

Rules and Regulations

Federal Register

Vol. 63, No. 125

Tuesday, June 30, 1998

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board is amending its rules of practice and procedure to provide notice that a judge may exclude a party, a representative, or other person from all or any portion of a Board proceeding before him or her because of misconduct. The amendment further provides procedures for a person facing exclusion to show cause why he or she should not be excluded, for an interlocutory appeal to the Board of a judge's order excluding a person, and for a motion to stay the proceeding pending the Board's decision on an interlocutory appeal of an exclusion order. The intent of the amendment is to inform parties and their representatives that MSPB judges have the authority to exclude a person from a proceeding and will exercise it when necessary to ensure that adjudication of cases proceeds expeditiously and without undue disruption.

EFFECTIVE DATE: June 30, 1998.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.

SUPPLEMENTARY INFORMATION: The Board previously published an interim rule to provide notice that a judge may exclude a party, a representative, or other person from all or any portion of a Board proceeding before him or her because of misconduct (62 FR 62689, November 25, 1997). The interim rule requested public comments and allowed 60 days, until January 26, 1998, for receipt of such comments.

Comments were received from two practitioners before the Board. Both commenters recommended that the interim rule be amended to provide: (1) an opportunity for the person facing exclusion to show cause why he or she should not be excluded from the proceeding; and (2) automatic Board review of a judge's exclusion order upon the filing of a motion for certification of the order as an interlocutory appeal. In the interest of due process, the Board has adopted both of these recommendations in the final rule. Subsection 1201.31(d)(2) in the interim rule has been replaced by subsections 1201.31(d)(2) and (d)(3) in the final rule. The former prescribes procedures for issuance of a show cause order and for a response to such an order, while the latter provides procedures for the certification of an interlocutory appeal.

One commenter recommended that the interim rule be amended to provide for a stay of the proceeding by a single Board member where a judge's exclusion order has been certified as an interlocutory appeal to the Board. The Board has not adopted this specific recommendation but, instead, has added new language at subsection 1201.31(d)(4)(ii) providing that where an exclusion order has been certified to the Board as an interlocutory appeal, the judge or the Board may stay the proceeding. The provision also permits a party to move for a stay of the proceeding. This approach preserves the Board's discretion to control the conduct of the proceeding and to determine whether, under the particular circumstances of the case, a stay would serve the interests of the parties. There has been no change in the interim rule's requirement that where the judge excludes a party's representative, the party be given a reasonable time to obtain another representative; see subsection 1201.31(d)(4)(i).

In the final rule, the Board also has amended section 1201.41(b)(7) to clarify that the authority of a judge to exclude a person from a proceeding is to be exercised as provided under section 1201.31(d).

Three other recommendations made in the public comments have not been adopted in the final rule. One commenter recommended that the Board require that all prehearing and settlement conferences be recorded and that the interim rule be amended to

provide a procedure for purging a person's exclusion from a proceeding from the record. The burden of implementing the former recommendation in over 8,000 prehearing conferences each year would far exceed the anticipated benefit, given that misconduct at that stage occurs infrequently. In addition, recording conferences could have the effect of inhibiting free discussion of settlement terms during the course of a settlement conference. The Board concludes that the decision to record a conference is best left to the judge's discretion. As to purging the record, the Board has determined that a special procedure is unnecessary; a motion could be filed in an appropriate case. The other commenter recommended that a procedure be established outside the context of adjudication of a specific case for filing a complaint against an administrative judge. This recommendation is outside the scope of the present rule. The Board, however, has referred the recommendation to its Director, Office of Regional Operations, for review and a determination as to whether a demonstrated need for such a complaint procedure has been established.

The Board has determined that one further change should be made in the interim rule in the interest of clarity. In subsection 1201.31(d)(1), the phrase, "misbehavior that obstructs the hearing," has been replaced by "conduct that is prejudicial to the administration of justice." The new language incorporates the standard established by the American Bar Association (ABA) *Model Rules of Professional Conduct* (Rule 8.4(d)), which has been adopted by over forty state bars and construed by the courts. See *Howell v. State Bar*, 843 F.2d 205, 208 (5th Cir.), cert. denied, 488 U.S. 982 (1988) (holding that the phrase "prejudicial to the administration of justice" is neither overbroad nor vague on its face as case law, court rules, and the "lore of the profession" provide sufficient guidance).

Finally, subsection 1201.31(d)(4) in the interim rule has been renumbered 1201.31(d)(5).

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board adopts as final its interim rule published at 62 FR 62689, November 25, 1997, with the following changes:

1. Section 1201.31(d), as added by the interim rule, is revised to read as follows:

§ 1201.31 Representatives.

* * * * *

(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.

(2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section.

(3) When, after consideration of the person's response to the show cause order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the ruling, a motion that the ruling be certified to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of §§ 1201.91 through 1201.93 of this part shall not apply.

(4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that:

(i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and

(ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding *sua sponte* or on the motion of a party for a stay of the proceeding.

(5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.

2. Section 1201.41(b)(7), is revised to read as follows:

§ 1201.41 Judges.

* * * * *

(b) * * *

(7) Exclude any person from all or any part of the proceeding before him or her as provided under § 1201.31(d) of this part;

* * * * *

Dated: June 22, 1998.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 98-16930 Filed 6-29-98; 8:45 am]

BILLING CODE 7400-01-P

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service**

7 CFR Parts 29, 31, 32, 36, 51, 52, 53, 54, 56, 58, 70, and 160

[Docket Number FV-95-303]

Removal of U.S. Grade Standards and Other Selected Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture is adopting two interim final rules concerning removal of voluntary U.S. grade standards and other selected regulations from the Code of Federal Regulations (CFR). This action is part of the National Performance Review Program to eliminate unnecessary regulations and improve those that remain in force.

EFFECTIVE DATE: July 30, 1998.

FOR FURTHER INFORMATION CONTACT: Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, USDA, AMS, Room 2085-S, P.O. Box 96456, Washington, D.C. 20090-6456, (202) 690-0262.

SUPPLEMENTARY INFORMATION: An interim final rule was published in the **Federal Register** on December 4, 1995. That rule removed most of the voluntary U.S. grade standards and other selected regulations covering a number of agricultural commodities (dairy products, tobacco, wool, mohair, fresh and processed fruits and vegetables, livestock, meats and meat products, eggs, and poultry and rabbit products) from the CFR. A second interim final rule was published on August 13, 1997 which: removed from the CFR those standards that had been retained pending completion of rulemaking at the time an interim final rule was published on December 4, 1995 which removed most of the U.S. standards from the CFR; reinstated the U.S. standards for Wisconsin Cigar-Binder Tobacco, and regulations related to the purchase of samples of wool and of mohair grades; and, lastly added a new part titled "Procedures by Which the Agricultural Marketing Service Develops, Revises, Suspends, or Terminates Voluntary Official Grade Standards." These procedures were first discussed in the original interim rule and further developed and published in the August 13, 1997 interim final rule providing specifics as to the procedures that AMS will follow when developing, revising, suspending, or terminating voluntary U.S. grade standards. The Department is making final the December 4, 1995, interim final rule, and the August 13, 1997, interim final rule. This regulatory action is being taken as part of the National Performance Review program to eliminate unnecessary regulations and improve those that remain in force.

Executive Order 12866

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have preemptive effect with respect to any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. This rule is not intended to have retroactive effect. There are no administrative procedures which must be exhausted prior to any judicial challenge to this rule or the application of its provisions.

Effect on Small Entities

This action was reviewed under the Regulatory Flexibility Act (RFA) (5