Options for revising the Board's regulations governing the establishment of MSPB jurisdiction over an appeal.

Note: These four options were developed by a working group comprised of MSPB employees. This document has been posted on the MSPB website to facilitate public review and comment pursuant to a Notice published in the Federal Register on November 8, 2013. 78 FR 67076. The discussion and analysis of the options contained herein reflect the views of the working group and its members, not the Board. The Board has not expressed a preference for any of the four options.

Option A

Regulatory Changes:

1. Amend § 1201.4, General Definitions, by adding four new definitions as follows:

§ 1201.4 General definitions

* * *

(p) *Substantial evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(q) *Preponderance of the evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(r) *Harmful error*. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

(s) *Nonfrivolous allegation.* A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. When a fact asserted is within the personal knowledge of the individual making the allegation and the allegation is credible on its face, in general the allegation will be considered nonfrivolous. In general, an allegation will not be considered nonfrivolous when: The fact asserted is not within the personal knowledge of the individual making the allegation and is unsupported by evidence in the record; the assertion is unsupported and contradicted by evidence in the record; or the assertion is immaterial to the legal issues in the appeal.

2. Amend § 1201.56 Burden and Degree of proof; affirmative defenses as to read as follows:

§ 1201.56 Burden and Degree of proof; affirmative defenses

(a) Generally, the agency bears the burden of proof by a preponderance of the evidence. Common exceptions include cases brought under the Whistleblower Protection Act and Whistleblower Protection Enhancements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, and the Veterans Employment Opportunities Act of 1998. The appellant bears the burden of proof by a preponderance of the evidence in appeals from final or reconsideration decisions on applications seeking retirement benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment. Individual elements and standards of proof apply to each type of appeal listed at 5 C.F.R. § 1201.3. The administrative judge will inform the parties of the proof required in each case.

(b) The appellant bears the burden of proof, generally by a preponderance of the evidence, on issues of jurisdiction, timeliness, and all affirmative defenses. The administrative judge will inform the parties of the proof required as to each defense.

Summary and Analysis:

The purpose of Option A is to put forward a regulation that informs the parties of only the general rules the Board follows in allocating burdens of proof. Over time, the Board's law as to issues of both jurisdiction and merits, as well as with respect to affirmative defenses, has evolved. By setting out only the general framework for determinations on these topics, the Board does not limit or preclude its authority to determine its jurisdiction and the burdens of proof it applies, and therefore does not set a regulatory hurdle in the way of changing these rules when changed circumstances, changes in the law, or other valid reasons require the modification of current law. The Board cannot create jurisdiction where it was not granted by Congress or the Office of Personnel Management, but on those matters on which it has discretion, this regulation allows it to exercise that discretion under the law.

The regulation also states that the administrative judge will inform the parties of the requirements for proof of the matter at issue. This codifies current practice and Board case law. More than half of the appeals filed in the Board's regional and field offices are filed by pro se appellants, those appearing without a representative. Because Board law may be complex, these appellants often find themselves overwhelmed by the lengthy formal written explanations necessary to fully inform them of their

burdens under the law. Administrative judges in such cases make great efforts to explain these burdens and to provide clarification to them. Option A is proposed with this in mind. By providing only a brief statement of law in the regulation, the Board does not risk confusing appellants who are unfamiliar with Board law. Rather, it assures them that the administrative judge will assist them in understanding what is required in all cases.

Option A, like Option B, would also move definitions from section 1201.56 to section 1201.4, the General Definitions section, and would add a definition of "nonfrivolous allegation," for the reasons stated in the explanation of that Option.

Option B

Regulatory Changes:

1. Amend § 1201.4 General definitions, by adding four new definitions as follows:

§ 1201.4 General definitions

* * *

(p) *Substantial evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(q) *Preponderance of the evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(r) *Harmful error*. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

(s) *Nonfrivolous allegation.* A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. When a fact asserted is within the personal knowledge of the individual making the allegation and the allegation is credible on its face, in general the allegation will be considered nonfrivolous. In general, an allegation will not be considered nonfrivolous when: The fact asserted is not within the personal knowledge of the individual making the allegation and is unsupported by evidence in the record; the assertion is unsupported and contradicted by evidence in the record; or the assertion is immaterial to the legal issues in the appeal.

2. Amend § 1201.56 Burden and degree of proof; affirmative defenses, by adding a new subsection (a); renumbering existing subsections (a) and (b); deleting the definitions at existing subsection (c) (they have been moved to § 1201.4); and making related conforming changes:

§ 1201.56 Burden and degree of proof

(a) *Applicability*. This section does not apply to the following types of appeals:

(1) An individual right of action appeal under the Whistleblower Protection Act, 5 U.S.C. § 1221;

(2) An appeal under the Veterans Employment Opportunities Act, 5 U.S.C. § 3330a(d); and

(3) An appeal under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311.

(b) *Burden and degree of proof.*

(1) *Agency*: Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (c) of this section, the agency action must be sustained if: (i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence (as defined in § 1201.4(p) of this part); or (ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence (as defined in § 1201.4(q) of this part).

(2) *Appellant*:

(A) The appellant has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q) of this part), with respect to:

(i) Issues of jurisdiction;

(ii) The timeliness of the appeal; and

(iii) Affirmative defenses.

(B) In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q) of this part), entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of

proving, by substantial evidence (as defined in § 1201.4(p) of this part), eligibility for waiver or adjustment.

(c) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (b) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision (as defined in § 1201.4(r) of this part);

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

3. Redesignate § 1201.57 as § 1201.58 and redesignate § 1201.58 as § 1201.59 and add a new § 1201.57 as follows:

§ 1201.57 Establishing jurisdiction in appeals not covered by § 1201.56; burden and degree of proof; scope of review

(a) *Applicability.* This section applies to the following types of appeals:

(1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. § 1221;

(2) An appeal under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. § 3330a(d); and

(3) An appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311.

(b) *Matters that must be proven by a preponderance of the evidence.* An appellant who initiates an appeal covered by this section has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q) of this part), on the following matters:

(1) Exhaustion of a statutory complaint process that is preliminary to an appeal to the Board;

(2) Timeliness of the appeal (IRA appeals and VEOA appeals only);

(3) Standing to appeal, when disputed by the agency or questioned by the Board. (An appellant has "standing" when he or she falls within the class of persons who may file an appeal under the law applicable to the appeal.); and

(4) The merits of the appeal, if the appeal is within the Board's jurisdiction and was timely filed.

(c) *Matters that must be supported by nonfrivolous allegations*. Except for matters described in subsections (b)(1) and (b)(3) above, in order to establish jurisdiction an appellant who initiates an appeal covered by this section must make nonfrivolous allegations (as defined in § 1201.4(s) of this part) with regard to the substantive jurisdictional elements applicable to the particular type of appeal he or she has initiated.

(d) *Scope of the appeal*. Appeals covered by this section are limited in scope. The Board will not consider matters described at 5 U.S.C. § 7701(c)(2) in an appeal covered by this section.

(e) *Notice of jurisdictional, timeliness, and merits elements*. The administrative judge will provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal.

(f) *Additional information*. For additional information on IRA appeals, the reader should consult 5 C.F.R. Part 1209. For additional information on VEOA appeals, the reader should consult 5 C.F.R. Part 1208, Subparts A & C. For additional information on USERRA appeals, the reader should consult 5 C.F.R. Part 1208, Subparts A & B.

Summary and Analysis:

The Board's current regulation governing "Burden and Degree of Proof [and] Affirmative Defenses," 5 C.F.R. § 1201.56, provides that the appellant bears the burden of proving jurisdiction by preponderant evidence; that the agency bears the burden of supporting a performance-based action by substantial evidence and supporting any other action by preponderant evidence; and that the appellant will prevail if he or she can establish a successful affirmative defense under 5 U.S.C. § 7701(c)(2)

(specifically, that the agency action was based on a harmful procedural error, constituted a prohibited personnel practice, or was not in accordance with law). The foregoing principles do not apply, however, in three categories of appeals: (1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. § 1221; (2) an appeal under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. § 3330a(d); and (3) an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311. At the same time, the current version of section 1201.56 by its own terms is not limited to any particular category or categories of appeals, and another Board regulation makes section 1201.56 applicable to all cases within the Board's appellate jurisdiction.

To correct this anomaly, Option B would amend section 1201.56 to limit its applicability to appeals other than IRA appeals, VEOA appeals, and USERRA discrimination and retaliation appeals. Option B would also add a section dealing specifically with the burden and degree of proof and scope of review in IRA appeals, VEOA appeals, and USERRA discrimination appeals. The new section would make clear that, in contrast to an appeal governed by section 1201.56, in the three aforementioned categories of appeals the appellant is not required to establish all jurisdictional elements by preponderant evidence, the appellant (not the agency) bears the burden of proof on the merits, and the appellant cannot assert an affirmative defense under 5 U.S.C. § 7701(c)(2). Option B would also move definitions from section 1201.56 to a part of the Board's regulations that is of general applicability. Finally, Option B would add a definition of "nonfrivolous allegation," an important concept that heretofore has not been defined in the Board's regulations.

The following authorities stand for well-established principles that are inconsistent with section 1201.56, thereby justifying Option B's limitation of section 1201.56's coverage to appeals other than IRA appeals, VEOA appeals, and USERRA discrimination and retaliation appeals, as well as Option B's creation of a new regulation covering IRA appeals, VEOA appeals, and USERRA discrimination and retaliation appeals: *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (to establish jurisdiction in an IRA appeal, the appellant must prove that he has exhausted his remedy before the Office of Special Counsel and make nonfrivolous allegations that he engaged in whistleblowing activity by making a protected disclosure and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 6 (2004) (to establish

jurisdiction in a VEOA appeal involving a claimed violation of veterans' preference rights, the appellant must show that he exhausted his remedy with the Department of Labor and nonfrivolously allege that he is a preference eligible and the agency violated his rights under a statute or regulation relating to veterans' preference); *Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶ 13 n.5 (2009) (to establish jurisdiction in a VEOA appeal involving a claimed violation of the right to compete, the appellant must show that he exhausted his remedy with the Department of Labor and make nonfrivolous allegations that he is a veteran described in 5 U.S.C. § 3304(f)(1) and the agency denied him the right to compete under merit promotion procedures for a vacant position for which the agency accepted applications from outside its own workforce); *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 10 (2012) (to establish jurisdiction in a USERRA discrimination case, the appellant must make nonfrivolous allegations that an executive agency committed discrimination based on his past military service or obligation to perform service); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 12 (2011) (the appellant bears the burden of proof on the merits in an IRA appeal); *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 13 (2006) (the appellant bears the burden of proof on the merits in a VEOA appeal); *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (the appellant bears the burden of proof on the merits in a USERRA discrimination case); *Marren v. Department of Justice*, 51 M.S.P.R. 632, 638 39 (1991) (in an IRA appeal, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. § 7701(c)(2)), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table); *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 11 (2005) (in a VEOA appeal, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. § 7701(c)(2)); *Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, ¶¶ 14-17 (1999) (in a USERRA discrimination case, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. § 7701(c)(2)).

Option C

Option C would clarify how jurisdiction is established in Board proceedings as set forth below. The essence of Option C can be stated succinctly: All Board appeals include "who" and "what" jurisdictional elements that must be proved by preponderant evidence. Except for the 8 appeal types listed in proposed section 1201.5(c), which require allegations (but only allegations) as to specific merits issues in order to establish jurisdiction, the "who" and "what" elements are the only jurisdictional requirements. Option C would also make a related change to section 1201.24, which, in the opinion of the drafter, codifies long-standing case law that clarifies when an appellant in a Board proceeding is entitled to a full evidentiary hearing. Option C would modify the Board's regulations in part 1201 to read as follows:

Regulatory Changes:

1. Amend § 1201.3(a) as follows:

§ 1201.3 Appellate jurisdiction.

(a) Generally. The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The particular requirements for establishing jurisdiction in Board proceedings are set forth in § 1201.5 of this part. The laws and regulations listed below—and not this section of part 1201—are the source of the Board's jurisdiction, and should be consulted for additional information:
* * * * *

2. Insert new § 1201.5 as follows:

§ 1201.5 Establishing appellate jurisdiction.

(a) *Burden of proof.* The appellant bears the burden of establishing that a challenged agency action or decision is within the Board's appellate jurisdiction. The Board must give an appellant explicit information as to the requirements for establishing jurisdiction in a given case.

(b) *Jurisdictional requirements relating to the nature of the challenged agency action or decision and the appellant's status.* In all appeals listed in § 1201.3, the appellant must establish by preponderant evidence that the agency action or decision is appealable to the Board under law, rule, or

regulation, and that he or she is a person entitled to appeal that action or decision. Except for the appeals described in paragraph (c), these are the only jurisdictional requirements. An appellant who makes a nonfrivolous allegation of both of these jurisdictional elements is entitled to a jurisdictional hearing to establish these jurisdictional elements by preponderant evidence. A nonfrivolous allegation is an allegation of facts and related contentions that, if proven, could establish the matter at issue.

(c) *Jurisdictional requirements relating to the merits of an appeal*. In the following types of appeals, the appellant must also make an allegation regarding the merits of the appeal:

> (1) In individual right of action (IRA) appeals under 5 U.S.C. 1221, the appellant must allege that a covered personnel action was taken in retaliation for whistleblowing or other protected activity;
>
> (2) In appeals under the Veterans Employment Opportunities Act (VEOA), the appellant must allege either that the agency violated the appellant's rights under any statute or regulation relating to veterans' preference (5 U.S.C. 3330a(a)(1)(A)), or that the agency denied the appellant the opportunity to compete for a vacant position for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures (5 U.S.C. 3330a(a)(1)(B));
>
> (3) In appeals under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324, the appellant must allege that a Federal executive agency has failed or refused, or is about to fail or refuse, to comply with the provisions of 38 U.S.C. chapter 43;
>
> (4) In appeals challenging the termination of probationary employment under 5 CFR 315.806(b) or 315.908(b), the appellant must allege that the agency took the action for partisan political reasons or because of the appellant's marital status;
>
> (5) In appeals challenging the termination of probationary employment under 5 CFR 315.806(c), the appellant must allege that the termination was taken for pre-appointment reasons and that the agency did not comply with the procedural requirements of § 315.805;

(6) In employment practice appeals under 5 CFR 300.104, the appellant must allege that an employment practice which was applied to the appellant violated a basic requirement of 5 CFR 300.103;

(7) In appeals of furloughs involving the Senior Executive Service under 5 CFR 359.805, the appellant must allege that the agency did not correctly follow required procedures; and

(8) In restoration and reemployment appeals under 5 CFR 330.214, 302.501, 352.508, 352.707, and 352.807, the appellant must allege a violation of his or her rights under the applicable regulations.

For jurisdictional purposes, such allegations need not be nonfrivolous or state a claim upon which relief can be granted.

(d) *Claim processing rules.* A requirement that an appellant exhaust an administrative process before filing a Board appeal, or that a complaint or appeal be filed within a statutory time frame, as in IRA and VEOA appeals, is not a jurisdictional requirement; it is a claim processing rule. An appellant must establish compliance with such rules by preponderant evidence. Failure to satisfy a claim processing rule may be the basis for dismissing a Board appeal.

3. Amend § 1201.24(d) as follows:

§ 1201.24 Content of an appeal; right to hearing.

* * *

(d) *Right to hearing.*

(1) *Generally*. An appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.

(2) *Evidentiary hearing.* As to the merits issues listed in § 1201.5(c) of this part, the issues listed in § 1201.56(a)(2) of this part, and as to other matters on which the appellant has the burden of proof as established by case law, the appellant is entitled to an evidentiary hearing, that is, a hearing that includes witness testimony and the introduction of exhibits, only when there are genuine issues of material fact to be resolved. When there are no genuine issues of

material fact to be resolved, a hearing may be limited to oral argument as to legal issues and the application of the law to the facts of the case. Such non-evidentiary hearings may be accomplished via telephone or videoconference as well as in person.

4. Amend § 1201.56(a) as follows:

§ 1201.56 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof*—(1) * * *

(2) *Appellant*. The appellant has the burden of proof, by a preponderance of the evidence, with respect to issues of timeliness, affirmative defenses, and the claim processing rules listed in § 1201.5(d) of this part. The appellant also has the burden of establishing jurisdiction over an appeal as described in § 1201.5 of this part. In appeals from final decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

* * * * *

Summary and Analysis:

Executive Summary

Jurisdiction refers to a court or administrative tribunal's authority to adjudicate a particular category of cases. The Supreme Court has criticized the issuance of "drive-by" jurisdictional rulings that conflate merits issues with jurisdictional requirements and has cautioned that, if it is questionable whether a threshold requirement is jurisdictional, a court or administrative tribunal should not treat the matter as jurisdictional. In Board proceedings, the "who" and "what" elements are the crucial determinants that govern whether the Board possesses the legal authority to adjudicate a case. As was recently stated by the Supreme Court, "the [Civil Service Reform Act] makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue." As detailed in the

MSPB Jurisdictional Matrix (www.mspb.gov/regulatoryreview/index.htm), all appeals within the Board's appellate jurisdiction contain "who" and "what" requirements, which are always jurisdictional in nature; they are never merits issues. Because they are properly viewed as conditions precedent to reaching the merits of an appeal, the Board should require that these elements be proved by preponderant evidence in every appeal. No merits issue should be regarded as a jurisdictional requirement unless Congress or OPM has clearly indicated that it should be treated as such. In eight specific types of appeals, Congress and OPM have indicated that *allegations* regarding the merits are required as a jurisdictional matter, but these statutes and regulations require only allegations, claims, or beliefs, they do not require nonfrivolous allegations. Except for the eight types of appeals listed in paragraph (c) of the proposed regulation, the "who" and "what" elements are the only jurisdictional requirements. The Supreme Court has ruled that exhaustion and timeliness requirements similar to those in IRA and VEOA appeals are claim processing rules, not jurisdictional requirements.

In addition to the above reasons for promulgating Option C, the drafter of this option believes its adoption would have two practical benefits. First, the proposed regulations would greatly simplify jurisdictional determinations in Board proceedings. Everyone would know that "who" and "what" jurisdictional elements must be proved by preponderant evidence in every appeal, and that, with eight listed exceptions, these are the only jurisdictional requirements. Second, the proposed regulations would open the door to resolving a substantial group of appeals by settlement, because enforceable settlement agreements could be reached without nonfrivolous allegations of some jurisdictional/merits matters, e.g., whether a protected disclosure was made in an IRA appeal.

The proposed regulatory changes would be entitled to *Chevron* deference because the relevant statutes and regulations that provide for Board jurisdiction are silent or ambiguous with respect to the identity of jurisdictional elements and the applicable burden of proof, and because the Board has either been given express rulemaking authority or has implicit rulemaking authority because it has been charged with the administration of the statutes and regulations at issue.

Proposed section 1201.24(d) provides that an appellant is entitled to an evidentiary hearing only when such a hearing is necessary to resolve genuine issues of material fact as to matters on which the appellant has the burden of proof. This rule is fully supported by long-established case law. In the opinion of the drafter, codifying this case law is especially important

in light of proposed section 1201.5(b)-(c), which modifies current case law that requires nonfrivolous allegations of merits issues in order to establish jurisdiction.

Arguments

All appeals within the Board's appellate jurisdiction contain "who" and "what" jurisdictional elements that must always be proved by preponderant evidence.

Jurisdiction refers to a court or administrative tribunal's authority "to adjudicate a particular category of cases." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006). The Supreme Court has criticized the issuance of "drive-by" jurisdictional rulings that conflate merits issues with jurisdictional issues. If it is questionable whether a threshold requirement is jurisdictional, a court or administrative tribunal should not treat the matter as jurisdictional. *See, e.g.*, *Reed-Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 1244 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006). In Board proceedings, the nature of the employee, former employee, or applicant for employment filing the appeal (the "who" element), and the type of employment action or decision being challenged (the "what" element), are the crucial determinants that govern whether the Board possesses the legal authority to adjudicate a case. The Supreme Court recently indicated that the "who" and "what" elements are typically the only jurisdictional requirements in Board appeals: "the [Civil Service Reform Act] makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue." *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2137 (2012).

Each and every statute and regulation that authorizes the Board to adjudicate an appeal includes "who" and "what" elements. *See* MSPB Jurisdictional Matrix (www.mspb.gov/regulatoryreview/index.htm). The "who" and "what" elements are *always* jurisdictional in nature; they are *never* merits issues. This is true even in constructive adverse actions. In such a case, proof that a retirement or resignation was involuntary establishes the "what" jurisdictional element, i.e., that the appellant was removed. If the appellant also establishes the "who" element, he or she will win on the merits because he or she will have been deprived of due process of law and/or the procedures required by 5 U.S.C. § 7513(b), and the action may not be sustained under 5 U.S.C. § 7701(c)(2)(A) and/or (C).

Because the "who" and "what" jurisdictional elements are properly viewed as conditions precedent that must be satisfied before the Board

addresses the merits of an appeal, the Board should always require preponderant evidence as to these matters. In an adverse action appeal, for example, the Board should determine whether the agency's action promotes the efficiency of the service only if the appellant is in fact an "employee" who has been subjected to one of the four listed adverse actions.

Because the "who" and "what" elements are never merits issues, the same rationale for requiring preponderant evidence as to these elements applies to IRA, VEOA, and USERRA appeals. For example, if an IRA appellant has not been subjected to one of the 12 actions listed in 5 U.S.C. § 2302(a)(2)(A), there is no basis for the Board to reach the merits issues of whether the appellant engaged in whistleblowing or other protected activity, and whether the whistleblowing or other protected activity was a contributing factor in the personnel action(s) in question. That IRA, VEOA, and USERRA appeals may not be appeals under 5 U.S.C. § 7701 is a distinction without a difference; there is no logical nexus between this fact and the quantum of proof required to establish the "who" or "what" jurisdictional element. What distinguishes these three types of appeals from other appeals within the Board's jurisdiction is that they are single-issue appeals in which appellants cannot raise discrimination or other unrelated claims, and that the right to a hearing either does not exist or has a legal basis other than section 7701. There is nothing in any of the pertinent statutes that states or even suggests that something less than preponderant evidence should be required for establishing "who" or "what" jurisdictional elements.

Only 8 types of MSPB appeals have jurisdictional requirements relating to the merits of the appeal and all that is required for jurisdictional purposes as to these matters is a bare allegation.

As noted above, the Supreme Court has decried the issuance of "drive-by" jurisdictional rulings that conflate merits issues—including whether a party has stated a claim upon which relief can be granted—with jurisdictional issues. To avoid such conflation, the Court prescribed a "readily administrable bright line" rule that a "threshold limitation on a statute's scope shall count as jurisdiction" only when "the Legislature clearly states" that the matter is jurisdictional. *Arbaugh*, 546 U.S. at 515-16. Combined with the premise developed above that all Board appeals contain "who" and "what" jurisdictional elements, the clear implication is that these are the only jurisdictional elements in a Board proceeding unless Congress or OPM (where an OPM regulation rather than a statute is the source of the Board's authority to adjudicate an appeal) has clearly indicated that there are additional jurisdictional requirements. If it is

unclear whether a particular requirement is jurisdictional, it should not be so treated.

As set forth in Exhibit A attached below, there are seven matters appealable to the Board in which Congress or OPM does appear to have required that there be an allegation regarding a merits issue as part of establishing jurisdiction. These statutes and regulations are listed in proposed section 1201.5(c)(2) through (8). For example, 5 C.F.R. § 300.104(a) provides that "*a candidate who believes* that an employment practice which was applied to him or her by [OPM] violates a basic requirement in § 300.103 *is entitled to appeal* to the [MSPB] . . . ." (emphasis added) These seven statutes or regulations are the *only* ones listed in section 1201.3 that specify that a merits issue is also jurisdictional in nature. None of these statutes or regulations states that a nonfrivolous allegation is required to establish jurisdiction; they provide that the individual must "allege," "claim," "believe," or "consider" that the agency did the wrongful thing in question. In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), the Supreme Court stated, "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ." When a statute or regulation authorizing the Board to adjudicate a particular kind of case states that an individual who "alleges," "claims," "believes," or "considers" that an agency has acted in a particular wrongful way is entitled to appeal to the MSPB, the statute or regulation must be applied as written. The Board has no authority in these instances to require that the allegations be "nonfrivolous."

IRA appeals are a special case. Congress included the "who" and "what" elements plus the exhaustion requirement and the merits issues in the same statutory section (5 U.S.C. § 1221(a)) that authorizes the Board to hear such appeals, without making any attempt to distinguish jurisdictional issues from merits issues or claim processing rules. Under these ambiguous circumstances, Option C treats IRA appeals as if the statute were written in the same way as the Board's other "affirmative claim" types of appeals, VEOA and USERRA appeals. Both of these require an allegation of a merits issue, as set forth in proposed § 1201.5(c)(2) & (3). Proposed section 1201.5(c)(1) describes the jurisdictional requirement for IRA appeals as follows: "the appellant must allege that a covered personnel action was taken in retaliation for whistleblowing or other protected activity."

Regarding the exhaustion requirements in IRA and VEOA appeals, the proposed regulation treats these as "claim processing rules" rather than

as jurisdictional requirements. The Supreme Court has distinguished between "'truly jurisdictional rules' which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thayer*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). A rule is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh*, 546 U.S. 500, 515 (2006). But if "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Id.* at 516. Applying these principles, the Court has found that various exhaustion and timeliness requirements similar to those in IRA and VEOA appeals are nonjurisdictional claim-processing rules. *See Gonzalez v. Thayer* (holding that a provision of the Antiterrorism and Effective Death Penalty Act that requires a certificate of appealability before an appeal may be taken to a court of appeals was not jurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (120-day deadline on filing appeals to the Veterans Court is not jurisdictional); *Reed-Elsevier*, 559 U.S. 154 (2010) (Copyright Act's registration requirement is a precondition to filing a copyright infringement claim but does not restrict a federal court's subject matter jurisdiction); *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009) (procedural rule requiring proof of conferencing prior to arbitration of minor dispute before the NRAB is not jurisdictional in nature); *Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (exhaustion of administrative remedies under the Prison Litigation Act is not a jurisdictional requirement); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964 is not jurisdictional). Under proposed section 1201.24(d), failure to meet a statutory time limit or exhaustion requirement in an IRA or VEOA appeal would be a basis to dismiss the appeal, but such dismissal would not be for lack of jurisdiction.

The proposed regulatory changes would be entitled to *Chevron* deference.

Under *Chevron*, when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. The first is whether Congress has directly spoken to the precise question at issue. If the answer is "yes," that is the end of the matter; the court must simply apply what Congress has written. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If it is, then the court must defer to the agency's interpretation. 467 U.S. at 842-43.

These principles apply to an agency's determination regarding its own jurisdiction to the same extent they apply to other matters. In *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), the question presented was "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, jurisdiction) is entitled to deference under *Chevron* . . . ." *Id.* at 1866. In resolving that question in the affirmative, the Court emphasized that courts should not replace or usurp the administrative agency's primary place in this scheme: "'Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion that ambiguity allows.'" *Id.* at 1868 (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)). Similarly, when rejecting the "false dichotomy between 'jurisdictional' and 'non-jurisdictional' agency interpretations," the Court stated that the effect of such a dichotomy "would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts. We have cautioned that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency." *Id.* at 1872-73 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (footnote deleted).

Identifying jurisdictional requirements in Board appeals falls squarely within the *Chevron* principle that agencies are authorized to interpret a statute that is "silent or ambiguous" with respect to a particular matter. That Congress and OPM did not unambiguously and with precision identify jurisdictional elements or specify applicable burdens of proof for establishing jurisdiction would be an understatement. Accordingly, as the agency charged with administering (by adjudication) the various laws and regulations authorizing the Board to hear various types of appeals, the Board is authorized to resolve Congress's and OPM's silence and/or ambiguity by notice-and-comment rulemaking, and the Federal Circuit would be required to defer to the Board's interpretation as long as it is a permissible one.

Because the MSPB is the agency charged with administering the statutes and regulations in question for purposes of determining whether jurisdiction has been established in a particular case, the Federal Circuit is required to give *Chevron* deference to properly promulgated notice-and-comment rules. For purposes of determining jurisdiction over an appeal to

the Board, the MSPB is the only agency that could be said to administer a particular law. OPM might be said to be the "administering agency" for some purposes, but not for determining whether the Board has jurisdiction over an appeal.

Deference to the Board under *Chevron* applies to all appeals under 5 U.S.C. § 7701, i.e., all appeals listed in section 1201.3(a), because that statute expressly gives the MSPB rulemaking authority. In its en banc decision in *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1338 (Fed. Cir. 2006), the Federal Circuit explained that *Chevron* deference applied to the rule in section 1201.56 requiring preponderant evidence as to jurisdictional issues because Congress had not "directly spoken" to this issue and because section 7701 specifically authorized the Board to issue regulations. The same reasoning applies to proposed section 1201.5 as to all matters listed in section 1201.3(a).

The authority for promulgating a regulation construing jurisdictional requirements in IRA, VEOA, and USERRA appeals has to be considered separately, as the Board and the Federal Circuit have determined that these are not appeals under section 7701, and the specific authorization of section 7701(a) to promulgate regulations would therefore not apply. Nevertheless, the absence of specific rulemaking authority does not mean that an interpretive regulation covering these appeal types would not be entitled to *Chevron* deference. As the Supreme Court stated in that decision, "Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844. As the Court further explained in a later decision,

> Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply

> because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable . . . .

United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citations deleted).

The Federal Circuit would be required to give *Chevron* deference to proposed section 1201.5 insofar as it applies to IRA, VEOA, and USERRA appeals because a delegation to construe ambiguities in these statutes as to how jurisdiction is established is implicit in the grant of authority to the Board to adjudicate these three types of appeals.

In the opinion of the drafter, the proposed change to section 1201.24(d) regarding the right to a hearing codifies well-established case law and is necessary in light of changes to how jurisdiction is determined in Board proceedings.

Proposed section 1201.24(d) provides that an appellant is entitled to a full evidentiary hearing only when such a hearing is necessary to resolve genuine issues of material fact as to matters on which the appellant has the burden of proof. This rule is fully supported by long-established case law. Setting forth this well-established case law in the Board's regulations so that everyone would have fair notice of this rule would be a sufficient basis for promulgating this regulation. Doing so is especially important in light of proposed section 1201.5(b)-(c), which modifies current case law that requires nonfrivolous allegations of merits issues in order to establish jurisdiction.

In *Bommer v. Department of the Navy*, 34 M.S.P.R. 543, 550-51 (1987), the Board held unequivocally that, under *Crispin v. Department of Commerce*, 732 F.2d 919 (Fed. Cir. 1984), which held that the Board lacks summary judgment authority, an appellant has a right to a hearing under section 7701(a) even when there are no genuine issues of material fact, but emphasized the limitations that an administrative judge can impose on such a hearing:

> To the extent the evidence and testimony a party seeks to introduce at a hearing before the Board concerns undisputed matters, and to the extent they concern only matters that are otherwise not material to the matter being heard, therefore, the administrative judge has the authority to exclude the proffered evidence and testimony. If all the proffered evidence and testimony concerns only undisputed or otherwise immaterial

> matters, the administrative judge has the authority to exclude all of it. Under those circumstances, however, in light of our holding that an appellant in a reduction-in-force appeal has a statutory right to a hearing, the appellant would still be entitled to a hearing at which he could present argument in the case.
>
> In view of the considerations stated above, we find that, when an administrative judge rules that all the evidence an appellant intends to introduce is immaterial, irrelevant, or repetitious, the administrative judge is not required to hold an evidentiary hearing in the appeal.

Id. at 551-52 (citations deleted). The Board reaffirmed this holding in *Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, ¶ 20 (2008). When there are no genuine issues of material fact, an appellant's hearing may be limited to a telephone conference in which the appellant has the opportunity to present oral argument on the legal issues involved in the appeal. *Id.*

As related in the Federal Circuit's *Crispin* decision, Congress considered but ultimately declined to enact a statute that expressly gave the MSPB summary judgment authority. For the reasons set out in cases like *Bommer* and *Jordan*, however, that does not mean that appellants are entitled to a full evidentiary hearing, including the presentation of witness testimony and documentary evidence, in cases where there are no genuine issues of material fact. Such an entitlement would completely eviscerate the authority of MSPB judges to limit witness testimony and other evidence to that which is relevant, material, and non-repetitious. *See* 5 C.F.R. § 1201.41(b)(10). What the statutory right to a hearing does necessarily entail is that, for each appeal that is within the Board's jurisdiction, the appellant will get his or her "day in court." This would include the appellant's right to tell his or her version of events, subject to the judge's authority to limit testimony to that which is relevant, material, and non-repetitious, but would not extend to introducing the testimony of other witnesses and documentary evidence that has not been shown to be relevant, material, and non-repetitious.

In declining to give the MSPB formal summary judgment authority, Congress may well have been mindful that, in contrast to federal district court proceedings governed by Rule 56 of the Federal Rules of Civil Procedure, in which the vast majority of litigants are represented by attorneys, proceedings before the MSPB frequently involve individuals

who are representing themselves, and who therefore could not be expected to be adept at the motion practice involved in summary judgment proceedings. In particular, the preparation of affidavits or declarations made under penalty of perjury, combined with the crafting of legal arguments that would show that genuine issues of material fact exist, might be too difficult for many pro se appellants to handle. In the merits hearing required by proposed section 1201.24(d), the Board's administrative judges would be expected not only to determine whether the appellant *has raised* a genuine issue of material fact, but also to explore whether the appellant *can articulate* a genuine issue of material fact that might require an evidentiary hearing. In cases in which an appellant has not raised a genuine issue of fact as to a matter on which he or she bears the burden of proof, judges would explain the applicable substantive law, and why the facts as known appear to indicate that the appellant cannot prevail on the merits as a matter of law. In such a setting, pro se appellants would be in a position to articulate why they believe there is a genuine issue of material fact. If they can articulate such an issue, the judge would schedule an evidentiary hearing. If they are unable to articulate such an issue, the judge would issue an initial decision based on the existing record.

Proposed section 1201.24(d) is a reasonable interpretation of an appellant's statutory entitlement in section 7701(a)(1) to a "hearing." As such, the U.S. Court of Appeals for the Federal Circuit would be required to give this regulation *Chevron* deference.

APPENDIX A — JURISDICTIONAL STATUTES AND REGULATIONS REQUIRING ALLEGATIONS RELATING TO THE MERITS

The following statutes and regulations that authorize the Board to adjudicate particular kinds of appeals require allegations relating to the merits of the appeal. In no instance does the statute or regulation require that the allegations be nonfrivolous.

VEOA, 5 U.S.C. § 3330a:

(a)(1)(A) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.

(B) A veteran described in section 3304 (f)(1) who alleges that an agency has violated such section with respect to such veteran may file a complaint with the Secretary of Labor.

(d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe . . . .

USERRA, 38 U.S.C. § 4322(a):

A person who claims that—(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and (2). . . (B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter, may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.

§ 4324(b)-(c): Once DOL exhaustion requirement has been established, MSPB authorized to adjudicate appeal.

Probationary Termination, 5 C.F.R. § 315.806:

(b) *On discrimination.* An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination . . . .

Probationary Termination (supervisory or managerial position), **5 C.F.R. § 315.908(b)**:

(b) An employee who alleges that an agency action under this subpart was based on partisan political affiliation or marital status, may appeal to the Merit Systems Protection Board.

Employment Practices under 5 C.F.R. § 300.104:

(a) *Employment practices*. A candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations.

Furlough appeals under 5 C.F.R. § 359.805: A career appointee who has been furloughed and who believes this subpart or the agency's procedures have not been correctly applied may appeal to the Merit Systems Protection Board under provisions of the Board's regulations.

Reemployment Rights appeal under 5 C.F.R. § 330.214: An RPL registrant who believes the agency violated his or her reemployment rights under this subpart by employing another person who otherwise could not have been appointed properly may appeal to the Merit Systems Protection Board under the Board's regulations in part 1200 of this chapter.

Priority Consideration appeal under 5 C.F.R. § 302.501: An individual who is covered by 5 U.S.C. 8101(1) and is entitled to priority consideration under this part (see § 302.103) may appeal a violation of his/her restoration rights to the Merit Systems Protection Board under the provisions of the Board's regulations by presenting factual information that he or she was denied restoration rights because of the employment of another person.

Reinstatement under 5 C.F.R. § 352.508: (c) If an employee considers that his reinstatement is not in accordance with the act and this subpart, he or she is entitled to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations.

Reemployment under 5 C.F.R. § 352.313: (c) An employee may submit an appeal, alleging that the agency has failed to comply with any of the other provisions of sections 3343 and 3581-3584 of title 5, United States Code, or of this part, to the Merit Systems Protection Board under the provisions of the Board's regulations.

Reemployment under 5 C.F.R. § 352.707: (b) If an employee considers reemployment to be not in accordance with this subpart, the employee is entitled to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations.

Reemployment under 5 C.F.R. § 352.807: An employee may appeal to MSPB, under the provisions of the Board's regulations, an agency's decision on his or her request for reemployment which he or she believes is in violation of this subpart.

Option D

Option D is the same as option C, except that option D does not include the proposed amendments to § 1201.24(d).

Regulatory Changes:

1. Amend § 1201.3(a) as follows:

§ 1201.3 Appellate jurisdiction.

(a) Generally. The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation. The particular requirements for establishing jurisdiction in Board proceedings are set forth in § 1201.5 of this part. The laws and regulations listed below—and not this section of part 1201—are the source of the Board's jurisdiction, and should be consulted for additional information:
* * * * *

2. Insert new § 1201.5 as follows:

§ 1201.5 Establishing appellate jurisdiction.

(a) *Burden of proof.* The appellant bears the burden of establishing that a challenged agency action or decision is within the Board's appellate jurisdiction. The Board must give an appellant explicit information as to the requirements for establishing jurisdiction in a given case.

(b) *Jurisdictional requirements relating to the nature of the challenged agency action or decision and the appellant's status.* In all appeals listed in § 1201.3, the appellant must establish by preponderant evidence that the agency action or decision is appealable to the Board under law, rule, or regulation, and that he or she is a person entitled to appeal that action or decision. Except for the appeals described in paragraph (c), these are the only jurisdictional requirements. An appellant who makes a nonfrivolous allegation of both of these jurisdictional elements is entitled to a jurisdictional hearing to establish these jurisdictional elements by preponderant evidence. A nonfrivolous allegation is an allegation of facts and related contentions that, if proven, could establish the matter at issue.

(c) *Jurisdictional requirements relating to the merits of an appeal.* In the following types of appeals, the appellant must also make an allegation regarding the merits of the appeal:

(1) In individual right of action (IRA) appeals under 5 U.S.C. 1221, the appellant must allege that a covered personnel action was taken in retaliation for whistleblowing or other protected activity;

(2) In appeals under the Veterans Employment Opportunities Act (VEOA), the appellant must allege either that the agency violated the appellant's rights under any statute or regulation relating to veterans' preference (5 U.S.C. 3330a(a)(1)(A)), or that the agency denied the appellant the opportunity to compete for a vacant position for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures (5 U.S.C. 3330a(a)(1)(B));

(3) In appeals under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324, the appellant must allege that a Federal executive agency has failed or refused, or is about to fail or refuse, to comply with the provisions of 38 U.S.C. chapter 43;

(4) In appeals challenging the termination of probationary employment under 5 CFR 315.806(b) or 315.908(b), the appellant must allege that the agency took the action for partisan political reasons or because of the appellant's marital status;

(5) In appeals challenging the termination of probationary employment under 5 CFR 315.806(c), the appellant must allege that the termination was taken for pre-appointment reasons and that the agency did not comply with the procedural requirements of § 315.805;

(6) In employment practice appeals under 5 CFR 300.104, the appellant must allege that an employment practice which was applied to the appellant violated a basic requirement of 5 CFR 300.103;

(7) In appeals of furloughs involving the Senior Executive Service under 5 CFR 359.805, the appellant must allege that the agency did not correctly follow required procedures; and

(8) In restoration and reemployment appeals under 5 CFR 330.214, 302.501, 352.508, 352.707, and 352.807, the appellant must allege a violation of his or her rights under the applicable regulations.

For jurisdictional purposes, such allegations need not be nonfrivolous or state a claim upon which relief can be granted.

(d) *Claim processing rules*. A requirement that an appellant exhaust an administrative process before filing a Board appeal, or that a complaint or appeal be filed within a statutory time frame, as in IRA and VEOA appeals, is not a jurisdictional requirement; it is a claim processing rule. An appellant must establish compliance with such rules by preponderant evidence. Failure to satisfy a claim processing rule may be the basis for dismissing a Board appeal.

3. Amend § 1201.56(a) as follows:

§ 1201.56 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof*—(1) * * *

(2) *Appellant*. The appellant has the burden of proof, by a preponderance of the evidence, with respect to issues of timeliness, affirmative defenses, and the claim processing rules listed in § 1201.5(d) of this part. The appellant also has the burden of establishing jurisdiction over an appeal as described in § 1201.5 of this part. In appeals from final decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

* * * * *

Summary and Analysis:

This option is the same as Option C, except that it does not include the proposed regulatory language in § 1201.24(d) authorizing an appeal to be decided without an evidentiary hearing when there is no genuine issue

of material fact to be resolved. The drafters of this option were concerned such a procedure might violate an appellant's statutory entitlement to a hearing under 5 U.S.C. § 7701(a)(1). This concern reflected the drafters' view that *Crispin v. Department of Commerce*, 732 F.2d 919, 922 (Fed. Cir. 1984) bars summary judgment proceedings. Therefore, Option D would continue the Board's current practice of affording appellants the opportunity for a hearing, if requested, in all cases within its jurisdiction.