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## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1201

#### Streamlining Regulations

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Revised interim rule with request for comment.

**SUMMARY:** The Merit Systems Protection Board ("MSPB") is issuing a revised interim rule amending several provisions of its practices and procedures regulations to improve the agency's service to its customers by facilitating the expeditious adjudication of appeals. This revised interim rule is intended to streamline MSPB case adjudication. It revises and adds to the regulatory changes undertaken in an interim rule issued by the MSPB on September 18, 2003. (68 FR 54651) This revised interim rule reflects the comments received from MSPB adjudicators and practitioners based on their experiences with the implementation of the current interim rule. The MSPB is soliciting comments concerning this revised interim rule, as well as additional comments concerning the September 18, 2003 interim rule. The MSPB will issue a final rule following the end of the comment period for this revised interim rule. All comments received during the comment period will be taken into consideration in drafting the final rule.

**DATES:** *Effective date:* April 3, 2008. Submit written comments on or before June 2, 2008.

**ADDRESSES:** Send comments to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200, phone; (202) 653-7130, fax; or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

**FOR FURTHER INFORMATION CONTACT:** William D. Spencer, Clerk of the Board,

Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200, phone; (202) 653-7130, fax; or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On September 18, 2003, the MSPB issued an interim rule amending several provisions of its practices and procedures regulations to improve the agency's service to its customers by facilitating the expeditious adjudication of appeals. These changes in the MSPB's rules of practice and procedure were, in part, a response to the directives contained in the President's Management Agenda (2002). The President's management reform initiative directs agencies to "reshape their organizations to meet a standard of excellence in attaining the outcomes important to the nation." Among other actions, agencies are directed to reduce the time they take to make decisions. In addition, appellants and agencies had also expressed concern about the amount of time it took to adjudicate or otherwise process a case through the MSPB. As a result, the MSPB reviewed its practice and procedure regulations and determined that aspects of the regulations could be modified to improve its efficiency and effectiveness while maintaining the rights of the parties to a fair and impartial adjudication of appeals before the MSPB.

##### II. Changes Contained in the September 18, 2003 Interim Rule

The September 18, 2003 interim rule amended 5 CFR 1201.28 to allow the judge to grant a joint or unilateral request for suspension of a case for only one 30-day period rather than two 30-day periods. Moreover, the amended regulation provided that such requests would only be granted for good cause shown at the discretion of the judge, rather than automatically. Finally, the amendment specified a 30-day limit on the amount of time the judge could grant for a unilateral request.

The September 18, 2003 interim rule also added two new subsections to the MSPB's regulations governing discovery procedures. These subsections, 5 CFR 1201.72(d) and 1201.73(e), permitted the administrative judge to impose limits on the frequency or extent of the use of discovery methods and the

number of discovery requests. The MSPB noted at that time that it had decided to follow the guidance of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) in adopting these changes to its discovery procedures. The September 18, 2003 interim rule also amended 1201.73(d)(2) to reduce the number of days for filing subsequent discovery requests from 10 days to 7 days.

##### III. Summary of Changes in This Revised Interim Rule

This revised interim rule makes several changes to the MSPB's regulations as follows:

5 CFR 1201.28(g) is added to provide that the date on which a case returns to the adjudication process following a suspension is the 31st day after the suspension went into effect, but that if that date falls on a day when the MSPB is not open for business, such as a weekend or Federal holiday, then the first business day after that date is substituted. The MSPB's regulations were previously silent on this point and it is anticipated that this amendment will serve its and the parties' interests by assuring that deadlines restart and parties are held responsible for meeting processing requirements only on days that the MSPB is open to conduct official business.

5 CFR 1201.72(c) is clarified by adding the words "to parties" after "interrogatories" in response to a comment received from a practitioner suggesting that there may be some confusion about whether interrogatories may be served on nonparties.

5 CFR 1201.72(d) is clarified by moving the words "the discovery sought is" from the introduction to the beginning of paragraph (1) of that section.

5 CFR 1201.73 is amended by adding a new section (a) concerning initial disclosures required of the parties. This new provision, which is similar to Fed. R. Civ. P. Rule 26, requires the parties to make certain specific initial disclosures to each other within 10 days of the date of the Acknowledgment Order, so as to jump start the discovery process.

5 CFR 1201.73(e)(1) and 74(a) are amended to add an express requirement that the parties attempt to resolve a discovery dispute before filing a motion to compel with the MSPB. Parties often file a motion to compel discovery when

interrogatories are only one day late or there is a minor disagreement over the scope of discovery, before they make any reasonable effort to discuss the issue with the opposing party. At a minimum, the MSPB believes that this amendment will cause the parties to narrow the discovery issues in dispute, saving time and effort.

#### IV. Request for Additional Comment

The MSPB received 8 comments from appellants' representatives and agency representatives in response to the September 18, 2003 interim rule. The MSPB is considering these comments and will respond to them when a final rule is issued. However, as agency and appellant representatives have now had a significant period of time operating under the amendments effected by the September 18, 2003 interim rule, the MSPB is interested in receiving additional comments based upon such actual experience prior to issuing a final rule. The MSPB also invites comments concerning other changes to its regulations discussed herein that could facilitate the expeditious adjudication of appeals without adversely affecting the rights of the parties.

#### List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

■ Accordingly, the MSPB amends 5 CFR Part 1201 as follows:

#### PART 1201—[AMENDED]

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

**Authority:** 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

■ 2. Add § 1201.28(g) as follows:

#### § 1201.28 Case suspension procedures.

\* \* \* \* \*

(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.

■ 3. Revise § 1201.72 by revising paragraphs (c) and (d) to read as follows:

#### § 1201.72 Explanation and scope of discovery.

\* \* \* \* \*

(c) *Methods.* Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories to parties, depositions, requests for production of documents or things for

inspection or copying, and requests for admission.

(d) *Limitations.* The judge may limit the frequency or extent of use of the discovery methods permitted by these regulations. Such limitations may be imposed if the judge finds that:

(1) The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely b

■ 5. Revise § 1201.73 to read as follows:

#### § 1201.73 Initial disclosures and 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 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 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 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 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.

(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.

■ 6. Revise § 1201.74(a) to read as follows:

#### § 1201.74 Orders for discovery

(a) Motion for an order compelling discovery. Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(e)(1) and (f)(4). An administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 CFR § 1201.73(e)(1) and (f)(4).

\* \* \* \* \*

William D. Spencer,  
Clerk of the Board.

[FR Doc. E8-6934 Filed 4-2-08; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2007-0341; Airspace  
Docket No. 07-AAL-19]

#### Establishment of Class E Airspace; Kobuk, AK

AGENCY: Federal Aviation  
Administration (FAA), DOT.

**ACTION:** Final Rule.

**SUMMARY:** This action establishes Class E airspace at Kobuk, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Two new SIAPs and a textual departure procedure (DP) are being developed for the Kobuk Airport. This action establishes existing Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Kobuk Airport, Kobuk, AK.

**DATES:** *Effective Date:* 0901 UTC, June 5, 2008. The Director of the **Federal Register** approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Gary Rolf, AAL-538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513-7587; telephone number (907) 271-5898; fax: (907) 271-2850; e-mail: [gary.ctr.rolf@faa.gov](mailto:gary.ctr.rolf@faa.gov). Internet address: <http://www.alaska.faa.gov/at>.

#### SUPPLEMENTARY INFORMATION:

##### History

On Friday, February 1, 2008, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Kobuk, AK (73 FR 6056). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing SIAPs for the Kobuk Airport. Class E controlled airspace extending upward from 700 ft. above the surface and from 1,200 ft. above the surface in the Kobuk Airport area is established by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9R, *Airspace Designations and Reporting Points*, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.