NELA at 25: Don't Stop Believing
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BLOWING THE WHISTLE AS A FEDERAL EMPLOYEE

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I. **Right of Action**. If the employee is a competitive service employee and the act is an appealable one under 5 U.S.C. § 7511, the individual may appeal the personnel action directly to the MSPB. Otherwise the employee must first seek remedy from the Office of Special Counsel (OSC).

II. **Basic process**.

a. File a complaint with OSC.
    i. The OSC evaluates the case and may prosecute it.
    ii. Must exhaust OSC remedies before proceeding to the MSPB.
b. Appeal the action to the MSPB.
    i. Hearing before an administrative judge.
c. File a petition for review (PFR).
    i. Hearing before the Board.
d. Appeal to the Federal Court of Appeals.

III. **Filing at the OSC**. OSC procedures are governed by 5 U.S.C. § 1214.

a. The Complaint.
    i. The complaint is submitted on form OSC-11. *See* Appendix pp. 1-13

ii. Whistleblower disclosures may be submitted on form OSC-12. *See* Appendix pp. 14-19.
iii. Additional information may be submitted on OSC-11a. *See* Appendix pp. 22-25.
iv. Electronic forms and .pdf copies are available in the OSC Reading Room (http://www.osc.gov/RR_OSCFORMS.htm).

b. Timing. There is no time limit for filing with the OSC. However, the impact of time on the agency's ability to defend itself is considered.

c. Stays. An individual may request the OSC to seek a delay or "stay" of an adverse personnel action during the OSC investigation. If the agency does not comply with the OSC's stay request, the OSC may seek enforcement of the stay through the MSPB. The OSC does not have authority to stay an agency action. On May 31, 2001, the OSC published an official Policy Statement on stays. *See* Appendix pp. 22-25.

d. Complaint handling. Complaints are handled by the Complaint Examining Unit (CEU). The complainant will be sent a response notifying them of the step being taken by the OSC. The responses sent include:
i. A letter acknowledging receipt of their complaint and identifying the staff member assigned to handle it, with an information sheet (Form OSC-53) enclosed explaining how the complaint will be processed by CEU;
ii. A status report after 90 days, and every 60 days thereafter while the matter is active;
iii. A letter advising that the matter has been referred to the OSC Investigation and Prosecution Division for further inquiry, with an information sheet (Form OSC-54) about the investigation and legal review process, (or, as noted below, a letter inviting the complainant to participate in mediation as an alternative to investigation);
iv. A preliminary determination letter, with a final opportunity for input when CEU proposes to close a matter without remedial action or referral to the Investigation and Prosecution Division; or
v. A letter advising that OSC will take no further action because it lacks jurisdiction over the matter.
vi. In some cases, the parties may be referred to a voluntary alternative dispute resolution process.

e. Corrective action. At any time, the OSC may enter into discussion with the agency in pursuit of a resolution.

f. Investigation and Prosecution Division (IPD). If the CEU determines that the complaint contains a valid claim, it is referred to one of four regional IPD offices.

i. IPD investigates pertinent records and conduct interviews. An attorney will also review the case for issues of law. Status notices are sent to the complainant every 60 days.
ii. Preliminary determinations.
    1. The Associate Special Counsel may issue a preliminary determination to close the case. If that happens, the complainant has 13 days to respond to the letter in writing and provide additional information.
    2. Corrective Action. If the OSC's preliminary determination is to prosecute the case, the agency head must be requested to take corrective action.
        a. Petitioning the MSPB - if the corrective action is not taken within a reasonable time (usually 45-60 days), the OSC may petition the MSBP.
iii. Settlement. The IPD investigator or attorney assigned to a case may attempt to settle it. However, the complainant must approve the settlement. If the agency offers complete corrective action which includes any relief the complainant may be entitled to in litigation before the MSPB, failure to accept the offer may result in the OSC closing the case.
iv. If it is determined that an agency official has taken a prohibited personnel action, the OSC will seek disciplinary action against the official.

g. Keeping the OSC informed. The complainant must keep the OSC informed of developments in the case. If the complainant is continuing to make disclosures or suffer new adverse actions, the OSC must be notified.
    i. Ex. If the complainant is continuing to call the FAA hotline and report safety issues, the OSC must be notified about these disclosures.

IV. Termination of the OSC investigation. If at any time, the OSC is going to the close the case, written notice shall be provided to the complainant at least 10 days in advance.

a. The complainant may submit comments to the OSC and request that the investigation continue.
    i. Upon termination of the case, the OSC must provide to the complainant: (1) a summary of gathered facts which support both the agency and individuals; and (2) responses to comments submitted by the complainant.
    ii. The above is not admissible in any judicial or administrative proceeding without the consent of the complainant.

V. **Timing of an MSPB appeal**.

a. A complainant may bring an appeal at the MSPB within 65 days after the OSC terminates its investigation, or
b. At *any* time after 120 days have elapsed since seeking corrective action at the OSC.
    i. There is no statute of limitations if there has not yet been an OSC decision – the doctrine of laches applies.
        1. Appeal was not time barred where the complaint was brought to the OSC 3.5 years after termination and over 7 years elapsed before the MSPB appeal was filed.
            a. *Mercer v. Dep't of Health & Human Servs.*, 82 M.S.P.R. 211 (MSPB 1999).
        2. Complaint was not timely where 8 years had passed prior to the OSC complaint.
            a. *Louie v. Dep't of Treasury*, 211 F. App'x 942 (Fed. Cir. 2007) (per curiam).
    ii. The laches analysis is fact dependent and focuses on whether the agency would be unfairly prejudiced in its efforts to defend against the claim due to a lack of documents, witnesses, or other information needed to mount a defense.
c. Appeals after a stay request. Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date the appellant receives the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown. 5 C.F.R. § 1209.5

VI. **Initiating an appeal**. An appeal may be filed electronically at https://e-appeal.mspb.gov. The appeal is not filed until it is filed at the correct geographic location. Look to the duty station when the adverse action was taken. *See Generally* 5 C.F.R. §§ 1201.14, .6, .22, .24.

a. Contents of the appeal. The appeal must contain: the nine items or types of information required in 5 C.F.R. § 1201.24(a)(1) through (a)(9) and:
    i. Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;
    ii. The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);
    iii. A description of each disclosure evidencing whistleblowing as defined in 5 C.F.R. § 1209.4(b); and
    iv. Evidence or argument that:

1. The appellant was or will be subject to a personnel action as defined in 5 C.F.R. § 1209.4(a), or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and
2. The personnel action was or will be based wholly or in part on the whistleblowing disclosure, as described in 5 C.F.R. § 1209.4(b).

v. An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of 5 C.F.R. § 1209.6 by filing with the appeal a copy of Part 2: Reprisal For Whistleblowing of the complaint form submitted to the Office of Special Counsel (Form OSC–11, Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.

b. Acknowledgment order. The appeal will be assigned to an administrative judge (AJ) who will issue an acknowledgement order to the appellant and agency within three days. The acknowledgment order:
   i. Provides a copy of the appeal to the agency
   ii. Requests the agency to provide a statement as to why the action was taken and copies of all agency records regarding the appealed action.
   iii. May request the appellant to provide support for the timeliness and jurisdiction of the MSPB
   iv. Contains a copy of the prehearing orders
   v. Sets up the prehearing conference and hearing date.

c. Order to show cause for jurisdiction. As of late, AJs have frequently issued an Order to Show Cause regarding the jurisdiction of the board to hear an appeal. An appellant has the burden of proof, by a preponderance of the evidence, to show that the Board has jurisdiction over their appeal. 5 C.F.R. § 1201.56(a)(2)(i). "[T]he Board's jurisdiction is established by nonfrivolous allegations that the appellant made a protected disclosure that was a contributing factor to the personnel action taken or proposed." *Stoyanov v. Dep't of Navy*, 474 F.3d 1377, 1382 (Fed. Cir. 2007). For a whistleblower, this means that he must allege that he engaged in whistleblowing conduct, i.e., that he made a protected closure which was a contributing factor in the agency's decision to take the appealed adverse personnel action. However, recent orders have required an appellant to prove, by a preponderance of the evidence, each element of a

whistleblower claim. These orders have the function of a motion to dismiss for lack of jurisdiction and failure to state a claim. *See* Appendix pp. 26-37.

d. Agency response. The agency response to appeal must contain:
    i. The name of the appellant and of the agency whose action the appellant is appealing;
    ii. A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;
    iii. All documents contained in the agency record of the action;
    iv. Designation of and signature by the authorized agency representative;
    v. Any other documents or responses requested by the Board;

e. Initial disclosures. As required by 5 C.F.R. § 1201.73, unless otherwise directed by the judge, each party must, without awaiting a discovery request, and within 10 days of the acknowledgement order, provide the following to other party:
    i. The agency must provide:
        1. A copy of, or a description by category or location of all documents in the possession, custody, or control of the agency that the agency may use in support of its claims or defenses, and
        2. The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information that the agency may use in support of its claims or defenses, identifying the subjects of such information.
    ii. The appellant must provide:
        1. A copy of, or a description by category or location of all documents in the possession, custody, or control of the appellant that the appellant may use in support of his or her claims or defenses, and;
        2. The name and, if known, the address, telephone number, and e-mail address of each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses, identifying the subjects of such information.
    iii. Each party must make its initial disclosure based upon the information then reasonably available to the party. A party is not excused from making its disclosures because it has not fully completed its investigation of its case, because it challenges the sufficiency of the other party's disclosures, or because the other party has not made its disclosures.

VII. Discovery. Regulations governing discovery are set out at 5 C.F.R. §§ 1201.17 to .75. Discovery is guided by not governed by the Federal Rules of Civil Procedure (FRCP). Parties are expected to start and complete discovery with a minimum of intervention.

a. Scope. Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal. 5 C.F.R. § 1201.72(b)
    i. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. 5 C.F.R. § 1201.72(a)
b. Methods. Parties may use any of the methods provided under the FRCP. Includes interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission. 5 C.F.R. § 1201.72(c).
c. Notable Differences From the FRCP.
    i. Parties may allow interrogatories to nonparties. 5 C.F.R. § 1201.73(e)(1).
    ii. Depositions may be taken by any method on which the parties agree, so long as the person providing the information in the deposition is subject to penalties for intentional false statements. 5 C.F.R. § 1201.75.
    iii. Motion for more definite statement of appeal – an agency may motion for a definite statement of the appeal, which if granted will require the appellant to redraft or further explain the appeal. This is similar to but the not the same as an interrogatory. See *Zimmerman v. Dep't of Hous. & Urban Dev*., 61 M.S.P.R. 75, 77 (1994).
d. Judge's involvement in discovery. Anticipate the judge inquiring about discovery during early conferences. Parties are expected to voluntarily cooperate during discovery and the judge will seek to facilitate this. The judge may assist in negotiating discovery disputes and offer informal direction in an attempt to limit the need for formal discovery and motions to compel.
    i. Limitations – The judge may limit the frequency or extent of use of the discovery methods. 5 C.F.R. § 1201.72(d). Such limitations may be imposed if the judge finds that:
        1. The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
        2. The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or
        3. The burden or expense of the proposed discovery outweighs its likely benefit.

e. Discovery requests. All requests must specify the time for responding. 5 C.F.R. § 1201.73(a).
    i. Service – a copy of each discovery request must be served on the representative of the party. 5 C.F.R. § 1201.73(a).
f. Time limits. *See generally* 5 C.F.R. § 1201.73
    i. Initial discovery requests must be initiated within 25 days after the date of issuance of the acknowledgment order.
    ii. Reponses – a party or nonparty must file a response to a discovery request promptly, but not more than 20 days after the date of service of the request.
    iii. Supplemental requests based upon responses received from prior requests must be sent within 7 days of the date of service of the subject responses.
    iv. Responses to supplemental requests must be sent within 20 days of the date of service of the supplemental request.
g. Subpoenas. The board has authority under 5 U.S.C. § 1204(b)(2)(A) to issue a subpoena requiring the attendance and testimony of any individual regardless of location and for the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico or the District of Columbia. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses. 5 C.F.R. § 1201.81.
    i. Form - Parties requesting subpoenas must file their requests, in writing, with the judge. Each request must identify specifically the books, papers, or testimony desired.
    ii. Relevance - The request must be supported by a showing that the evidence sought is relevant and that the scope of the request is reasonable.
    iii. Rulings - Any judge who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Judges who have the authority to rule on these requests themselves will do so directly.
    iv. Service – Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. The means prescribed by applicable state law are sufficient. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena. A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country. 5 C.F.R. § 1201.83

1. Proof of service is governed by 5 C.F.R. § 1201.84. The person who has served the subpoena must certify that he or she did so by:
    a. By delivering it to the witness in person,
    b. By registered or certified mail, or
    c. By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

v. Enforcement - If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the judge or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear before the judge, must submit an affidavit or sworn statement under 28 U.S.C. § 1746 (see Appendix IV) describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. § 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

vi. Motions to quash - Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited. 5 C.F.R. § 1201.82

h. Motions to compel. *See* 5 C.F.R. § 1201.73(e)

i. If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a MSPB-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty from whom the discovery was sought.

ii. Prior to filing a motion to compel, the moving party must discuss the anticipated motion with the opposing party either in person or by telephone and the parties must make a good faith effort to resolve the dispute and narrow the areas of disagreement.

iii. Must include:

1. A copy of the original request and a statement showing that the information sought is relevant and material; and
2. a copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. § 1746 supporting the statement (See appendix IV to part 1201.); and
3. a statement that the parties have discussed the anticipated motion and have made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

iv. Time to reply – the recipient of a motion to compel has 10 days to reply. 5 C.F.R. § 1201.73(f)(4).

v. Judge's response to a motion to compel – the judge should initiate a conference call to discuss the controversy and attempt to resolve it prior to ruling. Due to the short time, the judge should liberally grant a request for more time to respond. If possible, the judge may rule on the motion without awaiting a response.

vi. Noncompliance – the judge may impose sanctions for failure to comply with an order compelling discovery. 5 C.F.R. § 1201.74(c).

VIII. **<u>Stays</u>**. Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action. A stay may last no longer than the duration of the litigation before the Board. 5 C.F.R. § 1209.11(a). An agency must comply immediately with an order granting a stay and petitions for enforcement are governed by 5 C.F.R. § 1201.181 *et seq.* 5 C.F.R. § 1209.11(b).

a. <u>Filing a request for a stay</u>.

i. Content of the request is controlled dictated by 5 C.F.R. § 1209.9. General requirements:

1. Identify the agency, appellant, and appellant's representative;
2. Chronology of the facts, including a description of the appellant's disclosure and the action that the agency has taken to intends to take;
3. Information about previously sought corrective action from the OSC.
4. Evidence and/or argument showing:
    a. The action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. § 1209.4(a);
    b. The action complained of was based on whistleblowing, as defined in 5 C.F.R. § 1209.4(b); and

c. There is a substantial likelihood that the appellant will prevail on the merits of the appeal;

5. Evidence and/or argument addressing how long the stay should remain in effect; and
6. Any documentary evidence that supports the stay request.

ii. Optional content – an appellant may include evidence and/or argument addressing the question of whether a stay would impose extreme hardship on the agency. 5 C.F.R. § 1209.9(b).

iii. Agency response – Governed by 5 C.F.R. § 1209.9(c).
1. The agency's response to the stay request must be received by the appropriate Board regional or field office within five days (excluding Saturdays, Sundays, and Federal holidays) of the date of service of the stay request on the agency.
2. The agency's response must contain the following:
a. Evidence and/or argument addressing whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal;
b. Evidence and/or argument addressing whether the grant of a stay would result in extreme hardship to the agency; and
c. Any documentation relevant to the agency's position on these issues.

iv. Timing – An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal under 5 C.F.R. § 1209.5 (exhaustion of OSC remedies), but no later than the time limit set for the close of discovery in the appeal. The request may be filed to, or simultaneous with, or after the filing of the appeal. 5 C.F.R. § 1209.8(a)

v. Location of filing – a request for stay must be filed with the appropriate Board regional or field office as identified in 5 C.F.R. § 1201.4(d). 5 C.F.R. § 1209.8(b).

vi. Service of stay request - a stay request must be simultaneously served upon the Board's regional or field office and upon the agency's local servicing personnel office or the agency's designated representative, if any. A certificate of service stating how and when service was made must accompany the stay request. 5 C.F.R. § 1209.8(c).

vii. Method of filing – a stay request may be filed by mail, fax, commercial or personal delivery, or electronically in accordance with 5 C.F.R. § 1201.14. 5 C.F.R. § 1209.8(d).

viii. Hearing on a stay request – The judge must issue a ruling on the stay request within 10 days and may hold a hearing. The ruling must set forth

the factual and legal basis for the decision. This includes the judge's opinion on whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal. 5 C.F.R. § 1209.10.

IX. **Suspension**. The Board has a general policy of resolving appeals within 120 days. However, a suspension of up to 30 days may be requested. The procedures for a suspension are prescribed in 5 C.F.R. § 1201.28. Joint requests are granted at the discretion of the judge. Unilateral requests may be granted for good cause shown at the discretion of the judge.

a. Timing. Requests must be filed within 45 days of the date of the acknowledgement order or within 7 days of the appellant's receipt of the agency file, whichever is later. Untimely requests may still be considered at the discretion of the judge.
b. Termination of the suspension. The suspension period may be terminated prior to the end of the agreed up on period if the parties request the judge's assistance with discovery or settlement during the suspension period and the judge's involvement pursuant to the request is likely to be extensive.

X. **Sanctions**. A judge may sanction a party as necessary to serve the ends of justice. See 5 C.F.R. § 1201.43. Consider moving as soon as misconduct is suspected.

a. Failure to comply with an order. When a party fails to comply with an order, including an order to compel, the judge may:
    i. Draw an inference in favor of the requesting party with regard to the information sought;
    ii. Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
    iii. Permit the requesting party to introduce secondary evidence concerning the information sought; and
    iv. Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.
b. Default Judgment. Failure to prosecute or defend an appeal may result in the dismissal of the appeal with prejudice or a ruling in favor of the appellant
c. Failure to make a timing filing. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion.

XI. **Initial decision**. *See Generally* 5 C.F.R. §§ 1201.111 to .113.

a. Contents. The judge's initial decision will contain:
    i. Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

ii. The reasons or basis for those findings and conclusions;
iii. An order making final disposition of the case;
iv. If the appellant prevails, a statement as to whether interim relief is provided pending the outcome of any petition for review (PFR);
v. Notice that the decision becomes final in 35 days;
vi. A statement pertaining to the filing of a PFR, motion for attorney fees under 5 C.F.R. § 1201.203, and any other motions for additional damages.

b. Interim relief. If the appellant is the prevailing party, the initial decision will contain appropriate interim relief to the appellant effective the decision until the date of the final order of the Board on any PFR, unless the judge determines that interim relief is in appropriate. The agency may decline to return the appellant to work if agency believes that doing so will be unduly disruptive to the work environment. If the agency does not return the appellant to work, pay and benefits must still be provided.

c. Jurisdiction of the judge after issuing the initial decision. After issuing the initial decision, the judge will retain jurisdiction over the a case only to the extent necessary to:
i. Correct the transcript;
ii. Rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages;
iii. Process any petition for enforcement;
iv. Vacate an initial decision before it becomes final in order to accept a settlement agreement into the record.

d. Finality of the decision. An initial decision becomes final after 35 days. Initial decisions are not precedential.
i. An initial decision does not become final if a PFR is filed. If a PFR is denied, the decision becomes final upon the Board issuing its final denial.
ii. The Board, upon good cause shown, may extend the time limit for filing a PFR. Doing so will extend the time before an initial decision becomes final.

XII. Petition for Review (PFR). Any party to a proceeding may file a petition for review of the initial decision. PFR procedures are described in 5 C.F.R. § 1201.114 *et seq*.

a. Timing. A PFR must be filed within 35 days after the issuance of the initial decision. 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 for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition.

i. Extensions - an extension to file a petition, cross petition, or response may be granted upon showing good cause. Extensions must be filed before the due date of the petition or response.

XIII. **<u>Judicial Appeal</u>**. Final decisions issued by the Board may be appealed to the Federal Circuit. The appeal is over the Board's decision and not the agency action.