



U.S. MERIT SYSTEMS PROTECTION BOARD

APPELLANT'S PETITION FOR REVIEW FORM

PLEASE COPY THE FOLLOWING FROM YOUR DECISION:

CASE NAME: _____ v. _____
(Appellant Name) (Agency)

Docket No: _____

Initial or Addendum Decision Finality Date: _____
(See "Notice to Appellant" section of decision for "finality" date)

INSTRUCTIONS FOR COMPLETING PETITION FOR REVIEW FORM

If you decide to file a Petition for Review you may use the attached form. However, you are not required to do so. These instructions are designed to help you in filing your Petition for Review. Please read these instructions carefully. Before completing this form, you should read the attached copy (Attachment C) of the Board's regulations at 5 C.F.R. 1201.114 through 5 C.F.R. 1201.120.

IT IS IMPORTANT TO FILE YOUR PETITION ON OR BEFORE THE FILING DEADLINE IN THE JUDGE'S DECISION. IF YOU DO NOT, THE BOARD MAY REFUSE TO CONSIDER YOUR PETITION. The date of filing is the date you mail (by U.S. Mail or commercial overnight delivery), fax, or hand-deliver to the Board your petition.

YOU SHOULD NOT SUBMIT ANY EVIDENCE OR PAPERS THAT WERE SUBMITTED TO THE JUDGE BY YOU OR BY THE AGENCY. The Board will already have that information when it considers your petition.

After you complete this form you should send it, together with any attachments, by mail, personal delivery, FAX, or commercial overnight delivery to:

The Clerk of the Board
U.S. Merit Systems Protection Board
1120 Vermont Avenue, NW, Room 806
Washington, DC 20419
FAX NUMBER: (202) 653-7130

You must also send a copy of the form and all of the attachments to the agency and to any other party listed on Attachment A, Certificate of Service, at the addresses on the certificate. A COMPLETED COPY OF ATTACHMENT A MUST BE SENT TO THE BOARD AND TO EACH PARTY TO WHOM YOU SEND YOUR PETITION FOR REVIEW.

Please answer as many of the following questions as best you can. DO NOT DELAY FILING THIS PETITION BECAUSE YOU CANNOT ANSWER SOME OF THE QUESTIONS. Your answers should refer to the decision of the judge or to specific evidence or documents that were presented to the judge, if possible. If you do not have enough space on the form to answer a question, or if you use a computer to print your answers, you may attach extra sheets. Please type or clearly print your answers.

QUESTIONS

1. Is this petition being filed on or before the decision finality date (see first page of this document under docket number)?

(Circle one.) YES NO

[IF YOUR ANSWER IS NO, YOU MUST COMPLETE ATTACHMENT B AND RETURN IT WITH THIS FORM.]

2. Were you denied any procedures to which you believe you were entitled? If so, what procedures and why do you believe you were entitled to them? Did you raise this matter to the judge? Please also describe how this has harmed you.

3. Do you have any documents or evidence that are important to your appeal that were not filed with the judge? If so, you should attach these documents and evidence. Also, please explain why you did not submit these documents or evidence to the judge and why it is important for the Board to consider them.

4. Did the initial or addendum decision incorrectly decide any facts or fail to consider any facts? If so, describe the facts that were not considered and the incorrect findings.

5. Did the initial or addendum decision apply the wrong law or apply the law incorrectly? If so, what law should be applied and how?

6. Did the initial or addendum decision fail to consider important reasons for relief? If so, what are those reasons?

7. Are there other reasons why the initial or addendum decision was wrong? If so, what reasons?

8. What action (relief or remedy) do you want the Merit Systems Protection Board to order in this case?

DATE

Signature of Appellant
or Representative

Name of Appellant or
Representative (Typed or Printed)

Address

Telephone Number

Attachment A

YOU MUST COMPLETE THIS FORM

CERTIFICATE OF SERVICE

I hereby CERTIFY that a copy of my Petition For Review and attachments was sent by (circle one) U.S. Mail, FAX, personal delivery, or commercial overnight delivery to each of the following on _____
(Date)

AGENCY REPRESENTATIVE

OTHER PARTIES (IF THERE ARE ANY)

(Signature)

Attachment B

**YOU MUST COMPLETE AND SIGN THIS FORM IF YOU ANSWERED "NO" TO
QUESTION 1**

MOTION TO ACCEPT LATE FILED PETITION FOR REVIEW

I request that the Board accept my late filed Petition for Review and waive the filing deadline for the good cause described below. (Please give specific and detailed reasons why you were unable to file your petition for review on time and why you did not request the Board to give you an extension of time before the deadline passed. You should attach documents or evidence to this form.)

DECLARATION

I, _____, do hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____
(Date)

(Signature)

Attachment C--MSPB PFR FORM

PART 1201 - PRACTICES AND PROCEDURES

SUBPART C - PETITIONS FOR REVIEW OF INITIAL DECISIONS

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§ 1201.114 Filing petition and cross petition for review.

(a) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(b) *Cross petition for review.* If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

(d) *Time for filing.* Any petition for review must be filed within 35 days after the initial decision is issued. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition.

(e) *Extension of time to file.* The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of

the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(f) *Late filings.* Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must include:

- (1) The reasons for failing to request an extension before the deadline for the submission; and
- (2) A specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence.

Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(g) *Intervention* -

(1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.*

(i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of

intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(h) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative as provided in § 1201.26(b)(2).

(i) *Closing the record.* The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

(54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993)

§ 1201.115 Contents of petition for review.

(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

(b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by evidence that the agency has provided the interim relief required, except when the agency has made a determination as described in paragraph (b)(2) of this section. The agency may

comply by submitting an SF 50 or SF 52, a letter from an agency official directing the appellant to return to work and informing the appellant of his or her reinstatement as of the date of the initial decision, or an affidavit or declaration specifying the manner of the agency's compliance. The interim relief must be effected retroactively to the date of the initial decision. Cancellation of the appealed action or relief effected retroactively to the date of the action will result in dismissal of the agency's petition for mootness.

[Note: In *Moscato v. Department of Education*, MSPB Docket No. NY-0752-95-0028-I-1 (Nov. 12, 1996), the Board stated that it will no longer automatically dismiss an agency's petition for review as moot where it has in good faith and inadvertently exceeded the requirements of the interim relief order. The Board further expressed its intention to modify this section of the regulations accordingly, and stated that it will not enforce the regulation in the interim.]

(2) Under 5 U.S.C. 7701(b)(2), if the initial decision provides interim relief which requires that the appellant be returned to his or her place of employment pending the outcome of any petition for review and the agency determines that the return or presence of the appellant will be unduly disruptive to the work environment, the agency must notify both the appellant and the judge in writing. The agency must also provide evidence of such notification to the Board at the time of filing a petition or cross petition for review. The evidence must show that the agency has provided that the appellant will receive appropriate pay, compensation, and all other benefits as terms and conditions of employment from the date of the initial decision until a final decision is issued.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

(4) Failure of the agency to submit evidence that it has complied with the granting of interim relief in accordance with paragraph (b)(1) of this section, or that it has provided notification that interim relief will not be granted fully in accordance with paragraph (b)(2) of this section, will result in the dismissal of the agency's petition or cross petition for review.

(c) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief, upon order of the Clerk of the Board the agency must submit evidence that it has provided the interim relief required (or, where applicable, the evidence specified in paragraph (b)(2) of this section), and it must submit the name of the official responsible for compliance. The agency's failure to submit acceptable evidence of compliance with the interim relief order is a basis for the Board to order the withholding of the salary of the responsible official

pursuant to 5 U.S.C. 1204(e)(2)(A) and 5 CFR 1201.183(c). This sanction is in addition to the dismissal of an agency petition or cross petition for review provided for in paragraph (b)(4) of this section.

(d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record closed; or
- (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

(54 FR 53504, Dec. 29, 1989, as amended at 59 FR 30863, June 16, 1994)

§ 1201.116 Appellant requests for enforcement of interim relief.

(a) *Before a final decision is issued.* If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit.

(b) *After a final decision is issued.* If the appellant is not the prevailing party in the final Board order, and if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under § 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under § 1201.183.

(59 FR 30864, June 16, 1994)

§ 1201.117 Procedures for review or reopening.

(a) In any case that is reopened or reviewed, the Board may:

- (1) Issue a single decision that denies or grants a petition for review, reopens the appeal, and decides the case;
- (2) Hear oral arguments;

- (3) Require that briefs be filed;
- (4) Remand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions; or
- (5) Take any other action necessary for final disposition of the case.

(b) The Board may affirm, reverse, modify, or vacate the decision of the judge, in whole or in part. Where appropriate, the Board will issue a final decision and order a date for compliance with that decision.

(54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994)

§ 1201.118 Board reopening of case and reconsideration of initial decision.

The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.

(54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994)

§ 1201.119 OPM petition for reconsideration.

(a) *Criteria.* Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines:

- (1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and
- (2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(b) *Time limit.* The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order.

(c) *Briefs.* After the petition is filed, the Board will make the official record relating to the petition for reconsideration available to the Director for review. The Director's brief in support of the petition for reconsideration must be filed within 20 days after the Board makes the record available for review. Any party's opposition to the petition for reconsideration must be filed within 25 days from the date of service of the Director's brief.

(d) *Stays.* If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.

(54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994)

§ 1201.120 Judicial review.

Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review in the United States Court of Appeals for the Federal Circuit. As § 1201.175 of this part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.

(54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994)