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The Special Counsel

December 4, 2013

Via E-mail

Mr. William D. Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Re: Solicitation of Public Comments Concerning Options for Proposed Amendments to MSPB Rules of Practice and Procedure 78 Fed. Reg. 67076 (Nov. 8, 2013)

Dear Mr. Spencer:

The U.S. Office of Special Counsel (OSC) submits the following comments concerning the Board's proposed regulations commencing at page 67076 of volume 78 of the Federal Register, dated November 8, 2013. The Board invited public comment concerning options it is considering to revise its regulations on establishing jurisdiction in certain appeals, including Individual Right of Action (IRA) appeals. My office's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing and protected activity. OSC therefore has a particular interest ensuring that federal employees who challenge alleged prohibited personnel practices in IRA appeals enjoy the full protections of law.

Like the Board, OSC has a strong desire to ensure that IRA appellants have a fair opportunity to present their cases to the Board. We note that many appellants represent themselves *pro se* in Board appeals, as they do in OSC complaints. These *pro se* appellants are often confused about what they need to do to establish Board jurisdiction over their claims. We think that the proposed MSPB Jurisdictional Matrix is an exceptionally useful aid for sorting through the jurisdictional elements for each kind of claim that may be litigated before the Board. We therefore recommend that the Board continue to maintain the Matrix on its website, modified if necessary to reflect the regulatory option selected.[1]

[1] We note two modifications that may need to be addressed with regard to IRA appeals: (1) under "Claim Processing Rules," there is no explicit mention of the right to file with the MSPB after 120 days without a decision from OSC; (2) under numbers 2 and 3 of "Merit Issues," there is mention solely of protected "disclosure(s)," even though the Whistleblower Protection Enhancement Act of 2012 permits IRA appeals for other protected activity under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), (D).

We note from our own experience that retaliation cases are fact intensive, and that establishing the core elements of such cases – knowledge and the reasons for taking the personnel action – is difficult, particularly at the pleading stage. We therefore urge that, under any option, the Board continue to construe the allegations of IRA appellants broadly to find that the Board at least has jurisdiction to adjudicate the merits of the appeal. Given the challenges we encounter in our own retaliation investigations, we believe it is unreasonable to expect IRA appellants to be able to prove their claims by preponderant evidence prior to taking discovery. We also are aware that the Board, like OSC, is constrained by limited resources and a growing caseload. Therefore, like all government agencies, the Board must act prudently to avoid procedures that are unnecessary.

The question presented in the four options is what quantity of evidence should an appellant be required to present for the Board to accept jurisdiction over an appeal, to hold an evidentiary hearing, and to reach a final decision on the merits. We discuss below the pros and cons of each option, in our view, and conclude that Option C offers the best procedure to protect the interests of whistleblowers and to promote the efficiency of the service:

Option A would amend section 1201.56(b) to state that the appellant bears the burden of proof on jurisdiction, *generally* by a preponderance of the evidence, and that the administrative judge will inform the parties of the proof required in each case.

Pros:

- Constitutes the least amount of change from current practice;
- Allows *pro se* appellant to clarify legal terms, etc., through interaction with the administrative judge (AJ);
- Permits flexibility if jurisdictional requirements change through case law, statute, or regulation.

Cons:

- Creates some uncertainty at the pleading stage because an appellant must await an AJ's instructions on quantum of proof required to establish jurisdiction. This Option, however, provides appellants an opportunity to cure potential defects upon instruction by the AJ;
- Increases the burden on the AJ to be able to accurately identify potential causes of action at early stage of litigation based on *pro se* "pleadings" and to explain the various burdens of proof clearly;
- May lead to variations in Board practice if individual AJs provide different explanations of the proof required, even when they deal with same set of operative facts;

- Does not define legal terms of art such as "jurisdiction" or "affirmative defense" that a *pro se* appellant may not understand;
- Maintains current practice which requires IRA appellants to make a "nonfrivolous allegation" regarding the merits of their claim in order to establish Board jurisdiction over the claim – even though the appellant may not have the factual basis to make a "nonfrivolous allegation" at the early stage of the litigation.

Option B would similarly amend section 1201.56(b) to provide that the appellant bears the burden of proof on jurisdiction, *generally* by a preponderance of the evidence. It would add a regulation, section 1201.57, that would address how jurisdiction is established in IRA, VEOA, and USERRA appeals. Option B would also clarify the burdens of proof on merits and other issues.

Pros:

- Itemizes the various exceptions to the traditional jurisdictional burdens;
- Provides more predictable results than Option A because it does not require AJs to formulate individualized instructions on the proof required to overcome the jurisdictional hurdles in the instant appeal.

Cons:

- Is less flexible as standards evolve. If Congress amends the law, the regulation will be obsolete until an APA procedure is accomplished to update it;
- As discussed above for Option A, maintains current practice that requires IRA appellants to make a "nonfrivolous allegation" regarding the merits of their claim in order to establish Board jurisdiction over the claim – even though the appellant may not have the factual basis to make a "nonfrivolous allegation" at the early stage of the litigation;
- Does not clarify the "who" and "what" aspects of jurisdiction as clearly as Option C. Rather it introduces a new, vaguely defined concept of "standing" in IRA appeals.

Option C would amend the Board's regulations to state that all Board appeals include "who" and "what" jurisdictional elements that must be established by preponderant evidence, and identify the eight appeal types that require allegations as to specific merits issues in order to establish jurisdiction. This option would also include regulatory language stating that the MSPB is not required to hold an evidentiary hearing on matters on which the appellant bears the burden of proof when there is no genuine issue of material fact to be resolved. According to the commentary accompanying the proposed

option, the regulation contemplates that AJs would instruct appellants on the deficiencies in their request for a hearing and then allow appellants an opportunity to demonstrate that a genuine issue of material fact warrants a hearing. Associated with Option C is an MSPB Jurisdictional Matrix that lists the "who" and "what" jurisdictional elements for all appeals within the Board's appellate jurisdiction.

Pros:

- Provides a clear and well-organized jurisdictional matrix. (As discussed above, a jurisdictional matrix should be available regardless of which option is used.)
- States clearly in one regulation that there are several stages of "hurdles." The first is jurisdictional (who and what). The second is the merit-based pleadings needed to obtain an evidentiary hearing;
- Makes it easier for an IRA appellant to establish Board jurisdiction, because the appellant need only establish facts showing qualifying employment status and covered personnel action to pass the first hurdle. This Option reserves the more difficult issue of causation for the merit phase of the proceeding;
- Promotes settlement of IRA appeals by allowing the Board to take jurisdiction after the first hurdle is passed. This will permit the Board to use its ADR processes earlier to settle appeals and to accept settlement agreements into the record for enforcement;
- Follows and clarifies existing Board case law regarding when an evidentiary hearing is required. *See, e.g., Wible v. Dep't of the Army*, 2013 MSPB 87, ¶ 8 (Nov. 1, 2013);
- Establishes a regulatory framework that requires greater deference from reviewing courts than the deference given to Board case law, which may help avoid the seesawing jurisprudence that has occurred in the past with respect to appellate review of Board jurisdiction in IRA appeals.

Cons:

- Does not explain what "material fact to be resolved" means. This may end up increasing litigation costs as litigants will likely petition for review of the denial of an evidentiary hearing at the merit phase of the proceeding. New case law will develop over this issue;
- May disadvantage less sophisticated appellants who may not understand how to gather evidence to put themselves in the best posture for a hearing when there is no "material fact to be resolved." This ambiguity could be addressed by including the following language from the commentary in the regulation itself:

> In the merits hearing required by proposed section 1201.24(d), the Board's administrative judges would be expected not only 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. In cases in which an appellant has not raised a genuine issue of fact as to a matter on which he or she bears the burden of proof, judges would explain the applicable substantive law, and why the facts as known appear to indicate that the appellant cannot prevail on the merits as a matter of law. In such a setting, pro se appellants would be in a position to articulate why they believe there is a genuine issue of material fact. If they can articulate such an issue, the judge would schedule an evidentiary hearing. If they are unable to articulate such an issue, the judge would issue an initial decision based on the existing record.

Option D is the same as Option C, except that it does not include the proposed regulatory language authorizing an appeal to be decided when there is no genuine issue of material fact to be resolved. Option D would continue the Board's current practice of affording appellants the opportunity for a hearing, if requested, in all cases within its jurisdiction.

Pros:

- Appears to maximize the opportunities for IRA appellants to get hearings, although it is unclear whether this Option overrules and negates existing Board case law regarding when an evidentiary hearing is required, including the recent *Wible* decision.

Cons:

- Could waste time and delay processing of cases if evidentiary hearings are being held when there is no genuine material fact to be resolved.

Thank you for this opportunity to comment on the proposed regulations. As noted above, we recommend that the Board adopt Option C. Based on our comparison of the characteristics of each option, Option C appears to accomplish a number of important goals: (1) it provides the broadest protections for IRA litigants by welcoming appeals where appellants can establish the "who" and the "what," jurisdictional elements that

should be known to them and easily established with preponderant evidence; (2) it eliminates other pleading requirements that have proven problematic to appellants attempting to establish IRA jurisdiction; (3) it reserves likely fact-intensive issues in which appellants may be at natural disadvantage until the appeal reaches the merit phase when appellants may use the Board's discovery process to level the playing field; (4) it conserves the Board's resources by eliminating a need for an evidentiary hearing on the merits if there are no genuine issues of material facts regarding the appellant's prima facie case.

If the Board has any questions regarding these comments, please direct them to Greg Giaccio of my staff. He can be reached at (202) 254-3634, or by e-mail at ggiaccio@osc.gov.

Respectfully,

Carolyn N. Lerner