AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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William D. Spencer
Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, N.W.
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Re: Comments by AFGE Concerning Proposed Changes to MSPB Practices and Procedures, 78 Fed. Reg. 67076 (November 8, 2013).

Dear Mr. Spencer:

The American Federation of Government Employees, AFL-CIO ("AFGE") hereby submits its comments to the changes proposed by the U.S. Merit Systems Protection Board ("Board") to the Board's adjudicatory regulations. The proposed changes contain four different options that the Board's working group put forward to address nuances in the Board's jurisdictional requirements. AFGE will discuss each of these options in turn. Changes suggested by AFGE are shown in bold.

AFGE believes that, for the most part, each option contains some useful changes. AFGE does not, however, support Option C under which the Board would grant itself the power to decide appeals on summary judgment and without a hearing. The proposed regulatory creation of summary judgment authority is inconsistent with the plain language of the Civil Service Reform Act. It would also impede meaningful access to the Board for *pro se* litigants, who may be unfamiliar and/or unskilled at discovery and motion practice. Similarly, while Option A would provide needed flexibility, Option A is hampered by a lack of clarity.

I. Option A

5 C.F.R. §1201.4 General definitions.

AFGE does not object, in general, to the relocation of the definitions from §1201.56 to the General definitions section in §1201.4. Assuming that the definitions will apply throughout the rules, not exclusively to §1201.56 as stated in the current rules, this portion of the proposed

regulation is a reasonable choice to make the rules easier to digest. Having definitions spread sporadically throughout the rules is not an effective way to communicate this information.

However, the ordering of §1201.4 could be improved. The Board appears to have chosen to place the definitions in this section in chronological order. While it is understandable that the definitions section is ordered chronologically, from when the definition was added to the section, this approach makes it difficult to find a specific definition without searching through the entire section. A simple way to alleviate this problem would be to reorganize §1201.4 into alphabetical order. This change would also require the Board to change any reference to §1201.4 throughout the rules to the new citation.

5 C.F.R. §1201.56 Burden and degree of proof; affirmative defenses.

AFGE does not support this proposed regulation. The proposed changes to this section are unlikely to assist a *pro se* litigant in understanding the rule's requirements. Compressing the burden of proof section into one lengthy paragraph with multiple elements, requirements, and standards does not make the rules easier to digest. By including only bare bones information, this proposed change would also require a *pro se* litigant to continue searching throughout the rules and Board precedent to find the burden of proof for their specific appeal. The readability of this section could be improved by breaking the paragraph down into multiple segments as demonstrated in Option B and in the current rules.

The provision dictating that the administrative judge will inform the parties of the proof requirement for each defense is in recognition of long established practice and AFGE supports this proposal.

II. Option B

5 C.F.R. §1201.4 General definitions.

As discussed in AFGE's comments to Option A, the relocation of the definitions is a generally beneficial change, though the definitions should be listed in alphabetical order.

5 C.F.R. §1201.56 Burden and degree of proof.

AFGE suggests that subsection (a) of this proposal be adjusted to recognize that this section would apply to all appeals before the Board, except those listed in subsection (a). In addition, a cross reference should be included in §1201.56(a) so that a reader would know where to look for information regarding these three types of appeals. Therefore, AFGE recommends that this proposal should be adjusted to read as follows:

> (a) Applicability: **This section applies to all appeals before the Board, except** the following types of appeals **(the burden and degree of proof for these types of appeals are discussed in §1201.57)**:

Subsections (b) and (c) are similar to the current rules; however the proposal for subsection (b)(1) again attempts to compress information into a single unwieldy paragraph. AFGE therefore recommends that subsection (b)(1) be adjusted to read as follows:

> **(1) *Agency*: under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (c) of this section, the agency action must be sustained if:**
>
> **i. It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and it is supported by substantial evidence (as defined in §1202.4(p) of this part); or**
>
> **ii. It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence (as defined in §1201.4(q) of this part).**

Whether through intentional omission or by error, the title to this subsection does not include "affirmative defenses". Because subsection (c) discusses affirmative defenses, the title should be edited to read:

> 5 C.F.R. §1201.56 Burden and degree of proof; **affirmative defenses**
>
> 5 C.F.R. §1201.57 Establishing jurisdiction in appeals not covered by §1201.56; burden of proof; scope of review.

Placing the requirements of IRA appeals, VEOA appeals and USERRA discrimination appeals into a new section, §1201.57, is another logical step toward making the rules easier to understand. These three classes of appeals contain their own requirements and separating them into their own sections is a reasonable choice to aid a *pro se* litigant in finding the standards and burdens for their specific appeal. As noted above, a cross reference should be made in §1201.56(a) to §1201.57 to make the rules easier to follow.

III. Option C

AFGE opposes Option C. The creation of §1201.5 imposes procedural steps before an appellant can seek redress before the Board. Instead of requiring an appellant to satisfy the requirements of the authorizing law, rule, or regulation, this proposed rule requires the appellant to establish potentially additional elements. While phrased as merely requiring the appellant to adhere to pre-established principles, this section has the potential to place additional burdens on an already extensive and complicated process. Requiring the appellant to clear these additional hurdles places a great deal of effort on the appellant's representatives, and is an even steeper hurdle for unrepresented appellants.

The summary and analysis section for Option C states that §1201.5 would lead to more settlement agreements. Whether it would lead to more settlement agreements is a matter of debate; but what can be certain is that any new settlement agreements would be favorable to the agency and not to the appellant. An appellant, especially a *pro se* appellant, may be forced to settle a legitimate claim for fear of dismissal for failing to adhere to the requirements of §1201.5. More likely, this rule would lead to the Agency declining to engage in settlement discussion;

instead, waiting for a summary dismissal. This does not support the Board in administrating the laws, rules, and regulation it is tasked with enforcing.

AFGE opposes this proposed rule in its entirety.

5 C.F.R. §1201.24 Content of an appeal; right to hearing.

An appellant's right to a hearing is clearly established in 5 U.S.C. §7701(a)(1). While the Board may have legitimate reasons for seeking summary judgment authority, the Board lacks the power to rewrite the statute. This proposed regulation would create a regulatory summary judgment motion, which was specifically rejected by Congress when it enacted 5 U.S.C. §7701(a)(1).

As discussed by the Federal Circuit in *Crispin v. Department of Commerce*, 732 F.2d 919 (Fed. Cir. 1984), Congress was aware of the possibility of including a summary judgment when it drafted 5 U.S.C. §7701. The Senate Bill contained a provision to allow for a summary judgment without an evidentiary hearing, but the House Bill did not. *See id at ¶ 19-21.* Ultimately, the House bill was enacted. Congress's deliberate choice to enact the House version of the bill, without summary judgment authority, demonstrates the clear intent of Congress to afford a litigant the right to a hearing before an administrative judge. This proposed regulation would thus directly contradict the Board's enabling Act, and could potentially lead to further restrictions on an appellant's right to a hearing. In addition, this provision would add to the complexities of an appeal for *pro se* litigants who are often unfamiliar with discovery and motion practices. AFGE is firmly opposed to this proposed regulation.

5 C.F.R. §1201.56 Burden and degree of proof; affirmative defenses.

Once again, this proposal attempts to reduce the subsections of §1201.56 into a long and confusing paragraph. The organizational structure in Option B is a clearer and more effective way of conveying this information. AFGE recommends the structure in Option B, and that the structure of §1201.56 in Option C should be adjusted to reflect the clearer organization.

IV. Option D

This option does not include any substantive changes besides those already addressed in Option C. Because of its concerns noted in Option C, AFGE believes that this section's election not to include the proposed changes to §1201.24(d) is the more appropriate proposal.

AFGE incorporates its comments above discussing the proposed changes to §1201.3, the new §1201.5, and §1201.56. In addition, AFGE again notes its opposition to the proposed changes in §1201.3 and the new §1201.5.

V. Conclusion

AFGE thanks the Board for allowing it the opportunity to submit these comments. AFGE believes that the Board's proposed regulations would benefit from incorporation of the

changes suggested above. Finally, AFGE notes that by submitting these comments, AFGE does not waive any rights or challenges that it may have, now or in the future, concerning any aspect of the Board's proposed regulations.

Sincerely,

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