

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 3, 2023

**THIS DOCUMENT CONTAINS IMPORTANT INFORMATION ABOUT
THIS APPEAL AND ITS PROCESSING. PLEASE READ THE
ENTIRE DOCUMENT CAREFULLY.**

**MANDATORY ELECTRONIC FILING FOR AGENCIES AND
ATTORNEYS AT THE WASHINGTON REGIONAL OFFICE AND THE
DENVER FIELD OFFICE**

Effective January 11, 2012, the Board launched a pilot program under which the Washington Regional Office (WRO) and the Denver Field Office (DEFO) require all pleadings filed by agencies and attorneys who represent appellants in Board proceedings to be electronically filed (e-filed). This requirement applies to all pleadings except those containing classified information or Sensitive Security Information (SSI) in all adjudicatory proceedings before the Board. Agencies and attorneys in proceedings before the WRO and the DEFO must register as e-filers.

You will be notified by email after a document is e-filed. The e-filing system automatically serves all e-filed documents by e-mailing a notice of electronic service to all registered e-file users. If a party needs to be served a

paper copy, the system will notify you when you e-file a pleading and generate a certificate of service for you to use as part of the paper pleading.

For additional instructions on e-filing, read the section below of this Acknowledgment Order titled “Pleadings Submitted via e-Appeal Online,” and the Board’s regulations at 5 C.F.R. § 1201.14.

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 under my signature at the end of this order.

NOTICE TO THE 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.

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 30 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.

The regulations 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. 5 C.F.R. § 1201.73(c)(1).

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. **Note that if, prior to the close of the record, you fail to object to any of my written or verbal rulings on a matter raised by you or the agency, you will be precluded from challenging that ruling on petition for review or cross-petition for review.**

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 file 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 THE 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. However, if they do not enter the agreement into the record, the Board will have no authority to enforce the agreement.

FOR THE BOARD:

_____/S_____
Joshua Henline
Administrative Judge
Washington Regional Office
1901 South Bell Street, Suite 950
Arlington, VA 22202
Phone: (703) 756-6250
Fax: (703) 756-7112
V/TDD (800) 877-8339

Enclosures

**MSPB SCHEDULE 752
REQUIREMENTS FOR SUBMITTING AGENCY FILE
VIA E-APPEAL ONLINE**

The Agency File must be submitted via e-Appeal Online. The requirements of 5 C.F.R. § 1201.14 apply.

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 Submitted Electronically

The agency file does not have to be paginated. The e-file system will automatically paginate the submission.

To serve a paper copy of the agency file on a party who is not an e-filer, the agency should print out a paper copy of its e-file submission from the repository. It will be paginated and will be identical to the electronic copy in the e-file case record.

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

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

[Indicate whether the appellant is an “employee” as defined by 5 U.S.C. § 7511(a)(1) or 39 U.S.C. § 1005(a)(4)(A)(ii). If the appellant was barred from active duty during the notice period, explain the reasons and authority for that action.]

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

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

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

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

Tab 4. Electronic copies of all other documents which are relevant and material to this appeal.

[Provide electronic copies of the notice of proposed action; the appellant's written reply and summary of the oral reply, if any; the decision letter; the SF-50 (or other notification of personnel action) documenting the action; evidence supporting the action; and documentary evidence of any past disciplinary record relied upon in taking the action.]

Documents in tab 4 must be arranged in reverse chronological order, with the most recently dated document listed first (4a) and the oldest document listed last. Each document must be bookmarked and labeled, preferably by alphabet, and must include a brief description of the document with a date (e.g., 4a Letter of Decision, 5/10/2011; 4b Appellant's Response to Proposed Notice to Remove, 4/10/2011; 4c Proposed Notice to Remove 4/4/2011, etc). Do not include a copy of the appellant's initial appeal in the agency response file. It is already in the Board's appeal file.



Merit Systems Protection Board

-- Designation of Representative --

Please print or type:

Appellant's Name: Martin Akerman

Agency Name: Department of the Army

Docket Number: DC-0752-23-0457-I-1

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, the Merit Systems Protection Board collects personal information that is relevant and necessary to reach 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. Because 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. Conceivably, failure to provide all information essential to reaching a decision in your case could result in the dismissal or denial of your appeal.

DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD ARE AVAILABLE TO THE PUBLIC UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT AND ARE POSTED TO THE MERIT SYSTEMS PROTECTION BOARD'S PUBLIC WEBSITE. SOME INFORMATION ABOUT THE APPEAL ALSO IS USED IN DEPERSONALIZED FORM FOR STATISTICAL PURPOSES. FINALLY, INFORMATION FROM YOUR APPEAL FILE MAY BE DISCLOSED AS REQUIRED BY LAW UNDER THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT. SEE 5 U.S.C. §§ 552, 552A.

**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 or the judge may conclude that more time than is routinely provided should be granted. Therefore, the judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days. No case may be suspended for more than a total of 60 days under these procedures. *See* 5 C.F.R. § 1201.28.

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

NOTICE

ALTERNATIVE DISPUTE RESOLUTION

In an effort to provide alternatives to the regulatory adjudication process, the Board offers the parties to the cases several dispute resolution options. This notice explains 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. Resolving your case with the assistance of a professional who will guide the parties through the process offers the best chance of reaching a resolution that benefits both parties. Accordingly, the Board encourages you to be always open to such a resolution.

THE MEDIATION APPEALS PROGRAM

The Mediation Appeals Program (MAP) is a voluntary, confidential process in which the parties meet with an experienced mediator in a non-litigious, non-adversarial setting. Even more than other available settlement options, MAP encourages the parties to approach settlement with an open mind and to consider possible resolutions that may not be available in the adjudication process. Both parties must agree to mediation, and the Board must concur that it could be beneficial, given the circumstances of the case and of the parties. Because the case 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 45 days in MAP.

The mediator will meet with the parties and facilitate discussions between them to find common grounds on which to resolve the case. Mediations may be done in-person, virtually, or by telephone. If the efforts to resolve the case do not result in a settlement, the mediator will have no input into the adjudication of the case. Nonetheless, the parties will likely 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. MAP is further described online at <https://www.mspb.gov/appeals/mediationappeals.htm>.

If you have other questions regarding MAP, discuss them with the administrative judge, or you may contact the MAP coordinator at regionaloperations@mspb.gov.

THE SETTLEMENT JUDGE PROGRAM

A settlement judge is an administrative judge like the one assigned to your case, but they are assigned specifically and solely to discuss settlement options

with the parties. Like the administrative judge assigned to your case, 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 a case goes during the course of the traditional adjudication process and has no input into the decision if the case does not settle. Thus, some parties feel more open to frank discussion of their cases 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 among the parties and 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. If administrative judge concurs, a settlement judge will be assigned.

THE MSPB SETTLEMENT PROGRAM

The administrative judge assigned to decide your case will explore the possibility of settlement with the parties to almost all cases. 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 case, 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 have no effect on the ultimate outcome of the case if it 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.
- When you register as an e-filer, 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 an individual is represented, if only the representative is a registered e-filer, the individual will continue to receive documents by regular mail.

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>).

NOTICE TO SELF-REPRESENTED APPELLANTS

Your petition for appeal indicates that you are currently representing yourself before this office. The Federal Circuit Bar Association (FCBA) may be able to assist you in finding an attorney to represent you, if you are interested in pro bono representation, that is, representation at no cost to you. If you are interested in being represented in your appeal before this office, please click on this link or paste it into the address bar on your browser:

<http://fedcirbar.org/Pro-Bono/Government-Employees-Pro-Bono/Overview-FAQ>

Please note that the MSPB neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case. It will be the decision of the individual appellant to contact the FCBA about the possibility of pro bono representation, and it will be the decision of any attorney an appellant is referred to whether they will provide pro bono representation.

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 Martin Akerman
2001 North Adams Street
Unit 440
Arlington, VA 22201

Agency Representative

Electronic Mail Eugene R. Ingrao, Sr.
Department of the Army
Attorney- Advisor
Office of the Chief Counsel, NGB
111 S. George Mason Drive
AHS-2/Room 3TI-308
Arlington, VA 22204

May 3, 2023

(Date)

/s/

Tonya Holman
Paralegal Specialist