

The Treasury Inspector General for Tax Administration (TIGTA) offers the following comments:

Section 1201.53: Recording of proceedings

A. Substantive Comment:

TIGTA opposes the draft language of § 1201.53(b) and disagrees with the Board that the draft regulation does not constitute an improper augmentation of its appropriations. As drafted, the regulation appears to shift the Board's administrative hearing costs to individual employing agencies, which would result in an illegal augmentation of the Board's appropriations and a violation of the purpose statute, 31 U.S.C. § 1301, by the employing agencies. The U.S. Comptroller General has previously determined that the MSPB must use its own appropriations to pay for the administrative costs related to its statutory requirement to provide a hearing, whether or not those costs are specifically outlined in the statute, and that an agency paying for such a cost does not constitute a "necessary expense." The Comptroller General stated that the Economy Act does not cover statutorily required services. Matter of: Reconsideration of MSPB's Authority to Accept Reimbursement for Hearing Officers Travel Expenses, 61 Comp. Gen. 419, 1982 U.S. Comp. Gen. LEXIS 978 (1982), at *6-9.

We think requiring the direct payment of hearing transcript fees when the Board determines a written transcript (while not required as the Board points out in Gearan v. Department of Health and Human Services, 838 F.2d 1190, 1192 (Fed.Cir.1988)), "would significantly assist in the preparation of a clear, complete, and timely decision," as proposed by § 1201.53(b), is analogous. The Board has received appropriations to provide this service and, while employing agencies receive appropriated funds for litigation costs, the expenditure of those funds is for the employing agency to determine. Those appropriate funds are for the agency to carry-out its own mission, not the Board's. Where a written transcript "would significantly assist in the preparation of a clear, complete, and timely decision," the Board should pay the transcript costs.

B. Non-substantive Comment:

As a matter of drafting, we point out that § 1201.53(b) appears to contain a typo, otherwise it is easily circumvented. An employing agency merely has to request a copy of the transcript to avoid paying for the official transcript for the Board and the appellant, since the requirement to pay is only triggered where no party makes a request; only then would the judge's determination be relevant. We believe that the Board intended the section to read "a request by a party, OR upon determining..."

Additional Comment:

The Treasury Inspector General for Tax Administration (TIGTA) suggests the Board consider further amending its adjudicatory regulations to provide for an Offer In Judgment, such as Rule 68 of the Federal Rules of Civil Procedure, or an Offer in

Resolution, such as under 29 C.F.R. § 1614.109(c) of the Equal Employment Opportunity Commission. Under this provision, the agency would provide a written offer of resolution, specifying attorney's fees and costs, as well as nonmonetary and monetary relief (whether as a lump-sum or itemized offer). If the appellant does not accept the offer and the ultimate relief is not more favorable than the agency's offer in resolution, then the appellant would not be entitled to the attorney's fees or costs incurred after the offer period. In our opinion, such a provision would assist in the parties' reaching an early settlement.