

Rules and Regulations

Federal Register

Vol. 63, No. 154

Tuesday, August 11, 1998

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

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 an administrative law judge, to permit delegation of authority to an administrative law judge to decide Special Counsel stay requests, to permit delegation of authority to a member of the Board to rule on other matters related to a stay that has been granted to the Special Counsel (including motions for extension or termination of a stay), 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 intended to streamline the Board's adjudicatory procedures so that it can manage its original jurisdiction caseload more efficiently and effectively.

EFFECTIVE DATE: August 11, 1998.

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

SUPPLEMENTARY INFORMATION: The Board previously published an interim rule amending its regulations for the processing of original jurisdiction cases (5 CFR part 1201, subpart D) to permit assignment of certain of these cases to a judge other than an administrative law

judge, to permit delegation of authority to an 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. The interim rule made other changes in subpart D to reorganize and update the rules governing adjudication of original jurisdiction cases for the benefit of the Board's customers. 62 FR 48449, September 16, 1997. In issuing the interim rule, the Board allowed 60 days for receipt of public comments. No comments were received by the closing date, November 17, 1997.

The Board has determined that three changes should be made in the interim rule. Amendments are being made to § 1201.125(c)(2), concerning exceptions to a recommended decision; § 1201.134(b), concerning the deciding official for Special Counsel stay requests and related matters; and § 1201.136(b), concerning Special Counsel requests for extensions of stays.

Section 1201.125(c) describes the procedures to be followed where an administrative law judge finds in a Hatch Act case involving a Federal or District of Columbia Government employee that the Hatch Act was violated but that the violation does not warrant removal. In this circumstance, the administrative law judge issues a recommended decision, rather than an initial decision. Under the interim rule, § 1201.125(c)(2) requires that any exceptions to a recommended decision be filed within 35 days after the date of service of the recommended decision.

In a final rule published on November 6, 1997 (62 FR 59991), the Board amended various filing time limits, including the time limit for filing a petition for review of a judge's initial decision. The amendments made by that rule to §§ 1201.113 and 1201.114 govern the time for filing a petition for review of an initial decision in original jurisdiction cases, as well as in appellate jurisdiction cases. No amendment was made at that time, however, to the filing time limit for exceptions to a recommended decision.

To conform the filing time limit for exceptions to a recommended decision, therefore, the Board is amending § 1201.125(c)(2) to provide that any

exceptions to a recommended decision must be filed within 35 days after the date of service of the recommended decision or, if the filing party shows that the recommended decision was received more than 5 days after the date of service, within 30 days after the date the filing party received the recommended decision.

Under the interim rule at § 1201.134(b), any member of the Board may delegate his or her authority to decide a Special Counsel request for an initial stay to an administrative law judge. To expedite the processing of matters related to a stay that has been granted to the Special Counsel, including motions for extension or termination of a stay, the Board is amending § 1201.134(b) to also provide for delegation of the authority to rule on such matters to a single Board member. To the extent that *Kling v. Department of Justice*, 2 M.S.P.R. 464 (1980), holds that the Board may not delegate unreviewable decisionmaking authority, it is overruled.

Under the interim rule, § 1201.136(b) requires that the Special Counsel file any request for extension of a stay, along with its supporting brief, at least 15 days before the expiration date of the stay. The provision also requires that any agency response be filed within 10 days of the date of service of the Special Counsel's brief. The intent of prescribing specific time limits in this section was to allow sufficient time for Board attorneys to prepare a proposed decision on the extension request, and for the Board members to consider and vote on it, before the expiration date of the stay.

Experience operating under the interim rule, however, has demonstrated that the time limits prescribed by § 1201.136(b) often leave insufficient time for the preparation and consideration of a decision on an extension request. Furthermore, an agency may have insufficient time to respond to the Special Counsel's extension request if it is filed as late as 15 days before the stay expiration date and served on the agency by regular mail. Therefore, the Board is amending § 1201.136(b) to require that a Special Counsel request for extension of a stay, along with its supporting brief, be received by the Board and the agency no later than 15 days before the expiration date of the stay. The Special Counsel

may use any method of filing and service described in § 1201.134(f) that will ensure *receipt* by the due date. Section 1201.136(b) is further amended to require that any agency response to a Special Counsel request for extension of a stay be *received* by the Board no later than 8 days before the expiration date of the stay. The agency may use any method of filing described in § 1201.134(f) that will ensure *receipt* by the due date.

Subsequent to the issuance of the interim rule on September 16, 1997, the Board issued an interim rule at 62 FR 66813, December 22, 1997, that, among other things, amended §§ 1201.121 and 1201.131. This final rule, therefore, notes that those two sections continue to read as amended on December 22, 1997.

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

Accordingly, the Board adopts as final its interim rule published at 62 FR 48449, September 16, 1997, with the following changes:

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.

1a. Sections 1201.121 and 1201.131 continue to read as amended by 62 FR 66813, December 22, 1997.

§ 1201.125 [Amended]

2. Section 1201.125 is amended at paragraph (c)(2) by removing the period at the end of the second sentence and by adding in its place the following: "or, if the filing party shows that the recommended decision was received more than 5 days after the date of service, within 30 days after the date the filing party received the recommended decision."

§ 1201.134 [Amended]

3. Section 1201.134 is amended at paragraph (b) by adding the following sentence at the end of the paragraph: "The Board may delegate to a member of the Board the authority to rule on any matter related to a stay that has been granted to the Special Counsel, including a motion for extension or termination of the stay."

4. Section 1201.136 is amended by revising paragraph (b) to read as follows:

§ 1201.136 [Amended]

* * * * *

(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. Any request for an extension of a stay under 5 U.S.C. 1214(b)(1)(B) must be received by the Board and the agency no later than 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 received by the Board no later than 8 days before the expiration date of the stay.

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Dated: August 4, 1998.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 98-21288 Filed 8-10-98; 8:45 am]

BILLING CODE 7400-01-U

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Docket No. FV98-948-2 IFR]

Irish Potatoes Grown in Colorado; Exemption From Area No. 2 Handling Regulation for Potatoes Shipped for Experimentation and the Manufacture or Conversion Into Specified Products

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule exempts shipments of potatoes handled for experimentation and the manufacture or conversion into specified products from the grade, size, maturity, and inspection requirements prescribed under the handling regulations of the Colorado Potato Marketing Order for Area No. 2 (San Luis Valley). This rule was unanimously recommended by the Colorado Potato Administrative Committee for Area No. 2 (Committee), the agency responsible for local administration of the marketing order. This rule is designed to expand markets for potatoes and to increase fresh utilization. These changes are expected to improve the marketing of Colorado potatoes and increase returns to producers.

DATES: Effective August 12, 1998; comments received by October 13, 1998 will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and

Vegetable Programs, AMS, USDA, room 2525-S, PO Box 96456, Washington, DC 20090-6456; Fax: (202) 205-6632. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT:

Dennis L. West, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, room 369, Portland, Oregon 97204; telephone: (503) 326-2724, Fax: (503) 326-7440; or George J. Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Room 2525-S, PO Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, PO Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 205-6632.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948 (7 CFR part 948), both as amended, regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is authorized by the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the