

BLB



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05 May 2014

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William D. Spencer
Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, D.C. 20419

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2014 MAY -5 PM 6:40
CLERK OF THE BOARD

**Re: Comments Concerning the Board's Proposed Rule
Regarding Jurisdiction**

* * *

Proposed Rule 5 C.F.R. § 1201.56(d)
77 FR 62350

Dear Clerk of the Board:

The undersigned is the principal advisor for BLB Consulting, Inc., for over 25 years, under which we exclusively represent federal employees in administrative complaints, appeals and claims.

BLB Consulting supports a federal register interpretation of proposed rule at § 1201.56(d), that requires the Administrative Judge (AJ) to inform the parties of the proof required as to the issue of jurisdiction, the timeliness of the appeal, and affirmative defenses. 77 FR 62350. *See Burgess v. Merit Systems Protections Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue).

In this regard, the federal agency is generally an interested and opposing party in an employee Board appeal, under which it does not have authority nor the legal obligation to determine the burdens of proof on a jurisdictional dispute, as [an] interested party [to] the outcome of the case; unlike the AJ, who is not an interested or an opposing party to the matter. This avoids the *appearance*, if not actual, 'conflict of interest' in the case of an AJ relying on the agency to issue a proper *Burgess* notice in a motion to dismiss or

otherwise.

Accordingly, based on the Board's proposed rule on jurisdiction, explicit information concerning what is required to establish appellant burden of proof in an appeal, should come exclusively from the AJ. Any Board decisions that allow, *e.g.*, an agency's motion to dismiss to inform the appellant of what he or she has to allege to establish his/her burden of proof should be overruled, like *Bradley v. U.S. Postal Service*, 96 M.S.P.R. 539, ¶ 10 (2004); *Gonzalez v. U.S. Postal Service*, 77 M.S.P.R. 382, 386 (1998). Similarly, the AJ should be required to issue a 1201.56(d) notice *prior* to the issuance of an initial decision (ID), overruling cases like *Scott v. Department of Justice*, 105 M.S.P.R. 482, ¶ 6 (2007); thus, affording the appellant an opportunity to develop (through discovery or otherwise) and meet his/her jurisdictional burden prior to an appeal.

Respectfully submitted,

BLB CONSULTING, INC.

Brook L. Beesley

cc: File