Rules and Regulations

Federal Register
Vol. 78, No. 127
Tuesday, July 2, 2013

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201 and 1209

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) hereby amends its rules of practice and procedure to conform the Board's regulations to legislative changes that amended whistleblower protections for Federal employees and the penalties available in cases where the MSPB determines that a Federal employee or a State or local officer or employee violated restrictions on partisan political activity.

DATES: This interim final rule is effective on July 2, 2013. Submit written comments concerning this interim final rule on or before September 3, 2013.

ADDRESSES: Submit your comments concerning this interim final rule by one of the following methods and in accordance with the relevant instructions:

Email: mspb@mspb.gov. Comments submitted by email can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML and PDF. If possible, commenters are asked to use a text format and not an image format for attachments. An email should contain a subject line indicating that the submission contains comments concerning the MSPB's interim final rule. The MSPB asks that parties use email to submit comments if possible. Submission of comments by email will assist MSPB to process comments and speed publication of a final rule.

Fax: (202) 653–7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's interim final rule.

Mail or other commercial delivery: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419.

Hand delivery or courier: Comments should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, and delivered to the 5th floor reception window at this street address. Such deliveries are only accepted Monday through Friday, 9 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: As noted above, MSPB requests that commenters use email to submit comments, if possible. All comments received will be included in the public docket without change and will be made available online at the Board's Web site, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information whose disclosure is restricted by law. Those desiring to submit anonymous comments must submit comments in a manner that does not reveal the commenter's identity, include a statement that the comment is being submitted anonymously, and include no personally-identifiable information. The email address of a commenter who chooses to submit comments using email will not be disclosed unless it appears in comments attached to an email or in the body of a comment.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419; phone: (202) 653–7200; fax: (202) 653–7130; or email: *mspb@mspb.gov.*

SUPPLEMENTARY INFORMATION: This interim final rule is necessary to conform the MSPB's regulations to recent amendments to Federal law contained in the Hatch Act Modernization Act of 2012, Public Law 112–230 (the Act) and the Whistleblower Protection Enhancement Act of 2012, Public Law 112–199 (WPEA). The Act was signed by the President on December 28, 2012, and became effective on January 27, 2013. The WPEA was signed by the President on November 27, 2012, and became effective on December 27, 2012. The Board elected to combine all regulatory changes necessitated by the Act and the WPEA in this interim final rule because the Act and the WPEA have already taken effect.

Ordinarily, the Administrative Procedure Act (APA) requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. 553(b) and (c). However, section 553(b) of the APA specifically provides that the notice and comment requirements do not apply:

(A) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The APA also requires the publication of any substantive rule at least thirty days before its effective date, 5 U.S.C. 553(d), except where the rule is interpretive, where the rule grants an exception or relieves a restriction, or ''as otherwise provided by the agency for good cause found and published with the rule.'' *Id.*

A finding that notice and comment rulemaking is ''unnecessary'' must be ''confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.'' *Mack Trucks, Inc.* v. *Environmental Protection Agency,* 682 F.3d 87, 94 (D.C. Cir. 2012). The Board finds that use of an interim final rule instead of notice and comment rulemaking is appropriate here because the amendments contained herein merely reflect changes to both the Hatch Act and the Whistleblower Protection Act that have already been enacted into law. *Komjathy* v. *National Transp. Safety Bd.,* 832 F.2d 1294, 1296–97 (D.C. Cir. 1987) (notice and comment unnecessary where regulation does no more than repeat, virtually verbatim, the statutory grant of authority); *Gray Panthers Advocacy Comm.* v. *Sullivan,* 936 F.2d 1284, 1291–92 (D.C. Cir. 1991) (no reason exists to require notice and comment procedures where regulations restate or paraphrase the detailed requirements of the statute).

In addition, the Act and the WPEA both took effect 30 days after signature by the President. Given the short time within which amendments to the Act and the WPEA took effect, the Board finds that good cause exists to publish these amendments to its regulations in an interim rule that is effective immediately in order to reduce confusion caused by outdated regulations. *Philadelphia Citizens in Action* v. *Schweiker,* 669 F.2d 877, 882–84 (3d Cir. 1982) (finding good cause to dispense with notice and comment where Omnibus Budget Reconciliation Act amendments enacted by Congress became effective by statute on a specific date, shortly after enactment).

Regulatory Changes Required Under the Hatch Act Modernization Act of 2012

Links to the Act and a summary of the Act prepared by the Congressional Research Service are on MSPB's Web site at *http://www.mspb.gov/appeals/uscode.htm.* The Hatch Act prohibits certain Federal, State, and local government employees from engaging in certain political activities. Chapter 73 of title 5 covers Federal employees and chapter 15 covers State and local employees. Of the numerous changes made by the Act, the only item that requires an amendment to the MSPB's regulations concerns the penalty structure in provisions of the Hatch Act covering Federal employees. Prior to the effective date of the Act, the Hatch Act required the MSPB to impose termination of Federal employment for a Hatch Act violation, unless the Board found by unanimous vote that the violation did not warrant removal. *Special Counsel* v. *Simmons,* 90 M.S.P.R. 83, ¶ 14 (2001) (''[U]nder 5 U.S.C. 7326, removal is presumptively appropriate for a Federal employee's violation of the Hatch Act, unless the Board finds by unanimous vote that the violation does not warrant removal, whereupon a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.'') The Act modifies 5 U.S.C. 7326, the penalty provision of the Hatch Act, and now allows the MSPB to punish a violation by ordering removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000. These are the same penalties the Board may impose in other disciplinary cases under 5 U.S.C. 1215(a)(3).

This change in the Hatch Act penalty provision therefore requires the MSPB to delete 5 CFR 1201.125(c) and 1201.126(c), which contain specialized provisions that were necessary to accommodate the unique Hatch Act penalty provision that existed prior to the enactment of the Act.

Regulatory Changes Required Under the Whistleblower Protection Enhancement Act of 2012

Links to the WPEA and a summary of the WPEA prepared by the Congressional Research Service are on MSPB's Web site at *http://www.mspb.gov/appeals/uscode.htm.* A summary of the amendments to the MSPB's regulations required as a result of the enactment of the WPEA follows.

Scope of Protected Activity

Section 101 of the WPEA expanded the scope of protected activity subject to individual right of action (IRA) appeals. Previously, such appeals were limited to claims of retaliation for whistleblowing disclosures protected under 5 U.S.C. 2302(b)(8). IRA appeals now include claims of retaliation for additional protected activities covered under certain sections of 5 U.S.C. 2302(b)(9), as amended:

(A)(i): The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of 5 U.S.C. 2302(b)(8), i.e., the exercise of any appeal, complaint, or grievance right that included a claim of reprisal for protected whistleblowing;

(B): testifying for or otherwise lawfully assisting any individual in the exercise of any right granted by any law, rule, or regulation;

(C): cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; and

(D): refusing to obey an order that would require the individual to violate a law.

To accommodate these changes, all of the references to ''whistleblowing activities'' in the MSPB's regulations have been changed to refer to ''whistleblowing or other protected activity,'' and we have added a definition of ''other protected activity'' to section 1209.4, immediately following the definition of ''whistleblowing,'' which describes the activities protected by subsections (A)(i), (B), (C), and (D) of 5 U.S.C. 2302(b)(9).

We have modified and added to the Examples provided in section 1209.2 to illustrate the additional categories of protected activity. Example 2 reflects that, because IRA appeals now include claims of retaliation for exercising the rights protected by 5 U.S.C. 2302(b)(9)(A)(i), but not subsection (A)(ii), whether a claim of retaliation for exercising an appeal, complaint, or grievance right will be cognizable as an IRA appeal depends on whether the prior appeal, complaint, or grievance included a claim of retaliation for whistleblowing. In what might be viewed an anomaly in the scope of protected activity, Example 2 notes that, while a claim that one suffered reprisal for his or her own protected equal employment opportunity (EEO) activity may not be the subject of an IRA appeal, a claim that one suffered reprisal for testifying for or lawfully assisting another employee's protected EEO activity can be the subject of an IRA appeal. This is true because the latter activity is protected by subsection (b)(9)(B), which can form the basis of an IRA appeal, while the former is protected by subsection (b)(9)(A)(ii), which cannot form the basis of an IRA appeal.

Order and Elements of Proof

New paragraph (e) has been added to section 1209.2, entitled ''Elements and Order of Proof.'' This accomplishes three things, only one of which reflects changes to the law made by the WPEA. First, this paragraph defines the merits issues in a claim of retaliation for whistleblowing or other protected activity. Although the Board has laid out these elements of proof in numerous decisions, they have not previously been set forth explicitly in the part 1209 regulations. Second, this paragraph incorporates and states explicitly the ''knowledge/timing'' test of 5 U.S.C. 1221(e). Third, this paragraph incorporates section 114 of the WPEA, which addresses the scope of due process available to employees in whistleblowing cases. Specifically, section 114 provides that the issue of whether an agency can prove by clear and convincing evidence that it would have taken the same action in the absence of the appellant's whistleblowing or other protected activity will be reached only if there has first been a finding that an employee's whistleblowing or other protected activity was a contributing factor in a covered personnel action. Previously, the Board had ruled that it can, in an appropriate case, consider the clear and convincing evidence matter prior to determining whether a protected disclosure was a contributing factor in a covered personnel action. E.g., *McCarthy* v. *International Boundary & Water Commission,* 116 M.S.P.R. 594, ¶ 29 (2011); *Azbill* v. *Department of Homeland Security,* 105 M.S.P.R. 363,

¶ 16 (2007) (''The Board may resolve the merits issues in any order it deems most efficient.''). *See also, Fellhoelter* v. *Department of Agriculture,* 568 F.3d 965, 971 (Fed. Cir. 2009) (affirming the process and noting that the court had ''tacitly approved of the Board's practice'' in the past).

What Constitutes a Disclosure

The definition of ''whistleblowing'' in section 1209.4(b) has been revised to include the definition of ''disclosure'' contained in section 102 of the WPEA.

Reasonable Belief Test

The definition of what constitutes a ''reasonable belief'' from section 103 of the WPEA, which codifies the standard adopted by the U.S. Court of Appeals for the Federal Circuit in *Lachance* v. *White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999), has been incorporated into section 1209.4.

Nondisclosure Policies, Forms, or Agreements as Covered Personnel Actions

Section 1209.4(a) has been updated to include the implementation or enforcement of any nondisclosure policy, form, or agreement as a covered personnel action as reflected in section 104(a) of the WPEA.

Compensatory Damages

Section 1209.3, 1201.3(b)(2), 1201.201 and 1201.202 have been amended to provide for the possibility of an award of compensatory damages when there has been a finding of retaliation for whistleblowing or other protected activity, as provided by section 107 of the WPEA.

Referrals to the Special Counsel

Section 1209.13 has been revised to reflect that referrals to the Special Counsel will be made under this part when the Board determines that there is a reason to believe that a current Federal employee may have committed a prohibited personnel practice under 5 U.S.C. 2302(b)(9)(A)(i), (B), (C), or (D), as well as when there is a reason to believe that a current Federal employee may have committed a prohibited personnel practice under 5 U.S.C. 2302(b)(8).

List of Subjects in 5 CFR Parts 1201 and 1209

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR parts 1201 and 1209 as follows:

PART 1201—PRACTICES AND PROCEDURES

■ 1. The authority citation for 5 CFR 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. Section 1201.3 is amended by revising paragraph (b)(2) to read as follows:

§ 1201.3 Appellate jurisdiction.

* * * * *

(b) * * *

(2) *Appeals involving an allegation that the action was based on appellant's whistleblowing or other protected activity.* Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's whistleblowing or other protected activity, are governed by part 1209 of this title. The provisions of subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part. The provisions of subpart H of this part regarding awards of attorney fees, compensatory damages, and consequential damages under 5 U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.

* * * * *

■ 3. Section 1201.113 is amended by revising paragraph (f) to read as follows:

§ 1201.113 Finality of decision.

* * * * *

(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) or 2302(b)(9)(A)(i), (B), (C), or (D), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

■ 4. Section 1201.120 is revised to read as follows:

§ 1201.120 Judicial review.

Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review as provided by 5 U.S.C. 7703. As § 1201.175 of this part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.

■ 5. Section 1201.125 is amended by revising the first sentence of paragraph (b) and removing paragraph (c).

The revision reads as follows:

§ 1201.125 Administrative law judge.

* * * * *

(b) The administrative law judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557.

* * *

■ 6. Section 1201.126 is amended by revising paragraph (a) and removing paragraph (c).

The revision reads as follows:

§ 1201.126 Final decisions.

(a) In any action to discipline an employee, except as provided in paragraph (b) of this section, the administrative law judge, or the Board on petition for review, may order a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of a civil penalty not to exceed $1,000. 5 U.S.C. 1215(a)(3).

* * * * *

■ 7. Section 1201.132 is amended by revising paragraph (b) to read as follows:

§ 1201.132 Final decisions.

* * * * *

(b)(1) Subject to the provisions of paragraph (b)(2) of this section, in any case involving an alleged prohibited personnel practice described in 5 U.S.C. 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D), the judge, or the Board on petition for review, will order appropriate corrective action if the Special Counsel demonstrates that a disclosure or protected activity described under 5 U.S.C. 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action that was taken or will be taken against the individual.

(2) Corrective action under paragraph (b)(1) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure or protected activity. 5 U.S.C. 1214(b)(4)(B).

■ 8. Section 1201.133 is revised to read as follows:

§ 1201.133 Judicial review.

An employee, former employee, or applicant for employment who is adversely affected by a final Board decision on a corrective action complaint brought by the Special Counsel may obtain judicial review of the decision as provided by 5 U.S.C. 7703.

■ 9. Section 1201.201 is amended by revising paragraph (d) to read as follows:

§ 1201.201 Statement of purpose.

* * * * *

(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex, national origin, or disability. The Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

* * * * *

■ 10. Section 1201.202 is amended by
■ a. Redesignating paragraphs (a)(6) through (8) as paragraphs (a)(7) through (9);,
■ b. Adding new paragraph (a)(6);
■ c. Revising paragraph (b) introductory text;
■ d. Redesignating paragraph (b)(2) as paragraph (b)(3);
■ e. Adding new paragraph (b)(2);
■ f. Adding paragraph (b)(4); and
■ g. Revising paragraph (c).

The additions and revisions read as follows:

§ 1201.202 Authority for awards.

(a) * * *

(6) Attorney fees, costs and damages as authorized by 5 U.S.C. 1214(h) where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214 and determines that the employee has been subjected to an agency investigation that was commenced, expanded or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

* * * * *

(b) *Awards of consequential damages.* The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:

* * * * *

(2) As authorized by 5 U.S.C. 1221(g)(4) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

* * * * *

(4) As authorized by 5 U.S.C. 1214(h) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(c) *Awards of compensatory damages.* The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. The Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

* * * * *

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING OR OTHER PROTECTED ACTIVITY

■ 11. The authority citation for 5 CFR part 1209 is amended to read as follows:

Authority: 5 U.S.C. 1204, 1221, 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D), and 7701.

■ 12. The heading for part 1209 is revised to read as set forth above.

■ 13. Section 1209.1 is revised to read as follows:

§ 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activity activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing or other protected activity, and requests for stays of personnel actions allegedly based on whistleblowing or other protected activity.

■ 14. Section 1209.2 is revised to read as follows:

§ 1209.2 Jurisdiction.

(a) *Generally.* 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 or other protected activity.

(b) *Appeals authorized.* 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 or other protected activity. 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: An agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Employee X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Employee 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, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee 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. Whether the Board would have jurisdiction to review Employee X's performance rating as an IRA appeal depends on whether his previous Board appeal involved a claim of retaliation for whistleblowing. If it did, the Board could review the performance evaluation in an IRA appeal because the employee has alleged a violation of 5 U.S.C. 2302(b)(9)(A)(i). If the previous appeal did not involve a claim of retaliation for whistleblowing, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but Employee X could not establish jurisdiction over an IRA appeal. Similarly, if Employee X believed that the current performance appraisal was retaliation for his previous protected equal employment opportunity (EEO) activity, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but

Employee X could not establish jurisdiction over an IRA appeal.

Example 3: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he testified on behalf of a co-worker in an EEO proceeding. The Board would have jurisdiction over the performance evaluation in an IRA appeal because the appellant has alleged a violation of 5 U.S.C. 2302(b)(9)(B).

Example 4: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Employee Y files a complaint with OSC alleging that the proposed removal was 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 Employee 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 or other protected activity. 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 5: Same as Example 4 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 Employee 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 so, whether the agency can prove by clear and convincing evidence that it would have removed Employee 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 Employee 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 whistleblowing or other protected activity 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 whistleblowing or other protected activity. The appellant may not raise affirmative defenses, 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 whistleblowing or other protected activity.

(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 personnel action in retaliation for whistleblowing or other protected activity ''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 or other protected activity.

(e) *Elements and Order of Proof.* Once jurisdiction has been established, the merits of a claim of retaliation for whistleblowing or other protected activity will be adjudicated as follows:

(1) The appellant must establish by preponderant evidence that he or she engaged in whistleblowing or other protected activity and that his or her whistleblowing or other protected activity was a contributing factor in a covered personnel action. An appellant may establish the contributing factor element through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or protected activity, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) If a finding has been made that a protected disclosure or other protected activity was a contributing factor in one or more covered personnel actions, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure or activity.

■ 15. Section 1209.3 is revised to read as follows:

§ 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees, compensatory damages, and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

■ 16. Section 1209.4 is amended by revising paragraphs (a)(10) through (12) and (b), redesignating paragraphs (c) and (d) as paragraphs (d) and (e) and adding new paragraph (c) and paragraph (f) to read as follows:

§ 1209.4 Definitions.

(a) * * *

(10) A decision to order psychiatric testing or examination;

(11) The implementation or enforcement of any nondisclosure policy, form, or agreement; and

(12) Any other significant change in duties, responsibilities, or working conditions.

(b) *Whistleblowing* is the making of a protected disclosure, that is, a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial 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 Congress, the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Other protected activity* means any of the following:

(1) The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of 5 U.S.C. 2302(b)(8), i.e., retaliation for whistleblowing;

(2) Testifying for or otherwise lawfully assisting any individual in the exercise of any right granted by any law, rule, or regulation;

(3) Cooperating with or disclosing information to Congress, the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(4) Refusing to obey an order that would require the individual to violate a law.

* * * * *

(f) *Reasonable belief.* An employee or applicant may be said to have a reasonable belief when a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence the violation, mismanagement, waste, abuse, or danger in question.

■ 17. Section 1209.6 is amended by revising paragraphs (a)(4) and (a)(5)(ii) to read as follows:

§ 1209.6 Content of appeal; right to hearing.

(a) * * *

(4) A description of each disclosure evidencing whistleblowing or other protected activity as defined in § 1209.4(b) of this part; and

(5) * * *

(ii) The personnel action was or will be based wholly or in part on the whistleblowing disclosure or other protected activity, as described in § 1209.4(b) of this part.

* * * * *

■ 18. Section 1209.7 is revised to read as follows:

§ 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that the disclosure or other protected activity was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure or other protected activity.

■ 19. Section 1209.9 is amended by revising paragraph (a)(6)(ii) to read as follows:

§ 1209.9 Content of stay request and response.

(a) * * *

(6) * * *

(ii) The action complained of was based on whistleblowing or other protected activity as defined in § 1209.4(b) of this part; and

* * * * *

■ 20. Section 1209.13 is revised to read as follows:

§ 1209.13 Referral of findings to the Special Counsel.

When the Board determines in a proceeding under this part that there is reason to believe that a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

William D. Spencer,

Clerk of the Board.

[FR Doc. 2013–15633 Filed 7–1–13; 8:45 am]

BILLING CODE 7400–01–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 253

[FNS–2009–0006]

RIN 0584–AD95

Food Distribution Program on Indian Reservations: Amendments Related to the Food, Conservation, and Energy Act of 2008; Approval of Information Collection Request

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule; Notice of Approval of Information Collection Request (ICR).

SUMMARY: The final rule entitled Food Distribution Program on Indian Reservations: Amendments Related to the Food, Conservation, and Energy Act of 2008 was published on April 6, 2011. The Office of Management and Budget (OMB) cleared the associated information collection requirements (ICR) on December 20, 2011. This document announces approval of the ICR.

DATES: The ICR associated with the final rule published in the **Federal Register** on April 6, 2011, at 76 FR 18861, was approved by OMB on December 20, 2011, under OMB Control Number 0584–0293.

FOR FURTHER INFORMATION CONTACT: Dana Rasmussen, Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 506, Alexandria, Virginia 22302, by phone at (703) 305–2662, or via email at *Dana.Rasmussen@fns.usda.gov.*

Dated: June 25, 2013.

Jeffrey J. Tribiano,

Acting Administrator, Food and Nutrition Service.

[FR Doc. 2013–15634 Filed 7–1–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 925

[Doc. No. AMS–FV–13–0005; FV13–925–1 FR]

Grapes Grown in Designated Area of Southeastern California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the California Desert Grape Administrative Committee (Committee) for the 2013 and subsequent fiscal periods from $0.0150 to $0.0165 per 18-pound lug of grapes handled. The Committee locally administers the marketing order that regulates the handling of grapes grown in a designated area of southeastern California. Assessments upon grape handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins January 1 and ends December 31. The assessment rate will remain in effect indefinitely unless modified, suspended or terminated.

DATES: Effective July 3, 2013.