UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

JUL 23 2012

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 the MSPB Proposed Rule to Amend 5 C.F.R. Parts 1200, 1201, 1203, 1208, and 1209, Practices and Procedures

Dear Ms. Grundmann:

Thank you for the opportunity to comment on the Board's proposed rule to amend its adjudicatory practices and procedures, published at 77 Fed. Reg. 33,663 (June 7, 2012). Thank you also for the transparency with which you have undertaken this rulemaking, including the opportunity, late last year, for OPM and other stakeholders to submit comments on the preliminary recommendations of your regulatory working group. OPM submitted comments on the preliminary recommendations on December 1, 2011 and we are pleased that the proposed rule reflects many of our comments. I set forth OPM's comments on the proposed rule below.

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." OPM renews its December 1, 2011 comment that 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

OPM supports the Board's proposal to use plain language descriptions of the laws, rules, and regulations conferring a right of appeal.

Sec. 1201.4, General Definitions

OPM renews its comment that 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).

OPM renews its comment that the reference in paragraph (j) to "calendar days" is unnecessary because paragraph (h) already defines "days" as "calendar days."

OPM also renews its comment that paragraph (j) should cross-reference the computation of time rules in section 1201.23.

Sec. 1201.14, Electronic Filing Procedures

OPM supports the Board's proposal to amend paragraph (c) to expressly prohibit electronic filing of classified information and sensitive security information.

Sec. 1201.21, Notice of Appeal Rights

Paragraph (d) makes extensive additions to the notices agencies are required to give employees in final action letters. OPM renews its comment that this change 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.

Further, even if the proposed amendment is adopted, it has gaps. OPM renews its comment that as drafted, this section would inconsistently require 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. 1201.22, Filing an Appeal and Responses to Appeals.

Examples A, B, and C in proposed section 1201.22(b) purport to illustrate when an appellant is deemed to have received correspondence served by the agency. OPM recommends deleting the examples because they could be read as determinative in circumstances where they would be misleading. Example B states that an appellant who fails to pick up his mail due to hospitalization is not deemed to have received his mail; but the presumption is not necessarily valid if the appellant has made arrangements for a person of suitable age and discretion to pick up his mail during his hospitalization. Likewise example C states that an appellant is deemed to have received mail when it has been received by a roommate of suitable age and discretion; but the presumption fails if the roommate, while discreet, nonetheless has malicious intent to withhold or destroy the mail. The examples should be deleted and questions of this nature should be reserved for fact finding under the general standards prescribed by the proposed rule.

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.

5 C.F.R. § 1201.29 "Dismissal without prejudice"

Proposed section 1201.29(b) allows an appellant to object in advance to a dismissal without prejudice, but does not require the advance notice that would make such objections possible. OPM recommends that when a judge, on his or her own motion, dismisses an appeal without prejudice, he or she must first notify the parties and give them an opportunity to object.

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. OPM renews its comment that this is potentially inconsistent with agencies' regulations issued under *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) governing the production of witnesses for proceedings in which the agency is not a party.

OPM also renews its comment that 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 adopted, it should address these possibilities.

If paragraph (a) is adopted, OPM renews its comment that the rule be revised to (i) include a requirement that the non-party agency employing the witness in question be served by the 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 renew our comment that if the Board anticipates continuing its recent practice of soliciting *amicus* briefs through Federal Register notices, it should be referenced here.

Sec. 1201.35, Substituting Parties

The Board did not propose amending this section, which currently only addresses substituting appellants who have died or otherwise become unable to process an appeal. We recommend that the Board revise this section to also provide, consistent with its case law, that when an appellant files an appeal against the wrong agency, the presiding judge must substitute the proper party as the defending agency. *See, e.g., Fitzgerald v. Dep't of the Navy*, 70 M.S.P.R. 152, 156 (1996), *overruled in part on other grounds*, *Streeter v. Dep't of Def.*, 80 M.S.P.R. 481, 484 n.2 (1998). Likewise we recommend that the Board clarify when other agencies may be added as necessary defending parties. *See, e.g., Kelly v. Office of Pers. Mgmt.*, 53 M.S.P.R. 511, 514 (1992). These amendments are of interest to us because of involuntary retirement appeals and suitability appeals in which the appellant names the wrong defending agency. If the Board believes that these changes would not be a logical outgrowth of the notice and comment process for this rulemaking, however, *see, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the Board should issue a separate notice of proposed rulemaking for these amendments.

Sec. 1201.51, Scheduling the Hearing

The Board proposes to refer parties to its Web site for a current list of approved hearing locations for in-person hearings. Consistent with our December 1, 2011 comments, we recommend that the Board also use this section to expressly authorize

telephonic or video hearings, and to direct parties to its Web site for resources on arranging for telephonic or video hearings.

Sec. 1201.52, Public Hearings

As we previously commented, the Board should expect some confusion over this section's prohibition on powering and operating electronic recording and communication devices in the hearing room without the judge's express consent, because electronic devices are increasingly multifunctional (such as, for example, laptops used for witness questions or to project exhibits). We recommend clarifying that the section's reach extends to devices which have electronic recording and two-way communication functionality, even if those are not the devices' primary functions.

Sec. 1201.53, Record of Proceedings

OPM objects to the proposed deletion of paragraph (e) of this section, which specifies the contents of the official record of the appeal.

OPM also objects to proposed paragraph (b), which authorizes the presiding judge, in specified circumstances, to order the agency to pay for a transcript and to deliver it to the judge and the appellant free of charge. The Board explains, in 77 Fed. Reg. at 33,666, that agency payments for transcripts would not have the effect of illegally augmenting the Board's appropriated funds, because even though 5 U.S.C. § 7701(a) requires the Board to conduct a transcribed hearing, under Federal Circuit case law, the Board is not required to produce its transcripts in *verbatim written* form. OPM does not agree with this reasoning. The Civil Service Reform Act of 1978, as codified in 5 U.S.C. §§ 1204(a)(1) and 7701(a), gives the Board the responsibility to conduct or provide for a hearing in which a transcript must be kept; and the Board's appropriations statute, Public Law 112-74, appropriates funds to the Board for "necessary expenses to carry out [its] functions . . . pursuant to . . . the Civil Service Reform Act of 1978." Indeed, the Board admits that it "has in the past used appropriated funds to prepare a written hearing transcript." The Comptroller General has already decisively opined that because the conduct of hearings is the Board's statutory responsibility, funds are not appropriated for agencies to pay the Board's hearing expenses and the Board may not accept hearing expenses from agencies. 61 Comp. Gen. 419 (1982). If paragraph (b) is adopted as proposed, therefore, it will not be enforceable.

Finally, the Board errs in describing as "comparable" the EEOC regulation requiring agencies to pay for verbatim transcripts. The EEOC's apparent justification for its regulation is that "the hearing . . . take[s] place at the agency level," even though an EEOC administrative judge presides. *See* 57 Fed. Reg. 12,634, 12,636 (Apr. 10, 1992). In adopting this approach, the EEOC rejected its earlier proposal to "eliminate[ ] the hearing from the agency investigation stage" and to "shift" the hearing "from the agency

investigation process to the EEOC appeal process." 54 Fed. Reg. 45,747, 45,748 (Oct. 31, 1989). Yet MSPB initial decisions, unlike EEOC initial decisions, are not reviewable by a final agency decisionmaker. Accordingly the EEOC's basis for expense-shifting is unavailable to the Board (in addition to being untested as a matter of appropriations law).

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

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

Paragraph (c) of section 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. OPM requests that the Board explain this change in the supplementary information accompanying the final rule.

Sec. 1201.93, Procedures

The proposed 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 renews its comment that this point should be clarified.

Sec. 1201.111, Initial Decision by Judge

The Board proposes to eliminate language currently in paragraph (a) of this section, requiring judges to serve initial decisions on OPM. The accompanying supplementary information, 77 Fed. Reg. at 33,667, states that the text is no longer necessary because the Board makes its initial decisions available via an extranet service. Although OPM has no objection to eliminating language requiring judges to personally serve OPM with initial decisions, we recommend against eliminating all reference to the

Board's responsibility to serve OPM with initial decisions, since it is a statutory duty of the Board under 5 U.S.C. § 7701(b)(1).

Sec. 1201.113, Finality of Decision

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 renews its comment that the Board should address the difficulty that arises when a 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 this section, a requirement that, except in circumstances where the Board has ordered interim relief, the date the 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.

OPM renews its comment that the references in proposed 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.

Proposed paragraph (a) defines a "petition for review" and a "cross petition for review," and states that "a cross petition for review has the same meaning as a petition for review . . . ." Paragraph (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, paragraph (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 proposed section 1201.114(e), 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 renews its recommendation that the Board include an explicit reference to cross petitions for review in the definition of a reply at section 1201.114(a)(4). OPM would support permitting replies in both contexts.

Proposed paragraph (h) imposes page limits on briefs. OPM renews its recommendation that the Board regulate spacing limits as well, or impose maximum

word limits. Text should also be added to address the consequences, if any, if a brief does not conform to the Board's page limits.

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

This proposed section 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. 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 therefore renew our recommendation that the Board make its list of criteria for granting petitions for review exclusive, not inclusive.

Sec. 1201.116, Compliance with Orders for Interim Relief

Although proposed paragraph (a) merely incorporates certification requirements from current § 1201.115, and no changes have been made through the modification of this provision, OPM renews its recommendation 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.

Sec. 1201.117, Procedures for Review or Reopening

Paragraph (c) is the regulatory provision, originally adopted on October 5, 2010, specifies 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 final rule, and remains unchanged in the proposed revision of section 1201.117, OPM takes this opportunity to renew its request that the Board reconsider this provision. In the context of Board practice, we do not believe that the characterization of an opinion 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, however, the administrative judges will not have this freedom as a practical matter.

Sec. 1201.118, Board Reopening of Final Decisions

Section 1201.118 of the proposed rule, concerning Board reopening of final decisions, states that the Board will exercise its discretion to reopen a final decision "only in unusual or extraordinary circumstances, and generally within a short period of time after the decision becomes final." 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 standard seems particularly problematic given that 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 renew our recommendation that the Board preserve the current reopening language, at least with respect to agencies seeking to point out a mistake in fact or law.

Sec. 1201.119, OPM Petition for Reconsideration

The Board proposes to amend paragraphs (a), (b), and (d) to clarify that the Director of OPM may seek reconsideration of the Board's "final decision," which is defined in section 1201.117(c) as either a precedential Opinion and Order or a nonprecedential Final Order. In the accompanying supplementary information, 77 Fed. Reg. at 33,668, the Board makes its intent clear: to recognize OPM's right to petition for reconsideration of "any type of final decision, whether it be an Opinion and Order or a 'Final Order.'"

OPM welcomes this amendment. In the event that the Board does not accept OPM's recommendation to eliminate nonprecedential Final Orders altogether, the proposed amendment to section 1201.119 preserves the Government's interest in seeking judicial review of nonprecedential Final Orders in appropriate circumstances. As OPM stated in its December 1, 2011 comments, 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, should not prejudice the right of OPM to petition for reconsideration. In this respect 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).

Sec. 1201.137, Covered Actions; Filing Complaints; Serving Documents on Parties.

The Board proposes in paragraph (c) to eliminate the current restriction on initial filing and service by electronic means. However, the Board has retained the requirement that the appointee must file two copies of the request, a requirement that does not make sense in the electronic filing context, and that is inconsistent with proposed sections 1201.122 and 1201.134. We recommend removing the requirement for filing two copies.

Sec. 1201.155, Requests for Review of Arbitrators' Decisions

Proposed paragraph (d) of this 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. OPM renews its comment that 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 proposed 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

Proposed section 1201.183 would change the current practice of judges issuing recommended decisions on petitions for enforcement, to a new practice of having them issue initial decisions subject to a petition for review. However, the Board would not be able to simply deny an agency's petition for review or to allow an initial decision to become final in the absence of a petition for review. Instead, proposed paragraph (b) requires the Board, in all situations, to "render a final decision on the issues of compliance" following "review of the initial decision and the written submissions of the parties." Further, "[u]pon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency and the responsible agency official to appear before the Board to show why sanctions should not be imposed." The responsible official may also "respond in writing or . . . appear at any argument concerning the withholding of that individual's pay." We believe that these are important safeguards for cases in which significant sanctions may be imposed.

However, the accompanying supplementary information, 77 Fed. Reg. at 33,669, states that the initial decision "would become the Board's final decision if a petition for review is not filed or is denied." This statement is contrary to the express text of the proposed rule, which requires the Board to affirmatively decide the issues of compliance; and it posits an alternative approach to sanctions under which responsible agency officials would receive inadequate procedural safeguards. The Board should disavow this statement, in the supplementary information accompanying the final rule. In any event, because the statement is not consistent with the rule's text, the inconsistency may hinder the rule from receiving deference in judicial proceedings. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Further, it appears that the agency's "good faith effort" to be in compliance is eliminated as one of the factors to be considered under proposed paragraph (a)(5). OPM renews its recommendation that the good faith element in the current regulations 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 and 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 Department of Veterans Affairs and the Office of Workers' Compensation Programs).

Sec. 1203.13, Filing Pleadings

The Board proposes to amend sections 1201.122 and 1201.134 to eliminate requirements for filing multiple copies of pleadings, and to allow e-filing for the pleadings governed by those sections. OPM recommends that the Board make similar changes to section 1203.13. In practice, the Office of the Clerk of the Board is already functioning as if the amendment has been made, and the Clerk's practice should be ratified for the convenience of OPM and petitioners alike.

Conclusion

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

Sincerely,

ELAINE KAPLAN
General Counsel