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UNITED STATES
POSTAL SERVICE

July 23, 2012

VIA EMAIL AND FIRST CLASS MAIL

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

Re: Postal Service Comments - Merit System Protection Board's June 7, 2012 Notice of Proposed Rulemaking

The United States Postal Service (Postal Service) submits these comments in response to the U.S. Merit System Protection Board's ("MSPB" or "Board") Notice of Proposed Rulemaking dated June 7, 2012, concerning the MSPB's revision of its rules of practice and procedure pertaining to its adjudicatory process.[1] At the request of the MSPB, the Postal Service previously submitted comments on initial proposed revisions to these rules.[2]

On the whole, the Postal Service supports the MSPB's proposed changes as well-drafted and thoughtful. The Postal Service anticipates that these changes will, generally, facilitate a more streamlined and efficient litigation process before the Board. Particularly, the Postal Service supports the Board's revisions to its rules pertaining to initial disclosures and filing for a suspension period and expects that these changes will ease the burden of litigating MSPB actions for both agencies and appellants alike.

At the same time, the Postal Service recognizes some areas of concern with the Board's proposed revisions, some of which may lead to significant costs on the part of federal agencies, including the Postal Service. These concerns are expressed in greater detail below.

1201.29: The Postal Service supports the existing language in the MSPB's proposed rule requiring that Board judges fix a date certain for refiling an appeal

[1] Merit System Protection Board Practices and Procedures, 77 Fed. Reg. 110, 33663 (June 7, 2012) (to be codified at 5 CFR Parts 1200, 1201, 1203, 1208, and 1209).
[2] *See* Letter from Eric J. Scharf to the Honorable Susan Tsui Grundmann, November 30, 2011 (Letter from Eric J. Scharf).

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dismissed without prejudice. However, the Postal Service recommends requiring that a judge set a refiling date within six months of the order dismissing the appeal with prejudice. The Postal Service believes this is a reasonable time period. Furthermore, such a provision would provide a degree of certainty and finality to these proceedings. The Postal Service would also recommend providing that an appeal may not be dismissed without prejudice for more than two six-month periods.

1201.43: The Postal Service respects the Board's concern with maintaining the efficiency of the appeals process and, accordingly, its objection to delaying a proceeding for purposes of adjudicating an interlocutory appeal of sanctions. However, the Postal Service believes that, in the interest of justice, an interlocutory appeal process should be maintained.

1201.53(b): The Postal Service opposes the Board's proposal to allow Board judges, even in the absence of any party's request for a written transcript, to require agencies to "purchase a full or partial transcript from the court reporter" and "provide copies of such a transcript to the appellant and the Board." The Postal Service is concerned that the proposed regulation will likely result in litigating agencies being forced to bear the significant cost of producing a transcript in nearly all cases. First, the proposed standard for requiring agencies to purchase a transcript is very low. Far from being reserved for extraordinary cases in which a decision cannot be rendered without a written transcript (rather than a recording), the proposed rule authorizes Board judges to order a written transcript any time a judge believes that a transcript would "significantly assist in the preparation of a clear, complete, and timely decision..." Second, the incentives under the proposed rule are stacked in favor of ordering a transcript. Appellants, knowing that the costs of purchasing a transcript would be borne by the employing agency, will have no reason not to request a transcript as a matter of course. And Board judges would have every reason to err on the side of honoring an appellant's request, knowing that the denial of such a request could be a ground for reversal on review in the Federal Circuit while the grant of such a request cannot.

Moreover, the proposed rule violates the well-settled proposition that a federal agency may not reimburse another agency for services that the latter agency is required to provide and for which, as part of its statutory purpose, the latter agency receives appropriations.[3] Doing so would improperly augment the reimbursed agency's appropriations.[4] The Board apparently disagrees that its proposal

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[3] *See, e.g., In re Architect of the Capitol*, B-308774 (Comp. Gen. March 15, 2007); *In re Reconsideration of MSPB's Authority to Accept Reimbursement for Hearing Officers Travel Expenses*, 61 Comp. Gen. 419, 421 (1982).

[4] 61 Comp. Gen. at 421 (Because the MSPB is required by law to provide appeals hearings in cases under its jurisdiction and receives appropriations for this purpose, agencies could not cover the cost of travel expenses to

constitutes an improper augmentation, reasoning that "the Board is not required to prepare [a written] transcript and Federal agencies receive appropriations to pay for the costs of litigating appeals before the Board."[5]

These reasons are misplaced. There is no dispute that the Board is required by statute to provide appellants with a transcript, and that it receives appropriations for this purpose. The Board cites case law stating that (1) a recording of a hearing, as opposed to a written transcript, is sufficient to meet this requirement, and that (2) the Board's existing rule, requiring a requesting party to pay for the cost of a written transcript except "in extenuating circumstances for good cause shown," is reasonable.[6] But these propositions do not support a conclusion that that the Board may require a *non*-requesting party to pay for written transcripts. An appellant requesting a transcript does so for his or her own purposes in litigation. If a Board judge determines that having a written transcript will assist the Board in deciding a given case, such a determination is necessarily in furtherance of the Board's statutory duties – adjudicating appeals brought before the Board, including rendering decisions to parties – for which it receives appropriations.[7] It is incorrect for the Board to suggest that paying for such transcripts constitutes "costs of litigating appeals before the Board" for which "Federal agencies receive appropriations." It is necessarily a cost incurred *by the Board* in deciding the appeals (or, at the very least, *by the appellant* in furthering his or her prosecution of an appeal). Accordingly, requiring an agency to provide a written transcript to the Board for this purpose at the agency's cost, as this rule expressly proposes to do, constitutes an improper augmentation of the Board's appropriations.

Even if it were appropriate for the MSPB to receive payment for these costs, requiring the Postal Service to pay for transcripts that it does not require may exceed the Postal Service's statutory authority and could constitute an impermissible payment from the Postal Fund. Postal funds have been appropriated to the Postal Service by Congress, 39 U.S.C. § 2401(a), for the purpose of providing "postal services to bind the nation together through . . . correspondence of the people." 39 U.S.C. § 101(a). While paying its own costs in litigation before the MSPB is a permissible expenditure from the Postal Fund, paying the expenses of the Board or of private parties is not permissible unless such payments are authorized by statute (and they are not). Accordingly, the Postal Service and any

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allow hearing officers to travel to an appellant's home area; the fact that the Board's legislation does not require that hearing officers travel to an appellant's home area "does not make providing a hearing officer. . .any less a part of MSPB's statutory mission").

[5] 77 F.R. 110, 33666 (June 7, 2012).

[6] Id. (citing *Gonzalez v. Defense Logistics Agency*, 772 F.2d 887, 890 (Fed. Cir. 1985); *Gearan v. Department of Health and Human Services*, 838 F.2d 1190 (Fed. Cir. 1988)).

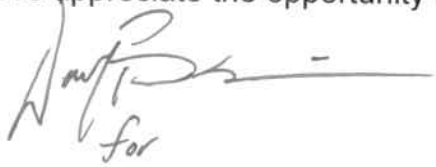
[7] 5 U.S.C. § 7701.

agency with similar limitations on its expenditures would be exempt from the application of this rule if the Board chooses to adopt it.[8]

1201.73: As stated in previous comments,[9] the Postal Service reiterates its position that this section should expressly authorize remotely-taken depositions conducted via mutually-available electronic media, such as telephones or other electronic devices.

1201.114(f): This provision only allows a party to file an extension "before the date on which the petition or other pleading is due." This provision should also provide for extenuating circumstances that may arise on the date of filing. Accordingly, this provision should be revised to reflect the fact that requests for an extension filed on the date the petition or pleading is due will not automatically be considered "late."

We appreciate the opportunity to comment on these proposed regulations.



Eric Scharf

cc: Charles Kappler
Thomas Marshall

[8] It is no answer to say that Congress has empowered the Board to conduct administrative proceedings and to issue orders making the victims of certain adverse employment actions whole. The Board's proposal – unlike, for instance, 5 U.S.C. § 7701(g), which authorizes the Board to order an agency to pay attorney fees to a prevailing party – applies to situations in which there has been no finding that the agency has violated a statutory command.

[9] *See* Letter from Eric J. Scharf at 2.