Summary of Significant Regulation Changes in Notice of Final Rulemaking

The following is a brief description of some of the more significant changes to the MSPB's adjudicatory regulations. For more information, a three-column table has been placed on the MSPB website. The first column contains the text of the regulation previously in effect; the second column contains the revised language; the third contains a brief description of the reasons for the changes. For the full text and explanation of changes, you can access the notice of proposed rulemaking, 77 Fed. Reg. 33663 (June 7, 2012), and the notice of final rulemaking, 77 Fed. Reg. 62349 (Oct.12, 2012). It should be noted that the summary provided below was prepared by MSPB employees as a shorthand summary of the longer explanations provided in the notice of proposed rulemaking and the notice of final rulemaking. Unlike those two notices, the text of this summary was not reviewed and approved by the Board members, and is provided to help the public understand the nature of the changes. Accordingly, nothing in this document should be construed to constitute an official interpretation of the revised regulations.

1201.3 Appellate Jurisdiction. This regulation has been revised to explain that section 1201.3 is not the source of Board jurisdiction and that the cited laws and regulations need to be consulted as to the nature of the Board's jurisdiction. In particular, the regulation cautions that jurisdiction depends on the appellant's status, e.g., the type of employment held, as well as the nature of the action or decision being appealed. The listing of appealable actions in subsection (a) has been revised to make them more understandable to laypersons by: (1) giving each of the numbered items a descriptive label; (2) using more plain language descriptions where feasible; (3) putting the items in the order of most commonly filed to least commonly filed; and (4) consolidating similar items (the list of 20 otherwise appealable actions has been reduced to 11).

1201.4 General definitions. The definition of "date of service" has been modified to clarify that the phrase refers to when a document is sent out, not when it is received.

1201.21 Notice of appeal rights. This regulation would be modified to require notification regarding elections between the IRA process and the regular appeal process when an allegation is made that an otherwise appealable action was taken in retaliation for protected whistleblowing. See summary of section 1209.2 for further information regarding elections under 5 U.S.C. § 7121(g). This regulation also requires that agencies give appellants notice of their options regarding claims of discrimination (EEOC mixed case complaint, Board appeal, or grievance).

1201.22 Filing an appeal and responses to appeals. This regulation was modified to describe and codify the Board's doctrine of constructive receipt of agency decisions. It provides that a decision notice sent to the appellant's address of record is "presumed to have been duly delivered to the addressee." While this presumption may be overcome, the regulation further provides that an appellant "may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service," and provides examples of how the regulation will be applied.

1201.23 Computation of time. To redress perceived inequities resulting from a party serving a pleading on the other party by regular mail, the revised regulation provides: "Unless a different

deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail."

1201.24 Content of an appeal; right to hearing. The scope of requested attachments has been reduced from "any relevant documents" to "a copy of the notice of proposed action, the agency decisions being appealed and, if available, the SF-50 or similar notice of personnel action." The Board determined that these are the only documents, in conjunction with the information required by § 1201.24(a)(1)-(9), that are necessary in order to docket a new appeal and issue appropriate acknowledgment and jurisdictional orders. The primary reason for making this change was to reduce the incidence of the filing of copies of documents that will be included in the Agency File. The language regarding the right to a hearing was clarified to state that 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."

1201.28 Case suspension procedures. As revised, this section allows for two suspension periods of up to 30 days each, instead of the current single suspension period, eliminates restrictions on when a request must be filed, and removes separate paragraphs for unilateral requests and joint requests. Paragraph (d) was added to clarify that, when an appeal is accepted into the Board's mediation program, processing of the appeal is suspended until the mediator returns the case to the judge.

1209.29 Dismissals without prejudice. This is a new regulation, which largely codifies existing case law.

1201.43 Sanctions. The provisions regarding sanctions for contumacious conduct by parties and representatives were moved from section 1201.31 to this section and revised. The revised regulation gives explicit authority for suspending or terminating a hearing that has begun. As a related matter, the proposed rule deletes the requirement of a show cause order in favor a general requirement that, before imposing a sanction, the judge must provide a prior warning and document the reasons for any sanction. The reason for this change is that a formal show-cause order is not feasible when the misconduct occurs during a hearing. Similarly, the revised regulation eliminates the provision for the automatic approval of a request for an interlocutory appeal of a sanction for contumacious behavior, even when the requirements of § 1201.92, including that the "ruling involves an important question of law or policy about which there is substantial ground for difference of opinion," have not been satisfied. The Board determined that review of sanctions of this nature via petition for review should be sufficient, and that delaying the entire proceeding to adjudicate the appropriateness of a sanction is not warranted.

1201.51 Scheduling the hearing (and Appendix III, Hearing Locations). Appendix III of the Part 1201 regulations, which contained a comprehensive list of fixed hearing locations, has been deleted in favor of a statement in section 1201.51 that the Board "has established certain approved hearing locations, which are listed on the Board's public website (www.mspb.gov). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board." The reason for this change is that the current extensive list of fixed hearing sites causes administrative inefficiencies and can have adverse budgetary considerations for the MSPB and other agencies, as the cost of airfares are renegotiated by GSA each fiscal year, and the cost of court reporters varies considerably from one city to the next. Having the flexibility to change

approved hearing sites from year to year by changing information on the Board's public website should improve the situation.

1201.53 Record of proceedings. The revised regulation clarifies the terminology to reflect the difference between recordings (oral) and transcripts (written). The regulation provides that the Board will provide recordings and already existing transcripts free of charge. As drafted in the notice of propose rulemaking, the regulation would have also authorized administrative judges to order the agency to order and pay for a full or partial transcript, but this provision was deleted in the notice of final rulemaking.

1201.56 Burden and degree of proof for establishing jurisdiction. The current regulation provides that appellants have the burden of proving jurisdiction by preponderant evidence. That regulation is in conflict with a fair amount of Board case law that provides for establishing some jurisdictional elements by making nonfrivolous allegations. Under the regulation in the notice of proposed rulemaking, the burden of proof would have varied depending on the type of jurisdictional element involved. The appellant would have been required to establish by preponderant evidence that he or she is a person entitled to appeal rights under applicable law, rule, or regulation, and that he or she is appealing an agency action or decision covered by applicable law, rule, or regulation. The appellant would also have been required to prove by preponderant evidence a jurisdictional requirement to exhaust a required administrative procedure before filing a Board appeal. Other types of jurisdictional elements would have been established by making a nonfrivolous allegation, which was defined as "an allegation of facts that, if proven, **would establish** the jurisdictional element in question." Two commenters objected to the proposed definition of a nonfrivolous allegation, with one arguing that the standard should be an allegation of facts and related legal contentions that **could establish** the element in question. That commenter also questioned whether the Board has in some instances incorrectly regarded merits issues as jurisdictional requirements. After considering those comments, as well as additional comments from within the MSPB, the Board has determined that it needs to reexamine the legal framework it employs to identify jurisdictional requirements and how they are established. Accordingly, the Board decided to withdraw the proposed regulation and plans to reconsider the whole subject in early 2013, and, if amendments are determined to be necessary, institute a new rulemaking procedure.

1201.73 Discovery procedures. The revised regulation eliminates the initial disclosure requirement of § 1201.73(a). It also eliminates the separate provisions that governed discovery from a party from those governing discovery from a nonparty. The only difference that remains would be the remedy when there are problems with discovery. When a party alleges that another party has failed to comply with its obligations, the appropriate procedure would be a motion to compel. When a party alleges that a nonparty has failed to comply, the appropriate procedure would be a motion to issue a subpoena. The time limit for initial discovery requests has been increased from 25 days to 30 days after the date on which the judge issues the Acknowledgment Order. That Order requires the production of the Agency File within 20 days. The increase of time to 30 days should ensure that, in most cases, appellants have had the opportunity to see what is in the Agency File before they initiate discovery. Subsection (c)(1)(i) was revised to reflect the proper relevance standard for motions to compel discovery.

1201.81 Requests for subpoenas. To be consistent with the distinction made in § 1201.72(b) between discovery of parties and nonparties, section 1201.81 was revised to provide that a

request for a subpoena to a nonparty "must be supported by a showing that the evidence sought is directly material to the issues involved in the appeal."

Subpart C: Petitions for Review. The sections in this subpart have been reorganized so that: Section 1201.114 contains all the rules governing the content and procedures for pleadings on review, including some matters that were covered in 1201.115; section 1201.115 is now limited to the criteria for granting petitions and cross petitions for review; and section 1201.116 contains the rules governing compliance with interim relief orders, including those that were previously located at 1201.115(b) and (c).

1201.114 Petition and cross petition for review – content and procedure. The revised regulation institutes length limits on PFR pleadings: 30 pages or 7500 words for PFRs and cross-PFRs and responses to either of those documents; and 15 pages or 3750 words for a reply to a response to a PFR or cross-PFR. The revised regulation provides for a reply to a response to a PFR, but limits such a reply to the factual and legal issues raised by the other party in the response to the PFR, and provides that no other pleadings will be allowed.

1201.115 Criteria for granting petition or cross petition for review. This regulation has been substantially rewritten so as to conform the regulation to the broader criteria by which the Board has actually reviewed PFRs, including situations where the Board has denied a PFR but "reopened" the appeal "on its own motion" to address a petitioner's arguments or vacate, modify, or reverse an initial decision. The regulation states that the Board will grant a PFR or cross-PFR when: (a) The initial decision contains erroneous findings of material fact; (b) the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; (c) the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion; and (d) the petitioner has new and material evidence or legal argument that was not available when the record closed despite the petitioner's due diligence. Categories (b), (c), and (d) all require a showing that the error (or new evidence) affected the outcome of the case.

1201.118 Board reopening of final decisions. The revised regulation reads as follows: "Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen only in unusual or extraordinary circumstances, and only within a reasonably short period of time." The purpose of this revision was to change the previous Board practice of reopening an appeal on the Board's own motion under 5 C.F.R. § 1201.118 when a party's petition for review is denied, but the Board deems it appropriate to issue an Opinion and Order for some reason. Under the revised regulation, "reopening" only applies to, and is reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law.

New 1201.155 Requests for review of arbitrators' decisions. [The previous section 1201.155 was deleted as obsolete. The regulation at paragraph (d) of section 1201.154 was revised and moved to become new section 1201.155.] Section 1201.155 contains two significant revisions. First, the regulation now provides that, "If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure." This overturns longstanding Board practice, based on

Jones v. Department of the Navy, 898 F.2d 133 (Fed. Cir. 1990), wherein appellants were allowed to raise discrimination claims for the first time when requesting Board review of an arbitration decision. Second, paragraph (d) provides that the "Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing." The reasoning behind this was the view that remand to the arbitrator would not be practical or feasible in most cases. Arbitration is a matter of contract and, once the arbitrator has issued an award, the contract has been performed and the arbitrator has been paid. The arbitrator could not become involved with the case on remand unless the union and the agency agreed to create a new contract.

1201.182 Petition for enforcement. The revised regulation clarifies that the Board's enforcement authority under 5 U.S.C. § 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of enforcement, as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

1201.183 Procedures for processing petitions for enforcement. The revised regulation changes the nature of an administrative judge's decision in a compliance proceeding from a "recommendation" to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The goal is to ensure, to the extent feasible, that all relevant evidence is produced during the regional office proceeding, and that the initial decision actually resolves all contested issues. In addition, the regulation provides that the "responsible agency official" whose pay may be suspended should a finding of noncompliance become the Board's final decision will be served with a copy of any initial decision finding the agency in noncompliance. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. This was done for a couple of reasons. First, when the initial decision is the first time that the agency learns definitively what actions it must take, 15 days would rarely be sufficient to have taken all required actions, e.g., the issuance of SF-52s and/or SF 50s and action taken by a payroll office. Second, the Board determined that there should not be different deadlines for submitting evidence of compliance as compared to contesting compliance actions with which the agency disagrees by filing a petition for review. New paragraph (d) codifies existing case law regarding the different burdens of proof that apply in enforcement actions depending on whether the Board is adjudicating a petition to enforce relief ordered by the Board (typically status quo ante relief when the Board has not sustained an agency action), or a petition to enforce a settlement agreement that a party is alleging that the other party breached.

1208.21 VEOA exhaustion requirement. Paragraph (a) of this regulation was revised to clarify an appellant's burden of proving exhaustion in a VEOA appeal. Section 1208.21 had provided that, to exhaust his administrative remedies with DOL, an appellant must file a complaint with DOL and allow DOL 60 days to resolve the complaint. However, this was an incomplete picture of the exhaustion process, in that it did not include the requirement that DOL close the complaint, either on its own accord or based on a letter from the appellant after 60 days have elapsed stating that the appellant intends to file a Board appeal. In addition, it did not account for the fact that DOL might close its investigation before 60 days have elapsed. The revised regulation provides a more accurate and complete picture of what is required to establish

exhaustion in a VEOA appeal. The regulation adds a paragraph (b), which provides that the deadline for filing a claim with DOL can be excused under the doctrine of equitable tolling.

1208.22 Time of filing. Paragraph (c) has been added to address the possibility of excusing an untimely appeal under the doctrine of equitable tolling.

1208.23 Content of VEOA appeal. In connection with the exhaustion requirement, paragraph (a)(5) has been added, which provides that a VEOA appeal must include "[e]vidence identifying the specific veterans' preference claims that the appellant raised before the Secretary." This is consistent with case law indicating that the Board will scrutinize the exhaustion issue in a VEOA appeal in the same way that it scrutinizes the exhaustion issue in an IRA appeal, i.e., the Board will only consider claims that were raised to the Department of Labor.

1209.2 Jurisdiction in IRA appeals (elections under 5 U.S.C. § 7121(g)). As revised, the regulation overrules a significant body of Board case law. Starting with its decision in *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318 (1993), the Board had consistently maintained the position that an individual who claims that an otherwise appealable action was taken against him in retaliation for making whistleblowing disclosures, and who seeks corrective action from the Special Counsel before filing an appeal with the Board, retains all the rights associated with an otherwise appealable action in the Board appeal. In an adverse action, for example, the agency must prove its charges, nexus, and the reasonableness of the penalty by a preponderance of the evidence, and the appellant is free to assert any affirmative defense he might have, including harmful procedural error and discrimination under Title VII or the Rehabilitation Act. In an IRA appeal, however, the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures. In 1994, the year after *Massimino* was issued, Congress amended 5 U.S.C. § 7121 to add paragraph (g). Subsection (g)(3) provides that an employee affected by a prohibited personnel practice "may elect not more than one" of 3 remedies: (A) an appeal to the Board under 5 U.S.C. § 7701; (B) a negotiated grievance under § 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (§ 1214), which can be followed by an IRA appeal filed with the Board (§ 1221). Under subsection (g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first. A plain reading of § 7121(g) indicates that, contrary to *Massimino,* an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal, and is limited to the rights associated with such an appeal, i.e., the only issue before the Board is whether the agency took one or more covered personnel actions against the appellant in retaliation for making protected whistleblowing disclosures; the agency need not prove the elements of its case, and the appellant may not raise other affirmative defenses.

The long-term consequences of the change to this regulation should be straightforward. When taking an otherwise appealable action, agencies will be required, per revised section 1201.21, to advise employees of their options under § 7121(g) and the consequences of such an election, including the fact that the employee would be foregoing important rights if he or she seeks corrective action from OSC before filing with the Board. There would be difficult interim questions concerning cases that are already in the pipeline. One issue would be whether, despite the seemingly clear language and consequences of § 7121(g), the appellant should be deemed to have made a valid and binding election. An argument might be made that an election is not binding unless it constitutes a knowing and informed decision. *Cf. Atanus v. Merit Systems*

Protection Board, 434 F.3d 1324, 1326-27 (Fed. Cir. 2006) (concluding that the appellant made a knowing and informed, and therefore binding election under § 7121(e)). The proposed regulation does not resolve this question, which would be resolved in particular appeals. If the Board were to hold that some elections were not binding, a related question would be whether the Board should excuse the untimely filing of the Board appeal, which would be filed well after the 30-day deadline of 5 C.F.R. § 1201.22(b)(1). Again, this would be resolved in particular appeals.