

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
[REDACTED] REGIONAL OFFICE**

[REDACTED],
Appellant,

DOCKET NUMBER
[REDACTED]

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: September 29, 2009

ACKNOWLEDGMENT ORDER

This office has received the appellant's petition for appeal. A copy of the appeal is being sent to the agency with this Order. I am the administrative judge assigned to this appeal.

I **ORDER** the parties to follow the procedures set out in the separate notices below. If any party fails to follow my orders or the Board's regulations, I may impose sanctions pursuant to 5 C.F.R. § 1201.43. If either party has a question regarding any aspect of the case processing instructions set forth in this order, he or she may seek clarification at the phone number listed at the end of this order.

NOTICE TO APPELLANT

INTRODUCTION

If your appeal is timely filed, and within the Board's jurisdiction, you have the right to a hearing on the merits of your case. If you requested a hearing, I will schedule a hearing for you. If you did not request a hearing, you have 10 calendar days from the date of this Order to file a written request for one. If you do not request a hearing, you waive your right to one. In that event, you and the

agency will be given an opportunity to make written submissions before the record on your appeal closes.

JURISDICTION

You state that you are challenging your non-selection. The Board may not have jurisdiction over such an action.

The Board does not have jurisdiction over all matters involving Federal employment that are allegedly unfair or incorrect. *Johnson v. U.S. Postal Service*, 67 M.S.P.R. 573, 577 (1995), *review dismissed*, 65 F.3d 186 (Fed. Cir. 1995) (Table). The appellant has the burden of proving, by preponderant evidence,¹ that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2)(i). The Board will grant a hearing on the issue of jurisdiction only if the appellant makes non-frivolous allegations² to support Board jurisdiction (*i.e.*, claims that, if proven, establish the Board's jurisdiction). *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006) (citations omitted).

It is well-settled that, with exceptions not relevant here, the Board does not have jurisdiction to consider an applicant's nonselection for a vacant position. *See Brown v. Office of Personnel Management*, 91 M.S.P.R. 314, ¶ 7 (2002). Nor does the Board possess any general authority to review agency selection actions. *See Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 886 (Fed. Cir. 1998).

¹ Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2).

² Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *See Ferdon v. U. S. Postal Service*, 60 M.S.P.R. 325, 329, (1994). The allegations should be supported by affidavits, declarations or other evidence if they are to be deemed non-frivolous. *Marcino v. U.S. Postal Service*, 344 F.3d 1199, 1204 (Fed. Cir. 2003). A form for a declaration is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV.

For an appointment to take effect, an authorized appointing officer must take an action that reveals his awareness that he is making a promotion or appointment in the United States civil service, and the affected employee must take some action denoting acceptance. *Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 13 (2009); *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1580 (Fed. Cir.), *cert. denied*, 484 U.S. 913 (1987). In addition, an appointment that has been effected may still be revoked prior to the employee's entrance on duty or performance in the higher grade. *See National Treasury Employees Union v. Reagan*, 663 F.2d 239, 253 (D.C. Cir. 1981).

To establish Board jurisdiction over the cancellation of a promotion or appointment, the appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Deida*, 110 MSPR at ¶¶ 14, 16. The Board has held that once an appellant has made a prima facie case of jurisdiction by showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion or appointment was an error contrary to law or regulation. *Deida*, 110 MSPR at ¶ 16, *Lomax*, 78 M.S.P.R. 559-60.

The agency must be afforded an opportunity to show that the appellant's promotion was an error contrary to law or regulation. *See Mulligan v. U.S. Postal Service*, 81 M.S.P.R. 1, ¶ 12 (1999). Given that the appellant bears the ultimate burden of proof on the issue of jurisdiction, he must be afforded the opportunity to rebut any showing that the agency may make. *Id.* The appellant must prove the Board has jurisdiction by a preponderance of the evidence.

You have the burden of proving that the Board has jurisdiction over your appeal. Accordingly, I **ORDER** you to file evidence and argument to prove that this action is within the Board's jurisdiction. Your submission must be filed within 15 calendar days of the date of this Order. The agency may file a response on this issue within 25 calendar days of the date of this Order. Unless I notify you to the contrary, the record on this issue will close on that date. No evidence or argument on the jurisdictional issue filed after the close of record will be accepted unless you show that it is new and material evidence that was unavailable before the record closed.

TIMELINESS

Generally, you must file an appeal with the Board no later than 30 calendar days after the effective date, if any, of the action you are challenging, or 30 days after the date you receive the agency's decision, whichever is later. The date your appeal is postmarked is ordinarily considered the date of filing. If you personally deliver your appeal to the regional office, the date of filing is the date of receipt. If you file by facsimile, the date of filing is the date of the facsimile. If you file by the Board's internet filing procedure (e-Appeal), the date of the filing is the date of the electronic submission. Because your appeal appears to have been filed after the time limit, it may be untimely.

If you and the agency mutually agreed in writing to participate in an alternative dispute resolution process prior to filing your appeal, the time limit for filing is extended for an additional 30 days for a total of 60 calendar days. In such a case, your response to this order must include a copy of the written agreement.

You have the burden of proof on the issue of timeliness. Accordingly, I **ORDER** you to file evidence and argument showing that your appeal was timely filed or that good cause existed for the delay. Your submission must be filed within 15 calendar days of the date of this Order. The agency may file a response

on this issue within 25 calendar days of the date of this Order. Unless I notify you to the contrary, the record on this issue will close on that date. No evidence or argument on the timeliness issue filed after the close of record will be accepted unless you show that it is new and material evidence that was unavailable before the record closed.

DESIGNATION OF REPRESENTATIVE

You may name a representative. If you already have a representative, you must fill out the enclosed “Designation of Representative” form and file it with the Board and with the agency within 10 calendar days of the date of this Order unless you have included your representative’s name, address, telephone number, and signature in your appeal. If your representative has filed the appeal for you and you have not personally signed the appeal or submitted a signed “Designation of Representative” form, you also must file a signed “Designation of Representative Form” with the Board and with the agency within 10 calendar days of the date of this Order. If you name a representative after receiving this Order, fill out the enclosed “Designation of Representative” form and file it with the Board and the agency **immediately** after obtaining your representative.

You must **immediately** notify the Board and the agency in writing of any changes in the name, address, or telephone number of your designated representative.

If you register as an e-filer (see information below), you can use electronic filing to file a Designation of Representative, or to notify the Board of a change in contact information.

DISCOVERY

Discovery is the procedure you may use to learn of any facts, documents, or other evidence the agency has that may be helpful to your case. If you wish to engage in discovery, initial requests or motions must be served on the other party within 25 calendar days of the date of this Order. Responses to initial discovery

requests must be served promptly but no later than 20 days after the date of service of the other party's discovery request or the MSPB order. Unless you are filing a motion to compel, you must not submit your discovery requests and responses to the Board. If you do, they will be rejected and returned to you. The procedures used for discovery are at 5 C.F.R. §§ 1201.71-.85.

It is the policy of the Board to decide an appeal within 120 calendar days of receipt. The Board expects all parties to assist in the expeditious processing of this case by honoring requests for relevant documents and producing material witnesses without additional Board intervention.

ADDITIONAL DISCOVERY PROCEDURES

Please note that, effective April 3, 2008, the Board issued interim regulations affecting discovery. *See* 73 F.R. 18149 (2008). The parties are expected to comply with those provisions, including the new requirement that unless I direct otherwise, without awaiting a discovery request and **within 10 days of the date of this order**, each party must provide the following information to the other:

- (1) The agency must provide:
 - (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of the agency that the agency may use in support of its claims or defenses, and
 - (ii) The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information that the agency may use in support of its claims or defenses, identifying the subjects of such information.
- (2) The appellant must provide:
 - (i) A copy of, or a description by category or location of all documents in the possession, custody, or control of the appellant that the appellant may use in support of his or her claims or defenses, and
 - (ii) The name and, if known, the address, telephone number, and e-mail address 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 such information.

These disclosures must be based on the information reasonably available to the parties at the time they are made. A party must make these disclosures even if it has not completed investigating the case, and despite any failure of the other party to comply fully with these requirements. **They must be served on the other party, but not on the Board.** If they are served on the Board, they will be rejected and returned to you.

In addition, the regulations now require that the parties attempt to resolve a discovery dispute before filing a motion to compel with me. Thus, the party who disputes the other's compliance must discuss the anticipated motion with the other party, and they both must make a good faith effort to resolve the dispute and narrow their disagreement. They must also include with any motion a statement indicating that they have complied with this requirement.

RESPONSE TO MOTIONS

You may file a response or objection to any motion filed by the agency. Unless otherwise specified by me or the Board's regulations, your response or objection must be filed with this office and served upon the agency within 10 calendar days of the date that appears on the agency's certificate of service. I will reject any untimely response or objection unless you show good cause for the delay in filing.

GENERAL INSTRUCTIONS

FILING PLEADINGS WITH THE MSPB

A "pleading" is any written submission setting out claims, allegations, arguments, or evidence. Pleadings include briefs, motions, petitions, attachments, and responses. 5 C.F.R. § 1201.4(b). Pleadings can be filed via postal mail, facsimile (fax), personal or commercial delivery, or in electronic format via e-Appeal Online (<https://e-appeal.mspb.gov/>). Pursuant to 5 C.F.R. § 1201.26, all pleadings filed with the Board must meet the following requirements:

- (1) All pleadings must be legible and either printed on 8½ by 11 inch paper, or formatted so that they will print on 8½ by 11 inch paper.
- (2) All pleadings must be filed by the date set by me or the Board's regulations. The date of filing is the date your submission is postmarked, faxed, the date of electronic submission if you e-file, or the date of receipt if you personally deliver it to the Board's regional office. Extensions of filing dates will only be granted if requested in writing and if good cause is shown. **A continuance of a hearing date will be granted only if requested in writing in accordance with the Board's regulation at 5 C.F.R. § 1201.51(c), which requires an affidavit or sworn statement, and if you are able to show extraordinary circumstances.**
- (3) All pleadings must be served upon opposing parties and their representatives, must be accompanied by a certificate of service stating (a) the names and addresses of the parties served; (b) the manner of service (personally delivered, mailed, faxed, or electronic delivery); and (c) the date of service. A certificate of service is attached to this Order and lists the names and addresses of the parties who must be served in this case. The attached certificate of service constitutes a model which you may follow in preparing your own certificate of service. The Board may reject a submission that does not have a certificate of service. If you register as an e-filer, a certificate of service will be prepared automatically as part of the pleading you file online.

Pleadings Submitted in Hardcopy

When a pleading submitted by postal mail, fax, personal or commercial delivery includes three or more documentary attachments, the attachments should be "tabbed." A "tab" is a dividing page, a portion of which extends beyond the normal 8½ inch width of the paper, and which contains a description or label. When such a pleading is submitted via fax, each page of the attachments should be sequentially numbered and the attachments should be preceded by a table of contents describing each attachment and indicating the page on which it starts. Special instructions for preparing the Agency's response to the appeal under 5 C.F.R. § 1201.25 are included below.

All documents within a tab must have new page numbers (by hand if necessary) so that each document, within each tab, is re-numbered, from the first

page of the first document to the last page of the last document. This will allow for specific page references to the record, by tab and by page number within a tab. The new page numbers should be placed in the bottom right-hand margin of each page. If some pages within a tab are already numbered in the bottom-right margin, parties should place the new page numbers just to the right of the original page numbers.

Pleadings Submitted via e-Appeal Online

Electronic bookmarks and tables of contents take the place of physical “Tabs” in pleadings filed by traditional means. When an e-filed pleading contains three or more electronic supporting documents, each attachment must be identified, either by filling out the table for such attachments at e-Appeal Online, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. 5 C.F.R. § 1201.14(g)(3).

Regardless of whether it is uploaded or entered online, each pleading will be assembled into a single PDF document, which will include all electronic attachments, and will contain sequential page numbers. E-filers need not manually paginate their pleadings and attachments.

Pleadings are subject to a 10 megabyte size limit. To avoid exceeding this limit, e-filers are encouraged to scan documents in black and white and to adjust settings to limit file size. If what would otherwise be a single pleading must be broken into multiple pleadings because of the size limit, each should contain the same descriptive title, together with a “Part” designation in parentheses, e.g., Agency File (Part A), Agency File (Part B), etc.

For more information about e-filing, read the Board’s regulation at 5 C.F.R. § 1201.14, or visit e-Appeal Online (<https://e-appeal.mspb.gov/>) and click the link entitled “How does Electronic Filing Work?”

REGULATIONS

For more detailed information on these procedures, you should refer to the Board's regulations in 5 C.F.R. Part 1201. The regulations are available for review in agency personnel offices, law libraries, some large public libraries, and at the Board's website (<http://www.mspb.gov>).

NOTICE TO AGENCY/INTERVENOR

AGENCY RESPONSE

I **ORDER** the agency to read, comply with, and/or respond to any and all portions of the "Notice to Appellant" which are applicable to it. I also **ORDER** the agency to serve me, appellant, and appellant's representative (if applicable), with the material listed on the enclosed schedule and any other information required by 5 C.F.R. § 1201.25 within 20 calendar days of the date of this Order.



DESIGNATION OF REPRESENTATIVE

The agency must designate a representative. I **ORDER** the agency to file the name, address, and telephone number of the person authorized to act for the agency on the enclosed "Designation of Representative" form within 20 calendar days of the date of this Order. The representative must have authority to settle this appeal or be able to directly reach someone with that authority on short notice.

NOTICE TO THE PARTIES

SETTLEMENT

The Board strongly encourages the settlement of the appeals that come before it. Even where discussions between the parties do not result in settlement, they often help to define the issues and assist the parties in agreeing to stipulations. I therefore urge the parties to contact each other to discuss the possibility of settlement as early in this proceeding as possible. I am available to assist in the discussions. The parties should discuss concrete, specific settlement

proposals unless either party concludes in good faith that no compromise of any kind is possible. They must also be prepared to discuss with me the status of any settlement discussions. See 5 C.F.R. § 1201.41(b)(12) (the administrative judge is authorized to “[h]old prehearing conferences for the settlement and simplification of issues”).

If the parties agree to settle this appeal, and to enter the agreement into the record, the Board will retain the authority to enforce its terms if the Board has jurisdiction over the appeal. However, if they do not enter the agreement into the record, or if jurisdiction has not been determined, the Board will have no authority to enforce the agreement.

FOR THE BOARD:

[Redacted]
Administrative Judge
[Redacted] Regional Office
[Redacted]
Phone: [Redacted]
Fax: [Redacted]
V/TDD [Redacted]

Enclosures

MSPB SCHEDULE 3443 REQUIREMENTS FOR AGENCY FILE

Insofar as the content of the Agency File is concerned, the instructions that follow apply in all cases. Insofar as the instructions refer to tabbing and numbering of Agency File materials, they apply only to instances in which the Agency File is submitted via postal mail, or personal or commercial delivery. **When the Agency File is submitted via e-Appeal Online, the requirements of 5 C.F.R. § 1201.14(g)(3) apply.** When the Agency File is submitted via fax, each page of the attachments should be sequentially numbered and the attachments should be preceded by a table of contents describing each attachment and indicating the page on which it starts.

General Information



All evidence submitted will be disclosed to the parties. Therefore, no classified document can be received in evidence unless accompanied by a statement that it is declassified and that full disclosure is permitted.

Materials Required to be Tabbed, with Pages Re-numbered within a Tab, and Filed

1. A narrative response to the appeal and all material issues raised by appellant.

[Indicate the agency's position regarding the Board's jurisdiction over this appeal. Specify whether there are material facts in dispute which may require a hearing, assuming appellant has requested one.]

2. With the exception of Postal Service cases, a statement whether appellant is covered by a collective bargaining agreement and whether that agreement covers the action being appealed.

[If so, provide a copy of the applicable provision(s) and state whether appellant has grieved the action. If appellant has, submit a copy of the grievance and indicate the date it was filed.]

3. A statement whether appellant has filed a formal complaint of discrimination on the action being appealed.

[If so, indicate its current status, provide a copy of the complaint, indicate the date the complaint was filed, and the agency's decision, if any.]

4. Copies of all other documents, which are relevant and material to this appeal.

[Provide a copy of the SF-50 (or other notification of personnel action) documenting appellant's original appointment. Also provide,

if they exist, copies of the agency decision and the SF-50 regarding the action being appealed.]

Instructions for Assembly of the Agency File

The agency's file must be organized as described below. Failure to do so may result in rejection of the submission.

All documents submitted in hardcopy must be bound at the top (not the side) with a two-hole fastening device. The holes must be 2 and 3/4 inches apart. A cover is not required.

Documents in item 4 must be arranged by date with the most recent on top and the oldest on bottom. Documents must be individually tabbed using the letters of the alphabet, e.g., 4a, 4b, 4c, etc.

All documents within a tab must have new page numbers (by hand if necessary) so that each document, within each tab, is re-numbered, from the first page of the first document to the last page of the last document. This will allow for specific page references to the record, by tab and by page number within a tab. The new page numbers should be placed in the bottom right-hand margin of each page. If some pages within a tab are already numbered in the bottom-right margin, parties should place the new page numbers just to the right of the original page numbers.

A Table of Contents is placed on top of the tabbed documents. Use the following headings for the Table:

Location Date Document Description Source

[The "location" is the tab number; the "date" is the date of the document; the "document description" fully identifies the document; and the "source" indicates the individual or office, who authored or otherwise produced the document.]

A completed Designation of Agency Representative form must be placed on top of the Table, if not previously submitted. A transmittal letter, identifying the case by name and docket number, must be placed on top of the Designation.

A Certificate of Service must be inserted on the bottom of the tabbed file.



Merit Systems Protection Board

-- Designation of Representative --

Please print or type:

Appellant's Name: _____

Agency Name: **Department of Justice**

Docket Number: _____

The parties may use this form or a similar document to designate any organization or individual to represent them before the Board. (Appellants representing themselves do not need to submit a designation of representative). The choice of representative must not result in a conflict of interest for the organization or person chosen. Each party must make all arrangements for representation. **The Board does not designate a representative for any party to this appeal.** The representative(s) must be able to proceed promptly. Normally, continuances or extensions of time **will not be granted** if the appellant or agency delays in seeking or arranging representation, if the representative cannot proceed in a timely manner, or for changes in representative(s). Despite the designation of representative, **the parties remain personally responsible for prosecuting the case in a timely manner.**

The purpose of the representative is to assist and counsel the appellant or agency in the preparation, presentation, or defense of the appeal. The representative appears with, or for, the party at hearings, settlement negotiations, or other proceedings before the Board. **The representative has the authority to settle the appeal. Any limitation on the representative's settlement authority must be filed in writing with the Board. By designating a representative, you agree to allow the Board to disclose to your representative all information concerning the appeal.**

DESIGNATION: The individual or organization named below is hereby designated -- to represent the
Appellant Agency

in connection with this appeal before the Board. **This individual or organization is to be served copies of all communications concerning this appeal from the Board or from the other party(ies).** The address and telephone number of the representative provided below must be correct and specific to ensure that mail or other communications are received promptly. Any change or cancellation of this designation **must be provided, in writing,** to the Board, and to the other party(ies).

SERVICE METHOD: US Mail FAX E-Mail

Name of Representative: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Phone Number: _____ FAX: _____ Other(E-Mail, etc.): _____

Signature of Appellant or Agency Authorizing Official: _____ Date: _____

Representative's Signature: _____ Date: _____

RETURN THIS FORM TO THE BOARD OFFICE WHERE THE APPEAL IS PENDING. PROVIDE A COPY TO THE OTHER PARTY(IES). BOARD REGULATIONS REQUIRE THAT COPIES OF ALL COMMUNICATIONS MUST BE SERVED ON THE OTHER PARTY(IES).

PRIVACY ACT STATEMENT



During the course of processing the appeal, which you or your representative has filed, it is necessary to collect personal information that is relevant and necessary to reaching a decision in your case. The Merit Systems Protection Board collects this information in order to process appeals under one or more of the following authorities: Title 5 U.S.C. §§ 1302, 1221, 3301, 3302, 4302, 5115, 5338, 5345, 5346, 7151, 7154, 7301, 7501, 7512, 7701, and 8347; as well as Executive Orders 9803, 11222, 11478, 11491, and 11787. Since your appeal is a voluntary action, you are not required to provide any personal information to the Merit Systems Protection Board in connection with your appeal. However, failure to provide all information essential to reaching a decision in your case could result in the cancellation of your appeal.

[REDACTED]

[REDACTED]

[REDACTED] Some information about the appeal is used in depersonalized form as a database for program statistics. If there is a need to disclose information from your appeal file for reasons other than these and those cited in the Privacy Act (Title 5, United States Code, 552 (a), (b), your prior written consent will be solicited.

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

NOTICE

SUSPENDED APPEAL PROCEDURE

Both the appellant and the agency are entitled to have this appeal adjudicated as quickly as possible, usually within 120 days (see 5 U.S.C. §7702(a)(1)). In some situations, however, the parties may conclude that they need more time than is routinely provided for discovery or settlement discussions. Therefore, should the agency and the appellant jointly agree that additional time is necessary to pursue discovery or settlement, additional time may be granted at the discretion of the presiding administrative judge for a period up to 30 days, and case processing will be **SUSPENDED**. In lieu of participating in a joint request, either party may submit a unilateral request for additional time of up to 30 days to pursue discovery. Such unilateral requests may be granted for good cause shown at the discretion of the administrative judge.

A request that the adjudication of this appeal be suspended must be filed with the administrative judge within 45 days of the date of this order (or within 7 days of the appellant's receipt of the agency file, whichever date is later). An untimely request may be granted at the discretion of the judge. No case may be suspended for more than a total of 30 days under these procedures.

Should the parties contact the administrative judge during the period of suspension for assistance relative to discovery or settlement, and if the administrative judge's involvement is likely to be extensive, the judge will notify the parties that it will be necessary to take the case off suspension and return it to standard processing.

NOTICE

ALTERNATIVE DISPUTE RESOLUTION

The Merit Systems Protection Board (MSPB), in an effort to provide alternatives to the regulatory adjudication process, offers the parties to the appeals brought to the Board several dispute resolution options. This notice will familiarize you with those possibilities so that you can consider them and discuss them with the Administrative Judge before you decide how to proceed. All options are cost free. Settling your case with the assistance of the professional who will guide the parties through the process offers your best chance of reaching a resolution of the appeal that benefits both parties. Accordingly, the MSPB urges you to be open to the possibility of such a resolution at all times.

THE MEDIATION APPEALS PROGRAM

The Mediation Appeals Program (MAP) is a voluntary, confidential process in which the parties meet with a trained mediator in a non-litigious, non-adversarial setting. Even more than the other settlement options available, MAP encourages the parties to approach settlement with an open mind and to consider possible resolutions that may not mirror a potential outcome of the adjudication process. Both parties must agree to mediation, and the MSPB must concur that it could be beneficial, given the circumstances of the case and of the parties. Because the appeal will be outside the normal adjudication process while it is in MAP, your agreement to mediate requires that you be ready to proceed to mediation without delay, and that you be willing to finalize any settlement you may reach expeditiously. Cases should normally not spend more than 30 days in the program.

The mediator will meet with the parties and facilitate discussions between them in an effort to find common grounds on which to resolve the appeal. In some circumstances, mediations may be done by video-conference or by telephone, but they are usually done in person. If the efforts to resolve the appeal do not result in a settlement, the mediator will have no input into the adjudication of the appeal. Nonetheless, the parties are likely to return to adjudication with a better understanding of what is important to them and to the other party, which often helps them reach a settlement during the adjudicatory process. A brochure that further explains MAP is enclosed for your review or is available on-line at www.mspb.gov/map. If you have other questions specific to the mediation option, in addition to discussing them with the Administrative Judge, you may call the MAP Regional Operations Coordinator, Cynthia Boston, at (202) 653-6772, ext. 1057, or e-mail at regionaloperations@mspb.gov.

THE SETTLEMENT JUDGE PROGRAM

A Settlement Judge is an Administrative Judge like the one assigned to your appeal, but he or she is assigned specifically and solely to discuss settlement options with the parties. Like the Administrative Judge assigned to your appeal, a Settlement Judge is skilled at evaluating the parties' positions and offering sound advice on the strengths and weaknesses of each party's position. A Settlement Judge plays no part in the processes and procedures through which an appeal goes during the course of the traditional adjudication process, and has no input into the decision if the appeal does not settle. For this reason, some parties feel more open to frank discussion of their appeals and their settlement goals with a Settlement Judge.

Unlike MAP, both parties do not have to request the services of a Settlement Judge. However, there must be a genuine willingness by both parties to explore settlement before one will be appointed. Accordingly, if, after initial settlement discussions between the parties and with the assigned Administrative Judge, a party believes the assignment of a Settlement Judge would be useful, a request may be made to the Administrative Judge or the Regional Director. If the Regional Director or Chief Administrative Judge concurs, a Settlement Judge will be assigned.

THE MSPB SETTLEMENT PROGRAM

The Administrative Judge assigned to decide your appeal will explore the possibility of settlement with the parties to almost all appeals. Thus, you need not make any election if this is the option you prefer. Through the documents filed by the parties and the evidence submitted, the Administrative Judge becomes thoroughly familiar with the case and is in the best position to discuss the strengths and weaknesses of the appeal, as well as to evaluate not just the likelihood of success but also the validity of settlement offers made by the parties, and to suggest proposals for their consideration. Administrative Judges often spend considerable time working with the parties to help them craft mutually beneficial settlements in lieu of adjudication, in which it is more likely that there will be a "winning" and a "losing" side. Any settlement discussions with the Administrative Judge, however, have no effect on the ultimate outcome of the appeal if the case does not settle.

ELECTRONIC FILING AT THE MSPB

Parties and representatives who register as e-filers can file virtually any type of pleading, including a new appeal, in electronic form. Those who register as e-filers will receive documents issued by the Board, and pleadings filed by other e-filers, in electronic form. Registration and filing are done via the Board's e-Appeal site on the Internet: (<https://e-appeal.mspb.gov>). The Board's electronic filing application includes the following features:

- Both the Board and e-filers will receive electronic documents on the same day they are submitted.
- E-filers need not disclose their e-mail addresses to anyone except the MSPB.
- E-filers can either enter their pleadings online or upload them as electronic files.
- Documents can be submitted in any common electronic format, including word-processing and image formats (electronic files created by scanning paper documents).
- Should they choose to do so, e-filers will be able to submit their pleadings and supporting attachments in the form of declarations made under penalty of perjury. The Board gives greater evidentiary weight to statements in this form than to unsworn statements.
- Regardless of whether it is uploaded or entered online, each pleading will be assembled into a single PDF document, which will include all electronic attachments, and which will contain sequential page numbers. Pagination will enable everyone involved to make specific citations to the record.
- If unable to complete a pleading while online, an e-filer will be able to save his or her work and complete it during a later session.
- E-filers will be provided a confirmation of electronic filing, and will be able to print or download a copy of the assembled pleading as a PDF document.
- Service of pleadings on other e-filers will be automated.
- If you elect to be served electronically, MSPB will e-mail you notification when documents are posted to the e-Appeal repository. You will need to download or read the documents from the repository. If your mail service has spam filters, please ensure that mail from @mspb.gov is approved or check your junk folder routinely.
- When a party who is an individual is represented, the party and the representative can separately decide whether to register for e-filing. If only the representative registers for e-filing, the party will continue to receive documents by regular mail.
- Although registration as an e-filer permits participants to file pleadings electronically, they may file any pleading, or portion of a pleading, by non-electronic means.
- Registration as an e-filer can be withdrawn at any time, but while in effect means that the individual consents to accept electronic service of all documents issued by the Board and all pleadings submitted by other e-filers.

For further information about electronic filing, please read the Board's regulation at 5 C.F.R. § 1201.14, or visit the Board's regular website (<http://www.mspb.gov>), or the Board's e-Appeal site (<https://e-appeal.mspb.gov>).

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail



Agency Representative

Facsimile

Employment Law Unit
Department of Justice
Office of General Counsel
Federal Bureau of Investigations HQ
935 Pennsylvania Avenue, NW, Room PA-400
Washington, DC 20535

September 29, 2009

(Date)

Paralegal Specialist