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November 12, 2024

**VIA FAX – (202) 653-7130**

Gina N. Grippando  
Clerk of the Board  
MERIT SYSTEMS PROTECTION BOARD  
1615 M Street NW  
Washington DC 20419

Re: ***89 Federal Register 174  
Interim Final Rule***

Dear Ms. Grippando:

Unfortunately, I did not become aware of the Agency's Interim Final Rule published in the Federal Register until November 12, 2024. Although these comments have not been presented by the November 8, 2024 deadline, I hope the Board takes them into consideration.

By way of background, I have been practicing before the Merit Systems Protection Board for 20 years and have handled hundreds of appeals. I oppose the proposed change to 5 C.F.R. § 1201.114 resulting in the elimination of the ability to file cross-petitions for review.

I do not believe the Board considered the interim regulation from the appellant's viewpoint when the appellant prevailed, in part, at the hearing stage. There are times where my clients have prevailed, in part, resulting in reversal of the adverse action or mitigation of the penalty. In such circumstances, my clients will often await a petition for review from the agency before deciding whether they are going to file a petition for review over the partial denial of their claim, such as a claim for discrimination, or the penalty imposed by the judge. By eliminating the cross-petition for review option, appellants will now be required to decide whether or not to prepare and have a cross-petition for review ready to file on the final day to react to the agency's petition for review or file it and then decide to withdraw it because the agency did not file a petition for review. This will result in the incurrence of unnecessary legal fees and pleadings.

Another scenario in which this concern is likely to arise is in regards to attorney fee petitions. An administrative judge may decide not to award 100 percent of petitioned fees. In those circumstances, if the agency files a petition for review challenging the fees, I am almost certainly going to file a cross-petition over the partial reduction of my fees reflected in the initial decision. However, if the agency does not file a petition for review, the decision whether to file a petition for review will be dictated by the amount of fees denied by the administrative judge and the delay in the receipt of payment that will result. Again, the changes in the Board's rules will result in having to

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prepare petitions to review over initial decisions on fees and filing them as a precautionary measure because of the uncertainty whether an agency will appeal. This involves a lot of work on the Appellant's end as the MSPB requires that all facts and arguments be presented at the time the petition for review is filed.

For these reasons, I strongly encourage the MSPB to restore the right to file a cross-petition for review.

Very truly yours,

WHEELER UPHAM, P.C.



Glenn L. Smith

GLS/jr