

# Rules and Regulations

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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 (MSPB or the Board) is amending its rules of practice and procedure to implement provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The purpose of these amendments is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed in cases raising claims that an agency employer or the Office of Personnel Management (OPM) has not complied with a USERRA provision governing the employment and reemployment rights to which a person is entitled after service in the uniformed services.

**DATES:** Effective date December 22, 1997. Submit written comments on or before February 20, 1998.

**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](mailto:mspb@mspb.gov).

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

**SUPPLEMENTARY INFORMATION:** The Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (108 Stat. 3149), consists principally of a revision of chapter 43 of title 38 of the United States Code, "Employment and Reemployment Rights of Members of the Uniformed Services."

Under USERRA, Federal employees have expanded employment and reemployment rights and benefits after service in the uniformed services, including a new statutory right to appeal USERRA violations to MSPB. Previously, a Federal employee had the right to appeal only an alleged failure to restore to duty, or improper restoration to duty, after military service, a right provided under OPM regulations (5 CFR part 353).

USERRA provides new mechanisms for Federal employees to enforce their employment or reemployment rights. In addition to the right to appeal to MSPB, a Federal employee has the right to seek assistance from the Secretary of Labor, to file a complaint with the Secretary of Labor, and to request representation before MSPB by the Special Counsel if the Secretary of Labor is unable to resolve the complaint. 38 U.S.C. 4321, 4322, and 4324.

USERRA authorizes OPM and the agencies involved in enforcement of USERRA rights for Federal employees—the Department of Labor (DOL), Office of Special Counsel (OSC), and the Board—to promulgate regulations to carry out their functions under the Act. 38 U.S.C. 4331(b)(2)(A).

OPM has issued interim regulations, in the form of amendments to 5 CFR parts 353, 870, and 890, to implement USERRA (60 FR 45650, September 1, 1995). As amended, part 353 includes separate MSPB appeal right provisions for USERRA appeals at 5 CFR 353.211 and for appeals involving restoration to duty after recovery from a compensable injury at 5 CFR 353.304.

The Board is amending its regulation at 5 CFR 1201.3(a), describing appealable actions, to conform to this change by OPM. Section 1201.3(a)(12) is amended to describe only restoration after recovery from a compensable injury and to conform the language to that in OPM's regulation at 5 CFR 353.304. USERRA actions are described in a new section 1201.3(a)(22), which includes citations to both the applicable enforcement provision of USERRA (38 U.S.C. 4324) and the OPM regulation at 5 CFR 353.211.

In describing appealable USERRA actions in new section 1201.3(a)(22), the Board has relied on the following provisions of the Act. The enforcement mechanisms for Federal employees under 38 U.S.C. 4324 apply to an agency

employer's or OPM's failure or refusal to comply with the provisions of chapter 43 of title 38. 38 U.S.C. 4322(a)(2)(B). The Act prohibits discrimination against an employee on the basis of service in the uniformed services and prohibits acts of reprisal for exercising a right or seeking to enforce a protection under chapter 43 of title 38. 38 U.S.C. 4311. One kind of action related to the rights and benefits afforded by USERRA is specifically excluded from the enforcement mechanism—an "action relating to benefits to be provided under the Thrift Savings Plan under title 5." 38 U.S.C. 4322(f).

USERRA does not prescribe specific procedures that the Board must apply to appeals brought under chapter 43 of title 38. The Board has determined that all USERRA cases should be processed under its appellate jurisdiction procedures and that its original jurisdiction procedures, contained in subpart D of part 1201, should not be applied to those USERRA appeals filed by the Special Counsel. Appeals involving restoration after military service that were authorized by OPM regulation have traditionally fallen under the Board's appellate jurisdiction. Congress was presumably aware of that practice, and nothing in USERRA or its legislative history suggests an intent that this practice be changed.

Subpart B of part 1201 is amended at section 1201.2(a) to exclude USERRA appeals from the Special Counsel actions included under the Board's "original jurisdiction," at section 1201.3(a) to add USERRA actions to the list of appealable actions as new paragraph (a)(22), and at section 1201.31 to add a specific provision in new paragraph (e) for representation of a person in a USERRA appeal by the Special Counsel. Subpart D of part 1201 is amended at sections 1201.121 and 1201.131 to exclude USERRA appeals specifically from the original jurisdiction procedures applying to corrective actions brought by the Special Counsel.

USERRA does not establish a time limit for appealing to the Board, nor does it specifically prohibit the establishment of a time limit. *Petersen v. Department of the Interior*, 71 M.S.P.R. 227 (1996); *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86 (1997); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367 (1997); *Wright v.*

Department of Veterans Affairs, 73 M.S.P.R. 453 (1997). The Board is authorized by 5 U.S.C. 1204(h) to promulgate regulations to carry out its functions and has used this authority since its inception to prescribe time limits for filing appeals with the Board. The Board is also authorized by 38 U.S.C. 4331(b)(2)(A) to promulgate regulations to carry out its functions under USERRA.

The Act provides a person three opportunities to file an appeal with MSPB: (1) after the alleged violation, if the person does not file a complaint with DOL; (2) after DOL notifies the person that it cannot resolve the matter with the agency, if the person chooses not to have the matter referred to the Special Counsel; and (3) after being advised that the Special Counsel chooses not to represent the person in an appeal to MSPB. 38 U.S.C. 4324(b). If a matter is referred to the Special Counsel, the Special Counsel may file an appeal with MSPB. 38 U.S.C. 4324(a)(2).

Any filing time limit established by the Board by regulation must allow sufficient time for a person to explore his or her options, including possibly pursuing the matter with DOL and OSC, while not allowing the matter to become stale. The Board has ruled that if a person files a formal complaint with DOL, the DOL procedure must be exhausted before an appeal may be filed with MSPB. *Petersen*, 71 M.S.P.R. at 233; *Jasper*, 73 M.S.P.R. at 370.

The Board is amending its regulation at 5 CFR 1201.22(b), prescribing time limits for filing, to provide that a USERRA appeal may be filed directly with MSPB within 180 days of the alleged violation. If a person seeks assistance from DOL under 38 U.S.C. 4321 but does not file a formal complaint under 38 U.S.C. 4322(a), he or she may subsequently file an appeal with MSPB at any time during the 180-day period. If a person files a formal complaint with DOL under 38 U.S.C. 4322(a) and receives notification from DOL that it has been unable to resolve the matter, he or she may subsequently file an appeal with MSPB within 30 days after receipt of the notification from DOL or within 180 days of the alleged violation, whichever is later. If DOL refers a person's complaint to OSC under 38 U.S.C. 4322(a) and the person receives notification from the Special Counsel that OSC will not represent the person before MSPB, he or she may subsequently file an appeal with MSPB within 30 days after receipt of the notification from the Special Counsel or within 180 days of the alleged violation, whichever is later.

This guarantees that a person will have at least six months from the time of an alleged violation of USERRA to file an appeal with MSPB. If a person files a formal complaint with DOL or seeks OSC representation, the time limit for filing with MSPB may be greater than six months.

Where the Special Counsel chooses to represent a person in a USERRA appeal before MSPB, the Board has not set a time limit for filing. The intent is to allow the Special Counsel time to secure voluntary compliance before filing an appeal with MSPB. Because DOL will have already tried, and failed, to secure compliance by the agency, the Board expects that the Special Counsel will file an appeal with MSPB expeditiously where a matter cannot be resolved with the agency.

In addition to the amendments with respect to USERRA discussed above, the Board is making several technical amendments to its regulation at 5 CFR 1201.3(a).

The Board is publishing this rule as an interim rule pursuant to 5 U.S.C. 1204(h) and 38 U.S.C. 4331.

**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. Section 1201.2 is amended by revising paragraph (a) to read as follows:

**§ 1201.2 Original jurisdiction.**

(a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;

3. Section 1201.3 is amended by revising paragraph (a)(12), by removing "and" at the end of paragraph (a)(19), by removing the period at the end of paragraph (a)(20) and adding a semi-colon in its place, by revising the citation in the parenthetical at the end of paragraph (a)(21) to read "(22 U.S.C. 4011)", by deleting the period at the end of paragraph (a)(21) and substituting "; and", and by adding a new paragraph (a)(22) to read as follows:

**§ 1201.3 Appellate jurisdiction**

(a) \* \* \* (12) Failure to restore, improper restoration of, or failure to return

following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304);

(22) Non-compliance by a Federal executive agency employer or the Office of Personnel Management with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (38 U.S.C. 4324, 5 CFR 353.211), excluding any action related to benefits to be provided under the Thrift Savings Plan under title 5 of the United States Code (38 U.S.C. 4322(f)).

4. Section 1201.22 is amended by redesignating the text of paragraph (b) as paragraph (b)(1), by revising the first sentence of paragraph (b)(1) and by adding a new paragraph (b)(2) to read as follows:

**§ 1201.22 Filing an appeal and responses to appeals.**

(b) \* \* \* (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. \* \* \*

(2) (i) Where a person alleges non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (see paragraph (a)(22) of § 1201.3 of this part), he or she may file an appeal directly with the Board within 180 days after the alleged act or incidence of non-compliance.

(ii) Where a person seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint under 38 U.S.C. 4322(a), he or she may file an appeal directly with the Board within 180 days after the alleged act or incidence of non-compliance.

(iii) Where a person files a complaint with the Secretary of Labor under 38 U.S.C. 4322(a) and receives notification under 38 U.S.C. 4322(e) that the Secretary has been unable to resolve the matter, he or she may subsequently file an appeal with the Board within 30 days after the date of receipt of the Secretary's notification or within 180 days after the alleged act or incidence of non-compliance, whichever is later. A

copy of the Secretary's notification must be submitted with the appeal.

(iv) Where the Secretary of Labor refers a person's complaint to the Special Counsel under 38 U.S.C. 4322(a) and the person receives notification that the Special Counsel declines to represent the person in an appeal to the Board, he or she may subsequently file an appeal with the Board within 30 days after the date of receipt of the Special Counsel's notification or within 180 days after the alleged act or incidence of non-compliance, whichever is later. A copy of the Special Counsel's notification must be submitted with the appeal.

(v) Where the Secretary of Labor refers a person's complaint to the Special Counsel under 38 U.S.C. 4322(a) and the Special Counsel agrees to represent the person in an appeal to the Board, the Special Counsel may file an appeal with the Board at any time thereafter.

\* \* \* \* \*

5. Section 1201.31 is amended by adding a new paragraph (d) to read as follows:

**§ 1201.31 Representatives.**

\* \* \* \* \*

(e) The Special Counsel may represent a person in an appeal alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (see paragraph (a)(22) of § 1201.3 of this part and 38 U.S.C. 4324). In such an appeal, a copy of any written request by the person to the Secretary of Labor that the matter be referred to the Special Counsel for litigation before the Board will be accepted as the written designation of representative required by paragraph (a) of this section.

6. Section 1201.121 is amended by adding a new paragraph (c) to read as follows:

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

\* \* \* \* \*

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by subpart B of this part.

**§ 1201.131 [Amended]**

7. Section 1201.131 is amended at paragraph (a) by adding after "Special Counsel" the phrase, "under this subpart".

Dated: December 17, 1997.

**Robert E. Taylor,**

*Clerk of the Board.*

[FR Doc. 97-33353 Filed 12-19-97; 8:45 am]

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**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**10 CFR Part 1703**

**Rules Implementing the Freedom of Information Act**

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Final rule.

**SUMMARY:** The Defense Nuclear Facilities Safety Board (Board) is amending its Freedom of Information Act (FOIA) rules to provide for expedited processing of certain requests, to conform response deadlines with those now provided in the statute, and to add a category of documents to be made available in the Public Reading Room. These changes result from new statutory provisions in the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231. A minor change is also made in the Board's fee provision.

**EFFECTIVE DATE:** January 21, 1998.

**FOR FURTHER INFORMATION CONTACT:** Robert M. Andersen, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Ave. NW, Suite 700, Washington, D.C. 20004, (202) 208-6387.

**SUPPLEMENTARY INFORMATION:** On October 21, 1997, the Board published proposed changes to its Freedom of Information Act rule (62 FR 54594) in response to the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231. One additional change was proposed to the Board's FOIA fee provision. No public comments were received on the proposed changes. Therefore, the amendments are being made final without change.

**Executive Order No. 12866**

These amendments do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they were not subject to Office of Management and Budget review.

**Regulatory Flexibility Act**

These amendments will not have a significant economic impact on a

substantial number of small entities since these rules affect only individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

**Paperwork Reduction Act**

These regulations will impose no additional reporting and recordkeeping requirements subject to Office of Management and Budget clearance.

**List of Subjects in 10 CFR Part 1703**

Freedom of information.

For the reasons stated in the preamble, the Board amends 10 CFR part 1703 as follows:

**PART 1703—PUBLIC INFORMATION AND REQUESTS**

1. The authority citation for part 1703 continues to read as follows:

**Authority:** 5 U.S.C. 552 as amended; 42 U.S.C. 2286b(c).

2. Section 1703.103 is amended by adding paragraph (b)(12) to read as follows:

**§ 1703.103 Requests for Board records available through the public reading room.**

\* \* \* \* \*

(b) \* \* \*

(12) Copies of records released pursuant to FOIA requests, along with an index to these records. The format will generally be the same as the format of the released records.

3. Section 1703.105 is amended by adding a new paragraph (e) to read as follows:

**§ 1703.105 Requests for Board records not available through the public reading room (FOIA requests).**

\* \* \* \* \*

(e)(1) *Expedited processing.* A person may request expedited processing of an FOIA request when a compelling need for the requested records has been shown. "Compelling need" means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information; or

(iii) The records pertain to an immediate source of risk to the public health and safety or worker safety at a defense nuclear facility under the Board's jurisdiction.

(2) A requester seeking expedited processing should so indicate in the