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April 28, 2014

**VIA e-mail to [mspb@mspb.gov](mailto:mspb@mspb.gov)**

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

**Re: Response to Proposed Rule, 79 Fed.Reg. 18,658-18,661**

Dear Mr. Spencer:

Passman & Kaplan, P.C. (P&K) respectfully submits the following comments in response to the Merit Systems Protection Board's Proposed Rule, published in the Federal Register on April 3, 2014, 79 Fed.Reg. 18,658-18,661. 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. P&K is concerned that this Proposed Rule represents a damaging shift from the Board's preexisting jurisdictional precedent in the area of constructive adverse actions. Instead of merely codifying the present standards into the Code of Federal Regulations, the Proposed Rule as currently written raises jurisdictional standards without any stated rationale for doing so.

The present Proposed Rule is most similar to "Option B" from the working group report referenced in the Board's 2013 Solicitation of Public Comment.<sup>1</sup> Neither the Proposed Rule, the Solicitation of Public Comment nor the attached working group report for "Option B" state its purpose as attempting to substantively change the Board's jurisdictional standards. Instead, the analysis of the Board and the working group identify clarification and codification of the prior

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<sup>1</sup> Board's Solicitation of Public Comments, published in the Federal Register on November 8, 2013, 78 Fed.Reg. 67,076-67,077.

caselaw as the goal of the proposed revision. For the reasons stated below, P&K believes that the current Proposed Rule effects such a substantive change.

Under current caselaw from the Board's chief reviewing court (the U.S. Court of Appeals for the Federal Circuit), appellants in constructive adverse action cases<sup>2</sup> have two different jurisdictional burdens at different stages of the case: the burden of showing a nonfrivolous allegation of jurisdiction in order to receive a jurisdictional hearing, and then the burden of showing preponderant evidence of jurisdiction for the case to prevail on the merits. *See Garcia v. Dept. of Homeland Security*, 437 F.3d 1322, 1341 (Fed.Cir. 2006) (In other words, the jurisdictional determination is not identical to the merits determination."). Board precedent requires that an administrative judge hold a jurisdictional hearing in order to be able to make the credibility determinations needed to assess if jurisdiction properly attaches. *See Hurwitz v. Dept. of the Army*, 61 M.S.P.R. 436 (1994); *Timberlake v. U.S. Postal Service*, 76 M.S.P.R. 172 (1997); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325 (1994). For example, such hearings are important where issues involving credibility determinations on issues of psychological stress from duress, harassment or discrimination (e.g., a case involving a constructive removal where the appellant claims to have been involuntarily forced by severe discrimination or harassment into resigning). The current proposed 5 C.F.R. § 1201.56 omits the jurisdictional hearing procedure. As the Board has cited no rationale for deliberately eliminating the jurisdictional hearing, P&K suggests that 5 C.F.R. § 1201.56 be rephrased to avoid changing this standard inadvertently.

Further, the present Proposed Rule seemingly changes the evidentiary standard for an appellant to meet the nonfrivolous allegation standard. Under the new definition in proposed 5 C.F.R. § 1201.4(s), appellants are required to present their nonfrivolous allegations in the form of a statement under oath or penalty of perjury. Historically, the Board did not limit the form of acceptable proof so narrowly. Instead, the Board has previously held that other forms of evidence—such as corroborative documents or unsworn corroborative witness statements—are competent evidence for making a nonfrivolous allegation. *See, e.g., Turner v. U.S. Postal Service*, 90 M.S.P.R. 385 (2001) at ¶¶ 3, 8 (nonfrivolous allegation found based on submission of documents evidencing preference eligible status); *Barnes v. U.S. Postal Service*, 71 M.S.P.R. 337 (1996) (SF-50s showing promotion and demotion, by themselves, sufficient to show nonfrivolous allegation for jurisdiction); *see also Clark v. Dept. of the Interior*, 68 M.S.P.R. 53 (1995) (unsworn declarations submitted by agency give rise to questions of fact requiring jurisdictional hearing); *see generally Scott v. Office of Personnel Management*, 69 M.S.P.R. 211 (1995) ("The Board has long held that relevant hearsay evidence is admissible in Board proceedings; the fact that it is unsworn merely goes to its weight and probative value. We find that an unsworn statement by an appellant in an initial appeal file is simply one form of hearsay

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<sup>2</sup> Under Board precedent, the nonfrivolous allegation standard also applies in other adverse action cases, such as cases involving adverse actions based on last chance agreements, cases where the appellant alleges improper application of probationary employee removal procedures to a non-probationer, and cases of alleged discrimination based on marital status or partisan political reasons. *See, e.g., Green-Brown v. Dept. of Defense*, 118 M.S.P.R. 327 (2012); *Sandoval v. Dept. of Agriculture*, 115 M.S.P.R. 71 (2010); *Hamiter v. U.S. Postal Service*, 96 M.S.P.R. 511 (2004).

evidence, i.e., a non-hearing statement offered to prove the truth of the matter asserted. The fact that it is unsworn may detract from its probative value, but it should still be considered as admissible evidence. An appellant's unsworn statement might be viewed as more reliable than some other types of hearsay, because it is the appellant's own account of what transpired, not a statement that someone else told the declarant about something the non-declarant saw or heard.”). P&K is concerned that this extra formality may prove an additional jurisdictional bar, especially for *pro se* appellants. As the Board has cited no rationale for deliberately changing this element of the jurisdictional standards, P&K suggests that 5 C.F.R. § 1201.4(s) be rephrased to avoid changing this standard inadvertently.

To address the two issues noted above, P&K suggests the following revisions to the proposed rule in relevant part (noting additions and ~~deletions~~ by underlining and strikethrough, respectively):

§ 1201.4 General definitions.

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[...] (s) *Nonfrivolous allegation.* A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. An allegation generally will be considered nonfrivolous when; ~~under oath or penalty of perjury~~, an individual makes an allegation that: (1) Is more than conclusory; (2) Is plausible on its face; and (3) Is material to the legal issues in the appeal. Such allegations can be supported by evidence, including, but not limited to, statements (sworn or unsworn), corroborative witness statements (sworn or unsworn), and documentary evidence.

[...]

§ 1201.56 Burden and degree of proof.

[...]

(b) *Burden and degree of proof.*

[...]

(2) *Appellant.* (i) The appellant has the ultimate burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), with respect to: (A) Issues of jurisdiction; (B) The timeliness of the appeal; and (C) Affirmative defenses. (ii) In appeals from reconsideration decisions of the Office of Personnel Management (OPM) involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q)), entitlement to the benefits. Where OPM proves by preponderant evidence an overpayment of benefits, an appellant may prove, by substantial evidence (as defined in § 1201.4(p)), eligibility for waiver or adjustment.

[...]

(e) *nonfrivolous allegations and jurisdictional hearings.* An appellant who initiates an appeal (other than one covered by 5 C.F.R. § 1201.57) which involves one or more of the following jurisdictional issues shall be entitled to a jurisdictional hearing if the appellant makes a nonfrivolous allegation (as defined in § 1201.4(s)) with regard to the jurisdictional issue applicable to the particular type of appeal he or she has initiated: (i) constructive adverse action, (ii)

discrimination on the basis of marital status or partisan political reasons in violation of 5 C.F.R. § 315.806(b), (iii) allegations that a last chance agreement was not violated in the case of an adverse action based upon alleged violation of a last chance agreement, and (iv) allegations that that an adverse action under 5 C.F.R. §§ 315.804, 315.805 was applied to a non-probationer.

As a more general matter, 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 court’s gloss on the Board’s jurisdiction-conferring statutes and OPM regulations (*i.e.*, the ‘non-frivolous allegation’ standard).<sup>3</sup>

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<sup>3</sup> Although the specific issue of the Board’s ability to dispose of the jurisdictional hearing methodology in favor of allowing appellants to proceed to a merits hearing based on making a nonfrivolous allegation was possibly left open by the Federal Circuit in *Garcia v. Dept. of Homeland Security*, 437 F.3d 1322, 1334-35, 1340-44 (Fed.Cir. 2006) (citing *Bartels v. U.S. Postal Service*, 98 M.S.P.R. 280, 285 (2005) and *Lloyd v. Small Business Administration*, 96 M.S. P.R. 518, 526 (2004) (McPhie, concurring)), such a revision would not be consistent with the Board’s apparent purpose in the present Proposed Rule of codifying without changing the substantive jurisdictional standards. While P&K favors the Board ultimately moving to allowing appellants to proceed to a merits hearing based on making a nonfrivolous allegation, P&K believes that such a laudable change would best effectuated by a separate deliberate Board rulemaking to effectuate that change, rather than by means of inadvertent changes, in order to properly substantiate the change in the administrative rulemaking record so as to maximize its likelihood of being upheld on appeal.

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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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