

Mr. William Spencer,

My name is Jim Fox. I am a supervisor with the U.S. Department of the Treasury, Bureau of the Fiscal Service, Office of Administrative Services, Human Resources Operations Division, Franchise Labor and Employee Relations Branch.

After reviewing the four options as proposed by the MSPB employees, I have just a few comments and preferences. Certainly under Option A and B, it makes perfect sense to provide the current definitions as provided under 5 CFR 1201.56, Burdens of Proof, for Substantial and Preponderance, under 5 CFR 1201.4 along with the existing definitions. I however support a modified Option D, incorporating the definitions under Option A and B. I have summarized my comments below

In addition, under Option B, considering that many appellants represent themselves and to further clarify for attorneys and other representatives that are not as familiar with the Board proceedings, the proposed regulation change has the administrative judge inform the parties of the requirements for the burden of proof of the matter at issue. The MSPB employee summary analysis of this proposed regulation explains this as simply codifying which has typically been common practice. I support this effort.

Under Option C, it furthers the advancement of jurisdictional determinations, by also providing a specific definition of "Non-frivolous allegation" and also further defining under 5 CFR 1201.56 (b) Matters that must be proven by a preponderance of the evidence. However, I do not find with the proposed regulation changes matters that must be proven by substantial evidence (performance cases under 432). Is there some reason why this issue is absent under this regulatory change? I suggest that substantial evidence be included under Burden and Degree of Proof, Scope of Review 1201.56.

I do support further defining under 5 CFR 1201.56, what matters are limited under this part for IRA, VEOA and USSERA appeals.

Furthermore, under Option C, under 5 CFR 1201.5 (c) Jurisdictional requirements relating to the merits of an appeal, (4) and (5), address appeals challenging the termination of probationary employment under 5 CFR 315.806 (b) under marital status and political affiliation and 5 CFR.315.806 (c) allegation that the action was taken for pre-appointment reasons and the agency did not comply with the procedural requirements of 315.805. However, all of this is in regards to the competitive service under 315. However, I cannot find any regulatory guidance applying to trial period employees under the Excepted Service. I would recommend some guidance from OPM and MSPB on this issue of jurisdiction. The regulations are silent in regards to this issue.

In addition, absent Congressional guidance through statute or from OPM regulations, defining jurisdictional determinants will provide a clearer avenue for agencies and appellants to determine whether to advance to the appeal process. It certainly appears to aid an agency's effort to argue jurisdiction and provide definitive measure in which to do so. However, in light of this particular issue, I prefer incorporating this under Option D.

Under Option D, I especially support the regulation change 1201.24 (d) where it stipulates the appellant is entitled to a full evidentiary hearing only when such a hearing is necessary to resolve genuine issues of material fact as to matters on which the appellant has the burden of proof. This regulatory change would require administrative judges to not only be expected to determine whether the appellant has raised a genuine issue of material fact, but also to explore whether the appellant can articulate a genuine issue of material fact that might require an evidentiary hearing. If the appellant could articulate a genuine issue of material fact, the judge would schedule an evidentiary hearing. If the appellant were unable to articulate such an issue, the judge would issue an initial decision based on the existing record. This would provide a much needed change to the already crowded docket and provide agencies a more efficient means to address jurisdictional matters before the board. It would provide a greater means of utilizing the resources of agencies when addressing these issues and certainly expedite the process and providing greater cost savings to agencies, including the MSPB.

I appreciate the chance to provide feedback to these proposed regulatory changes. I equally appreciate your time in considering my comments and suggestions. Thanks.

Jim Fox
Supervisory
Human Resources Specialist