. Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance. * * * * *	other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition. (b) *Original jurisdiction*. Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance. * * * * *	
1201.183 Procedures for processing petitions for enforcement. (a) * * * (2) If the agency is the alleged noncomplying party, it shall submit the name and address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President	**1201.183 Procedures for processing petitions for enforcement.** (a) * * * (2) If the agency is the alleged noncomplying party, it shall submit the name, title, grade, and address of the agency official charged with complying with the Board's order, and inform such official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. 1204(a)(2) and (e)(2)(A), even if the agency asserts it has fully complied. The	Paragraphs (a)(2), (a)(5) through (a)(7), (b), and (c) were revised; previous paragraphs (c) and (d) were redesignated as (e) and (f). The revised regulation changes the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The goal is to ensure, to the extent feasible, that all relevant evidence

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
by and with the consent of the Senate is charged with compliance. * * * * * (5) If the judge finds that: (i) The alleged noncomplying party has not taken, or has not made a good faith effort to take, any action required to be in compliance with the final decision, or (ii) The party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decision; he or she will issue a recommendation containing his or her findings, 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. (6) If a recommendation described under paragraph (a)(5) of this section is issued, the alleged noncomplying party must do one of the following: (i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions. (ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within	agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance. * * * * * (5) If the judge finds that the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for enforcement and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. A copy of the initial decision will be served on the responsible agency official. (6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in noncompliance must do the following: (i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under § 1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those	is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues. In addition, the regulation 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. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. This was done for a couple of reasons. First, when the initial decision is the first time that the agency learns definitively what actions it must take, 15 days would rarely be sufficient to have taken all required actions, e.g., the issuance of SF-52s and/or SF 50s and action taken by a payroll office. Second, the Board determined that there should not be different deadlines for submitting evidence of compliance as compared to contesting compliance actions with which the agency disagrees by filing a petition for review. 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

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance. (iii) If the party decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(6)(ii) of this section. (7) The petitioner may file a brief that responds to the submission described in paragraph (a)(6) of this section, and that asks the Board to review any finding in the recommendation, made under paragraph (a)(5)(ii) of this section, that the other party is in partial compliance with the final decision. The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(6) of this section. (b) Consideration by the Board. (1) The Board will consider the recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the alleged	actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision. (ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§ 1201.114 and 1201.115 of this part. (iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading. (7) If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2) of this section. (8) The complying party may file evidence and argument in response to any submission described in paragraph (a)(6) by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed. (b) *Final Decision of noncompliance*. If a party found to be in noncompliance under paragraph (a)(5) does not file a timely pleading with the Clerk of the Board as required by paragraph (a)(6), the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section. (c) *Consideration by the Board*. (1) Following review	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. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
noncomplying party, or that party's representative, to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the party or its representative to make this showing in writing, or to make it both personally and in writing. (2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing. (3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part. (c) *Certification to the Comptroller General*. When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order. (d) *Effect of Special Counsel's action or failure to act*. Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.	of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency and the responsible agency official to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the agency and the responsible agency official to make this showing in writing, or to make it both personally and in writing. The responsible agency official has the right to respond in writing or to appear at any argument concerning the withholding of that official's pay. (2) The Board's final decision on the issues of compliance is subject to judicial review under 1201.120 of this part. (3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part. (d) *Burdens of proof*. If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence. (e) *Certification to the Comptroller General*. When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any	

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order. (f) *Effect of Special Counsel's action or failure to act*. Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.	
Subpart H – Attorney (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages	**Subpart H - Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)**	The title of this subpart was amended to reflect that it now covers liquidated damages as well as the other listed forms of relief.
1201.201 Statement of purpose. (a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages. * * * * *	**1201.201 Statement of purpose.** (a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, compensatory damages, and liquidated damages. * * * * * (e) An award equal to back pay shall be awarded as liquidated damages under 5 U.S.C. 3330c when the Board or a court determines an agency willfully violated an appellant's veterans' preference rights.	Paragraph (a) was revised, and paragraph (e) was added, to include provisions relating to awards of liquidated damages under the Veterans Employment Opportunities Act of 1998.
1201.202 Authority for awards. * * * * * (d) *Definitions*. For purposes of this subpart: (1) A proceeding on the merits is a proceeding to	**1201.202 Authority for awards.** * * * * * (d) *Awards of liquidated damages*. The Board may award an amount equal to back pay as liquidated damages under 5 U.S.C. 3330c when it determines	A new paragraph (d) was added to include provisions relating to awards of liquidated damages under the Veterans Employment Opportunities Act of 1998. Existing paragraph (d) was redesignated as (e).

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
decide an appeal of an agency action under 5 U.S.C. 1221 or 7701, an appeal under 38 U.S.C. 4324, an appeal under 5 U.S.C. 3330a, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521. (2) An addendum proceeding is a proceeding conducted after issuance of a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under § 1201.113 of this part or a final decision of the Board.	that an agency willfully violated an appellant's veterans' preference rights. (e) *Definitions*. * * *	
1201.204 Proceedings for consequential damages and compensatory damages. * * * * * (h) *Request for damages first made in proceeding before the Board*. Where a request for consequential damages or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the 3-member Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may: * * * * *	**1201.204 Proceedings for consequential, liquidated, and compensatory damages.** * * * * * (h) *Request for damages first made in proceeding before the Board*. Where a request for consequential, liquidated, or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may: * * * * *	The section title and paragraph (h) were revised to include actions for liquidated damages.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
1203.2 Definitions. * * * * * (e) *Prohibited personnel practices* are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(11).	**1203.2 Definitions.** * * * * * (e) *Prohibited personnel practices* are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(12).	Paragraph (e) was revised to reflect that there are now 12 prohibited personnel practices, not 11.
1208.3 Application of 5 CFR part 1201. Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages) of 5 CFR part 1201 regarding awards of attorney fees to appeals governed by this part.	**1208.3 Application of 5 CFR part 1201.** Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)) of 5 CFR part 1201 regarding awards of attorney fees and liquidated damages to appeals governed by this part.	This section was revised to reflect the references to liquidated damages in subpart H of Part 1201.
1208.21 VEOA exhaustion requirement. Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation and allow the Secretary at least 60 days from the date the complaint is filed to attempt to resolve the complaint.	**1208.21 VEOA exhaustion requirement.** (a) *General rule*. Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation. In addition, either the Secretary must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or, if the Secretary has not issued such notification and at least 60 days have elapsed from the date the complaint was filed, the appellant must have provided written notification to the Secretary of the appellant's intention to file an appeal with the Board.	Paragraph (a) of this regulation was revised to clarify an appellant's burden of proving exhaustion in a VEOA appeal. Section 1208.21 had provided that, to exhaust his administrative remedies with DOL, an appellant must file a complaint with DOL and allow DOL 60 days to resolve the complaint. However, this was an incomplete picture of the exhaustion process, in that it did not include the requirement that DOL close the complaint, either on its own accord or based on a letter from the appellant after 60 days have elapsed stating that the

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	(b) *Equitable tolling; extension of filing deadline*. In extraordinary circumstances, the appellant's 60-day deadline for filing a complaint with the Secretary is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.	appellant intends to file a Board appeal. In addition, it did not account for the fact that DOL might close its investigation before 60 days have elapsed. The revised regulation provides a more accurate and complete picture of what is required to establish exhaustion in a VEOA appeal. The regulation adds a paragraph (b), which provides that the deadline for filing a claim with DOL can be excused under the doctrine of equitable tolling. NOPR.
1208.22 Time of filing.	**1208.22 Time of filing.** * * * * * (c) *Equitable tolling; extension of filing deadline*. In extraordinary circumstances, the appellant's 60-day deadline for filing an appeal with the MSPB is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.	Paragraph (c) was added to address the possibility of excusing an untimely filed appeal under the doctrine of equitable tolling. NOPR; NOFR.
1208.23 Content of a VEOA appeal; request for hearing. (a) * * * * * * * * (5) (i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the	**1208.23 Content of a VEOA appeal; request for hearing.** (a) * * * * * * * * (5) Evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary; and	Existing paragraph (a)(5) was redesignated as (a)(6) and insert new paragraph (a)(5), which indicates that the Board will scrutinize the exhaustion issue in a VEOA appeal in the same way that it scrutinizes the exhaustion issue in an IRA appeal, i.e., the Board will only consider claims that were raised to the Department of Labor.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
Secretary's notice satisfies this requirement); or (ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement). * * * * *	(6) (i) Evidence that the Secretary * * * * * * * *	NOPR.
1209.2 Jurisdiction. (a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. (b) The Board exercises jurisdiction over: (1) *Individual right of action appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. Example: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because of his whistleblowing activities. Because a performance evaluation is	**1209.2 Jurisdiction.** (a) Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. (b) The Board exercises jurisdiction over: (1) *Individual right of action (IRA) appeals*. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board. *Example 1*: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he reported that his supervisor embezzled public funds in violation of	As revised, the 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 an adverse action, for example, the agency must prove its charges, nexus, and the reasonableness of the penalty by a preponderance of the evidence, and the appellant is free to assert any affirmative defense he might have, including harmful procedural error and discrimination under Title VII or the Rehabilitation Act. In an IRA appeal, however, the only issue before the Board is whether the agency took one or more

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal. (2) Otherwise appealable action appeals. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).) Example: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513 . Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a) , Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board. (3) Stays. Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.	Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal. *Example 2*: As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days and because he testified on behalf of a co-worker in an EEO proceeding. The Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for filing a Board appeal would constitute a different prohibited personnel practice, 5 U.S.C. 2302(b)(9), retaliation for having exercised an appeal, complaint, or grievance right granted by any law, rule, or regulation. Similarly, retaliation for protected EEO activity is a prohibited personnel practice under subsection (b)(9), not under subsection (b)(8). *Example 3*: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Y files a complaint with OSC alleging that the proposed removal was	covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures. 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.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of Federal law and regulation. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal. (2) *Otherwise appealable action appeals*. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3(a).) An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section. *Example 4*: Same as Example 3 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if	The long-term consequences of the change to this regulation should be straightforward. When taking an otherwise appealable action, agencies will be required, per revised section 1201.21, to advise employees of their options under § 7121(g) and the consequences of such an election, including the fact that the employee would be foregoing important rights if he or she seeks corrective action from OSC before filing with the Board. There would be difficult interim questions concerning cases that are already in the pipeline. One issue would be whether, despite the seemingly clear language and consequences of § 7121(g), the appellant should be deemed to have made a valid and binding election. An argument might be made that an election is not binding unless it constitutes a knowing and informed decision. *Cf. Atanus v. Merit Systems Protection Board*, 434 F.3d 1324, 1326-27 (Fed. Cir. 2006) (concluding that the appellant made a knowing and informed, and therefore binding election under § 7121(e)). The proposed regulation does not resolve this question, which would be resolved in particular appeals. If the Board were to hold that some elections were not binding, a related question would be whether the Board should excuse the untimely filing of the Board appeal, which would be filed well after the 30-day deadline of 5 C.F.R. § 1201.22(b)(1). Again, this would be

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
	so, whether the agency can prove by clear and convincing evidence that it would have removed Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Y can raise any affirmative defenses she might have. (c) *Issues before the Board in IRA appeals*. In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure(s). The appellant may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), i.e., that its action is taken "only for such cause as will promote the efficiency of the service." However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure(s). (d) *Elections under 5 U.S.C. 7121(g)*. (1) Under 5 U.S.C. 7121(g)(3), an employee who believes he or she was subjected to a covered	resolved in particular appeals. NOPR; NOFR.

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	personnel action in retaliation for protected whistleblowing "may elect not more than one" of 3 remedies: an appeal to the Board under 5 U.S.C. 7701; a negotiated grievance under 5 U.S.C. 7121(d); or corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with the special counsel (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under 5 U.S.C. 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first. (2) In the case of an otherwise appealable action as described in paragraph (b)(2) of this section, an employee who files a complaint with OSC prior to filing an appeal with the Board has elected corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC, which can be followed by an IRA appeal with the Board. As described in paragraph (c) of this section, the IRA appeal in such a case is limited to resolving the claim(s) of reprisal for whistleblowing activities.	
1209.4 Definitions. * * * * * (b) *Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does	**1209.4 Definitions.** * * * * * (b) *Whistleblowing* is the making of a protected disclosure, that is, a disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial	The Board's case law, as well as its acknowledgment and jurisdictional orders, speak in terms of "protected disclosures," but this regulation defined "whistleblowing" and the Part 1209 regulations refer in several places to "whistleblowing activities." This minor revision to the definition combines the two concepts so that the use of

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not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. * * * * *	and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it. * * * * *	"whistleblowing activities" is not ambiguous.
1209.5 Time of filing. (a) *Individual right of action appeals*. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed: (1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or, (2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.	**1209.5 Time of filing.** (a) *General rule*. The appellant must seek corrective action from the Special Counsel before appealing to the Board unless the action being appealed is otherwise appealable directly to the Board and the appellant has elected a direct appeal. (See § 1209.2(d) regarding election of remedies under 5 U.S.C. 7121(g)). Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed: (1) No later than 65 days after the date of issuance of the Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or, (2) At any time after the expiration of 120 days, if the Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the	Paragraphs (a) and (b) were revised to eliminate the distinction between IRA appeals and otherwise appealable actions in light of the change made to 5 CFR 1209.2, and to revise the language regarding equitable tolling consistent with the changes made in sections 5 CFR 1208.21 and .22.. NOPR; NOFR.

Text of Previous Regulation	Text of Revised Regulation	Description and Reason for Revision
(b) *Otherwise appealable action appeals*. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b). * * * * *	date of filing of the request for corrective action. (b) *Equitable tolling; extension of filing deadline*. The appellant's deadline for filing an individual right of action appeal with the Board after receiving written notification from the Special Counsel that it is terminating its investigation of his or her allegations is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period. * * * * *	
1209.6 Content of appeal; right to hearing. * * * * * (b) *Right to hearing*. An appellant has a right to a hearing. * * * * *	**1209.6 Content of appeal; right to hearing.** * * * * * (b) *Right to hearing*. An appellant generally has a right to a hearing if the appeal has been timely filed and the Board has jurisdiction over the appeal. * * * * *	Paragraph (b) was revised proposed to clarify that an appellant does not automatically have a right to a hearing in every Board appeal and that such a right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal. NOPR.