



MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Organization and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim final rule; request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is launching an updated electronic filing (e-filing) system, e-Appeal, on October 2, 2023, in support of MSPB's agency-wide initiative to modernize its technology, gain new efficiencies, and improve the e-filing experience for our external users. MSPB hereby amends its rules of practice and procedure to require all pleadings filed by agencies and attorneys who represent appellants in MSPB proceedings to be electronically filed (e-filed). This requirement will apply to all pleadings in all adjudicatory proceedings before the Board except those specifically excluded by this interim final rule.

DATES: This interim final rule is effective October 2, 2023. Submit written comments concerning this interim final rule on or before December 31, 2023.

ADDRESSES: Submit comments by using only one of the following methods:

Email: mspb@mspb.gov. Include "Amendments to E-filing Regulations" in the subject line of the email.

Fax: (202) 653-7130.

Mail or other commercial delivery: Jennifer Everling, Acting Clerk of the Board, Merit Systems Protection Board, 1615 M Street N.W., Washington, DC 20419.

Instructions: All comments must reference "Amendments to E-filing Regulations."

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to MSPB's website (www.mspb.gov) and will include any personal information you provide. Therefore, submitting this information makes it public.

FOR FURTHER INFORMATION CONTACT: Jennifer Everling, Acting Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419; phone: (202) 653-7200; fax: (202) 653-7130; email: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 26, 2008, MSPB issued final regulations at 5 CFR parts 1201, 1203, 1208, and 1209 governing e-filing. 73 FR 10127. Under those regulations, virtually any type of pleading could be filed electronically via MSPB's e-filing application. In the February 26, 2008 Federal Register notice, MSPB announced that it was giving serious consideration to mandating e-filing for agencies and attorneys who represent appellants in MSPB proceedings. 73 FR 10127-28.

On October 13, 2011, MSPB issued an interim final rule, with request for comments, launching a pilot program under which the Washington Regional Office (WRO) and Denver Field Office (DEFO) required all pleadings filed by agencies and attorneys who represent appellants in MSPB proceedings to be e-filed. In the October 13, 2011 Federal Register notice, MSPB noted that should the pilot program in WRO and DEFO prove to be successful, the Board would consider proposing a final comprehensive rule that would make e-filing mandatory for agencies and attorneys who represent appellants. Since the launch of the pilot program, the proportion of pleadings e-filed has steadily increased. In fiscal year 2022, 85% of initial appeals and 95% of pleadings were filed electronically using MSPB's e-filing application.

On October 2, 2023, MSPB will launch an updated e-filing system, e-Appeal. The extensive capabilities of MSPB's current e-filing application that allow appellants, their representatives, and agencies to e-file an appeal and pleadings and view case records will still be available in the new, modernized e-Appeal system. Additionally, in the new e-Appeal, parties and their representatives will have access to a dashboard that allows management of all their Board cases and case materials in one place, providing new

efficiencies for our customers. Although MSPB's current e-filing application has been valuable to both MSPB and its customers, some benefits can only be fully realized by maximizing the number of pleadings that are e-filed. By requiring e-filing for agencies and attorneys who represent appellants, MSPB can improve efficiency in adjudication and reduce costs associated with the need to scan pleadings that are submitted in paper form.

Finally, while these amendments are being issued immediately as interim final rules, the Board still requests that all stakeholders or other interested individuals provide their views on the amendments. The Board will thoroughly consider all input and respond to all comments as necessary.

II. Summary of Changes

Set forth below is a summary of amendments being implemented by MSPB.

Part 1201 – Practices and Procedures

Subpart B – Procedures for Appellate Cases

Section 1201.14 Electronic filing procedures

This amendment modifies the procedures related to e-filing with the Board to require agency representatives and appellant attorney representatives to register as e-filers with MSPB and to file all pleadings using MSPB's e-Appeal. The amendment further modifies the scope of registration as an e-filer to now include all cases a party has with MSPB, and the requirements for what may be included with electronic pleadings in Board appeals. The amendment adds the requirement for agencies to designate an individual agency representative to whom the Board will serve a copy of an appeal when it is docketed.

Section 1201.24 Content of an appeal; right to hearing.

This amendment modifies the requirements for the information contained in an appeal to include the email address of the appellant and the appellant's representative,

if any. Because free email addresses are widely available, requiring an email address should not be an undue burden on appellants or appellant non-attorney representatives who do not register as e-filers. The amendment further removes references to the direct link to MSPB's e-Appeal, which can be accessed directly from MSPB's website.

Section 1201.26 Service of pleadings and response

This amendment removes the requirement for the appellant to file two copies of the appeal with the Board and modifies the formatting requirements for pleadings filed via postal mail, facsimile, or commercial or personal delivery in Board appeals. This amendment further adds the requirements for how audio and video evidence may be submitted to the Board.

Appendix II to Part 1201—Appropriate Regional or Field Office for Filing Appeals

This amendment reflects the change to the contact information of the Board's New York Field Office. Appendix II of this part is amended to show the new address and facsimile number. The geographical areas served by the New York Field Office are unchanged. This amendment also removes obsolete language regarding text-based telecommunications capabilities of the facsimile numbers for the Board's Regional and Field Offices.

III. *Effective Date of Amendments*

The amendments described above will go into effect on October 2, 2023.

IV. *Procedural Requirements*

A. *Administrative Procedure Act*

Pursuant to 5 U.S.C. 553(b), MSPB has determined that good cause exists for waiving the general notice of proposed rulemaking and public comment procedures as to these technical amendments. The notice and comment requirements of section 553(b) do not apply to interpretive rules, general statements of policy, or rules of

agency organization, procedure, or practice. The Board finds that use of an interim final rule instead of notice and comment rulemaking is appropriate here because the amendments contained herein apply solely to the Board's rules of agency organization, procedure, or practice. All of the amendments solely address how appeals proceed at the Board, and do not affect any substantive rights of parties before the Board or interested stakeholders. No substantive changes in existing law or policy are effected from these amendments. Under these circumstances, notice and comment rulemaking is unnecessary and not required by any public interest.

B. *Regulatory Impact Analysis: Executive Order 12866*

MSPB has determined that this is not a significant regulatory action under E.O. 12866. Therefore, no regulatory impact analysis is required.

C. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires an agency to prepare a regulatory flexibility analysis for rules unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency is required to first publish a proposed rule. *See* 5 U.S.C. 603(a) and 604(a). As discussed above, notice and comment rulemaking is unnecessary for these changes due to the lack of substantive changes being made to existing law or policy. Thus, the RFA does not apply to this final rule.

D. *Paperwork Reduction Act*

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Pub. L. 104-13 (44 U.S.C. Chapter 35).

E. *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure.

Accordingly, for the reasons set forth above, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES [AMENDED]

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

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. 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 electronically.

(b) *System for electronic filing.* (1) The MSPB's e-Appeal system is the exclusive system for electronic filing (e-filing) with the MSPB. Except as specifically provided, the MSPB will not accept pleadings filed by email. The link to e-Appeal is available at the MSPB's website (<https://www.mspb.gov>).

(2) e-Appeal is a closed system that collects and maintains records as part of an MSPB system of records and is subject to the provisions of the Privacy Act of 1974. Access to cases in e-Appeal is limited to the parties participating in a Board proceeding who have registered as e-filers with the MSPB, and authorized individuals providing legal support to designated representatives.

(c) *Matters subject to electronic filing.* Subject to the registration requirement of paragraph (e) of this section, parties and representatives may use 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, including a new complaint, 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 request for attorney fees (§ 1201.203);

(5) File a request for compensatory, consequential, or liquidated damages (§ 1201.204);

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

(7) Notify the MSPB of a change in contact information such as address (geographic or email) or telephone number; or

(8) Receive a requested subpoena from the Board for issuance to a witness (§ 1201.83).

(d) *Matters excluded from e-filing.* E-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 on a witness (§ 1201.83);

(3) File a pleading with the Special Panel (§ 1201.137);

(4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520);

(5) File a pleading that contains classified information (32 CFR part 2001); or

(6) File a request to intervene or participate as an *amicus curiae* or file a brief as *amicus curiae* pursuant to § 1201.34.

(e) Registration as an e-filer.

(1) The exclusive means to register as an e-filer is to follow the instructions at e-Appeal using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other e-filers and documents issued by the MSPB. No one may

electronically file a new appeal or a pleading with the MSPB, or view the case record in an assigned appeal, unless registered as an e-filer.

(3) Registration as an e-filer applies to all MSPB proceedings with which the e-filer is associated in their e-Appeal role (appellant, appellant representative, or agency representative). If an individual requires more than one e-Appeal role (*e.g.*, appellant and appellant representative), they must register for each role separately using a different email address.

(4) All notices, orders, decisions, and other documents issued by the MSPB, as well as all pleadings filed by parties, will be made available for viewing and downloading at e-Appeal. Access to documents at e-Appeal is limited to the parties and representatives who are registered e-filers in the appeals in which they were filed.

(5) Agency representatives and appellant attorney representatives must register as e-filers.

(6) Each e-filer must promptly update their e-Appeal profile and notify the MSPB and other participants of any change in their address, telephone number, or email address by filing a pleading in each pending proceeding with which they are associated.

(7) An appellant or an appellant non-attorney representative may withdraw their registration as an e-filer pursuant to requirements set forth in e-Appeal policies posted to the MSPB's website. Such withdrawal means that, effective upon the MSPB's processing of a proper withdrawal, pleadings and MSPB documents will no longer be served on that person electronically and that person will no longer have electronic access to their case records through e-Appeal. A withdrawal of registration as an e-filer may preclude future re-registering as an e-filer.

(f) *Pleadings by e-filers.* Agency representatives and appellant attorney representatives must file all pleadings using e-Appeal, except those pleadings excluded from e-filing by paragraph (d) of this section. A pleading, or any part thereof, filed by

non-electronic means, *i.e.*, via postal mail, facsimile, or personal or commercial delivery, may be rejected.

(g) *Agency Initial Contacts.* (1) Agencies are required to designate a specific individual as an initial agency representative to whom the Board will serve a copy of an appeal when it is docketed. Agency initial contacts are responsible for monitoring case activity regularly at e-Appeal.

(2) Agency initial contacts must be designated pursuant to requirements set forth in e-Appeal policies posted to the MSPB's website.

(h) *Form of electronic pleadings—*(1) *Electronic formats allowed.* E-Appeal accepts 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 is set forth in e-Appeal policies posted to the MSPB's website. Pleadings filed via e-Appeal must be formatted so that they will print on 8 1/2-inch by 11-inch paper in portrait orientation. Parties are responsible for reviewing all pleadings to confirm legibility and to minimize the inclusion of nonrelevant personally identifiable information.

(2) *Requirements for pleadings with electronic attachments.* An e-filer who uploads supporting documents, in addition to the document that constitutes the primary pleading, must identify each attachment, either by bookmarking the document using e-Appeal, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. Bookmark names must comply with requirements set forth in e-Appeal policies posted to the MSPB's website and include information such as a brief descriptive label with dates (e.g., "Oct. 1, 2021 - Decision Notice").

(3) *Submission of audio and video evidence.* Audio and video evidence must be submitted according to the formatting and submission requirements set forth in e-Appeal policies posted to the MSPB's website.

(i) *Service of electronic pleadings and MSPB documents.* (1) When MSPB documents are issued or when parties e-file any pleadings, e-Appeal will send an email notification to other parties who are e-filers. When using e-Appeal 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 email can encounter failure points. E-filers are responsible for ensuring that email from mspb.gov is not blocked by filters.

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

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

(k) *Affidavits and declarations made under penalty of perjury.* 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 signed affidavit or declaration should be uploaded as an image file or with an acceptable digital signature that complies with requirements set forth in e-Appeal policies posted to the MSPB's website.

(l) *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 is the date of electronic submission. All pleadings filed via e-Appeal are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office

(in the Eastern Time Zone) 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 e-filers are deemed received on the date of electronic transmission.

(m) *Authority of MSPB to regulate e-filing.* (1) A judge or the Clerk of the Board may issue orders regulating the method of submissions for a particular period or particular submissions.

(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.

(3) The MSPB may order any party or authorized individual to cease participation as an e-filer or access to e-Appeal in circumstances that constitute a misuse of the system or a failure to comply with law, rule, regulation, or policy governing use of a U.S. government information system.

(4) MSPB reserves the right to revert to traditional methods of service. The MSPB may serve documents via traditional means—postal mail, facsimile, commercial or personal 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 are e-filers.

§ 1201.24 [Amended]

3. Amend § 1201.24 as follows:

a. By removing from the third sentence in paragraph (a) introductory text the words “in electronic form” and adding in their place “electronically”;

b. By removing from paragraph (a)(1) the words “and telephone number” and adding in their place “telephone number, and email address”;

c. By removing from paragraph (a)(6) the words “and telephone number” and adding in their place “telephone number, and email address”;

d. By removing from paragraph (a)(9) the words “the Board’s e-Appeal site (<https://e-appeal.mspb.gov>)” and adding in their place “e-Appeal”; and

e. By removing from paragraph (c) the words “the e-Appeal site (<https://e-appeal.mspb.gov>)” and adding in their place “e-Appeal” and by removing the words “Board’s Web site” and adding in their place “MSPB’s website”.

4. Revise § 1201.26 to read as follows:

§ 1201.26 Service of Pleadings and Response

(a) *Service*—(1) *Service by the Board*. The appropriate office of the Board will notify each party to the proceeding that a new appeal has been docketed and will attach to the initial order in the proceeding a certificate of service, consisting of a list of the parties to the proceeding or their designated representatives.

(2) *Service by the parties*. The parties must serve on each other one copy of each pleading, as defined by § 1201.4(b), and all documents submitted with it, except for the appeal. They may do so by electronic filing in accordance with § 1201.14, postal mail, facsimile, or commercial or personal delivery. Documents and pleadings must be served on each party and each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties and their representatives must notify the appropriate Board office and one another, in a pleading, of any changes in their address, telephone number, or email address.

(b) *Submission of documents*. Pleadings and attachments filed via postal mail, facsimile, or commercial or personal delivery must be filed on 8 1/2-inch by 11-inch paper. This requirement enables the Board to comply with standards established for U.S. courts. Paper pleadings and attachments may not contain binders, folders, staples, paper clips, or notes adhered to pages. Such items will be removed and not included in the record, or the filing may be rejected. Documents may not be submitted on an electronic media storage device such as a Compact Disc (CD), Digital Video Disc (DVD), or flash drive. Parties are responsible for reviewing all pleadings to confirm legibility

and to minimize the inclusion of nonrelevant personally identifiable information.

Pleadings filed via e-Appeal must adhere to the formatting and filing requirements set forth in § 1201.14(h).

(c) *Submission of audio and video evidence.* Audio and video evidence must be submitted according to the formatting and submission requirements set forth in policies posted to the MSPB's website.

Appendix II to Part 1201—[Amended]

5. Amend appendix II to part 1201 by:

a. Removing the second sentence of the introductory text; and

b. Removing from paragraph 3a the words “26 Federal Plaza, Room 3137–A, New York, New York 10278–0022, Facsimile No.: (212) 264–1417” and adding in their place “1601 Market Street, Suite 1700, Philadelphia, PA 19103, Facsimile No.: (215) 597-3456”.

Jennifer Everling,

Acting Clerk of the Board.

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