

The U.S. Department of Homeland Security (DHS) respectfully submits the following comments to the Merit Systems Protection Board's Federal Register Notice regarding jurisdiction.

Under § 1201.4(s) of Options A and B, "nonfrivolous allegation" is defined as:

an assertion that, if proven, could establish the matter at issue. When a fact asserted is within the personal knowledge of the individual making the allegation and the allegation is credible on its face, in general the allegation will be considered nonfrivolous. In general, an allegation will not be considered nonfrivolous when: The fact asserted is not within the personal knowledge of the individual making the allegation and is unsupported by evidence in the record; the assertion is unsupported and contradicted by evidence in the record; or the assertion is immaterial to the legal issues in the appeal.

This definition should be rewritten to make it clearer and more user friendly, particularly for pro se appellants. The Options working group indicates that more than half of the appeals filed in the Board's regional and field offices are filed by pro se appellants who are often overwhelmed by lengthy formal written explanations. The new definition of "nonfrivolous allegation" will likely be confusing to a pro se appellant.

The definition raises a number of questions. For example, what does "within the personal knowledge of the individual" mean, and how does the appellant demonstrate that the allegation is within his/her personal knowledge. Also, what is the standard for determining that an allegation is "credible on its face"? Substantial evidence and a preponderance of evidence are determined based on a "reasonable person" standard. No standard is identified in this definition.

Further, the explanations in the definition contain the qualifier "in general," but there is no information on what would merit an exception. Finally, the definition provides in one sentence that "an allegation will not be considered nonfrivolous when: . . ." The sentence should be rewritten to avoid the use of multiple negatives to limit any confusion for the reader.