

NO. 2021-1116

BRIEF FOR AMICUS CURIAE MERIT SYSTEMS PROTECTION BOARD

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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DOREEN CROSS,  
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Respondent.

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PETITION FOR REVIEW OF A DECISION OF THE  
MERIT SYSTEMS PROTECTION BOARD IN NO. AT-0843-19-0760-I-1

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DATE: April 8, 2021

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**STATEMENT OF IDENTITY OF AMICUS**

Pursuant to Rule 29(a)(4)(D) of the Federal Rules of Appellate Procedure, amicus curiae Merit Systems Protection Board (“MSPB” or “Board”) provides this statement of its identity, its interest in this case, and its authority to file this amicus curiae brief. The Board is an independent, quasi-judicial agency in the executive branch established by the Civil Service Reform Act of 1978, Public Law No. 95-454, codified at 5 U.S.C. § 1101, et seq. The Board adjudicated the petitioner’s survivor annuity appeal pursuant to its authority at 5 U.S.C. § 8461(e).

In an Order dated March 2, 2021, the Court invited the MSPB to participate in this case to address the jurisdictional issues related to the timeliness of the petitioner’s petition for judicial review. ECF No. 8. The Board files this brief to respond to the issues raised by the Court in its Order and to explain how the Board has interpreted its own regulations. The Board does not take a position on the other issues before the Court.

The MSPB files this amicus curiae brief pursuant to Federal Rule of Appellate Procedure 29(a)(2), which permits an agency of the United States to file an amicus brief without the consent of the parties or leave of court.

**JURISDICTIONAL STATEMENT**

The Court has jurisdiction over this appeal pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9). As discussed *infra*, the petitioner's appeal was filed within the 60-day time limit set by 5 U.S.C. § 7703(b)(1)(A).

NO. 2021-1116

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OFFICE OF PERSONNEL MANAGEMENT,  
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PETITION FOR REVIEW OF A DECISION OF THE  
MERIT SYSTEMS PROTECTION BOARD IN NO. AT-0843-19-0760-I-1

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**STATEMENT OF THE ISSUE**

Whether an extension of time granted by the Clerk of the Board for filing an administrative petition for review extends the finality date of the initial decision.

**STATEMENT OF THE CASE**

I. Nature of the Case

Petitioner, Doreen Cross, seeks review of a final MSPB decision that affirmed the denial of survivor benefits by the Office of Personnel Management (“OPM”) and ordered OPM to notify Ms. Cross of her right to request waiver of collection of her overpayment. Cross v. Office of Pers. Mgmt., MSPB Docket No. AT-0843-19-0760-I-1 (Initial Dec., March 2, 2020, final on Sept. 3, 2020); Appx1-14.<sup>1</sup>

II. Statement of Facts and Disposition Below

On September 8, 2019, Ms. Cross appealed to the Board from an OPM determination that she was not entitled to survivor annuity benefits and that OPM would seek to collect \$1,241.73 in benefits that had been improperly paid to her. Appx1. After holding a hearing, the MSPB administrative judge issued an initial decision on March 2, 2020 that determined that Ms. Cross had not proven her entitlement to a former spouse survivor annuity. Appx1-14. The administrative judge therefore affirmed OPM’s decision denying survivor benefits. Appx5-6. With respect to the overpayment, the

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<sup>1</sup> “Appx\_\_” refers to pages of the joint appendix to be filed by the petitioner.



administrative judge ordered OPM to provide Ms. Cross with notice of her waiver rights before any collection efforts are made. Appx6. The initial decision included a notice that the decision would “become final on April 6, 2020, unless a petition for review is filed [with the Board] by that date.” Id.

On April 6, 2020, Ms. Cross filed the first of five requests for 30-day extensions of time in which to file an administrative petition for review with the Board. Appx21-22. See also Appx25-26, Appx30-31, Appx35-36, and Appx40-41. All five extensions were granted by the Acting Clerk of the Board for a total of 150 days. See Appx23, Appx27-28, Appx32-33, Appx37-38, and Appx42-43. The fifth and final extension of time was granted in an order issued by the Acting Clerk on August 5, 2020. Appx42-43. The order stated that Ms. Cross may file her petition for review on or before September 3, 2020. Appx42. The order further stated:

If a petition is not filed by September 3, 2020, the administrative judge’s March 2, 2020 initial decision will remain the final decision of the Board and any further right of appeal must then be exercised in accordance with the provisions as stated in that initial decision.

Appx42-43.

Ms. Cross did not file a petition for review with the Board by September 3, 2020. Instead, she filed a petition seeking this Court’s review on October 25, 2020. ECF No. 1. On March 2, 2021, the Court issued an

Order that raised the issue of whether the 60-day filing period for seeking judicial review began to run from April 6, 2020, the finality date stated in the initial decision, or from September 3, 2020, the last day on which the petitioner could have timely filed a Board petition for review pursuant to extensions granted by the Acting Clerk of the Board. ECF No. 8. In addition to the parties, the Court invited the MSPB to address this issue. Id.

### **SUMMARY OF ARGUMENT**

Ms. Cross filed her petition for judicial review within the 60-day statutory time limits. When the Acting Clerk of the Board granted Ms. Cross' requests for extensions of time to file a Board petition for review, those extensions moved the finality date to the last day upon which Ms. Cross could timely file a Board petition for review. This view is supported by a review of Board regulations and Board precedent interpreting those regulations.

By statute, the Board has discretionary authority to grant extensions of time. Pursuant to that authority, the Board promulgated a regulation that permits a party to file a motion with the Clerk of the Board in order to request an extension of time for good cause shown. The Board has delegated authority to the Clerk of the Board to rule on such motions. In a decision interpreting its own regulations, the Board held that the date when

an extended time period for filing a petition for review has expired becomes the finality date if no petition for review has been filed. The Board's precedent is entitled to deference because it is within the bounds of reasonable interpretation.

In this case, Ms. Cross requested multiple extensions to file a petition for review with the Board. When Ms. Cross did not file a Board petition for review in compliance with the Clerk's fifth and final extension order, the initial decision became final on that date and the time for filing an appeal to this Court began to run. She timely filed an appeal with this Court within 60 days of that date.

### **ARGUMENT**

#### **I. THE CLERK OF THE BOARD HAS AUTHORITY TO GRANT AN EXTENSION OF TIME TO FILE A PETITION FOR REVIEW WITH THE BOARD**

As the Court noted in its March 2, 2021 order, the Board has discretionary authority to extend the time for filing a Board petition for review pursuant to 5 U.S.C. § 7701(e)(1). That provision states, in subparagraph A, that a party to an MSPB appeal or the Director of OPM may petition the Board for review within 30 days after the receipt of the initial decision. The statute further provides that the "Board, for good cause

shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph.” Id.

The Board interpreted that statutory authority when it promulgated 5 C.F.R. § 1201.114(f), which provides:

(f) Extension of time to file. The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

5 C.F.R. § 1201.114(f).<sup>2</sup> The Board has delegated its authority to grant extensions of time to the Clerk of the Board. See MSPB Organization Functions and Delegation of Authority, § 2.3.5.1 (April 28, 2011).<sup>3</sup>

Pursuant to that delegated authority, the Acting Clerk of the Board properly

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<sup>2</sup> 5 C.F.R. § 1201.114 is reproduced in the addendum to this brief at ADD2-4.

<sup>3</sup> The relevant excerpt is reproduced in the addendum to this brief at ADD6-7. The document is available in its entirety on the MSPB website at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1279407&version=1284518&application=ACROBAT>.

granted Ms. Cross' motions requesting extensions of time to file a petition for review with the Board.

## II. AN EXTENSION OF TIME TO FILE A BOARD PETITION FOR REVIEW EXTENDS THE FINALITY DATE OF THE INITIAL DECISION

In its March 2, 2021 Order, the Court noted two possible interpretations of the Acting Clerk's order granting Ms. Cross an extension of time to September 3, 2020. The order could be viewed as not changing the finality date in the initial decision and therefore not tolling the time period for filing in this Court. Given that the finality date in the initial decision was April 6, 2020, under that view Ms. Cross' appeal to this Court would be untimely and the Court would not have jurisdiction. See Monzo v. Dep't of Transp., 735 F.2d 1335, 1336 (Fed. Cir. 1984) (The time limit for appealing a final MSPB decision or order is statutory and jurisdictional and cannot be waived). On the other hand, the Acting Clerk's order could be construed as making September 3, 2020 the finality date if Ms. Cross did not file a timely Board petition for review by that date. As discussed below, the Board has adopted the latter interpretation in its precedent construing its own regulations.

A. The Board's Regulation on Finality Is Silent On This Issue

Pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9), the Court has jurisdiction to review “a final order or final decision” of the Board. See Weed v. Soc. Sec. Admin., 571 F.3d 1359, 1361 (Fed. Cir. 2009). Under the Board's regulations, a final order or decision results only when the Board or administrative judge disposes of the entire action. Weed, 571 F.3d at 1362. This occurs when: (a) an initial decision becomes final 35 days after issuance;<sup>4</sup> (b) a party files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record; (c) a party files a petition for review which is denied by the Board; or (d) a party files a petition for review which is granted by the Board, or the Board reopens or dismisses a case, and the Board's decision disposes of the entire action. See 5 C.F.R. § 1201.113.<sup>5</sup> The Board's regulation does not explicitly address the situation here, where the petitioner, before the initial decision becomes final, is granted an extension of time to file a petition for review with the Board but does not file the petition within the extension period. See Greek v. U.S. Postal Serv., 84 M.S.P.R. 368, 370-71 (1999)

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<sup>4</sup> The 35-day period after which an initial decision becomes final correlates with the 35-day time limit in the Board's regulations for filing a petition for review. See 5 C.F.R. §§ 1201.111(b), 1201.114(e).

<sup>5</sup> 5 C.F.R. § 1201.113 is reproduced in the addendum to this brief at ADD1.

(noting that the Board’s regulations do not specify the finality date for an initial decision after an extension for filing a petition for review has been granted but such a petition is not ultimately filed).

B. The Board’s Interpretation of Its Regulation Is Within The Bounds of Reasonableness

Given that the Board’s regulation is “genuinely ambiguous” – indeed, § 1201.113 is silent on the issue raised by the Court – the Board’s construction of its own regulation is entitled to deference so long as it is within the bounds of reasonable interpretation. Kisor v. Wilkie, 139 S.Ct. 2400, 2415-2416 (2019). See also Roberto v. Dep’t of the Navy, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (holding that if a regulation is silent or ambiguous, a court then gives deference to the agency’s own interpretation).

The Board construed 5 C.F.R. § 1201.113(c) in Greek and concluded that “if an extension [to file a petition for review] is granted, the initial decision will not become final 35 days after issuance.” 84 M.S.P.R. at 370.<sup>6</sup> In Greek, the MSPB administrative judge issued an initial decision reversing the agency’s constructive suspension action and sustaining the appellant’s affirmative defenses. Id. at 368. The initial decision included a notice informing the parties that the decision would become final after 35 days

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<sup>6</sup> The Board’s decision in Greek is reproduced in the addendum to this brief at ADD8-15.

unless a party filed a petition for review with the Board or the Board reopened the case on its own motion. Id. at 370. The notice also informed Mr. Greek that he could file a motion for attorney fees and costs no later than 60 days after the initial decision became final. Id.

Prior to the finality date in the initial decision, the agency requested a 25-day extension of time to file a petition for review. Id. The Clerk of the Board granted the extension request. Id. The Clerk's order stated that if no petition were filed by the date of the extension, the "initial decision will remain the final decision of the Board and any further right of appeal must then be exercised in accordance with the provisions as stated in that initial decision." Id. The agency did not file a petition for review with the Board. Id.

Subsequently, Mr. Greek filed a motion for attorney fees and costs. Id. The agency responded that the motion should be dismissed as untimely because it was not filed within 60 days of the finality date in the initial decision. Id. In his reply, Mr. Greek asserted that the motion for fees was timely because the extension granted by the Clerk of the Board effectively modified the initial decision by extending the dates of compliance with that decision for both the agency and the appellant. Id. The administrative judge granted the agency's motion to dismiss. Id.



On review, the Board concluded that the most reasonable interpretation of its regulations under such circumstances is that the finality date is the date when an extended time period for filing a petition for review has actually expired. Id. at 371. To find otherwise, the Board stated, would mean that “a 61-day extension granted to an agency by the Clerk’s Office would deprive an appellant of any opportunity to file a timely motion for fees, and seriously reduce an appellant’s statutory period for filing a timely judicial appeal.” Id. (emphasis added in original). Because the Board’s interpretation of its own regulations is “within the bounds of reasonableness,” it is entitled to deference. Kisor, 139 S.Ct. at 2415-2416. Furthermore, the Board’s construction is not advanced as an ad hoc or convenient litigating position. See id. at 2417-18.

Moreover, the Board’s decision in Greek is consistent with the Court’s reasoning in Howell v. Merit Sys. Prot. Bd., 785 F.2d 282 (Fed. Cir. 1986). In Howell, the petitioner untimely filed a petition for review with the Board. Id. at 283. The Board dismissed the petition as untimely after finding that the petitioner had not shown good cause for waiving the time limits. Id. The Board’s order included a notice of appeal rights that erroneously stated that the initial decision would become final five days from the date of the order. Id. The Court held that, even if erroneous, the Board’s order had

extended the time for filing an appeal to the Court by changing the finality date of the initial decision. Id. at 284. Thus, this Court has recognized that by granting an extension, the Board may change the finality date which, in turn, affects when the time runs for filing an appeal to this Court under 5 U.S.C. § 7703(b).

Here, the Acting Clerk's order extending the time for filing a petition for review effectively changed the finality date of the initial decision. Ms. Cross' time for filing to this Court ran from the last date she could timely file a Board petition for review, i.e., September 3, 2020. Given that she filed her appeal to this Court less than 60 days from that date, she has complied with the time limits of 5 U.S.C. § 7703(b)(1)(A).

**CONCLUSION**

For the reasons set forth above, the Court should hold that the finality date of the initial decision was extended to September 3, 2020, the last day on which the petitioner could have timely filed a Board petition for review pursuant to extensions granted by the Acting Clerk of the Board.

Respectfully submitted,

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/s/ Jeffrey A. Gauger

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DATE: April 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the BRIEF FOR AMICUS CURIAE MERIT SYSTEMS PROTECTION BOARD was filed and served upon the parties through the appellate ECF/CM system.

DATE: April 8, 2021

/s/ Naomi D. Williams  
Naomi D. Williams  
Paralegal

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Circuit Rules 29(b) and 32(b), I hereby certify that the text of the electronic version of the foregoing brief is identical to the paper copies, has been scanned by Symantec Endpoint Version 12.1 and found to be virus-free, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 2,549 words as determined by the word counting feature of Microsoft Word, and therefore complies with Federal Circuit Rules 29(b) and 32(b).

/s/ Jeffrey A. Gauger  
JEFFREY A. GAUGER

**ADDENDUM**

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**§ 1201.112**

the initial decision and remaining in effect until the date of the final order of the Board on any petition for review, unless the judge determines that the granting of interim relief is not appropriate. The agency may decline to return the appellant to his or her place of employment if it determines that the return or presence of the appellant will be unduly disruptive to the work environment. However, pay and benefits must be provided.

(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.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 17045, Apr. 9, 1997; 63 FR 41179, Aug. 3, 1998; 64 FR 27900, May 24, 1999; 77 FR 62367, Oct. 12, 2012]

**§ 1201.112 Jurisdiction of judge.**

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

(1) Correct the transcript; when one is obtained;

(2) Rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages under subpart H of this part;

(3) Process any petition for enforcement filed under subpart F of this part;

(4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review, even if the settlement agreement is not received until after the date when the initial decision becomes final under § 1201.113 of this part.

(b) Nothing in this section affects the time limits prescribed in § 1201.113 regarding the finality of an initial deci-

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sion or the time allowed for filing a petition for review.

[59 FR 22125, Apr. 29, 1994, as amended at 62 FR 17045, Apr. 9, 1997; 70 FR 30609, May 27, 2005; 77 FR 62368, Oct. 12, 2012; 78 FR 23458, Apr. 19, 2013]

**§ 1201.113 Finality of decision.**

The initial decision of the judge will become the Board's final decision 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become the Board's final decision if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record.

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

(d) *Extensions.* The Board may extend the time limit for filing a petition for good cause shown as specified in § 1201.114 of this part.

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

(f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 59992, Nov. 6, 1997; 77 FR 62368, Oct. 12, 2012; 78 FR 39545, July 2, 2013]



**Merit Systems Protection Board**

**§ 1201.114**

**Subpart C—Petitions for Review of Initial Decisions**

**§ 1201.114 Petition and cross petition for review—content and procedure.**

(a) *Pleadings allowed.* Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review.

(1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.

(2) A cross petition for review has the same meaning as a petition for review but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review.

(3) A response to a petition for review and a cross petition for review may be contained in a single pleading.

(4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new allegations of error.

(5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading.

(b) *Contents of petition or cross petition for review.* A petition or cross petition for review states a party's objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation of why the evidence or argument was not presented before the record below closed (see § 1201.58 of this part). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board.

(c) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or

the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition or cross petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(d) *Place for filing.* All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 1201.14 of this part.

(e) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3) of this part, pertaining to an appellant's receipt of a final agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition or cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review.

(f) *Extension of time to file.* The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or before the date on which the petition or other

## § 1201.114

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pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(g) *Late filings.* Any pleading described in paragraph (a) of this section that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (f) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: The reasons for failing to request an extension before the deadline for the submission, and a specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (e) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(h) *Length limitations.* A petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words,

whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

(i) *Intervention.* (1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (i)(2)(ii) of this section. The notice of intervention is timely filed if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an

**Merit Systems Protection Board****§ 1201.115**

appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, organization, or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization, or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(j) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of §1201.26.

(k) *Closing the record.* The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless it is new and material as defined in §1201.115(d) and the party submitting it shows that the evidence or argument was not readily available before the record closed.

(l) *Rejection for failure to comply.* The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for re-submission. Any deadlines affected by the rejection will be addressed in the rejection letter.

[77 FR 62368, Oct. 12, 2012, as amended at 78 FR 23458, Apr. 19, 2013]

**§1201.115 Criteria for granting petition or cross petition for review.**

The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact.

(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

[77 FR 62369, Oct. 12, 2012]

## **2.3 ADJUDICATION DELEGATIONS**

### **2.3.1 Purpose And Overview**

The U.S. Merit Systems Protection Board exercises adjudicatory authorities that are vested by law in the three-member Board and, in certain instances, in the individual Board Members. The Board and the individual Board Members may delegate authorities as permitted by law. This section documents such delegations.

### **2.3.2 Adjudicatory Authorities And Delegations**

The Board's general adjudicatory authority is set forth at 5 U.S.C. § 1204(a). Additional adjudicatory authorities with respect to specific kinds of cases are set forth in other provisions of Title 5, as well as but not limited to, provisions in Title 3 (Presidential and Executive Office Accountability Act cases) and Title 38 (Uniformed Services Employment and Reemployment Rights Act cases). The Board's delegations of its adjudicatory authorities may be effected through the issuance of regulations or internal orders, which are documented in this Manual.

#### **2.3.2.1 Adjudicatory Authorities – Board or Chairman**

1. The Board is authorized to hear and adjudicate, or to provide for the hearing and adjudication of, all matters within the jurisdiction of the Board under any law, rule, or regulation and to take final action on such matters. 5 U.S.C. § 1204(a)(1).
2. The Board is authorized to order any Federal agency or employee to comply with its final decisions and orders and to enforce compliance with such orders. 5 U.S.C. § 1204(a)(2).
3. The Board is authorized to review OPM regulations to determine whether such OPM regulation is invalid on its face because it would require an employee to commit a prohibited personnel practice, or the OPM regulation is invalidly implemented by an agency such that its implementation requires an employee to commit a prohibited personnel practice. If the Board determines that an OPM regulation is invalid on its face or invalidly implemented, the Board has the authority to require the agency to cease compliance with the OPM regulation and to correct any invalid implementation of the regulation. 5 U.S.C. §§ 1204(a)(4) and (f).
4. The Board is authorized to provide for an informal hearing requested by a career SES member whose removal has been proposed under 5 U.S.C. § 3592(a).
5. The Board is authorized to prescribe such regulations as may be necessary for the performance of its functions. 5 U.S.C. § 1204(h), 5 U.S.C. § 7701(k), 5 U.S.C. §§ 3330a-3330b, and 38 U.S.C. § 4331(b)(2)(A).
6. Except as provided in section 518 of Title 28 of the United States Code, relating to litigation before the Supreme Court, the Chairman shall designate attorneys to appear for MSPB, and represent MSPB, in any civil action brought in connection with any function carried out by

#### 2.3.4.1.2 Actions Against Administrative Law Judges

Agency complaints under 5 U.S.C. § 7521 seeking authorization to take any of the following actions against an ALJ: removal, suspension, reduction in grade, reduction in pay, or furlough of 30 days or less.

#### 2.3.4.1.3 SES Performance-based Removals

Informal hearing under 5 U.S.C. § 3592(a).

#### **2.3.4.2 Delegations of Adjudicatory Authorities to the Administrative Law Judge - Appellate Jurisdiction**

The Board delegates to an ALJ the authority to hear and decide appeals filed by MSPB employees. The Board may, from time to time, assign other cases arising under MSPB's appellate jurisdiction to an ALJ for adjudication.

#### **2.3.4.3 Exercise of Authorities by the Administrative Law Judge**

In hearing and deciding cases under the above, an ALJ may exercise all authorities vested in judges under MSPB's regulations. In addition, an ALJ may exercise authorities vested in judges under adjudicatory pilot projects approved by the Board during the pendency of the project. An ALJ will issue initial decisions, recommended decisions, or orders as provided by MSPB's regulations. The exercise of authorities by ALJs is subject to applicable provisions of law and regulation.

#### **2.3.5 Clerk of the Board**

##### **2.3.5.1 Delegations of Adjudicatory Authorities to the Clerk of the Board**

The Board delegates to the Clerk of the Board the following adjudicatory authorities with respect to cases pending at headquarters:

1. Authority to accept or reject documents;
2. Authority to grant a withdrawal of a petition for review when requested by a petitioner;
3. Authority to deny noncertified interlocutory appeals;
4. Authority to dismiss petitions for review that are moot;
5. Authority to rule on the time for filing pleadings;
6. Authority to rule on motions for consolidation, joinder, or intervention, and other procedural motions;

7. Authority to issue responses to requests for reconsideration or reopening;
8. Authority to issue show cause orders and notices as appropriate;
9. Authority to sign all Board orders, opinions and orders, and decisions, unless otherwise directed by the Board;
10. Authority to issue errata or addenda to Board orders, opinions and orders, and decisions, as necessary;
11. Authority to prepare and/or issue orders ruling on motions to seal records;
12. Authority to prepare and/or issue orders ruling on motions for waiver of costs for transcripts filed after the issuance of the initial decision;
13. Authority to accept subpoenas and other judicial orders, and accept service of legal documents served on MSPB or any of its Board Members or staff in the exercise of any of the statutory or regulatory authorities of MSPB;
14. Authority to execute subpoenas on behalf of the Board as required; and
15. Authority to administer oaths and affirmations at hearings before the Board or any Board Member.

#### **2.3.5.2 Exercise of Authorities by the Clerk of the Board**

The exercise of the authorities in this section by the Clerk of the Board is subject to applicable provisions of law and regulation. In exercising the authorities in this section, the Clerk of the Board will issue appropriate orders on behalf of the Board.

#### **2.3.6 Office of the General Counsel**

##### **2.3.6.1 Delegations of Adjudicatory Authorities to the Office of the General Counsel**

The Chairman of the Board delegates to the Office of the General Counsel the following adjudicatory authority:

1. Authority to appear for MSPB, and represent MSPB, in any civil action brought in connection with any function carried out by MSPB pursuant to Title 5 of the United States Code or as otherwise authorized by law.

The Board delegates to the Office of the General Counsel the following adjudicatory authorities:

2. Authority to draft decisions ordering a Federal agency or employee to comply with any order or decision issued by MSPB and authority to enforce compliance with any such order;

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

RONALD E. GREEK,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
DE-0752-97-0555-A-1

DATE: November 12, 1999

Paul F. Prentiss, Esquire, and Michael F. Polk, Esquire, Timmermier, Gross & Prentiss, Omaha, Nebraska, for the appellant.

JoAnne Jacobsen, Bloomingdale, Illinois, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

Vice Chair Slavet concurs without opinion.

**OPINION AND ORDER**

¶1 The appellant timely petitions for review of an initial decision that dismissed his motion for attorney fees as untimely filed. For the following reasons, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for adjudication of the merits of the appellant's attorney fee motion.

**BACKGROUND**

¶2 The administrative judge (AJ) issued an initial decision reversing the agency's constructive suspension action and sustaining the appellant's affirmative defenses

of harmful error, disability discrimination, and retaliation for filing Occupational Safety & Health Administration and equal employment opportunity complaints. *Greek v. U.S. Postal Service*, MSPB Docket No. DE-0752-97-0555-B-1 (Initial Decision, Dec. 21, 1998). The AJ informed the parties that the initial decision would become final on January 25, 1999, unless a petition for review was filed by that date or the Board reopened the case on its own motion. *Id.* The initial decision also indicated that the appellant could file a motion for attorney fees and costs no later than 60 calendar days after the initial decision became final. *Id.*

¶3 The agency filed a timely request for an extension of time to file a petition for review. The Clerk of the Board granted the request and extended the deadline for filing a petition for review until February 19, 1999. The parties do not dispute that the Clerk's notice also provided that "[i]f a petition for review is not filed by February 19, 1999, the administrative judge's December 21, 1998, initial decision will remain the final decision of the Board and any further right of appeal must then be exercised in accordance with the provisions as stated in that initial decision." The agency did not file a petition for review.

¶4 The appellant filed a March 31, 1999 motion for attorney fees. Attorney Fee File (AFF), Tab 1. The agency moved to dismiss the motion as untimely filed by five days, alleging that the motion had not been filed within sixty days of the date the initial decision became final, i.e., January 25, 1999, as required by 5 C.F.R. § 1201.203(d). AFF, Tab 6. In his response, the appellant asserted that the extension granted by the Clerk of the Board effectively modified the initial decision by changing the dates of compliance with that decision for both the agency and the appellant. AFF, Tab 7. Thus, the appellant asserted that the initial decision did not become final until February 19, 1999, when the agency failed to file a petition for review. *Id.* The appellant contended that the agency should not benefit from an extension of time to file a petition for review by reducing the amount of time he has to prepare a motion for attorney fees. *Id.* The



appellant asserted that if the extension had been for sixty-one days, under the agency's analysis he would have had no time at all to file a timely motion for attorney fees. *Id.* Finally, the appellant asserted that the Clerk's notice did not specifically state when the initial decision would become final. *Id.*

¶5 The AJ dismissed the motion as untimely filed with no showing of good cause for the delay. She found that because the agency did not file a petition for review, and the December 21, 1998 initial decision remained the final decision of the Board, the finality date of January 25, 1999, stated therein, remained applicable. The AJ found that the last day for filing a motion for attorney fees, therefore, was March 26, 1999, and that the appellant's March 31, 1999 motion was five days late. She held that the appellant's interpretation of the Clerk's order was inconsistent with the clear language of the order, which stated that the initial decision would remain the final decision of the Board if the agency did not file a petition for review. The AJ found that the appellant's counsel, based on his over two years of experience before the Board, knew or should have known shortly after February 19, 1999, that the agency had not filed a petition for review. At that time, the AJ found that he still had approximately one month to file a timely attorney fee motion or a request for an extension of time. The AJ concluded that she did not find it credible that the appellant's counsel believed that the Clerk's order had changed the finality date of the initial decision in light of the order's clear statement to the contrary, i.e., that the December 21, 1998 initial decision would "remain" the final decision of the Board in the absence of an agency petition for review. She therefore found no good cause for the delay.

¶6 The appellant petitions for review, and the agency timely responds.

#### ANALYSIS

¶7 The appellant asserts that, among other things, the Board's regulations, as well as court and Board precedent, support a finding that his motion for attorney fees was timely filed or that good cause existed for the delay. We agree.

¶8 Under 5 C.F.R. § 1201.203(d), a motion for attorney fees "must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final." Under 5 C.F.R. § 1201.113(a), an initial decision ordinarily becomes final 35 days after issuance *except* where a party files a petition for review within the time limit for filing specified at 5 C.F.R. § 1201.114, or if the Board reopens the case on its own motion. This 35-day period after which an initial decision becomes final correlates with the 35-day time limit in the Board's regulations for filing a petition for review. 5 C.F.R. § 1201.114(d). Another circumstance, however, also prevents an initial decision from becoming final 35 days after issuance. Under 5 C.F.R. § 1201.113(d), the Board may extend the time limit for filing a petition for review for good cause shown. Obviously, if an extension is granted, the initial decision will not become final 35 days after issuance.

¶9 If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review. 5 C.F.R. § 1201.113(b). If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action. 5 C.F.R. § 1201.113(c). The Board's regulations do not, however, specify the finality date for an initial decision after an extension for filing a petition for review has been granted, but such a petition for review is not ultimately filed.

¶10 Thus, we must decide whether the "date on which a decision becomes final," as set forth in 5 C.F.R. § 1201.203(d), refers to the date when an extended time period for filing a petition for review has actually expired, or the date retroactively representing the original deadline for filing a petition for review. Construing sections 1201.113 and 1201.203 consistent with each other if at all possible, since they touch on the same subject matter, *see Loui v. Merit Systems Protection Board*, 25 F.3d 1011, 1013 (Fed. Cir. 1994), we find that the former

interpretation is the more reasonable construction, *see, e.g., Bost v. Office of Personnel Management*, 43 M.S.P.R. 310, 314 (1990) (an administrative agency's interpretation of its own regulation is generally entitled to great deference).

¶11 "The importance of allowing an employee to take full advantage of the appeal time permitted under the regulations ... is ... clear on its face." *Woodyard-Hamilton v. Office of Personnel Management*, 64 M.S.P.R. 150, 155 (1994); *cf. Schultz v. U.S. Postal Service*, 70 M.S.P.R. 633, 638 (1996) (the agency is entitled to use the entire 35-day period before the initial decision is to become final to decide either to comply fully with the decision, or to file a petition for review and comply on an interim basis). Moreover, our regulation is clear: Appellants have 60 days after the date on which an initial decision becomes final to file a timely motion for attorney fees. 5 C.F.R. § 1201.203(d).

¶12 Under the AJ's reasoning, the appellant effectively had only 35 days to file a motion for attorney fees after it became clear that no petition for review would be filed and the initial decision would become final. Taking the AJ's reasoning to an extreme, a 61-day extension granted to an agency by the Clerk's Office would deprive an appellant of *any* opportunity to file a timely motion for fees, and seriously reduce an appellant's statutory period for filing a timely judicial appeal. *See* 5 U.S.C. § 7703(b)(1) (a petition to review a final order or final decision of the Board must be filed in the U.S. Court of Appeals for the Federal Circuit within 60 days after the date the petitioner received notice of the final order or decision of the Board). It would make little sense to require an appellant to prepare a motion for attorney fees when the agency has been granted an extension of time to file a petition for review that may ultimately result in the reversal of the initial decision and no entitlement to attorney fees at all. Allowing an appellant to file a timely motion for attorney fees during a petition for review extension period would be pointless because the motion would likely be dismissed as premature. Even if an AJ did not dismiss such a motion as premature, and the

agency filed a petition for review that was ultimately denied, the appellant would have to file a supplemental motion to recover fees that were incurred on review.

¶13 The Board's regulations recognize that an initial decision becomes final when the entire action is "dispose[d] of." 5 C.F.R. § 1201.113(c); *cf.* 2 Am. Jur. 2d *Admin. Law* §382 (1994) (generally, to be final, an administrative order must leave nothing further for the agency to do). A case cannot be "disposed of" until an extended time limit for filing a petition for review has expired. Thus, we find that the 60-day time limit for filing a motion for attorney fees begins after an extended time period for filing a petition for review has expired.

¶14 Our decision follows the reasoning set forth in *Loui*, 25 F.3d at 1013-14, where the court construed 5 C.F.R. § 1201.22(b) (1993) (an appeal must be filed during the period beginning on the day after the effective date of the action being appealed and ending 20 days after the effective date) and 5 C.F.R. § 752.404(f) (1993) (agencies must deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights) so as to ensure that an appellant could take advantage of the entire period of time allowed under the regulations to file a petition for appeal. The court held that "[t]he regulations in their entirety gave *Loui* 20 days from the date of delivery of notice and he was entitled to the full amount. Section 752.404(f) cannot be interpreted in such a way as to deprive an employee of part of the time for appeal provided for by section 1201.22(b)." *Id.* at 1014. Similarly, we interpret the applicable regulations so as to ensure that the appellant is not deprived of the full 60-day regulatory time period for filing a motion for attorney fees.

¶15 The notice issued by the Clerk of the Board extending the time period for the agency to file a petition for review does not require a different result. The notice indicated that "[i]f a petition for review is not filed by February 19, 1999, the administrative judge's December 21, 1998, initial decision will remain the final decision of the Board and any further right of appeal must then be exercised in

accordance with the provisions as stated in that initial decision." The notice did not, however, indicate *when* the initial decision would become final. Although the Clerk's notice indicated that any "right of appeal" must be exercised in accordance with the provisions of the initial decision,<sup>1</sup> it was silent with respect to addendum proceedings before the Board such as motions for attorney fees. The initial decision's indication that it would become final on January 25, 1999, unless a party filed a petition for review by that date or the Board reopened the case on its own motion, became meaningless for purposes of an attorney fee motion once the agency's request for an extension of time to file a petition for review was granted, because that January 25, 1999 deadline was based on the 35-day time limit set forth in the Board's regulations, which had been extended.

¶16 Although the AJ found that the appellant "still had approximately a month to file a timely attorney fee motion, or to file a timely submission requesting an extension of time, for good cause, to file such a motion," it is irrelevant that he might not have needed the full 60 days, or that he could have requested an extension. *See Loui*, 25 F.3d at 1014. Our regulations entitled him to 60 days to file an attorney fee motion, and he filed his motion no later than 60 days after the date on which it became clear that the initial decision was final.

¶17 Even assuming, however, that the appeal was not timely filed, we would find that the appellant demonstrated good cause for the delay. Contrary to the AJ's finding, and in accordance with our findings above, the appellant's counsel's claim that he believed that the Clerk's order extended the finality date to February 19, 1999, is entirely credible. Before receiving any notice that there was a question as to the timeliness of the motion for attorney fees, the appellant's counsel wrote

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<sup>1</sup> Our records indicate that the appellant has not filed a judicial appeal of the initial decision. The timeliness of such an appeal, if it had been filed, would have been decided by the U.S. Court of Appeals for the Federal Circuit. *See Howell v. Merit Systems Protection Board*, 785 F.2d 282, 283-85 (Fed. Cir. 1986).

in the motion itself that "[t]he Initial Decision issued on December 21, 1998 became final on February 19, 1999 when the Agency failed to appeal the decision to the Board." AFF, Tab 1 at 1. Moreover, a prudent person could reasonably have misconstrued the language at issue in this appeal. *Cf. Walls v. Merit Systems Protection Board*, 29 F.3d 1578, 1583 (Fed. Cir. 1994) (agency's letter informing the employee of the time limit for filing an appeal was sufficiently ambiguous, along with other factors, to warrant waiver of the filing deadline); *Brackins v. Office of Personnel Management*, 66 M.S.P.R. 535, 539-40 (1995) (a prudent person could have misconstrued the language of the initial decision and the Board's final decision to indicate that, as with the initial decision, the full Board's decision dismissing the agency's petition for review would not become final until after the expiration of the period for appeal). The length of the filing delay is minimal, and the agency has demonstrated no prejudice as a result of that delay.

#### ORDER

¶18 Accordingly, we VACATE the initial decision and FIND that the motion for attorney fees was timely filed. This appeal is therefore REMANDED to the Western Regional Office<sup>2</sup> for adjudication of the merits of the attorney fee motion.

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.

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<sup>2</sup> The administrative judge has relocated from the Denver Field Office to the Western Regional Office in San Francisco.