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December 6, 2013

VIA e-mail to mspb@mspb.gov

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

Re: Response to Solicitation of Public Comments, 78 Fed.Reg. 67,076-67,077

Dear Mr. Spencer:

Passman & Kaplan, P.C. (P&K) respectfully submits the following comments in response to the Merit Systems Protection Board's Solicitation of Public Comments, published in the Federal Register on November 8, 2013, 78 Fed.Reg. 67,076-67,077. P&K appreciates the opportunity to comment on the proposals for additional modifications to the Board's procedural regulations. As a general matter, P&K has supported the Board's recent efforts of continuing reevaluation of internal processes in the interest of improving operations and the adjudication of appeals. However, we do not believe this particular proposed modification is necessary, and so we urge the Board to reject the working group's Options A, B C and D. To the contrary, based on our experience in representing appellants before the Board, P&K strongly believes that some of the working group's proposed changes are likely to prove deleterious to the federal sector appeals process.

At present, the jurisdictional standards for establishing a non-frivolous allegation are well defined in case precedent of the Board and of the U.S. Court of Appeals for the Federal Circuit—and indeed long predate the Civil Service Reform Act of 1978. *See, e.g., Stokes v. Federal Aviation Administration*, 761 F.2d 682, 685-86 (Fed.Cir. 1985) (citing *Ralston Steel Corp. v. United States*, 340 F.2d 663, 169 Ct.Cl. 119 (1965), which in turn cites cases, including Supreme Court precedent, dating back to 1906). The non-frivolous allegation standard is a well-established creature of the common law, and so P&K sees no special benefit—and instead a risk of harm—in trying to restate that common law concept in the Code of Federal Regulations. The Board already tasks its administrative judges with advising *pro se* appellants of their jurisdictional burdens and has done so for many years; that burden would not be reduced, as administrative judges would still have to provide just as much explanation to *pro se* appellants of the regulation as they have for the related precedent. Further, P&K is concerned as to whether the Board would be able to make any modification to the 'non-frivolous allegation' standard,

even by regulation, because the ‘non-frivolous allegation’ precedent is based on the binding precedent from the Federal Circuit’s review of the statutes and OPM regulations which grant the Board jurisdiction (and not of Board regulation). *See, e.g., Stokes*, 761 F.2d at 685-86 (interpreting OPM regulation granting Board jurisdiction); *see generally King v. Jerome*, 42 F.3d 1371, 1374 (Fed.Cir. 1994); *Cowan v. U.S.*, 710 F.2d 803, 805 (Fed.Cir. 1983) (Board’s limited jurisdiction is not plenary, but instead set by the contours of statute and OPM regulation). As the Board itself has long taught, “the Board is without authority to broaden *or narrow* its appellate jurisdiction through the exercise of inherent power”. *See McNeese v. Office of Personnel Management*, 61 M.S.P.R.70 (February 24, 1994)(emphasis added); *accord Kaapana v. Dept. of the Interior*, 1 M.S.P.R. 556 (February 27, 1980). Accordingly, the Board would ostensibly lack the inherent plenary authority to modify its chief reviewing courts’ gloss on the Board’s jurisdiction-conferring statutes and OPM regulations (*i.e.*, the ‘non-frivolous allegation’ standard).

P&K is most gravely concerned about the pernicious proposal in “Option C” to allow for summary judgment. P&K has long believed that summary judgment has no place in the Board’s proceedings, and we emphatically oppose any proposal to allow for or to extend summary judgment into Board proceedings. This move is a slippery slope toward ending the Board’s long-stated policy of giving appellants their fair ‘day in court’ by ensuring that cases go to a hearing whenever possible for a decision on the merits. If anything, Congress has recently clearly signaled to the Board its concerns about truncation of merits hearings on cases, even as to affirmative defenses. For example, in Section 114 of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub.L. 112-199, Congress flatly rejected the prior practice of truncating hearings to skip over the underlying evidence of retaliatory animus in whistleblower cases in favor of solely focusing on the agency’s clear and convincing evidence that they would have taken the same action notwithstanding the protected whistleblowing. A mere year after Congress’ passage of WPEA Section 114, “Option C” would undo Congress’ work and provide another window for barring whistleblower reprisal claims from reaching merits hearings. As correctly noted elsewhere,¹ other elements of the WPEA’s legislative history show that Congress considered—and then expressly rejected—giving the Board summary judgment authority at this time, both in terms of the GAO report after four years’ study on the possible need for summary judgment in WPEA Section 116 and the removal of the summary judgment provision from an earlier version of the bill. Just as summary judgment is clearly inappropriate in WPA cases, it is similarly inappropriate in the other areas of Board jurisdiction where the appellant has the burden of proof that are identified in proposed new 5 C.F.R. § 1201.5(c) in “Option C” (*e.g.*, USERRA cases, VEOA cases, cases where probationers allege discrimination on marital status or partisan political affiliation).

P&K believes that the Board has not demonstrated delay at the administrative judge level that would require a draconian fix such as creating a new summary judgment mechanism to hasten the disposition of appeals. The Board’s standard is for administrative judges to decide appeals within 120 days. *See, e.g., MSPB Handbook for Administrative Judges*, Ch. 1, § 2. According to the Board’s own performance statistics, average case processing time for initial decisions has long been well below 100 days—and actually decreased by one day between FY 2011 and FY

¹ *See, e.g.,* MSPB Watch, “Does MSPB Have the Discretion to Implement Summary Judgment Procedures Via Regulation?”, November 13, 2013, *available at* <http://mspbwatch.org/2013/11/13/does-mspb-have-the-discretion-to-implement-summary-judgment-procedures-via-regulation/>.

2012.² While those statistics will naturally be affected in FY 2013 and FY 2014 as a one-off result of the FY 2013 Sequester, the long-term statistics do not show any long-term inability to meet the Board's own 120 day deadline at the administrative judge level in most cases. Further, the impact of summary judgment under "Option C" would likely be statistically marginal; the cases where the appellant has the burden of proof that are identified in proposed new 5 C.F.R. § 1201.5(c) in "Option C" on all claims only constitute roughly 20% of the total cases decided at the administrative judge level in FY 2012—and only roughly 10% of those cases adjudicated on their merits.³ Such claims are also adjudicated as affirmative defenses in Chapter 75 and Chapter 43 cases. However, Chapter 75 and Chapter 43 cases must go to hearing in any event to decide the merits of their underlying adverse actions—and Congress has recently clearly rejected prior tactics used to sever such affirmative defenses from merits hearings, presumably on the excuse of expediency. *See, e.g.*, Pub.L. 112-199 at § 114; *see also* discussion, *supra*. Undoubtedly, some percent of summary judgment decisions will be appealed to the full Board, reversed, and remanded for hearing. Thus, the summary judgment process will only lengthen the litigation process and twice place before the administrative judge and the Board what could only have been before them once.

Summary judgment in employment law matters is daunting to get past in order to get to hearing, even for parties represented by counsel.⁴ P&K believes that, for the Board's large portion of *pro se* appellants (which, according to page 3 of the "options" report attached to the Solicitation of Public Comments, constitute "more than half of the appeals filed in the Board's regional and field offices"), presenting the legal argument and detailed factual proofs necessary to defeat summary judgment would present a nearly-insurmountable obstacle to a merits hearing. Authorizing summary judgment would massively increase the overall amount of motions practice at the trial level, which would likely severely delay proceedings. Further, P&K expects that allowing summary judgment would greatly increase the workload of the Board itself by massively increasing the number of Petitions for Review; with each grant of summary judgment potentially resulting in multiple Petitions for Review: review of the summary judgment decision and then, after remand, review on the merits after hearing. Such repetitive back-and-forth appeals practice is not at all unusual in federal-sector EEO cases. Further, in order to create a written record which is detailed enough to allow their claims to survive summary judgment, appellants will be forced to engage in far more expansive discovery and deposition practice

² *See MSPB Annual Performance Report (FY 2012) and Plan (FY 2013 (Final) – 2014 (Proposed))*, April 10, 2013, at 17 (average case processing time to initial decision between 83 and 94 days between FY 2007 and FY 2012, and specifically 93 days in FY 2012 versus 94 days in FY 2011), 43 (81% of initial appeals were processed in 120 days or less); *MSPB Performance and Accountability Report for FY 2011*, November 15, 2011, at 24 (average case processing time to initial decision between 83 and 94 days between FY 2006 and FY 2011).

³ *See MSPB Annual Report for FY 2012*, January 31, 2013, at 36-37.

⁴ *See, e.g.*, Hon. Nancy Gertner (ret.), "The Virtual Repeal of Kennedy-Johnson Administrations' Signature Achievement," *Huffington Post*, November 27, 2013, available at http://www.huffingtonpost.com/judge-nancy-gertner/the-virtual-repeal-of-kennedy-johnson-administrations-signature-achievement_b_4311759.html; *see also* Prof. Richard L. Steagall, "The Recent Explosion of Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power," 33 S. ILL. U. L.J. (Spring 2009) at 498 ("An expanded survey of employment discrimination cases from 1979 to 2006 shows that plaintiffs succeed in only 15% of the federal employment discrimination cases. Plaintiffs in other federal cases succeed in 51% of the time. This has resulted in a 37% decline in employment discrimination cases brought in federal courts from 1997–2007."), available at <http://www.law.siu.edu/journal/33spring/5%20-%20Steagall%20-%20redo.pdf>.

(which will also likely result in increased discovery motions practice). This increase in discovery and in motions practice would greatly multiply the costs of proceedings at the Board for all parties. Further, through increasing the number of Petitions for Review, summary judgment would swamp the Board and its Office of Appeals Counsel, which is already facing increasing delays in processing Petitions for Review.⁵ This situation risks creating a Petition for Review workload that might imperil one of the present Board's signature policy reforms: the issuance of substantive nonprecedential decisions to guarantee all parties a fully-reasoned and explained decision from the Board on a Petitions for Review (replacing the former non-explanatory affirmance decisions).

P&K fears that such increased difficulty and costs, and such increased barriers to *pro se* appellants, may further undercut the public perception of the Board as a fair forum for hearing whistleblower reprisal claims and other matters—a perception already challenged by the fact that less than 4% of all appeals received a merits decision favorable to the appellant in FY 2012, versus the over 71% of cases which were either dismissed or where a merits finding favored the agency.⁶ P&K would remind the Board that Congress made clear in the WPEA that it wants whistleblower reprisal claims heard on their merits, even going to the extent of stripping the Federal Circuit of its exclusive appellate jurisdiction over WPA claims due to prolonged judicial resistance to giving those merits hearings. *See, e.g.*, Pub.L. 112-199, § 108; S.Rep. 112-155 at 1-2, 6, 11-12.

P&K also notes that the creation of summary judgment mechanisms is unnecessary because the Board has a robust settlement and ADR program where deficiencies in each parties' case can be candidly discussed, often leading to settlements which voluntarily obviate the need for hearing. In such situations, appellants' cases are concluded but without appellants feeling that they have been denied their 'day in court.' For all these reasons, summary judgment would not be a helpful addition to the Board's procedural regulations.

That said, P&K does applaud the MSPB working group's attempts to try to resolve the jurisdictional issues associated with ensuring the enforceability of settlement agreements reached in all Board appeals. We, however, believe that an alternate means should be used to ensure that enforceability. Other administrative tribunals, such as the EEOC, follow the common practice of accepting federal sector settlement agreements for enforcement without requiring exhaustive jurisdictional standards to be met—even when the case settles at the EEO informal complaint/precomplaint stage, for example. *See, e.g.*, 29 C.F.R. §§ 1614.504(a), 1614.603.

⁵ *See MSPB Annual Performance Report (FY 2012) and Plan (FY 2013 (Final) – 2014 (Proposed))*, April 10, 2013, at 19.

⁶ *See MSPB Annual Report for FY 2012*, January 31, 2013, at 36, 38.

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Again, P&K appreciates the opportunity to respond to the Solicitation of Public Comments, and wishes to thank the Board for its attention and consideration.

Respectfully submitted,



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