



U.S. Merit Systems Protection Board

Questions and Answers About Whistleblower Appeals

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Introduction

Whistleblowing means disclosing information that you reasonably believe is evidence of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

On July 9, 1989, the Whistleblower Protection Act of 1989 (Public Law 101-12) became effective. Congress enacted this law to strengthen protections for Federal employees, former employees, and applicants for employment who claim that they have been subject to personnel actions because of whistleblowing activities. The 103rd Congress further expanded whistleblower protections by enacting Public Law 103-424, which became effective October 29, 1994, making additional personnel actions subject to coverage and extending whistleblower protections to employees of Government corporations and to employees in the Veterans Health Administration.

The Board's regulations governing appeals generally are contained in Title 5 of the Code of Federal Regulations, Chapter II, Part 1201. Additional regulations that apply only to whistleblower appeals are contained in Title 5 of the Code of Federal Regulations, Part 1209. Because the Part 1209 regulations contain only the special provisions applying to whistleblower appeals, they must be used in conjunction with Part 1201.

This publication covers the unique provisions of the law and the Board's regulations that apply to whistleblower appeals. *The discussion of whistleblower appeals in this publication is not all-inclusive, nor is the information regulatory in nature.* Such appeals are governed by the pertinent statutes, regulations, and case law.

Further information about filing whistleblower claims, an appeal form to complete when filing an initial appeal, and the Board's regulations covering whistleblower claims are available on the MSPB Web site at www.mspb.gov. You can send email to the Board at mspb@mspb.gov.

Information on procedures that apply to all appeals to the Board is contained in a separate MSPB publication entitled "Questions & Answers About Appeals," which is available on the MSPB World Wide Web site or at any MSPB office.

Please see MSPB at Your Fingertips at the end of this publication to find out how to locate Board decisions, case summaries, press releases, addresses of MSPB regional and field offices, and other information about the Board.

Whistleblowing and Whistleblower Appeal Rights

It is a prohibited personnel practice for an agency to subject you to a personnel action if the action is threatened, proposed, taken, or not taken because of whistleblowing activities. You are protected if you make such a disclosure to the Special Counsel, the Inspector General of an agency, or another employee designated by an agency head to receive such disclosures. You are also protected if you make such a disclosure to any other individual or organization (e.g., a congressional committee or the media), provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs.

The Office of Special Counsel has jurisdiction over prohibited personnel practice complaints with respect to a broad range of personnel actions, including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. A whistleblower may file a complaint with the Special Counsel with respect to most personnel actions allegedly based on whistleblowing. Prior to the Whistleblower Protection Act, if a whistleblower filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board, no further recourse was available, unless the action was directly appealable to the Board.

Under the Whistleblower Protection Act, a whistleblower may appeal directly to the Board if he first complains to the Special Counsel and the Special Counsel does not seek corrective action on his behalf. This right exists with respect to any personnel

action that can be the subject of a prohibited personnel practice complaint to the Special Counsel, even though the action may not be directly appealable to the Board.

A whistleblower has the right to appeal directly to the Board if he is subject to a personnel action that is appealable to the Board. The Whistleblower Protection Act does not change that. Actions that are directly appealable to the Board include adverse actions, performance-based removals or reductions in grade, denials of within-grade salary increases, reduction-in-force actions, and denials of restoration or reemployment rights.

Two Kinds of Whistleblower Appeals

There are two kinds of whistleblower appeals. The principal difference between the two is in the way they reach the Board.

Otherwise Appealable Action: In the first kind of case, the individual is subject to a personnel action that is directly appealable to the Board, and the individual claims that the action was taken because of whistleblowing. This kind of case is referred to by the Board as an "otherwise appealable action," and the individual may file an appeal directly with the Board after the action has been taken.

Individual Right of Action: The second kind of case was created by the Whistleblower Protection Act and is referred to as an "Individual Right of Action." In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of whistleblowing, but the action is not one that is directly appealable to the Board. In this kind of case, the individual can appeal to the Board only if he files a complaint with the Special Counsel first and the Special Counsel does not seek corrective action on the individual's behalf.

An individual who is subject to a personnel action that is directly appealable to the Board, and who claims that the action was taken because of whistleblowing, may choose to file a complaint with the Special Counsel rather than appeal to the Board. If the Special Counsel does not seek corrective action on his behalf, the individual may then appeal to the Board. While this is considered an "otherwise appealable action," the time limits for filing are the same as for an "individual right of action."

Questions and Answers

1. Who may file whistleblower appeals with the Board?

The right to file an *individual right of action* appeal with the Board is determined by the employee's eligibility under the "Prohibited Personnel Practices" statute (Title 5 of the United States Code, section 2302) to file a complaint with the Special Counsel alleging that a personnel action was taken because of whistleblowing. Covered employees include:

- Competitive service employees;

- Most excepted service employees in Executive agencies;
- Employees of Government corporations who allege whistleblower reprisal;
- Employees of the Government Printing Office; and
- Former employees of and applicants for employment with covered agencies.

Employees specifically *excluded* from coverage are those in the General Accounting Office, the FBI, and various intelligence agencies. A *covered employee who files a whistleblower complaint with the Special Counsel becomes eligible to file an individual right of action appeal with the Board only if the Special Counsel does not seek corrective action on his or her behalf.*

In the case of an *otherwise appealable action*, any employee eligible to appeal the particular action can appeal directly to the Board. The regulations applying to the particular action being appealed govern who may appeal that action. In general, competitive service and preference-eligible employees (e.g., veterans) have Board appeal rights with respect to most appealable actions. Most excepted service employees may appeal adverse actions and performance-based actions. Former employees and applicants for employment can appeal some actions.

If there is any question as to whether you come under the jurisdiction of the Special Counsel with respect to complaints of personnel actions allegedly based on whistleblowing, or under the Board's jurisdiction with respect to actions that may be appealed directly to the Board, you should file your complaint or appeal with the Board in order to preserve your appeal rights.

2. How do I file a whistleblower appeal with the Board?

You must file your timely appeal in writing with the Board's regional or field office serving the area where your duty station was located when the action was taken. This requirement applies to all whistleblower appeals, both otherwise appealable actions and individual right of action appeals.

A form for filing a petition for review is available on the MSPB Web site at <http://www.mspb.gov/foia/forms-pubs/pfrform.html>. A listing of addresses of all MSPB regional and field offices are available on the MSPB Web site at <http://www.mspb.gov/offices/regions/regions.html>.

Your appeal must contain the following:

- All of the information required by the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1201, for other types of appeals, including the signature of the appellant or the appellant's representative and a certificate of service stating how and when a copy of the appeal was served on the agency.
- A description of the whistleblowing disclosure and a chronology of facts concerning the personnel action--including the name and position of the person(s) taking the action.
- An explanation as to why you believe the personnel action is in reprisal for whistleblowing and any supporting evidence you have.
- In the case of a threatened action not yet taken, the specific indications giving rise to your apprehensions.
- If you have sought corrective action from the Special Counsel first, evidence that your appeal is being filed within the required time limits.

Appeals may be filed by mail, by facsimile, by commercial overnight delivery, or by personal delivery. The date of filing by mail is considered to be the postmark date. The date of filing by facsimile is the date of the facsimile. The date of filing by commercial overnight delivery is the date you deliver the appeal to the commercial overnight delivery service.

3. What are the required time limits for filing a whistleblower appeal?

The time limits are different for an otherwise appealable action and for an individual right of action appeal.

Otherwise Appealable Action: You must file within 30 calendar days of the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later. (If the filing deadline falls on a Saturday, Sunday, or Federal holiday, the filing deadline is extended to the next working day.) However, if you have been subjected to an otherwise appealable action and you choose to seek corrective action from the Special Counsel first, the time limits for appealing to the Board are the same as for an individual right of action appeal.

Individual Right of Action: The time limits for filing an individual right of action appeal depend on what the Special Counsel does with your complaint.

- If the Special Counsel notifies you that the office is terminating its investigation of your complaint, you have 65 days from the date of the Special Counsel's written notice, or 60 days from your receipt of the notice, whichever is later, to file an individual right of action appeal with the Board.

- If 120 days pass after you file a complaint with the Special Counsel and that office has not notified you that it will seek corrective action on your behalf, you may file an individual right of action appeal with the Board anytime thereafter.

4. What is a "stay" and how does it apply to whistleblower appeals?

A stay orders the agency to suspend the personnel action being appealed. You may file a stay request with the Board in connection with either kind of whistleblower appeal--an otherwise appealable action or an individual right of action appeal. You may file a stay request at any time after you become eligible to file your appeal, but no later than the time limit the judge sets for close of discovery in the appeal. You may file a stay request before, at the same time as, or after you file your appeal. If you file the stay request first, you must file your appeal within 30 days after the judge rules on the stay request.

5. How do I file a stay request with the Board?

You file a stay request in writing with the same Board regional or field office where you file your appeal. You may file the request by personal delivery, by facsimile, by commercial overnight delivery, or by mail.

Your stay request must contain the following information:

- Your name and the names and addresses of the agency and your representative, if you have one.
- A chronology of the facts, including a description of the whistleblowing disclosure and the personnel action that the agency has threatened, taken, or failed to take.
- An explanation as to why you believe the personnel action is based on whistleblowing. You should support your explanation with documentary proof because a stay will be granted only if you show a "substantial likelihood" that your appeal will succeed.
- An explanation as to how long the stay should remain in effect and whether the stay will cause a hardship on the agency.
- If you first sought corrective action from the Special Counsel, evidence that the request is timely filed.

6. How does the Board decide on a stay request?

After you have filed your stay request, the administrative judge will allow the agency an opportunity to comment and submit evidence. After considering all the

arguments and evidence, the administrative judge will either grant or deny your request.

If your stay request is granted, the administrative judge will specify the time period during which the agency must suspend the personnel action. A typical stay order will suspend the personnel action indefinitely, until it is later modified or vacated by another Board order.

If your stay request is not granted, you may file a written request with the administrative judge asking that he refer your request and his decision denying your request to the Board members in Washington, D.C. for their review. This is called "petitioning" the administrative judge to "certify" his decision as an "interlocutory appeal." The Board's regulations regarding interlocutory appeals are found at Title 5 of the Code of Federal Regulations, Part 1201.

Please see MSPB at Your Fingertips at the end of this publication for information about obtaining the Board's regulations.

7. What are the burden of proof and degree of proof in whistleblower appeals?

In whistleblower appeals, *you have the burden of proving by a preponderance of the evidence* that whistleblowing was a contributing factor in the personnel action threatened, taken, or not taken against you. The Board will order the agency to correct the action if you demonstrate that the whistleblowing was a contributing factor in the personnel action. You may demonstrate that the whistleblowing was a contributing factor by showing that the official taking the action knew about the whistleblowing and that the action occurred within a time period such that a reasonable person would conclude that the whistleblowing was a contributing factor in the personnel action.

The Board will not order corrective action, however, *if the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing.* The clear and convincing standard of proof is a higher standard than the preponderance of the evidence standard that you must meet.

8. If I file a whistleblower appeal with the Board after the Special Counsel has terminated an investigation of my complaint, will that termination influence the Board's decision?

No. Under the Whistleblower Protection Act, when the Board considers your appeal, it may not take into account the Special Counsel's decision to terminate an investigation of your complaint. Moreover, if you file your appeal because 120 days have passed without your being notified that the Special Counsel will seek corrective action on your behalf, the Special Counsel may not proceed to seek

corrective action without your permission. Furthermore, the Special Counsel may not intervene in your appeal before the Board without your permission.

9. What can I do if I am not satisfied with the administrative judge's decision on my whistleblower appeal?

As is the case with other decisions on appeals to the Board, you have the right to ask the 3-member Board in Washington to review the initial decision of the administrative judge. You do this by filing a *petition for review* in accordance with the Board's regulations at Title 5 of the Code of Federal Regulations, Part 1201. *If no party files a petition for review, the initial decision of the administrative judge becomes final 35 days after it is issued.* If a petition for review is filed, the decision issued by the Board becomes the final decision.

You may request *judicial review of a final Board decision* on your whistleblower appeal--either an initial decision of an administrative judge that has become final or the Board's decision on a petition for review--by the U.S. Court of Appeals for the Federal Circuit. *The court must receive your request for review within 60 days of your receipt of the Board's final decision.* The court normally will not waive this time limit and filings that do not meet the deadline will be dismissed.

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