

Social Security Administration Comments
on MSPB's Proposed Rule Revising Adjudicatory Regulations
February 23, 2012

Section 1200.4 Petition for Rulemaking

Draft section 1200.4(b) states “If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate.”

Recommendations: Delete “or a final rule will be issued as appropriate.” This phrase permits an inappropriate, unilateral adoption of a final rule, without notice and comment. Also, consider adding a request for reconsideration process for denied petitions.

Section 1201.21 Notice of Appeal rights

Recommendation: That the MSPB publish model notice language for agencies to use in decisions to comply with the requirements of 1201.21(d).

Section 1201.29 Dismissal Without Prejudice

This new provision addresses dismissal without prejudice in the interest of fairness, due process and administrative efficiency: “...the judge may issue a decision dismissing an appeal without prejudice, and setting a date certain by which the appeal must be refiled.”

Recommendation: The provision should allow the judge to set the refiling deadline based on an applicable triggering event instead of a date certain (*e.g.*, after a decision in a related matter).

Section 1201.34 Intervenors and *Amicus Curiae*

The proposed language provides details on what *amicus curiae* can and cannot do.

Recommendation: Add that having the status of *amicus curiae* to file a brief does not entitle the *amicus curiae* to receive service of any pleadings or submit replies to briefs filed by the parties.

Section 1201.51 Scheduling the Hearing

Currently, the appendix to the regulations provides an extensive list of hearing sites. The proposed language would allow the MSPB more discretion in determining the hearing location.

Recommendation: We believe this section should not be implemented. In many situations, the new language could require agencies to pay substantial additional travel costs, since the main criteria for determining hearing location would be the cost of the MSPB judge’s travel—even if such a location would dramatically increase agency travel costs for its representatives, as well as witnesses and for both the agency and the appellant.

Section 1201.53 Record of Proceedings

This section would allow MSPB to require the agency to purchase a transcript and provide a copy to the MSPB and appellant if the MSPB needs it to prepare a clear and complete decision.

Recommendation: This provision is objectionable cost-shifting. In many cases, unless the agency is appealing, the agency does not desire or purchase a transcript.

Section 1201.155 Requests for Review of Arbitrators’ Decisions

The draft section 1201.155(d) allows the MSPB, at its discretion, to develop a claim of prohibited discrimination. This section permits the grievant to raise an allegation of discrimination for the first time upon MSPB review (case law already permits this).

Recommendation: delete the draft paragraph (d). It is prejudicial to the agency to allow the claim to be raised for the first time upon the MSPB’s review of an arbitrator’s award.