Rules and Regulations

Federal Register
Vol. 64, No. 99
Monday, May 24, 1999

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.
AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to provide an automatic extension of the regulatory time limit for filing an appeal with MSPB where an appellant and agency mutually agree, prior to the timely filing of an appeal, to attempt to resolve their dispute through an alternative dispute resolution process.

EFFECTIVE DATE: May 24, 1999.

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

SUPPLEMENTARY INFORMATION: On May 1, 1998, the President issued a Memorandum for Heads of Executive Departments and Agencies in which he called on Federal agencies to ''promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques'' to resolve disputes to which the agency is a party. The Memorandum established an Interagency Alternative Dispute Resolution (ADR) Working Group to assist agencies in establishing ADR programs, help agencies that already have ADR programs to improve and promote greater use of them, and share ADR information among agencies. The President's Memorandum furthers the purposes of the Administrative Dispute Resolution Act of 1996 (Pub. L. 104–320, October 19, 1996). The Board has determined to encourage use of ADR by allowing an automatic 30-day extension of its regulatory filing time limit where parties mutually agree in writing to attempt to resolve workplace disputes through an ADR process.

The Board has been committed to the use of ADR to resolve matters submitted to it for adjudication since its establishment by the Civil Service Reform Act of 1978 (CSRA). The CSRA explicitly granted the Board authority to provide for one or more alternative methods for settling matters within its jurisdiction.

For more than a decade, the Board has required its administrative judges to conduct settlement efforts in all cases. Since 1988, the administrative judges have maintained an annual settlement rate of about 50 percent of cases not dismissed. In 1993, the Board implemented a petition for review (PFR) settlement program at headquarters, thus extending the benefits of ADR to cases at the Board review level. The Board continues to explore ways in which it can employ its legal and ADR expertise in a cooperative effort with agencies to try to resolve personnel disputes at the agency level, before they result in formal appeals to MSPB.

In light of the longstanding MSPB commitment to ADR, the Board would like to support the new and improved agency ADR programs that can be expected to result from the President's May 1, 1998, Memorandum and the work of the Interagency ADR Working Group. The Board wants to ensure that its regulatory requirements with respect to filing time limits do not deter potential appellants from first attempting to resolve their disputes through an agreed-upon ADR process. Therefore, the Board is amending its regulation at 5 CFR 1201.22(b)(1) by adding a new provision to extend the 30-day filing time limit by an additional 30 days—for a total of 60 days—where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an ADR process.

The Board intends that when an agency provides notice of the time limits for appealing to the Board in compliance with 5 CFR 1201.21(a), it include notice of the automatic extension of the time limit that will apply under 5 CFR 1201.22(b)(1) should the parties mutually agree in writing to attempt to resolve their dispute through an ADR process.

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 amends 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.22 is amended by revising paragraph (b)(1) to read as follows:

§ 1201.22 Filing an appeal and response to appeals.

* * * * *

(b) * * * (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with § 1201.23 of this part.

* * * * *

Dated: May 18, 1999.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 99–12975 Filed 5–21–99; 8:45 am]

BILLING CODE 7400–01–P

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 (MSPB or the Board) is amending its rules of practice and procedure to

modify the rules regarding what an agency must show when it files a petition for review of an initial decision that has ordered interim relief for an appellant.

EFFECTIVE DATE: May 24, 1999.

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

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 7701(b)(2)(A), an employee or applicant for employment who prevails in an appeal to the Board must be granted interim relief—that is, the relief provided in the MSPB administrative judge's initial decision—if a petition for review of the initial decision is filed with the Board. Such interim relief must be effected as of the date of the initial decision and must remain in effect until the Board issues a decision on the petition for review.

There are two exceptions to the requirement for interim relief. Under 5 U.S.C. 7701(b)(2)(A)(i), interim relief will not be granted if the administrative judge determines that the granting of such relief is not appropriate. Under 5 U.S.C. 7701(b)(2)(A)(ii), complete interim relief will not be provided if the initial decision provides that the appellant shall return to or be present at the place of employment and the agency determines that the return or presence of the appellant would be unduly disruptive to the work environment. Under 5 U.S.C. 7701(b)(2)(B), an agency that makes an undue disruption determination under 5 U.S.C. 7701(b)(2)(A)(ii) must provide the appellant with pay and benefits during the period pending the outcome of a petition for review.

Under the Board's rule at 5 CFR 1201.115(b), in a case where interim relief has been granted, an agency must submit with its petition for review evidence that it has provided the interim relief required by the initial decision— paragraph (b)(1)—or evidence that it has made an undue disruption determination and is providing the appellant with pay and benefits as required—paragraph (b)(2). The rule further provides that if the agency does not submit evidence showing compliance with either paragraph (b)(1) or (b)(2), the Board *will* dismiss the agency's petition for review.

Under this rule, a dismissal might occur, for example, where an agency shows that it has reinstated an appellant's pay and benefits as of the date of the initial decision but fails to submit with its petition for review evidence that it has made an undue disruption determination to support its failure to restore the appellant to his former position. The circumstances of a case may demonstrate, however, that the agency's actions are equivalent to an undue disruption determination. In other circumstances, evidence of an undue disruption determination may be submitted late. In circumstances such as these, where the appellant's pay and benefits have been restored effective from the date of the initial decision, if there is no harm to the appellant, dismissal of the agency's petition for review should not be required.

In keeping with its commitment to resolving disputes on the merits rather than dismissing them on the basis of a technical violation of a rule, not mandated by statute, the Board has determined that its requirements with respect to interim relief should be modified. Therefore, the Board is amending its rules at 5 CFR 1201.111 and 1201.115 as follows:

Section 1201.111(c) is redesignated as § 1201.111(c)(1). Section 1201.111(c)(2) is a new rule which ensures that an appellant has notice of his rights under an interim relief order.

Section 1201.115(b)(1) is amended to replace the current requirement for submission of *evidence* at the time of filing a petition for review with a requirement that the agency include in its petition for review a *certification* that it has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

Section 1201.115(b)(2), as amended, is a new rule providing that, if the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance, and allowing the appellant to respond to the agency's submission of evidence.

The former § 1201.115(c) is redesignated as § 1201.115(b)(3). It is amended to conform to § 1201.115(b)(2), as amended, and to clarify that the provision applies only where an appellant or intervenor files a petition for review *and* there is a challenge to the agency's compliance with the interim relief order.

Section 1201.115(b)(4) is amended to provide that a failure by the agency to provide the required certification in accordance with § 1201.115(b)(1), or to provide evidence of compliance in response to a Board order in accordance with § 1201.115(b)(2) or (b)(3), *may* result in the dismissal of the agency's petition or cross petition for review.

The former § 1201.115(b)(3) is redesignated as § 1201.115(c) and is amended only to make necessary conforming changes.

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 amends 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.111 is amended by redesignating the text of paragraph (c) as paragraph (c)(1) and by adding new paragraph (c)(2) to read as follows:

§ 1201.111 Initial decision by judge.

* * * * *

(c) *Interim relief.* (1) * * *

(2) An initial decision that orders interim relief shall include a section which will provide the appellant specific notice that the relief ordered in the decision must be provided by the agency effective as of the date of the decision if a party files a petition for review. If the relief ordered in the initial decision requires the agency to effect an appointment, the notice required by this section will so state, will specify the title and grade of the appointment, and will specifically advise the appellant of his right to receive pay and benefits while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

3. Section 1201.115 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1201.115 Contents of petition for review.

* * * * *

(b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may

respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(c) Nothing in paragraph (b) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

* * * * *

Dated: May 18, 1999.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 99–12976 Filed 5–21–99; 8:45 am]

BILLING CODE 7400–01–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR 318 and 319

[Docket No. 94–015DF]

RIN 0583–AB82

Use of Soy Protein Concentrate, Modified Food Starch, and Carrageenan as Binders in Certain Meat Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the Federal meat inspection regulations to allow the use of soy protein concentrate, both singly and in combination with modified food starch or carrageenan, as a binder in cured pork products labeled ''Ham with Natural Juices,'' ''Ham Water Added,'' and ''Ham and Water Product—X% of Weight is Added Ingredients,'' and to increase the permitted use level of modified food starch as a binder in ''Ham and Water Product—X% of Weight is Added Ingredients'' products. These binders will be used to reduce purging of the pumped brine solution from the products. FSIS is proceeding with this direct final rule in response to petitions submitted by Central Soya and the National Starch and Chemical Company and informal requests from several food manufacturers.

DATES: This rule will be effective July 23, 1999, unless FSIS receives written adverse comments within the scope of this rulemaking or written notice of intent to submit adverse comments within the scope of this rulemaking on or before June 23, 1999.

ADDRESSES: Submit adverse comments or notice of intent to submit adverse comments within the scope of this rulemaking to: FSIS Docket Clerk, DOCKET #94–015DF, U.S. Department of Agriculture, Food Safety and Inspection Service, Cotton Annex, room 102, 300 12th Street, SW, Washington, DC 20250–3700. Any written comments submitted in response to this direct final rule and reference materials cited in this document will be available for public inspection in the FSIS Docket Room from 8:30 a.m. to 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Post, Director, Labeling and Additives Policy Division, Office of Policy, Program Development and Evaluation, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250–3700; (202) 205–0279.

SUPPLEMENTARY INFORMATION:

Background

During the manufacturing of cured pork products labeled ''Ham with Natural Juices,'' ''Ham Water Added,'' and ''Ham and Water Product—X% of Weight is Added Ingredients,'' the products are pumped or injected with a brine solution in an amount equal to various percentages of the weight of the raw, unprocessed product. These pork products are normally packaged in clear plastic and enclosed by a vacuum seal before curing. As the brine purges from them during the curing process, it settles in the package of the product. As a result, some retailers remove and discard these products well before their shelf life expiration date, creating economic losses for both industry and consumers.

Section 318.7(c)(4) of the Federal meat inspection regulations currently permits the use of soy protein concentrate as a binder in sausage products at up to 3.5 percent of formulations and in spaghetti with meatballs, chili con carne, and similar products at up to 8 or 12 percent, depending on the product in which it is used. Section 318.7(c)(4) of the Federal meat inspection regulations also permits the use of modified food starch or carrageenan as a binder in cured pork products, as provided in 9 CFR 319.104, at a level not to exceed 2 percent and 1.5 percent, respectively, of the product formulation, to inhibit purging of brine solution. Section 319.104 provides for the use of certain binders or extenders in ''Ham with Natural Juices,'' ''Ham Water Added,'' and ''Ham and Water Product—X% of Weight is Added Ingredients'' products.

Modified Food Starch

FSIS was petitioned by the National Starch and Chemical Company [1] to amend the Federal meat inspection regulations to permit an increase in the use level of modified food starch from 2 percent to 3.5 percent of product formulation in cured pork products labeled as ''Ham Water Added'' and ''Ham and Water Product—X% of Weight is Added Ingredients'' to reduce and control purging of brine during product retail shelf life. The petitioner contended that certain cured pork products, i.e., those injected with brine solutions that remain in the product, require higher levels of modified food starch than the currently allowed level of 2 percent to accomplish purge reduction.

According to research data submitted by the petitioner, a level of 2 percent modified food starch in a ''Ham Water Added'' product pumped to contain 35 percent of the solution is sufficient to effectively reduce purge. These data are also applicable to the use of modified food starch in ''Ham with Natural Juices'' products. Once the level of modified food starch is increased above 2 percent, and the pump level remains the same (35 percent), the modified food starch will not properly hydrate due to excessive competition for water. Therefore, modified food starch is a self-limiting ingredient in products labeled as ''Ham Water Added'' and ''Ham with Natural Juices.''

However, when the overall water level is increased in products labeled ''Ham and Water Product—X% of Weight is Added Ingredients,'' the level of modified food starch must be increased because a level of 2 percent can only bind a limited quantity of water and is not adequate to reduce the

[1] A list of all data and information submitted to FSIS in support of this direct final rule is attached at the end of this document. The data are available for review in the FSIS Docket Clerk's Office.