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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to: Implement the compensatory damages provision of the Civil Rights Act of 1991, Public Law 102-166, with respect to MSPB cases where certain kinds of discrimination are found; implement the attorney fee provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353; implement the attorney fee, consequential damages, and choice of procedures provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994); and amend its existing rules governing requests for attorney fees to change the time limit for filing and incorporate an evidentiary requirement from the Board's case law. The purpose of these amendments is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed with respect to requests for attorney fees, consequential damages, and compensatory damages, and to inform them of the statutory requirement regarding choice of procedures in cases involving both an appealable action and a prohibited personnel practice other than discrimination. The Board is also making a technical change to its rules governing mixed cases to reflect the fact that the Equal Employment Opportunity Commission's regulations governing Federal employee discrimination complaints are now found at 29 CFR

part 1614. The Board is implementing other provisions of Public Law 103-424 through an amendment to its rules at 5 CFR part 1209, which is being published simultaneously with this amendment.

DATES: Effective date April 9, 1997. Submit written comments on or before June 9, 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: This amendment consists principally of the addition of a new subpart H to the Board's rules of practice and procedure at 5 CFR part 1201. This new subpart sets forth the Board's statutory authorities to make awards of attorney fees (plus, where applicable, costs, expert witness fees, and litigation expenses), consequential damages, and compensatory damages. It combines the Board's existing procedural rules governing requests for attorney fees (with modifications) with new procedural rules governing requests for consequential damages and compensatory damages. Conforming amendments are made in appropriate sections of part 1201.

Awards of Attorney Fees

The Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, authorized the newly established Merit Systems Protection Board to award attorney fees to an employee or applicant who prevails before the Board. The CSRA provided two authorities for attorney fee awards. The first, 5 U.S.C. 7701(g)(1), authorizes an award where warranted in the interest of justice, including any case in which the agency engaged in a prohibited personnel practice or the agency's action was clearly without merit. The second, 5 U.S.C. 7701(g)(2), applies only to cases where the employee or applicant prevails on a finding of discrimination; it authorizes an award under the standards of section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)). The Civil Rights Act standard also permits an award for out-of-pocket costs such as those for copying, postage, and facsimile (see

Chin v. Department of the Treasury, 55 M.S.P.R. 84, 86 (1992)).

Although the CSRA authorities for attorney fee awards were made a part of chapter 77 of title 5 of the U.S. Code, which governs appeals to MSPB, subsequent case law determined that section 7701(g) provides authority for an award of attorney fees in other kinds of MSPB cases as well. In *Frazier v. MSPB*, 672 F.2d 150, 168-170 (D.C. Cir. 1982), the U.S. Court of Appeals for the District of Columbia Circuit ruled that section 7701(g) permitted the Board to award attorney fees where the Special Counsel obtained corrective action from the Board for an employee and the employee also was represented by private counsel. In *Social Security Administration v. Goodman*, 28 M.S.P.R. 120, 124-125 (1985), the Board, citing *Frazier*, ruled that it could award attorney fees to a prevailing administrative law judge in an agency action brought under 5 U.S.C. 7521.

The Whistleblower Protection Act of 1989 (WPA), Public Law 101-12, included a new provision—at that time 5 U.S.C. 1221(g)(1), now 5 U.S.C. 1221(g)(2)—making an agency liable for payment of attorney fees and costs in an action before MSPB where an employee, former employee, or applicant prevails on a finding of a prohibited personnel practice. Although enacted as part of the new chapter 12 of title 5, governing individual right of action (IRA) appeals filed by whistleblowers, the provision, by its plain language, applies to any MSPB case in which an employee, former employee, or applicant prevails on a finding of a prohibited personnel practice. The Board has construed “costs” in this provision to include a prevailing employee's out-of-pocket costs, such as those for copying, clerical services, word processing services, postage, and facsimile (see *Bonggat v. Department of the Navy*, 59 M.S.P.R. 175, 179 (1993)).

In October 1994, President Clinton signed two new laws that provide four additional authorities for the Board to make attorney fee awards. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, authorized the Board to adjudicate Federal employee complaints alleging violation of a right or benefit to which an individual is entitled following service in the uniformed services and

included authority for the Board to award reasonable attorney fees, expert witness fees, and other litigation expenses (38 U.S.C. 4324(c)(4)). Public Law 103-424, which reauthorized MSPB and the Office of Special Counsel, included a new provision—5 U.S.C. 1221(g)(1)(B)—that requires an award of attorney fees and any other reasonable costs incurred when the Board orders corrective action under section 1221 of title 5, governing IRA appeals and certain other whistleblower appeals. (The former section 1221(g)(1) was renumbered section 1221(g)(2).) Public Law 103-424 also included two provisions authorizing awards of attorney fees in Special Counsel cases. In a corrective action case under 5 U.S.C. 1214, where the Special Counsel obtains corrective action for an employee, former employee, or applicant, and that individual also is represented by private counsel, the Board may award attorney fees under 5 U.S.C. 1214(g)(2). Where an employee against whom the Special Counsel has brought a disciplinary action under 5 U.S.C. 1215 is the prevailing party, the Board may award attorney fees under 5 U.S.C. 1204(m).

Thus, the Board now has seven—sometimes overlapping—statutory authorities to make awards of attorney fees. (An eighth authority was enacted in October 1996 as part of the Presidential and Executive Office Accountability Act, Public Law 104-331, but that authority does not take effect with respect to cases to be adjudicated by MSPB until the President issues implementing regulations or on October 1, 1998, whichever is earlier. See section 2(a), adding new 3 U.S.C. 435.)

The Board's existing rules governing requests for attorney fees, found at 5 CFR 1201.37(a), implement only the two original authorities provided by the CSRA and the additional authority provided by the WPA in 1989. There is a need, therefore, to amend the Board's rules governing requests for attorney fees to incorporate the new statutory authorities and, in view of the overlap among certain of the authorities for attorney fee awards, to provide guidance to parties and their representatives as to how the Board will apply its various authorities for attorney fee awards to the cases it adjudicates.

In the course of its review of the rules governing requests for attorney fees, the Board also has determined that two changes should be made in its existing rules. The current time limit for filing a request for attorney fees—30 days after an initial decision becomes final or 35 days after a final Board decision—is

deleted and replaced by a requirement that such a request be filed as soon as possible after there is a final Board decision but no later than 60 days after the date on which a decision becomes final. This change is intended to reduce the need for litigation over late-filed attorney fee requests. The evidentiary requirements for attorney fee requests are amended, in accordance with the Board's established case law, to incorporate the requirement for evidence of an established attorney-client relationship. *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 427 n.9 (1980). See *Stewart v. Office of Personnel Management*, 70 M.S.P.R. 544 (1996).

Awards of Consequential Damages

Public Law 103-424 also gave the Board new authority—in two kinds of cases only—to order payment of medical costs, travel expenses, and any other reasonable and foreseeable consequential damages incurred by an employee, former employee, or applicant. This authority applies only where the Board orders corrective action in a Special Counsel case brought under 5 U.S.C. 1214 (see 5 U.S.C. 1214(g)(2)) or in an IRA or other whistleblower appeal to which 5 U.S.C. 1221 applies (see 5 U.S.C. 1221(g)(1)(A)(ii)).

Because the Board has no existing rules governing awards of consequential damages, there is a need to amend its rules of practice and procedure to set forth the statutory authorities for it to make such awards and to prescribe procedural rules for making requests for such awards. In these new rules, the Board uses the term "consequential damages" to encompass what the statutory provisions at 5 U.S.C. 1214(g)(2) and 5 U.S.C. 1221(g)(1)(A)(ii) describe as "medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages." The legislative history of Public Law 103-424 provides no further guidance as to the kinds of costs and expenses intended to be covered by these provisions. The Board, therefore, will interpret these provisions through its adjudication of individual cases.

The Board has had little opportunity to date to address these new provisions for awards of consequential damages in actual cases. Its principal ruling thus far is that the consequential damages provisions of Public Law 103-424 may not be applied retroactively and, therefore, do not apply where the contested personnel action took place before the law's effective date, October 29, 1994. See *Roman v. Department of the Army*, 72 M.S.P.R. 409 (1996). In *Roman*, the Board also ruled that while

the appellant's claimed mileage costs could not be awarded as consequential damages, because of the Board's ruling against retroactive application, they could be awarded as "costs" under the WPA provision for attorney fees and costs (formerly 5 U.S.C. 1221(g)(1), now 5 U.S.C. 1221(g)(2)). The Board declined in *Roman* to decide what the term "travel expenses" means in the new consequential damages provisions.

Despite the paucity of case law dealing with consequential damages, the Board has determined that its procedural rules for adjudication of requests for consequential damages should be consistent with those governing requests for compensatory damages. These rules are discussed below under "Awards of Compensatory Damages."

Awards of Compensatory Damages

Section 102 of the Civil Rights Act of 1991, Public Law 102-166, authorizes an award of compensatory damages where there is a finding of intentional discrimination or a failure to provide reasonable accommodation, where such discrimination is prohibited by the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990 (42 U.S.C. 1981a). In late 1992, the Equal Employment Opportunity Commission ruled that compensatory damages under the Civil Rights Act of 1991 are available to Federal employees in administrative proceedings (*Jackson v. U.S. Postal Service*, EEOC Appeal No. 01923399, Nov. 12, 1992).

The Board issued its first decision on a request for compensatory damages in July of 1994. *Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 503-508 (1994), *aff'd* 64 F.3d 676 (Fed. Cir. 1995) (table), *cert. denied*, 116 U.S. 918, 116 S.Ct. 918 (1996). Citing the EEOC ruling in *Jackson*, the Board ruled in *Hocker* that compensatory damages are available in MSPB proceedings where there is a finding of discrimination to which section 102 of the Civil Rights Act of 1991 applies. The Board further ruled that it would not apply the compensatory damages provision of the Civil Rights Act of 1991 retroactively to cases pending on the effective date of the Act, November 21, 1991. In addition, the Board stated that a request for compensatory damages may not be made for the first time in a petition for enforcement of a Board order (unless the non-compliance with the order constituted a separate, intentional act of discrimination) but must be made in the proceeding on the merits before the judge.

In *Yates v. U.S. Postal Service*, 70 M.S.P.R. 170, 179–180 (1996), the Board distinguished the *Hocker* requirement that a request for compensatory damages must be made in the proceeding on the merits before the judge as *dictum*, ruling that an appellant who prevails on a finding of discrimination to which section 102 of the Civil Rights Act of 1991 applies has a right to seek compensatory damages. Finding that the appellant was not notified of his right to seek compensatory damages or the time for doing so, the Board gave the appellant 30 days from the date of the decision to file a request for compensatory damages with the judge. (Accord *Spencer v. Department of the Navy*, MSPB Docket No. DC–0752–96–0116–I–1, Jan. 3, 1997, and *Callagan v. Department of Agriculture*, MSPB Docket No. DE–0752–95–0588–I–2, Feb. 26, 1997).

Other key cases in which the Board has ruled on compensatory damages issues include *Schultz v. U.S. Postal Service*, 70 M.S.P.R. 633, 639–640 (1996) (remand to judge for adjudication of compensatory damages claim necessary where appellant made claim early on in the appeal), and *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 195–198 (1996) (where appellant has made a nonfrivolous claim of discrimination to which section 102 of the Civil Rights Act of 1991 applies but has not specifically made a claim for compensatory damages, judge should afford opportunity to make such a claim before dismissing appeal as moot; judge may bifurcate proceeding by deferring a decision on a claim for compensatory damages for a separate proceeding after there is a final decision in the merits proceeding).

Because the Board has no existing rules governing awards of compensatory damages, there is a need to amend its rules of practice and procedure to set forth the statutory authority for it to make such awards and to prescribe procedural rules for making requests for such awards. Based on its rulings in cases involving compensatory damages to date, the Board in these rules calls for a request for compensatory damages to be made as early as possible in a Board proceeding before an administrative judge or administrative law judge. Such a request is to be made no later than the time the first pleading is filed with the three-member Board. In permitting a request for compensatory damages to be made as late as the time of the first filing with the three-member Board, the Board is following the lead of the EEOC (the lead agency in interpreting compensatory damages provisions). *Hocker, supra*. See *Thorne v.*

Department of Education, EEOC No. 01922524, slip op. at 3 (Dec. 23, 1993); *Square v. Department of Veterans Affairs*, EEOC No. 0193053, slip op. at 5 (Aug. 25, 1994); and *Simpkins v. U.S. Postal Service*, EEOC No. 01942339, slip op. at 2–3 (Sep. 28, 1995).

The rules permit the judge or the Board, as applicable, to waive the time limit for good cause shown. The rules also permit the judge or the Board, as applicable, to decide a request for compensatory damages in the merits proceeding or to defer it for an addendum proceeding.

Amendment to Choice of Procedures

Section 9(b) of Public Law 103–424 amended 5 U.S.C. 7121, “Grievance procedures,” by adding a new subsection (g) which imposes a new choice of procedures requirement. Where an employee is subject to a personnel action that is appealable to MSPB, and the employee may grieve the action under a negotiated grievance procedure (NGP), and the employee alleges that the action was the result of a prohibited personnel practice—other than discrimination—that may form the basis of a complaint to the Special Counsel, the employee may elect not more than one of the following remedies: an appeal to MSPB, a grievance under the NGP, or a corrective action complaint under subchapters II (Special Counsel actions) and III (IRA appeals) of chapter 12 of title 5. The choice among these three procedures is deemed to have been made when the employee timely files an appeal with MSPB, a written grievance under the NGP, or a complaint with the Special Counsel.

The Board’s existing rules at 5 CFR 1201.3(c) reflect the choice of procedures requirements of 5 U.S.C. 7121 prior to its amendment by Public Law 103–424. Those rules require a choice between an MSPB appeal and a grievance under the NGP where there is an allegation of discrimination (see 5 U.S.C. 7121(d)) or where the personnel action is a performance-based action under chapter 43 of title 5 or an adverse action under chapter 75 of title 5 (see 5 U.S.C. 7121(e)). There is a need, therefore, for the Board to amend its rules at 5 CFR 1201.3(c) to incorporate the new choice of procedures requirement in 5 U.S.C. 7121(g).

Under 5 U.S.C. 7121 as amended by Public Law 103–424, an employee who chooses to seek corrective action from the Special Counsel could not also appeal to MSPB—unless the prohibited personnel practice complained of is an action based on whistleblowing, in which case the employee could file an

IRA appeal with MSPB after exhausting the procedures of the Office of Special Counsel. (See *Briley v. National Archives and Records Administration*, 71 M.S.P.R. 211, 224–226 (1996).)

Technical Amendment

The Equal Employment Opportunity Commission’s regulations governing discrimination complaints filed by Federal employees, formerly found at 29 CFR part 1613, are now found at 29 CFR part 1614. The Board, therefore, is amending its mixed case rules at 5 CFR 1201.163 to change all references to “29 CFR part 1613” to read “29 CFR part 1614.”

Section-by-Section Guide to Changes

The following paragraphs constitute a section-by-section guide to the changes made in 5 CFR part 1201 by this amendment.

(1–3) The authority citation for part 1201 is amended to include the authority for the Board to issue implementing regulations under USERRA, 38 U.S.C. 4331.

(4) Section 1201.3(b), concerning appeals governed by part 1209, is amended to include a statement that the attorney fee and consequential damages provisions of subpart H apply to such appeals.

(5) Section 1201.3(c)(1) is amended to incorporate the choice of procedures requirements of 5 U.S.C. 7121(g), as discussed above under “Amendment to Choice of Procedures.”

(6) Section 1201.3(c)(2) is amended to incorporate the provisions of 5 U.S.C. 7121(g) regarding when a choice of procedures is deemed to have been made, as discussed above under “Amendment to Choice of Procedures.”

(7) Section 1201.37 is amended to change the title from “Fees” to “Witness fees;” to remove paragraph (a)—which is moved to the new subpart H (with modifications)—in its entirety; and to redesignate the remaining paragraphs.

(8) Section 1201.55(b), concerning objections to motions, is amended to remove the reference to a motion for attorney fees; new section 1201.203(d) in subpart H will now apply to such objections.

(9) Section 1201.111(b)(6), concerning the statement in a judge’s initial decision of any further processes available, is amended to state that such further processes include, as appropriate, a motion for attorney fees under new section 1201.203 of subpart H, and, where a claim for consequential damages or compensatory damages has been deferred for an addendum proceeding, the right to such a

proceeding, with the time to be established by the judge.

(10) Section 1201.112(a)(3), concerning a judge's retaining jurisdiction to rule on a request for attorney fees after issuing an initial decision, is amended to also authorize the judge to retain jurisdiction to rule on a request for consequential damages or compensatory damages under subpart H.

(11) Section 1201.121, concerning actions brought by the Special Counsel, is amended by revising the section title to read "Scope of jurisdiction; application of subparts B, F, and H."

(12) Section 1201.121 is further amended by revising the heading of paragraph (b) to read "Application of subparts B, F, and H;" by revising paragraph (b) to state that all provisions of subpart B of part 1201—not just the hearing procedures—apply to Special Counsel cases, except as otherwise expressly provided by this subpart; and by including in the revised paragraph (b) cross-references to subpart F for enforcement proceedings and to subpart H for requests for attorney fees, consequential damages, and compensatory damages.

(13) Section 1201.131, concerning procedures for actions against administrative law judges, is amended by revising it to state that all provisions of subpart B of part 1201—not just the hearing procedures—apply to actions against administrative law judges, except as otherwise expressly provided by this subpart, and by including cross-references to subpart F for enforcement proceedings and to subpart H for requests for attorney fees and compensatory damages.

(14) Section 1201.163, concerning mixed case procedures, is amended at paragraphs (a) and (c) by removing "29 CFR part 1613" each place it appears and by replacing it with "29 CFR part 1614."

(15) A new subpart H is added after subpart G of part 1201. The following is a section-by-section guide to the provisions of subpart H:

Section 1201.201 states that the purpose of subpart H is to prescribe procedures for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages in MSPB cases. It provides a general overview of the Board's statutory authorities to make such awards.

Section 1201.202(a) provides a "roadmap" to each statutory authority for the Board to award attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable)

and describes the kind of case or cases with which each authority is associated. Section 1201.202(b) sets forth the Board's statutory authorities for awards of consequential damages and describes the kind of case with which each authority is associated. Section 1201.202(c) sets forth the Board's statutory authority to award compensatory damages and incorporates the definition of such damages from 42 U.S.C. 1981a.

Section 1201.203 prescribes procedures for requests for attorney fees. The procedures are essentially the same as in the Board's existing rules at 5 CFR 1201.37(a)(3), with some modifications. The time limit for filing a motion for attorney fees has been changed to "as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final." A requirement for submission of evidence of "an established attorney-client relationship" has been incorporated, reflecting the Board's established case law. Certain changes in wording have been made to clarify that the provisions apply to MSPB cases generally—not just to appeals, the requirements for an addendum proceeding are set forth more fully, and a definition of a "proceeding on the merits" has been added.

Section 1201.204 prescribes procedures for requests for consequential damages and compensatory damages. Paragraph (a)(1) calls for such requests to be made as early as possible in the merits proceeding before an administrative judge or administrative law judge. Such a request may be made no later than the time the first pleading is filed with the three-member Board. Paragraph (a)(2) permits the judge or the Board, as applicable, to waive the time limit for filing a request for consequential damages or compensatory damages for good cause shown. Paragraph (b) sets forth the service requirements.

Paragraph (c) of section 1201.204 authorizes the judge or the Board, as applicable, to decide a request for consequential damages or compensatory damages either in the merits proceeding or in an addendum proceeding after there is a final decision on the merits. Paragraph (d) requires the judge, where a decision on a request for consequential damages or compensatory damages has been deferred for an addendum proceeding, to schedule that proceeding after there is a final Board decision. Paragraph (e) permits the Board, at its discretion, to order that an addendum proceeding to decide a request for consequential damages or compensatory damages be held prior to

the issuance of a final decision on the merits.

Paragraph (f) of section 1201.204 provides for the application of appropriate provisions of subpart B in an addendum proceeding to decide a request for consequential damages or compensatory damages, and paragraph (g) provides for a petition for review of the judge's initial decision by the Board and for Board review of a recommended decision of an administrative law judge. Paragraph (h) provides for EEOC review of a final Board decision on a request for compensatory damages (but not consequential damages) in accordance with subpart E of part 1201.

Section 1201.205 provides that a final Board decision issued under subpart H—on a request for attorney fees, consequential damages, or compensatory damages—is subject to judicial review in accordance with 5 U.S.C. 7703.

Citations

All citations to MSPB decisions are to West Publishing Company's *Merit Systems Protection Board Reporter* (M.S.P.R.). The citation to a D.C. Circuit decision is to West Publishing Company's *Federal Reporter*, second series (F.2d). These publications are available in many law libraries and some public libraries. They are also available in the MSPB Library, 1120 Vermont Avenue, NW, 8th Floor, Washington, DC, which is open to the public between 1:00 and 5:00 PM, Monday through Friday (excluding Federal holidays).

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]

1–3. The authority citation for part 1201 is revised to read as follows:

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

4. Section 1201.3 is amended in paragraph (b) by adding a sentence to the end of the paragraph to read as follows:

§ 1201.3 Appellate jurisdiction.

* * * * *

(b) * * * The provisions of subpart H of this part regarding awards of attorney fees and consequential damages under 5

U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.

* * * * *

5. Section 1201.3 is amended by revising paragraph (c)(1)(ii) and adding paragraph (c)(1)(iii) to read as follows:

* * * * *

(c) * * *

(1) * * *

(ii) An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

(A) The Board's appellate procedures;

(B) The negotiated grievance procedures; or

(C) The procedures for seeking corrective action from the Special Counsel under subchapters II and III of chapter 12 of title 5 of the United States Code.

(iii) Except for actions involving discrimination under 5 U.S.C. 2302(b)(1) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

* * * * *

6. Section 1201.3 is further amended at paragraph (c) by adding a sentence to the end of paragraph (c)(2) to read as follows:

* * * * *

(c) * * *

(2) * * * When an employee has the choice of pursuing an appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) in accordance with paragraph (c)(1)(ii) of this section, the Board considers the choice among those procedures to have been made when the employee timely files an appeal with the Board, timely files a written grievance under the negotiated grievance procedure, or seeks corrective action from the Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1), whichever event occurs first.

* * * * *

§ 1201.37 [Amended]

7. Section 1201.37 is amended by revising the heading to read "Witness fees"; by removing paragraph (a) in its entirety; by removing the heading of paragraph (b), and by redesignating paragraphs (b)(1), (b)(2), and (b)(3) as paragraphs (a), (b), and (c), respectively.

§ 1201.55 [Amended]

8. Section 1201.55 is amended at paragraph (b) by removing the phrase, "and unless the motion is one for payment of attorney fees under

§1201.37(a) of this part," in the first sentence.

§ 1201.111 [Amended]

9. Section 1201.111 is amended by removing the phrase, "and a petition for judicial review," in paragraph (b)(6) and by adding in its place the phrase "a petition for judicial review, a motion for attorney fees under section 1201.203 of this part, and where a claim for consequential damages or compensatory damages has been raised, the right to an addendum proceeding to determine consequential damages or compensatory damages, with the time to be established by the judge."

§ 1201.112 [Amended]

10. Section 1201.112 is amended by removing the semi-colon at the end of paragraph (a)(3) and by adding in its place the phrase ", consequential damages, or compensatory damages under subpart H of this part;"

11. Section 1201.121 is amended by revising the heading to read as follows:

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

12. Section 1201.121 is further amended by revising paragraph (b) to read as follows:

* * * * *

(b) *Application of subparts B, F, and H.* Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part apply to complaints or requests filed by the Special Counsel under this subpart. Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints or requests decided under this subpart. Subpart H of this part applies to requests for attorney fees, consequential damages, or compensatory damages in connection with Special Counsel complaints decided under this subpart.

13. Section 1201.131 is revised to read as follows:

§ 1201.131 Procedures.

When an agency proposes an action against an administrative law judge, the regulations in subpart B of this part apply, unless these provisions expressly provide otherwise. Initial and subsequent pleadings, however, must be filed and served in accordance with § 1201.122 of this subpart. Subpart F of this part applies to enforcement proceedings in connection with actions against administrative law judges decided under this subpart. Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with actions against administrative law judges decided under this subpart.

§ 1201.163 [Amended]

14. Section 1201.163 is amended at paragraphs (a) and (c) by removing "29 CFR part 1613" each place it appears and by adding in its place "29 CFR part 1614".

15. Part 1201 is amended by adding new subpart H to read as follows:

Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages

Sec.

1201.201 Statement of purpose.

1201.202 Authority for awards.

1201.203 Proceedings for attorney fees.

1201.204 Proceedings for consequential damages and compensatory damages.

1201.205 Judicial review.

Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages

§ 1201.201 Statement of purpose.

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages.

(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by § 1201.202(a)(1). There are, however, other attorney fee provisions that apply only to specific kinds of cases. For example, § 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202 (a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.

(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.

(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. 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.

§1201.202 Authority for awards.

(a) *Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable).* The Board may order payment of:

(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;

(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);

(3) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the Board's decision is based on a finding of a prohibited personnel practice;

(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;

(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;

(6) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215; and

(7) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4).

(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:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders

corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(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. 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.

§1201.203 Proceedings for attorney fees.

(a) *Form and content of request.* A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney's services; and

(4) An established attorney-client relationship.

(b) *Addendum proceeding.* (1) A request for attorney fees will be decided in an addendum proceeding before a judge after issuance of a final decision in the proceeding on the merits, including a decision accepting the parties' settlement of the case.

(2) For purposes of this subpart, a "proceeding on the merits" is a proceeding to decide an appeal of an agency action under 5 U.S.C. section 1221 or 7701, an appeal under 38 U.S.C. 4324, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. section 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(3) The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under section 1201.113 of this part or a final decision of the Board.

(c) *Place of filing.* Where the decision in the proceeding on the merits was

issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the decision. Where the decision in the proceeding on the merits was issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

(d) *Time of filing; service.* A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. A copy of the motion must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(e) *Hearing; applicability of subpart B.* The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(f) *Review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

§1201.204 Proceedings for consequential damages and compensatory damages.

(a) *Time for making request.* (1) In all instances where a request for consequential damages or compensatory damages is made, it should be made as early as possible in a Board proceeding before an administrative judge or administrative law judge but no later than the first pleading filed with the three-member Board.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown.

(b) *Service.* A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made. A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(c) *Discretion to decide in merits proceeding or addendum proceeding.* When a request for consequential damages or compensatory damages is made, the judge or the Board, as applicable, may:

(1) Consider the request during the proceeding on the merits and rule on the request in the decision on the merits if the judge or the Board, as applicable, determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication; or

(2) Defer a decision on the request for an addendum proceeding. Except as provided in paragraph (e) of this section, the addendum proceeding will be held after issuance of a final decision in the proceeding on the merits. As used in this section, a "final decision in the proceeding on the merits" has the same meaning as in § 1201.203(b) of this part.

(d) *Initiation of addendum proceeding.* If a decision on a request for consequential damages or compensatory damages has been deferred for an addendum proceeding, the judge will schedule the proceeding after issuance of an initial decision that becomes final or a final Board decision.

(e) *Discretion of Board to order addendum proceeding.* Notwithstanding paragraphs (a) through (d) of this section, the Board, at its discretion, may order that an addendum proceeding to decide a request for consequential damages or compensatory damages be held prior to the issuance of a final decision on the merits. If the Board exercises this discretion, the Board order will provide for initiation of the addendum proceeding.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Review by the Board.* (1) An initial decision issued by a judge under this section, whether in accordance with paragraph (c)(1) of this section or in an addendum proceeding, shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(2) A recommended decision issued by an administrative law judge in accordance with paragraph (c)(1) of this section shall be subject to the provisions of subpart D of this part.

(h) *EEOC review of decision on compensatory damages.* A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

§ 1201.205 Judicial review.

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

Dated: April 1, 1997.

Robert E. Taylor,
Clerk of the Board.

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1209

Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure for whistleblower appeals to implement the provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994) that: Added a new personnel action and amended another in the statutory provisions governing prohibited personnel practices; and added a requirement that the Board refer its findings to the Special Counsel when it determines in a whistleblower proceeding that a current Federal employee may have committed a prohibited personnel practice. The Board is also amending its rules of practice and procedure for whistleblower appeals to include a cross-reference to subpart H of part 1201 regarding awards of attorney fees and consequential damages. The purpose of these amendments is to provide guidance to the parties to MSPB cases and their representatives regarding the new and amended personnel actions, to refer parties and their representatives to subpart H of part 1201 for the procedures governing requests for attorney fees and consequential damages, and to provide public notice of the requirement that the Board refer certain prohibited personnel practice findings to the Special Counsel. The Board is implementing other provisions of Public Law 103-424 through an amendment to its rules at 5 CFR part 1201, which is being published simultaneously with this amendment.

DATES: Effective date April 9, 1997. Submit written comments on or before June 9, 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: Public Law 103-424, which reauthorized the Board and the Office of Special Counsel

in October 1994, also included a number of provisions that affect cases involving prohibited personnel practices, especially actions based on whistleblowing. This amendment to the Board's rules at 5 CFR part 1209 reflects two of those provisions.

New and Amended Personnel Actions

Section 5 of Public Law 103-424 amended 5 U.S.C. 2302(a)(2)(A), the list of personnel actions that may form the basis for a prohibited personnel practice, to: (1) add a new personnel action, "a decision to order psychiatric testing or examination;" and (2) replace the existing provision, "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level," with an amended provision, "any other significant change in duties, responsibilities, or working conditions." Because the Board's rules at 5 CFR 1209.4(a) incorporate the statutory list of personnel actions at 5 U.S.C. 2302(a)(2)(A), it is necessary to amend the Board's rules to reflect the changes made in the statutory provision by Public Law 103-424.

The Board has ruled that these amendments to 5 U.S.C. 2302(a)(2)(A) may not be applied retroactively to cases pending on the effective date of the amendments, October 29, 1994, where the personnel action occurred prior to the effective date, because the amendments enlarge the category of conduct that may form the basis of a prohibited personnel practice. See *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 352-54 (1995), and *Briley v. National Archives and Records Administration*, 71 M.S.P.R. 211, 223-224 (1996).

Referrals to the Special Counsel. Section 4(c) of Public Law 103-424 amended 5 U.S.C. 1221(f) to add a new requirement that when the Board determines in a proceeding under section 1221 of title 5 (governing individual right of action appeals and certain other whistleblower appeals) that a current Federal employee may have committed a prohibited personnel practice, the Board is to refer the matter to the Special Counsel for investigation and possible prosecution under 5 U.S.C. 1215. The Board began making such referrals to the Special Counsel soon after this provision took effect on October 29, 1994. It is now amending its rules at 5 CFR part 1209 by adding a new subpart E to provide public notice that it is required to make such referrals.