

Rules and Regulations

Federal Register

Vol. 89, No. 69

Tuesday, April 9, 2024

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Appellate Jurisdiction Update

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: This final rule updates the list of sources from which the Merit Systems Protection Board (MSPB) derives appellate jurisdiction.

DATES: Effective May 9, 2024.

FOR FURTHER INFORMATION CONTACT: Gina K. Grippando, 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: On February 6, 2024, the Merit Systems Protection Board (MSPB or Board) proposed an amendment to 5 CFR 1201.3, which sets forth a non-exclusive list of the types of appeals within the MSPB's jurisdiction. 89 FR 8083. In response to publication of the proposed rule, the MSPB received three comments from three commenters. The comments received by the MSPB are available for review by the public at <https://www.mspb.gov/foia/e-foiareadingroom.htm>.

Comments and Summary of Changes to the Proposed Rule

The MSPB initially proposed amending 5 CFR 1201.3 to include a new type of appeal proposed by the Office of Personnel Management (OPM) at 5 CFR 302.603. 89 FR 8083. OPM's proposed rule provided that certain Federal employees moved from the competitive service into the excepted service, or moved between schedules in the excepted service, would have a right to appeal to the MSPB any purported loss of civil service protections stemming from that move. 88 FR 63862.

OPM's Final Rule for 5 CFR 302.603, published elsewhere in this issue of the **Federal Register**, adjusted the language of the proposed regulation providing the appeal right. Generally, OPM's final rule at section 302.603 permits an appeal for: (1) an agency's assertion that a Federal employee moved from the competitive service into the excepted service, or moved between schedules in the excepted service, would lose appeal rights, competitive status, or other previously accrued protections as a result of that move; and (2) an agency's failure to provide required notice to the employee regarding whether the move would affect the employee's appeal rights, competitive status, or other accrued protections. An appeal arising under the first part of this regulation would request that the MSPB correct the assertion from the agency regarding the individual's alleged loss of appeal rights, competitive status, or other accrued protections, stemming from the move and direct the agency to afford such rights, status, and protections to the employee in subsequent actions under chapters 43 or 75 of title 5, United States Code, except to the extent that any such order would be inconsistent with an applicable statute. An appeal arising under the second part of this regulation would request that the MSPB order the employee's agency to issue the required notice regarding the asserted effect of the move. The MSPB has thus adjusted the language of its proposed rule implementing OPM's rule to accord with OPM's revisions.

Additionally, the MSPB received three comments from three commenters in response to its proposed rulemaking. Two of the commenters did not provide any substantive comment on the MSPB's proposal, but indicated general approval of the proposal. The third commenter also expressed support for the MSPB's original proposal, but further suggested that the MSPB clarify its proposal to include all of the types of appeals provided by OPM in its proposed 5 CFR 302.603. OPM's proposed rule provided not only appeals when individuals were involuntarily moved, but also appeals when individuals believed that their facially voluntary moves were coerced or otherwise involuntary. The MSPB agrees with the commenter's suggestion and has reformulated its draft rule to more clearly reflect all of the types of

appeals provided in OPM's final 5 CFR 302.603.

This final rule will become effective 30 days after publication in the **Federal Register**.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

For the reasons set forth above, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES

■ 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.

§ 1201.3 [Amended]

■ 2. Section 1201.3 is amended by adding paragraph (a)(12) to read as follows:

§ 1201.3 Appellate Jurisdiction.

- (a) * * *
- (12) *Actions Related to Placement or Movement into an Excepted Service Position Without Civil Service Protections.* (i) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of a competitive service employee into the excepted service, will eliminate competitive status or any other procedural and appeal rights that the employee had previously accrued. (5 CFR 302.603(b); 5 CFR 302.603(d));
- (ii) An agency assertion that an involuntary (including a facially voluntary, but alleged to be involuntary) movement or placement of an excepted service employee into a different schedule of the excepted service, will eliminate competitive status or any other procedural and appeal rights that the employee had previously accrued. (5 CFR 302.603(b); 5 CFR 302.603(d));
- (iii) An agency's failure to provide the required notice, under 5 CFR 302.602(c)(1), of the effect of the above-described movements or placements on the employee's status or procedural and appeal rights. (5 CFR 302.603(c)).

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Gina K. Grippando,
Clerk of the Board.

[FR Doc. 2024-07191 Filed 4-4-24; 8:45 am]

BILLING CODE 7400-01-P