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

Re: Comment on Proposed Rulemaking: Establishment of
Jurisdiction

Dear Mr. Spencer:

Determining jurisdiction is not difficult in the sense of ascertaining the nature of a pleading committed to the Board's adjudicative responsibility. Explaining how jurisdiction is to be pleaded in terms that can be applied by nonspecialist lawyers and *pro se* appellants is more demanding .

Jurisdiction should be determined by a nonfrivolous assertion of jurisdictional elements, initially to be determined through a summary procedure by the judge. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 130 S.Ct. 1043 (1995).

Option A leaves to judges identification of the jurisdictional elements of a claim in an acknowledgment or show cause order. Placing the burden of identification of jurisdictional elements on judge is appropriate, given their expected expertise.

Remaining is the task of defining how a nonfrivolous jurisdictional allegation is to be expressed by the appellant. Although the Federal Circuit has not embraced the concept of a nonfrivolous allegation, *Garcia v. DHS*, 437 F.3d 1322 (Fed. Cir 2006), was constrained by the then-controlling Board regulation; *Garcia* expressly favored an analysis that "jurisdiction attaches when the appellant makes non-frivolous allegations that [the appellant] was constructively removed." Although the court declined advance approval of a regulatory nonfrivolous pleading standard, the Court impliedly invited to the Board to develop a regulation that it could later assess under deferential *Chevron* standards.

To allow jurisdictional determinations to be made on nonfrivolous allegations rather

than preponderant evidence, 5 CFR 1201.56 must be modified.

Since both parties to an appeal should inform the Board on jurisdiction, the suggested regulation is:

The appellant has the burden of proof as to issues of jurisdiction, to be determined, with the opportunity for discovery in the discretion of the judge, based on nonfrivolous jurisdictional allegations.

Nonfrivolous jurisdictional allegations are the parties' sworn declarations of facts that may be supported by documentation. Should there be material factual differences in jurisdictional submissions, Appellant's submission, as supplemented by noncontradictory submissions of the Agency, will form the basis for a jurisdictional determination.

Judges typically issue acknowledgment or show cause orders reciting pleading standards, followed by case citations establishing those standards. Some *pro se* appellants connect the dots; others do not. The pleading requirements need to be stated by the judge in plain English, rather than by citation to cases; for example, if a person claims her retirement was coerced, the judge would state to the appellant (with a parallel notice to the agency requiring a jurisdictional response):

"To establish that your retirement was forced and is within the jurisdiction of the Board, you must provide a sworn declaration explaining how any the following conditions occurred that led to your retirement:

1. You were given incorrect information by the agency;
2. You were given too little time to make a decision on whether to retire;
3. The retirement occurred because the agency proposed or threatened a disciplinary action against you that the agency should have known had no basis;
4. You did not understand what you were doing when you decided to retire;
5. You were subjected to intolerable working conditions;
6. The agency failed to provide accommodate your disability in a way that would have permitted you to continue to work;

7. The agency failed to permit you to withdraw your retirement application;
8. Any other unreasonable action by the agency left you no alternative to retirement.

You may supplement your answers with documents. If you believe that additional information can be obtained through Board discovery procedures that would assist the Judge in resolving these questions, file a request with the Judge to extend the time for your submission and follow Board discovery processes.”

The Board should distinguish jurisdictional pleading with proof of a claim within the Board’s jurisdiction. The judge needs to assume an inquisitorial role on the initial jurisdictional determination, recasting Board law into questions that can be readily understood by appellants and that will lead to the disclosure of jurisdictional information. If the underlying claim is not clear, the judge can request clarification by pleading or conference call—through any mean necessary to determine the nature of the claim. These requirements can be supplied through internal Board directives and judges’ performance standards. The Board can assist judges by providing templates for acknowledgment and show cause orders.

Thank you for the opportunity to submit this response.

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Broida', followed by a horizontal line extending to the right.

Peter B. Broida