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**U.S. Department of Justice**

Civil Division

*Washington, D.C. 20530*

November 16, 2011

The Honorable Susan Tsui Grundmann
Chairman
Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Dear Chairman Grundmann:

In response to your letter of October 19, 2011 to Assistant Attorney General Tony West, we have reviewed the proposed revisions to your adjudicatory regulations. We have no comment. Thank you for the opportunity to consider the proposed regulations before publication.

Very truly yours,

Todd M. Hughes
Deputy Director
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November 29, 2011

Clerk
Merit Systems Protection Board
1615 M St., NW
Washington, DC 20419

Re: Regulation Revision Comments

Gentlemen:

I thank you for the opportunity to comment on the proposed regulatory revisions. I have taken a little time to prepare my suggestions, below, and I hope they may be of some benefit to you.

1200.4 Rulemaking

Suggested revisions:

a. The affirmative or negative action by the Board should occur within 60 days of submission of the rulemaking request.

b. For purposes of clarity, the submission by an interested person should be titled " rulemaking petition."

1201.3 Appellate Jurisdiction

Suggested revisions: Change the first sentence to: The Board's jurisdiction is limited to matters established by statute or regulation.

Change the second sentence to: For the Board to have jurisdiction there must be an appealable action established by a statute or regulation and the person filing the appeal may be required by the statute or regulation to hold a particular type of appointment such as competitive or excepted service or veterans preference status.

Comments: Avoid saying what jurisdiction does not include. Additionally, the terms "plenary or general" are interesting constructs created by courts, but have no meaning to individuals not legally trained. If the regulations are to be in plain English, the terminology employed should be plainly understood and not constitute legal jargon.

Summarizing Board jurisdiction in a paragraph or two is an impossible task,

but the summary should at least reflect reality. Board jurisdiction is established by statute or regulation (there is no rule that creates Board jurisdiction).

1201.4

Definitions: date of service

Comments:

The observation is correct that in the past service by mail has effectively cut the response date significantly compared to the response date that would apply if e-service or fax was employed to serve a document.

Suggested Revision: it should be made plain in the regulation, that is, should be specifically stated, that the calculus for materials served by mail applies not only to pleadings submitted by parties but also to orders issued by judges, including but not limited to acknowledgment orders, show cause orders, and prehearing conference summaries. Judges are part of the problem here, because they serve materials by mail upon geographically distant parties and counsel when they could have used fax to obtain immediate service.

Also suggested here is an internal operating instruction to be issued by the Office of Regional Operations requiring judges and law clerks and regional and field offices to employ fax service of documents when possible. That requirement would not only expedite case processing, but it would also save duplication and mailing costs to the Board.

1201.14
Electronic Filing Procedures

No comment.

1201.21
Notice of Appeal Rights

Comments:

Provision of Board regulations: agencies should be required to provide a copy of Board regulations; agencies may construe "access" is no more than an Internet address.

Election of Remedies: The regulation calls for agencies to give appellants clear advice on the effect of grievances and elections of remedies. These are complex subjects. To avoid errors and confusion, it is suggested that the Board provide the language for agencies to use so that there are uniform notices to potential appellants of election problems relating to grievances and other potential routes of appeal or complaint that would constitute an election of remedies.

The Board would probably be required to prepare two forms of notice, one

for agencies other than the Postal Service; and one for the Postal Service.

A uniform notice would readily apply to most of the actions appealable to the Board for which an election applies: adverse actions and performance-based actions.

Areas where uniform notice may need to be more general would include cases involving reductions in force and denials of within grade increases, where the election depends upon contract coverage and upon whether an allegation of discrimination is raised in an appeal to the Board. In those cases, it is reasonable to require agencies to include a notice that is based upon applicable contract language, but this will be the exceptional case, since those two categories of appeal amount to little more than 1% of all Board appeals.

Comment on IRA Remedy:

the Board suggests that a plain reading of §7121(g) limits and appellant to a whistleblower case if the appellant is subjected to an otherwise appealable action but files first with OSC rather than with the Board. The Board also recognizes that its own interpretation is quite contrary to what it now calls the "plain reading" of the statute. See my remarks below on the regulatory revision suggested regarding remedial elections.

1201.22Filing an Appeal

Comments:

It is agreed that constructive receipt law is created ad hoc and needs to be established by regulation.

(I) personal receipt–seems fine, with an understanding that there will be litigation over what constitutes personal receipt;

(ii) receipt by relative–should be dropped. Either the appellant personally receives it or he or she does not personally receive it. That someone collects the mail and fails to provide it to the appellant does not constitute receipt.

(Iii) designated representative–there needs to be clarification here: the appellant should specifically and through a writing have designated the representative as the individual to receive the decision. The representative who delivers the oral or written reply may not be the person retained, if any, to appeal the case. There will be times when the appellant does not want to receive the decision, or for some reason cannot. Then a specific written designation would be appropriate.

(Iv) the appellant's constructive receipt: let's get more specific here: make clear that the appellant is to inform a specific individual of a change of address, e.g., the deciding official, and require in the proposal notice that the agency identify the person to whom such notice is to be provided by name, address, fax, email and phone. Keeping an agency advised of anything without further direction is a problem–e.g., if it is a VA case, would it be sufficient to send the change of address card to the Secretary of

Veterans Affairs?

(v) intentional avoidance–I am not sure how you can avoid a motivational analysis, but I am not sure how you can accomplish the result desired, an ascertainable period for appeal, in any other way.

1201.24Content of Appeal

Comments:

Restricting the appellant to the decision notice. I strongly disagree. If documents are attached to the appeal they are in the Board record, assuming they are not subject to a motion to strike because the submission is absurd. If they are in the record, they do not have to be subjected to evidentiary scrutiny, and possible rejection later, when the same materials that would earlier have automatically have entered the record are rejected as exhibits listed in the prehearing submission because they are "irrelevant."

Agencies load up their responses to appeals with all sorts of material that has not been placed into the evidence file supporting a proposed action. No one scrutinizes those submissions.

The point is: keep the playing field level. The appellant should no more have to argue about the admissibility of a document submitted with the appeal than the agency should have to fight over a document submitted in its response to the appeal.

If the documents supplied by the appellant have nothing to do with the appeal, they are subject to a motion to strike or order to show cause from the judge.

1201.24 Right to Hearing

Agreed.

1201.28Case Suspension

Comments:

The proposed revision is awkward.

A joint request is granted at the discretion of the judge–that means there must be good cause, correct? So how does that differ from the good cause required for a unilateral request?

Suggestion: go back to the original plan: if the parties jointly request the suspension, it is granted.

If there is a unilateral request, good cause is required.

Forget about the 45 day requirement. If the case is suspended because the

parties desire it or there is good cause in case of a unilateral request, what difference would it make that the request comes in after the 45th day? The only possible exception would be where the request is made immediately prior to the hearing and cancellation of the hearing would involve demonstrable prejudice to the Board, e.g., substantial expense. There's no need for the involvement of the regional director as to a "late" request.

Let the parties have more control over their cases. The Board serves the parties. Judges have no vested interest in control over a case other than case processing statistics, which should be of no importance when a suspension is granted.

1201.29DWOP

Comments:

The DWOP process is in need of formal regulation. But the proposed regulation needs to be revised. First, the judge must be required to articulate the reason for denying a DWOP. Second, refilings should be automatic. The Board has created a situation where it dismisses refiled appeals based on brief refiling delays and then creates a body of caselaw that, in some circumstances, distinguishes the application of *Alonzo* standards based on the type of appeal, e.g., retirement benefits. To avoid the dismissals of appeals that are otherwise timely filed, judges should be required to automatically refile the appeal. There will be circumstances where the automatic refiling is premature, e.g., during a pending criminal proceeding, or perhaps during a period of serious illness of a party. But even then, the appeal can be refiled automatically and again placed on DWOP status.

Additionally, the Board's caselaw suggests that the DWOP is at the instance of the appellant. But there are cases where judges DWOP a case sua sponte or at the suggestion of the agency. Let agencies file the motion as well, subject to opposition by the appellant.

1201.31Representation

No comment.

1201.33Federal Witnesses

Comments:

Clarification is needed. The first sentence calls for production of "employees or personnel." My guess is that "personnel" is a reference to individuals in military status, but it may also mean contractors. The Board needs to state what the term means. Then, the second sentence talks about arranging for the presence of "employee witnesses." What about the "personnel" referred to in the first sentence? The sentences should either be combined or rewritten to provide parallel application.

1201.34intervenors; amici

Comments:

A suggested revision: allow for amicus submissions on agreement of the parties; make it discretionary if there is no agreement. That is the process followed by the Federal Circuit rules. If the parties agree to submission of an amicus brief, the amicus enters an appearance, notes the agreement of the parties, and files its brief within 7 days of submission of the appellant's brief. The Board does not tie an amicus submission to a formal briefing schedule, but it can permit amicus submissions by consent. If there is no consent, to avoid delays, require the amicus to submit the brief with the request for amicus status. Also, to require concise filings, set a page or word-count limit, as the Federal Circuit does (7,000 words for an amicus brief).

1201.43Sanctions

Comments:

The sanction of exclusion of an appellant's counsel from a case is one that should be subject to interlocutory appeal as a matter of right. Most appellant's do not have the money to hire one lawyer; hence the high rate of pro se appellants. To have paid for one lawyer, particularly to take the case to hearing, and then have to go out and hire another is an expense that cannot be remedied through a PFR of an appellant who loses his or her case. The only effective remedy is immediate review. The delay entailed should not be substantial if the Board requires an expedited briefing schedule. In short, the Board controls the delay.

1201.51Scheduling the Hearing

Agreed.

1201.52Public Hearings

Comments:

The revised rule is too restrictive. If a hearing is public, why can it not be recorded or broadcast, subject to the control of the judge to maintain order? Such was the situation in the Air Traffic Control cases and there did not seem to be a problem with press coverage.

Further, as to the appellant who cannot afford a transcript, the appellant should have the right to record the Board hearing, assuming the recording is not obstructive. This allows the appellant, particularly the pro se who cannot afford transcription, to have a record of the hearing for reference or use in briefing or a PFR. Whether that unofficial transcript is relied upon by the Board depends on its quality and content. *Compare Fidelibus v. DLA*, 21 MSPR 280, 281 (1984), and 24 MSPR 198, 201 n.2 (1984), *with Marotta v. DHHS*, 34 MSPR 252, 257 (1987). The right to create an informal record should be a right, not a matter of discretion by the judge. The judge has no stake in matter.

Additionally, some judges are locking the doors to hearing rooms once the hearing has begun, on the theory that the hearing in progress should not be disturbed. Federal district courts and appellate courts are open venues where spectators come and go, subject to controls to avoid undue disruption.

Board hearings should be truly open, or if a door is closed to avoid noise from the hallway, there should be posted on the unlocked door a notice that a hearing is in progress and people may enter but should close the door after they enter the hearing room.

In conjunction with the public hearing requirement, some judges obtain a "security presence," e.g., a GSA armed guard or guards to sit outside a hearing room. This is done on the basis of an ex parte communication, often from the agency to the judge. The Board should issue a regulation requiring any such application for a security presence to be made in writing, for good cause shown, based on a sworn declaration, filed with the Board, with service on the opposing party, and a reasonable opportunity to respond.

1201.53Record of Proceedings

Comments:

Change suggested:

(c) Copies: the request for a transcript goes to the regional office or the clerk, but under (b), a party requests the reporter to prepare the transcript. Merge the two sections and eliminate the ambiguity of who asks for what and who does what relative to the transcript.

1201.71Purpose of Discovery

Comments:

The revised regulation is incomplete or misleading. It limits the filing of discovery and responses to a motion to compel or a motion for a subpoena. Discovery requests and responses, e.g., interrogatories and answers to them, can be filed as evidence in the form of exhibits listed in the prehearing submission, or, if needed, in response to motions or show cause orders relating to matters of jurisdiction or timeliness or with other motions pertaining to substantive rights, e.g., damages, fee awards, compliance proceedings.

1201.73Discovery Procedures

Comments:

Elimination of Initial Disclosures: excellent. It was a bad idea and had no place in Board practice. There was a recent nonprocedential final order approving the sanctioning of an agency for failing to disclose a potential witness who could have been identified in response to discovery or in a prehearing submission. The decision was a very poor result given the means available to parties to have otherwise dealt with the situation by means of a continuance, if necessary, to take some discovery of a newly–named witness.

(a) Initiating Discovery: agreed.

(b) Responses: Parties do not furnish "testimony requested" in discovery. They take depositions. Strike "or testimony requested".

(c) Motions to compel; subpoenas. A subpoena should not be required for a nonparty federal agency. A Board order should suffice. Agencies are required to comply with Board orders. Subpoenas require special service processes and payment of witness fees to document custodians. The Board has never made clear that its regulations permit documents to be subpoenaed without the production of the document custodian.

As to a motion to compel accompanied by a statement of nonreceipt or nonresponse from the other party or nonparty, there should be no need for a sworn statement. A statement in the motion papers should be sufficient. It is subject to rebuttal by the party that responds to the motion.

(d) Time limits. Change the response time from 20 days from service to 20 days from receipt. A judge or party who uses mail when fax would be more efficient effectively cuts the 20 day response time to 15 days. Similarly, clock the time for followup discovery from the date of receipt rather than the date of service.

Similarly, with the timing of the motion to compel or for issuance of a subpoena, clock the time from receipt of the document leading to the motion.

Additionally, the parties are supposed to enter good faith negotiations to resolve discovery issues. It takes days for people to actually confer and reach agreement, and meanwhile the 10 days is running. To avoid running out of time for discussions required for resolution of disputes, provide that the time for filing a motion to compel or for a subpoena will be extended by the time used in good faith discussions, subject to a required statement by the moving party summarizing the chronology of those discussions. Do not leave that "extension" to the discretion of the judge, although you could require that in any event a motion would have to be filed not later than the prehearing submission date.

Not included here is the treatment of discovery requests to nonparties. The Board currently has a very cumbersome process of "voluntary" efforts to discovery, followed by ambiguous procedures involving mandatory efforts at such discovery. Suggested is dropping the voluntary process. Just treat nonparties, either governmental or nongovernmental, like everyone else. Serve your discovery, await the response and file necessary motions to compel or requests for subpoenas as necessary. Do not confuse the discovery process with a special voluntary process for a subset of organizations or individuals from who discovery is sought.

Comments:

It is unclear what is meant by "stay the appeal." Certainly a hearing should not proceed while an interlocutory appeal is ongoing, and that should be made clear in the regulation. The judge may be given the right to stay other components of the appellate process, including discovery and prehearing processes.

1201.112 Jurisdiction of Judges

Comments:

I must admit, I don't see any change other than the arrangement of words. Perhaps the explanation, which is more complete than the revised regulation, should be reworked and used as the "plain English" regulation.

1201.113 Finality of Decisions

Comments:

Referral to OSC: Is the referral made if the initial decision becomes final by passage of time or only if the Board itself issues a finding? There should be clarification of the referral requirement.

1201.114 PFR/cross PFR

Comments:

(a) Pleadings Allowed: The reply pleading is a good idea. There needs to be clarification on whether both an appellant and her representative can file a PFR/reply. Board case law suggests both can file. As a practical matter, a client may not trust his or her representative to properly plead the case. Dual filings do not often occur, but I cannot think of a good reason to prevent them, since the respondent can file a pleading addressing both submissions. The way the Board structures its law, negligence of counsel is charged to the client absent evidence of careful monitoring of counsel and gross negligence or obstruction by counsel or his staff. Dual filings permit the appellant to avoid problems with representatives, some of whom are not lawyers.

(b) Contents. I would drop the language that the PFR "must be supported by . . . references." The Board's practice has been to examine the PFR and respond to the arguments made, many of which will be inelegantly expressed by pro se appellants or non-attorney representatives. Change "must" to "should" and you might better achieve your objective without encouraging motions to strike by respondents to PFRs who seek dismissal of those petitions because they do not provide sufficient record citation.

(c) Who may file: Under 5 USC 7701(e)(1), OPM may file a PFR as a matter of right. OSC is not a party to most appeals and has no statutory right to file a PFR. If the statute did not include OSC as an entity that can by right seek review, presumably Congress meant to exclude OSC. Further, OPM can file a PFR only if the Director is of the opinion that the decision is erroneous and will have a

substantial impact on a law, rule or regulation under OPM jurisdiction. That language should be included in the regulation. Returning to OSC, to the extent that current regulations give OSC an unrestricted right to file a PFR, the regulation is incorrect. OSC is either a party to the case, with the right to file a PFR, or it is not a party and becomes involved in the case through its statutory intervention authority, a limitation that should be made clear in the revisions to the regulations.

(d) Place: agreed.

(e) Time: If the time for filing a response or reply is triggered by service, given mailing delays, particularly in overseas cases, the same language concerning delayed receipt of initial decisions should apply to these filing periods as well.

(f) Extensions: I am not sure what is gained by the requirement of a an affidavit or sworn statement. Any submission to a federal agency is made pursuant to the False Statements Act. Imposing an sworn statement requirements gets the Board involved in adjudicating the technical sufficiency/wording of the statement by people who aren't familiar with affidavits and the language of Section 1746 of Title 28. Granted, one can look it up, but that is expecting a lot from pro se appellants. Does the Board think that these statements of "good cause" are going to be more accurate or complete because someone writes out the language of Section 1746? The requirement adds a level of unnecessary complexity to an already complex process.

(g) Late Filings: Same concern as with "Extensions" as to the necessity of an affidavit or sworn statement.

(h) Length limitations: This "one size fits all" appeals rule is unrealistic. Some cases, e.g., IRA and complex removal appeals, involve considerable records, and the briefs involve extensive quotation of testimony and documents. Given the relatively short time for filing a PFR, many people, including those represented by lawyers, are not going to have them finished until the deadline or a day or two before. It is recognized that OAC counsel and Board staff may tire of the occasional 300 page rambling submission, but the Board can control the exceptional situation by directing resubmission of a more concise pleading. The Board needs to show some flexibility and consideration for the appellants who appear before it rather than imposing rules that are appropriate for a court served by members of the bar who can (usually) conform to page or type volume limitation. The administrative agencies the Board mentions with page limitations, e.g., SEC, PTO, are organizations that are usually working with advocates skilled in brief writing in complex commercial cases, not the 55% pro se rate of representation before the Board. The Board is not a court. It does not exist in a complex regulatory environment populated by

attorney specialists with multiple appearances before it. For most pro se appellants, and for many advocates, the Board is a once in a lifetime or career experience. Avoid making it more complex and expensive than it needs to be.

(k) Closing the record: For the first time, there's mention made of a brief on intervention. That filing should be enumerated in 1201.114(a), and subsection (c) should then state the time limits for response to an intervenor's brief.

1201.115 Criteria for PFR

Comments:

The criteria, as restated in the proposed regulation, are correct and desirable restatements of Board law—particularly the section about factual disputes.

What is confusing and needs to be clarified is the reference to "harmful error" in subsection (c). The term "harmful error" is statutory and relates to an error in the procedures employed by the agency in the action under appeal that is sufficient to set aside the action. 5 USC 7701(c)(1)(2)(A). A judge's case rulings would not result, in themselves, in reversal of the action under appeal. The judge's rulings are adjudicatory error, which the Board may be able to correct on its own case review through the PFR, or which may lead the Board to remand the case, e.g., to permit discovery to be undertaken that the judge improperly precluded. Revision suggested: for that subsection, change "harmful error" to "adjudicatory error."

1201.116 Interim Relief

Comments:

(a) Certification: the regulation should require the agency not simply to certify that interim relief has been provided but to state exactly what constitutes the interim relief provided. The Board can, upon challenge, quickly determine if there is a distinction between what was ordered and what relief was supplied. The appellant can then also focus her challenge to the specific area or areas of compliance asserted by the agency.

Filing dates: to allow for delays in mailing time of pleadings, change the calculus for filing to start the deadline with the receipt of a pleading, or modify the existing language to allow for additional time when service is by mail.

1201.117 Reopening Procedures

Agreed.

1201.118 Reopening/Reconsideration

Comments:

Agreed. The distinction between action of a PFR and reopening has long been a muddle. This clarifies that the Board reopens a final decision; a nonfinal decision is subject to the PFR process.

There remains the question: how does the Board style its action on a case where the PFR is late, i.e., the initial decision has become final. If the belated PFR is allowed, does the Board's action then constitute a denial/grant of the PFR or a decision to reopen or not to reopen the case. For consistency it would seem reasonable that the Board address a belated PFR for which the time limit is waived as a determination of whether or not to reopen the case. Since the statute, 7701(e)(1) sets the time limit of 30 days on a PFR, absent a theory of equitable tolling, the authority to consider a late PFR should only be through the authority of the Board to reopen the case on its own motion (albeit at the request of a party to exercise that discretion). The regulation needs to square with the jurisdictional limitations of the statute, meaning the revised regulation should be further clarified.

As to the grounds for reopening, the statute sets none. The regulatory language referencing fraud and the time period for requesting reconsideration are products of caselaw. I suggest you delete the last sentence to avoid imposing a regulatory limit on reopening authority that is more restrictive than the statutory authority. Allow caselaw to develop as to the basis for and timing of reopening.

1210.153 Contents of appeal

Comments:

Further clarity is needed. The reference to grievance is ambiguous. An administrative grievance does not affect Board jurisdiction. Only a grievance under a negotiated agreement presents a potential election of remedies. Rephrase the section to show it only requires identification and the date of a grievance submitted pursuant to a negotiated grievance procedure.

1201.154 Time for Filing

Agreed.

1201.155 Remand of EEO allegation

Agreed.

1201.156 Time for appeals processing

Agreed

1201.155 Arbitration decisions review

Comments:

Looks like you are deleting 1201.154?

(a) Scope: As to 1201.155, you speak about how "usually, the final decision on a grievance is the decision of an arbitrator." I cannot think of a situation where that would not be the case and the matter could be brought before the Board. Why not just say that the review process applies to a decision of an arbitrator on a matter otherwise within the Board's appellate jurisdiction? A final decision on a grievance could be the agency's final decision on the grievance either denying the grievance or rejecting it for some reason, and that certainly would not be appealable to the Board.

(b) Time for filing: you speak of the "final decision." Although 5 USC 7121(d) speaks of a "final decision," no one calls an arbitration award a final decision. Call it what it is: an arbitration award or an arbitration decision.

(c) Contents: agreed.

(d) Development of Record: the statute, 5 USC 7121(d) calls for Board review of a final decision, not a Board hearing on the issue of discrimination. Had Congress intended the Board to conduct a supplemental hearing with the issuance of another decision, it would likely have granted that authority to the Board. An individual seeking Board review of a final decision can raise, under Board law, an EEO allegation with the Board, but the statute suggests that what is being reviewed is the final decision and the supporting record. In short, Congress did not provide the Board for de novo factual review involving arbitrators' awards through some type of supplemental fact gathering process.

(e) Record Closure: I can think of no statutory or regulatory process for intervention in arbitration review. Arbitration review is not an appeal. Unless one is established, there should be no reference to "brief on intervention." Conceivably there could be an amicus brief, but the parties to an arbitration are the union and the agency. The grievant can seek review, but I see no authority in the statute creating the right of review for an intervenor.

1201.182 Enforcement

Comments:

I do not recall an agency filing a notice of compliance. No such notice is required under Board regulations. The only purpose to file such a notice would be to cut off an enforcement petition. Why not simply require that an enforcement petition be filed within a reasonable period of time following knowledge of noncompliance with a settlement or final order? The agency can raise laches as a defense. But there seems no good reason, other than to cut off

enforcement petitions, to tie the ability to secure a right governed by contract or final order to an artificial constrain created by a notice of compliance that in practice is not required and that is not often employed.

1201.183 Petitions for Enforcement

Comments:

On the matter of the responsible agency official, the way the regulation is proposed, that official could lose pay if the agency is in noncompliance when the initial decision becomes final. What that means is that if an agency does not file a PFR to stop the effectiveness of the initial decision, the responsible official could lose pay. The failure to file a PFR could be negligence as opposed to a reasoned decision. The responsible official would then lose pay with no due process protections, since the responsible official is not a party to the appeal. That cannot be the result desired by the Board. The regulation would be unconstitutional. To avoid that result, the judge's authority should be limited to matters of agency liability—not to matters concerning the pay of the responsible official, which can be separately dealt with by the Board through its statutory sanctioning authority, following due process notice and an opportunity to respond. The regulation will need to be more carefully phrased. Or, a separate regulation could be established to create a due process review for the responsible official. Given the lack of likely users of the latter regulation, it would seem a better approach to more carefully phrase the judge's authority in the issuance of a compliance initial decision.

1208.21VEOA Exhaustion

Comments:

(b) Equitable Tolling: lawyers may know what equitable tolling is, maybe; but pro se appellants do not. Put it in plain English–if you must use the term, explain it; otherwise, write the section to explain that delays past the deadline can be excused under the circumstances noted.

1208.22Time for Filing

Comments:

Same comment as above regarding equitable tolling.

1208.33VEOA appeal content

Comments:

It would seem a more direct approach relative to demonstrating exhaustion of DOL remedies to require a copy of the DOL complaint and to inform the appellant that he or she can also describe in the appeal any matters raised with DOL that were not placed on the complaint form or attachments.

1209.2 IRA jurisdiction

Comments:

This is a fundamental revision of Board law, as the drafters recognize. The regulation will disenfranchise many individuals from true review of otherwise appealable actions if they first seek the assistance of OSC.

People go to OSC to avoid legal costs or the enormous disadvantage of litigating against an agency *pro se*. They go to OSC to obtain a stay, informal or formal, of a personnel action. OSC automatically gets a stay. If an individual first seeks resort with the Board and asks for a stay, the judge almost always denies the stay. As OSC takes on a proactive approach towards eradication of whistleblowing reprisal, more people will want to utilize the assistance of that Office.

The amendments to the Reform Act, including the OSC reauthorization legislation and the WPA, were to strengthen, not weaken, employee rights.

I cannot imagine that any drafter of the amendatory language intended that employees would sacrifice Board review of the complete merits of an otherwise appealable action, including the factual basis of the agency and considerations of nexus and the reasonableness of the penalty, by first seeking OSC assistance. No one would have imagined that the Board's analysis would then be limited to determining whether the appellant proved reprisal, with nexus, the strength of the evidence, and reasonableness of the penalty becoming meaningless absent a finding of whistleblowing reprisal–which could easily be the case if, for example, it was shown that an action was in the works prior to a protected disclosure or if, for example, the disclosure that triggered the discharge was to the wrongdoer/supervisor who took the action against the employee.

The result is that proposed regulation reaches an absurd result that is wholly contrary to the overall structure of the curative purpose of the anti-reprisal provisions of the CSRA and WPA.

The Board's reviewing court has admonished against statutory interpretation that, although seemingly simplistic, negates statutory intent. *Ed A. Wilson, Inc. v. GSA*, 126 F.3d 1406, 1409 (Fed. Cir. 1997), held:

> While the plain language of a statute always begins, and often ends, a court's inquiry into its meaning, the Supreme Court has "repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'" Lynch v. Overholser, 369 U.S. 705, 710, 82 S. Ct. 1063, 1067, 8 L. Ed.2d 211 (1962) (citations omitted);

> see also Brewer v. American Battle Monuments Comm'n, 814 F.2d 1564, 1566–67 (Fed. Cir. 1987) (legislative history of the Act warns against an "overly technical construction...resulting in the unwarranted denial of fees"). While there is some allure to the simplicity of the board's construction, it cannot stand in light of precedent and the purposes underlying the Act.

Further, under *Foret v. Dept. of Army*, 105 MSPR 437, 441, 2007 MSPB 97 ¶ 9 (2007),

> Under the usual rules of statutory construction, the use of two different terms is presumed to be intentional. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982). Moreover, the provisions of a statute should be read in harmony, leaving no provision inoperative or superfluous or redundant or contradictory. Gonzalez v. Department of Transportation, 101 M.S.P.R. 416, ¶ 7 (2006). The rules of statutory construction apply when interpreting an agency regulation. Roberto v. Department of the Navy, 440 F.3d 1341, 1350 (Fed. Cir. 2006); Spigner v. Department of the Air Force, 96 M.S.P.R. 275, ¶ 14 (2004), aff'd, 143 Fed. Appx. 336 (Fed. Cir. 2005).

Under 5 USC 1222, nothing in 5 USC Chapter 12 or Chapter 23 limits any "right or remedy" available under a provision of statute which is outside of both this chapter and chapter 23.

5 USC 7701 falls outside the ambit of Chapters 12 or 23 of Title 5, leaving the appellate remedy to the Board despite the reference in § 7121 to Chapter 12 remedies.
In short, for an otherwise appealable action, the § 7701 appeal is not divested by resort to OSC. Section 7121 does preclude initial appeal to the Board of a case with whistleblower allegations and subsequent appeal of the same matter through OSC and the IRA mechanism.

There remains the issue of the 30-day appeal period for the § 7701 case. That period is regulatory. There is no reason why it cannot co-exist with the statute requiring a Board appeal within 60 days of the OSC closeout letter. For those who are concerned that there is no limitation period for initiating an OSC case, meaning people can through access to OSC circumvent the usual 30–day period for filing a Board appeal, it was the decision of Congress not to impose a filing deadline and OSC has not imposed a regulatory deadline of its own. There is available to an agency the defense of laches if the delay in resort to OSC is prejudicial to the agency.

I think there are other regulations that could use review and possible revision, but I will address those in a future, separate letter or rulemaking petition.

Yours very truly,

Peter B. Broida

ERIC J. SCHARF
MANAGING COUNSEL
EMPLOYMENT & LABOR LAW

UNITED STATES POSTAL SERVICE

November 30, 2011

BY FASCIMILE

Honorable Susan Tsui Grundmann
Chairman
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002

Re: Request for Comments Regarding Proposed Revised Regulations

Dear Chairman Grundmann:

This is in response to your request for comments on proposed revisions to the U.S. Merit Systems Protection Board's regulations in 5 C.F.R. Parts 1201, 1208, and 1209.

Overall, the Postal Service finds the proposed changes to be well-drafted and thoughtful. Following are comments and recommendations regarding selected sections of the proposed revisions.

**1201.24(a) (7):** This section seeks to restrict the attachments to an appeal to only the agency decision from which the appeal is being taken. The Postal Service believes that appellants should be allowed to attach both the notice of proposed action and letter of decision. This would help both the respondent agency and the Board to determine quickly the nature of the case while imposing little additional burden upon the Board.

**1201.29:** In order to preclude dismissals without prejudice without a specific duration, we recommend revising this section to state that "the judge may issue a decision dismissing an appeal without prejudice, and setting a date certain within six months by which the appeal must be refilled." In addition, we recommend that an appeal may be dismissed without prejudice for no more than two six-month periods.

**1201.43:** The Postal Service believes that in the interest of justice, the ability to seek an interlocutory review of sanctions imposed at the hearing stage, as provided in the current regulations, should be retained.

**1201.53:** Because some discourse between the attorney/representative and the court reporter is likely in order to estimate costs and to determine what part of the transcript is needed, the Postal Service believes that a party should be able to continue to order a hearing transcript directly from the court reporter. The result of the Board's proposed revision would be to place the administrative judge in the position of intermediary in the transaction.

**1201.73(b):** The Postal Service believes that this section should expressly authorize remotely-taken depositions at the discretion of the party noticing the deposition and that such depositions should be conducted via mutually-available electronic media, such as telephones or other electronic devices. The defending representative may in his discretion also choose to participate in any deposition remotely. The rule should also expressly authorize that a proxy for the representative taking the deposition may attend the deposition in the presence of the deponent and that the proxy should be selected by the representative taking the deposition. The proxy would perform any functions that an in-person representative would while taking a deposition, including presenting exhibits for a deponent to review and ensuring the deponent's representative is not improperly coaching his or her testimony. As for the court reporter, the general rule should be that he or she attends the deposition in the presence of the deponent. With the affirmative agreement of the parties, the rule should permit the court reporter to be elsewhere - a remote location or with the representative who is taking the deposition remotely. If the court reporter is not with the deponent, exhibits identified by the deponent should not be received into the record.

**1201.73(c):** This section pertaining to discovery requests issued to non-parties does not indicate the extent to which a party has the right to object to discovery issued to a non-party. Therefore, the Postal Service recommends that this section be clarified accordingly.

**1201.114(f):** This section outlines how an extension should be sought, but limits the right to seek an extension to no later than the day before the due date sought to be extended. It has been our experience that emergencies also occur on the date of filing, such as illness, accidents, power failures, weather emergencies, equipment failures, etc. Therefore, we recommend that requests for an extension filed on the due date should not automatically be considered "late."

We note that both subsections (f) and (g) of the proposed revision incorrectly refer to declarations given pursuant to 28 U.S.C §1746 as "sworn" statements.

**1201.118:** The Postal Service believes that the proposed revision contains contradictions that at least render the rule ambiguous. In its first sentence, the rule says the Board can reopen a case "at any time." Then, in the next sentence, it restricts the time to, "only within a reasonable short time." Rather, we suggest that the Board might consider incorporating into its regulations Fed. R. Civ. P. 60(b)(1) and (2), which generally provide that bases for reopening include mistake and similar equitable reasons, newly discovered evidence not discoverable with diligence, and fraud and misrepresentation. Further we recommend the Board consider incorporating Fed. R. Civ. P. 60(c) (1), which provides that reopening must be within a reasonable time, and in no event more than one year after a matter is closed.

We appreciate having this opportunity to share our comments on the proposed revisions to the regulations.

Sincerely,

Eric J. Scharf

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November 30, 2011

*VIA* e-mail to mspb@mspb.gov

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

**Re: Proposed Revisions to MSPB Regulations**

Dear Mr. Spencer,

On behalf of Ed Passman, myself, and the legal staff at Passman & Kaplan, P.C., I want to thank Chairman Grundmann, Vice Chair Wagner and Member Rose for this opportunity to comment on the Board's proposed plan to review and revise the Board's Regulations. The openness, and inclusiveness, of the Board's review process is very commendable and welcomed.

Passman & Kaplan, P.C. (P&K) appreciates the opportunity to comment on the proposed regulations. We have not, however, commented on every proposed change. Rather, we have commented on those on which we feel the strongest, either by way of support or opposition. As to those issues on which we have not commented, we reserve our rights for further comment in if and when the Board formally issues a notice of proposed rulemaking.

Our comments on proposed modifications to specific regulations, and suggestions for additional modifications, are as follows:

**5 C.F.R. § 1201.4**: P&K supports this proposed modification.

**5 C.F.R. § 1201.14(c)**: P&K is concerned about the present phrasing of the proposed new 5 C.F.R. § 1201.14(c)(4) in several respects. First, the definitions of what constitutes Sensitive Security Information (SSI), as currently defined by the Transportation Security Administration, is extremely broad, and that extreme breadth would exclude entire groups of federal employees from using e-filing under the Board's proposed regulation. For example, under present regulations, federal air marshals identifying themselves as such in writing is itself deemed SSI. See 49 C.F.R. § 15.5(b)(11)(i)(D) ("Except as otherwise provided in writing by the Secretary of DOT in the interest of public safety or in furtherance of transportation security, the following

information, and records containing such information, constitute SSI: [...] Identifying information of certain transportation security personnel. (i) Lists of the names or other identifying information that identify persons as— [...]Holding a position as a Federal Air Marshal."). Second, by incorporating these TSA SSI regulations, the Board cedes to the TSA the power to determine which TSA employees are permitted to use the Board's e-filing procedures. This cession of the Board's authority is extremely problematic, as current precedent permits TSA to *retroactively* designate information as SSI, so long as the designation is done consistent with then-current TSA SSI regulations. *See, e.g., MacLean v. Dept. of Homeland Security,* 112 M.S.P.R. 4 (2009), *aff'd* 2011 MSPB 70 (2011). This ambiguity hampers the parties' ability to make submissions to the Board, insofar as appellants may not even know for certain that particular documents will be deemed SSI at the time of filing, and therefore may be unclear on which filing procedure to utilize.

P&K also opposes the continued inclusion of class appeal-related filings and requests to appear as *amicus curiae* in the exclusion from e-filing, as currently appearing in proposed 5 C.F.R. § 1201.14(c)(1, 6). While P&K does note the observation in the comments section for proposed 5 C.F.R. § 1201.34 about the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* and interested parties concerning class certification gain access to the case docket, P&K believes that such concerns could be easily addressed and should be revisited by the Board, especially in light of the current Board's policy favoring more oral argument and *amicus* briefing in cases of public policy import.

**5 C.F.R. § 1201.14(m)**: P&K generally supports this proposed modification. We wish to note that some discrepancies have been observed between the time of certification of filing and the time stamp on the pleading, and believe that the regulations should be clarified to reflect that, in the event of a discrepancy, the earlier time should control.

**5 C.F.R. § 1201.22(b)(3)**: P&K opposes several of the proposed modifications. With regard to 5 C.F.R. § 1201.22(b)(3)(i, iii), P&K has no objection, but believes that the regulation should be modified to clarify that, in the event of a date discrepancy between the date of receipt by the appellant and the date of receipt by the appellant's representative, the latter of the two dates should control.

P&K opposes 5 C.F.R. § 1201.22(b)(3)(ii), as the regulation as presently drafted (a) does not define who constitutes a "relative" for purposes of this regulation, and (b) does not require that the 'relative' be a normal resident of the appellant's current address. 5 C.F.R. § 1201.22(b)(3)(ii), as currently proposed, would permit effective service upon a non-resident relative of the appellant briefly visiting the appellant's residence, which P&K believes is a perverse result. Instead, P&K believes that "lawful resident at appellant's current address" should be substituted for "relative of the appellant" in 5 C.F.R. § 1201.22(b)(3)(ii).

P&K further opposes 5 C.F.R. § 1201.22(b)(3)(iv, v), on the grounds that these two standards could only be ascertained by the Board after some form of fact-finding proceeding (for example, a jurisdictional hearing after a show cause order).

**5 C.F.R. § 1201.23**: Although this regulation was not specifically identified for modification by the Board's internal working group, P&K believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, P&K is aware of instances where certain MSPB administrative judges have taken the position that 5 C.F.R. § 1201.23 is only applicable to submissions to the Board, and thus does not govern deadlines for matters not directly submitted to the Board or to an administrative judge (for example, discovery deadlines). To clarify this issue, 5 C.F.R. § 1201.23 should be revised to make clear that all deadlines pertaining to matters within the Board's jurisdiction which fall on a weekend should extend to the next federal workday. P&K notes that the Board's internal working group has supported this approach, as demonstrated by proposed 5 C.F.R. § 1201.28(e), and believes that the Board can readily apply this time calculation approach more globally. P&K further notes that this approach has been used for many years in adjudications in the Equal Employment Opportunity Commission, and endorses this approach. *See* 29 C.F.R. 1614.604(d).

**5 C.F.R. § 1201.24**: P&K opposes the internal working group's approach in the proposed regulations, and believes that the jurisdictional exceptions should be expressly cited or expressly referenced here.

**5 C.F.R. § 1201.28**: P&K believes that the internal working group's approach in the proposed regulations should be modified in several respects. First, P&K is aware of numerous cases under the present regulations in which administrative judges have rejected even joint requests for case suspension by the parties during the initial 45 day period. P&K believes that these abuses of discretion by administrative judges need to be curtailed, and so P&K strongly supports making the first case suspension mandatory if jointly requested by the parties.

Second, while P&K strongly supports allowing a second thirty-day case suspension period, P&K believes that the existing 45 day deadline appearing in present 5 C.F.R. § 1201.28 (c, d) would unduly complicate the parties' ability to request the second case suspension period authorized by the proposed revised regulations. To rectify this problem, P&K believes that the current 45 day deadline should be extended to 60 days.

Third, P&K supports the presiding administrative judge retaining jurisdiction over initial adjudication of case suspension requests, and strongly opposes moving that authority to the Regional Director/Chief Administrative Judge even in the event of a late case suspension request.

Fourth, P&K is generally concerned that 5 C.F.R. § 1201.28 does not provide the administrative judges with any standards for exercising their discretion in adjudicating requests for case suspensions, and so believes that, for any case suspension request that is not mandatory (as discussed *supra*), the Board should specify standards to guide the administrative judge's exercise of discretion in deciding the relevant case suspension request.

P&K supports the proposed revision to 5 C.F.R. § 1201.28(a)(1), in that it removes the restrictions on what reasons justify case suspension.

P&K believes that a modification needs to be made to proposed revised 5 C.F.R. § 1201.28(d) to reflect the interaction between case suspension and motions to compel discovery. Under both the present regulations and the proposed regulations, one of the specified uses for case suspension is for purposes of allowing the parties additional time to pursue discovery, an approach P&K supports. However, under both the current and the proposed revised 5 C.F.R. §§ 1201.28, 1201.73, parties receiving deficient discovery responses are required in many instances to file motions to compel discovery during the case suspension period—and such a filing could potentially constitute a situation requiring termination of case suspension under proposed revised 5 C.F.R. § 1201.28(d). This causes problems where the parties have sought case suspension for discovery purposes in order to allow time for depositions, and where a discovery dispute arises in responses to written discovery prior to conducting the depositions. The requesting party is then left choosing between either moving to compel written discovery (thus forfeiting the rest of the case suspension period and potentially losing the chance for depositions), or else losing the benefit of written discovery and going into depositions under the case suspension period. The allowance of a second case suspension period does not solve this problem, as the adjudication of the pending motion to compel discovery would be presumably stopped (with all other case processing) during the second suspension period, thus leaving the dispute on written discovery unresolved. To resolve this issue, P&K believes that 5 C.F.R. § 1201.28(d) should be revised to specify that, in the event that case suspension is for discovery purposes, adjudication of a motion to compel discovery does not require termination of the case suspension period.

Finally, P&K proposes that an additional section should be added to the regulation (perhaps as a new 5 C.F.R. § 1201.28(f)) to provide that, in the event that the parties jointly request that the case be referred for mediation under the Board's Mediation Appeals Program (MAP), then the administrative judge shall be required to place the case on case suspension of indefinite duration, until such time as the case is referred back to the administrative judge by the MAP coordinator (either because the case settled or because MAP mediation proved unsuccessful). P&K supports MAP, and believes that MAP should be more formally included into the Board's regulations.

**5 C.F.R. § 1201.29**: P&K supports the proposed 5 C.F.R. § 1201.29, but believes that the proposed regulation should be modified to also allow that dismissals without prejudice may be structured so that the appeal is automatically deemed refiled on a date certain if the appellant does not refile earlier. This modification is consistent with current practice of some administrative judges, and P&K believes that this practice should be permitted to continue.

**5 C.F.R. § 1201.33**: P&K supports the proposed 5 C.F.R. § 1201.33, but believes that the proposed regulation should be modified to require federal agencies to produce current employees not just for furnishing sworn statements or to testify at hearing, but to testify at deposition as well.

**5 C.F.R. § 1201.34**: As discussed *supra* concerning 5 C.F.R. § 1201.14(c), P&K objects to the comments in the draft concerning the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* gain access to the case docket, and believes that the issue should be revisited by the Board.

**5 C.F.R. § 1201.43**: P&K believes that the present phrasing "contumacious misconduct or conduct prejudicial to the administration of justice" in 5 C.F.R. § 1201.43(e) allows too much discretion to administrative judges, and that the Board should limit that discretion through adding a non-exclusive list of express examples to the regulation to guide administrative judges in applying this regulation. P&K supports the proposed revised 5 C.F.R. § 1201.43(d) in its allowance of additional time to appellants to find replacement representatives in the event that their representative is excluded.

**5 C.F.R. § 1201.51**: P&K believes that the internal working group's approach in the proposed regulations should be modified in several respects. P&K is aware of numerous cases under the present regulations in which administrative judges have issued orders scheduling hearings and prehearing deadlines (including prehearing submission deadlines) to fall far before the parties have had the chance to complete discovery. P&K believes that this practice is highly prejudicial to appellants through denial of their ability to conduct discovery in support of their appeals, and roundly denounces the practice. Further, P&K has observed that the present system of administrative judges unilaterally selecting hearing dates, and then burdening the parties with filing verified motions to reschedule pursuant to 5 C.F.R. § 1201.51(c), often proves inefficient, and that in some cases administrative judges have denied unopposed requests to reschedule outright for personal reasons such as scheduled leave for the administrative judge. The internal working group's proposed regulations take the approach of cutting short discovery to meet the prehearing dates set by the administrative judge (*see* proposed revised 5 C.F.R. § 1201.73(d)(4)) rather than setting prehearing deadlines to accommodate discovery, an approach P&K strongly opposes.

P&K believes that these abuses of discretion by administrative judges need to be curtailed, and to do so supports modifying 5 C.F.R. § 1201.51 to restrict administrative judges' scheduling authority in three respects. First, 5 C.F.R. § 1201.51 should require that, before setting the hearing date, the administrative judge should convene a prehearing conference with the parties to establish dates acceptable (to the extent practicable) to the administrative judge and to both parties. Second, 5 C.F.R. § 1201.51 should require that the administrative judge, when setting deadlines, must allow the parties sufficient time for the discovery process (including depositions and adjudication of discovery motions) to conclude prior to prehearing and hearing. Third, 5 C.F.R. § 1201.51 should require that, absent the consent of the parties, the administrative judge may set the hearing no sooner than 90 days from the Acknowledgement Order, and the administrative judge may set the deadline for prehearing submissions no sooner than 80 days from the Acknowledgement Order. These restrictions would ensure that the parties have a fair chance to complete discovery efforts, and would help to ensure a full development of the record at hearing.

**5 C.F.R. § 1201.52**: P&K vigorously objects to permitting administrative judges to close hearings "when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding". P&K believes that hearing should always remain public, save to the limited extent necessary to protect classified information.

**5 C.F.R. § 1201.53**: P&K supports provision of free copies of the recording to the parties, and supports allowing for use of technologies other than tape recordings to record hearings. P&K believes that, when an e-transcript is available to the Board, those e-transcripts should also be provided to the parties at no cost.

**5 C.F.R. § 1201.61**: Although this regulation was not specifically identified for modification by the Board's internal working group, P&K believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, P&K believes that the regulation should be clarified to make sure that documentary evidence (in addition to testimony) is included in the record for review by the Board, through addition of an extra sentence at the end of the regulation, "Furthermore, excluded evidence shall become part of the record, segregated and identified as 'excluded evidence.'" P&K believes that this modification is necessary to ensure that the Board can properly review and oversee administrative judges' admissibility decisions at hearing.

**5 C.F.R. § 1201.73**: P&K strongly supports the elimination of mandatory initial disclosures. P&K strongly supports extension of the parties' discovery initiation deadlines from 25 days to 30 days. P&K further supports eliminating the distinctions between discovery from parties and from non-parties found in the proposed regulation, including allowing motions to compel discovery against non-parties withholding discovery.

As noted *supra* concerning 5 C.F.R. § 1201.51(d)(4), P&K opposes limiting the discovery period to meet the prehearing dates set by the administrative judge, and favors the approach of setting prehearing deadlines to accommodate completion of discovery.

P&K further believes that the deadline for the Agency's submission of the agency file should be reduced from 20 days to 15 days. This reduction is necessary to allow appellants sufficient time to propound discovery after receipt of the agency file, the receipt of which has historically often been delayed in the mail (and, in some instances, by agency tardiness). P&K believes that agencies will not be unduly prejudiced by this reduction, in that agencies should have compiled the vast majority of the content of the agency file at the time of issuing a decision on the original adverse action underlying the appeal.

Finally, P&K has observed repeated problems with the present discovery initiation deadlines in cases where the Board's jurisdiction over the appeal is challenged (either through a motion to dismiss, or more frequently through a *sua sponte* order to show cause), in that present deadlines (and even the proposed modified deadlines under the internal working group's revisions) overlap with the parties' briefing schedule for briefing jurisdictional issues. To address this recurrent problem—and to ensure that the Board has the benefit of well-drafted jurisdictional submissions to facilitate appellate review—P&K believes that an additional provision should be incorporated into 5 C.F.R. § 1201.73 mandating an automatic stay of all discovery deadlines if the Board's jurisdiction over the appeal is called into question (whether by show cause order or by motion), said stay to last until the jurisdictional issues are adjudicated.

**5 C.F.R. § 1201.113**: P&K supports the addition of proposed 5 C.F.R. § 1201.113(f). However, P&K believes that referrals to the Office of Special Counsel (OSC) should not be limited to just whistleblower reprisal situations, and instead should extend to all of prohibited personnel practices. Accordingly, P&K supports removing "(8)" from the text of proposed 5 C.F.R. § 1201.113(f), so as to authorize referrals to OSC if the Board finds reason to believe that a current federal employee committed any of the 5 U.S.C. § 2302(b) prohibited personnel practices.

**5 C.F.R. § 1201.114**: P&K strongly opposes the revisions to this section in a number of respects.

First, P&K opposes imposing a page limit on appeals. P&K believes that the internal working group's analogy in the comments section to courts' page limits is inapposite, in that appellate courts' review of trial courts is far less extensive than the oversight duties of the Board over its administrative judges. Regarding the internal working group's comparison to other administrative tribunals, P&K notes that the Equal Employment Opportunity Commission's Office of Federal Operations does not impose any page limit in its federal sector appellate rules, and that it makes more sense to compare the Board's proceeding to adjudication of individual federal employees' discrimination complaints than to draw upon the adjudication rules for mine safety issues or patent/trademark issues.

In the event that Board rejects P&K's position concerning page limits, P&K in the alternative suggests that the page limit should be extended in the event of consolidated appeals or in the event that the appeal raises affirmative defenses, to allow an additional 30 pages for each affirmative defense or for each constituent appeal in the consolidated appeal. To do otherwise would prejudice parties seeking review of initial decisions in the more complicated cases.

Second, P&K opposes the proposed 7 day deadline for filing motions to exceed the page limit. P&K observes that—in practice—most parties cannot practicably complete their appeals briefs early enough to know 7 days in advance if their brief will exceed the page limit. P&K believes that such motions should be allow far closer in to the appeal briefing deadline, and certainly no more than 3 days out. Concomitantly, the Board must ensure a ruling on the motion to exceed the page limit within 24 hours to ensure that the party's motion is adjudicated in advance of the actual filing deadline so that parties can have time to format their appeal briefs accordingly.

Finally, P&K opposes the general revision to eliminate 'notice of appeal' filings and require all facts and arguments to be specified in the initial petition for review. P&K supports the 'notice of appeal' approach, in no small part due to the delays inherent in having hearing recordings transcribed, and believes that shortening the time available to review the hearing once transcribed and to brief arguments will result in degradation of the quality of briefing in petitions for review, complicating the Board's appellate review. P&K notes that the Equal Employment Opportunity Commission's Office of Federal Operations has long utilized the 'notice of appeal' approach for appellants. *See* EEOC Management Directive 110, Ch. 9, § IV.D.

**5 C.F.R. § 1201.118**: P&K opposes this modification and its limitation of the Board's authority to reopen cases on its own discretion.

**5 C.F.R. § 1201.154**: P&K opposes the phrasing of this proposed regulation, in that the regulation repeatedly uses the male pronoun "he" in its text, in a manner inconsistent with the gender-neutral phrasing generally used by the Board elsewhere in its regulations.

**5 C.F.R. § 1201.182**: P&K supports this modification.

**5 C.F.R. § 1201.183**: P&K supports this modification, and favors according administrative judges the authority to decide breach/noncompliance issues rather than merely making recommendations to the Board for later enforcement.

**5 C.F.R. § 1209.2**: P&K believes that the proposed regulation needs to make clear that an election of the Independent Right of Action (IRA) procedure is solely made if the appellant files a whistleblower reprisal complaint on the final adverse action, and not if the appellant files with the Office of Special Counsel (OSC) regarding the notice of proposed adverse action. The Whistleblower Protection Act (WPA) not only protects against actual adverse actions, but also separately protects against threatened adverse actions (such as notices of proposed adverse action). *See, e.g.,* 5 U.S.C. § 2302(b)(8) ("Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—[...] take or fail to take, *or threaten to take or fail to take*, a personnel action..." [emphasis added]). Accordingly, an appellant can separately and independently file a reprisal claim under the WPA for a notice of proposed adverse action, and then again for the final adverse action itself. P&K believes that the regulation should clearly draw the distinction between the two, to ensure that a procedural election for the IRA process only occurs if the appellant files with OSC regarding the final adverse action itself.

This distinction is especially important, in that many appellants facing a notice of proposed adverse action will contact the OSC to assistance in seeking a stay from the Board of the final adverse action, pending OSC investigation of the whistleblower reprisal claims attached to the notice of proposed adverse action. P&K strongly believes that appellants should not be required to choose between seeking a stay and their right to a merits appeal of the ultimate adverse action outside of the IRA framework.

**Orders to Show Cause For Affirmative Defenses:** Finally, P&K wishes to express its concern with the practice among some of the Board's administrative judges of issuing Orders to Show Cause or similar special briefing orders requiring appellants to make factual proffers and present argument to prove the elements of certain affirmative defenses (in particular, discrimination/EEO reprisal affirmative defenses) before the appellant is permitted to raise those claims at hearing. P&K understands the need to ensure that the issues for hearing are clearly defined and that witnesses called at hearing are non-cumulative and relevant to the claims at issue in the case. However, P&K objects to the practice of placing an additional pleading burden (a burden akin to requiring proof of a *prima facie* case of discrimination, if not higher) upon appellants above and beyond ordinary prehearing submission requirements prior to permitting appellants to raise all

legitimate affirmative defenses at hearing, and believes that this practice unduly interferes with appellants' ability to present all of their legitimate arguments in support of their appeal.

Again, P&K appreciates the opportunity the Board has given us to comment on the proposed regulations. We invite the Board to contact us if there are any questions concerning our comments. We further look forward to the opportunity to be involved with, or comment upon, the Board's proposed rulemaking when the appropriate time arrives.

Thank you for your attention and consideration.

Sincerely yours,

Joseph V. Kaplan
Passman & Kaplan, P.C.

# BONNEY, ALLENBERG & O'REILLY, P.C.

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SANDRA J. HURD
PARALEGALS


November 30, 2011

Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.
Washington, D. C. 20419
Email: mspb@mspb.gov

RE: Regulation Revision Comments

Dear Sir:

Thank you for the opportunity to make comments on the planning of major revisions to the Board's regulations. Our comments are as follows:

1200.4 We view this proposed addition as a very positive change which opens the door to make necessary changes.

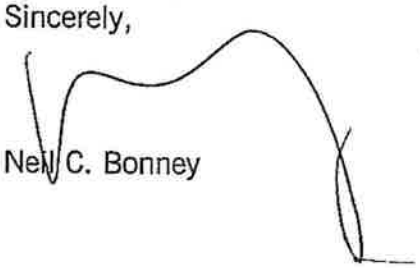
1201.3. This significant suggestion is long overdue.

1201.24(a). Does the proposed change limit what the appellant may attach? Since some agencies are prone to attaching whatever they like and leaving out other pertinent documents which may be favorable to the appellant, the appellant should not be precluded from what he/she attaches.

1201.51. As a note, Administrative Judges have been ignoring the requirements for neutral sites, forcing appellants to hearings on the agency's property which creates hardship on appellants such as long delays in proceeding through security.

We view many of the proposed changes as positives steps to improve practicing before the Board. Once again, thank you for allowing us to comment on the proposed changes. Thanking you for your attention to this matter, I am

Sincerely,



Neil C. Bonney

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***VIA EMAIL TO: mspb@mspb.gov***

November 30, 2011

Hon. Susan Tsui Grundmann
Chairman
U.S. Merit Systems Protection Board
Office of the Chairman
1615 M Street, NW
Washington, D.C. 20419-0002

RE: MSPB's Regulation Revision Comments

Dear Chairman Grundmann:

I am writing on behalf of our entire firm in timely response to your gracious correspondence to me dated October 19, 2011, in order to submit our comments on the U.S. Merit Systems Protection Board's (MSPB or "the Board") suggested preliminary revisions to its adjudicatory regulations. Initially, we sincerely appreciate the opportunity to participate in this important effort by the Board to conduct an in-depth review of and major revision to its regulations, especially at this pre-notice-and-comment formal rulemaking stage, and applaud the Board for its efforts in this regard. If there is anything else that this firm can do to assist the Board in this or any other endeavor, please do not hesitate to contact me.

As for the Board's Regulation Review Table, first, we wholeheartedly agree with the Board's proposed new regulation at **5 C.F.R. § 1200.4 – Petition for Rulemaking**, as such a regulatory provision would increase public participation into the method by which the MSPB adjudicates the cases under its jurisdiction.

Next, we agree with the Board's proposed change to **5 C.F.R. § 1201.3(a)**, as it provides important guidance to *pro se* appellants in terms of explaining the limited nature of the Board's jurisdiction.

Also, the proposed change to **5 C.F.R. § 1201.3(a)(13)** properly clarifies the basis of a reemployment priority rights under 5 C.F.R. §§ 302.501 and 330.209.

We believe that the Board should clarify its regulations at **5 C.F.R. § 1201.4** to give parties the right to serve documents solely by email and that the date of such service is the date on which the email was sent to the recipient's email address.

With regard to the Board's proposed change to **5 C.F.R § 1201.4(j)**, we respectfully request that the Board instead adopt an overall rule that actions must be taken based upon the date the prior document is received, rather than filed/served, which would make the Board's regulations the same as those of the EEOC in federal sector cases. On this note, the EEOC's regulation at 29 C.F.R. § 1614.604 states the following:

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

We fully concur with the Board's rationale for its proposed revision to **5 C.F.R. § 1201.21** to require agencies to explain the impact of an employee's decision to file an OSC whistleblower retaliation complaint over an otherwise appealable adverse action. However, we also recommend that the Board's regulation require agencies to also provide employees notice of their rights to file mixed case EEO complaints by contacting an EEO counselor at the agency within 45 calendar days if they believe the adverse action constituted a prohibited personnel practice of unlawful employment discrimination under 5 U.S.C. § 2302(b)(1).

We understand and concur with the Board's possible revised regulation at **5 C.F.R. § 1201.22(b)(3)**, to the extent that it provides appellant's with a clear regulatory explanation of the Board's "constructive receipt" doctrine.

We totally agree with the Board's possible revised regulation at **5 C.F.R. § 1201.24** to reduce the need to provide any documents with an initial MSPB appeal other than the decision or notice of action being appealed, as that will greatly reduce duplicative documents in the record in light of the Board's requirement that agencies submit an Agency File under 5 C.F.R. § 1201.25.

With regard to the Board's possible revised regulation at **5 C.F.R. § 1201.28**, we applaud the Board's proposal to allow up to 60 days for case stays. We request, however, that the Board eliminate the current and proposed requirement that requests for stays must be filed within 45 days of the issuance of the acknowledgment order, as stays sought at later stages of an appeal may promote alternative dispute resolution and reduce the cost of Board litigation for all parties involved.

Likewise, we applaud the Board's possible revised regulation at **5 C.F.R. § 1201.29** to codify the longstanding practice of allowing dismissals without prejudice, which are a valuable procedural tool that lend fairness to and increases the opportunity to provide full discovery rights and enhanced opportunities to engage in settlement negotiations without continuing to invest time and money into preparing the appeal for hearing.

Regarding the MSPB's possible revised regulation at **5 C.F.R. §§ 1201.33**, the Board's current and proposed regulation should explicitly reference sitting for depositions in addition to simply furnishing sworn statements as requirements for federal employees and contractors. Furthermore:

**Federal Witnesses:**

This rule change is beneficial because it places the burden on the Agency who is the most likely to have the information to provide information for and to contact the federal witnesses who may have moved from the Agency party to another federal Agency. This occurs frequently and often poses problems because the Agency is the only party who would likely have the new information in its possession. However, I think it would be helpful for this rule to include a provision requiring the Agency to provide the last known contact information of an Agency employee who has retired and may have relevant information without forcing a discovery request from the Appellant.

With regard to the Board's possible revised regulation at **5 C.F.R. § 1201.73**, we agree with the Board's possible revision to eliminate current initial disclosure requirements. Furthermore:

**§ 1201.73 Discovery Procedures:**

Comment: Abolishment of the "initial disclosure" requirement is appropriate only with respect to appellants. In the case of a usual adverse action appeal, the initial disclosure requirement essentially forces the appellant to know the entire theory of his or her case immediately after he or she files an appeal before the Board. Under the proposed revisions, appellants (many of which appear pro se before the Board) will no longer be forced to shoulder the burden of having to piece together their entire litigation plan before having been afforded the benefit of the Agency file or its discovery responses.

In contrast, from the outset of the appeal, the agency knows which witness and documents it intends to offer in support of its action --- since this, presumably, would be the same evidence on which the agency relied in the first place in bringing the action that is the subject matter of the appeal. As such, the agency should be required to continue to make its initial disclosures to the appellant, since this transparency in litigation will expedite the resolution of the appeal without placing any burden on the agency. Alternatively, the Board may amend the requirements of the Agency File at § 1201.25 to include a witness list and detailed proffers, which would essentially have the same effect.

The removal of initial disclosures may be helpful when there is an Agency file, but it may not be as helpful to our client's if they are filing an IRA for whistle blowing which may not be based on a disciplinary action with a file. Many of the personnel actions that can be appealed in an IRA are not the same as the general requirements for jurisdiction, and this change does not seem to include any requirement that the Agency produce any information on an IRA appeal until discovery if it's not the type of action that has an Agency file, for example a performance evaluation, a failure to promote, or other changes in duties that wouldn't normally be appealable. 5 U.S.C. §2302A(a)(2)(a).

The proposed extension of time for the initiation of discovery from 20 to 30 days is positive in light of the fact that it gives additional time to the Appellant to review the Agency's file. However, we would recommend that the Board increase the time period for discovery responses from 20 to 30 days, which would conform with the discovery response deadline under the EEOC's federal sector regulations at 29 C.F.R. § 1614.109 and the FEDERAL RULES OF CIVIL PROCEDURE. Furthermore, depositions should be limited to one day

of seven hours, as stated in the FEDERAL RULES OF CIVIL PROCEDURE. Also, the discovery period should by regulation end seven days before the prehearing conference.

With regard to the Board's possible revised regulation at **5 C.F.R. § 1201.112**, we do not see how the proposed regulatory language accomplishes the goal sought to be accomplished, as stated in the Board's reasons for the proposed change. That proposed change should state that judges retain jurisdiction post initial decision for the purpose of accepting a settlement agreement into the record until the deadline for a party to file a petition for review or until a party files such a PFR.

We fully support the Board's proposed change to **5 C.F.R. § 1201.113(f)** to refer findings of whistleblower reprisal in non-IRA appeals to OSC for investigation and disciplinary action.

We agree with MSPB's proposed change to **5 C.F.R. § 1201.114(a)** to expressly allow for the filing of replies to responses to Petitions for Review (PFR), as well as the explanation of the contents of a PFR in **5 C.F.R. § 1201.114(b)**. Likewise, we do not oppose the proposed page limitations provisions in **5 C.F.R. § 1201.114(h).**

As for the Board's proposed changes to **5 C.F.R. § 1201.115(a)**, we agree that the criteria for granting a PFR should be codified to clearly include erroneous findings of material fact in a judge's initial decision.

We agree with the Board's proposed elimination of the generally unused **5 C.F.R. §§ 1201.155 & .156**.

With regard to the Board's proposed clarifications to **5 C.F.R. § 1201.182**, we agree that it is important for the Board to codify that Petitions for Enforcement (PFE) may be filed to enforce MSPB settlement agreements entered into the Board's record for enforcement in addition to MSPB decisions on the merits. To that end, we recommend that the MSPB specifically require agencies to provide appellants written notice when they maintain that they have fully complied with settlement agreements, as well as final Board decisions, so there is a concrete starting time for breach of settlement PFEs.

As for the Board's proposed changes to **5 C.F.R. § 1201.183**, we fully support the Board sanctioning agencies that fail to comply with final Board decisions and settlement agreements in addition to merely enforcing the underlying Board decision or settlement. We agree with requiring noncompliant agencies to appear in person before the Board regarding possible sanctions for failing to comply with Board decisions and settlement agreements.

We agree with Board's proposed changes to the VEOA appeals process in **5 C.F.R. § 1208.21(a)** to clarify that the Appellant must first inform Department of Labor (DOL) of their intent to file with the MSPB, after their Complaint under 5 U.S.C. § 3330.a(a) has been pending before DOL for 60 days without action, before filing an appeal with the MSPB. We also support the Board's efforts to clarify its VEOA appeals process in the proposed changes to **5 C.F.R. §§ 1208.22 & .23**.

We appreciate the Board's efforts to clarify its whistleblower reprisal regulations at **5 C.F.R. § 1209.2**, especially the impact of an appellant's choice to file an OSC complaint over an otherwise appealable action on the Board's subsequent review of an IRA appeal in such a case, as well as to clarify in regulation that claims of retaliation for filing an MSPB appeal are to be treated as a complaint under 5 U.S.C. § 2302(b)(9).

As for the Board's proposed regulation at **5 C.F.R. § 1209.5(a)(2)**, the Board should further clarify that the 120-day waiting period required before an appellant can opt out of the OSC whistleblower complaint process and file an IRA appeal before the Board means 120 days from the filing of the appellant's initial OSC complaint rather than from any subsequent amendments thereto to cover subsequent retaliatory personnel actions. Further, the Board should clarify its proposed regulations to state that any subsequent IRA appeal will consider all of those subsequent personnel actions, if alleged in the IRA appeal, even though they may not have been pending before OSC for 120 days.

If you have any questions regarding this matter, please do not hesitate to contact me. Your attention to this matter is appreciated.

Sincerely,

Mathew B. Tully, Esq.
Founding Partner

**DEPARTMENT OF VETERANS AFFAIRS**
**Office of the General Counsel**
**Washington DC 20420**

NOV 30 2011

In Reply Refer To:

Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002

Dear Clerk of the Board:

Thank you for the opportunity to comment on the proposed amendments to MSPB regulations. The Department of Veterans Affairs provides the following comments in response to the proposed amendments sent by your office on October 19, 2011.

1. Proposed § 1201.4 General Definitions

The Board proposes to amend the definition of "date of service" in 5 C.F.R. § 1201.4(j) so that it has the same meaning as "date of filing" under § 1201.4(l). While we appreciate that the change will bring some clarity, our concern with the proposal is that whenever a pleading deadline is based upon the date of service of a previous document and that previous document was served by mail, "the filing deadline will be extended by 5 calendar days." An extra five days does not reflect the actual amount of time for a mailed document to arrive at VA Central Office, as VA's mail is screened by an off-site entity prior to its arrival at VA for security purposes, adding several days to the process. Other Federal agencies, including the Department of Justice, follow a similar practice. Thus, we suggest adding the following to the end of proposed § 1201.4(j): "However, if the receiving party establishes that it received the document beyond the 5-day deadline, the date of service will be the date upon which the receiving party received the document."

We also suggest that the Board consider amending the proposal to read "5 business days" instead of "5 calendar days." In current § 1201.4(l) ("date of filing), the five-day extension excludes "days on which the Board is closed for business." In other words, when counting the due date of a filing under § 1201.4(l), one uses the "business day" counting method that is commonly associated with Federal filings. However, proposed § 1201.4(j) ("date of service") includes a deadline that "will be extended by 5 calendar days." By using calendar days in proposed § 1201.4(j), but using business days in § 1201.4(l), the Board is further muddying the waters regarding how to count days when serving or filing documents.

Clerk of the Board

2. Proposed § 1201.33 Federal Witnesses

   The Board proposes to require agencies to bear the burden of ensuring the appearance of witnesses who are requested by the appellant and who are employed by a non-party Federal agency. We strongly oppose this proposal.

   Federal agencies have no authority to control employees of other Federal agencies. With this proposed amendment, a Federal agency would be responsible for employees over which it has no supervisory authority or responsibility. We can think of no reason why VA should—or could—be held responsible for securing the appearance of non-VA employees.

3. Proposed § 1201.73 Discovery Procedures

   The Agency agrees with the proposal to eliminate the initial disclosures that are currently required by § 1201.73(a).

4. Proposed § 1201.183 Procedures for processing petitions for enforcement

   The Board proposes that if a judge determines that an agency has not complied with a Board decision, the responsible agency official "shall not be entitled to receive payment for service as an employee during the period of noncompliance[.]" Although Congress granted this authority to the Board under 5 U.S.C. § 1204(e)(2)(A), we believe that it is both unwise and unfair to issue such a blanket rule. There are many scenarios in which noncompliance with a Board's order is based not upon the responsible agency official's refusal to comply, but upon practical problems in implementing the order, such as ensuring that the appropriate amount of back pay is granted to the employee. Further, the implementation of an order often occurs several levels below the responsible agency official and involves offices, such as HR and payroll, not under the supervisory control of the responsible agency official. In such situations, the prohibition of pay is a disproportionate response to noncompliance. We suggest that if the Board wishes to promulgate regulations regarding this authority, that it preserve the permissive statutory language and provide that such a drastic measure will be reserved only for situations in which the appellant presents clear and convincing evidence that the responsible agency official intentionally refused to comply with the order.

Clerk of the Board

5. Proposed § 1201.21 Notice of appeal rights and Proposed § 1209.2 Jurisdiction

   We agree with the Board's decision to promulgate regulations that overrule *Massimino* and bring Board practice into compliance with the requirements of 5 U.S.C. § 7121(g).

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

Sincerely yours,

Will A. Gunn
General Counsel

NELA Advocates for Employee Rights
National Employment Lawyers Association

November 30, 2011

**VIA E-MAIL**
mspb@mspb.gov

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

**Re: Proposed Revisions to MSPB Regulations**

Dear Mr. Spencer:

The National Employment Lawyers Association (NELA) submits these comments in response to the Merit Systems Protection Board's request for stakeholder comments regarding contemplated revisions to its procedural regulations in 5 C.F.R. Parts 1201, 1208 and 1209 pursuant to Executive Order 13563.

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 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 thus we appreciate the opportunity to comment on the proposed regulations. By commenting on various aspects of these regulations, we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting. We reserve our rights for further comment in that regard if and when the Board opts to issue formally a notice of proposed rulemaking. Our

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comments on proposed modifications to specific regulations, and suggestions for additional modifications, are as follows:

**5 C.F.R. § 1201.4**: NELA supports this proposed modification.

**5 C.F.R. § 1201.14(c)**: NELA is concerned about the present phrasing of the proposed new 5 C.F.R. § 1201.14(c)(4) in several respects. First, the definitions of what constitutes Sensitive Security Information (SSI), as currently defined by the Transportation Security Administration, is extremely broad, and that extreme breadth would exclude entire groups of federal employees from using e-filing under the Board's proposed regulation. For example, under present regulations, federal air marshals identifying themselves as such in writing is itself deemed SSI. See 49 C.F.R. § 15.5(b)(11)(i)(D) ("Except as otherwise provided in writing by the Secretary of DOT in the interest of public safety or in furtherance of transportation security, the following information, and records containing such information, constitute SSI: [...] Identifying information of certain transportation security personnel. (i) Lists of the names or other identifying information that identify persons as— [...]Holding a position as a Federal Air Marshal."). Second, by incorporating these TSA SSI regulations, the Board cedes to the TSA the power to determine which TSA employees are permitted to use the Board's e-filing procedures. This cession of the Board's authority is extremely problematic, as current precedent permits TSA to designate *retroactively* information as SSI, so long as the designation is done consistent with then-current TSA SSI regulations. *See, e.g., MacLean v. Dept. of Homeland Security,* 112 M.S.P.R. 4 (2009), *aff'd* 2011 MSPB 70 (2011). This ambiguity hampers the parties' ability to make submissions to the Board, insofar as appellants may not even know for certain that particular documents will be deemed SSI at the time of filing, and therefore may be unclear on which filing procedure to utilize.

NELA also opposes the continued inclusion of class appeal-related filings and requests to appear as *amicus curiae* in the exclusion from e-filing, as currently appearing in proposed 5 C.F.R. § 1201.14(c)(1, 6). While NELA does note the observation in the comments section for proposed 5 C.F.R. § 1201.34 about the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* and interested parties concerning class certification gain access to the case docket, NELA believes that such concerns could be easily addressed and should be revisited by the Board, especially in light of the current Board's policy favoring more oral argument and *amicus* briefing in cases of public policy import.

**5 C.F.R. § 1201.14(m)**: NELA generally supports this proposed modification. We wish to note that some discrepancies have been observed between the time of certification of filing and the time stamp on the pleading, and believe that the regulations should be clarified to reflect that, in the event of a discrepancy, the earlier time should control.

**5 C.F.R. § 1201.22(b)(3)**: NELA opposes several of the proposed modifications. With regard to 5 C.F.R. § 1201.22(b)(3)(i, iii), NELA has no objection, but believes that the regulation should be modified to clarify that, in the event of a date discrepancy between the date of receipt by the

appellant and the date of receipt by the appellant's representative, the latter of the two dates should control.

NELA opposes 5 C.F.R. § 1201.22(b)(3)(ii), as the regulation as presently drafted (a) does not define who constitutes a "relative" for purposes of this regulation, and (b) does not require that the "relative" be a normal resident of the appellant's current address. 5 C.F.R. § 1201.22(b)(3)(ii), as currently proposed, would permit effective service upon a non-resident relative of the appellant briefly visiting the appellant's residence, which NELA believes is a perverse result. Instead, NELA believes that "lawful resident at appellant's current address" should be substituted for "relative of the appellant" in 5 C.F.R. § 1201.22(b)(3)(ii).

NELA further opposes 5 C.F.R. § 1201.22(b)(3)(iv, v), on the grounds that these two standards could only be ascertained by the Board after some form of fact-finding proceeding (for example, a jurisdictional hearing after a show cause order).

**5 C.F.R. § 1201.23**: Although this regulation was not specifically identified for modification by the Board's internal working group, NELA believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, NELA is aware of instances where certain MSPB administrative judges have taken the position that 5 C.F.R. § 1201.23 is only applicable to submissions to the Board, and thus does not govern deadlines for matters not directly submitted to the Board or to an administrative judge (for example, discovery deadlines). To clarify this issue, 5 C.F.R. § 1201.23 should be revised to make clear that all deadlines pertaining to matters within the Board's jurisdiction which fall on a weekend should extend to the next federal workday. NELA notes that the Board's internal working group has supported this approach, as demonstrated by proposed 5 C.F.R. § 1201.28(e), and believes that the Board can readily apply this time calculation approach more globally. NELA further notes that this approach has been used for many years in adjudications in the Equal Employment Opportunity Commission, and endorses this approach. *See* 29 C.F.R. 1614.604(d).

**5 C.F.R. § 1201.24**: NELA opposes the internal working group's approach in the proposed regulations, and believes that the jurisdictional exceptions should be expressly cited or expressly referenced here.

**5 C.F.R. § 1201.28**: NELA believes that the internal working group's approach in the proposed regulations should be modified in several respects. First, NELA is aware of numerous cases under the present regulations in which administrative judges have rejected even joint requests for case suspension by the parties during the initial 45 day period. NELA believes that these abuses of discretion by administrative judges need to be curtailed, and so NELA strongly supports making the first case suspension mandatory if jointly requested by the parties.

Second, while NELA strongly supports allowing a second thirty-day case suspension period, NELA believes that the existing 45 day deadline appearing in present 5 C.F.R. § 1201.28 (c, d) would unduly complicate the parties' ability to request the second case suspension period

authorized by the proposed revised regulations. To rectify this problem, NELA believes that the current 45 day deadline should be extended to 60 days.

Third, NELA supports the presiding administrative judge retaining jurisdiction over initial adjudication of case suspension requests, and strongly opposes moving that authority to the Regional Director/Chief Administrative Judge even in the event of a late case suspension request.

Fourth, NELA is generally concerned that 5 C.F.R. § 1201.28 does not provide the administrative judges with any standards for exercising their discretion in adjudicating requests for case suspensions, and so believes that for any case suspension request that is not mandatory (as discussed *supra*), the Board should specify standards to guide the administrative judge's exercise of discretion in deciding the relevant case suspension request.

NELA supports the proposed revision to 5 C.F.R. § 1201.28(a)(1), in that it removes the restrictions on what reasons justify case suspension.

NELA believes that a modification needs to be made to proposed revised 5 C.F.R. § 1201.28(d) to reflect the interaction between case suspension and motions to compel discovery. Under both the present regulations and the proposed regulations, one of the specified uses for case suspension is for purposes of allowing the parties additional time to pursue discovery, an approach NELA supports. Under both the current and the proposed revised 5 C.F.R. §§ 1201.28, 1201.73, however, parties receiving deficient discovery responses are required in many instances to file motions to compel discovery during the case suspension period—and such a filing could potentially constitute a situation requiring termination of case suspension under proposed revised 5 C.F.R. § 1201.28(d). This causes problems where the parties have sought case suspension for discovery purposes in order to allow time for depositions, and where a discovery dispute arises in responses to written discovery prior to conducting the depositions. The requesting party is then left choosing between either moving to compel written discovery (thus forfeiting the rest of the case suspension period and potentially losing the chance for depositions), or else losing the benefit of written discovery and going into depositions under the case suspension period. The allowance of a second case suspension period does not solve this problem, as the adjudication of the pending motion to compel discovery would be presumably stopped (with all other case processing) during the second suspension period, thus leaving the dispute on written discovery unresolved. To resolve this issue, NELA believes that 5 C.F.R. § 1201.28(d) should be revised to specify that, in the event that case suspension is for discovery purposes, adjudication of a motion to compel discovery does not require termination of the case suspension period.

Finally, NELA proposes that an additional section should be added to the regulation (perhaps as a new 5 C.F.R. § 1201.28(f)) to provide that, in the event that the parties jointly request that the case be referred for mediation under the Board's Mediation Appeals Program (MAP), then the administrative judge shall be required to place the case on case suspension of indefinite duration, until such time as the case is referred back to the administrative judge by the MAP coordinator (either because the case settled or because MAP mediation proved unsuccessful). NELA

Supports MAP, and believes that MAP should be more formally included into the Board's regulations.

**5 C.F.R. § 1201.29**: NELA supports the proposed 5 C.F.R. § 1201.29, but believes that the proposed regulation should be modified to also allow that dismissals without prejudice may be structured so that the appeal is automatically deemed refiled on a date certain if the appellant does not refile earlier. This modification is consistent with current practice of some administrative judges, and NELA believes that this practice should be permitted to continue.

**5 C.F.R. § 1201.33**: NELA supports the proposed 5 C.F.R. § 1201.33, but believes that the proposed regulation should be modified to require federal agencies to produce current employees not just for furnishing sworn statements or to testify at hearing, but to testify at deposition as well.

**5 C.F.R. § 1201.34**: As discussed *supra* concerning 5 C.F.R. § 1201.14(c), NELA objects to the comments in the draft concerning the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* gain access to the case docket, and believes that the issue should be revisited by the Board.

**5 C.F.R. § 1201.43**: NELA believes that the present phrasing "contumacious misconduct or conduct prejudicial to the administration of justice" in 5 C.F.R. § 1201.43(e) allows too much discretion to administrative judges, and that the Board should limit that discretion through adding a non-exclusive list of express examples to the regulation to guide administrative judges in applying this regulation. NELA supports the proposed revised 5 C.F.R. § 1201.43(d) in its allowance of additional time to appellants to find replacement representatives in the event that their representative is excluded.

**5 C.F.R. § 1201.51**: NELA believes that the internal working group's approach in the proposed regulations should be modified in several respects. NELA is aware of numerous cases under the present regulations in which administrative judges have issued orders scheduling hearings and prehearing deadlines (including prehearing submission deadlines) to fall far before the parties have had the chance to complete discovery. NELA believes that this practice is highly prejudicial to appellants through denial of their ability to conduct discovery in support of their appeals, and roundly denounces the practice. Further, NELA has observed that the present system of administrative judges unilaterally selecting hearing dates, and then burdening the parties with filing verified motions to reschedule pursuant to 5 C.F.R. § 1201.51(c), often proves inefficient, and that in some cases administrative judges have denied unopposed requests to reschedule outright for personal reasons such as scheduled leave for the administrative judge. The internal working group's proposed regulations take the approach of cutting short discovery to meet the prehearing dates set by the administrative judge (*see* proposed revised 5 C.F.R. § 1201.73(d)(4)) rather than setting prehearing deadlines to accommodate discovery, an approach NELA strongly opposes.

NELA believes that these abuses of discretion by administrative judges need to be curtailed, and to do so supports modifying 5 C.F.R. § 1201.51 to restrict administrative judges' scheduling authority in three respects. First, 5 C.F.R. § 1201.51 should require that, before setting the hearing date, the administrative judge should convene a prehearing conference with the parties to establish dates acceptable (to the extent practicable) to the administrative judge and to both parties. Second, 5 C.F.R. § 1201.51 should require that the administrative judge, when setting deadlines, must allow the parties sufficient time for the discovery process (including depositions and adjudication of discovery motions) to conclude prior to prehearing and hearing. Third, 5 C.F.R. § 1201.51 should require that, absent the consent of the parties, the administrative judge may set the hearing no sooner than 90 days from the Acknowledgement Order, and the administrative judge may set the deadline for prehearing submissions no sooner than 80 days from the Acknowledgement Order. These restrictions would ensure that the parties have a fair chance to complete discovery efforts, and would help to ensure a full development of the record at hearing.

**5 C.F.R. § 1201.52**: NELA vigorously objects to permitting administrative judges to close hearings "when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding." NELA believes that hearing should always remain public, save to the limited extent necessary to protect classified information.

**5 C.F.R. § 1201.53**: NELA supports provision of free copies of the recording to the parties, and supports allowing for use of technologies other than tape recordings to record hearings. NELA believes that, when an e-transcript is available to the Board, those e-transcripts should also be provided to the parties at no cost.

**5 C.F.R. § 1201.61**: Although this regulation was not specifically identified for modification by the Board's internal working group, NELA believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, NELA believes that the regulation should be clarified to make sure that documentary evidence (in addition to testimony) is included in the record for review by the Board, through addition of an extra sentence at the end of the regulation, "Furthermore, excluded evidence shall become part of the record, segregated and identified as 'excluded evidence.'" NELA believes that this modification is necessary to ensure that the Board can properly review and oversee administrative judges' admissibility decisions at hearing.

**5 C.F.R. § 1201.73**: NELA strongly supports the elimination of mandatory initial disclosures. NELA strongly supports extension of the parties' discovery initiation deadlines from 25 days to 30 days. NELA further supports eliminating the distinctions between discovery from parties and from non-parties found in the proposed regulation, including allowing motions to compel discovery against non-parties withholding discovery.

As noted *supra* concerning 5 C.F.R. § 1201.51(d)(4), NELA opposes limiting the discovery period to meet the prehearing dates set by the administrative judge, and favors the approach of setting prehearing deadlines to accommodate completion of discovery.

NELA further believes that the deadline for the Agency's submission of the agency file should be reduced from 20 days to 15 days. This reduction is necessary to allow appellants sufficient time to propound discovery after receipt of the agency file, the receipt of which has historically often been delayed in the mail (and, in some instances, by agency tardiness). NELA believes that agencies will not be unduly prejudiced by this reduction, in that agencies should have compiled the vast majority of the content of the agency file at the time of issuing a decision on the original adverse action underlying the appeal.

Finally, NELA has observed repeated problems with the present discovery initiation deadlines in cases where the Board's jurisdiction over the appeal is challenged (either through a motion to dismiss, or more frequently through a *sua sponte* order to show cause), in that present deadlines (and even the proposed modified deadlines under the internal working group's revisions) overlap with the parties' briefing schedule for briefing jurisdictional issues. To address this recurrent problem—and to ensure that the Board has the benefit of well-drafted jurisdictional submissions to facilitate appellate review—NELA believes that an additional provision should be incorporated into 5 C.F.R. § 1201.73 mandating an automatic stay of all discovery deadlines if the Board's jurisdiction over the appeal is called into question (whether by show cause order or by motion), said stay to last until the jurisdictional issues are adjudicated.

**5 C.F.R. § 1201.113**: NELA supports the addition of proposed 5 C.F.R. § 1201.113(f). NELA, however, believes that referrals to OSC should not be limited to just whistleblower reprisal situations, and instead should extend to all of prohibited personnel practices. Accordingly, NELA supports removing "(8)" from the text of proposed 5 C.F.R. § 1201.113(f), so as to authorize referrals to OSC if the Board finds reason to believe that a current federal employee committed any of the 5 U.S.C. § 2302(b) prohibited personnel practices.

**5 C.F.R. § 1201.114**: NELA strongly opposes the revisions to this section in a number of respects.

First, NELA opposes imposing a page limit on appeals. NELA believes that the internal working group's analogy in the comments section to courts' page limits is inapposite, in that appellate courts' review of trial courts is far less extensive than the oversight duties of the Board over its administrative judges. Regarding the internal working group's comparison to other administrative tribunals, NELA notes that the Equal Employment Opportunity Commission's Office of Federal Operations does not impose any page limit in its federal sector appellate rules, and that it makes more sense to compare the Board's proceeding to adjudication of individual federal employees' discrimination complaints than to draw upon the adjudication rules for mine safety issues or patent/trademark issues.

In the event that Board rejects NELA's position concerning page limits, NELA in the alternative suggests that the page limit should be extended in the event of consolidated appeals or in the event that the appeal raises affirmative defenses, to allow an additional 30 pages for each affirmative defense or for each constituent appeal in the consolidated appeal. To do otherwise would prejudice parties seeking review of initial decisions in the more complicated cases.

Second, NELA opposes the proposed 7 day deadline for filing motions to exceed the page limit. NELA observes that—in practice—most parties cannot practicably complete their appeals briefs early enough to know 7 days in advance if their brief will exceed the page limit. NELA believes that such motions should be allowed far closer in to the appeal briefing deadline, and certainly no more than 3 days out. Concomitantly, the Board must ensure a ruling on the motion to exceed the page limit within 24 hours to ensure that the party's motion is adjudicated in advance of the actual filing deadline so that parties can have time to format their appeal briefs accordingly.

Finally, NELA opposes the general revision to eliminate "notice of appeal" filings and require all facts and arguments to be specified in the initial petition for review. NELA supports the "notice of appeal" approach, in no small part due to the delays inherent in having hearing recordings transcribed, and believes that shortening the time available to review the hearing once transcribed and to brief arguments will result in degradation of the quality of briefing in petitions for review, complicating the Board's appellate review. NELA notes that the Equal Employment Opportunity Commission's Office of Federal Operations has long utilized the "notice of appeal" approach for appellants (*see* Management Directive 110, Ch. 9, § IV.D).

**5 C.F.R. § 1201.118**: NELA opposes this modification and its limitation of the Board's authority to reopen cases on its own discretion.

**5 C.F.R. § 1201.154**: NELA opposes the phrasing of this proposed regulation, in that the regulation repeatedly uses the male pronoun "he" in its text, in a manner inconsistent with the gender-neutral phrasing generally used by the Board elsewhere in its regulations.

**5 C.F.R. § 1201.182**: NELA supports this modification.

**5 C.F.R. § 1201.183**: NELA supports this modification, and favors according administrative judges the authority to decide breach/noncompliance issues rather than merely making recommendations to the Board for later enforcement.

**5 C.F.R. § 1209.2**: NELA believes that the proposed regulation needs to make clear that an election of the Independent Right of Action (IRA) procedure is solely made if the appellant files a whistleblower reprisal complaint on the final adverse action, and not if the appellant files with the Office of Special Counsel (OSC) regarding the notice of proposed adverse action. The Whistleblower Protection Act (WPA) not only protects against actual adverse actions, but also separately protects against threatened adverse actions (such as notices of proposed adverse action). *See, e.g.,* 5 U.S.C. § 2302(b)(8) ("Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— [...] take or fail to take, *or threaten to take or fail to take*, a personnel action..." [emphasis added]). Accordingly, an appellant can separately and independently file a reprisal claim under the WPA for a notice of proposed adverse action, and then again for the final adverse action itself. NELA believes that the regulation should clearly draw the distinction between the two, to ensure that a procedural election for the IRA process only occurs if the appellant files with OSC regarding the final adverse action itself.

This distinction is especially important, in that many appellants facing a notice of proposed adverse action will contact the OSC for assistance in seeking a stay from the Board of the final adverse action, pending OSC investigation of the whistleblower reprisal claims attached to the notice of proposed adverse action. NELA strongly believes that appellants should not be required to choose between seeking a stay and their right to a merits appeal of the ultimate adverse action outside of the IRA framework.

**Orders to Show Cause For Affirmative Defenses:** NELA wishes to express its concern with the practice among some of the Board's administrative judges of issuing Orders to Show Cause or similar special briefing orders requiring appellants to make factual proffers and present argument to prove the elements of certain affirmative defenses (in particular, discrimination/EEO reprisal affirmative defenses) before the appellant is permitted to raise those claims at hearing. NELA understands the need to ensure that the issues for hearing are clearly defined and that witnesses called at hearing are non-cumulative and relevant to the claims at issue in the case. NELA, however, objects to the practice of placing an additional pleading burden (a burden akin to requiring proof of a *prima facie* case of discrimination, if not higher) upon appellants above and beyond ordinary prehearing submission requirements prior to permitting appellants to raise all legitimate affirmative defenses at hearing, and believes that this practice unduly interferes with appellants' ability to present all of their legitimate arguments in support of their appeal.

**Electronic Discovery Under F.R.C.P Rules 26 & 34:** Finally, NELA recognizes that the proposed regulations relating to discovery pursuant to 5 C.F.R. § 1201.73 do not incorporate any changes concerning electronic discovery under the Rules 26 and 34 of the Federal Rules of Civil Procedure. We strongly encourage the MSPB to undertake a review of this matter with input from all stakeholders (including agencies, federal sector unions and the appellants' bar), and to also consider whether any needed changes concerning e-discovery would be better incorporated into 5 C.F.R. § 1201.73 or into the Judges' Handbook.

Again, NELA appreciates the opportunity to comment on the proposed regulations. We reiterate that by commenting on various aspects of these regulations, we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting.

Thank you for your attention and consideration.

Sincerely yours,

Terisa E. Chaw
Executive Director
National Employment Lawyers Association

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November 30, 2011

VIA EMAIL

Ms. Susan Tsui Grundmann
Chairman
U.S. Merit Systems Protection Board
Office of the Chairman
1615 M Street, NW
Washington, DC 20419-0002

Dear Chairman Grundmann:

This letter is a response to the Board's request for comments or suggestions concerning proposed revisions to its regulations in 5 C.F.R. Parts 1201, 1208, and 1209. Thank you for providing me the opportunity to comment on these regulations.

I note that you also requested comments from Carol Bonosaro, President of the Senior Executives Association (SEA). Since I serve as General Counsel to SEA, Ms. Bonosaro requested that I respond for SEA. My comments below are from both SEA and from me personally as a practitioner.

Overall, I found the proposed revisions to be far more informative than the current regulations. The proposed language is a general improvement to the regulations, providing needed clarity. I do, however, have comments concerning two specific revisions, 5 C.F.R. § 1201.29 and 5 C.F.R. § 1209.2.

Section 1201.29, a new section, provides a judge with wide discretion to dismiss a case without prejudice where the judge determines a dismissal will further the interests of fairness, due process and administrative efficiency. I do not believe the judge should have the discretion to dismiss a case without prejudice if the Appellant objects to the dismissal. An Appellant's right to a quick resolution to his case likely will be jeopardized should judges be granted this latitude to dismiss cases without prejudice when the judge finds it appropriate to do so because of any perceived fairness, due process and/or administrative efficiency concerns. I am particularly concerned about this proposed regulation's potential effect on removal appeals, where the circumstances may warrant a swift resolution of the Appellant's appeal.

The proposed revisions to Section 1209.2 concern whistleblower independent right of action ("IRA) appeals. The revisions limit the scope of the Board's review of an IRA appeal

because the individual sought corrective action from the OSC before filing an appeal with the Board. A scenario unaddressed is where an individual has a pending EEO complaint on the same issue and then files an appeal with the Board. What, if any, impact would the pending EEO complaint have on the scope of the Board's review? I recommend that the proposed revisions be clarified to address this point.

I look forward to continuing to work with you on this project. It is clear that a great amount of time and effort went into these proposed revisions and I look forward to the final revised regulations.

Sincerely,

William L. Bransford

MEMORANDUM FOR: SUSAN TSUI GRUNDMANN
CHAIRPERSON
U.S. MERIT SYSTEMS PROTECTION BOARD

FROM: BRIAN J. SONFIELD BJS/acc
DEPUTY ASSISTANT GENERAL COUNSEL
GENERAL LAW, ETHICS & REGULATION
OFFICE OF GENERAL COUNSEL
DEPARTMENT OF TREASURY

RE: COMMENTS TO PROPOSED CHANGES TO THE MSPB'S REGULATIONS

DATE: 30 NOVEMBER 2011

The Department of Treasury ("Treasury") welcomes the opportunity as provided in your October 19, 2011 correspondence to comment on the Board's proposed changes to its regulations to be published at a later date for formal review and comment as per the Administrative Procedure Act, 5 U.S.C. § 553.

The following comments are provided and correspond to the specific regulations listed below.

§1200.4 We support the proposed new regulation to permit interested persons to petition the Board for modification to its rules. Consistent with the Board's efforts to reach out to the parties that appear before the Board through amicus briefs and oral argument, this provision is another welcomed opportunity to address substantive and government-wide issues.

§1201.4(j) The clarification of "date of service" is helpful as it provides for a definitive response date for pleadings served by United States Postal Service delivery or other than electronic filings. We recommend a related provision pertaining to courier and commercial overnight delivery and propose adding three extra days from the date of "service" as in larger agencies, overnight delivery does not always arrive at the appropriate official's location in that time frame.

§1201.24(d) The clarification to the provisions regarding a "right to a hearing" is necessary to reaffirm to appellants that the appellant must first file a timely appeal for which a non-frivolous allegation of jurisdiction is presented.

§1201.28 Extending duration and number of case suspensions is recommended based upon all the reasons stated. It frustrates judicial economy to not be able to suspend a case after prehearing but prior to a hearing. The proposed change assists parties who believe a settlement can be reached but need more time than usually provided and/or have already exhausted one 30 day suspension for purpose of additional discovery.

§1201.29 Recommend using this new provision regarding dismissals without prejudice for constructive adverse action mixed appeals in which the appellant previously elected to pursue remedy through the EEOC and the discrimination complaint is "firmly enmeshed" within the EEO process as per EEOC precedent.

§1201.33 Recommend striking the portion of the revised provision that allows the Board to sanction an Agency for not producing a federal employee from another non-party agency. The party Agency does not always have the power to do so for reasons which may or may not be foreseeable at the time of a prehearing order. Further, if the provision is retained, the regulation should make clear that the travel-related costs are borne by the agency employing the witness, especially if the party that is requesting the witness is the appellant.

§1201.43 Recommend retaining the provision that any sanctions imposed must be preceded by a Show Cause order, similar to EEOC practice. The elimination of this formal process would raise due process concerns to either party. Expediency and efficiency of the hearing process should not be a basis to eliminate the opportunity of a party to be fully heard before sanctions are imposed.

§1201.73 Treasury supports the proposal to eliminate initial disclosures as the Agency Appeal File accomplishes the same purpose within the same time frame.

For subsection (d), recommend extending time to respond to written discovery by five days such that responses are due within 25 days of service as opposed to 20 days. Existing deadlines are unrealistic and often result in informal agreements to extend anyway.

§1201. 118 Recommend defining "within a reasonably short period of time" to encourage principles of finality of an adjudication and the ability of an agency to rely on final decisions of the Board.

(new) §1201.155(a) We urge the Board to consider revisiting long-standing precedent that a grievant / appellant can raise discrimination claims for the first time on appeal from an arbitrator's decision. This works a greater prejudice against the agency as extensive resources put into litigation of an arbitration matter must essentially be re-visited on an entirely different issue (i.e., the discrimination claim) and potentially years later.

§1201.183 We urge the Board to re-consider whether sufficient due process rights are afforded in the Board's regulations for sanctioning an individual federal official by way of deduction of pay for non-compliance. Recommend seeking advisory opinion from the Board's General Counsel.

U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., SW.
Washington, DC 20591

November 29, 2011

Susan Tsui Grundman, Chairman
U. S. Merit Systems Protection Board
1615 M Street, NW
Washington, D.C. 20419-0002

Dear Ms. Grundman:

Thank you for giving us the opportunity to provide input on the planned revision to the U.S. Merit Systems Protection Board's regulations. I commend this effort to update the regulations and appreciate that you are seeking feedback from the MSPB's stakeholders.

Enclosed you will find the Federal Aviation Administration's (FAA) suggestions on the draft regulatory changes. If you have any questions about our suggestions, please contact Jerry Mellody, Assistant Chief Counsel for Personnel and Labor Law on 202-385-8254.

Thanks again for the opportunity to comment on this important initiative.

Sincerely,

Marc L. Warren
Acting Chief Counsel

Enclosure

| Proposed Regulation | FAA Comment/Suggestion |
|---|---|
| **1201.4 (j)** | The FAA's offices located in Washington DC have all US mail irradiated. There are other Executive Agencies where the US mail is also irradiated before delivery to the addressed recipient or office(s). The FAA does not control the irradiation process and the time it takes for any document to be irradiated and then delivered the addressee. It is not uncommon for mail sent via US mail to be delayed by more than 5 days.<br><br>Accordingly, the FAA recommends the proposed definition at §1201.4(j) be amended so that the "date of service" is the date of actual receipt of a document where the party's receipt of the document is the basis for a deadline for filing a responsive pleading. |
| **1201.22(b)(3)(v)** | The FAA believes that a requirement to prove an appellant intentionally avoided receipt of a document is too high of a burden for the Agency in cases where an appellant is avoiding receipt of a document. Proving actual intent is more than should be required for the delivery of a document to an appellant's address of record. The regulations require an appellant to keep an agency informed of a current address for the purposes of receiving correspondence. An agency should be allowed to rely upon and use the address provided by an appellant for service of correspondence.<br><br>The Agency believes a better approach to constructive service issues is found in the National Transportation Safety Board regulations. 49 C.F.R. §821.8(d) allows for a presumption of service "when a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused." Id. Similarly, where a properly addressed envelope was served via mail to the address of record and not returned there is a presumption of service on the addressee. As with the MSPB regulations, there are applicable Federal Aviation Regulations which require pilots, flight instructors and ground instructors with FAA Issued certificates to keep their current addresses up to date with the FAA. 14 C.F.R. § 61.60. Accordingly, the FAA believes the better practice for constructive service would be to adopt the procedures used by the NTSB. |

| Proposed Regulation | FAA Comment/Suggestion |
|---|---|
| **Agency File** | The proposed revised regulations do not address or change the current deadlines to produce an Agency file, i.e. within 20 days of the Acknowledgment and Order. The Agency believes that in cases where there is a question of Board jurisdiction or timeliness of an appeal there should be a rule tolling or suspending the deadline to produce an Agency file until the underlying issue of jurisdiction or timeliness is resolved by the Administrative Judge. |
| **1201.73** | The proposed regulations do not address limits on the number of discovery requests propounded by a party. The FAA recommends the MSPB consider and adopt the general limits on discovery requests contained in the Federal Rules of Civil Procedure, i.e. 25 written interrogatories F.R. Civ. P. 33. There are also various local rules which also limit the number of requests for admission and requests to produce among the various judicial districts. The MSPB should consider reasonable limits on the number of discovery requests, subject to the discretion of Administrative Judges to deviate from the limits. |
| **1201.114(h)** | The FAA concurs the page limitations for Petitions for Review (PFR) and responses thereto are an improvement in the Board's practice and disposition of PFRs. |

MWELA
Metropolitan Washington
Employment Lawyers Association

November 30, 2011

*VIA* e-mail to mspb@mspb.gov

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

**Re: Proposed Revisions to MSPB Regulations**

Dear Mr. Spencer,

The Metropolitan Washington Employment Lawyers Association (MWELA) submits these comments in response to the Merit Systems Protection Board's request for stakeholder comments regarding contemplated revisions to its procedural regulations in 5 C.F.R. Parts 1201, 1208 and 1209 pursuant to Executive Order 13563.

MWELA appreciates the opportunity to comment on the proposed regulations. By commenting on various aspects of these regulations, we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting. We reserve our rights for further comment in that regard if and when the Board opts to formally issue a notice of proposed rulemaking. Our comments on proposed modifications to specific regulations, and suggestions for additional modifications, are as follows:

**5 C.F.R. § 1201.4**: MWELA supports this proposed modification.

**5 C.F.R. § 1201.14(c)**: MWELA is concerned about the present phrasing of the proposed new 5 C.F.R. § 1201.14(c)(4) in several respects. First, the definitions of what constitutes Sensitive Security Information (SSI), as currently defined by the Transportation Security Administration, is extremely broad, and that extreme breadth would exclude entire groups of federal employees from using e-filing under the Board's proposed regulation. For example, under present regulations, federal air marshals identifying themselves as such in writing is itself deemed SSI. See 49 C.F.R. § 15.5(b)(11)(i)(D) ("Except as otherwise provided in writing by the Secretary of DOT in the interest of public safety or in furtherance of transportation security, the following information, and records containing such information, constitute SSI: [...] Identifying information of certain transportation security personnel. (i) Lists of the names or other identifying information that identify persons as— [...]Holding a position as a Federal Air Marshal."). Second, by incorporating these TSA SSI regulations, the Board cedes to the TSA the power to determine which TSA employees are permitted to use the Board's e-filing procedures. This cession of the Board's authority is extremely problematic, as current precedent permits TSA to *retroactively* designate information as SSI, so long as the designation is done consistent with then-current TSA SSI regulations. *See, e.g., MacLean v. Dept. of Homeland Security,* 112

M.S.P.R. 4 (2009), *aff'd* 2011 MSPB 70 (2011). This ambiguity hampers the parties' ability to make submissions to the Board, insofar as appellants may not even know for certain that particular documents will be deemed SSI at the time of filing, and therefore may be unclear on which filing procedure to utilize.

MWELA also opposes the continued inclusion of class appeal-related filings and requests to appear as *amicus curiae* in the exclusion from e-filing, as currently appearing in proposed 5 C.F.R. § 1201.14(c)(1, 6). While MWELA does note the observation in the comments section for proposed 5 C.F.R. § 1201.34 about the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* and interested parties concerning class certification gain access to the case docket, MWELA believes that such concerns could be easily addressed and should be revisited by the Board, especially in light of the current Board's policy favoring more oral argument and *amicus* briefing in cases of public policy import.

**5 C.F.R. § 1201.14(m)**: MWELA generally supports this proposed modification. We wish to note that some discrepancies have been observed between the time of certification of filing and the time stamp on the pleading, and believe that the regulations should be clarified to reflect that, in the event of a discrepancy, the earlier time should control.

**5 C.F.R. § 1201.22(b)(3)**: MWELA opposes several of the proposed modifications. With regard to 5 C.F.R. § 1201.22(b)(3)(i, iii), MWELA has no objection, but believes that the regulation should be modified to clarify that, in the event of a date discrepancy between the date of receipt by the appellant and the date of receipt by the appellant's representative, the latter of the two dates should control.

MWELA opposes 5 C.F.R. § 1201.22(b)(3)(ii), as the regulation as presently drafted (a) does not define who constitutes a "relative" for purposes of this regulation, and (b) does not require that the 'relative' be a normal resident of the appellant's current address. 5 C.F.R. § 1201.22(b)(3)(ii), as currently proposed, would permit effective service upon a non-resident relative of the appellant briefly visiting the appellant's residence, which MWELA believes is a perverse result. Instead, MWELA believes that "lawful resident at appellant's current address" should be substituted for "relative of the appellant" in 5 C.F.R. § 1201.22(b)(3)(ii).

MWELA further opposes 5 C.F.R. § 1201.22(b)(3)(iv, v), on the grounds that these two standards could only be ascertained by the Board after some form of fact-finding proceeding (for example, a jurisdictional hearing after a show cause order).

**5 C.F.R. § 1201.23**: Although this regulation was not specifically identified for modification by the Board's internal working group, MWELA believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, MWELA is aware of instances where certain MSPB administrative judges have taken the position that 5 C.F.R. § 1201.23 is only applicable to submissions to the Board, and thus does not govern deadlines for matters not directly submitted to the Board or to an administrative judge (for example, discovery deadlines). To clarify this issue, 5 C.F.R. §

1201.23 should be revised to make clear that all deadlines pertaining to matters within the Board's jurisdiction which fall on a weekend should extend to the next federal workday. MWELA notes that the Board's internal working group has supported this approach, as demonstrated by proposed 5 C.F.R. § 1201.28(e), and believes that the Board can readily apply this time calculation approach more globally. MWELA further notes that this approach has been used for many years in adjudications in the Equal Employment Opportunity Commission, and endorses this approach. *See* 29 C.F.R. 1614.604(d).

**5 C.F.R. § 1201.24**: MWELA opposes the internal working group's approach in the proposed regulations, and believes that the jurisdictional exceptions should be expressly cited or expressly referenced here.

**5 C.F.R. § 1201.28**: MWELA believes that the internal working group's approach in the proposed regulations should be modified in several respects. First, MWELA is aware of numerous cases under the present regulations in which administrative judges have rejected even joint requests for case suspension by the parties during the initial 45 day period. MWELA believes that these abuses of discretion by administrative judges need to be curtailed, and so MWELA strongly supports making the first case suspension mandatory if jointly requested by the parties.

Second, while MWELA strongly supports allowing a second thirty-day case suspension period, MWELA believes that the existing 45 day deadline appearing in present 5 C.F.R. § 1201.28 (c, d) would unduly complicate the parties' ability to request the second case suspension period authorized by the proposed revised regulations. To rectify this problem, MWELA believes that the current 45 day deadline should be extended to 60 days.

Third, MWELA supports the presiding administrative judge retaining jurisdiction over initial adjudication of case suspension requests, and strongly opposes moving that authority to the Regional Director/Chief Administrative Judge even in the event of a late case suspension request.

Fourth, MWELA is generally concerned that 5 C.F.R. § 1201.28 does not provide the administrative judges with any standards for exercising their discretion in adjudicating requests for case suspensions, and so believes that, for any case suspension request that is not mandatory (as discussed *supra*), the Board should specify standards to guide the administrative judge's exercise of discretion in deciding the relevant case suspension request.

MWELA supports the proposed revision to 5 C.F.R. § 1201.28(a)(1), in that it removes the restrictions on what reasons justify case suspension.

MWELA believes that a modification needs to be made to proposed revised 5 C.F.R. § 1201.28(d) to reflect the interaction between case suspension and motions to compel discovery. Under both the present regulations and the proposed regulations, one of the specified uses for case suspension is for purposes of allowing the parties additional time to pursue discovery, an approach MWELA supports. However, under both the current and the proposed revised 5 C.F.R.

§§ 1201.28, 1201.73, parties receiving deficient discovery responses are required in many instances to file motions to compel discovery during the case suspension period—and such a filing could potentially constitute a situation requiring termination of case suspension under proposed revised 5 C.F.R. § 1201.28(d). This causes problems where the parties have sought case suspension for discovery purposes in order to allow time for depositions, and where a discovery dispute arises in responses to written discovery prior to conducting the depositions. The requesting party is then left choosing between either moving to compel written discovery (thus forfeiting the rest of the case suspension period and potentially losing the chance for depositions), or else losing the benefit of written discovery and going into depositions under the case suspension period. The allowance of a second case suspension period does not solve this problem, as the adjudication of the pending motion to compel discovery would be presumably stopped (with all other case processing) during the second suspension period, thus leaving the dispute on written discovery unresolved. To resolve this issue, MWELA believes that 5 C.F.R. § 1201.28(d) should be revised to specify that, in the event that case suspension is for discovery purposes, adjudication of a motion to compel discovery does not require termination of the case suspension period.

Finally, MWELA proposes that an additional section should be added to the regulation (perhaps as a new 5 C.F.R. § 1201.28(f)) to provide that, in the event that the parties jointly request that the case be referred for mediation under the Board's Mediation Appeals Program (MAP), then the administrative judge shall be required to place the case on case suspension of indefinite duration, until such time as the case is referred back to the administrative judge by the MAP coordinator (either because the case settled or because MAP mediation proved unsuccessful). MWELA supports MAP, and believes that MAP should be more formally included into the Board's regulations.

**5 C.F.R. § 1201.29**: MWELA supports the proposed 5 C.F.R. § 1201.29, but believes that the proposed regulation should be modified to also allow that dismissals without prejudice may be structured so that the appeal is automatically deemed refiled on a date certain if the appellant does not refile earlier. This modification is consistent with current practice of some administrative judges, and MWELA believes that this practice should be permitted to continue.

**5 C.F.R. § 1201.33**: MWELA supports the proposed 5 C.F.R. § 1201.33, but believes that the proposed regulation should be modified to require federal agencies to produce current employees not just for furnishing sworn statements or to testify at hearing, but to testify at deposition as well.

**5 C.F.R. § 1201.34**: As discussed *supra* concerning 5 C.F.R. § 1201.14(c), MWELA objects to the comments in the draft concerning the perceived overburdensomeness of trying to adjust the e-Appeal system to reflect Privacy Act concerns in the event that *amici* gain access to the case docket, and believes that the issue should be revisited by the Board.

**5 C.F.R. § 1201.43**: MWELA believes that the present phrasing "contumacious misconduct or conduct prejudicial to the administration of justice" in 5 C.F.R. § 1201.43(e) allows too much discretion to administrative judges, and that the Board should limit that

discretion through adding a non-exclusive list of express examples to the regulation to guide administrative judges in applying this regulation. MWELA supports the proposed revised 5 C.F.R. § 1201.43(d) in its allowance of additional time to appellants to find replacement representatives in the event that their representative is excluded.

**5 C.F.R. § 1201.51**: MWELA believes that the internal working group's approach in the proposed regulations should be modified in several respects. MWELA is aware of numerous cases under the present regulations in which administrative judges have issued orders scheduling hearings and prehearing deadlines (including prehearing submission deadlines) to fall far before the parties have had the chance to complete discovery. MWELA believes that this practice is highly prejudicial to appellants through denial of their ability to conduct discovery in support of their appeals, and roundly denounces the practice. Further, MWELA has observed that the present system of administrative judges unilaterally selecting hearing dates, and then burdening the parties with filing verified motions to reschedule pursuant to 5 C.F.R. § 1201.51(c), often proves inefficient, and that in some cases administrative judges have denied unopposed requests to reschedule outright for personal reasons such as scheduled leave for the administrative judge. The internal working group's proposed regulations take the approach of cutting short discovery to meet the prehearing dates set by the administrative judge (*see* proposed revised 5 C.F.R. § 1201.73(d)(4)) rather than setting prehearing deadlines to accommodate discovery, an approach MWELA strongly opposes.

MWELA believes that these abuses of discretion by administrative judges need to be curtailed, and to do so supports modifying 5 C.F.R. § 1201.51 to restrict administrative judges' scheduling authority in three respects. First, 5 C.F.R. § 1201.51 should require that, before setting the hearing date, the administrative judge should convene a prehearing conference with the parties to establish dates acceptable (to the extent practicable) to the administrative judge and to both parties. Second, 5 C.F.R. § 1201.51 should require that the administrative judge, when setting deadlines, must allow the parties sufficient time for the discovery process (including depositions and adjudication of discovery motions) to conclude prior to prehearing and hearing. Third, 5 C.F.R. § 1201.51 should require that, absent the consent of the parties, the administrative judge may set the hearing no sooner than 90 days from the Acknowledgement Order, and the administrative judge may set the deadline for prehearing submissions no sooner than 80 days from the Acknowledgement Order. These restrictions would ensure that the parties have a fair chance to complete discovery efforts, and would help to ensure a full development of the record at hearing.

**5 C.F.R. § 1201.52**: MWELA vigorously objects to permitting administrative judges to close hearings "when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding". MWELA believes that hearing should always remain public, save to the limited extent necessary to protect classified information.

**5 C.F.R. § 1201.53**: MWELA supports provision of free copies of the recording to the parties, and supports allowing for use of technologies other than tape recordings to record hearings. MWELA believes that, when an e-transcript is available to the Board, those e-transcripts should also be provided to the parties at no cost.

**5 C.F.R. § 1201.61**: Although this regulation was not specifically identified for modification by the Board's internal working group, MWELA believes that this regulation should be modified as part of the overall revisions to the Board's procedural regulations. Specifically, MWELA believes that the regulation should be clarified to make sure that documentary evidence (in addition to testimony) is included in the record for review by the Board, through addition of an extra sentence at the end of the regulation, "Furthermore, excluded evidence shall become part of the record, segregated and identified as 'excluded evidence.'" MWELA believes that this modification is necessary to ensure that the Board can properly review and oversee administrative judges' admissibility decisions at hearing.

**5 C.F.R. § 1201.73**: MWELA strongly supports the elimination of mandatory initial disclosures. MWELA strongly supports extension of the parties' discovery initiation deadlines from 25 days to 30 days. MWELA further supports eliminating the distinctions between discovery from parties and from non-parties found in the proposed regulation, including allowing motions to compel discovery against non-parties withholding discovery.

As noted *supra* concerning 5 C.F.R. § 1201.51(d)(4), MWELA opposes limiting the discovery period to meet the prehearing dates set by the administrative judge, and favors the approach of setting prehearing deadlines to accommodate completion of discovery.

MWELA further believes that the deadline for the Agency's submission of the agency file should be reduced from 20 days to 15 days. This reduction is necessary to allow appellants sufficient time to propound discovery after receipt of the agency file, the receipt of which has historically often been delayed in the mail (and, in some instances, by agency tardiness). MWELA believes that agencies will not be unduly prejudiced by this reduction, in that agencies should have compiled the vast majority of the content of the agency file at the time of issuing a decision on the original adverse action underlying the appeal.

Finally, MWELA has observed repeated problems with the present discovery initiation deadlines in cases where the Board's jurisdiction over the appeal is challenged (either through a motion to dismiss, or more frequently through a *sua sponte* order to show cause), in that present deadlines (and even the proposed modified deadlines under the internal working group's revisions) overlap with the parties' briefing schedule for briefing jurisdictional issues. To address this recurrent problem—and to ensure that the Board has the benefit of well-drafted jurisdictional submissions to facilitate appellate review—MWELA believes that an additional provision should be incorporated into 5 C.F.R. § 1201.73 mandating an automatic stay of all discovery deadlines if the Board's jurisdiction over the appeal is called into question (whether by show cause order or by motion), said stay to last until the jurisdictional issues are adjudicated.

**5 C.F.R. § 1201.113**: MWELA supports the addition of proposed 5 C.F.R. § 1201.113(f). However, MWELA believes that referrals to the Office of Special Counsel (OSC) should not be limited to just whistleblower reprisal situations, and instead should extend to all of prohibited personnel practices. Accordingly, MWELA supports removing "(8)" from the text of proposed 5 C.F.R. § 1201.113(f), so as to authorize referrals to OSC if the Board finds reason to

believe that a current federal employee committed any of the 5 U.S.C. § 2302(b) prohibited personnel practices.

**5 C.F.R. § 1201.114**: MWELA strongly opposes the revisions to this section in a number of respects.

First, MWELA opposes imposing a page limit on appeals. MWELA believes that the internal working group's analogy in the comments section to courts' page limits is inapposite, in that appellate courts' review of trial courts is far less extensive than the oversight duties of the Board over its administrative judges. Regarding the internal working group's comparison to other administrative tribunals, MWELA notes that the Equal Employment Opportunity Commission's Office of Federal Operations does not impose any page limit in its federal sector appellate rules, and that it makes more sense to compare the Board's proceeding to adjudication of individual federal employees' discrimination complaints than to draw upon the adjudication rules for mine safety issues or patent/trademark issues.

In the event that Board rejects MWELA's position concerning page limits, MWELA in the alternative suggests that the page limit should be extended in the event of consolidated appeals or in the event that the appeal raises affirmative defenses, to allow an additional 30 pages for each affirmative defense or for each constituent appeal in the consolidated appeal. To do otherwise would prejudice parties seeking review of initial decisions in the more complicated cases.

Second, MWELA opposes the proposed 7 day deadline for filing motions to exceed the page limit. MWELA observes that—in practice—most parties cannot practicably complete their appeals briefs early enough to know 7 days in advance if their brief will exceed the page limit. MWELA believes that such motions should be allow far closer in to the appeal briefing deadline, and certainly no more than 3 days out. Concomitantly, the Board must ensure a ruling on the motion to exceed the page limit within 24 hours to ensure that the party's motion is adjudicated in advance of the actual filing deadline so that parties can have time to format their appeal briefs accordingly.

Finally, MWELA opposes the general revision to eliminate 'notice of appeal' filings and require all facts and arguments to be specified in the initial petition for review. MWELA supports the 'notice of appeal' approach, in no small part due to the delays inherent in having hearing recordings transcribed, and believes that shortening the time available to review the hearing once transcribed and to brief arguments will result in degradation of the quality of briefing in petitions for review, complicating the Board's appellate review. MWELA notes that the Equal Employment Opportunity Commission's Office of Federal Operations has long utilized the 'notice of appeal' approach for appellants. *See* EEOC Management Directive 110, Ch. 9, § IV.D.

**5 C.F.R. § 1201.118**: MWELA opposes this modification and its limitation of the Board's authority to reopen cases on its own discretion.

**5 C.F.R. § 1201.154**: MWELA opposes the phrasing of this proposed regulation, in that the regulation repeatedly uses the male pronoun "he" in its text, in a manner inconsistent with the gender-neutral phrasing generally used by the Board elsewhere in its regulations.

**5 C.F.R. § 1201.182**: MWELA supports this modification.

**5 C.F.R. § 1201.183**: MWELA supports this modification, and favors according administrative judges the authority to decide breach/noncompliance issues rather than merely making recommendations to the Board for later enforcement.

**5 C.F.R. § 1209.2**: MWELA believes that the proposed regulation needs to make clear that an election of the Independent Right of Action (IRA) procedure is solely made if the appellant files a whistleblower reprisal complaint on the final adverse action, and not if the appellant files with the Office of Special Counsel (OSC) regarding the notice of proposed adverse action. The Whistleblower Protection Act (WPA) not only protects against actual adverse actions, but also separately protects against threatened adverse actions (such as notices of proposed adverse action). *See, e.g.*, 5 U.S.C. § 2302(b)(8) ("Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— [...] take or fail to take, *or threaten to take or fail to take*, a personnel action..." [emphasis added]). Accordingly, an appellant can separately and independently file a reprisal claim under the WPA for a notice of proposed adverse action, and then again for the final adverse action itself. MWELA believes that the regulation should clearly draw the distinction between the two, to ensure that a procedural election for the IRA process only occurs if the appellant files with OSC regarding the final adverse action itself.

This distinction is especially important, in that many appellants facing a notice of proposed adverse action will contact the OSC to assistance in seeking a stay from the Board of the final adverse action, pending OSC investigation of the whistleblower reprisal claims attached to the notice of proposed adverse action. MWELA strongly believes that appellants should not be required to choose between seeking a stay and their right to a merits appeal of the ultimate adverse action outside of the IRA framework.

**Orders to Show Cause For Affirmative Defenses:** Finally, MWELA wishes to express its concern with the practice among some of the Board's administrative judges of issuing Orders to Show Cause or similar special briefing orders requiring appellants to make factual proffers and present argument to prove the elements of certain affirmative defenses (in particular, discrimination/EEO reprisal affirmative defenses) before the appellant is permitted to raise those claims at hearing. MWELA understands the need to ensure that the issues for hearing are clearly defined and that witnesses called at hearing are non-cumulative and relevant to the claims at issue in the case. However, MWELA objects to the practice of placing an additional pleading burden (a burden akin to requiring proof of a *prima facie* case of discrimination, if not higher) upon appellants above and beyond ordinary prehearing submission requirements prior to permitting appellants to raise all legitimate affirmative defenses at hearing, and believes that this practice unduly interferes with appellants' ability to present all of their legitimate arguments in support of their appeal.

Again, MWELA appreciates the opportunity to comment on the proposed regulations. We reiterate that by commenting on various aspects of these regulations, we are not suggesting that we agree with or tacitly approve the portions of the regulations upon which we are not commenting.

Thank you for your attention and consideration.

Sincerely yours,

Joseph V. Kaplan
*For the* Metropolitan Washington Employment Lawyers Association

**From:** MSPB
**To:** Spencer, William;
**Subject:** FW: Regulation Revision Comments
**Date:** Thursday, December 01, 2011 10:38:02 AM

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Bill, for some reason it appears the attachment disappears when I forward it to you. I am going to try to e-mail it separately, and also will print a copy. M

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**From:** Kessmeier, Catherine L CIV ASN (M&RA), AGC [mailto:catherine.kessmeier@navy.mil]
**Sent:** Wed 11/30/2011 4:32 PM
**To:** MSPB
**Cc:** Woods, Robert L SES ASN (M&RA), AGC; Names, Donald CIV OCHR, 00E
**Subject:** Regulation Revision Comments

Clerk of the Board
1615 M Street, NW
Washington, DC 20419

Dear Sir/Madam,

Thank you for your invitation to provide comments or suggestions on the Merit System Protection Board's revisions to the regulations set forth in 5 C.F.R. Parts 1201, 1208, and 1209. In response to your request for comment and suggestion, the Department of the Navy established a working group of attorneys and human resources professionals to review the proposed revisions and to identify comments/suggestions that you may find helpful as you move forward in the rulemaking process. Our recommendations and comments are attached as a .pdf file to this email.

Should you have any questions or concerns, please feel free to contact me at the number below.

Sincerely,
Catherine L. Kessmeier
Deputy Assistant General Counsel
Office of the Assistant Secretary of the Navy
(Manpower & Reserve Affairs)
1000 Navy Pentagon
Room 4D548
Washington, DC 20350-1000
Tel: 703-614-3053
Fax: 703-697-1457
catherine.kessmeier@navy.mil

## COMMENTS MATRIX

| Paragraph | Title | Comments |
|---|---|---|
| 1201.4(j) | General Definitions<br>(j) Date of Service | Recommend date of service be date of receipt not the date it is sent. The presumption that mailed documents are received within 5 days is not accurate for those Government agencies that irradiate all incoming mail for anthrax. The irradiation process can significantly delay receipt of mail, which would impact many agencies' response time under the proposed rule. |
| 1201.14(c) | Electronic Filing Procedures | In subsection (c), the word "or" should be moved from the end of subparagraph (4) to the end of subparagraph (5). |
| 1201.21(a) through (d)(4) | Notice of Appeal Rights | (1) Line 3 should be changed from "corrective action under subchapters II and II" to "subchapters II and III."<br><br>(2) There are several areas where MSPB desires to incorporate provisions related to prohibited personnel actions into the revised regulations. Recommend that any whistleblower-related or other prohibited personnel actions be addressed in one place for a more orderly reading and understanding of the effect pursuing such claims have on any Board appeals. |
| 1201.22(b) | Time of filing | Concur with the objective to clarify the Board's doctrine of constructive receipt. However, certain provisions may lead to unnecessary litigation. For example, how is one to prove that a relative of the appellant "who is at least 18 years of age and of suitable discretion" received the notice or that the appellant would have received the decision if he or she were not "intentionally avoiding receipt"? Recommend that subparagraph (b)(3)(ii) be changed to "any adult resident", which would include roommates and others. Regulations should also reflect that subparagraphs are examples and that the Board may continue to make decisions concerning constructive receipt. |
| 1201.24 | Content of an appeal; right to hearing | (1) The agency is required to provide MSPB appeal forms; thus, if the Board wants to reduce the number of documents submitted by an appellant, it would make sense to amend the appeal form and mandate its use vice allowing letter-form appeals.<br><br>(2) Eliminating the requirement for the appellant to submit relevant information with his/her appeal disadvantages an agency's ability to discern the affirmative defenses being presented by the appellant. Recommend that appellants be required to disclose with their appeal any information they believe is relevant to their appeal. |
| 1201.28 (a) & (c) | Case suspension procedures | (1) Subsection (c) requires that a suspension request filed more than 45 days after issuance of the acknowledgment order must be approved by the Regional Director or the Chief |

| Paragraph | Title | Comments |
|---|---|---|
| | | Administrative Judge. Recommend that the Administrative Judge have the authority to grant a late request if good cause is shown. To the extent such requests must be approved by the RD or CAJ, recommend a time frame be placed on these officials to approve/disapprove the request. (2) The requirement to prepare and file any opposition to a unilateral request within 5 days of filing is not reasonable if service of the request is done via U.S. mail. Suggest that time frame run from date of receipt or that time frame be expanded to provide a reasonable period for receipt and response (for example 10 calendar days). |
| 1201.33 | Federal Witnesses | This proposed change unfairly shifts the burden of ensuring appearance of witnesses who work for non-party Federal agencies. The responsibility for ensuring attendance at the hearing should remain with the requesting party and the Federal agency for which the witness is employed. The Board's regulations currently provide a mechanism for a party to request a subpoena for an employee of a non-party agency or an order to a non-party agency to produce an employee as a witness. The Board possesses the authority to enforce such orders. Respondent agencies, on the other hand, have no similar authority to order other agencies to make their employees available as witnesses in MSPB proceedings. Holding the respondent agency responsible for attendance of non-party agency employees, presumably by imposing sanctions when the respondent agency in unable to produce such a witness, when the agency has no power to require the attendance of the witness would not promote the interest of justice. While enforcement of a subpoena or order to a non-party agency to produce an employee as a witness amounts to ancillary litigation and delays the processing of the appeal, the burden upon the Board does not justify making respondent agencies responsible for producing witnesses over whom they have no control. If the Board believes that its current regulations have not been effective in convincing non-party agencies to make their employees other, more appropriate options exist to obtain such witnesses. If the Board believes that appellants do not how to properly serve a subpoena or order upon the non-party agency, then the Board could require AJ's to serve those orders upon the General Counsel of the non-party agency. We trust that the General Counsel of an agency would ensure that an agency employee is made available for an MSPB proceeding. If the Board believes that agencies are being recalcitrant in making their witnesses available for proceedings in which they are not a party, the Board could develop an expedited procedure to enforce subpoenas or orders to produce witnesses upon non-party agencies, to include the threat of sanctions under 5 USC 1204(e)(2). Recommend that burden remain with the requesting party to secure its own witnesses and all Federal agencies be |

| Paragraph | Title | Comments |
|---|---|---|
| | | required to comply with such requests. |
| 1201.43(d) | Sanctions | While we agree with the Board that the discussion of exclusion of representative is better handled under sanctions and that the current provisions for a show-cause order is not feasible when the misconduct occurs at a hearing, the current rule at 1201.31(d)(4)(i) has the advantage of being equally applicable to both parties compared to the proposed revision which would only afford the Appellant a reasonable time to obtain a replacement counsel in the event Appellant's counsel is excluded, but not for the agency. Accordingly, consistent with the current provision, we recommend the second sentence of the draft revision be changed to read, "when the judge excludes **a party's** representative, the judge will afford **the party** a reasonable time to obtain another representative before proceeding with the case." |
| 1201.73(a) | Discovery Procedures | We support the proposed elimination of the initial disclosure requirement. The initial disclosure requirement is duplicative of the requirement for the agency to file the Agency File 20 days after receipt of the acknowledgment order. The appellant has the opportunity to obtain additional evidence through discovery. Further, because the MSPB customarily serves a central agency point of contact with the acknowledgment order rather than the responsible organization, the agency representative often does not receive the acknowledgment order until the eighth or ninth day after it was issued. This leaves the agency with insufficient time to perform an appropriate search for evidence and distracts the agency representative from preparing the response and Agency File, which generally add more benefit to the MSPB's adjudication. |
| 1201.153(a)(2) | Contents of appeal | In order to reduce any confusion with agency grievance procedures the first sentence of the proposed revision should be changed from:<br><br>The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency regarding the matter being appealed to the Board.<br><br>Should be changed to:<br><br>The appeal must state whether the appellant has filed **a grievance under a negotiated grievance procedure** or a formal discrimination complaint with any agency regarding the matter being appealed to the Board. |

| Paragraph | Title | Comments |
|---|---|---|
| | | Further, that any reference to "grievance" should be changed to "a grievance under a negotiated grievance procedure" throughout the rules as has been done in the first sentence of the proposed revision to 1201.155(a). |
| 1201.153 | Remand of allegations of discrimination | The first sentence of (a) Scope: presently begins "If an individual has filed a grievance of action appealable to the Board with the agency under a negotiated grievance procedure ..."<br><br>Should be changed to:<br><br>"If an individual, **or a union official acting on the individual's behalf,** has filed a grievance of an action appealable to the Board with the agency under a negotiated grievance procedure ..."<br><br>Reason: Union stewards typically file grievances. |
| 1201.155 | Requests for review of arbitrators' decisions | Neither the current nor the proposed regulations provide for an agency response to the request for review of an arbitrator's decision. Recommend that the proposed regulation provide for an agency response or clarify when an agency response may be required, e.g., only upon request of the Board. |
| 1201.21(d) and 1209.2(b)(2): | Notice of Appeal Rights & Jurisdiction | We support the MSPB's new interpretation of section 7121(g). That statute permits employees affected by an appealable action to elect "not more than one of" three remedies: an MSPB appeal, a grievance, or an OSC complaint with the potential of an IRA appeal to the MSPB. By adjudicating IRA appeals of otherwise appealable actions in the same manner as direct appeals, the MSPB effectively allows employees to elect two remedies, an OSC complaint and an MSPB appeal. By adjudicating those IRA appeals in the same manner as IRA appeals of non-appealable actions, the Board would give effect to section 7121(g) and to the employee's election under that statute. Including notice of the right to make an election under section 7121(g) and the ramifications of such an election would not impose a substantial burden on the agency. |

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

DEC 1 2011

The Honorable Susan Tsui Grundmann
Chairman
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, D.C. 20419-0002

Re: OPM Comments on Proposed Revisions to MSPB Regulations

Dear Ms. Grundmann:

Thank you for the opportunity to comment informally on the Board's preliminary draft of potential proposed revisions to the current MSPB regulations. I set forth OPM's comments below. As I am sure you understand, OPM, by providing these comments, does not waive its right to participate in the public rulemaking process under 5 U.S.C. § 553(c).

*Specific Comments:*

**Sec. 1200.4, Petition for Rulemaking**

Paragraph (b) states that in response to a rulemaking petition, the Board may either initiate a rulemaking proceeding or issue "a final rule." Because the Board is a quasi-judicial agency, there is a risk that advocates will strategically use rulemaking petitions in anticipation of litigation. For this reason, and in the interest of fairness, OPM recommends that the Board indicate that it will proceed pursuant to notice and comment rulemaking, even when such procedures are not technically required.

**Sec. 1201.3, Appellate Jurisdiction**

In paragraph (a)(13), the citation to 5 C.F.R. § 330.209 is now out of date. The new reference is § 330.214. Also in this paragraph, the reference to a "reemployment priority list" is incomplete. Because the regulation covers the appeal rights of both competitive and excepted service employees, the appropriate term is "reemployment priority list for the competitive service or reemployment list for the excepted service." *See* 5 C.F.R. § 353.301(b).

**Sec. 1204.4, General Definitions**

In paragraph (j), "date of service" should be defined in a narrative fashion, rather than by reference to the definition of "date of filing." We make this observation because the "date of filing" definition is geared toward submitting briefs to the Board and thus contains requirements that have no bearing on how parties serve discovery requests and responses to each other (*e.g.*, the filing requirements for days when the Board is closed for business).

The reference in paragraph (j) to "calendar days" is unnecessary because paragraph (h) already defines "days" as "calendar days."

Paragraph (j) should cross-reference the computation of time rules in section 1201.23.

**Sec. 1201.14, Electronic Filing Procedures**

In paragraph (c), the word "or" should be deleted from paragraphs (2) and (4) and follow only subparagraph (5). In addition, the periods at the end of paragraphs (3) and (5) should be converted to semi-colons. In other words each item in the list from paragraphs (1) through (5) should end with a semi-colon, and the word "or" should precede only paragraph (6).

**Sec. 1201.21, Notice of Appeal Rights**

There are typographical errors in paragraphs (d) and (d)(4) (see especially the reference to "subchapters II and II").

Paragraph (d) makes extensive additions to the notices agencies are required to give employees in final action letters. This will make final action letters lengthy recitations of procedure. It will also increase the risk of erroneous or inadequate notice. To avoid these outcomes, we suggest that the Board issue a model notice as an appendix to the rule, which agencies can reference and supplement, as needed, in their letters.

It is unclear why the Board wants agencies to give employees specific notice of their rights under 5 U.S.C. § 7121(g) but not of their rights under §§ 7121(d) and (e)(1).

**Sec. 1201.24, Content of an Appeal; Right to a Hearing**

OPM generally supports these changes. Requiring the appellant to submit only a copy of the decision or notice of agency action from which he or she appeals should reduce the number of duplicative documents submitted to OPM and the Board during an appeal.

Paragraph (d), however, states that the appellant "generally has a right to a hearing if . . . the Board has jurisdiction." OPM believes that, in order to avoid an implication that an appellant has no right to any kind of hearing until jurisdiction is

established, this language should be revised to say that the appellant generally has a right to a "hearing *on the merits* if . . . the Board has jurisdiction."

**5 C.F.R. § 1201.29, Dismissal without prejudice**

OPM supports this addition. Adding a regulation that permits administrative judges to dismiss without prejudice could help avoid unwarranted petitions for review.

**Sec. 1201.33, Federal Witnesses**

Paragraph (a) makes a Federal agency that is party to a Board proceeding responsible for ensuring the appearance of approved Federal employee witnesses who are employed by non-party agencies. This is potentially inconsistent with agencies' regulations issued under *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951) governing the production of witnesses for proceedings in which the agency is not a party.

Paragraph (a), if adopted, could pose a potential problem for the respondent agency in terms of adverse inferences when a non-party agency fails to produce a witness per the responding agency's request or determines to produce a witness at a time inconsistent with the judge's order. If the paragraph is ultimately proposed, it should address these possibilities.

If this change is considered necessary, OPM recommends that the draft regulation be revised to (i) include a requirement that the non-party agency employing the witness in question be served by the Administrative Judge with the order including the nonparty agency's employee among the approved witnesses; (ii) include a requirement that the non-party agency be given an opportunity to object to or seek modification of the order before it becomes effective; and (iii) eliminate the possibility of any adverse inference against the respondent agency with respect to the non-appearance of any employee not under its control.

**Sec. 1201.34, Intervenors and Amicus Curiae**

Paragraph (e)(1) allows "[a]ny person or organization" to "request permission" to file an *amicus* brief and provides the standards that the Board will apply in deciding whether to grant such permission. We support this change to the Board's rules. We would suggest that the Board consider adding a provision to this rule that also describes its recent practice of soliciting amicus briefs through Federal Register notices.

**Sec. 1201.43, Sanctions**

Paragraph (d) allows the judge, as a sanction, to exclude a person "from further participation in the case." OPM is concerned about permitting an administrative judge to exclude a representative or other person without any interlocutory proceedings. The revision notes indicate that the MSPB believes that any erroneous exclusion could be remedied upon a petition for review. If this provision is adopted as written, however, the

regulation could result in a situation where the evidence that the excluded person could have entered into the record would not be in the record for any such review. In addition, the provision empowers administrative judges to exclude persons who might have relevant evidence regarding the underlying matter on appeal, without adequate safeguards against arbitrary action.

In addition, we note that this proposal is less nuanced than the EEOC's regulation on sanctions, 29 C.F.R. § 1614.109(e), which allows a less severe sanction (exclusion from the hearing while still being allowed to participate in the case) and a more severe sanction (suspension from practice before the Commission). The Board may wish to consider giving its judges a similar range of options.

The term used in the rule, "contumacious misconduct," is redundant. OPM recommends that the Board revise this phrase to "contumacious conduct."

**Sec. 1201.51, Scheduling the Hearing**

This would be a good place to reference the viability of video hearings as a Government-wide cost-saving measure.

**Sec. 1201.52, Public Hearings**

The Board should expect some confusion over its text prohibiting electronic recording and communication devices in the hearing room without the judge's express consent, because electronic devices are increasingly multifunctional. For example, a laptop accessed for witness questions or connected to a projector to display exhibits may also have recording and transmission capabilities.

**5 C.F.R. § 1201.73, Discovery procedures**

Paragraph (a) of § 1201.73 of the present regulations, which provides for initial disclosures during discovery, is deleted in the revised regulations. OPM strongly supports this change.

The use of the term "litigants" in paragraph (c) to refer to nonparties served with discovery requests is inappropriate.

Paragraph (c)(1)(ii) contains typographical errors.

In paragraph (c)(1)(iii), "opposing party or nonparty" should be changed to "nonmoving party or nonparty."

The following phrase in paragraph (c)(2) is ambiguous: "The party or nonparty . . . may respond to the motion to compel or issue a subpoena . . . ." The apparent meaning is to address how a party or nonparty should respond either to a motion to compel or to a subpoena request. But it can also be read to allow a party or nonparty to respond to a

motion to compel with a subpoena. OPM recommends that the Board edit this text for clarity.

Paragraph (c)(3) allows a motion to compel discovery within 10 days of the non-service of a discovery response. But the flexible new definition of "service" in section 1201.4 will make it exceedingly difficult to determine the date of non-service under section 1201.73(c)(3).

Paragraph (c) of § 1201.73 of the current regulations provides that a party may obtain discovery from a nonparty by "filing a written motion with the judge, showing the relevance, *scope*, and materiality of the particular information sought" (emphasis supplied). When a party files a motion to compel discovery under § 1201.73(e) of the current regulations, the motion must explain why the information sought is "relevant and material." When a party seeks a subpoena under § 1201.81 of the current regulations, however, the party must demonstrate that the evidence sought is relevant and that the *scope* of the request is reasonable. Subsection (c) of § 1201.73 of the revised regulations combines the provisions for motions to compel discovery and motions to issue a subpoena without incorporating this notion that the scope of the request must be reasonable. In OPM's view, the movant should be required to make such a showing in both contexts.

Paragraph (c) of § 1201.73 of the current regulations also includes the following text regarding a motion to obtain discovery from a nonparty:

> If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the MSPB will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any MSPB-approved discovery request and subpoena on the individual or entity, or for arranging for its service.

This provision is not included in the revised regulations and there is no explanation for the deletion.

**Sec. 1201.93, Procedures**

The draft rule allows a stay during an interlocutory appeal, but it is unclear whether this stay is charged against the 60-day aggregate limit on case suspensions. OPM recommends that this point be clarified.

**Sec. 1201.113, Finality of Decision**

Paragraph (a) of this draft provision requires a party seeking to vacate an initial decision in a case based on a settlement agreement filed before the finality date, but received after the finality date, to have moved to vacate the initial decision before the finality date. OPM is having difficulty parsing how this would work and believes the language should be clarified.

The first sentence of the Reasons for Recommended Change appears to be missing a word.

Although the Board does not appear to be contemplating a change to the existing regulations regarding when initial decisions become final (35 days after issuance) and the time limit for filing a petition for review (35 days after date of issuance of the initial decision), OPM encourages the Board to address the difficulty that arises when an administrative judge orders compliance with an initial decision on a date prior to the date the initial decision becomes final. For example, one recent initial decision ordered compliance "no later than 20 calendar days after the date of this Order." OPM recommends that the Board include in § 1201.113(e) or in a new subsection, a requirement that, except in circumstances where the Board has ordered interim relief, the date the administrative judge provides for a party to comply with an initial decision must be on or after the date the initial decision becomes final. This recommendation may eliminate confusion among appellants as to why OPM has not complied with an order in an initial decision in circumstances when the compliance date precedes the deadline for filing a petition for review. It may also reduce the number of compliance actions filed with the Board prior to the initial decision's finality date.

**Sec. 1201.114, Petition and Cross Petition for Review – Content and Procedure.**

The references in paragraph (a), subparagraphs (1), (2), (4), and (5) to "a party" are incomplete to the extent that they do not include the OPM Director or the Special Counsel.

Paragraph (a) of § 1201.114 of the revised regulations provides definitions of "petition for review" and "cross petition for review," and states that "a cross petition for review has the same meaning as a petition for review . . . ." Section 1201.114(a) also provides a new definition of "reply to a response to a petition for review." Because a cross petition for review has the same meaning as a petition for review, section 1201.114(a)(4) appears to permit a reply to a response to a petition for review *or a cross petition for review*. This seems to be confirmed by the last sentence of § 1201.114(e) of the revised regulations, which provides that "[a]ny reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review or cross petition for review." Nevertheless, the intent is not free from ambiguity, and OPM recommends that the Board include an explicit reference to a cross petition for review in the definition of a reply at 1201.114(a)(4). OPM would support permitting replies in both contexts.

Paragraph (h) imposes page limits on briefs. It should be revised to address spacing limits as well. Otherwise, the Board may begin to receive 30-page single-spaced briefs, especially from *pro se* appellants. Alternatively, the Board may wish to consider a word limitation instead. Text should also be added to address the consequences, if any, if a brief does not conform to the Board's page limits.

In note (1) under Reasons for Recommended Change, the word "similar" is spelled incorrectly.

**Sec. 1201.115, Criteria for Granting Petition or Cross Petition for Review**

This draft provision is potentially problematic in that, by employing the phrase "includ[ing] but not limited to" the Board proposes an open-ended, discretionary standard for granting or denying a petition for review. The Board's stated reason for this change -- to limit the use of reopening procedures for cases that do not meet the traditional standard – is laudable. But with an open-ended standard for granting or denying petitions for review, agencies and appellants alike will have no way to reliably predict whether their petitions will be successful. This will create an incentive for parties to petition for review of every unfavorable initial decision. Appellants will unnecessarily waste time and resources contesting unwinnable cases, while the Board may see a significant spike in workload and a case processing backlog.

Another consequence of an open-ended regulatory standard for granting and denying petitions for review is that a standard will be developed through case law. It will be especially burdensome to require *pro se* appellants to research Board case law to determine whether their petitions for review will be successful.

A final consequence of the rule change may be the creation of an unwarranted perception that the Board is not applying a consistent, principled legal standard in granting or denying petitions for review. We would recommend, therefore, that the Board make its list of criteria exclusive, not inclusive.

**5 C.F.R. § 1201.116, Compliance with orders for interim relief**

Although subsection (a) merely incorporates certification requirements from current § 1201.115, and no changes have been made through the modification of this provision, OPM recommends that this section be revised to provide an agency the opportunity to seek a stay of interim relief while its petition for review is pending.

**5 C.F.R. § 1201.117, Procedures for review or reopening**

Subsection (c) is the regulatory provision, originally adopted on October 5, 2010, specifying that a final Board decision in the form of a Final Order is not precedential, while a final Board decision issued in the form of an Opinion and Order is precedential. Although it already has been promulgated as a regulation, and remains unchanged in the

draft revision of section 1201.117, OPM takes this opportunity to request that the Board reconsider this provision. Under current § 1201.119, OPM may petition for reconsideration only with respect to a "final order." In current § 1201.117(c), however, the Board states that a final decision may be either a "Final Order or an Opinion and Order," that "a Final Order may, but need not, include additional discussion of the issues raised in the appeal," and that "[a]ll Final Orders are nonprecedential . . . ." It seems incongruous that the Board would have intended that OPM could petition for reconsideration only with respect to that branch of final decisions that "need not . . . include . . . discussion of the issues raised in the appeal" and is, by definition non-precedential. Accordingly, section 1201.117(c) appears to be out of synch with section 1201.119. Perhaps the Board intended the "Final Order" of 1201.117(c) to have a different meaning then the "final order" of 1201.119. In any event, OPM recommends that the Board take this opportunity to at least clarify its intent.

OPM also asks the Board to reconsider the wisdom of section 1201.117(c) in its entirety, in light of its potential interaction with the rules that govern OPM's ability to petition for review at the Federal Circuit. The effect of labeling final decisions with extensive discussion of the merits "non-precedential" makes sense in a forum, like the Federal Circuit, where there can be multiple configurations of panels (and a panel may not wish to bind other panels through its holding in a particular case), and where either side to an appeal is equally able to seek further review. Doing so in the context of Board practice, however, where there is only one panel and unique rules as to the availability of further review, is not warranted and unduly complicates the Government's ability to obtain judicial review of important concepts. At the conclusion of a proceeding before the Board, only an appellant, not the respondent agency, has the right to seek review by the Federal Circuit. The Government may obtain review of the underlying holding only if OPM concludes that the criteria of 5 U.S.C. § 7703(d) are met and, only then, after seeking reconsideration by the Board. The Board's 2010 amendment complicates this deliberation in ways that the Board may not have considered. We recommend against perpetuating a scheme that could impose further limitations on this already narrow entitlement and complicates the considerations that Congress intended to be in play when OPM determines whether it is appropriate to petition for reconsideration in contemplation of a possible petition for review.

Further, in the context of Board practice, we do not believe that the characterization of a decision as "non-precedential" is meaningful. Where non-precedential decisions are issued by a panel on the court of appeals, the lower court (or administrative review body) may feel free to depart from its reasoning both because the decision has been classified as "non-precedential" and because an entirely different panel may review the issue on appeal. In the context of Board practice, the administrative judges will not have this freedom as a practical matter.

In any case, if the Board decides to keep this provision, the rule should expressly acknowledge that when the Board exercises its discretion to review an Initial Decision, its issuance of a Final Order with additional discussion, instead of an Opinion and Order, does not prejudice the right of OPM to petition for reconsideration. We believe that a Final Order secured after the Board's grant of a petition for review is distinguishable

from an Initial Decision that is merely allowed to become final after a petition for review is denied. *Compare Horner v. Burns*, 783 F.2d 196, 201-2 (Fed. Cir. 1986).

**5 C.F.R. § 1201.118, Board reopening of final decisions**

Section 1201.118 of the draft revised regulations, concerning Board reopening of final decisions, states that the Board will exercise its discretion to reopen a final decisions "only in unusual or extraordinary circumstances . . . and only within a reasonably short period of time." This would establish a very high standard for reopening. Under this standard, it will be extremely difficult for OPM or another agency to successfully seek relief from an erroneous order, even though an agency may be in the best position to perceive and notify the Board of such an error. This extraordinarily high standard for reopening seems particularly problematic given that, as noted above, agencies may not seek judicial review, and OPM may petition for such review only when the underlying matter meets a statutory standard that is itself exacting. We recommend that the Board preserve the current reopening language, at least with respect to agencies seeking to point out a mistake in fact or law.

OPM recommends that the Board define what it means by a "reasonably short period of time."

**Sec. 1201.155, Requests for Review of Arbitrators' Decisions**

Paragraph (d) of this new section would allow the Board to deny finality to an arbitrator's decision on a grievance, and to reopen the record for additional evidence or to retry the grievance before the Board's own administrative judge. This provision conflicts with the collective bargaining process and the election of the union to pursue a matter in arbitration. Once filed, the matter belongs to the arbitrator; at best, any direction to supplement the record should be directed to the parties for submission to the arbitrator in question.

**Sec. 1201.182, Petition for Enforcement**

We strongly agree with the Board's edits clarifying that the Board's authority to enforce a final decision or order includes the authority to enforce a settlement agreement that is entered into the record of an order or decision under the Board's appellate jurisdiction. This statement in the regulations will help the Government defend against collateral suits to enforce Board settlement agreements in other venues, such as the Court of Federal Claims.

**Sec. 1201.183, Procedures for Processing Petitions for Enforcement**

Although the Board recognizes, in its Reasons for Recommended Changes, that compliance may take time, it appears that the agency's "good faith effort" to be in compliance is eliminated as one of the factors to be considered under revised paragraph (a)(5). OPM recommends that the good faith element be re-inserted into this text. OPM, for example, is often dependent on other agencies to provide SF-50s, 52s, 2806s, 3100s, and the like in order to effectuate compliance in cases where it is the respondent.

Accordingly, OPM could well require more than 30 days to fully effectuate a decision, even when it makes its best efforts to comply. For example, when a retiree prevails in an appeal concerning belated post-1956 military service deposits for Civil Service Retirement System retirement credit, OPM, or the appellant's employing agency, must often obtain records of the retiree's military earnings to compute the amount of the post-1956 military service deposit. Because military earnings must be obtained from the Defense Finance Accounting Service, this is frequently a very lengthy process for reasons that are entirely beyond OPM's control. Similar concerns arise as to other sorts of records critical to retirement decisions that are maintained by other agencies (e.g., the by the Department of Veterans Affairs and the Office of Workers' Compensation Programs).

Currently, in a compliance proceeding, the administrative judge submits a recommendation to the Board, and the Board itself determines whether the agency has complied. Paragraph (a)(5) eliminates that provision. In addition, it inserts new language that would make the sanction of withholding pay from the responsible OPM official automatic once the period for a petition for review has elapsed, if an administrative judge has issued an initial decision holding that the agency has failed to comply. Although, Congress has, in fact, conferred upon the Board the authority to direct that an employee charged with complying with an order shall not receive payment during a period of non-compliance, Congress did not require that pay be withheld automatically in all such circumstances. OPM questions the wisdom of imposing this sanction through an automatic trigger, with no determination of bad faith, especially in tandem with the provision changing the nature of the administrative judge's action from a recommendation to an actual decision. Nothing in the Reasons for Recommended Change appears to address the perceived need for this rather drastic shift.

Paragraph (a)(6) deletes the text currently in clause (iii), addressing the situation where a party decides to take one or more, but not all, actions required by the administrative judge's recommendation with a new clause (iii) that, read literally, appears to describe procedures for a party to explain to the Board both that it intends to fully implement the administrative judge's initial decision and that it intends to implement none of it. The text, as rewritten, does not work, logically, and appears to preclude the possibility that a party might choose to implement some but not all of the initial decision. We recommend that the Board either revise this text or return to the original text.

Paragraph (a)(6)(i) provides that if a party decides to take the actions required by the initial decision, the party must file evidence of compliance and a detailed statement of compliance within the time limit for filing a petition for review under § 1201.114(d). Section 1201.114(d) of the revised regulations, however, would address the place for filing a petition for review, not the time limits. The time limits would be at § 1201.114(e).

Presumably, under § 1201.183(a)(6)(ii) the time limit for filing the petition for review would be 35 days as provided at § 1201.114(e) of the revised regulations. The explanation provided in the Reasons for Recommended Change, however, states that the time limit would be 30 days.

**Sec. 1209.5, Time of Filing**

The use of the term "adversary" in the equitable tolling provision is inappropriate, because the provision concerns a filing procedure for a matter not yet in litigation.

*Conclusion*

We thank you again for the opportunity to comment on your ambitious endeavor.

Sincerely,

ELAINE KAPLAN
General Counsel

**From:** MSPB
**To:** Spencer, William;
**Subject:** FW: Regulation Revision Comments
**Date:** Friday, December 02, 2011 10:56:21 AM

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**From:** Alexander-Hoeppner, Jessee [mailto:Alexander-HoeppnerJ@state.gov]
**Sent:** Thu 12/1/2011 3:40 PM
**To:** MSPB
**Subject:** Regulation Revision Comments

Below are the comments on Possible Changes to MSPB Adjudicatory Regulations from Department of State, Office of the Legal Adviser, Office of Employment Law. Where proposed changes would alter the existing numbering of subsections, the subsection numbers below refer to those that appear in the "Possible Revised Regulation" column of the table.

§ 1201.14(c): We recommend the following punctuation/conjunction edits: add semicolons (instead of periods) at the end of (c)(3) and (c)(5), remove the "or" at the end of (c)(2) and (c)(4), and insert "or" at the end of (c)(5).

§ 1201.21(d): We recommend changing the second "II" to "III" in subsections (d) and (d)(4).

§ 1201.24(a)(7): We recommend that § 1201.24(a) not be changed, as the Agency has found that, in practice, the requirement to include relevant documents often leads to a more efficient flow of information between the parties at an early stage of litigation. In this way, it facilitates settlement and/or withdrawal of cases in instances where appellants have filed claims based upon an inaccurate understanding of supporting documents by allowing the Agency an opportunity to correct any misconceptions prior to engaging in discovery.

§ 1201.28(a): We support the proposed expansion of the suspension period to a total of 60 days and the removal of the discovery or settlement limitation.

§ 1201.28(c): We recommend that § 1201.28(c) not be changed to require approval of a late suspension request by the Regional Director or Chief Administrative Judge. It is our experience that the decision to grant such a request is a case management decision best made by the Administrative Judge, who is most familiar with the circumstances of the case that might constitute "good cause."

§ 1201.33(a): We oppose the change to § 1201.33(a). The regulations in the current form already make clear that every Federal agency has an independent obligation to make its employees or personnel available, as necessary. The responding agency does not possess any authority to compel the presence of employees of other Federal agencies. The only entity with the power to do so in the MSPB context is the Administrative Judge, who has ample authority to do so under the existing regulations. To require the responding agency to ensure the appearance of employees it does not oversee unjustly exposes the responding agency to penalties for non-appearance of witnesses whom it cannot compel to appear.

§ 1201.53(c): We recommend that this subsection also address the proper procedure to obtain copies of recordings and transcripts if a private court reporter is used. In the Agency's experience, *pro se* appellants in particular are confused as to how to request a transcript from a private court reporter.

§ 1201.73: We support the proposed elimination of the initial disclosure requirement from subsection (a). We also support the proposed extension of the deadline for initial discovery requests in order to facilitate review of the Agency File prior to initiating discovery.

§ 1201.73(e): Although the table does not include a proposed change to this subsection, we recommend that the limit on the number of discovery requests be expanded to apply to document requests and requests for admission in addition to interrogatories, because the lack of a limitation on the number of requests is subject to abuse. For example, we are aware of at least one *pro se* appellant who served the Agency with more than 100 requests for admission.

§ 1201.114(a): If this provision is changed as proposed to expressly

allow a reply to a response to a petition for review, we recommend that the regulation also permit a reply to a response to a cross petition for review. Accordingly, we recommend that a corollary to subsection (a)(4) pertaining to such a pleading be added.

§ 1209.2: We support the proposed changes to § 1209.2 pertaining to the Board's jurisdiction.

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