

Rules and Regulations

Federal Register

Vol. 73, No. 38

Tuesday, February 26, 2008

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201, 1203, 1208, and 1209

Final Rule for Implementation of Electronic Filing

AGENCY: Merit Systems Protection Board.

ACTION: Final rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB) is adopting as a final rule the interim rule governing electronic filing (e-filing) that it promulgated in 2003, as amended the following year, and as further amended by the present notice. When first promulgated in 2003, the online application was restricted to the filing of new appeals; subsequent documents could only be delivered via electronic mail (e-mail). A year later, we modified the rule to reflect that e-Appeal Online could be used to file almost any type of pleading. As further modified in the present Notice, the rule recognizes the MSPB's online Repository of case-related documents that enables parties and their representatives to access the pleadings and MSPB issuances related to the particular employment controversies in which they are involved. The modified rule also contains a requirement that e-filers who include three (3) or more attachments with a pleading describe each attachment. Finally, although not a part of this final rule, the MSPB is giving serious consideration to making e-filing mandatory for agencies and attorneys who represent appellants in MSPB proceedings. Although any such rule could only be issued following a new **Federal Register** notice, we welcome comments on this issue at the present time.

DATES: This rule is effective April 28, 2008. Written comments should be submitted on or before March 27, 2008.

ADDRESSES: Send or deliver comments to the Office of Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: Before describing the changes being made to our regulations at this time, we note that the MSPB did not receive any comments from the public to the interim rule promulgated in 2003, 68 FR 59859, nor to the 2004 modifications to that rule, 69 FR 57627.

Summary of Significant Changes

1. Repository at e-Appeal Online (paragraph (i))

Beginning in July 2007, the MSPB has maintained a Repository at e-Appeal Online (<https://e-appeal.mspb.gov>) that contains the electronic documents that relate to MSPB appeals, including all notices, orders, decisions, and other documents issued by the MSPB to the parties, as well as pleadings filed via e-Appeal Online. In addition, virtually all pleadings filed at the petition for review stage of adjudication, even if filed in paper form, and some pleadings filed at the regional office level, are available at the Repository. Also available at the Repository is an electronic "docket sheet" that lists all documents issued by the MSPB to the parties, as well as all pleadings filed by the parties, including those pleadings that are not available for viewing and downloading in electronic form. When the MSPB issues a document to the parties, or when an electronic pleading is filed by an e-filer, an e-mail message is generated to all e-filers in the case notifying them of the new pleading or MSPB issuance, and providing a link to the document at the Repository. (See paragraph (j).) Access to appeal documents at the Repository is limited to the parties and representatives of the cases in which they were filed.

In the very near future, all pleadings added to the Repository will be full-text searchable, including printed materials that have been converted to electronic format by scanning. This will be

accomplished using optical character recognition software that converts image-only electronic formats into an image-plus-text electronic format. We believe that making case-related documents full-text searchable will make it easier for both the parties to MSPB proceedings and the MSPB itself to search case files for pertinent materials.

2. Multiple Attachments Must be Described

Paragraph (g)(3) requires an e-filer who is uploading three (3) or more supporting attachments, in addition to the document that constitutes the party's primary pleading, to describe each attachment. The reason for this requirement is to increase the utility of having large documents in electronic format. When attachments are described as required by this provision, the MSPB's software formats the pleading so that it includes a table of contents which lists the page number on which each attachment starts. In addition, the electronic Portable Document Format (PDF) version contains "bookmarks" that can be seen at the same time as the document itself, and clicking the bookmark for a particular attachment takes the user directly to that attachment.

Although this requirement would apply to all electronic pleadings with three (3) or more attachments, it will have particular significance for the Agency File (see 5 CFR 1201.25), which is often the largest pleading in the case file, and which often has the most attachments of any pleading in the case file. We believe that any extra time required to describe each attachment under this rule will be offset by the time saved compared to the present method of producing the Agency File, which requires the manual production of a table of contents and the insertion of numerous paper dividers. In addition, this feature will enable all participants to cite the exact pages on which each attachment can be found, as all pages in e-filed pleadings, including attachments, are sequentially paginated by the e-Appeal Online software, e.g., page 1 of 125, page 2 of 125, etc. Under current practice, such precise citation is frequently not possible, as a particular attachment may consist of two pages in the middle of a group of documents

located within a single tab in the Agency File.

3. Other Changes

Other additions and changes from the current rule include the following:

- The current regulation excludes the filing of the original complaint or request in an appeal within the MSPB's original jurisdiction from e-filing. That exclusion will no longer be necessary, as the MSPB is adding a module to e-Appeal Online that will allow such filings. Paragraphs (b) and (c) of section 1201.14, and sections 1201.134(g), 1201.137(g), and 1201.143(f) have been amended to reflect this change.

- Paragraph (e)(3) has been modified to provide that, when a party has more than one representative, all representatives must choose the same method of service. In the interest of administrative efficiency, we do not believe it would be unduly burdensome to require all representatives to choose the same service method, be it electronic or postal mail. The regulation still provides that the appellant and his or her representative can choose different methods of service.

- Because the content of what was paragraph (e)(4) has been modified and redesignated as paragraph (f), and because a new paragraph (i) has been added regarding the Repository at e-Appeal Online, the designations of the materials that had been contained in paragraphs (f) through (m) have changed. This redesignation of paragraphs also required a minor change to § 1201.4(k).

- Paragraph (e)(5) clarifies that registration as an e-filer ordinarily applies only to a single MSPB appeal, i.e., the MSPB will not presume that an individual who was an e-filer in one proceeding has opted to become an e-filer in subsequent MSPB proceedings.

- Paragraph (e)(6) mandates that e-filers notify the MSPB of any change in their e-mail addresses.

- Paragraph (h) provides that, in hybrid pleadings in which part of a pleading is submitted electronically, and one or more attachments is submitted in paper form, all components are subject to applicable time limits, and untimely filed components may be rejected as untimely filed. We note in this regard that an e-filer is only required to certify that he or she will submit the paper components within one business day of the electronic submission.

- Paragraph (j)(1) clarifies that paper copies of MSPB documents will not ordinarily be served on e-filers.

- Paragraph (j)(2) clarifies that e-filers are responsible for ensuring that e-mail

messages from e-Appeal Online are not blocked by filters of one sort or another.

- Paragraph (j)(3) provides that e-filers are responsible for monitoring case activity. The MSPB's software automatically generates an e-mail message to e-filers with a link to the Repository whenever the MSPB issues a document to the parties, or when another e-filer submits an electronic pleading. In addition, e-filers are responsible for ensuring that their e-mail accounts are not blocked by filters, as noted above. Nevertheless, this rule clarifies that e-filers are still responsible for monitoring the Repository on a regular basis to ensure that they have received all case-related documents.

- Paragraph (m) clarifies that e-filed pleadings are stamped with the date and time of submission in the Eastern Time Zone, but that the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted.

- Paragraph (o) clarifies that the MSPB reserves the right to revert to traditional methods (postal mail, fax, personal or commercial delivery) for serving documents on parties and representatives, and that parties and representatives are responsible for ensuring that the MSPB always has their current postal mailing addresses, even when they have registered as e-filers.

Possible Requirement of Mandatory E-Filing for Agencies and Attorneys

Although not part of this final rule, the MSPB is considering proposing a rule that would make e-filing mandatory for agencies and attorneys who represent appellants. The MSPB's long-term goal is to have entirely electronic case files (e-case files), which we believe would have significant benefits both for the MSPB and the participants in MSPB appeals. All parties and representatives, as well as appropriate MSPB employees, would have access to all case-related documents at any time and place, as long as they had access to the Internet. In addition, the ability to run sophisticated full-text searches of the contents of the entire case file would make it easier for parties and the MSPB to find and cite pertinent record evidence.

There are only two basic methods for getting the parties' pleadings into an electronic format for inclusion in an e-case file—they can be filed in an electronic format; or they can be scanned after they have been filed in paper form. The MSPB lacks the resources to scan all pleadings received in paper form, and we view that option as unduly labor intensive. If e-filing remains completely optional, it is

unlikely that the MSPB will ever achieve completely electronic, searchable case files. If, however, all pleadings submitted by agencies and attorneys were e-filed, scanning the remaining paper pleadings would become manageable, especially considering the significant number of pleadings e-filed by pro se appellants.

Although the law requires federal agencies to provide information and services via the Internet, it also mandates that agencies consider the impact on persons without access to the Internet and, to the extent practicable, ensure that the availability of government services has not been diminished for such persons. 44 U.S.C. 3501 note. Accordingly, the MSPB cannot make e-filing mandatory for pro se appellants. We see no legal restriction to making e-filing mandatory for Federal agencies or attorneys, however, and do not believe it would impose undue costs or difficulties for them. We note in this regard that e-filing is generally mandatory for attorneys in the Federal district courts; only parties proceeding on a pro se basis have the option of filing pleadings in paper form. We also note that, unlike e-filing in the Federal courts, e-Appeal Online does not require the filer to convert other electronic formats to PDF before filing; the MSPB's software accepts numerous common formats, including word-processing formats, and converts them to PDF. All that would be required are a computer, access to e-mail and the Internet, and a scanner.

List of Subjects

5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

5 CFR Part 1203

Administrative practice and procedure, Civil rights, Government employees.

5 CFR Part 1208

Administrative practice and procedure, Government employees, Veterans.

5 CFR Part 1209

Administrative practice and procedure, Government employees, Whistleblowing.

■ Accordingly, the interim rules amending 5 CFR parts 1201, 1203, 1208, and 1209, which were published at 68 FR 59859 on October 20, 2003, and at 69 FR 57627 on September 27, 2004, are adopted as final rules 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, unless otherwise noted.

■ 2. Revise § 1201.4(k) to read as follows:

§ 1201.4 General definitions.

* * * * *

(k) *Certificate of service.* A document certifying that a party has served copies of pleadings on the other parties or, in the case of paper documents associated with electronic filings under paragraph (h) of § 1201.14, on the MSPB.

* * * * *

■ 3. Section 1201.14 is revised to read as follows:

§ 1201.14 Electronic Filing Procedures.

(a) *General.* This section prescribes the rules and procedures by which parties and representatives to proceedings within the MSPB's appellate and original jurisdiction may file and receive documents in electronic form.

(b) *Matters subject to electronic filing.* Subject to the registration requirement of paragraph (e) of this section, parties and representatives may use electronic filing (e-filing) to do any of the following:

(1) File any pleading, including a new appeal, in any matter within the MSPB's appellate jurisdiction (§ 1201.3);

(2) File any pleading in any matter within the MSPB's original jurisdiction (§ 1201.2);

(3) File a petition for enforcement of a final MSPB decision (§ 1201.182);

(4) File a motion for an attorney fee award as a prevailing party (§ 1201.203);

(5) File a motion for compensatory or consequential damages (§ 1201.204);

(6) Designate a representative, revoke such a designation, or change such a designation (§ 1201.31); or

(7) Notify the MSPB of a change in contact information such as address (geographic or electronic mail) or telephone number.

(c) *Matters excluded from electronic filing.* Electronic filing may not be used to:

(1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);

(2) Serve a subpoena (§ 1201.83); or

(3) File a pleading with the Special Panel (§ 1201.173).

(d) *Internet is sole venue for electronic filing.* Following the instructions at e-Appeal Online, the MSPB's e-Appeal site (<https://e-appeal.mspb.gov>), is the only method allowed for filing electronic pleadings with the MSPB.

The MSPB will not accept pleadings filed by electronic mail (e-mail).

(e) *Registration as an e-filer.*

(1) Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the MSPB. Except when filing a new appeal within the MSPB's appellate jurisdiction (§ 1201.3), no party or representative may file an electronic pleading with the MSPB unless he or she has registered with the MSPB as an e-filer.

(2) With the exception of a designation of a representative by a party who is an individual, the exclusive means for a party or representative to register as an e-filer during an MSPB proceeding is to follow the instructions at e-Appeal Online (<https://e-appeal.mspb.gov>).

(3) When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as an e-filer. For example, an appellant may file and receive pleadings and MSPB documents by non-electronic means, even though his or her representative has registered as an e-filer. When a party has more than one representative, however, all representatives must choose the same method of service.

(4) A party or representative may withdraw his or her registration as an e-filer. Such withdrawal means that, effective upon the MSPB's receipt of this withdrawal, pleadings and MSPB documents will no longer be served on that person in electronic form. A withdrawal of registration as an e-filer may be filed at e-Appeal Online, in which case service is governed by paragraph (j) of this section, or by non-electronic means, in which case service is governed by § 1201.26(b).

(5) Registration as an e-filer applies only to a single MSPB appeal or proceeding. If an appeal is dismissed without prejudice, however, and is later refiled, an election of e-filing status will remain in effect. An election of e-filing status will also remain in effect for purposes of filing a petition for enforcement under Subpart F of this part, or filing a motion for an attorney fee award or compensatory or consequential damages under Subpart H of this Part.

(6) Each e-filer must notify the MSPB and other participants of any change in his or her e-mail address. When done via e-Appeal Online, such notification is done by selecting the "Pleading" option.

(f) *e-Filing not mandatory for e-filers.* A party or representative who has registered as an e-filer may file any pleading by non-electronic means, i.e.,

via postal mail, fax, or personal or commercial delivery.

(g) *Form of electronic pleadings.*

(1) *Options for e-filing.* An appellant or representative using e-Appeal Online to file a new appeal within the MSPB's appellate jurisdiction (§ 1201.3) must complete the structured interview at that site (<https://e-appeal.mspb.gov>). For all other pleadings, the e-filer has the option of uploading an electronic file or entering the text of the pleading online. Regardless of the means of filing a particular pleading, the e-filer will be allowed to submit supporting documentation such as attachments, in either electronic or paper form, as described in paragraphs (g)(2), (g)(3), and (h) of this section.

(2) *Electronic formats allowed.* The MSPB will accept numerous electronic formats, including word-processing and spreadsheet formats, Portable Document Format (PDF), and image files (files created by scanning). A list of formats allowed can be found at e-Appeal Online. All electronic documents must be formatted so that they will print on standard 8½ inch by 11 inch paper.

(3) *Requirements for pleadings with 3 or more electronic attachments.* An e-filer who uploads 3 or more supporting documents, in addition to the document that constitutes the primary pleading, must identify each attachment, either by filling out the table for such attachments at e-Appeal Online, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. Each attachment must be designated with a brief descriptive label, which will include exhibit numbers or letters where appropriate or required, e.g., "Exh. 4b, Decision Notice."

(h) *Hybrid pleadings that include both electronic and paper documents.* An e-filer may file a hybrid pleading in which part of the pleading is submitted electronically, and part of the pleading consists of one or more paper documents filed by non-electronic means. All components of a hybrid pleading are subject to applicable time limits. If one or more parts of a hybrid pleading are untimely filed, the judge or the Clerk may reject the untimely part or parts while accepting timely filed parts of the same pleading.

(i) *Repository at e-Appeal Online.* All notices, orders, decisions, and other documents issued by the MSPB, as well as all pleadings filed via e-Appeal Online, will be made available to parties and their representatives for viewing and downloading at the Repository at e-Appeal Online. In addition, most pleadings filed at the petition for review stage of adjudication, and some

pleadings filed at the regional office level, will be available at the Repository. Also available at the Repository will be an electronic "docket sheet" listing all documents issued by the MSPB to the parties, as well as all pleadings filed by the parties, including those pleadings that are not available for viewing and downloading in electronic form. Access to appeal documents at the Repository will be limited to the parties and representatives of the appeals in which they were filed.

(j) *Service of electronic pleadings and MSPB documents.*

(1) When MSPB documents are issued, e-mail messages will be sent to e-filers that notify them of the issuance and that contain links to the Repository where the documents can be viewed and downloaded. Paper copies of these documents will not ordinarily be served on e-filers. Pleadings submitted via e-Appeal Online will be available to parties and representatives at the e-Appeal Online Repository, and the MSPB will send e-mail messages to other e-filers notifying them of each pleading, with a link to the Repository. When using e-Appeal Online to file a pleading, e-filers will be notified of all documents that must be served by non-electronic means, and they must certify that they will serve all such documents no later than the first business day after the electronic submission.

(2) Delivery of e-mail can encounter a number of failure points. If the MSPB is advised of non-delivery, it will attempt to redeliver and, if that is unsuccessful, will deliver by postal mail or other means. E-filers are responsible for ensuring that e-mail from @mspb.gov is not blocked by filters.

(3) E-filers are responsible for monitoring case activity at the Repository at e-Appeal Online to ensure that they have received all case-related documents.

(k) *Documents requiring a signature.* Electronic documents filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, or 1209 of this chapter that requires a signature.

(l) *Affidavits and Declarations made under penalty of perjury.* Registered e-filers may submit electronic pleadings in the form of declarations made under penalty of perjury under 28 U.S.C. 1746, as described in Appendix IV to this part. If the declarant is someone other than the e-filer, a physically signed affidavit or declaration should be uploaded as a non-electronic document under paragraph (h) of this section.

(m) *Date electronic documents are filed and served.*

(1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading is assessed based on the time zone where the pleading is being filed. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Western Regional Office on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20.

(2) MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission.

(n) *Authority of a judge or the Clerk to regulate e-filing.*

(1) In the event that the MSPB or any party encounters difficulties filing, serving, or receiving electronic documents, the judge or the Clerk of the Board may order one or more parties to cease filing pleadings by e-filing, cease serving documents in electronic form, or take both these actions. In such instances, filing and service shall be undertaken in accordance with § 1201.26. The authority to order the cessation of the use of electronic filing may be for a particular submission, for a particular time frame, or for the duration of the pendency of a case.

(2) A judge or the Clerk of the Board may require that any document filed electronically be submitted in non-electronic form and bear the written signature of the submitter. A party receiving such an order from a judge or the Clerk of the Board shall, within 5 calendar days, serve on the judge or Clerk of the Board by postal mail, by fax, or by commercial or personal delivery a signed, non-electronic copy of the document.

(o) *MSPB reserves the right to revert to traditional methods of service.* The MSPB may serve documents via traditional means—postal mail, fax, personal or commercial delivery—at its discretion. Parties and their representatives are responsible for ensuring that the MSPB always has their current postal mailing addresses, even when they have registered as e-filers.

■ 4. Revise § 1201.134(g) to read as follows:

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

* * * * *

(g) *Electronic filing.* All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (<https://e-appeal.mspb.gov/>), provided the requirements of § 1201.14 are satisfied.

■ 5. Revise § 1201.137(f) to read as follows:

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

* * * * *

(f) *Electronic filing.* All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (<https://e-appeal.mspb.gov/>), provided the requirements of § 1201.14 are satisfied.

■ 6. Revise § 1201.143(f) to read as follows:

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

* * * * *

(f) *Electronic filing.* All pleadings may be filed and served in electronic form at the MSPB e-Appeal site (<https://e-appeal.mspb.gov/>), provided the requirements of § 1201.14 are satisfied.

William D. Spencer,

Clerk of the Board.

[FR Doc. E8-3515 Filed 2-25-08; 8:45 am]

BILLING CODE 7400-01-P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 270, 274a, and 280

RIN 1653-AA39

DEPARTMENT OF JUSTICE

28 CFR Part 68

Executive Office for Immigration Review

8 CFR Part 1274a

RIN 1125-AA61

[EOIR Docket No. 165F; A.G. Order No. 2944-2008]

Inflation Adjustment for Civil Monetary Penalties Under Sections 274A, 274B, and 274C of the Immigration and Nationality Act

AGENCIES: U.S. Immigration and Customs Enforcement, DHS; Executive Office for Immigration Review, Justice.

ACTION: Final rules.

SUMMARY: As required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the Department of Homeland Security and the Department of Justice are