

TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III - EMPLOYEES
Subpart F - Labor-Management and Employee Relations
CHAPTER 77 - APPEALS

§ 7702. Actions involving discrimination

- (a) (1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—
- (A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
 - (B) alleges that a basis for the action was discrimination prohibited by—
 - (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16),
 - (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d)),
 - (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
 - (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
 - (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,
 the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board’s appellate procedures under section 7701 of this title and this section.
- (2) In any matter before an agency which involves—
- (A) any action described in paragraph (1)(A) of this subsection; and
 - (B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;
- the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.
- (3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—
- (A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or
 - (B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.
- (b) (1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.
- (2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.
- (3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—
- (A) concur in the decision of the Board; or

- (B)** issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—
- (i)** the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or
 - (ii)** the decision involving such provision is not supported by the evidence in the record as a whole.
- (4)** In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.
- (5)**
- (A)** If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.
 - (B)** If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.
- (c)** Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—
- (1)** concur and adopt in whole the decision of the Commission; or
 - (2)** to the extent that the Board finds that, as a matter of law,
 - (A)** the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or
 - (B)** the Commission decision involving such provision is not supported by the evidence in the record as a whole—
 - (i)** reaffirm the initial decision of the Board; or
 - (ii)** reaffirm the initial decision of the Board with such revisions as it determines appropriate.
- If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.
- (d)**
- (1)** If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—
 - (A)** the factual record compiled under this section,
 - (B)** the decisions issued by the Board and the Commission under this section, and
 - (C)** any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.
 - (2)**
 - (A)** The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.
 - (B)** The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.
 - (3)** The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.
 - (4)** The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.
 - (5)** Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might

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otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

- (6)** **(A)** Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—
- (i)** an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;
 - (ii)** one member of the Board designated by the Chairman of the Board each time a panel is convened; and
 - (iii)** one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

- (e)** **(1)** Notwithstanding any other provision of law, if at any time after—
- (A)** the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;
 - (B)** the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or
 - (C)** the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16 (c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216 (b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

- (f)** In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

(Added Pub. L. 95–454, title II, § 205, Oct. 13, 1978, 92 Stat. 1140; amended Pub. L. 96–54, § 2(a)(46), Aug. 14, 1979, 93 Stat. 384.)

References in Text

The civil service law, referred to in subsec. (c)(2), is set out in this title. See, particularly, section 3301 et seq. of this title. The General Schedule, referred to in subsec. (d)(6)(B), is set out under section 5332 of this title.

Amendments

1979—Subsec. (a)(1)(A). Pub. L. 96–54, § 2(a)(46)(A), substituted “affected” for “effected”.

Subsec. (a)(1)(B)(i). Pub. L. 96–54, § 2(a)(46)(B), substituted “2000e–16” for “2000e–16c”.

Subsec. (e)(1). Pub. L. 96–54, § 2(a)(46)(C), (D), substituted “of this section” for “of this title” in subpar. (C), and “216(b)” for “216(d)” in provision following subpar. (C).

Effective Date of 1979 Amendment

Amendment by Pub. L. 96–54 effective July 12, 1979, see section 2(b) of Pub. L. 96–54, set out as a note under section 305 of this title.

Effective Date

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.