

UNITED STATES MERIT SYSTEMS PROTECTION BOARD

REGULATIONS REVIEW STAKEHOLDERS MEETING

Washington, D.C.

Tuesday, March 6, 2011

PARTICIPANTS:

Stakeholders:

PETER BROIDA, Esquire

RUSSELL CHRISTENSEN, Esquire, Federal Aviation
Administration (FAA)

ROBERT GIROUARD, Senior Counsel, Office of
Personnel Management (OPM)

ERIC GUTIERREZ, Esquire, National Employment
Lawyers Association (NELA)

CATHERINE KESSMEIER, Esquire, Deputy Assistant
General Counsel, Department of the Navy

JOHN MAHONEY, Esquire, Tully Rinckey, PLLC

ANDREW PERLMUTTER, Esquire, representing
Passman & Kaplan, P.C., and the Metropolitan
Washington Employment Lawyers Association
(MWELA)

MSPB Staff:

LYNORE M. CARNES, Office of Appeals Counsel

MICHAEL A. CARNEY, Office of General Counsel

TOM COOK, Chief Counsel to the Chairman

BERNARD E. DOYLE, Chief Counsel to the Vice
Chairman

JAMES EISENMANN, General Counsel

TIMOTHY L. KORB, Office of Appeals Counsel

STEVE LENKART, Executive Director

WILLIAM SPENCER, Clerk of the Board

SUSAN M. SWAFFORD, Office of Appeals Counsel

RICHARD W. VITARIS, Atlanta Regional Office

RONALD WEISS, Office of Regional Operations

* * * * *

P R O C E E D I N G S

(10:03 a.m.)

MR. EISENMANN: Good morning and thanks for your attendance and participation today. This is a meeting of MSPB senior staff and various stakeholders concerning our internal review of MSPB's adjudicatory regulations at 5 CFR parts 1201, 1208, and 1209. At this time, I would ask that we go around the room and introduce ourselves and identify our affiliations. I'll start with me. My name is Jim Eisenmann. I'm the MSPB's general counsel.

MR. SPENCER: I'm Bill Spencer, clerk of the Board.

MR. GIROUARD: Robert Girouard, Office of General Counsel of OPM.

MR. BROIDA: Peter Broida, I'm a practitioner.

MR. GUTIERREZ: I'm Eric Gutierrez with the National Employment Lawyers Association.

MR. MAHONEY: I'm John Mahoney and partner with Tully Rinckey.

MR. PERLMUTTER: I'm Andrew Perlmutter, representing both Passman & Kaplan and the Metropolitan Washington Employment Lawyers Association, MWELA.

MR. CHRISTENSEN: Russell Christensen, I'm representing the Federal Aviation Administration this morning.

MS. KESSMEIER: I'm Cathy Kessmeier, representing the Department of Navy Office of General Counsel.

MR. COOK: Thomas Cook, I'm chief counsel to Chairman Grundmann.

MR. VITARIS: Richard Vitaris, I'm an administrative judge with the Merit Systems Protection Board's Atlanta Regional Office.

MS. CARNES: Lynore Carnes, Office of Appeals Counsel and moving to the Chairman's office next month.

MR. DOYLE: Bernard Doyle, I'm chief counsel to the vice-chairman.

MR. CARNEY: Michael Carney, I'm a staff attorney in the Office of General Counsel.

MS. SWAFFORD: Susan Swafford,

Office of Appeals Counsel.

MR. WEISS: Ron Weiss, I'm an administrative judge with the Office of Regional Operations.

MR. KORB: I'm Tim Korb, an attorney in the Office of Appeals Counsel.

MR. LENKART: Steve Lenkart, Executive Ddirector of MSPB.

MR. EISENMANN: Okay. All right. Thank you. As you know, Chairman Grundmann is improving transparency and openness to MSPB's operations. The key aspect of this initiative is to reach out to the MSPB stakeholders on a variety of issues. The Board previously consulted with stakeholders concerning the MSPB's studies function and held various stakeholder meetings. Our meeting today is another attempt to learn from our stakeholders and have stakeholders participate in the regulation review process.

Last year, the Chairman asked an internal working group to review MSPB's adjudicatory regulations and to suggest areas where they may be changed, improved, or

updated. Ultimately, this will take the form of notice and comment rule-making via federal registrar as required by the administrative procedure act. The MSPB working group performed an in-depth review of our regulations and identified a number of proposed revisions. But before undertaking formal rule-making we saw input from our stakeholders in accordance with the public participation requirement and executor 13563 improving regulation and regulatory review.

On October 19, 2011, the Chairman sent copies of the working group's proposed revisions to various MSPB's stakeholders seeking initial comments. In the Chairman's October 19th letter to you, we emphasized that the proposed revisions should be considered preliminary and tentative in nature and that no decisions have been made as to which suggestions would become part of the noticed proposed rule-making or the precise language of any proposed revisions to our regulations. You are some of the stakeholders who responded to the Chairman's October 19th letter with

subtenant written comments regarding the working group's suggested changes to MSPB's adjudicatory regulations. We greatly appreciate your previous written responses.

On February 6th, the Board invited you to participate in this meeting to provide oral comments regarding the Board's adjudicatory regulations. So, today, we would like to hear further from you on any matter relevant to the Board's adjudicatory regulations.

A few things before we begin. Each of you is allotted 10 minutes to address any aspect of the Board's adjudicatory regulations on which you would like to comment. The only exception to that is Mr. Perlmutter who is representing both his law firm and an association. He is allotted 15 minutes total. We are seeking your individual feedback not collective advice from the group. None of the MSPB employees present are speaking for the Board or a board member. The MSPB employees present today will not be commenting on any aspect of your presentations today or prior

written comments.

A transcript of this meeting will be placed on the Board's website when it is available. Bill Spencer, the clerk of the Board will monitor the time and inform you when you are nearly out of time and when your time is expired. We'll go alphabetically by last name beginning with non-government organizations and followed by federal agencies. Peter, we'll start with you.

MR. BROIDA: Thank you, Judge, and my good friends of the Board. Well, folks I've worked with over the years I appreciate the opportunity to speak with you today. I've written at the end of November some comments on the proposed changes. I'm not going to repeat those to a great relief. I will, however, add a few suggestions on areas that the Board might consider in the course of its regulatory revision process. And these are in no particular order except what I thought of late last night.

First, let me talk about the time limit for the Board appeal identified at

1201.22 of the Board's regulations. The time limit is not statutory, although the regulatory time limit has been in effect so long one would think it was statutory. There are a couple aspects of this that I think merit the Board's consideration first. Some years ago, the Board slightly varied the time limit for an appeal by allowing additional time for those who engage in pre-appeal mediation. Now, I cannot think of a single case where that has occurred but then I'm not familiar with all the cases that come before the Board. If that process is not being used and it does seem somewhat unlikely that an agency would immediately move to mediation after having spent years attempting to fire an individual, then I think if the provision is not being used it should be omitted.

The regulations of the Board allow a very short time limit for an appeal. Thirty days is not much time for a person to go out and secure counsel and square up what they're going to do after they've been fired and get the financing necessary or try to figure out

the Board's regulations. It's shorter than even the EEO process, 45 days to go to a counsel, much shorter than the six months allowed to file an unfair labor practice charge with the FRLA.

I don't fundamentally have a problem with a relatively short time limit except in one area that I think has unintentionally caused a lot of hardship for a class of appellants. And this group I speak of are those with vested retirement benefit claims. And too often the Board has found an appeal late on a retirement claim even though it's just a few days late. Although, I must say in recent years, the Board has changed that practice and showed more flexibility. For a vested retirement claim, I can see no purpose for a 30-day limitation on the appeal period. OPM loses nothing if the appeal is somewhat delayed. And I would urge instead that the Board adopt an approach that would apply the doctrine of Laches rather than a 30-day period for an appeal from a retirement benefit denial like OPM.

The next topic I wanted to speak about was the Regularization of the Process of Dismissals without Prejudice to Re-file. It's no big secret that judges are driven by performance standards and the performance standards depend in a large part upon productivity requirements. And the judges have seized upon dismissals without prejudice to satisfy their productivity requirements in part. And they, as well as the parties are pleased with the use of the process. However, the process is not consistently applied by judges. Some judges, even the case that does not involve the VEOA or USERRA will provide for automatic re-filing of a case that's dismissed without prejudice to re-file. Other judges don't think to do that or the parties don't think to ask for it. And as a result from time to time, people are defaulted when they re- file their cases a few days late. The Board tends to apply the same standards with respect to late re-filings of DWOP applications as it does for cases that are belatedly filed the first time around.

What I urge is that the Board place the DWOP process into its regulations and that it require judges absent extraordinary circumstances to automatically re-file the appeals for the appellant, avoiding defaults. Linked to this is the suspension process at 1201.28 from the Board's regulations. There was a time when the suspension process first came into effect that if the parties agreed to a suspension the judge had to grant it. Now, for reasons that I could never understand I believe the judges opposed this because they believe it withdrew some of the control of the case from the judges. I think the Board needs to recognize that the case is something that is part of the process employed by the parties. The parties do not serve the Board; the Board serves the parties and the public interest. If the parties want a suspension for 30 days which isn't all that long I think that they should get it without regard to the discretionary ability of the judge to deny it. So, I urge you to change the regulation back to what it was before this was performed.

Witness Fees 1201.37, it would seem a fairly straight forward provision with respect to witness fees. However, what occurs under the Board's regulation is that if the government subpoenas a witness the government is not required to advance the witness fees or the travel expense or the lodging expense to the witness who has been subpoenaed. Theoretically, what happens is the witness travels, finds a hotel, shows up at the Board's hearing location, and signs a voucher for those expenses if the agency representative thinks to bring a voucher. This is unrealistic. In my estimation, what the Board should do is change the regulation to require prepayment of those fees to avoid hardship to people who are subpoenaed.

Public Hearings, 1201.52 with the Board's regulations, the regulation requires a public hearing as does the statute. Very few people actually attend these hearings. When they do, I've had the experience that some people show up at a hearing room and find the hearing room locked because the judge doesn't

want to be disturbed by people coming in. Either change the regulation or change the practice in two ways. One, post notices on the Board's website with respect to hearings that are occurring in various offices. You don't have to list the appellant's name. You could do so by a general description of the case and the time. And secondly, absent extraordinary reasons require the judges to allow the public to come and go as they choose as long as they're not disruptive to the proceedings just as you find in district courts and courts of appeals.

Closing the Record, 1201.58 there's been many cases dealing with judges who allow the record to close and one party or the other submits new evidence at the time the record closes and the other side sees the evidence for the first time and has to figure how to deal with it. And the problem is they don't deal with it very well. I suggest that the Board modify that regulation to ensure due process to people to allow a reply right when the record is closed and new evidence is

received from one of the parties.

Interlocutory Appeals, 1201.92. The regulation parallels 28 U.S.C. 1292, which allows for an interlocutory appeal based on the certification as to a ruling by the judge. Now, in board cases, there are not that many preliminary rulings but there are all sorts of interesting issues that arise, particularly jurisdictional. The problem is how to get it into an interlocutory appeal because there's no advanced ruling by the judge. So, I suggest you change the rule to allow certification in interlocutory appeals either on a ruling or on an issue that's identified by the parties and accepted by the judge for that purpose.

Criteria for Granting Petitions for Review 1201.115. The regulation talks about new evidence or errors in law and everybody knows that one of the fundamental reasons people file petitions for review is because they think the judge inappropriately decided factual issues or credibility issues. The Board obviously reviews cases on that basis.

I suggest you change the regulation to clearly state that as a basis for a petition for review.

Consequential Damages or Compensatory Damages 1201.204. The regulation has instruction that now requires bifurcation of the case. You have to win the case, survive a petition for review, come back, go through an adundant proceeding. The Board's adjudication is slowed down in the past couple of years because of non-precedential final orders. The average age of the Board case PFR level is increasing not decreasing. And I suggest to avoid unwarranted delays when there is actually a finding of discrimination or reprisal that just like with the EEOC you allow the judge the opportunity to make the determination whether or not to bifurcate the case rather than requiring it as a matter of regulation.

Specifically, Mr. Spencer asked that the parties here today, people here today, speak about the Burdens of Proof under 1201.56. The statute sets the burden of proof

for various cases of the Board depending on the type of the case. I think an effort by the Board to classify burdens of proof and a regulation given the many different types of cases the Board hears and the many varying and sometimes conflicting pronouncement. May I finish this sentence, sir?

MR. SPENCER: Go ahead. Yes.

MR. BROIDA: Even the federal circuit would allow me to finish the sentence. All right. Given the various occasionally conflicting and sometimes confounding statements with respect to jurisdiction and burdens of proof in the federal circuit and the Board, I don't think it's going to do much good to try to codify that in terms of a regulation. Instead, you have to insist that the administrative judges do what they know how to do which is to research the law and identify those for the parties either as part of the acknowledgement order or as part of the pre-hearing conference summary. Mr. Spencer, I thank you for the extension of time. I have no further comments. Thank you.

MR. SPENCER: Thank you.

MR. GUTIERREZ: Good morning. I'm Eric Gutierrez. I'm the legislative and public policy directory for The National Employment Lawyers Association. I have the most amazing privilege in terms of my job to call upon the brain trust of NELA which is exactly what I did in this situation. Peter, I don't want to follow you. I feel sort of embarrassed but I will tell you that NELA has formally submitted comments. That process was basically calling on the brain trust of NELA including our executive director, Terri Chaw, that said to say hello, Jim, to you. And I will say this, that Passman & Kaplan actually is part of our brain trust. I will not totally defer to Andrew but I know that he worked very much, very hard with Terri on these, on these comments. And I wish I could add more but at this point, I just submit our comments from NELA and if there are any questions after the fact I'm happy to respond. I will have extra time for anyone else. Thank you.

MR. EISENMANN: John.

MR. MAHONEY: Hi, I'm John Mahoney partner with Tully Rinckey. We represent appellants especially members of the -- former members of the Uniform Services and VEOA and USERRA cases as well as civilian and federal employees and adverse action appeals before the Board. And we certainly appreciate the Board reaching out to the parties who are often appearing before them to provide comment on these proposed rule changes. And we have submitted on behalf of the firm written comments and responses to the proposed regulatory changes on November 30th. I'd like to highlight a few of them here today and to add additional comments that I think the Board should take into consideration.

With regard to the proposed changes at 5 CFR Section 1200.4 the petition for rulemaking, we wholeheartedly agree with the Board's proposed changes, so as to make public participation in rulemaking by the Board easier for the public to engage in. We also agree with the proposed changes at 5 CFR

1201.3, in terms of providing guidance to pro
se appellants in terms of explaining the
limited nature of the Board's jurisdiction.
As far as 5 CFR Section 1201.3(a)13, we
believe that the proposed change does properly
clarify the basis for re-employment priority
rights under 5 CFR Section 302.501 and
330.209.

We believe that the Board should
clarify further it's regulation at 5 CFR
Section 1201.4 to give parties the right to
serve documents solely by email. I think
you're seeing a movement in the district
courts as well as the court of appeals in
terms of allowing email service solely in
cases and we think that the Board should
codify that in its regulation at 1201.4. And
that the date of service for email should be
the date on which the email is sent even if it
is after the normal business hours rather than
carrying it over to the future date.

With regards to the proposed change
at 5 CFR Section 1201.4(j), we respectfully
request that the Board instead adopt an

overall rule that actions must be taken based upon the date the prior document is received rather than the date on which the document is served. There is confusion between the federal rules of civil procedure and the regulations that have been promulgated by the EEOC between the difference of service and the difference of receipt. We think that all time limits in Board litigation should go from the date of receipt of the document rather than the date of service of the document. Which would make the Board's regulation at 1201.4(j) consistent with the EEOC's regulation, longstanding regulation at 29 CFR Section 1614.604, which states that all time periods before the EEOC litigation are run from the date on which the document is served and the document is presumed to have been -- I'm sorry, from the date the document is received and it is presumed that the document is received within five calendar days from when served. We think the Board's regulation should mirror that provision in the EEOC's regulation.

We fully concur with the Board's rationale for its proposed revision of 5 CFR Section 1201.21, to require agencies to explain in their decision letters in adverse action cases, the impact of the employee's decision to file an OSC complaint, whistleblower or retaliation complaint over an otherwise appealable adverse action. However, we also recommend that the Board's regulation require agencies to also provide employees notice of their rights to file mixed case EEO complaints by contacting an EEO counselor at the agency within 45 calendar days if they believe that the adverse action is discriminatory under -- by the United States Code Section 200e-16.

Some agencies provide EEO notice of mixed appeal rights, some agencies don't in their decision letters. We think by codifying a requirement that an agency explained the impact of a mixed case complaint versus a mixed case appeal that it would provide federal employees and former federal employees greater adverse action notice and due process

rights.

We totally agree with the Board's possible revised regulation at 5 CFR Section 1201.24 to reduce the need to provide any documents with the initial MSPB appeal other than the decision and the notice of action being appealed. Oftentimes, as the Board references in its proposed regulations, employees who are pro se don't know what they have to provide and often bury the Board in terms of paper. And I think it is very helpful especially for pro se appellants to know that they only have to provide the proposed adverse action and the decision letter.

With regard to the Board's proposed revision of 5 CFR Section 1201.28(a), we applaud the Board's proposal to allow 60-day stays but we take issue with the Board's effort to eliminate the current proposed requirement that requests for stays must be filed within 45 days of the issuance of the acknowledgement order. And stays sought at a later stage of the appeal may be helpful in

terms of promoting alternative dispute resolution and reducing the costs of overall Board litigation for the parties involved. We think that basically having requirements in terms of what the time limit is for requesting ADR throughout the process really puts a damper on the party's ability to negotiate settlement under the certain time table that Board acknowledgement orders often set forth for parties. We don't think there should be an artificial time limit for when a party or when parties can seek a stay. And we also don't believe that there should be an artificial time limit on how long a stay should last. If the parties need more than 60 days we don't see why the Board should limit the parties to a finite period of 60 days for settlement negotiations.

Likewise, we applaud the Board's possible revised regulation at 5 CFR Section 1201.29 to codify the longstanding practice of allowing dismissals without prejudice. And we echo Mr. Broida's comments in terms of requiring Board judges to automatically

re-file appeals after the dismissals without prejudice. Sometimes, pro se appellants forget, frankly, how long a case has been dismissed without prejudice and we think an automatic filing -- re-filing provision would be helpful in terms of protecting the statutory rights of pro se employees.

With regard to the Board's possible revised regulation at 5 CFR Section 1201.33, the Board's current and proposed regulation should explicitly reference sitting for depositions in addition to simply furnishing sworn statements as a requirement for federal employees and as well as for contractors. Federal contractors receive federal benefits through statute. And oftentimes, we find representing appellants, that federal employee cases that are based upon federal contractor testimony, agencies can escape having to produce those employees because they're simply contractors. And we think that because federal contractor employees receive federal benefits that they should likewise be required as a part of their right to be required to sit

for that position as well. Of course, the appellants would have to pay their witness fees as we always do but certainly that is a problem that we've experienced. You know, witness statements by federal contractors and retirees escaping discovery examination.

Now, with regard to the Board's proposed revised regulation at 5 CFR Section 1201.73, we agree with the Board's revision to eliminate the current initial disclosures requirement. Although representing appellants I would think it might be helpful to keep that provision with regard to requiring agencies to provide initial disclosures. Let's face the reality: Agencies possess most of the information in these cases and therefore it's easier for them to produce initial disclosures which would cut down on the costs of discovery for appellants than it is for appellants, especially pro se appellants, to produce evidence. So, we would, you know, require -- we would request that initial disclosures stay with regard to the agencies providing them but that appellants be released

from that requirement.

In terms of the discovery response period, we think that discovery responses like in EEOC cases should be 30 days. A party should have 30 calendar days to respond to discovery requests as opposed to 20 days. That is the current federal rule of civil procedure rule. It's also the rule before the EEOC and we think that it's fair that parties before MSPB should also be provided 30 days to respond to written discovery requests.

The additional comments that -- given the fact that I have 22 seconds -- are in our written responses to the proposed rulemaking. I would recommend, however, that we deal with something to do with penalties. Before the Board, penalties traditionally have always been the maximum recommended penalty, the maximum reasonable penalty that treats non-bargaining union employees differently because before arbitration it's usually a minimum reasonable penalty. And we think that non-union employees should not be treated differently in

terms of penalty assessment. So, we think that the Board should regulate that as well. Thank you very much.

MR. EISENMANN: Thanks, John.

Andrew?

MR. PERLMUTTER: Good morning. I'd like to thank the Board of -- well, both Passman & Kaplan and the members MWELA. I would like to thank the Board for giving us the opportunity to provide further comments concerning the Board's proposed changes to regulations. Now, both, Passman & Kaplan and MWELA have previously provided -- or the detailed written comments submitted coincidentally both by Joseph Kaplan. And so, I'm not going to be rehashing the contents of those particular written comments. Although I will be addressing a few of the more high-level issues pertaining to some of the underlying circumstances that cross several different modifications and regulations. First though, I wanted to make sure to address the requested comments on the proposed changes to 5 CFR Section 1201.56 as referenced in the

February 6, 2012 letter.

In response, concerning codification of the burdens of proof which have not been previously put in the Board's regulations such as non-frivolous allegations. Passman & Kaplan supports this effort to develop and provide better guidance to administrative judges and to especially pro se appellants, provided that the regulations are a codification of the prior precedent and not a replacement. We're concerned that -- and we want to make sure that if this is an issue that the Board decides to visit in its proposed rulemaking that the record of rulemaking here makes clear that this is an attempt simply to codify pre-existing precedent. And not to un-seed it or modify it to avoid the possible risk that a later misinterpretation of the updated phrasing that would appear in any proposed revised of Section 1201.56 would be intended to replace what had been in prior precedent. On this particular regulation, MWELA doesn't have any specific comment one way or the other.

Now, looking at some of the higher level issues. As we're touching on a greater detail -- I mean, sort of underlying a number of the concerns that we raised in our comments, are issues pertaining to certain stages in the overall procedural processing of complaints. First of all, there's the issue of the -- many which deal with problems associated with how certain administrative judges in our experience have been applying the regulations perhaps with prejudicial effects. I guess, with the overall goal, perhaps, of trying to expedite the processing of the complaint perhaps by shortchanging the appellant's opportunity for discovery either from the procedure the agency filed or promulgating written discovery or the like. At the very front end of the case, one of the difficulties here is in terms of propounding initial written discovery -- the delay is often in receiving the agency file is often -- I mean even under the present regulation there is a mere five days to -- then draft for discovery since

agencies -- and we've observed often are late in filing these agency -- the file submissions often leaving the appellants shorthanded to try to draft their written discovery requests. We support the effort to try to address this by adjusting deadlines.

And, in addition, as we proposed in our comments we believe that reducing the time for agencies to submit the agency file may actually help promote this and that wouldn't be sufficiently burdensome to the agencies. And that agencies often are compiling most of the records as part of their proceedings and adverse actions matters for instance and just as part of their normal proceedings of the adverse action.

One problem that we have observed also comes up at the very front of the case is the issue of orders to show cause especially in jurisdictional matters. In particular, in the context of whistleblower reprisal cases and cases of where there might be constructive adverse actions. A lot of administrative judges appear to use each of the show cause

orders as a routine matter, perhaps as a docket clearing device to keep their production numbers up but that will be speculative, I suppose. And so, our concern is that those deadlines are often overlapping with the deadlines for the parties to be propounding the written discoveries. And so, we propose that stays or some other mechanisms be put into the regulations to allow the different jurisdictional issues that are raised that the parties should not be required to be trying to propound written discovery requests at the same time they're trying to conduct the detailed jurisdictional briefing required to defend the Board's jurisdiction over a case.

Similarly, and sometimes this appears at the very front of the case but in other stages late in the processing as well. The administrative judges we've noticed especially of more recent vintage have shown cause or other procedural devices to require appellants to make extensive proffers and proofs of affirmative defenses in order to

have those defenses actually be able to be heard at hearing. As -- and this is something that we consider to be of great concern, especially burdening pro se appellants. It might not necessarily be in a position to be able to make the kind of detailed argumentation on discrimination, firm defenses or other matters that would be necessary in order to make sure that the cases get to hearing. We believe that it's part of the Board's general position and that is appearing in statute case law and their authority that cases should be heard -- go to hearing. That there shouldn't be any special burden placed on particular defenses or to make sure that actually have a chance to be heard and adjudicated.

The issue of case suspension. Several points come to mind. Echoing the comments of Mr. Broida both Passman & Kaplan and MWELA, our concern about issuances in situations where administrative judges in our experience have denied even joint requests for case suspension. And we believe that given

the number of problems that have occurred in this that the only solution is to make -- that if the initial request for case suspension is joined, it be made non-discretionary and mandatory on the administrative judges.

We believe that the 45-day deadline for when cases suspensions can be granted absent of special circumstances is probably not appropriate and we think it should be extended to at least 60 days. We believe that historically, the issue of case suspension absent of a few of these abuses are probably still better left with the -- some discretion of the trial administrative judges and should -- and that the regional director or the chief administrative judge who does not have oversight over the particular case should not be involved with the decision making on case suspension.

We believe it generally because of the difficulties with administrative judges administrating these case suspensions that standards need to be promulgated to better guide administrative judges on their exercise

of discretion for those non-mandatory grants of case suspension. And we also proved generally expanding the possible reasons for case suspension beyond just the limited ones that appear in the present regulation. Because discovery historically had been one of the reasons for case suspension we wanted to pose the issue that when we possess difficulties in case suspension was the issue of motions to compel, discovery -- if discoveries were to occur during the case suspension period. And that we believe that ejecting the case from case suspension is not the best solution to the matter. And so, we would propose that motions to compel discovery or maybe -- well, they should be able to be adjudicated in some fashion by an administrative judge without losing the benefits of the case suspension both in terms of a long time for the parties to develop the record and also to not be burdening the administrative judges given their production requirements.

Both Passman & Kaplan and MWELA,

support the highly successful mediation appeal program, MAP program and believe it should be codified in the regulations. And that case suspension would be a place to do so with an extra section providing that if a case is referred to mediation appeals, program mediation, that a indefinite case suspension would be placed unless the case were to settle or the case would otherwise be referred back to the administrative judge by the mediation appeals program staff.

Like most of the other commenter's, both Passman & Kaplan and MWELA, support codifying the dismissal without prejudice precedent into the Board's regulations. Now, the second juncture where issues in terms of the discovery come into play at the very end of the discovery period in conjunction with the pre-hearing process. It's been our observation that many administrative judges have abused their prerogatives in terms of schedule -- upsetting scheduling and briefing schedules for pre-hearing and pre-hearing submissions. Sometimes, so that the deadlines

for the parties to submit pre-hearing submissions occur even before the deadline for the parties to submit written discovery responses.

This is highly prejudicial especially to appellants who, given the information to symmetries in the adverse action litigation process with the agencies possessing most of the information they're in a better position to attempt to put together a pre-hearing statement without having discovery responses in hand from the opposite party. Because of these particular abuses we believe that the only solution would be to restrict the administrative judges from setting the pre-hearing before the ordinary completion of discovery. In particular, with setting specific numeric limits for how early the pre-hearing submissions deadline and the pre-hearing conference can be scheduled to allow the full time to complete discovery.

Put simply, both Passman & Kaplan and MWELA, believe that the parties should have the sufficient time to complete discovery

before pre-hearing and that discovery should take precedence over any specific pre-hearing deadline.

We also are known to the present regulations, the administrative judges have the ability to set deadlines for pre-hearing hearing and there are certain very onerous regulations in terms of the pleading requirements for the parties to seek adjustment of those deadlines once set. We believe that the superior practice in this would be to codify that to the extent practicable, that the administrative judge confer with the parties first about possible scheduling dates for pre-hearing and hearing before those dates are specified. So, that to try to minimize the burden on either party in terms of the scheduling being set.

Now, at the hearing process itself both MWELA and Passman & Kaplan oppose closing hearings except to the extent of that a hearing might have some -- might actually contain literally classified information or something equivalent. We believe that it is

as important public policy function for these hearings to be kept open. And so, we would object to any -- to regulatory changes that would make a closure of these hearings more feasible.

In addition, we support, as noted before, provisions for allowing free e-transcripts if available to the parties after the hearing for solely review and a possible appeal if need be.

Looking at the appellate stage both Passman & Kaplan and MWELA oppose the changes to 1201.114 in terms of setting page limits for appeals. We believe that would be unduly burdening. Appellants especially in cases where there might be multiple claims, extensive affirmed defenses, or consolidated claims or the like.

And changing gears for a second to look at the regulations for the 1209.2 dealing with whistleblowing issues. We oppose for several aspects some of the proposed changes to this particular regulation, for several different reasons. For instance, the very

important issue of not shortcutting the ability of the individuals to seek relief from the Office of Special Counsel in form of their support for a stay and proposed adverse actions something which the new -- which the current Special Counsel has been a lot more active as the case law -- as reported decisions have indicated. We are concerned about the jurisdictional effects of this especially because under the Whistleblower Protection Act there is -- it borders jurisdiction not to just adjudicate actual implemental adverse action but also to deal with threats. And so, this would create some jurisdictional problems.

And finally, because again a lot of the appellants appearing before the Board are pro se, we would just generally object to any factor that would increase the difficulty on especially a pro se appellant being able to examine their strategic options and being able to possibly enforce their rights.

Both Passman & Kaplan and MWELA would like to -- would welcome any additional

questions or any requests for -- further requests for comment on proposed regulations. We'd be happy to provide our input and hopefully expertise. And we wish to thank the Board for the opportunity to provide comments on these proposed regulations.

MR. EISENMANN: Thank you, Andrew. Russell.

MR. CHRISTENSEN: My name is Russell Christensen. I'm here representing the Office of Chief Counsel for the Federal Aviation Administration. And like Mr. Perlmutter said and I think everybody else, we do appreciate this opportunity to participate. We commend the Board for undertaking this effort. As an agency that deals with a lot of rulemaking we understand how cumbersome it can be and even tedious and we encourage you in your efforts to assist in this. We submitted written responses back in November. We didn't have many comments on the proposed rule changes as we went over them. I would just touch on a few of them today and then to comment on some of what we have heard this far from my

colleagues, I guess, on the other side of the bar in these cases.

Somebody had mentioned serving documents, service of process. One of our comments was to take note that currently the mail and executive agencies here in Washington, D.C. is still being radiated, at least mail that's served in the U.S. Mail. So, the five day presumption often does not work for executive agencies here in the Washington, D.C. area. It's not uncommon to receive documents via U.S. mail seven, eight, nine days if there's a weekend or holiday in there because the mail is first irradiated. So, we believe there should be a provision as long -- and that's not a decision that I think any one agency makes as to how long the mail will continue to be irradiated. So as long as it is, there is there should be a provision in the rules more akin to what I believe a colleague from Tully Rinckey said actual receipt of the document, kind of like what the EEOC does.

And so, there should a presumption,

we believe, or something in the rules to allow for time limits to begin when a party receives the document and we believe the five days does not work particularly -- well, at least in the Washington, D.C. area. And we would suggest that you reconsider those or including something in the provision to allow for more than five days to when you have those extraordinary circumstances that are beyond the control of the agencies.

Next, we at the agency, the FAA, had submitted a response regarding producing tabbed appeal files or the agency files, what we call tabbed appeal files. It is often the case that the timeline for producing them is not tolled in cases where's there's an issue of jurisdiction or timeliness. So, when there's a chance that the case is not going to go forward anyway the agency still has the burden or the obligation to produce an appeal file. We believe and we would recommend that the rules toll the timing for preparing an agency tabbed appeal file where there has been an issue identified related to timeliness or

jurisdiction. Because if the case is not going to go forward then there's no reason to produce and deal with an agency tabbed appeal file.

We do agree with the rule that no longer requires the initial disclosures which track the federal rules. We completely agree with the informal working group's suggestion in their draft; comments that the agency tabbed appeal file largely serves that same purpose as is found in the federal rules with the initial disclosures. So, we don't have any problem with that.

Getting back to the tabbed appeal file and also picking up on some of the other comments I don't know -- well, the agency would not go so far as to say the judges are abusing the deadlines but we have been affected similarly by overlapping deadlines. Mr. Perlmutter identified what is kind of common where we have a deadline for participating or producing a pre-hearing report and participating in a pre-hearing conference when discovery hasn't closed yet.

We believe the regulation should set forth a way that those deadlines don't overlap. That one process can finish before we move into the next one. We believe that makes it easier. It'll make it easier for the parties. The process will, I think, move more efficiently. It'll save the parties the burden of having to notify the judge that we have these overlapping deadlines and we need to get those squared away. So, we could finish one part of the case before we move into the other. Even if those timelines are short but the overlapping deadlines has been a recurring issue. And again, the agency is not saying that there's some abuse of process here but just that we understand the commission or the Board's commitment to processing these cases quickly and we support that and we want to work with them.

And we don't think that there is any prejudice to either party if the deadline for producing an agency appeal file is tolled pending a decision on jurisdiction or timeliness issues or waiting to do a

pre-hearing conference or submit pre-hearing submissions until the close of discovery. On the latter point, we think both parties are benefitted by that practice. So, one of the other comments that the agency would submit and recommend that the informal working group consider are limits on the numbers on the discovery requests. Currently, the Board has a limit of 25 interrogatories and 10 depositions. We believe if you do a survey of the various local rules in the federal district courts throughout the country, it's not uncommon to see there also be limits on requests for production and even requests to admit in some jurisdictions. We believe the Board should look at that and carefully consider whether those are necessary. The agency contends that they are. We've seen it in our practice, extraordinary numbers of requests to produce documents and even an extraordinarily high number of requests for admissions in cases. One we had over 900 requests to admit in a single case.

We believe that it would be well

advised for the informal working group to consider additional limitations on discovery requests that would fall on both parties with, of course, keeping in the option now with under special circumstances a judge could allow deviations from the limits. That's in the rules now. We believe it should be extended to request for production of documents or requests for admissions.

The FAA concurs with the Board's -- or excuse me -- the informal working group's suggestion that there be a 25- page limit on PFR's, petitions for review. I'm sorry. We believe that would help practice. It would help to focus arguments. And narrow the appeals that we review and we receive and we have to respond to. Twenty-five pages are not uncommon in many courts of appeals on state and federal level. So, a page limit, we believe is a good addition to the practice and should be strongly considered.

I just want to quickly look over the notes. The FAA also agrees with the comments

that have been made here regarding the granting of the joint request to suspend the case. If the parties are in agreement that they need more time to work out a case or to consider other issues we believe that the regulations should incorporate or require a judge to grant a joint request for a suspension of processing of a case in order for the parties to continue.

And then, finally, going a little bit out of order with the regulations. One of the proposed regulations, changes to the regulations was to require an agency to prove that an appellant is intentionally avoiding service of process of document. And we believe that raises the bar too high unnecessarily. Appellants or employees are supposed to keep the agency abreast of their current mailing address and we believe a better regulation or a scheme to follow would be to track what the National Transportation Safety Board does with their judicatory practice. And under the NTSB's rules of practice, airmen, certificate holders, are

required to keep the FAA up to date with their current address and the agency may send a document including an order of suspension or revocation to the person's address of record. And if it's not returned to the agency as undeliverable, change of address, or some other reasons there's a presumption there that service was effective. We believe that for the MSPB and the regulations that apply to service of process of documents that it should track the NTSB rules that the agency can serve a document, send a document to the address of record for the person. And as long as it's not returned then service will be assumed to have been effective.

Again, the FAA appreciates the opportunity to have participated here this morning. We look forward to future invitations if they are extended and we commend the group for doing this. Thank you for your time.

MR. EISENMANN: Thanks, Russell.

MS. KESSMEIER: Good morning. On behalf of the General Counsel for the

Department of the Navy, thank you for the opportunity to comment. The Department of the Navy is somewhat unique in terms of federal agency representatives. We're not -- our representative pool in front of the Merit Systems Protection Board comprises not only of attorneys but human resource specialists. So, a lot of the comments that you will see that came from the Department of the Navy are really geared towards clarification of the regulations so, that a non-attorney practitioner can understand what the Board is requiring of the parties in the process. I don't intend to belabor the comments that we've already submitted in writing. Many of our comments overlap the comments that you've heard earlier this morning.

One area that I have not heard a comment on that I would like to reiterate the Navy's position has to do with the production of federal agency witnesses. We received a lot of feedback from our practitioners with regard to concerns of having to obtain participation of non-Navy agency

representatives in the process. Currently, the Board's regulations allow for the issuance of a subpoena for the participation of a witness if necessary. And we believe that that should remain in place.

There appears to be a presumption that if you work for one federal agency you necessarily would be easily able to obtain the participation of another federal employee in the process and the Navy disagrees with that perception. And it's just not that difficult or it's not that easy for one federal agency to understand the inner-workings of another federal agency especially if you're looking, for example, the Department of Navy is part of the Department of Defense. It's a very, very large federal agency compared to a much smaller agency comprised of 200 people. If you're asking a very small agency to obtain a Department of Defense representative, that's going to be very difficult for them to ascertain where to go in and ask for that witness to participate, especially where it is not the agency that is asking to produce that

witness. So, we would ask that you consider that as you're looking at your regulations.

Again, we appreciate the Board's process as a very efficient process and we appreciate that the regulations provide for an efficient process. We would suggest that while you may want to consider extending time frames that those time frames be extended on a reasonable basis. There's been some discussion today of where we are in the EEOC process. Our take on the EEOC process is it is not an efficient process neither for the agency or the complainant in that it takes a very long time for a decision to be rendered. And we would suggest that the Board keep an eye towards maintaining the efficient process that you have as you promulgate regulations.

Again, the Department of Navy is available to answer any questions or provide further comment on the feedback that we've provided. And we thank you for the opportunity.

MR. EISENMANN: Okay. Thank you.
On behalf of the Chairman and the MSPB staff,

I want to thank you for taking time out of your schedules today to provide us your insights on our adjudicatory regulations. And that's it. Thank you. We're off the record.

(Whereupon, at 10:56 a.m., the PROCEEDINGS were adjourned.)

* * * * *

CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Stephen K. Garland, notary public in and for the District of Columbia, do hereby certify that the forgoing PROCEEDING was duly recorded and thereafter reduced to print under my direction; that the witnesses were sworn to tell the truth under penalty of perjury; that said transcript is a true record of the testimony given by witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was called; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

(Signature and Seal on File)

**Notary Public, in and for the District of
Columbia**

My Commission Expires: May 31, 2014