



December 17, 2015

VIA E-mail: mspb@mspb.gov

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

Re: Interim Final Rule, 80 Fed.Reg. 66,787-66,788

Dear Mr. Spencer:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Merit Systems Protection Board's Interim Final Rule, published in the Federal Register on October 30, 2015, 80 Fed.Reg. 66,787-66,788.

NELA is the largest professional membership organization in the country of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy initiatives on behalf of workers throughout the United States. NELA members represent a substantial number of federal employees before the Merit Systems Protection Board (the Board), and thus NELA has an interest in proposed modifications to the Board's federal sector regulations.

NELA supports the Board's Interim Final Rule which would amend 5 C.F.R. §1201.183 (a) to permit discovery by the parties in cases involving breach of settlement agreements and cases alleging noncompliance with remedial orders. Currently, permitting discovery in such cases is within the discretion of the Administrative Judge, but is not assured. It is critically important that the ability to conduct discovery be established to ensure a fair process for appellants in cases involving breach of settlement agreements and cases alleging noncompliance with remedial orders. In practice, these cases most often involve allegations by an appellant of breach or noncompliance by an agency. The situation is rarely reversed because most agencies have recourse to self-help if individual appellants breach a settlement agreement. Further, practically speaking, appellants cannot breach remedial orders in their favor.

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In the absence of an opportunity for an appellant to conduct discovery, an Administrative Judge's ability to make an independent determination of the sufficiency of the agency's conduct is limited. Thus, the development of these cases is somewhat one-sided given that the agency has far greater and easier access to relevant information and witnesses. Without discovery, employees alleging noncompliance are left to attempt to make a written proffer based solely on whatever records may be in their possession, custody, or control. In contrast, even when employees lack the independent ability to access the agency's records to allow critical adversarial examination of the agency's compliance efforts, the agency is free to craft an agency file painting itself in the best possible light.

Without discovery, hearings in breach and compliance matters do not cure this deficiency as employees are still left to identify hearing witnesses without adequate information. Furthermore, once hearing witnesses have been identified, the employee must question witnesses without the benefit of discovery to facilitate hearing preparation. Such discovery is extremely important in certain categories of breach and compliance cases, for example, cases where the agency claims an inability to place an employee in a position due to alleged position unavailability.

NELA supports the Interim Final Rule as it makes such discovery automatically available when either party deems it necessary, and not dependent on the discretionary approval of the Administrative Judge. The Interim Final Rule provides the added benefit of codifying what had previously been a matter of case law, therefore making unambiguously clear that discovery should be available in all breach and compliance proceedings before the Board, as well as clarifying the scope and timeframes for that discovery (which previously was determined on a case by case basis).

NELA appreciates the opportunity to comment on the Interim Final Rule, and thanks the Board for its attention and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with a long horizontal stroke at the end.

Terisa E. Chaw
Executive Director