

Comments of Robert B. Richardson, MBA
36 Chicory Lane, Lancaster, NY 14086

Re: Options for Proposed Amendments to MSPB Rules of Practice and Procedure
79 Fed. Reg. 64 (Apr. 3, 2014)

April 23, 2014

William D. Spencer
Clerk of the Board
Merit Systems Protection Board
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Dear Mr. Spencer:

I am a supervisory mission support specialist that has overseen workforce management for a 25,000-man federal agency. I write now in my personal capacity to express concern with the Board's proposal to exclude VEOA, IRA, and USERRA appeals from 5 C.F.R §1201.56, which would definitively preclude recourse to "Affirmative Defenses of the Appellant" as granted by 5 U.S.C. 7701(c)(2). My disagreement is limited to the extent that once jurisdiction for the complaint is established, the proposal seems to dictate that all consideration of any affirmative defense is prohibited from examination of the underlying merits. (I do not mean to suggest that the Board must fully adjudicate/remedy other alleged "appeals," for which it does not have original jurisdiction under the particular "complaint" raised, but only consider them to the extent necessary to address the merits of the complaint under the "totality of the circumstances.")

Bluntly, the proposal's claim that "The following authorities stand for well-established principles that are inconsistent with section 1201.56, thereby justifying Option B's limitation of section 1201.56's [and 5 U.S.C. 7701(c)(2)'s] coverage to appeals other than IRA appeals, VEOA appeals, and USERRA discrimination and retaliation appeals, as well as Option B's creation of a new regulation covering IRA appeals, VEOA appeals, and USERRA discrimination and retaliation appeals" seems to be vastly overstated. To the contrary, the instant proposal explicitly acknowledges existence of an "anomaly" in the Board's own regulations that have yet to be fully resolved, hence the Board's unilateral desire to do so now outside the judicial process. For instance, cited authorities such as "*Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶

13 (2006) (the appellant bears the burden of proof on the merits in a VEOA appeal)” and “*Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 11 (2005) (in a VEOA appeal, the Board lacks authority to adjudicate an appellant’s affirmative defense under 5 U.S.C. § 7701(c)(2))” do not necessarily support the propositions attributed to them once read in their entirety. In *Dale*, the cited paragraph simply infers that no other allegations were applicable to the grade level sought, and therefore, there was nothing left to adjudicate, including any affirmative defenses. Moreover, the proposal’s citation of *Goldberg* seems to be a complete overreach. That is, ¶ 11 does not cite § 7701(c)(2)) at all. It merely establishes that VEOA jurisdiction, once met, cannot be extended to other allegations for adjudication: “However, the Board cannot obtain jurisdiction over the appellant’s age discrimination and prohibited personnel practice claims through USERRA or VEOA.” It does not hold that once VEOA jurisdiction (i.e. “who,” “what,” and case processing rules) is established, the *principles* of affirmative defenses are inapplicable to the merits of the underlying VEOA claim itself.

In fact, the recent VEOA nonselection decision in *Lazaro v. Dep’t of Veterans Affairs*, 666 F.3d 1316 (Fed. Cir. 2012) is instructive. *Lazaro* plainly refutes the proposed regulation’s premise that the “*principles*” of 5 U.S.C. 7701(c)(2) do not apply to VEOA cases. The Court found: “There is simply no way to analyze whether a veteran’s preference rights were violated without examining the grounds upon which the veteran’s non-selection was predicated.”

Further, in another VEOA nonselection case, *Robinson v. Dep’t of Housing and Urban Development*, MSBP Docket Number CH-3330-11-0845-I-1 (2012), the Board’s final decision clearly contemplates, in its last operative paragraph, that *harmful error*, 5 USC 7701(c)(2)(a), applies to VEOA cases! In relevant part:

The [VEOA] appellant also contends that the agency violated its own procedural guidelines. PFR File, Tab 1 at 12-13; IAF, Tab 27, Subtabs 3c, 3d, 3h. The appellant has not specifically explained how any agency error harmed him by showing that the error was likely to have caused the agency to reach a different conclusion from the one that it would have reached in the absence or cure of the error. Thus, he has not shown that his contention warrants reversing the initial decision. *Cf. Doe v. Department of Justice*, 118 M.S.P.R. 434, ¶ 31 (2012) (stating that an agency’s procedural error does not warrant reversal of an employee’s removal unless the employee has shown that the error was harmful under 5 U.S.C. § 7701(c)(2)(A)).

Robinson, then, explicitly contradicts the proposed regulation's premise that § 7701(c)(2)(A) does not have any legal relevance in VEOA cases—at the very least, this case suggests that such proposition is not so obviously “well established” as the proposal alleges. Thus, denying VEOA appellants appropriate recourse to the principles of Affirmative Defenses, now seemingly guaranteed under the Board's current regulations via 5 C.F.R. 1208.3 “Application of 5 C.F.R. part 1201 to VEOA Appeals,” seems unconscionable for a Board whose primary purpose is to safeguard merit system principles.

And, before stripping VEOA appellant's access to Affirmative Defenses, the Board should also consider its analysis of the legislative history of the VEOA relative to merit system principles as captured in *Dean v. Dep't of Agriculture*, 99 MSPR 533, (2005). There, the Board emphasized Congress's explicit intent to give special consideration to covered veterans and specifically noted its desire that “VEOA [broadly] address a variety of strategies recently used by agencies that threaten veterans' preference, whether that is their intended effect or not. H.R. Rep. No.105-40 (1997)” ¶18. How then does the Board now justify its proposal to remove access to the *principles* of Affirmative Defenses, currently extended to VEOA cases via §1208.3, where the appellant reasonably proves that the selection/nonselection involved prohibited personnel practices, harmful errors, and/or was otherwise not in accordance with law vice providing bona fide consideration?¹

For similar reasons, I share the same concerns regarding the proposed changes to the extent they relate to USERRA and IRA nonselection cases on the basis that selections must always be made

¹ The Board has actually applied the *principle* of “harmful error” to find several VEOA cases in favor of appellant, see *Walker v. Dep't of the Army*, 2006 MSPB 337 (2006) (nonselection as a result of Agency failure to process veteran's self-nomination), *Lazaro* (nonselection resulting from Agency failure to credit military and volunteer experience), *Vassallo v. Dep't of Defense*, 2014 MSPB 24 (2014) (nonselection resulted from Agency improperly rejecting application because appellant included an SF-52 vice SF-50 which provides identical information), etc. Similarly, and by definition (perhaps to the proposal's underlying rationale), the principle “not in accordance with law” applies to all VEOA cases to varying degrees. See for example, *Endres v. Dep't of Veterans Affairs*, 2007 MSPB 301 (2007) (nonselection where selectee lacked any appointment authority even where the appellant was otherwise considered) and *Shapley v. Department of Homeland Security*, 2008 MSPB 212 (Agency attempted to use noncompetitive hiring authority to circumvent bona fide consideration of appellant). Further, as seemingly allowed under *Lazaro*, prohibited personnel practices might also give rise to affirmative defenses in VEOA cases as being argued now before the Board, see Docket # NY-3330-13-0128-I-1 (uncontested preselection where the disputed position was offered in writing to another outside candidate without any special hiring authority before the announcement was even published).

“solely on individual merit” which must be “secured by every possible safeguard.”² In fact, the Board has repeatedly held that remedial statutes such as the VEOA, USERRA and IRAs “should be construed [broadly] to suppress the evil and advance the remedy.” *Endres v. Dep’t of Veterans Affairs*, 2007 MSPB 301, (2007), ¶ 17, citing both *Dean*, ¶ 19, and *Williams v. Dep’t of the Navy*, 90 M.S.P.R. 669, ¶7, vacated on other grounds, 55 F. App’x 538 (Fed. Cir. 2002). Moreover, in *Metzenbaum v. Department of Justice*, 89 M.S.P.R. 285 (2001) ¶ 15, “The Board has held that its authority with regard to IRA appellants does not extend beyond whistleblower issues, does not allow for a decision on the merits of the underlying personnel action **except to the extent necessary to address the appellant’s whistleblower claims**... Similarly, the Board has held, and we reaffirm today, that its authority with regard to USERRA complaints or appeals does not extend beyond the complained-of discrimination because of military status, does not allow for a decision on the merits of the underlying matter **except to the extent necessary to address the appellant’s military status discrimination claims**” (emphasis added). See also, *Wright v. Department of Veterans Affairs*, 73 M.S.P.R. 453, 456 n.* (1991), review dismissed, 173 F.3d 432 (Fed. Cir. 1998) (Table) (Board remanded appeal containing a USERRA claim, directing AJ to consider appellant’s evidence attacking merits of underlying action, not otherwise appealable, only to the extent it was relevant to the USERRA claim); *Botello v. Department of Justice*, 76 M.S.P.R. 117, 124 (1997) (where Board found jurisdiction over USERRA claim, AJ was directed to consider the appellant’s claim of reprisal for filing EEO complaints only if AJ determined that the Board had jurisdiction to consider the underlying personnel action, a negative suitability determination).

Consequently, artificially parsing the merit elements of these types of “complaints” to strict rubrics without explicitly requiring a *Lazaro* Analysis and application of the *principles* enumerated by 5 U.S.C. 7701(c)(2)’s Affirmative Defenses as currently required by the aforementioned authorities, is inconsistent not only with the Board’s primary purpose of upholding merit principles, but it also goes against the explicit Congressional intent of these remedial statutes. Certainly, this proposal, if enacted without adequate safeguards to these

² See 5 USC 2301 and S. Rep. No. 576, 47th Cong. (1882) as quoted in *Dean*, “The single, simple, fundamental, pivotal idea of the whole bill is...appointment or promotion shall be given to the man who is best fitted to discharge the duties of the position... The impartiality...is to be secured by every possible safeguard. They are to be open to all who choose to present themselves.”

concerns (e.g. adding a *Lazaro* analysis requirement to the Board's new jurisdiction matrix³ under the VEOA "merit issues" portion, continuing to allow 5 U.S.C. 7701(c)(2) application to VEOA appeals per 5 C.F.R. 1208.3, etc.), will do nothing to advance merit system principles which should be the overruling imperative.

Thank you for this opportunity to comment on the proposed regulations.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "R.B. Reichard".

³ Author notes that MSPB's current chart incorrectly refers to "5 USC 3104(f)(1)" vice "3304(f)(1)" under the "Who are You" VEOA jurisdictional element—a simple typo.