

§ 1210.6

§ 1210.6 Savings provision.

This part does not apply to adverse actions proposed prior to the date of an affected employee's coverage under 5 CFR part 9701, subpart G.

Subpart B—Procedures for Appeals of Actions Taken Under 5 CFR Part 9701, Subpart F

§ 1210.10 Notice of appeal rights.

(a) When the Department of Homeland Security (or component thereof) issues a decision notice to an employee on a matter that is appealable to the Board, except as provided under 5 CFR 9701.707, the Department must provide the employee with the following:

(1) Notice of the time limits for appealing to the Board, the requirements of 5 CFR 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(2) A copy, or access to a copy, of the Board's regulations at 5 CFR parts 1201 and 1210, and relevant Department of Homeland Security regulations;

(3) A copy of MSPB Form 185, the MSPB Appeal Form. MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>);

(4) Notice of any right the employee has to file a grievance, and that the election of any applicable grievance procedure may result in a waiver of the employee's right to file an appeal with the Board; and

(5) Notice that a copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

(b) The notice must also include a specific statement that the matter was taken under 5 CFR part 9701.

§ 1210.11 Filing an appeal.

(a) *Time of filing.* An appeal must be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later. A response to an appeal must be filed within 15 days of the date of service of the acknowledgment order. All other submissions to the adjudicating official must be filed in accordance with the time

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limits set in the Board's acknowledgment order or in any other order issued by the adjudicating official.

(b) *Computation of time.* The time for filing a submission under this subpart is computed in accordance with 5 CFR 1201.23.

(c) *Place for filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See 5 CFR 1201.4(d), 1201.22(a), and Appendix II to part 1201.

(d) *Decision notice.* A copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

§ 1210.12 Representatives.

Each party has the right to be represented by an attorney or other representative. Either party may file a motion to disqualify a representative at any time during the proceedings.

§ 1210.13 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof—(1) Agency.* Subject to paragraph (b) of this section, the decision of the Department must be sustained if it is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

(b) *Affirmative defenses of the appellant.* The decision of the Department must be sustained where it has met the evidentiary standard stated in paragraph (a) of this section, unless the appellant shows that:

(1) There was harmful error in the application of the Department's procedures in arriving at its decision;

(2) The decision was based on a prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient