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MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201, 1210, and 1215

Interim Regulatory Changes Regarding Department of Homeland Security Personnel System

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or “the Board”) is revising its regulations to clarify the procedures applicable to MSPB processing and adjudication of cases arising under the Department of Homeland Security’s new human resources management system established pursuant to the Homeland Security Act of 2002. As is discussed below, these revisions to the Board’s regulations are necessary to reconcile the Board’s regulations and procedures with final regulations published by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) on February 1, 2005, at 70 FR 5272.

DATES: This rule is effective on November 5, 2007. Written comments should be submitted on or before November 5, 2007.

ADDRESSES: Send or deliver comments to the Office of Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Matthew D. Shannon, Acting Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: On November 25, 2002, the President signed into law H.R. 5005, the Homeland Security Act of 2002 (Pub. L.

107-296), which established DHS and authorized the DHS Secretary and OPM Director to jointly establish a new human resources management system within DHS. Pursuant to this grant of authority, on February 20, 2004, DHS and OPM published proposed regulations (69 FR 8030) for this new human resources system. Thereafter, on February 1, 2005, DHS and OPM published final regulations (70 FR 5272) implementing the new DHS personnel system.

Afterwards, the National Treasury Employees Union, American Federation of Government Employees, National Federation of Federal Employees, National Association of Agriculture Employees, and Metal Trades Department of the AFL-CIO, which collectively represent approximately 50,000 DHS bargaining unit employees, challenged portions of the regulations governing labor-management relations, adverse actions, and the appeals process. One of the provisions of the DHS regulations that was challenged is 5 CFR 9701.706(k)(6), which changes the standard by which the Board may mitigate penalties imposed by DHS. Pursuant to that provision, an arbitrator, adjudicating official or the Board may not modify such a penalty unless it is so disproportionate to the basis for the action as to be wholly without justification. The U.S. District Court for the District of Columbia enjoined the mitigation provision. *NTEU v. Chertoff*, 385 F.Supp.2d 1, 32-33 (D.D.C.), modification denied by, 394 F.Supp.2d 137 (D.D.C. 2005). A panel of the U.S. Court of Appeals for the D.C. Circuit reversed on this issue, holding that the question of the mitigation standard’s legality was not ripe for judicial review. *NTEU v. Chertoff*, 452 F.3d 839, 855 (D.C. Cir. 2006). Therefore, the MSPB’s regulations include that mitigation standard.

Subparts F and G of the final DHS/OPM regulations concern adverse actions and appeals and will have a significant effect on the way the MSPB processes and adjudicates appeals of adverse actions by DHS employees. In addition to limiting the types of cases that may be appealed to the Board, the final DHS/OPM regulations make many changes in how the Board will process and adjudicate appeals by DHS employees, including:

Shortened filing deadlines;

Streamlined and limited discovery procedures;
New settlement procedures;
Limitations on the right to a hearing;
Summary judgment and limitation of issues;
Time limits within which the Board must issue decisions;
Procedures for Board review of a decision of the DHS Mandatory Removal Panel (MRP); and,
Changes in certain standards of review.

In order to accommodate these substantive and procedural changes with the least possible confusion and delay, the Board determined to publish the following interim amendments to its regulations. Specifically, these changes involve amendments to 5 CFR part 1201 and the promulgation of new regulations applicable only to appeals, petitions for review, and requests for review of MRP decisions brought by DHS employees. These new DHS-specific regulations are being published in a revised 5 CFR part 1210. The regulations previously found in 5 CFR part 1210 have been moved, redesignated as 5 CFR part 1215, and are otherwise not changed.

A brief summary of the changes contained herein is as follows:

1201.3(a)(19) and (20) are amended and 1201.3(a)(21) is added to reflect the Board’s jurisdiction over certain actions taken by DHS (an unrelated housekeeping change is also made to 1201.3(a)(20));

1201.3(b)(3) is amended to reflect the Board’s jurisdiction over certain actions taken by DHS and to make clear that 5 CFR parts 1201, 1208 and 1209 apply to proceedings brought under 5 CFR part 1210, except as otherwise provided therein;

1201.11 is amended to state that the regulations of subpart B of 5 CFR part 1201 apply to appellate proceedings covered by part 1210 unless other specific provisions are made in that part;

1201.14(i) is amended to indicate that the Board’s rules applicable to electronic signatures by e-filers apply to any regulation in part 1210 that requires a signature;

1201.21 is renumbered and amended to delete an outdated reference to Appendix 1. A new section (1201.21(b)) addresses notice of appeal rights when DHS issues a decision notice to an

employee on a matter that is appealable to the Board.

1201.22(b)(2) is amended to indicate that additional time limits applicable to certain appeals by DHS employees are contained in part 1210.

The debt management regulations formerly in part 1210 are moved and redesignated as part 1215. As is discussed in greater detail below, new regulations regarding appeals by DHS employees are added in part 1210. Parts 1211, 1212, 1213, and 1214 are reserved for future agency-specific regulations.

The new regulations in part 1210 apply to Board proceedings in appeals of certain DHS adverse actions that are covered under subparts F and G of 5 CFR part 9701. Part 1210 consists of four subparts.

Subpart A of part 1210 discusses the scope of part 1210 and the Board's policy with regard to application of part 1210 in a fair and expeditious manner (1210.1); addresses MSPB jurisdiction (1210.2); sets forth the applicability of 5 CFR parts 1201, 1208, and 1209 to appeals by DHS employees (1210.3); defines certain words and terms used within part 1210 (1210.4); describes when and how the Board and/or an adjudicating official may revoke, amend or waive the regulations in part 1201 (1210.5); and adds a savings provision indicating that part 1210 does not apply to adverse actions proposed prior to the date of an affected employee's coverage under 5 CFR part 9701, subpart G (1210.6).

Subpart B of part 1210 sets forth procedures for appeals of actions taken under 5 CFR Part 9701, Subpart F, including agency responsibilities regarding notice of appeal rights (1210.10); procedures for filing an appeal (1210.11); representation by, and disqualification of, representatives (1210.12); burden and degree of proof and affirmative defenses (1210.13); required disclosure and the scope of discovery (1210.14); discovery procedures (1210.15); intervention by the Director of OPM (1210.16); procedures applicable to settlement (1210.17); case suspension procedures (1210.18); the right to a hearing (1210.19); summary judgment (1210.20); and requirements pertaining to the adjudicating official's initial decision, including completion deadlines and interim relief (1210.21).

Subpart C of part 1210 addresses procedures applicable to petitions for review of initial decisions and petitions for reconsideration, including requirements such as who may file and the use of electronic filing (1210.30(a)); time limits applicable to petitions for review, cross petitions for review and

responses (1210.30(b)); the proper place for filing petitions for review, cross petitions for review, and responses (1210.30(c)); time limits within which the Board must render its decision (1210.30(d)); the ramifications of the Board's failure to meet such time limits (1210.30(e)); and requirements applicable to an OPM request for reconsideration (1210.31).

Subpart D of part 1210 addresses MSPB review of decisions of the Mandatory Removal Panel (MRP), including jurisdiction and procedures and time limits applicable to a request for review (1210.40); the standard of review and time limits applicable to a decision by the Board (1210.41); intervention by the Director of OPM (1210.42); finality of Board decisions and judicial review (1210.43); and requests for reconsideration (1210.44).

List of Subjects in 5 CFR Parts 1201, 1210, and 1215

Administrative practice and procedure, Government employees.

■ Accordingly, the Board amends 5 CFR Chapter II as follows:

PART 1201—[AMENDED]

■ 1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701.

■ 2. Section 1201.3 is amended by revising paragraphs (a)(19) and (a)(20) and adding new paragraphs (a)(21) and (b)(3) as follows:

§ 1201.3 Appellate jurisdiction.

* * * * *

(a) * * *

(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);

(20) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011); and

(21) Actions taken by the Department of Homeland Security under subpart F of 5 CFR part 9701, except for those matters excluded under 5 CFR 1210.2(c) and (d). Actions covered include suspensions of 15 days or more, demotions, reductions in pay, removals, or furloughs of 30 days or less, subject to the limitations set forth in 5 CFR 9701.704.

* * * * *

(b) * * *

(3) *Appeals of certain actions taken by the Department of Homeland Security.* Appeals of actions taken by

the Department of Homeland Security under subpart F of 5 CFR part 9701, except for those matters excluded under 5 CFR 1210.2 (c) and (d), are governed by part 1210 of this title. Parts 1201, 1208 and 1209 of this title apply to Board appellate proceedings conducted under 5 CFR part 1210, except as otherwise provided therein.

* * * * *

■ 3. Section 1201.11 is revised to read as follows:

§ 1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. The regulations in this subpart apply also to appellate proceedings covered by part 1210 unless other specific provisions are made in that part. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case.

■ 4. Section 1201.14 is amended by revising paragraph (i) to read as follows:

§ 1201.14 Electronic filing procedures.

* * * * *

(i) *Documents requiring a signature.* An electronic document filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, 1209, or 1210 of this title that requires a signature.

* * * * *

■ 5. Section 1201.21 is revised to read as follows:

§ 1201.21 Notice of appeal rights.

(a) When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(1) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(2) A copy, or access to a copy, of the Board's regulations;

(3) A copy of the MSPB appeal form available at the Board's Web site (<http://www.mspb.gov>), and

(4) Notice of any right the employee has to file a grievance, including:

(i) Whether the election of any applicable grievance procedure will

result in waiver of the employee's right to file an appeal with the Board;

(ii) 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 with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(iii) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).

(b) When the Department of Homeland Security (or component thereof) issues a decision notice to an employee on a matter that is appealable to the Board, except as provided under 5 CFR 9701.707, the Department must comply with the notice provisions set forth in 5 CFR 1210.10.

■ 6. Section 1201.22 is amended by revising paragraph (b)(2) to read as follows:

§ 1201.22 Filing an appeal and responses to appeals.

(b) * * *

(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. See part 1210 of this title for time limits applicable to appeals by employees of the Department of Homeland Security.

* * * * *

PART 1210—[REDESIGNATED AS PART 1215]

■ 7. Part 1210 is redesignated as part 1215.

PART 1215—[AMENDED]

■ 8. In newly redesignated part 1215, remove "1210" and add in its place "1215" wherever it may occur.

■ 9. Add a new part 1210 to read as follows:

PART 1210—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

Subpart A—Jurisdiction, Definitions, and Waiver of Rules

Sec.

- 1210.1 Scope and policy.
- 1210.2 Jurisdiction.
- 1210.3 Application.
- 1210.4 Definitions.
- 1210.5 Revocation, amendment and waiver of regulations in this part.
- 1210.6 Savings provision.

Subpart B—Procedures for Appeals of Actions Taken Under 5 CFR Part 9701, Subpart F

Sec.

- 1210.10 Notice of appeal rights.
- 1210.11 Filing an appeal.
- 1210.12 Representatives.
- 1210.13 Burden and degree of proof; affirmative defenses.
- 1210.14 Initial disclosures; scope of discovery.
- 1210.15 Discovery procedures.
- 1210.16 Intervention.
- 1210.17 Settlement.
- 1210.18 Case suspension procedures; use of the Mediation Appeals Program; refiled appeals.
- 1210.19 Right to a hearing.
- 1210.20 Summary judgment.
- 1210.21 Initial decision by the adjudicating official.

Subpart C—Petitions for Review of Initial Decisions and Petitions for Reconsideration

Sec.

- 1210.30 Filing petition and cross petition for review.
- 1210.31 OPM petition for reconsideration.

Subpart D—Review of Mandatory Removal Action Appeals

Sec.

- 1210.40 Filing a request for Board review.
- 1210.41 Decision of the Board.
- 1210.42 Intervenors.
- 1210.43 Finality.
- 1210.44 Request for reconsideration.

Authority: 5 U.S.C. 1204 and 7701.

Subpart A—Jurisdiction, Definitions, and Waiver of Rules

§ 1210.1 Scope and policy.

The regulations in this part apply to Board proceedings in appeals of certain adverse actions of the Department of Homeland Security that are covered under subparts F and G of 5 CFR part 9701. The Board will apply these rules in a manner that promotes the fair, efficient and expeditious resolution of appeals.

§ 1210.2 Jurisdiction.

(a) *Employees covered.* The Board has jurisdiction over appeals brought by employees covered by 5 CFR 9701.604(c), except for those classes of

employees excluded under 5 CFR 9701.604(d).

(b) *Actions covered.* The Board has jurisdiction over appeals from actions taken by the Department under subpart F of 5 CFR part 9701, except for those matters excluded under paragraphs (c) and (d) of this section. Actions covered include suspensions of 15 days or more, demotions, reductions in pay, removals, or furloughs of 30 days or less, subject to the limitations set forth in 5 CFR 9701.704.

(c) *Matters excluded from MSPB jurisdiction—(1) Mandatory removal offenses.* Except as stated in paragraph (c) of this section, the Board does not have jurisdiction over first-level appeals from actions taken pursuant to 5 CFR 9701.707 for offenses that the Secretary has designated as mandatory removal offenses. The procedures governing petitions for review of decisions of the Mandatory Review Panel are set forth in subpart D of this part.

(2) *National security suspensions and removal.* The Board does not have jurisdiction over appeals from suspension and removal actions taken by the Secretary pursuant to 5 CFR 9701.613 when he or she considers such actions to be in the interest of national security.

(d) *Effect of status under a retirement system.* If an employee has been removed under subpart F of 5 CFR part 9701, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

§ 1210.3 Application.

Subject to modification and/or waiver by the adjudicating official, the regulations set forth in 5 CFR parts 1201, 1208 and 1209 apply to Board appellate proceedings conducted under this part except as otherwise provided herein.

§ 1210.4 Definitions.

In this subpart:

(a) *Adjudicating official* means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

(b) *Demotion* means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by the Department pursuant to 5 CFR 9701.355.

(c) *Department* means the Department of Homeland Security.

(d) *Director* means Director of the Office of Personnel Management.

(e) *Furlough* means the placement of an employee in a temporary status

without duties and pay because of lack of work or funds or other non-disciplinary reasons.

(f) *Grade* means a level of work under a position classification or job grading system.

(g) *Indefinite suspension* means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and usually ends with either the employee returning to duty or the completion of any subsequent administrative action.

(h) *Initial service period (ISP)* means the 1 to 2 years employees must serve after selection (on or after the date this subpart becomes applicable, as determined under 5 CFR 9701.102(b)) for a designated Department position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation. All relevant prior Federal civilian service (including non-appropriated fund service), as determined by appropriate standards established by the Department, counts toward completion of this requirement.

(i) *Mandatory removal offense (MRO)* means an offense that the Secretary determines in his or her sole, exclusive and unreviewable discretion, has a direct and substantial adverse impact on the Department's homeland security mission.

(j) *Mandatory Removal Panel (MRP)* means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

(k) *Pay* means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, locality or special rate supplements under subpart C of 5 CFR 9701, or other similar payments.

(l) *Removal* means the involuntary separation of an employee from the Department.

(m) *Secretary* means Secretary of the Department of Homeland Security.

(n) *Suspension* means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

§ 1210.5 Revocation, amendment and waiver of regulations in this part.

The Board or a judge may not revoke, amend or waive a regulation in this Part in a manner inconsistent with the Homeland Security Act of 2002 or 5 CFR Part 9701. Otherwise, the Board or a judge may revoke, amend or waive a regulation in this Part for good cause shown.

§ 1210.6 Savings provision.

This part does not apply to adverse actions proposed prior to the date of an affected employee's coverage under 5 CFR part 9701, subpart G.

Subpart B—Procedures for Appeals of Actions Taken Under 5 CFR Part 9701, Subpart F

§ 1210.10 Notice of appeal rights.

(a) When the Department of Homeland Security (or component thereof) issues a decision notice to an employee on a matter that is appealable to the Board, except as provided under 5 CFR 9701.707, the Department must provide the employee with the following:

- (1) Notice of the time limits for appealing to the Board, the requirements of 5 CFR 1201.22(c), and the address of the appropriate Board office for filing the appeal;
- (2) A copy, or access to a copy, of the Board's regulations at 5 CFR parts 1201 and 1210, and relevant Department of Homeland Security regulations;
- (3) A copy of MSPB Form 185, the MSPB Appeal Form. MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>);
- (4) Notice of any right the employee has to file a grievance, and that the election of any applicable grievance procedure may result in a waiver of the employee's right to file an appeal with the Board; and
- (5) Notice that a copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

(b) The notice must also include a specific statement that the matter was taken under 5 CFR part 9701.

§ 1210.11 Filing an appeal.

(a) *Time of filing.* An appeal must be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later. A response to an appeal must be filed within 15 days of the date of service of the acknowledgment order. All other submissions to the adjudicating official

must be filed in accordance with the time limits set in the Board's acknowledgment order or in any other order issued by the adjudicating official.

(b) *Computation of time.* The time for filing a submission under this subpart is computed in accordance with 5 CFR 1201.23.

(c) *Place for filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See 5 CFR 1201.4(d), 1201.22(a), and Appendix II to part 1201.

(d) *Decision notice.* A copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

§ 1210.12 Representatives.

Each party has the right to be represented by an attorney or other representative. Either party may file a motion to disqualify a representative at any time during the proceedings.

§ 1210.13 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof—*(1) *Agency.* Subject to paragraph (b) of this section, the decision of the Department must be sustained if it is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

(b) *Affirmative defenses of the appellant.* The decision of the Department must be sustained where it has met the evidentiary standard stated in paragraph (a) of this section, unless the appellant shows that:

- (1) There was harmful error in the application of the Department's procedures in arriving at its decision;
- (2) The decision was based on a prohibited personnel practice described in 5 U.S.C. 2302(b); or
- (3) The decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(2) *Harmful error.* Error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the

error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

(d) *Efficiency of the service.* Pursuant to 5 CFR 9701.606, the Department may take an adverse action under subpart F of 5 CFR part 9701 only for such cause as will promote the efficiency of the service.

§ 1210.14 Initial disclosures; scope of discovery.

(a) *Initial disclosures.* Except to the extent otherwise directed by order, each party must, without awaiting a discovery request and within ten calendar days following the date of the Board's acknowledgment order, provide the following information to the other party:

(1) The Department must provide:

(i) The Departmental record required by 5 CFR 9701.612; and

(ii) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the Department may use in support of its claims or defenses, identifying the subjects of such information.

(2)(i) The appellant must provide:

(A) 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 support of his or her claims or defenses; and

(B) The name and, if known, the address and telephone number 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 the information.

(ii) Each party must make its initial disclosure based on the information then reasonably available to the party. A party is not excused from making its disclosures because it has not fully completed the 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) *Scope of discovery.* The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

§ 1210.15 Discovery procedures.

(a) *Responses to discovery requests.* Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s). To the extent not inconsistent with this subpart, and subject to modified time limits and procedures that may be set by the adjudicating official, the provisions of 5 CFR 1201.71 through 1201.85 govern discovery in cases under this subpart.

(b) *Limitations on discovery.* (1) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts. In addition, neither party may conduct/compel more than 2 depositions.

(2) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

§ 1210.16 Intervention.

The Director may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this Part in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

§ 1210.17 Settlement.

(a) *Settlement discussion.* Neither an adjudicating official nor the Board may require settlement discussions in connection with any action appealed under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication. The parties are not prohibited from engaging in settlement discussions on their own.

(b) *Settlement Judges.* Where the parties agree to engage in settlement discussions, these discussions will be conducted by an official specifically designated by MSPB in each case for that sole purpose. That settlement discussions are being held by the settlement judge in no way alters the authority of the adjudicating official, who will continue to process all other aspects of the appeal.

§ 1210.18 Case suspension procedures; use of the Mediation Appeals Program; refiled appeals.

(a) The parties may submit a request for additional time. Requests for such case suspensions must be submitted jointly. 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 adjudicating official. Suspension periods granted pursuant to this procedure shall not be included when determining whether an initial decision has been issued within the 90-day period specified in section 5 CFR 9701.706(k)(7) and § 1210.21(a) of this part.

(b) If the parties agree jointly to use the Board's Mediation Appeals Program (MAP), the period within which the parties participate in MAP shall not be included when determining whether an initial decision has been issued within the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a).

(c) If an appeal is refiled after it has been dismissed without prejudice, the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a) restarts on the date of refiled. For purposes of this paragraph, "refiled" has the same meaning as "filed" set out in § 1210.21(a).

§ 1210.19 Right to hearing.

(a) An employee with a right of appeal under subparts F and G of 5 CFR part 9701 generally has a right to a hearing. When the adjudicating official finds that material facts are not in dispute, he or she must issue an initial decision without conducting a hearing, as appropriate. See 1210.20(e).

(b) Where the appellant requests a hearing and summary judgment is not appropriate, the adjudicating official may, in his or her discretion, hold the hearing in whole or in part by telephone, videoconference, or in person at the Board's regional or field office or at a designated hearing site listed at 5 CFR part 1201, Appendix III. Although the preferences of the parties and the nature of the issues to be heard and determined will inform the adjudicating official's decision, the ultimate selection rests in the sound judgment of the official. Among the factors that the adjudicating official will consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone are:

(1) The costs of traveling to the hearing site as compared with the costs of traveling to a videoconferencing site;

(2) The distance the parties and their witnesses would have to travel to appear in person; and

(3) Whether appearance by videoconference or telephone of the appellant or his or her witnesses would unduly prejudice the appellant.

§ 1210.20 Summary judgment.

(a) *Motion by a party.* Any party may file a motion for summary judgment if

the party believes that material facts are not in genuine dispute and that the party may be entitled to judgment as a matter of law. Each motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the moving party contends there is no genuine dispute. The statement shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury, or other evidence attached to the motion, relied on to support the statement.

(b) *Opposition to motion.* An opposition to a motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the party contends there exists a genuine dispute for hearing. The statement in opposition shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury or other evidence attached to the opposition, relied on to support the statement. The party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine dispute for hearing.

(c) *Time of filing.* Any party may file a motion for summary judgment no later than 5 days after the time limit for the completion of discovery set in the Board's acknowledgment order, or other time limit set by the adjudicating official. An opposition to a motion for summary judgment shall be filed within 15 days of service of the motion, or at the time specified by the adjudicating official.

(d) *Initiated by adjudicating official.* In addition to the authority set forth in 5 CFR 1201.41(b), if the adjudicating official determines on his or her own initiative that material facts may not be in genuine dispute, he or she may, after giving the parties written notice and at least 15 days to respond in writing, find that material facts are not in genuine dispute. The written notice to the parties shall include a statement separately listing all material facts as to which the adjudicating official believes there is no genuine dispute.

(e) *Decision by adjudicating official.* If, after considering the parties' submissions, the adjudicating official finds that material facts are not in genuine dispute, he or she must grant summary judgment on the law pursuant to 5 CFR 9701.706(k)(5) without conducting a hearing.

(f) *Definitions.* A fact is material if it is capable of affecting the outcome of the appeal. For a dispute to be genuine, there must be evidence sufficient for a

reasonable person to find in favor of the nonmoving party.

§ 1210.21 Initial decision by the adjudicating official.

(a) *General.* The adjudicating official must issue a decision after the close of the record and a copy of the decision must be provided to each party to the appeal and to the Director. An initial decision must be issued no later than 90 days after the date on which the appeal is filed. However, failure to meet this deadline will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l). 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 date of filing by facsimile is the date of the facsimile. The date of filing by mail is the date on the Board's acknowledgment order, and the Board must issue an acknowledgment order within five calendar days after receiving the appeal. 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.

(b) *Consideration of penalty.* The adjudicating official may modify the penalty imposed by the Department if he or she determines that such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the adjudicating official's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(c) *Interim relief.* (1) If an employee is the prevailing party in an appeal under this subpart, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (b)(3) of this section. Such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department, subject to paragraph (b)(2) of this section, determines, in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee would be unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (b)(1)(ii)

of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

Subpart C—Petitions for Review of Initial Decisions and Petitions for Reconsideration

§ 1210.30 Filing petition and cross petition for review.

(a) *Who may file.* Any party to the proceeding or the Director may file a petition for review of the decision by the adjudicating official. The Director may request review when he or she believes that the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation or policy directive. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any petition for review must be filed within 30 days after receipt of the initial decision. Absent evidence to the contrary, the Board presumes that a decision delivered by regular mail is received by the addressee 5 days after its issuance. If regular mail is not delivered on the fifth day following the issuance of the decision, the presumed date of receipt is the next date on which mail is delivered. 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. The Board may extend the filing period for good cause shown.

(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 5 CFR 1201.14.

(d) *Time for decision by the Board.* MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review as defined in 5 CFR 1201.114(i).

(e) *Effect of late decision.* The Board's failure to meet the requirement that

decisions be rendered no later than 90 days after the close of the record will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l).

§ 1210.31 OPM petition for reconsideration.

(a) If the Director seeks reconsideration of a final Board order, the Board must render its decision no later than 60 days after receipt of the opposition to the Director's petition in support of such reconsideration. The Board's failure to meet this requirement will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l).

(b) The Board shall state the reasons for any decision rendered in response to a petition for reconsideration filed by the Director.

Subpart D—Review of Mandatory Removal Action Appeals

§ 1210.40 Filing a request for Board review.

(a) *Who may file.* Any party to the proceeding or OPM may file a request for review. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any request for review must be filed within 15 days after issuance of the MRP's decision. Any party's response to the request for review, cross request for review, or OPM's request for review must be filed within 15 days of the Board's receipt of the request for review. If OPM does not file a request for review, it may intervene within 15 days after MSPB's receipt of a request for review of the record. A party or OPM may submit, and the Board may grant for good cause shown, a request for a single extension of time not to exceed 15 days.

(c) *Record for review.* The Board will establish, in conjunction with the MRP, standards for the contents of the record and the administrative process for review, including notice to the parties and OPM and procedures for the transfer of records from the Department to the Board.

§ 1210.41 Decision of the Board.

(a) *Board review of an MRP decision.* The Board must accept the findings of fact and interpretations of law of the MRP and sustain the MRP's decision unless the party appealing the MRP's decision shows that the MRP's decision was:

(1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(3) Unsupported by substantial evidence.

(b) *Definitions.* The following definitions apply to this part:

(1) *Harmful error.* Error by the MRP in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the party appealing the MRP's decision to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

(2) *Substantial evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(c)(1) *Mandatory time limit for decision.* The Board must complete its review of the record and issue a final decision within 30 days after receiving any party's response to the request for review, cross request for review, or OPM's intervention brief, whichever is filed later. The Board may extend the period for review by a single extension of time not to exceed 15 days, if it determines that:

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(2) No further extension of time will be permitted.

§ 1210.42 Intervenors.

The Director may intervene as a matter of right under 5 CFR 9701.707(f) or otherwise participate in any proceeding brought under this subpart, if the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

§ 1210.43 Finality.

Final decision of the Board. A decision of the Board on a request for review of an MRP decision shall constitute a final decision subject to judicial review in accordance with 5 U.S.C. 7703.

§ 1210.44 Request for reconsideration.

A decision of the Board under this subpart is final unless the Director petitions the Board for review within 30 days after the receipt of the decision.

The Director may petition the Board for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. The Board may extend the filing period for good cause shown.

Dated: September 28, 2007.

Arlin Winefordner,

Acting Clerk of the Board.

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FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Correcting amendments.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is correcting a document published in the **Federal Register** of September 27, 2007, that amended Regulation A to reflect a decrease in the primary and secondary credit rates at each Federal Reserve Bank.

DATES: This correction is effective October 5, 2007. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452-3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263-4869.

SUPPLEMENTARY INFORMATION: The Board published a document in the **Federal Register** of September 27, 2007 (72 FR 54813). The document (FR Doc. E7-19062) amended the Federal Reserve Banks' primary and secondary credit rates on extensions of credit available to depository institutions as a backup source of funding on a short-term basis. This document corrects the secondary credit rates for the Federal Reserve Bank of Dallas and the Federal Reserve Bank of San Francisco.

List of Subjects in 12 CFR Part 201

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows: