

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Proposed rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) proposes to amend its rules of practice and procedure with respect to the notice an agency must provide when it takes an appealable action against an employee who has both a right to appeal to the Board and a right to file a grievance under a grievance procedure. The proposed amendment is intended to ensure that such an employee understands the consequences of making a choice between the MSPB appeal procedure and the grievance procedure. It also is intended to ensure that, where an employee may pursue both procedures (as in the case of preference eligible employees of the United States Postal Service), the employee understands that the Board's time limit for filing an appeal will not be modified or extended if the employee files a grievance. The proposed amendment would also clarify that preference eligible employees of the United States Postal Service and other employees excluded from the coverage of the Federal Labor-Management Relations Statute may not seek MSPB review of a final arbitration decision. **DATES:** Submit comments by January 3, 2000.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 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: The Board is proposing this amendment to its rules

of practice and procedure as part of its continuing effort to ensure that its customers understand the procedural rights to which they are entitled and the procedures they are required to follow to ensure full and fair adjudication of their claims.

Many Federal employees who may appeal an agency personnel action to the Board may also have the right to pursue the matter under a statutory grievance procedure or a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA). Where an employee is affected by a personnel action that can either be appealed to MSPB or grieved in accordance with a grievance procedure, it is especially important that the agency notice of MSPB appeal rights required by 5 CFR 1201.21 fully explain the consequences of choosing the appeal or grievance procedure. Given the various laws and CBAs that come into play, it is essential that agency notices of appeal and grievance rights state the situation clearly with respect to the particular employee against whom the action is being taken.

Most Executive Branch agencies and their employees are subject to the Federal Labor-Management Relations Statute (5 U.S.C. 7101, et. seq., hereafter the Statute). Under 5 U.S.C. 7121, most matters appealable to the Board that are also covered under the NGP of a CBA may only be challenged through the NGP (5 U.S.C. 7121(a)(1)). There are certain exceptions, however.

- If the employee is challenging an adverse action under 5 U.S.C. 7512 or an action based on unacceptable performance under 5 U.S.C. 4303, the employee may choose to appeal to the Board or file a grievance but may not do both (5 U.S.C. 7121(e)).

- If the employee raises a claim of prohibited discrimination in connection with an action that is appealable to the Board, the employee may choose to appeal to the Board (or to raise the matter under any other applicable statutory procedure, such as an EEO complaint filed with the agency under the regulations of the Equal Employment Opportunity Commission) or file a grievance but may not do both (5 U.S.C. 7121(d)).

- If the employee raises a claim that an action appealable to the Board was based on a prohibited personnel practice other than discrimination, the

employee may choose to appeal to the Board, file a prohibited personnel practice complaint with the Special Counsel, or file a grievance but may choose only one of these procedures (5 U.S.C. 7121(g)).

The employee's choice of procedure is determined by his first filing. If he chooses to file a grievance, he may not subsequently file an appeal with the Board. Once the grievance procedure is chosen, there is no further opportunity for Board consideration of the matter, except that in matters that include a claim of prohibited discrimination, the employee may obtain Board review of the final decision of an arbitrator in accordance with 5 U.S.C. 7121(d) and 5 U.S.C. 7702. It is essential that agency notices to employees covered by the Statute clearly convey these statutory requirements governing the choice between the MSPB appeal procedure (and any other applicable statutory procedure) and the grievance procedure.

For employees not covered by the Statute (see 5 U.S.C. 7103(a)(2)-(3) and (b)), the rules governing the choice between appeal and grievance procedures are far less uniform. The choices of such employees may be governed by statute, the NGP in a CBA, or both. The provisions of CBAs, of course, are particularly subject to change as new agreements are negotiated. The following are three examples of the different rules that apply outside the coverage of the Statute.

- A preference eligible employee in the U.S. Postal Service (which is excluded from the coverage of the Statute pursuant to the Postal Reorganization Act) may be able to file both an MSPB appeal and a grievance on the same matter under the terms of the applicable CBA. If an appeal is filed first, a grievance may still be filed as long as a hearing on the MSPB appeal has not begun or the record has not been closed if there was no hearing. If a grievance is filed first, an appeal may still be filed with MSPB but must be filed within the Board's filing time limit.

- Employees in the Tennessee Valley Authority (TVA) may appeal certain RIF actions to MSPB. TVA preference eligible employees may also appeal adverse actions. Under the terms of the current CBAs at TVA, if an employee files an appeal with MSPB and

subsequently files a grievance, the grievance will not be accepted. If the employee files a grievance and subsequently files an appeal with MSPB, the processing of the grievance will terminate. As is the case with the USPS, filing a grievance has no effect on the time limit for filing a MSPB appeal.

- Foreign Service employees in the State Department and other designated agencies are also excluded from the Statute. Career and career-candidate Foreign Service employees have the right to appeal RIF actions to MSPB. Such employees also have the option but only under specific circumstances to file a grievance on a RIF matter with the Foreign Service Grievance Review Board (FSGRB). If the employee files a grievance with the FSGRB first, the Board has no jurisdiction over any subsequent MSPB appeal. If the employee appeals to MSPB first, a grievance is precluded. (20 U.S.C. 4010a(c).) Again, filing a grievance has no effect on the time limit for filing a MSPB appeal.

Two recent cases—both involving employees not covered by the Statute—illustrate the problems that can result from incomplete or ambiguous agency notices regarding appeal and grievance rights. In *Lourie v. United States Postal Service*, 82 M.S.P.R. 119 (1999), the appellant (a preference eligible employee in the Postal Service), relying on a statement in the agency's decision letter (DL) that he could file with MSPB after his grievance went to arbitration, filed his appeal after the 30-day time limit had passed and was, therefore, untimely. The Board found that while the DL correctly informed the appellant that he could file an appeal with the Board and also file a grievance on the same matter, and while it described the circumstances under which one could be filed after the filing of the other, it failed to advise the appellant that filing a grievance would not relieve him from complying with the 30-day time limit for filing an appeal with MSPB. The Board ruled, therefore, that the appellant showed good cause for the untimely filing of his MSPB appeal because the notice language in the DL was ambiguous.

In *Delaney v. Agency for International Development*, 80 M.S.P.R. 146 (1998), the appellant (a career Foreign Service employee) filed an appeal of his separation by RIF with MSPB after having first filed a grievance with the Foreign Service Grievance Review Board, which ruled that the grievance did not come within its limited review authority. As a result, the MSPB appeal was untimely and also raised an issue of Board jurisdiction because of the

prior election of the grievance procedure. The Board found that the agency's notice regarding the appellant's appeal and grievance rights did not adequately inform him of the limitations on the scope of his grievance rights ("cases of reprisal, interference in the conduct of an employee's official duties, or similarly inappropriate use of the authority of this section," 22 U.S.C. 4010a(c)) and therefore precluded an informed election of procedures. The Board ruled, as a result, that the appeal was within its jurisdiction and that the appellant had shown good cause for his untimely filing.

Because of the problems illustrated by these cases, and the multiplicity of circumstances that apply depending on the agency and employee involved, the Board has concluded that its rule at 5 CFR 1201.21 should be expanded to include specific criteria that an agency notice of appeal and grievance rights must meet. Therefore, the Board proposes to amend that section to require that a notice of any applicable grievance right include information as to:

- Whether choosing the grievance procedure will result in waiver of the employee's right to file an appeal with the Board;
- Whether both an appeal and grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and
- Whether there is any right to request Board review of a final arbitration decision in accordance with 5 CFR 1201.154(d).

The Board also proposes to amend 5 CFR 1201.154(d). Although this provision applies by its plain language only to employees covered by the Statute, some employees who are not covered by the Statute (particularly in USPS) continue to file requests with the Board to review a final arbitration decision. The proposed amendment would qualify the term "appellant" to clarify that it does not include any USPS employee or any other employee excluded from the Statute.

The Board is publishing this rule as a proposed rule pursuant to 5 U.S.C. 1204(h). The Board has made a determination under the Regulatory Flexibility Act, Pub. L. 96-354, 95 Stat. 1164, 5 U.S.C. 601-612, that this proposed regulatory action would not have a significant impact on a substantial number of small entities.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board proposes to amend 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 would continue to read as follows:

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

2. Amend § 1201.21 by revising paragraph (d) to read as follows:

§ 1201.21 Notice of appeal rights.

* * * * *

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

(1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(3) Whether there is any right to request Board review of a final arbitration decision in accordance with 5 CFR 1201.154(d).

3. Amend § 1201.154 by revising the introductory text paragraph (d) to read as follows:

§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.

* * * * *

(d) If the appellant, *other than an employee of the Postal Service or any other employee excluded from the coverage of chapter 71 of title 5, United States Code*, has filed a grievance with the agency under its negotiated grievance procedure in accordance with 5 U.S.C. 7121, he may ask the Board to review the final decision under 5 U.S.C. 7702 within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

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Dated: October 25, 1999.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 99-28285 Filed 10-29-99; 8:45 am]

BILLING CODE 7400-01-U

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

12 CFR Part 1102

[Docket No. AS99-1]

Appraisal Subcommittee; Appraiser Regulation; Disclosure of Information

AGENCY: Appraisal Subcommittee,
Federal Financial Institutions
Examination Council ("ASC").

ACTION: Proposed rules.

SUMMARY: The ASC proposes to amend its regulations governing the public disclosure of information to reflect changes to the Freedom of Information Act ("FOIA") as a result of the enactment of the Electronic Freedom of Information Act Amendments of 1996 ("E-FOIA"). Among other things, the proposed rules implement expedited FOIA processing procedures; implement processing deadlines and appeal rights created by E-FOIA; and describe the expanded range of records available to the public through the ASC's Internet World Wide Web site (<http://www.asc.gov>).

DATES: Comments must be received on or before December 1, 1999.

ADDRESSES: Send written comments to Ben Henson, Executive Director, Attention: Docket No. AS99-1; ASC, 2000 K Street, NW, Suite 310; Washington, DC 20006. Comments may be faxed to the ASC at (202) 872-7501 or sent via Internet e-mail at benhl@asc.gov. Comments may be inspected and photocopied at the ASC's office between 9:00 a.m. and 4:30 p.m. on business days. Comments also will be posted on the ASC's Web site for review and downloading.

FOR FURTHER INFORMATION CONTACT: Marc L. Weinberg, General Counsel, at (202) 872-7520 or marcwl@asc.gov; Appraisal Subcommittee; 2000 K Street, NW, Suite 310; Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

Section-by-Section Analysis

E-FOIA, Public Law 104-231, amended the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. Among other things, E-FOIA requires agencies to promulgate regulations that provide for expedited processing of certain requests for records. Changes are proposed to 12 CFR part 1102, subpart

D ("subpart") to comply with the E-FOIA requirements for expedited processing. In addition, the ASC is proposing changes to the subpart on fees and fee waivers, and portions of this subpart have been reorganized.

Section 1102.300 has been expanded to clarify the purpose and scope of the various sections found within the subpart. Section 1102.301 has been amended to incorporate several E-FOIA definitions. Section 1102.302 remains unchanged. Section 1102.303 has been updated to reflect changes in the ASC's office address and staff organization. Current § 1102.304, which incorporated by reference the FOIA regulations of the Federal Financial Institutions Examination Council ("FFIEC"), has been deleted. New § 1102.304 specifies records that must be published in the **Federal Register** under FOIA. Section 1102.305 identifies the ASC's Internet World Wide Web site as the primary source of ASC information and describes the information that is made available over the Internet as required by E-FOIA. The section also sets out the categories of information that are publicly available upon request. The ASC notes that the records provided over the Internet cover a much smaller scope than those available by request. E-FOIA only requires the ASC to place on the Internet records created after November 1, 1996. The ASC, however, is increasing the resources available over the Internet on its World Wide Web site.

Section 1102.306 describes the ASC's procedures for processing FOIA requests. This section essentially is new because it no longer incorporates by reference the FFIEC's FOIA rules. It also reflects the changes required by E-FOIA. Because of the small size of the ASC and the dearth of FOIA requests received, the ASC has determined not to provide multitrack processing. The proposal, however, would provide expedited processing where a requester has demonstrated a compelling need for the records, or where the ASC has determined to expedite the response. The time limit for expedited processing is set at ten business days, with expedited procedures available for an appeal of the ASC's determination not to provide expedited processing. Under E-FOIA, there are only two types of circumstances that can meet the compelling need standard: Where failure to obtain the records expeditiously could pose an imminent threat to the life or physical safety of a person, or where the requester is a person primarily engaged in disseminating information and there is an urgency to inform the public

concerning actual or alleged agency activity. For ease of administration and consistency, the proposal uses the term "representative of the news media" to describe a person primarily engaged in disseminating information. To demonstrate a compelling need, a requester must submit a certified statement, a sample of which may be obtained from the ASC.

All information requests that do not meet expedited processing standards will be handled under regular processing procedures, as required by FOIA and E-FOIA. The statutory time limit for regular-track processing would be extended to twenty business days, pursuant to E-FOIA, from the previous ten business days.

Section 1102.306(e) contains the FOIA fees and the standards for waiver of fees. The fee provisions have been revised to clarify that the processing time of a FOIA request does not begin until: (1) Payment is received when payment in advance is required, or (2) a person has requested a fee waiver and has not agreed to pay the fees if the waiver request is denied.

New Section 1102.307 covers the disclosure of exempt records. The section prohibits the disclosure of exempt records, and, at the same time, authorizes the ASC, through its Chairman or Executive Director, to release certain types of otherwise exempt records upon receipt of a written request specifically identifying the subject records and providing sufficient information for the ASC to evaluate whether good cause for disclosure exists.

The next two sections, 1102.308 and 1102.309, carry over unchanged current §§ 1102.30 and 1102.306, respectively.

The final section, 1102.310, is new. The section describes the procedures for serving subpoenas or other legal process on the ASC.

The ASC notes that the substantive portions of these proposals are based on 12 CFR part 309, the Federal Deposit Insurance Corporation's regulations concerning the disclosure of information.

Regulatory Flexibility Act Analysis

Pursuant to § 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), the ASC certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. These amendments simplify some of the procedures regarding release of information and require disclosure of information in certain instances in accordance with law. The requirements to disclose apply to the ASC; therefore, they should not have a