

Rules and Regulations

Federal Register

Vol. 73, No. 76

Friday, April 18, 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, 1210, and 1215

Final Regulatory Changes Regarding Department of Homeland Security Personnel System

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: As the Merit Systems Protection Board (MSPB or “the Board”) explained in its notice of Interim Regulatory Changes Regarding Department of Homeland Security Personnel System, *Federal Register*, 72 FR 56883, October 5, 2007, it is revising its regulations to clarify the procedures applicable to MSPB processing and adjudication of cases arising under the Department of Homeland Security’s new human resources management system established pursuant to the Homeland Security Act of 2002. As is discussed below, these revisions to the Board’s regulations are necessary to reconcile the Board’s regulations and procedures with final regulations published by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) on February 1, 2005.

DATES: This rule is effective on April 18, 2008.

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: (*Regarding Issuance of the Interim Regulatory Changes*): On November 25, 2002, the President signed into law H.R. 5005, the Homeland Security Act of 2002 (Pub. L. 107-296), which established DHS and authorized the DHS Secretary and OPM Director to jointly establish a new

human resources management system within DHS. Pursuant to this grant of authority, on February 20, 2004, DHS and OPM published proposed regulations (69 FR 8030) for this new human resources system. Thereafter, on February 1, 2005, DHS and OPM published final regulations (70 FR 5272) implementing the new DHS personnel system.

Afterwards, the National Treasury Employees Union, American Federation of Government Employees, National Federation of Federal Employees, National Association of Agriculture Employees, and Metal Trades Department of the AFL-CIO, which collectively represent approximately 50,000 DHS bargaining unit employees, challenged portions of the regulations governing labor-management relations, adverse actions, and the appeals process. One of the provisions of the DHS regulations that was challenged is 5 CFR 9701.706(k)(6), which changes the standard by which the Board may mitigate penalties imposed by DHS. Pursuant to that provision, an arbitrator, adjudicating official or the Board may not modify such a penalty unless it is so disproportionate to the basis for the action as to be wholly without justification. The U.S. District Court for the District of Columbia enjoined the mitigation provision. *NTEU v. Chertoff*, 385 F.Supp.2d 1, 32-33 (D.D.C.), *modification denied by*, 394 F.Supp.2d 137 (D.D.C. 2005). A panel of the U.S. Court of Appeals for the D.C. Circuit reversed on this issue, holding that the question of the mitigation standard’s legality was not ripe for judicial review. *NTEU v. Chertoff*, 452 F.3d 839, 855 (D.C. Cir. 2006). Therefore, the MSPB’s regulations include that mitigation standard.

Subparts F and G of the final DHS/OPM regulations concern adverse actions and appeals and will have a significant effect on the way the MSPB processes and adjudicates appeals of adverse actions by DHS employees. In addition to limiting the types of cases that may be appealed to the Board, the final DHS/OPM regulations make many changes in how the Board will process and adjudicate appeals by DHS employees, including:

- Shortened filing deadlines;
- Streamlined and limited discovery procedures;
- New settlement procedures;

Limitations on the right to a hearing; Summary judgment and limitation of issues;

Time limits within which the Board must issue decisions;

Procedures for Board review of a decision of the DHS Mandatory Removal Panel (MRP); and,

Changes in certain standards of review.

In order to accommodate these substantive and procedural changes with the least possible confusion and delay, the Board determined to publish interim amendments to its regulations. Specifically, these changes involve amendments to 5 CFR parts 1201 and the promulgation of new regulations applicable only to procedures for appeals, petitions for review, and requests for review of MRP decisions brought by DHS employees. These new DHS-specific regulations were published in a revised 5 CFR part 1210. The regulations previously found in 5 CFR part 1210 were moved, redesignated as 5 CFR part 1215, and are otherwise not changed.

A brief summary of the changes contained in the interim amendments and the final amendments contained herein is as follows:

1201.3(a)(19) and (20) are amended and 1201.3(a)(21) is added to reflect the Board’s jurisdiction over certain actions taken by DHS (an unrelated housekeeping change is also made to 1201.3(a)(20));

1201.3(b)(3) is amended to reflect the Board’s jurisdiction over certain actions taken by DHS and to make clear that 5 CFR parts 1201, 1208 and 1209 apply to proceedings brought under 5 CFR part 1210, except as otherwise provided therein;

1201.11 is amended to state that the regulations of subpart B of 5 CFR part 1201 apply to appellate proceedings covered by part 1210 unless other specific provisions are made in that part;

1201.14(i) is amended to indicate that the Board’s rules applicable to electronic signatures by e-filers apply to any regulation in part 1210 that requires a signature;

1201.21 is renumbered and amended to delete an outdated reference to Appendix 1. A new section (1201.21(b)) addresses notice of appeal rights when DHS issues a decision notice to an employee on a matter that is appealable to the Board.

1201.22(b)(2) is amended to indicate that additional time limits applicable to certain appeals by DHS employees are contained in part 1210.

The debt management regulations formerly in part 1210 are moved and redesignated as part 1215. As is discussed in greater detail below, new regulations regarding appeals by DHS employees are added in part 1210. Parts 1211, 1212, 1213, and 1214 are reserved for future agency-specific regulations.

The new regulations in part 1210 apply to Board proceedings in appeals of certain DHS adverse actions that are covered under subparts F and G of 5 CFR part 9701. Part 1210 consists of four subparts.

Subpart A of part 1210 discusses the scope of part 1210 and the Board's policy with regard to application of part 1210 in a fair and efficient manner (1210.1); addresses MSPB jurisdiction (1210.2); sets forth the applicability of 5 CFR parts 1201, 1208, and 1209 to appeals by DHS employees (1210.3); defines certain words and terms used within part 1210 (1210.4); describes when and how the Board and/or an adjudicating official may revoke, amend or waive the regulations in part 1210 (1210.5); and adds a savings provision indicating that part 1210 does not apply to adverse actions proposed prior to the date of an affected employee's coverage under 5 CFR part 9701, subpart G (1210.6).

Subpart B of part 1210 sets forth procedures for appeals of actions taken under 5 CFR Part 9701, Subpart F, including agency responsibilities regarding notice of appeal rights (1210.10); procedures for filing an appeal (1210.11); representation by, and disqualification of, representatives (1210.12); burden and degree of proof and affirmative defenses (1210.13); required disclosure and the scope of discovery (1210.14); discovery procedures (1210.15); intervention by the Director of OPM (1210.16); procedures applicable to settlement (1210.17); case suspension procedures (1210.18); the right to a hearing (1210.19); summary judgment (1210.20); and requirements pertaining to the adjudicating official's initial decision, including completion deadlines and interim relief (1210.21).

Subpart C of part 1210 addresses procedures applicable to petitions for review of initial decisions and petitions for reconsideration, including requirements such as who may file and the use of electronic filing (1210.30(a)); time limits applicable to petitions for review, cross petitions for review and responses (1210.30(b)); the proper place for filing petitions for review, cross

petitions for review, and responses (1210.30(c)); time limits within which the Board must render its decision (1210.30(d)); the ramifications of the Board's failure to meet such time limits (1210.30(e)); and requirements applicable to an OPM request for reconsideration (1210.31).

Subpart D of part 1210 addresses MSPB review of decisions of the Mandatory Removal Panel (MRP), including jurisdiction and procedures and time limits applicable to a request for review (1210.40); the standard of review and time limits applicable to a decision by the Board (1210.41); intervention by the Director of OPM (1210.42); finality of Board decisions and judicial review (1210.43); and requests for reconsideration (1210.44).

Availability of Documents

You can get an electronic copy of the entire set of amendments to 5 CFR part 1201 and the entirety of 5 CFR part 1210 using the Internet by visiting the Merit System Protection Board's Web page at <http://www.mspb.gov>. In addition, paper copies may be obtained by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify this final rule as the final regulatory changes regarding the Department of Homeland Security Personnel System.

Summary and Analysis of the Comments Received on the Interim Regulatory Changes: The Board's **Federal Register** notice of interim regulatory changes provided for a comment period of 30 days after date of publication, which ended on Monday, November 5, 2007. The Board received five comments, three from individuals, and the others from the National Treasury Employees Union and the American Federation of Government Employees. As explained below, upon consideration of these comments, the Board is making several amendments to its interim regulatory changes. The comments are summarized and discussed below.

Comment 1: An employee from the Transportation Security Administration stated a preference for the MSPB's appeals process under 5 CFR Part 1201 to the TSA's Disciplinary Review Board process. The commenter made the following statements:

"I know that I would want to have the option of thirty days to appeal an adverse action versus the 20 days proposed. I beg of you to keep in place the current appeal rights for all employees in the Federal system."

MSPB's Response to Comment 1: Pursuant to the DHS's regulations, at 5 CFR 9701.702, DHS's appellate

procedures supersede those of the MSPB to the extent that there may be inconsistencies between the procedures. The Board had the options of following the DHS regulations or issuing its own conforming regulations. It chose the latter option. In order for the Board's regulations to be conforming, they must provide for an appeal period of 20 days instead of 30 days.

Comment 2: An employee from the Transportation Security Administration raised concerns about the difficulties in receiving pay raises.

MSPB's Response to Comment 2: This comment did not address any of the interim regulatory changes in 5 CFR Part 1201 or 1210.

Comment 3: A DHS employee expressed opposition to the implementation of the DHS personnel management system as a whole.

MSPB's Response to Comment 3: This comment did not address any of the interim regulatory changes in 5 CFR Part 1201 or 1210.

Comment 4: The National Treasury Employees Union (NTEU) commented on 11 provisions in the interim regulatory changes. Most of NTEU's suggestions, if adopted, would result in MSPB regulations that would not be consistent, as required by 5 CFR 9701.702, with Subpart G of Part 9701. However, as explained below, the Board has determined that several of NTEU's suggested revisions would add clarity to the Board's regulations and that those suggestions should be adopted.

MSPB's Response to Comment 4: The Board's responses to NTEU's 11 suggestions are as follows:

Suggestion 1: The Board's regulations should not incorporate DHS's initial service period:

MSPB's Response to Suggestion 1: DHS's regulations, at 5 CFR 9701.603, define "initial service period" as the one- or two-year period employees must serve after selection for a designated DHS position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation. 5 CFR 9701.604(d)(1) provides that the Board would have no jurisdiction over an appeal brought by a nonpreference eligible employee serving an initial service period. MSPB's regulation, at 5 CFR 1210.2(a), states that the Board lacks jurisdiction over those classes of employees excluded under 5 CFR 9701.604(d). However, MSPB's regulations clarify that, as determined by DHS, prior Federal civilian service counts toward completion of the initial service period.

To be consistent with DHS's regulations, MSPB's regulations must

recognize that a nonpreference eligible employee does not acquire appeal rights until after the initial service period has been fulfilled.

Suggestion 2: MSPB should revise 5 CFR 1210.10 to require DHS to include in its decision notices to employees information about the availability of an appeal to the Board of an adverse arbitration decision.

MSPB's Response to Suggestion 2: The Board agrees and will revise 5 CFR 1210.10 accordingly. NTEU correctly noted that other agencies are required, under 5 CFR 1201.21(d)(3), to inform employees in the decision notices as to whether they have the opportunity to request Board review of an arbitration decision. NTEU further noted that Board appeal of an arbitration decision "is clearly available in mixed cases pursuant to 5 CFR 9701.709." It is the Board's understanding that DHS takes the position that certain provisions of 5 CFR Part 1201, Subpart E, including 5 CFR 1201.154(d), will apply to the Board's processing of mixed case appeals brought under 5 CFR Part 9701. Board review of arbitration decisions is available in mixed cases pursuant to subsection 1201.154(d).

Suggestion 3: If the Board is going to incorporate the 20-day deadline in DHS's regulations for filing an appeal, the Board should exercise its discretion liberally to permit consideration of the merits of untimely filed appeals upon a showing of good cause. In addition, DHS should have only 10 days, not 15 days, to respond to appeals.

MSPB's Response to Suggestion 3: Because DHS's regulations do not provide for any exception from the 20-day deadline for filing an appeal, see 5 CFR 9701.706(k)(1) ("All appeals" "will 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."), MSPB's conforming regulations cannot so provide either. As for the suggestion that DHS be given 10 days, instead of 15 days to respond to appeals, the Board declines to adopt it. Because a response entails the filing of a narrative response as well as submission of a record, the Board believes that the 15-day time frame is more reasonable.

Suggestion 4: MSPB's regulations should authorize administrative judges to act on case suspension requests submitted unilaterally.

MSPB's Response to Suggestion 4: Because DHS's regulations require that case suspension requests be made jointly, MSPB's conforming regulations cannot provide for authorization of

unilaterally submitted case suspension requests.

Suggestion 5: The MSPB regulations governing discovery should be modified to give DHS employees an additional 30 days following receipt of DHS's initial disclosures to make their initial disclosures. They also should be modified to require that the Board's acknowledgment orders advise parties of their initial disclosure obligations.

MSPB's Response to Suggestion 5: An amendment to MSPB's regulations which would require DHS to submit initial disclosures within 10 days of the date of the Board's acknowledgment order and would allow appellants to wait until 40 days after the date of the acknowledgment order to file their initial disclosures would make it extremely difficult for the parties to complete discovery, for a hearing to be held and for an initial decision to be made within the 90-day deadline imposed by DHS's regulations. As for the suggested amendment to MSPB's acknowledgment orders, it is inconsistent with current practice for Board regulations to set requirements for acknowledgment orders. Moreover, such an amendment would be unnecessary because acknowledgment orders issued in appeals subject to these regulations will contain notice of initial disclosure requirements.

Suggestion 6: MSPB's regulations, at 5 CFR 1210.17(b), should be amended to permit either party to invoke the service of a settlement judge.

MSPB's Response to Suggestion 6: In order to reconcile its regulations with DHS's regulations, at 5 CFR 9701.706(i)(1) and (2), the Board must require that the request for the services of a settlement judge be made by the parties jointly.

Suggestion 7: The MSPB's regulations should not require administrative judges to resolve appeals through summary judgment when they conclude that no material facts are in dispute, and appellants should have 30 days, instead of 15 days, to file an opposition.

MSPB's Response to Suggestion 7: In order to reconcile its regulations with DHS's regulations, at 5 CFR 9701.706(k)(5), MSPB's regulations must require an administrative judge to render summary judgment on the law without a hearing when there are no material facts in dispute. The Board declines the suggestion to give appellants 30 days to oppose a summary judgment motion in all instances because the 90-day deadline for issuance of an initial decision may not permit judges to give appellants this much time to file an opposition. Moreover, 15 days is the same amount

of time that a complainant with a discrimination complaint has to oppose a summary judgment motion. See 29 CFR 1609.109(g)(2). In addition, it should be noted that the Board's regulations, at 5 CFR 1210.20(c), do not provide for a rigid deadline but, instead, state that an opposition to a summary judgment motion "shall be filed within 15 days of service of the motion, or at the time specified by the adjudicating official." Therefore, where time permits, an administrative judge could give an appellant a longer period than 15 days to file an opposition. The regulations also would permit the judge to provide for a response period shorter than 15 days. Finally, under neither DHS's nor MSPB's regulations are appellants precluded from seeking summary judgment.

Suggestion 8: The MSPB's regulations, at 5 CFR 1210.19(b), should be amended to require that the administrative judge conduct an in-person hearing whenever material facts are in dispute.

MSPB's Response to Suggestion 8: The suggestion, stated otherwise, is that whenever the administrative judge holds a hearing on an appeal, it must always be an in-person hearing. However, the Board, in a recent decision, recognized that, for hearings held pursuant to 5 CFR Part 1201, there is no statutory mandate for an unlimited entitlement to an in-person hearing. *Koehler v. Dept. of the Air Force*, 99 M.S.P.R. 82, ¶ 6 (2005). Over the years, especially under circumstances where there were issues as to the inconvenience and expense of travel, the Board has given appellants the option of having their hearings conducted telephonically. *Id.* As technology has developed, the Board has offered the option of videoconference hearings so that an appellant at a remote location could avail himself of a hearing without undertaking the expense and inconvenience of having to travel to a designated hearing site. *Id.* at ¶ 8, citing *Siman v. Dept. of the Air Force*, 80 M.S.P.R. 306, ¶ 6 (1998).

Like the rest of the Federal Government, the Board is facing serious challenges to work harder and faster, and to decide cases more efficiently. *Id.* at ¶ 11. Therefore, the Board cannot ignore the advances in videoconferencing technology, which provide a less costly alternative to affording every appellant an in-person hearing. Under the MSPB's interim regulatory changes, one of the factors that judges must consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone is undue prejudice to the appellant. The

Board believes that its regulations strike the right balance between giving appellants the right to appear before an administrative judge and conserving the resources of the parties and the Board.

Suggestion 9: To the extent that the time-of-filing rules in the MSPB's regulations, at 5 CFR 1210.21(a), apply to all filings with the Board, they should be set forth as a separate regulation in Subpart A of the MSPB's regulations.

MSPB's Response to Suggestion 9: The time-of-filing rules in 5 CFR 1210.21(a) are intended to apply only to the requirement that initial decisions be issued within 90 days after the date on which the appeal is filed; they do not determine whether an appeal was timely filed with the Board. The Board is amending its interim regulatory changes to make this intent clearer.

Suggestion 10: The MSPB should refrain from adopting the standard for mitigating penalties in the DHS regulations.

MSPB's Response to Suggestion 10: In order to reconcile its regulations with DHS's regulations, at 5 CFR 9701.706(k)(6), the MSPB must adopt DHS's standard for the mitigation of penalties.

Suggestion 11: The MSPB should revoke its regulations on "mandatory removal offenses," or, in the alternative, clarify its regulations to reflect that a de novo standard of review applies to the review of decisions of the Mandatory Removal Panel that involve issues of discrimination.

MSPB's Response to Suggestion 11: The MSPB lacks authority to revoke the appeals process for mandatory removal offenses established by DHS. Nor can it issue regulations that expand its jurisdiction over appeals of DHS actions taken for mandatory removal offenses beyond the jurisdiction that the DHS regulations provide. However, the Board will adopt the suggestion that 5 CFR 1210.41(a) be clarified to reflect that a de novo standard of review applies to allegations of discrimination contained in mixed case appeals of MRP decisions.

Comment 5: The American Federation of Government Employees (AFGE) objects largely to provisions that must be in the MSPB regulations in order for them to be reconciled with the DHS regulations. The first section of the AFGE comments contains an objection to our issuance of the regulations as interim regulations. The MSPB addressed this concern in a letter to AFGE and will summarize this letter below. The second section of the AFGE comments objects to the regulations because they purportedly bypass the collective bargaining rights of DHS employees. The third and fourth

sections of the AFGE comments suggest changes to specific provisions in 5 CFR Parts 1201 and 1210, respectively. Each section of AFGE's comment letter is addressed below.

Part 1: The MSPB should rescind the interim rule issued on October 5, 2007, because it violates the notice and comment requirements of the Administrative Procedure Act.

MSPB's Response: As reflected in this notice, the MSPB has taken all comments it received into serious consideration and, as a result, will make several modifications to its interim regulatory changes. It is important to note that the Administrative Procedure Act, at 5 U.S.C. 553(b)(A), provides that its notice and comment requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." This MSPB interim rule falls within this exception. The U.S. Court of Appeals for the D.C. Circuit clarified this exception in *JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d 320, 326-27 (D.C. Cir. 1994): "Our oft-cited formulation holds that the 'critical feature' of the procedural exception 'is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" (citations omitted). This interim rule is intended merely to conform MSPB practices and procedures to the changes implemented by DHS in a final rule after notice and comment. Therefore, MSPB has not violated any of the requirements of the APA.

Part 2: MSPB should rescind the interim rule because it bypasses the collective bargaining rights of DHS employee unions and their bargaining unit members.

MSPB's Response: The Board has been informed that the DHS regulations governing the appeals process will not apply to DHS employees who are covered by a collective bargaining agreement until negotiations between DHS management officials and representatives of the appropriate labor organizations have been concluded.

Part 3: AFGE's suggestions regarding the interim regulatory changes to 5 CFR, Part 1201: AFGE suggests two modifications. The first suggested modification is to 5 CFR 1201.3(b)(3), which pertains to the Board's jurisdiction over appeals of certain actions taken by DHS. The suggestion is that language be added regarding possible conflicts between Part 1210 and Part 9701 as modified by a collective bargaining agreement. The second suggested modification is that

the policy statement in 5 CFR 1201.11 be modified to reflect the concept of fairness as well as expedience.

MSPB's Response: The Board declines to adopt the first suggestion. At this time, there are no collective bargaining agreements that modify the time limits and procedures in Part 9701. Should that change, the Board will consider revising its regulations at that time. The Board has adopted the second suggestion and modifies 5 CFR 1201.11 accordingly.

Part 4: AFGE's suggestions regarding the interim regulatory changes to 5 CFR Part 1210: AFGE suggests modifications to seven provisions of 5 CFR Part 1210. As explained below, the Board is adopting the suggestion pertaining to the discovery obligations.

Suggestion 1: Modify the savings provision in 5 CFR 1210.6 to note that it will be subject to modified time limits and procedures set by 5 CFR Part 9701 or applicable collective bargaining agreements.

MSPB's Response to Suggestion 1: According to AFGE, this proposed modification "simply acknowledges the possibility that bargaining could result in changed provisions of Part 9701 being applicable to members of bargaining units." The Board declines to adopt the suggestion. At this time, there are no collective bargaining agreements that modify the time limits and procedures in Part 9701. Should that change, the Board will consider revising its regulations at that time.

Suggestion 2: Modify 5 CFR 1210.14 to allow for appellants' provision of documents and information that become known to him or her after the close of the initial disclosure period.

MSPB's Response to Suggestion 2: The purpose of this suggestion seems to be to allow appellants to disclose or identify documents as they become aware of their existence. The Board finds that an effective way to make this modification applicable to both parties is to add to 5 CFR 1210.14(a) the requirement that both parties update their initial disclosures as relevant documents and information are discovered or become available. The Board is modifying 5 CFR 1210.14(a) accordingly.

Suggestion 3: The discovery procedures, specifically, 5 CFR 1210.15(b)(2), should be modified to allow for discovery beyond the limitations set out in 5 CFR 1210.15(b)(1) "for good cause, and as fairness may require" instead of under a "necessity and good cause" standard.

MSPB's Response to Suggestion 3: In order to reconcile its regulations with DHS's regulations, at 5 CFR

9701.706(k)(3)(iii), the Board must consider requests for additional discovery under the "necessity and good cause" standard.

Suggestion 4: The language regarding the right to a hearing set out in 5 CFR 1210.19(b) should be modified to make it clear that, absent summary judgment, a hearing must be held.

MSPB's Response to Suggestion 4: Read together, subparts (a) and (b) of 5 CFR 1210.19 make it clear that, absent summary judgment, there is a right to a hearing but that the form of hearing to be held is within the administrative judge's discretion.

Suggestion 5: The summary judgment provision, at 5 CFR 1210.20, should be stricken in its entirety or, in the alternative, subsection (d), which provides that an administrative judge may initiate summary judgment sua sponte if he or she determines that material facts may not be in dispute, should be stricken.

MSPB's Response to Suggestion 5: In order to reconcile its regulations with DHS's regulations, at 5 CFR 9701.706(k)(5), MSPB's regulations must require an administrative judge to render summary judgment on the law without a hearing when there are no material facts in dispute. That is the case whether summary judgment is initiated by a party or by the judge.

Suggestion 6: The mitigation of penalty standard in 5 CFR 1210.21(b) should be stricken in its entirety.

MSPB's Response to Suggestion 6: In order to reconcile its regulations with DHS's regulations, at 5 CFR 9701.706(k)(6), MSPB's regulations must contain DHS's standard for mitigation of penalties.

Suggestion 7: All references to mandatory removal offenses should be stricken from 5 CFR Part 1210.

MSPB's Response to Suggestion 7: The Board lacks authority to revoke the appeals process for mandatory removal offenses established by DHS. However, as explained above, the Board is adopting the suggestion of NTEU that 5 CFR 1210.41(a) be clarified to reflect that a de novo standard of review applies to allegations of discrimination contained in mixed case appeals of MRP decisions.

List of Subjects in 5 CFR Parts 1201, 1210, and 1215

Administrative practice and procedure, Civil rights, Government employees.

■ For reasons set forth in the preamble, the interim rule published October 5, 2007 (72 FR 56883) is adopted as final with the following changes:

PART 1201—PRACTICES AND PROCEDURES

■ 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 1201.11 is amended by adding a new sentence at the end of the section to read as follows:

§ 1201.11 Scope and policy.

* * * It is the Board's policy that these rules will be applied in a manner that ensures the fair and efficient processing of each case.

PART 1210—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

■ 3. The authority citation for part 1210 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701.

■ 4. Section 1210.10(a)(4) is revised to read as follows:

§ 1210.10 Notice of appeal rights.

(a) * * *
(4) Notice of any right the employee has to file a grievance, including notice 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 as to whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d); and
* * * * *

■ 5. Section 1210.14 is amended by revising paragraphs (a)(1)(ii) and (a)(2)(ii) to read as follows:

§ 1210.14 Initial disclosures; scope of discovery.

(a) * * *
(1) * * *
(ii) The name, work address and work telephone number, if known, of each individual likely to have discoverable information that the Department may use in support of its claims or defenses, identifying the subjects of such information.
(2) * * *
(ii) The name, address and telephone number, if known, of each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses, identifying the subjects of the information. Each party must make its initial disclosure based on the information then reasonably available to the party. Each party has an ongoing obligation to supplement and update its initial disclosure as relevant documents and information are discovered or

become available. A party is not excused from making its disclosures because it has not fully completed the investigation of its case, because it challenges the sufficiency of the other party's disclosures or because the other party has not made its disclosures.

■ 6. Section 1210.21 is amended by adding a new sentence to the end of paragraph (a) to read as follows:

§ 1210.21 Initial decision by the adjudicating official.

(a) *General.* * * * For purposes of this subsection only, a document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it.
* * * * *

■ 7. Section 1210.41 is amended by adding a sentence to paragraph (a)(3) to read as follows:

§ 1210.41 Decision of the Board.

(a) * * *
(3) * * * The Board will apply a de novo standard of review to allegations of discrimination contained in mandatory removal appeal actions.
* * * * *

Dated: April 10, 2008.

William D. Spencer,

Clerk of the Board.

[FR Doc. E8-8092 Filed 4-17-08; 8:45 am]

BILLING CODE 7400-01-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 959

[Docket No. AMS-FV-07-0151; FV08-959-1 FR]

Onions Grown in South Texas; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the South Texas Onion Committee (Committee) for the 2007-08 and subsequent fiscal periods from \$0.02 to \$0.03 per 50-pound equivalent of onions handled. The Committee locally administers the marketing order which regulates the handling of onions grown in South Texas. Assessments upon onion handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins August 1 and ends July 31. The assessment rate will remain