



MERIT SYSTEMS PROTECTION BOARD FORM 185-1

Appeal Form--Appellant and Agency Information

Please type or print legibly.

OMB No. 3124-0009

1. Name (last, first, middle initial)

[REDACTED]

2. Present Address (number and street, city, state, and zip code)

Address:

[REDACTED]

City, State, Zip Code:

[REDACTED]

United States of America

3. Telephone numbers (include area code) and E-Mail Address

You must notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.

Home:

[REDACTED]

Work:

Fax:

Other:

E-mail Address:

[REDACTED]

Other Phone Type:

4. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)

☐ Yes

☒ No

5. Name and address of the agency that made the decisions or took the action you are appealing (include bureau or division, street

Agency Name:

Department of Justice

Bureau:

Federal Bureau of Investigation

Address:

935 Pennsylvania Ave. NW

City, State, Zip code:

Washington, District of Columbia, 20004, United States of America

6. Your Federal employment status at the time of the decision or action you are appealing:

☐ Temporary ☐ Permanent ☒ Applicant

☐ Term ☐ Retired ☐ Seasonal

☐ None

7. Type of appointment (if applicable):

NOT APPLICABLE

8. Your occupational series, position title, grade, and duty station at the time of the decision or action you are appealing (if applicable):

NOT APPLICABLE

9. Are you entitled to veteran's preference?
See 5 U.S.C. 2108.

☐ Yes

☒ No

10. Length of Government Service (if applicable):

0 Years 0 Months

11. Were you serving a probationary or trial period at the time of the decision or action you are appealing?

NOT APPLICABLE

Appeal Number: [REDACTED]

Submission Date: 9/25/2009 11:07:17 AM

Confirmation Number: [REDACTED]



MERIT SYSTEMS PROTECTION BOARD FORM 185-1

Appeal Form--Appellant and Agency Information

Please type or print legibly.

HEARING: You may have a right to a hearing before an administrative judge. If you choose to have a hearing, the Board will notify you when and where it is to be held. If you do not want a hearing, the Board will make its decision on the basis of the submission of the parties.

12 Do you want a hearing? ☒ Yes ☐ No

E-Filing: Registration as an E-Filer enables you to file any or all of your pleadings with the Board in electronic form. Registration also means you consent to accept service of all pleadings filed by other registered E-Filers and all documents issued by the Board in electronic form. You will receive these as PDF documents at the e-mail address you provided the Board. If registered as an E-Filer, you may file any pleading, or portion of a pleading, by non-electronic means. You can withdraw your registration as an e-filer at any time.

13. Do you wish to register as an E-Filer in this appeal?


☒ I elect to E-File

☐ I decline to E-File

14. I certify that all of the statements made in this form and all attached forms are true, complete, and correct to ☐ the best of my knowledge and belief.

 Appellant

Date:

Appeal Number: 

Submission Date: **9/25/2009 11:07:17 AM**

Confirmation Number: 

MSPB Form 185-1, Page 2 (6/1/2002)
5 CFR Parts 1201, 1208, and 1209



MERIT SYSTEMS PROTECTION BOARD FORM 185-2

Appeal of Agency Personnel Action or Decision (Non-retirement)

Complete this form and attach it to MSPB Form 185-1 if you are appealing an agency personnel action or decision (other than a decision or action affecting your retirement rights or benefits) that is appealable to the Board under a law, rule, or regulation. If the personnel See 5 CFR 1201.3(a) for a list of appealable personnel actions and action or decision is appealable to the Board, you should have received a final decision letter from the agency that informs you of your right to file an appeal with the Board.

Please type or print legibly.

OMB No. 3124-0009

Please submit only the attachments requested in this form at this time. You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding.

Name (last, first, middle initial)

Check the box that best describes the personnel action or decision taken by the agency you named in MSPB Form 185-1 that you are appealing. (If you are appealing more than one action or decision, check each box applies.) Attach a copy of the decision letter (if any). If an SF-50 or its equivalent was issued and is available, attach it now; however, DO NOT delay filing your appeal because you do not have an SF-50. You may submit the SF-50 when it becomes available.

Termination of Employment (You may select only one of the following four personnel actions.)

- ☐ Removal (Termination after probationary or initial service period) ☐ Involuntary Resignation
☐ Termination during probationary or initial service period ☐ Involuntary Retirement
☐ Reduction in grade or pay ☐ Suspension for more than 14 days
☐ Separation, demotion, or furlough for more than 30 days by reduction in force (RIF) ☐ Furlough of 30 days or less
☐ Denial of within-grade increase ☐ Failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement
☒ Negative suitability determination
☒ Other action Describe other action Unknown

2. Date you received the agency's proposal letter (if any) (month, day, year)

3. Date you received the agency's final decision letter (if any) (month, day, year) (Attach a copy)

4. Effective date (if any) of the agency action or decision (month, day, year)

07/01/2009

5. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process?

☐ Yes

☒ No

6. Explain briefly why you think the agency was wrong in taking this action or making this decision.

See Continuation Sheet for Response.

7. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

See Continuation Sheet for Response.

Appeal Number:

MSPB Form 185-2, Page 1 (6/1/2002)

Submission Date: 9/25/2009 11:07:17 AM

5 CFR Parts 1201, 1208, and 1209

Confirmation Number:



MERIT SYSTEMS PROTECTION BOARD FORM 185-2

Appeal of Agency Personnel Action or Decision (Non-retirement)

Please type or print legibly.

8. With respect to the agency personnel action or decision you are appealing, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provided by a collective bargaining agreement?

☐ Yes

☒ No

9. If your answer to question 8 is "Yes," on what date was the grievance filed (month, day, year)?

NOT APPLICABLE

10. If your answer to question 8 was "Yes," has a decision on the grievance been issued?

NOT APPLICABLE

11. Select all the additional claims you would like to file with this appeal.

☐ No Additional Claims

☒ File a claim for harmful procedural error

☐ File a claim for not in accordance with law

☐ File a claim of prohibited discrimination

☒ File a claim of prohibited personnel practices

☐ File a Whistleblower claim

☐ Request a whistleblower stay

☐ File a USERRA claim

☐ File a veteran's preference claim

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Merit Systems Protection Board Form 185-2

Appeal of Agency Personnel Action or Decision (Non-retirement)

Continuation Sheet

6. Explain briefly why you think the agency was wrong in taking this action or making this decision.



Applicant's completed post-polygraph application for appointment as a Special Agent in the FBI was submitted to the Special Agent Clearance Unit on 6/15/09 by FBI [REDACTED]. Until 6/30/09, applicant was suitable for employment and had already disclosed all significant negative information about himself. For example, in a written attachment to his SF-86 Cover Sheet filed on 5/18/09, applicant reported occasionally downloading commercial software without purchase from his teens (later clarified as age 13 and up) through his second year of college. The stated purpose was for applicant's own education and non-commercial use. The statement had already been reviewed and must have been favorably adjudicated, else applicant would not have been allowed to take the polygraph.

On 6/30/09, a SACU Special Agent contacted applicant and asked about the written statement.

Applicant had never been advised of the scope of the FBI background investigation at his Personnel Security Interview or otherwise (age 18 and up except traffic and employment offenses), which the agency's own procedures require. As a result, when answering the question on 6/30/09 applicant believed his whole life was relevant, just as he had when he filed the written statement on 5/18/09.

The SACU Special Agent asked on 6/30/09, "you mentioned in your written application that you sometimes pirated commercial software. How many times did you pirate software?" There was no restriction on time period, and no definition of the term "pirate."

With the express reference to applicant's original statement reporting childhood and adult conduct, applicant understood that he was being asked to provide an answer for the number of times he had merely downloaded software without purchase in his whole life.

Applicant was asked a similar question at the PSI, and applicant stated he could not recall. Here, applicant also stated he could not recall. **The Special Agent pressed applicant for a response using an interviewing technique**, and applicant provided an estimate in good faith: "probably a couple of dozen times."

The FBI manual requires that the investigator ascertain the specific factual basis of the negative conduct. Here, there were no follow up questions regarding the specific factual basis of the conduct.

It appears the FBI may have believed applicant had been advised of the scope of investigation, in which case the FBI believed (1) that applicant made a statement inconsistent with his original statement, in that downloading software "probably a couple of dozen times" would not be occasional if it occurred in one or two years of applicant's adulthood, or (2) that applicant had admitted to frequent Criminal Copyright Infringement (i.e., selling or distributing unlicensed software).

Had follow up questions been asked, the specific factual basis would have shown that applicant's statement was not inconsistent, and that applicant's conduct was not Criminal Copyright Infringement. The Special Agent had asked follow up questions to develop specific facts on multiple prior occasions, but chose not to do so on this occasion.

Had applicant been advised of the scope of investigation, applicant would have provided an estimate for only his adult life, which would have been consistent with applicant's original reporting of the conduct as occasional.

It also appears that the Special Agent represented applicant's estimate as a fact to the analyst, rather than as an estimate. In addition to applicant being harmed by FBI personnel not following protocol, the inference could be made that applicant was discriminated against for conduct not related to his performance in the appointment. Specifically, the obtainment of a believed "gotcha" type admission that was not actually an admission, in an area of conduct not even relevant to the appointment and not even criminal, after applicant on two separate occasions stated he could not recall the answer.





Merit Systems Protection Board Form 185-2

Appeal of Agency Personnel Action or Decision (Non-retirement)

Continuation Sheet

7. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

Reverse the negative suitability determination and remand the case for reprocessing consistent with the decision.
Order all information outside the scope of investigation stricken from applicant's file and any suitability decisions in the future.
Order that applicant be appropriately advised of the scope of investigation and be allowed to re-answer questions reasonably necessary to move his case forward to the background investigation.
Award applicant attorney fees and costs.



MERIT SYSTEMS PROTECTION BOARD FORM 185-4A

Claims of Mistakes in Procedures or Violations of Law

Please type or print legibly.

OMB No. 3124-0009

Name (last, first, middle initial) [REDACTED]

Harmful error is defined in the Board's regulations as: "Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error." See 5 C.F.R.

If you believe that the agency made a error(or error) in applying required procedures in connection with the action or decision you

See Continuation Sheet for Response.

2. Explain how the error you in response to question 1 above caused the agency to reach a conclusion different from the one it would have

See Continuation Sheet for Response.

An appealable action will be reversed as being "not in accordance with the law" if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for action.

3. If you believe that the agency action or decision you are appealing, was "not in accordance with law," please explain.

NOT APPLICABLE

4. If you believe a specific law was violated, please identify the law and describe how the law you identified was violated.

NOT APPLICABLE

Appeal Number: [REDACTED]

Submission Date: 9/25/2009 11:07:17 AM

Confirmation Number: [REDACTED]

MSPB Form 185-4A (6/1/2002)
5 CFR Parts 1201



Merit Systems Protection Board Form 185-4A

Claims of Mistakes in Procedures or Violations of Law

Continuation Sheet

1. If you believe that the agency made a error(or error) in applying required procedures in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3, identify the procedure(s) and describe the error(s).

The scope of an applicant background investigation is age 18 and up except employment and traffic offenses. Normally this is done in the Personnel Security Interview.

Here, applicant was never advised of the scope of investigation. As a result, it was believed applicant made an inconsistent statement, when the statement was not actually inconsistent.

It also appears to have been believed that applicant also admitted to Criminal Copyright Infringement frequently occurring in his adult life, due to the questioner's use of the term "pirate" in the question while referring to applicant's original written statement, which uses the term "pirate" consistent with colloquial usage to mean merely downloading software without purchase. This is not a crime and certainly not Criminal Copyright Infringement.

The FBI manual requires that an investigator ask questions to ascertain the specific factual basis of negative conduct, probably in order to prevent this type of misunderstanding.

The PSI interviewer not advising applicant of the scope of investigation caused harmful error. The harm was compounded by the SACU Special Agent choosing not to asking follow up questions that would have uncovered the original error.

In addition, it appears the Special Agent represented applicant's estimate given on 6/30/09 as a fact to the analyst, also a harmful error.



Merit Systems Protection Board Form 185-4A

Claims of Mistakes in Procedures or Violations of Law

Continuation Sheet

2. Explain how the error you in response to question 1 above caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

It was concluded applicant made an inconsistent statement, when the statement was not actually inconsistent. Had the PSI interviewer advised applicant of the scope of investigation, applicant would have given an estimate of his software downloading for only his adult life, which would have been consistent with the original written statement. Had the SACU Special Agent asked follow up questions, the original error in the PSI would have been uncovered.

In addition, due to the SACU Special Agent's use of the ambiguous term "pirate" in reference to applicant's written statement, applicant believed his original use of the term had been understood. The original use of the term was clearly that applicant merely downloaded software without purchase, and was not used to indicate Criminal Copyright Infringement. Had the SACU Special Agent asked any follow up questions, this conclusion also could have been avoided.

In addition, the statement made by applicant was an estimate, not a fact. Had the SACU Special Agent not represented this estimate as a fact to the analyst, the result might have been different.



MERIT SYSTEMS PROTECTION BOARD FORM 185-4C

Claims of Prohibited Personnel Practices

Complete this form and attach it to MSPB Form 185-1 if you are raising a claim—in connection with an appeal of an agency action or decision for which you have completed MSPB Form 185-2 or MSPB Form 185-3—that the agency action or decision was the result of one or more of the statutory prohibited personnel practices. See 5 U.S.C. 2302 b .

DO NOT use this form for any of the following prohibited personnel practice claims:

- A claim that the action or decision was the result of discrimination based on race, color, religion, sex, national origin, disability, or age, 5 U.S.C. 2302(b)(1); complete MSPB Form 185-4B instead.
- A claim that the action or decision was based on whistleblowing, 5 U.S.C. 2302(b)(8); complete MSPB Form 185-5 instead.
- A claim that the action or decision violated a veterans' preference requirement, 5 U.S.C. 2302(b)(11); complete MSPB Form 185-8 instead.

Please type or print legibly.

OMB No. 3124-0009

Name (last, first, middle initial)

Prohibited Personnel Practices - The statutory prohibited personnel practices are set forth at 5 U.S.C. 2302(b)(1)-(b)(12). An allegation of a prohibited personnel practice is not an independent source of Board jurisdiction. The underlying action must first be within the Board's jurisdiction before an allegation of a prohibited personnel practice may be considered by the Board. See 5 CFR 1201.56(b)(2).

Section 2302 of title 5, U.S. Code, does not apply to all personnel actions or to all Federal employees. Please review the definitions of "personnel action," "covered position," and "agency" at 5 U.S.C. 2302(a) to be sure that both you and the action or decision you are appealing are covered by those definitions before you complete and submit this form.

1. Check the appropriate box (or boxes) below to indicate the basis (or bases) of your claim that the agency committed a prohibited personnel practice in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3.

- | | |
|---|---|
| <input type="checkbox"/> Discrimination based on political affiliation | <input type="checkbox"/> Discrimination based on marital status |
| <input type="checkbox"/> Coercing the political activity of any person | <input type="checkbox"/> Nepotism (favoring relatives) |
| <input type="checkbox"/> Soliciting or considering employment recommendations not based on the individual's work performance, ability, aptitude, general qualifications, suitability, character, or loyalty | |
| <input type="checkbox"/> Taking or failing to take a personnel action as a reprisal for the exercise of any appeal, complaint or grievance right; for assisting anyone else in exercising such a right; for cooperating with or disclosing information to the Special Counsel or the Inspector General of an agency; or for refusing to violate a law | |
| <input type="checkbox"/> Deceiving or willfully obstructing a person's right to compete for employment | |
| <input type="checkbox"/> Influencing any person to withdraw from competition for any position, whether to help or hurt anyone else's employment prospects | |
| <input type="checkbox"/> Giving unauthorized preferential treatment to any employee or applicant | |
| <input checked="" type="checkbox"/> Discriminating on the basis of personal conduct which does not adversely affect the performance of the employee or applicant or the performance of others, except in case of criminal conviction for the conduct | |
| <input checked="" type="checkbox"/> Taking or failing to take any other personnel action that would violate any law, rule, or regulation implementing or directly concerning the merit system principles | |

Appeal Number:

Submission Date: 9/25/2009 11:07:17 AM

Confirmation Number:

MSPB Form 185-4C (6/1/2002)
5 CFR Parts 1201

e-Appeal Attachment Transmittal

Appeal Number:

[REDACTED]

Appellant Name:

[REDACTED]

Agency Name:

Department of Justice

Please check the box for each document included with this transmittal.

<input type="checkbox"/>	Name of Attachment	Attachment Processing Status	File Name/Delivery Method
<input type="checkbox"/>	SF-50, Notification of Personnel Action	Document not available or not applicable	N/A

2 copies must be submitted of all documents submitted in hardcopy.

Send documents to be submitted in paper form to:

[REDACTED] Regional Office

[REDACTED]
United States of America

Phone:

Fax: