

## § 1208.4

## 5 CFR Ch. II (1–1–08 Edition)

and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages) of 5 CFR part 1201 regarding awards of attorney fees to appeals governed by this part.

### § 1208.4 Definitions.

(a) *Appeal*. “Appeal” means a request for review of an agency action (the same meaning as in 5 CFR §1201.4(f)) and includes a “complaint” or “action” as those terms are used in USERRA (38 U.S.C. 4324) and a “complaint” or “appeal” as those terms are used in VEOA (5 U.S.C. 3330a).

(b) *Preference eligible*. “Preference eligible” is defined in 5 U.S.C. 2108.

(c) *USERRA appeal*. “USERRA appeal” means an appeal filed under 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Re-employment Rights Act of 1994 (Public Law 103–353), as amended. The term includes an appeal that alleges a violation of a predecessor statutory provision of chapter 43 of title 38, United States Code.

(d) *VEOA appeal*. “VEOA appeal” means an appeal filed under 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (Public Law 105–339).

## Subpart B—USERRA Appeals

### § 1208.11 Choice of procedure under USERRA; exhaustion requirement.

(a) *Choice of procedure*. An appellant may file a USERRA appeal directly with the Board under this subpart or may file a complaint with the Secretary of Labor under 38 U.S.C. 4322.

(b) *Exhaustion requirement*. If an appellant files a complaint with the Secretary of Labor under 38 U.S.C. 4322, the appellant may not file a USERRA appeal with the Board until the Secretary notifies the appellant in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint. An appellant who seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint with the Secretary under 38

U.S.C. 4322 is not subject to the exhaustion requirement of this paragraph.

(c) *Appeals after exhaustion of Department of Labor procedure*. When an appellant receives notice from the Secretary of Labor in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint, the appellant may file a USERRA appeal directly with the Board or may ask the Secretary to refer the complaint to the Special Counsel. If the Special Counsel agrees to represent the appellant, the Special Counsel may file a USERRA appeal directly with the Board. If the Special Counsel does not agree to represent the appellant, the appellant may file a USERRA appeal directly with the Board.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

### § 1208.12 Time of filing.

Under chapter 43 of title 38, United States Code, there is no time limit for filing a USERRA appeal with the Board. However, the Board encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation or, if a complaint is filed with the Secretary of Labor, as soon as possible after receiving notice from the Secretary in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint, or, if the Secretary has referred the complaint to the Special Counsel and the Special Counsel does not agree to represent the appellant, as soon as possible after receiving the Special Counsel’s notice.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

### § 1208.13 Content of appeal; request for hearing.

(a) *Content*. A USERRA appeal may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9);

(2) Evidence or argument that the appellant has performed service in a uniformed service, including the dates of such service (or, where applicable, has

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applied for or has an obligation to perform such service), and that the appellant otherwise satisfies the requirements for coverage under chapter 43 of title 38, United States Code;

(3) A statement describing in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38, United States Code, allegedly violated if possible.

(4) If the appellant filed a complaint with the Secretary of Labor under 38 U.S.C. 4322(a), evidence of notice under 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); and

(5) If the appellant's complaint was referred to the Special Counsel and the appellant has received notice that the Special Counsel will not represent the appellant before the Board, evidence of the Special Counsel's notice (a copy of the Special Counsel's notice satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the USERRA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established. The judge may also order a hearing if necessary to resolve issues of jurisdiction. The appellant has the burden of proof with respect to issues of jurisdiction (5 CFR 1201.56(a)(2)(i)).

(c) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with §1201.14 of this chapter.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board, and that the

Special Counsel has agreed to represent the appellant, will be accepted as the written designation of representative required by 5 CFR 1201.31(a). The designation of representative may be filed by electronic filing, provided the requirements of §1201.14 of this chapter are satisfied.

[69 FR 57631, Sept. 27, 2004]

### § 1208.15 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency employer or the Office of Personnel

Management has not complied with a provision or provisions of chapter 43 of title 38, United States Code (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees), the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the Federal agency employer or the Office of Personnel Management, as applicable, to comply with such provision(s) and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of such lack of compliance. Under 38 U.S.C. 4324(c)(3), any compensation received by the appellant pursuant to the Board's order shall be in addition to any other right or benefit provided for by chapter 43 of title 38, United States Code, and shall not diminish any such right or benefit.

(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board has discretion to order payment of reasonable attorney fees, expert witness fees, and other litigation expenses under 38 U.S.C. 4324(c)(4). The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

### § 1208.16 Appeals under another law, rule, or regulation.

Nothing in USERRA prevents an appellant who may appeal an agency action to the Board under any other law, rule, or regulation from raising a claim of a USERRA violation in that appeal. The Board will treat such a claim as an affirmative defense that the agency action was not in accordance with law (5 CFR 1201.56(b)(3)).