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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule; request for comments.

SUMMARY: The Merit Systems Protection Board is amending its rules of practice and procedure for original jurisdiction cases to permit assignment of certain of these cases to a judge other than the Administrative Law Judge, to provide for delegation of authority to the Administrative Law Judge to decide Special Counsel stay requests, and to provide for judges to issue initial decisions, rather than recommended decisions, in Special Counsel complaints (including alleged violations of the Hatch Act) and proposed actions against administrative law judges. Certain other changes are made to reorganize and update the rules governing adjudication of original jurisdiction cases for the benefit of the Board's customers. These changes are the result of a recommendation made by the Board's Reinventing Government II (REGO II) Task Force and a review by the Board of its delegations of authority to decide original jurisdiction cases. They are intended to streamline the Board's adjudicatory procedures so that it can manage its original jurisdiction caseload more efficiently and effectively.

DATES: Effective date September 16, 1997. Submit written comments on or before November 17, 1997.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC 20419. Comments may be sent via e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.

SUPPLEMENTARY INFORMATION: In response to the second phase of the Administration's Reinventing Government initiative (REGO II), the Chairman of the Merit Systems Protection Board appointed a REGO II Task Force to review all Board operations and to make recommendations for changes in organization, functions, and procedures that would enable the agency to continue performing its functions effectively at the reduced budget and staffing levels expected through fiscal year 2000. One recommendation of the Task Force with respect to the Board's adjudicatory function, subsequently approved by the Board, was that the regulations for original jurisdiction cases be amended to permit the issuance of an initial decision in Special Counsel complaints and proposed actions against administrative law judges, subject to a petition for review of the initial decision by the Board.

The Board also reviewed its delegations of authority to decide original jurisdiction cases and determined that it should have the flexibility to assign to any of its judges those cases that are not required by law to be heard by an administrative law judge. In addition to making these changes, which are intended to enable the Board to manage its caseload more efficiently and effectively, the Board is taking this opportunity to reorganize and update its original jurisdiction regulations for the benefit of its customers.

This amendment to 5 CFR part 1201 revises the Board's procedures for the adjudication of original jurisdiction cases set forth in subpart D. The following are the principal changes:

(a) Subpart D has been reorganized so that, following an introductory section, there are separate, self-contained provisions setting forth the procedures for each kind of original jurisdiction case covered by the subpart. The introductory section, 1201.121, sets forth the jurisdictional scope of subpart D and the applicability of other subparts of part 1201. The procedures for each kind of original jurisdiction case then are set forth in the following sections: 1201.122 through 1201.127 for Special Counsel disciplinary action complaints

(including Hatch Act cases), 1201.128 through 1201.133 for Special Counsel corrective action complaints, 1201.134 through 1201.136 for Special Counsel stay requests, 1201.137 through 1201.142 for actions against administrative law judges, and 1201.143 through 1201.145 for informal hearings in proposed removals of career appointees from the Senior Executive Service for performance reasons. For each kind of case, the sections have been rearranged to follow the chronology of a case as it proceeds through filing of the complaint or request, answer, adjudication, decision, and review (if any). The provisions on protective orders are moved to the end of the subpart, §§ 1201.146 through 1201.148, and are revised to clarify that protective orders may be issued in connection with any pending original jurisdiction proceeding, as well as during the course of an investigation by the Special Counsel.

(b) The provisions on assignment of cases to an administrative law judge for hearing (formerly in §§ 1201.129 and 1201.135) have been replaced by new provisions in §§ 1201.125 and 1201.140 stating that Special Counsel disciplinary action complaints (including Hatch Act cases) and proposed agency actions against administrative law judges will be heard by an administrative law judge. Because a hearing before an administrative law judge is required by law in these kinds of cases (see 5 U.S.C. 1215(a)(2)(C) and 5 U.S.C. 554(a)(2)), all such cases will continue to be assigned to the Board's Administrative Law Judge at headquarters. New provisions have been added at §§ 1201.131 and 1201.144 to provide the Board flexibility to assign Special Counsel corrective action complaints and Senior Executive Service performance-based removal cases to any of its judges, as defined at § 1201.4(a). That section defines "judge" as: "Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board." Under these new provisions, therefore, a Special Counsel corrective action complaint or a Senior Executive Service performance-based removal case can be assigned to a judge in one of the Board's regional or field offices or to a judge

(including an administrative law judge) at the Board's headquarters.

(c) The provisions for Special Counsel requests for stays of personnel actions have been revised to provide that any member of the Board may delegate to an administrative law judge the authority to decide an initial stay request. See § 1201.134.

(d) The provisions on filing Special Counsel corrective action complaints and Senior Executive Service performance-based removal cases have been revised to require that subsequent pleadings be filed with the office where the judge to whom the case is assigned is located. See §§ 1201.128 and 1201.143. When a case is assigned to a judge in a regional or field office, an acknowledgment order will be issued directing that subsequent pleadings be filed with the office where the judge is located.

(e) The provisions on filing original jurisdiction cases have been revised to require that telephone and facsimile numbers, as well as names and addresses, be provided on a certificate of service. See §§ 1201.122, 1201.128, 1201.134, 1201.137, and 1201.143.

(f) The provisions on serving copies of initial complaints and requests in original jurisdiction cases have been revised to require that service be accomplished by the filer—the Special Counsel, the agency proposing an action against an administrative law judge, or the career appointee in the Senior Executive Service who is requesting an informal hearing. See §§ 1201.122, 1201.128, 1201.134, 1201.137, and 1201.143. Previously, service in original jurisdiction cases was accomplished by the Clerk of the Board (see former § 1201.122(b)). The provisions on serving copies of subsequent pleadings are unchanged.

(g) New provisions have been added to require the Clerk of the Board to furnish a copy of the applicable Board regulations to each respondent (other than a Federal, State, or local government agency) named in a Special Counsel disciplinary action complaint or a proposed agency action against an administrative law judge. Furthermore, the Clerk must advise each respondent of his or her procedural rights and the Board's requirements regarding the time limit for filing a response to the complaint and the content of the response. See §§ 1201.124 and 1201.139.

(h) The provision on contents of a Special Counsel disciplinary action complaint, § 1201.123, has been revised to describe more specifically the prohibited conduct and violations of law that can form the basis for a disciplinary action complaint, and to

eliminate an obsolete provision. As revised, the provision states that a disciplinary action may be brought against an employee alleged to have committed a prohibited personnel practice, to have committed a violation described in 5 U.S.C. 1216, to have violated the Hatch Act prohibitions applicable to State and local government employees under 5 U.S.C. 1505, or to have knowingly and willfully refused or failed to comply with an order of the Board. The reference to the Federal Employees Flexible and Compressed Work Schedule Act (formerly at § 1201.123(a)(4)) has been deleted as no longer necessary. A corresponding revision has been made in § 1201.126 to delete the provisions regarding discipline the Board can impose under the Federal Employees Flexible and Compressed Work Schedule Act (formerly at § 1201.126(e)).

(i) A new provision has been added that provides any person on whose behalf the Special Counsel brings a corrective action complaint the right to request intervention in the Board proceeding under the provisions of § 1201.34. The current language regarding the right of any person alleged to have been the subject of any prohibited personnel practice alleged in the complaint to make written comments is revised to clarify that this right applies regardless of whether such a person requests and is granted intervenor status. The current language regarding the rights of the Special Counsel, the agency involved, and the Office of Personnel Management to provide oral or written comments is unchanged. See § 1201.130.

(j) New provisions have been added permitting judges to issue initial decisions in Special Counsel corrective action complaints, Special Counsel disciplinary action complaints (with one exception, described in paragraph (k) below), and proposed agency actions against administrative law judges. Such initial decisions will be subject to a petition for review by the Board. See §§ 1201.125, 1201.131, and 1201.140. These provisions replace the procedure in the former § 1201.129, which provided for an administrative law judge to issue a recommended decision, subject to exceptions and a final decision by the Board.

(k) In a Hatch Act case involving a Federal or District of Columbia government employee, where an administrative law judge determines that removal of the employee is not warranted, he or she is without statutory authority to order a lesser penalty. The statute provides that the Board may

impose a lesser penalty of not less than a 30-day suspension only if the Board finds "by unanimous vote" that the violation does not warrant removal. 5 U.S.C. 7325. Therefore, the regulations provide at § 1201.125(c) that in such a case, the administrative law judge will issue a recommended decision, subject to exceptions and a final decision by the Board. The procedures applying in this instance are the same as those under the former § 1201.129.

(l) A new provision has been added to state the statutory right (at 5 U.S.C. 1508) for an aggrieved party to obtain judicial review of a Board decision in a Hatch Act case involving a State or local government employee. See § 1201.127(b).

(m) In the provisions governing extension of a Special Counsel stay that has been granted, a new requirement has been added that the Special Counsel file any request for extension, along with its supporting brief, at least 15 days before the expiration date of the stay. A time limit of 10 days from the date of filing of the Special Counsel's brief is established for the filing of any agency response. See § 1201.136(b). These changes are intended to ensure that there is sufficient time to decide a request for extension of a stay before the expiration date of the stay.

(n) In the provisions governing extension of a Special Counsel stay that has been granted, the requirement that the Special Counsel provide periodic reports during the pendency of the stay (formerly at § 1201.127(c)(3)) has been deleted. In its place has been added a requirement, reflecting current Board practice, that the agency ordered to stay a personnel action provide evidence of compliance with the stay order within five working days of the date of the order. See § 1201.136(c).

(o) A new section has been added to the provisions on "Actions Against Administrative Law Judges" to cover the situation in which a complaint is filed by an administrative law judge rather than an agency. In this situation, the administrative law judge may allege that the employing agency has interfered with the judge's qualified decisional independence so as to constitute a constructive removal or other action under 5 U.S.C. 7521 that has not been authorized by the Board. See § 1201.142.

The revised procedures in subpart D will be applied to original jurisdiction cases that are: (1) Pending on the effective date of this interim rule, except for cases pending before the Board on a recommended decision of an administrative law judge; (2) remanded by the Board to a judge on or after the effective date of this interim rule; and

(3) filed on or after the effective date of this interim rule.

The Board is publishing this rule as an interim rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board 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 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Subpart D is revised to read as follows:

Subpart D—Procedures for Original Jurisdiction Cases

GENERAL

Sec.

1201.121 Scope of jurisdiction; application of subparts B, F, and H.

Special Counsel Disciplinary Actions

- 1201.122 Filing complaint; serving documents on parties.
- 1201.123 Contents of complaint.
- 1201.124 Rights; answer to complaint.
- 1201.125 Administrative law judge.
- 1201.126 Final decisions.
- 1201.127 Judicial review.

Special Counsel Corrective Actions

- 1201.128 Filing complaint; serving documents on parties.
- 1201.129 Contents of complaint.
- 1201.130 Rights; answer to complaint.
- 1201.131 Judge.
- 1201.132 Final decisions.
- 1201.133 Judicial review.

Special Counsel Requests for Stays

- 1201.134 Deciding official; filing stay request; serving documents on parties.
- 1201.135 Contents of stay request.
- 1201.136 Action on stay request.

Actions Against Administrative Law Judges

- 1201.137 Covered actions; filing complaint; serving documents on parties.
- 1201.138 Contents of complaint.
- 1201.139 Rights; answer to complaint.
- 1201.140 Judge; requirement for finding of good cause.
- 1201.141 Judicial review.
- 1201.142 Actions filed by administrative law judges.

Removal From the Senior Executive Service

- 1201.143 Right to hearing; filing complaint; serving documents on parties.
- 1201.144 Hearing procedures; referring the record.
- 1201.145 No appeal.

Requests for Protective Orders

- 1201.146 Requests for protective orders by the Special Counsel.

- 1201.147 Requests for protective orders by persons other than the Special Counsel.
- 1201.148 Enforcement of protective orders.

Subpart D—Procedures for Original Jurisdiction Cases

General

§ 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

(a) *Scope.* The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.

(b) *Application of subparts B, F, and H.* (1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.

(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.

(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.

Special Counsel Disciplinary Actions

§ 1201.122 Filing complaint; serving documents on parties.

(a) *Place of filing.* A Special Counsel complaint seeking disciplinary action under 5 U.S.C. 1215(a)(1) (including a complaint alleging a violation of the Hatch Political Activities Act) must be filed with the Clerk of the Board.

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on

each party or the party's representative, as shown on the certificate of service.

(c) *Subsequent filings and service.*

Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(d) *Method of filing and service.* Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

§ 1201.123 Contents of complaint.

(a) If the Special Counsel determines that the Board should take any of the actions listed below, he or she must file a written complaint in accordance with § 1201.122 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(1) Action to discipline an employee alleged to have committed a prohibited personnel practice, 5 U.S.C. 1215(a)(1)(A);

(2) Action to discipline an employee alleged to have violated any law, rule, or regulation, or to have engaged in prohibited conduct, within the jurisdiction of the Special Counsel under 5 U.S.C. 1216 (including an alleged violation by a Federal or District of Columbia government employee involving political activity prohibited under 5 U.S.C. 7324), 5 U.S.C. 1215(a)(1)(B), 1216(a), and 1216(c);

(3) Action to discipline a State or local government employee for an alleged violation involving prohibited political activity, 5 U.S.C. 1505; or

(4) Action to discipline an employee for an alleged knowing and willful refusal or failure to comply with an order of the Board, 5 U.S.C. 1215(a)(1)(C).

(b) The administrative law judge to whom the complaint is assigned may order the Special Counsel and the responding party to file briefs, memoranda, or both in any disciplinary action complaint the Special Counsel brings before the Board.

§ 1201.124 Rights; answer to complaint.

(a) *Responsibilities of Clerk of the Board.* The Clerk of the Board shall furnish a copy of the applicable Board

regulations to each party that is not a Federal, State, or local government agency and shall inform such a party of the party's rights under paragraph (b) of this section and the requirements regarding the timeliness and content of an answer to the Special Counsel's complaint under paragraphs (c) and (d), respectively, of this section.

(b) *Rights.* When the Special Counsel files a complaint proposing a disciplinary action against an employee under 5 U.S.C. 1215(a)(1), the employee has the right:

- (1) To file an answer, supported by affidavits and documentary evidence;
- (2) To be represented;
- (3) To a hearing on the record before an administrative law judge;
- (4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and
- (5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.

(c) *Filing and default.* A party named in a Special Counsel disciplinary action complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a party fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.

(d) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

§1201.125 Administrative law judge.

(a) An administrative law judge will hear a disciplinary action complaint brought by the Special Counsel.

(b) Except as provided in paragraph (c)(1) of this section, the administrative law judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of §§ 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

(c) (1) In a Special Counsel complaint seeking disciplinary action against a Federal or District of Columbia

government employee for a violation of 5 U.S.C. 7324, where the administrative law judge finds that the violation does not warrant removal, the administrative law judge will issue a recommended decision to the Board in accordance with 5 U.S.C. 557.

(2) The parties may file with the Clerk of the Board any exceptions they may have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date of service of the recommended decision.

(3) The parties may file replies to exceptions within 25 days after the date of service of the exceptions, as that date is determined by the certificate of service.

(4) No additional evidence will be accepted with a party's exceptions or with a reply to exceptions unless the party submitting it shows that the evidence was not readily available before the administrative law judge closed the record.

(5) The Board will consider the recommended decision of the administrative law judge, together with any exceptions and replies to exceptions filed by the parties, and will issue a final written decision.

§1201.126 Final decisions.

(a) In any action to discipline an employee, except as provided in paragraphs (b) or (c) 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 civil penalty not to exceed \$1,100. 5 U.S.C. 1215(a)(3).

(b) In any action in which the administrative law judge, or the Board on petition for review, finds under 5 U.S.C. 1505 that a State or local government employee has violated the Hatch Political Activities Act and that the employee's removal is warranted, the administrative law judge, or the Board on petition for review, will issue a written decision notifying the employing agency and the employee that the employee must be removed and not reappointed within 18 months of the date of the decision. If the agency fails to remove the employee, or if it reappoints the employee within 18 months, the administrative law judge, or the Board on petition for review, may order the Federal entity administering loans or grants to the agency to withhold funds from the agency as provided under 5 U.S.C. 1506.

(c) In any Hatch Act action in which the administrative law judge, or the Board on petition for review, finds that

a Federal or District of Columbia government employee has violated 5 U.S.C. 7324 and that the violation warrants removal, the administrative law judge, or the Board on petition for review, will issue a written decision ordering the employee's removal. If the administrative law judge determines that removal is not warranted, the judge will issue a recommended decision under §1201.125(c)(1) of this part. If the Board finds by unanimous vote that the violation does not warrant removal, it will impose instead a penalty of not less than 30 days suspension without pay. If the Board finds by majority vote that the violation warrants removal, it will order the employee's removal.

§1201.127 Judicial review.

(a) An employee subject to a final Board decision imposing disciplinary action under 5 U.S.C. 1215 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit, except as provided under paragraph (b) of this section. 5 U.S.C. 1215(a)(4).

(b) A party aggrieved by a determination or order of the Board under 5 U.S.C. 1505 (governing alleged violations of the Hatch Political Activities Act by State or local government employees) may obtain judicial review in an appropriate United States district court. 5 U.S.C. 1508.

Special Counsel Corrective Actions

§1201.128 Filing complaint; serving documents on parties.

(a) *Place of filing.* A Special Counsel complaint seeking corrective action under 5 U.S.C. 1214 must be filed with the Clerk of the Board. After the complaint has been assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative, and each person on whose behalf the corrective action is brought. The Special Counsel must serve a copy of the complaint on the agency or its representative, and each person on whose behalf the corrective action is brought, as shown on the certificate of service.

(c) *Subsequent filings and service.* Each party must serve on every other

party or the party's representative one copy of each of its pleadings, as defined by §1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(d) *Method of filing and service.* Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the office determined under paragraph (a) of this section. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

§1201.129 Contents of complaint.

(a) If the Special Counsel determines that the Board should take action to require an agency to correct a prohibited personnel practice (or a pattern of prohibited personnel practices) under 5 U.S.C. 1214(b)(4), he or she must file a written complaint in accordance with §1201.128 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(b) If the Special Counsel files a corrective action with the Board on behalf of an employee, former employee, or applicant for employment who has sought corrective action from the Board directly under 5 U.S.C. 1214(a)(3), the Special Counsel must provide evidence that the employee, former employee, or applicant has consented to the Special Counsel's seeking corrective action. 5 U.S.C. 1214(a)(4).

(c) The judge to whom the complaint is assigned may order the Special Counsel and the respondent agency to file briefs, memoranda, or both in any corrective action complaint the Special Counsel brings before the Board.

§1201.130 Rights; answer to complaint.

(a) *Rights.* (1) A person on whose behalf the Special Counsel brings a corrective action has a right to request intervention in the proceeding in accordance with the regulations in §1201.34 of this part. The Clerk of the Board shall notify each such person of this right.

(2) When the Special Counsel files a complaint seeking corrective action, the judge to whom the complaint is assigned shall provide an opportunity for oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management. 5 U.S.C. 1214(b)(3)(A).

(3) The judge to whom the complaint is assigned shall provide a person alleged to have been the subject of any prohibited personnel practice alleged in the complaint the opportunity to make written comments, regardless of whether that person has requested and been granted intervenor status. 5 U.S.C. 1214(b)(3)(B).

(b) *Filing and default.* An agency named as respondent in a Special Counsel corrective action complaint may file an answer with the judge to whom the complaint is assigned within 35 days of the date of service of the complaint. If the agency fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the judge's decision.

(c) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent agency has no knowledge of a fact, it must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

§1201.131 Judge.

(a) The Board will assign a corrective action complaint brought by the Special Counsel to a judge, as defined at §1201.4(a) of this part, for hearing.

(b) The judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of §§1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

§1201.132 Final decisions.

(a) In any Special Counsel complaint seeking corrective action based on an allegation that a prohibited personnel practice has been committed, the judge, or the Board on petition for review, may order appropriate corrective action. 5 U.S.C. 1214(b)(4)(A).

(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), the judge, or the Board on petition for review, will order appropriate corrective action if the Special Counsel demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) 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. 5 U.S.C. 1214(b)(4)(B).

§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 in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c).

Special Counsel Requests for Stays

§1201.134 Deciding official; filing stay request; serving documents on parties.

(a) *Request to stay personnel action.* Under 5 U.S.C. 1214(b)(1), the Special Counsel may seek to stay a personnel action if the Special Counsel determines that there are reasonable grounds to believe that the action was taken or will be taken as a result of a prohibited personnel practice.

(b) *Deciding official.* Any member of the Board may delegate to an administrative law judge the authority to decide a Special Counsel request for an initial stay.

(c) *Place of filing.* A Special Counsel stay request must be filed with the Clerk of the Board.

(d) *Initial filing and service.* The Special Counsel must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

(e) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by §1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(f) *Method of filing and service.* Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by

facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

§1201.135 Contents of stay request.

The Special Counsel, or that official's representative, must sign each stay request, and must include the following information in the request:

- (a) The names of the parties;
- (b) The agency and officials involved;
- (c) The nature of the action to be stayed;
- (d) A concise statement of facts justifying the charge that the personnel action was or will be the result of a prohibited personnel practice; and
- (e) The laws or regulations that were violated, or that will be violated if the stay is not issued.

§1201.136 Action on stay request.

(a) *Initial stay.* A Special Counsel request for an initial stay of 45 days will be granted within three working days after the filing of the request, unless, under the facts and circumstances, the requested stay would not be appropriate. Unless the stay is denied within the 3-day period, it is considered granted by operation of law.

(b) *Extension of stay.* Upon the Special Counsel's request, a stay granted under 5 U.S.C. 1214(b)(1)(A) may be extended for an appropriate period of time, but only after providing the agency with an opportunity to comment on the request. The Special Counsel must file any request for an extension of a stay under 5 U.S.C. 1214(b)(1)(B) at least 15 days before the expiration date of the stay. A brief describing the facts and any relevant legal authority that should be considered must accompany the request for extension. Any response by the agency must be filed within 10 days of the date of service of the Special Counsel's brief.

(c) *Evidence of compliance with a stay.* Within five working days from the date of a stay order or an order extending a stay, the agency ordered to stay a personnel action must file evidence setting forth facts and circumstances demonstrating compliance with the order.

(d) *Termination of stay.* A stay may be terminated at any time, except that a stay may not be terminated:

- (1) On the motion of an agency, or on the deciding official's own motion, without first providing notice and opportunity for oral or written comments to the Special Counsel and the individual on whose behalf the stay was ordered; or
- (2) On the motion of the Special Counsel without first providing notice

and opportunity for oral or written comments to the individual on whose behalf the stay was ordered. 5 U.S.C. 1214(b)(1)(D).

(e) *Additional information.* At any time, where appropriate, the Special Counsel, the agency, or both may be required to appear and present further information or explanation regarding a request for a stay, to file supplemental briefs or memoranda, or to supply factual information needed to make a decision regarding a stay.

Actions Against Administrative Law Judges

§1201.137 Covered actions; filing complaint; serving documents on parties.

(a) *Covered actions.* The jurisdiction of the Board under 5 U.S.C. 7521 and this subpart with respect to actions against administrative law judges is limited to proposals by an agency to take any of the following actions against an administrative law judge:

- (1) Removal;
- (2) Suspension;
- (3) Reduction in grade;
- (4) Reduction in pay; and
- (5) Furlough of 30 days or less.

(b) *Place of filing.* To initiate an action against an administrative law judge under this subpart, an agency must file a complaint with the Clerk of the Board.

(c) *Initial filing and service.* The agency must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative.

The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service.

(d) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by §1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(e) *Method of filing and service.* Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the Clerk of the Board. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

§1201.138 Contents of complaint.

A complaint filed under this section must describe with particularity the facts that support the proposed agency action.

§1201.139 Rights; answer to complaint.

(a) *Responsibilities of Clerk of the Board.* The Clerk of the Board shall furnish a copy of the applicable Board regulations to each administrative law judge named as a respondent in the complaint and shall inform each respondent of his or her rights under paragraph (b) of this section and the requirements regarding the timeliness and content of an answer to the agency's complaint under paragraphs (c) and (d), respectively, of this section.

(b) *Rights.* When an agency files a complaint proposing an action against an administrative law judge under 5 U.S.C. 7521 and this subpart, the administrative law judge has the right:

- (1) To file an answer, supported by affidavits and documentary evidence;
- (2) To be represented;
- (3) To a hearing on the record before an administrative law judge;
- (4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and
- (5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.

(c) *Filing and default.* A respondent named in an agency complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a respondent fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.

(d) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

§1201.140 Judge; requirement for finding of good cause.

(a) *Judge.* (1) An administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.

(2) The judge will issue an initial decision pursuant to 5 U.S.C. 557. The

applicable provisions of §§ 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

(b) *Requirement for finding of good cause.* A decision on a proposed agency action under this subpart against an administrative law judge will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after a finding of good cause as required by 5 U.S.C. 7521 has been made.

§1201.141 Judicial review.

An administrative law judge subject to a final Board decision authorizing a proposed agency action under 5 U.S.C. 7521 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703.

§1201.142 Actions filed by administrative law judges.

An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and service requirements of § 1201.137 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

Removal From the Senior Executive Service

§1201.143 Right to hearing; filing complaint; serving documents on parties.

(a) *Right to hearing.* If an agency proposes to remove a career appointee from the Senior Executive Service under 5 U.S.C. 3592(a) (2) and 5 CFR 359.502, and to place that employee in another civil service position, the appointee may request an informal hearing before an official designated by the Board. Under 5 CFR 359.502, the agency proposing the removal must provide the appointee 30 days advance notice and must advise the appointee of the right to request a hearing. If the appointee files the request at least 15 days before the effective date of the proposed removal, the request will be granted.

(b) *Place of filing.* A request for an informal hearing under paragraph (a) of this section must be filed with the Clerk of the Board. After the request has been

assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(c) *Initial filing and service.* The appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

(d) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by §1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(e) *Method of filing and service.* Filing may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to the office determined under paragraph (b) of this section. Service may be by mail, by facsimile, by commercial overnight delivery, or by personal delivery to each party or the party's representative, as shown on the certificate of service.

§1201.144 Hearing procedures; referring the record.

(a) The official designated to hold an informal hearing requested by a career appointee whose removal from the Senior Executive Service has been proposed under 5 U.S.C. 3592(a)(2) and 5 CFR 359.502 will be a judge, as defined at §1201.4(a) of this part.

(b) The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the judge. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the judge or the Board.

(c) The judge will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

§1201.145 No appeal.

There is no right under 5 U.S.C. 7703 to appeal the agency's action or any

action by the judge or the Board in cases arising under §1201.143(a) of this part. The removal action will not be delayed as a result of the hearing.

Requests for Protective Orders

§1201.146 Requests for protective orders by the Special Counsel.

(a) Under 5 U.S.C. 1204(e)(1)(B), the Board may issue any order that may be necessary to protect a witness or other individual from harassment during an investigation by the Special Counsel or during the pendency of any proceeding before the Board, except that an agency, other than the Office of the Special Counsel, may not request a protective order with respect to an investigation by the Special Counsel during such investigation.

(b) Any motion by the Special Counsel requesting a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. Where the request is made in connection with a pending Special Counsel proceeding, the motion must be filed as early in the proceeding as practicable.

(c) Where there is a pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the judge conducting the proceeding, and the judge will rule on the motion. Where there is no pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the Clerk of the Board, and the Board will designate a judge, as defined at §1201.4(a) of this part, to rule on the motion.

§1201.147 Requests for protective orders by persons other than the Special Counsel.

Requests for protective orders by persons other than the Special Counsel in connection with pending original jurisdiction proceedings are governed by §1201.55(d) of this part.

§1201.148 Enforcement of protective orders.

A protective order issued by a judge or the Board under this subpart may be enforced in the same manner as provided under subpart F of this part for Board final decisions and orders.

Dated: September 10, 1997.

Robert E. Taylor,

Clerk of the Board.

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