



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Office of the
General Counsel

MAY 4 2014

Honorable Susan Tsui Grundmann
Chairman, U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Dear Chairman Grundmann:

Thank you for the opportunity to comment on the Merit Systems Protection Board's April 3, 2014 notice of proposed rulemaking, published at 79 Fed. Reg. 18658, to amend the Board's rules of practice and procedure governing how jurisdiction is established over appeals.

The proposed rule reflects the Board's careful consideration of stakeholders' comments on the Board's prior request for information (RFI), published at 78 Fed. Reg. 67076 (Nov. 8, 2013). Thank you for considering and, in part, adopting OPM's December 9, 2013 comments on the RFI. OPM's comments on the proposed rule follow.

OPM generally agrees with the Board's approach of following option "B" of its prior RFI: moving the definitions of standards of proof to the "general definitions" section of the regulations; setting forth, in section 1201.56, the standards of proof that apply to typical cases, such as adverse action and retirement cases; and setting forth, in a new section 1201.57, the standards of proof that apply to specialized categories of cases, namely, individual right of action appeals under the Whistleblower Protection Act, requests for corrective action under the Veterans' Employment Opportunities Act and the Uniformed Services Employment and Reemployment Rights Act, and appeals of denials of restoration. This approach adds significant clarity to the Board's rules of practice and procedure.

OPM has no objection to the Board's decision not to use this rulemaking to propose summary judgment procedures (option "C" of Board's November 8, 2013 RFI). However, OPM urges the Board to study whether additional proposed rulemaking is needed in this area.

OPM does not object to the Board's proposal to add, to section 1201.56(b)(2)(ii), a statement that in appeals related to overpayments of benefits, OPM has the burden of proving the existence of the overpayment by preponderant evidence. This is consistent with OPM's own regulations in 5 C.F.R. §§ 831.1407 and 845.307.

OPM's remaining comments relate to proposed section 1201.57.

Substantive comments:

- In its December 9, 2013 comments, OPM cautioned that "omission of precise jurisdictional rules may result in inconsistent practice." Consistent with our prior

comment, we recommend revising section 1201.57 to state with greater specificity the standards of proof applicable to each of the types of cases covered by the section.

- Paragraph (e) states that “[t]he administrative judge will provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal.” OPM notes that in practice, the Board’s administrative judges typically provide the parties explicit information on what is required to establish an appealable jurisdictional issue. However this notice and a jurisdictional show-cause order may be issued well after the filing and discovery deadlines prescribed in the acknowledgement order have begun to run. We recommend that the paragraph be revised to require the jurisdictional notice to be issued as soon as practicable, with an opportunity for the parties to request an extension of filing and discovery deadlines pending the resolution of any unresolved jurisdictional question. This would allow the administrative judge to resolve threshold jurisdictional questions without an undue, premature commitment of the parties’ time and resources to merits questions.
- In its December 9, 2013 comments, OPM noted with approval that options “C” and “D” of the Board’s RFI addressed the additional jurisdictional pleading requirements that may be a factor when matters are made appealable to the Board by OPM regulation rather than by statute, *e.g.*, in appeals of probationary terminations and appeals of employment practices. The Board’s proposed adoption of option “B” means that the proposed rule does not address these matters. OPM requests that the Board study whether additional proposed rulemaking is needed in this area.

Technical comments:

- We recommend reversing the order of paragraph (c), which addresses the elements that an appellant must non-frivolously allege in order to make an initial jurisdictional showing, and paragraph (b), which addresses the preponderant evidence standard of proof required for the appellant to ultimately prevail on the merits. This reordering will reinforce the rule that the Board cannot “skip over the jurisdictional question in order to reach the merits” of a case. *Yunus v. Dep’t of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The regulations will also be easier to follow since their internal organization will follow the order of decision in a Board appeal.
- The meaning of the text in paragraph (c), stating that the paragraph (or some part of it) applies “[e]xcept for matters described in paragraphs (b)(1) and (3) of this section,” is ambiguous. Please revise the paragraph for clarity.

Thank you again for the opportunity to comment on the Board’s proposed rule.

Sincerely,



Kamala Vasagam
General Counsel