Maryland Employment Lawyers Association

Comments Regarding

Merit System Protection Board: Practices and Procedures

Proposed Rule, 77 Fed. Reg. 33,663 (June 7, 2012)

Statement of Interest

The Maryland Employment Lawyers Association (MELA), organizationally and through its members, hereby submits Comments Regarding Merit System Protection Board: Practices and Procedures Proposed Rule, 77 Fed. Reg. 33,663 (June 7, 2012). MELA is comprised of more than 100 attorneys who represent and protect the interests of employees under federal and state law. MELA is a local affiliate of the National Employment Lawyers Association. The purpose of MELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA has been granted leave to participate as *amicus curiae* in many cases before state and federal appellate courts. MELA members have represented numerous federal employees living and working in Maryland who seek to enforce their rights under federal law. Thus, MELA has a significant interest in this rulemaking to ensure that such employees have access to a remedy.

Comments Regarding Proposed Section 1201.56 "Burden and Degree of Proof; Affirmative Defenses"

MELA wishes to comment particularly upon Proposed Section 1201.56, addressing the burden and degree of proof for establishing Board jurisdiction. *See* 77 Fed. Reg. at 33,675 (text of proposed regulation); *id.* at 33666 (discussion).

With one exception discussed below – the definition of what constitutes a nonfrivolous allegation – MELA concurs with the proposed revisions. In particular, we agree that it makes sense to differentiate and apply different burdens of proof to different types of jurisdictional elements. When Congress or OPM has clearly differentiated and completely separated jurisdictional issues from merits issues, jurisdictional issues are properly seen as conditions precedent that must be proved by preponderant evidence before the Board can reach the merits of the case. For example, in an adverse action appeal, the Board can consider whether an agency action was taken "for such cause as will promote the efficiency of the service" only when an appellant has established by preponderant evidence that he or she is a covered "employee" who was subjected to one of the listed personnel actions.

However, when Congress or OPM has not clearly differentiated and separated jurisdictional issues from merits issues, that is, when some issues go to both jurisdiction and merits, treating such "dual purpose" jurisdictional elements as conditions precedent that require proof by preponderant evidence is inappropriate, because it requires an appellant to prove the merits of his or her case just to establish the Board's jurisdiction. Indeed, we encourage the Board to reconsider whether the "dual purpose" elements it has previously identified are actually jurisdictional in nature at all, or whether they are simply merits issues. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385, 393 &n.6 (1982) (holding that filing timely charge of discrimination with EEOC is not a jurisdictional prerequisite to filing suit in federal court, despite references in prior cases to 90-day filing requirement as "jurisdictional").

Where the Board determines that an element is both jurisdictional and merits in nature, we agree that the burden of persuasion should be something less than by a preponderance of the evidence. That lesser degree of persuasion could be characterized as making a "nonfrivolous allegation." But we object to the way the Board has newly defined this term, as "an allegation of facts that, if proven, would establish the jurisdictional element in question." (emphasis supplied). Our objection is twofold: (1) The requirement that such allegations "would establish" the matter in question overrules existing Board caselaw and transforms the requirement into a higher burden of proof, and (2) the regulation should not focus exclusively on factual matters because the matters in question are mixed issues of fact and law.

Individual right of action appeals under 5 U.S.C. § 1221 provide a good illustration of both aspects of our objection. The Board has held that whether an appellant has made a protected whistleblowing disclosure is both a jurisdictional and a merits issue. Whether the disclosure was a contributing factor in the agency's decision to take or propose a covered personnel action is also a "dual purpose" element. *See, e.g., Peterson v. Department of Veterans Affairs*, 116 M.S.P.R. 113, ¶¶ 8-9 (2011); *Weed v. Social Security Admin.*, 113 M.S.P.R. 221, ¶¶ 18-19 (2010). Existing Board caselaw provides that, to meet the nonfrivolous allegation standard, an IRA appellant need only allege facts which, if proven, could (not would) show that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action. *Peterson*, 116 M.S.P.R. 113, ¶ 8; *Weed*, 113 M.S.P.R. 221, ¶ 18. If the proposed Section 1201.56 is approved as drafted, these decisions would be effectively overruled and appellants would be subjected to a higher burden of proof in establishing jurisdiction.

Furthermore, whether an appellant made a protected disclosure always entails a combination of legal and factual claims. For example, when an appellant contends that she disclosed what she reasonably believed was a violation of law, rule, or regulation, she must not only describe the factual basis for that belief, she must also typically identify the law, rule, or regulation in question and why she believed that the behavior violated it. The test for whether such a belief was reasonable is whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence" a violation of law, rule, or regulation. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

Resolving this question, however, requires a consideration of all relevant evidence and, where applicable, hearing testimony. Even when a pleading asserts facts and circumstances which an administrative judge could conclude form the basis for the requisite reasonable belief, the asserted facts and circumstances would rarely be sufficient to conclude that they "would

establish" such a belief. And even in the rare circumstance in which the asserted facts and circumstances would appear to establish that a disclosure was protected, there is always the possibility that the record when fully developed would establish that the disclosure was made in the normal performance of the employee's duties, rendering the disclosure unprotected under *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1353 (Fed. Cir. 2001). Accordingly, the most that could ever be said of an appellant's allegations in a pleading is that, if proven, they could establish that a disclosure was protected under the Whistleblower Protection Act.

The Board's new definition for a nonfrivolous allegation is similarly problematic for the other (b)(8) categories of wrongdoing (gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety), as well as for other types of appeals in which the Board has identified "dual purpose" elements that are both jurisdictional and merits in nature, such as claims under the Veterans Employment Opportunities Act, the Uniformed Services Employment and Reemployment Rights Act, and partial recovery restoration claims under 5 C.F.R. § 353.304(c). In all of these appeal types, the "dual purpose" jurisdictional issues are mixed questions of law and fact, and the most that could be expected of an assertion in a pleading is that the asserted facts and associated legal contentions could establish the matter in question.

The problems with the Board's definition of "nonfrivolous allegation" could be remedied with minor word changes. A nonfrivolous allegation could be defined as "an allegation of facts and circumstances and related legal contentions that could establish the jurisdictional element in question." We respectfully suggest that the Board adopt this, or similar, language for Section 1201.56.