



January 15, 2013

**VIA e-mail to [mspb@mspb.gov](mailto:mspb@mspb.gov)**

William D. Spencer  
Clerk of the Board  
Merit Systems Protection Board  
1615 M Street NW  
Washington, DC 20419

**Re: Comments Regarding Notice Proposing Revisions to MSPB Form 185**

Dear Mr. Spencer:

The National Employment Lawyers Association (NELA) appreciates the opportunity to submit the following comments in response to the Merit Systems Protection Board's Notice of Proposed Collection concerning modifications to MSPB Form 185, 77 Fed.Reg. 71,640 (December 3, 2012). NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and/or represent federal employees in employment law matters, and thus we have an interest in the modifications to MSPB Form 185.

NELA generally supports the Board's overall proposal to update MSPB Form 185, and agrees with many of the Board's proposed revisions appearing in the Notice. In particular, NELA notes its support for the following modifications:

- Simplification of the instructions at the beginning of the form;
- Elimination of the question appearing on the old MSPB Form 185 at Part 2, Box 19 concerning requested remedies;
- Moving the routine Privacy Act text to the back of the form;
- Adding Appendix B; and
- Adding Appendix A in general (although NELA does have concerns about the specific content of Appendix A, as noted below).

As a general matter, NELA is concerned about any attempt to make MSPB Form 185 (either in its paper form, or in electronic format as it appears on the MSPB website in the form of electronic appeals filing) a mandatory part of appeals filing. Instead, we suggest that MSPB Form 185 remain optional for filing appeals—and that the Board adjust the e-Appeal system to ensure that this option is viable for all methods for appeal filing approved by 5 C.F.R. § 1201.22(d). Like many attorneys who frequently appear before the Board, some NELA members have their own standard boilerplate for drafting appeals to the Board which does not employ MSPB Form 185 but which meets all requirements of 5 C.F.R. § 1201.24(a). Under the current e-Appeal system, it is impossible to file an appeal in any form other than MSPB Form 185 (such as by uploading an appeal document in .pdf or .doc form in the same way that motions and other pleadings can be filed in the present e-Appeal system).

As a result, attorneys such as NELA members who have such boilerplate must either file appeals through e-Appeal on MSPB Form 185, or else are restricted to filing appeals using their own boilerplate by other means. Allowing full use of such boilerplate promotes resolution of appeals by helping to lower attorneys' fees and costs. In NELA's experience, appeals filed on MSPB Form 185 cannot be readily recycled and reused as boilerplate, requiring each form to be re-filled from scratch in each new appeal. The Board itself estimates that this time is significant, "vary[ing] from 20 minutes to 4 hours, with an average of 60 minutes per response." *See* 77 Fed.Reg. at 71,641. That time, when multiplied by an attorney's hourly billing rate, can have a material effect on early case settlement and similar issues. Allowing use of boilerplate other than MSPB Form 185 to help contain costs thus promotes the Board's wise policy of favoring settlement of cases when practicable. The Board already has the capacity for processing e-Appeal filings of appeals in this fashion, as demonstrated by the fact that e-Appeal currently allows for filing of motions and pleadings (other than appeals) through uploading .pdf documents. Finally, allowing the option of e-Appeal filings other than on MSPB Form 185 would still be subject to the requirements of 5 C.F.R. § 1201.22(d), ensuring completeness and sufficiency of the appeals filed.

Further, NELA has the following specific concerns and objections with certain modifications identified in the Notice:

- While NELA generally supports the creation of Appendix A, as noted above, we have some concerns about the content of the current draft text as under-inclusive. NELA is concerned that many appellants, in particular *pro se* appellants, may read Appendix A as currently drafted as being the exclusive and complete list of all defenses available to an appellant. This risk is compounded by the draft text for Box 16, which seems to list "harmful procedural error, [...] a prohibited personnel practice, or [...] the other claims listed in Appendix A" as the complete list of defenses available. The current draft of Appendix A omits several common claims and defenses recognized by Board precedent from the list, including excessiveness of penalty/failure to consider *Douglas* mitigation factors for Chapter 75 actions, constitutional due process violations at the agency level, and timeliness of adverse action defenses such as the statute of limitations for Chapter 43 actions under 5 U.S.C. §§ 4303(c)(2)(A), 40303(d). Appendix A also omits the remaining Prohibited Personnel Practices, which NELA believes should either all be

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listed, or at a minimum should at least include 5 U.S.C. § 2302(b)(10) for claims of discrimination on other bases such as sexual orientation. To remedy these concerns, NELA suggests that the Board either modify Appendix A to note that the list of defenses is not exclusive, or specifically expand the Appendix A list to incorporate all of these defenses (including listing the *Douglas* factors and 5 U.S.C. §§ 2302(b)(1), (b)(8), (b)(9) and (b)(10)).

- Draft Boxes 16 and 18 on revised MSPB Form 185 both contain lists of documents for appellants to attach; NELA suggests that the draft be reformatted to flag those lists as clearly as possible. NELA is concerned that *pro se* appellants might miss this list, and suggests that the formatting be adjusted to draw attention to the lists of documents, perhaps through the use of a bullet point list or checklist.
- Draft Boxes 16 and 25 on revised MSPB Form 185 call for narrative responses, but only provide about 1-1/2 inches of space to write in the requested narrative—which NELA suspects would not be enough space for many appellants. NELA suggests adding a note in the instructions allowing appellants to attach additional pages if necessary to allow the appellants to complete their narrative responses.

Again, NELA appreciates the opportunity to comment on the proposed regulations, and wishes to thank the Board for its attention and consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with a large initial "T" and "C".

Terisa E. Chaw  
Executive Director

TEC/ehp-ajp