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Mr. William D. Spencer
Clerk of the Merit Systems
Protection Board

By email: mspb@mspb.gov

Dear Mr. Spencer"

First, let me thank the board for taking this initiative. I have been practicing before the board for decades, and its treatment of jurisdictional issues has been extremely frustrating.

With respect, however, I do not believe the options prepared by staff solve the problem.

A. THE BOARD SHOULD FOLLOW THE FEDERAL JUDICIARY'S PRACTICE REGARDING JURISDICTIONAL ISSUES, AND DISCARD THE CONCEPT OF "NON-FRIVOLOUS" ALLEGATIONS.

The board should keep in mind that it is not the first tribunal whose jurisdiction is not plenary, and which must, in every case, assure itself that it has jurisdiction before ruling on the merits of a case. The federal judiciary has been doing this since 1789.

The solution adopted by the judiciary works far more efficiently than the process that is used by the board and which the various options would retain in one way or another. The judiciary's policy is based on the simple premise that the court always has jurisdiction to determine its own jurisdiction, and taking a case on this basis does not prejudice the board or the other party.

Anyone with a filing fee can file a suit in federal court any time he wants. The court will, however, quickly dismiss the case if the complaint does not allege facts

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which, if true, would bring the case within the court's jurisdiction. If the court itself does not immediately notice the deficiencies, the defendant will as soon as it is served and will immediately move to dismiss.

However, the burden on the plaintiff at the complaint stage is merely to make the necessary allegations. The federal courts do not have to make some sort of preliminary analysis of whether the allegations are frivolous or non-frivolous; neither should the board.

Thus, in board cases, once the necessary allegations have been made, the next steps would depend on the nature of the case. Surely, in the overwhelming majority of the cases if the jurisdictional facts are questionable, the agency will be ready, willing, and able to quickly present evidence contradicting the allegations. The judge can then give the appellant a reasonable amount of time to submit countering evidence. If the appellant fails to do so, the case is dismissed. If the appellant submits sufficient evidence, there is a hearing (after adequate opportunity for discovery), and a decision on jurisdiction. If the judge finds a lack of jurisdiction, the case is dismissed. If there is jurisdiction, the case is set for discovery and hearing on the merits (unless the ruling on jurisdiction requires judgment for the appellant on the merits).

This process eliminates the step of determining whether jurisdictional allegations are frivolous or non-frivolous. It would also relieve the board of the embarrassment of trying to define "nonfrivolous."

Dealing with jurisdiction as the judiciary does would change the use of the valuable distinction which option 3 makes between truly jurisdictional requirements, on the one hand, and claims processing rules, on the other. In order to give the board jurisdiction to determine its jurisdiction in the case, the appeal would have to (a) allege the jurisdictional facts and (b) either allege compliance with the claims processing rules or allege reasons that the failure to comply with those rules should be excused.

B. THE BOARD SHOULD NOT VIOLATE THE LAW BARRING USE OF SUMMARY JUDGMENT.

I was counsel for the petitioner in *Crispin v. Dept. of Commerce*, 732 F.2d 9169(Fed.Cir. 1984), which held that 5 U.S.C. § 7701(a)(1) denied the board the authority to grant summary judgment to agencies. If, as is suggested in option 3, the board has in practice been defying *Crispin* for years, the board should repudiate this misconduct, not codify it.

C. THE BOARD SHOULD NOT RETAIN THE ERRONEOUS DEFINITION OF "PREPONDERANCE OF THE EVIDENCE."

I am attaching a copy of the submission made to the board by AFGE Local 1923 in response to the June 2012 proposed rule. The submission points out that because the existing definition of "preponderance of the evidence" is different from the one used in all other areas of United States jurisprudence, it is misleading and confusing.

All of the options propose to retain the erroneous definition and require parties to prove their cases according to it. Unless the Local 1923 analysis is mistaken, there is no good reason for insisting on using a definition which every attorney in the country knows is dead wrong. The board should take this opportunity to conform its use of the phrase to that which is used throughout the rest of the legal system in the U.S.

D. THE BOARD SHOULD PROPERLY DEFINE THE BURDEN OF PROOF FOR THE AGENCY'S USE OF PART 351.

Except where the conditions for use of 5 U.S.C. Chapter 43 are established, an agency may not remove or demote an employee for allegedly poor performance unless it proves its case by a preponderance of the evidence. If Chapter 43 can be used, however, then even if the board finds that the preponderance of the evidence shows that the employee met all the applicable standards, it must rule against the employee as long as the agency's erroneous contention to the contrary is supported by substantial evidence.

As explained in Local 1923's July 2012 submission, Chapter 43 cannot be used unless (a) the agency has a performance appraisal system that meets all the requirement of § 4302 and (b) OPM has reviewed the system and itself has

determined that the system meets all the § 4302 requirements. However the board's practice, not mentioned in its rules, is to allow Chapter 43 to be used even when the board finds by a preponderance of the evidence that the agency's system does not meet the § 4302 standards or OPM has not determined that the system meets those requirements. This is accomplished by holding that chapter 43 can be used as long as substantial evidence supports the agency's false contention that the conditions for its use are met.

The board should remedy this by adopting a rule stating that in a Chapter 43 case the agency has the burden of proving, by a preponderance of the evidence, that the employee was covered by a performance appraisal system which meets each requirement of § 4302 and which OPM has determined meets each of those requirements.

Respectfully submitted,

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PETITION FOR RULEMAKING BY AFGE LOCAL 1923
OR, IN THE ALTERNATIVE,
COMMENTS BY AFGE LOCAL 1923 ON THE JUNE 7, 2012
PROPOSED RULE

By its June 7, 2012, Federal Register notice, "The MSPB also invites additional comments on any other aspect of MSPB's adjudicatory regulations that commenters believe should be amended."[1]

Local 1923 represents over 30,000 employees in seven agencies around the country. It, therefore, has a strong stake in the MSPB's effective operations and fair adjudications.

In general, Local 1923 supports the comments earlier submitted by the Metropolitan Washington Employment Lawyers Association, as well as those submitted by the Maryland Employment Lawyers Association in response to the June 7 notice. However, Local 1923 believes two changes should be made which have not previously been addressed. These would be amendments to 5 C.F.R. § 1201.56.

[1] 77 FR 33663.

A. A CORRECT DEFINITION OF "PREPONDERANCE OF THE EVIDENCE" SHOULD REPLACE THE CURRENT ONE.

The current definition of "preponderance of the evidence" in § 1201.56(c)(2) is not only flatly wrong, but it creates the misimpression that the trier-of-fact's responsibility is something other than determining on which side of a factual dispute the evidence preponderates:[2]

> (2) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

This language suggests that for some reason the administrative judge should be concerned with determining whether some other reasonable person would (could?) decide that the evidence is sufficient to find that a contested fact is more likely to be true than untrue.

Thus, the current definition says that the judge, faced with conflicting evidence as to whether an employee slugged his supervisor or not, asks whether a reasonable person would conclude that the employee did the deed and also asks whether a different reasonable person would conclude the employee did not do so. The definition does not suggest what the judge himself or herself should find.

[2] 5 C.F.R. § 1201.56(c).

If, alternatively, the current definition means that the judge must determine whether every reasonable person would conclude that the employee did what he or she is charged with, then the standard is actually that of beyond a reasonable doubt. That might be favorable to employees, but it is not what the statute says.

There is no reason for creating this confusion.

There can be no dispute that "preponderance of the evidence" simply means "evidence which is of greater weight or more convincing than the evidence offered in opposition to it. . . . It is that degree of proof which is more probable than not."[3] In a run-of-the-mill discipline case, the question to the board judge is whether it is more likely that the employee slugged his supervisor than that he did not slug his supervisor. The judge must directly weigh the evidence and decide on which side it preponderates.

The board should, therefore, substitute the standard law dictionary definition of "preponderance of the evidence" for the current erroneous and misleading language.

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[3] *Black's Law Dictionary* 1182 (6th Ed. 1991).

B. QUESTIONS OF WHETHER AN AGENCY HAS MET THE PREREQUISITES FOR USE OF 5 U.S.C. CHAPTER 43 MUST BE RESOLVED ON THE BASIS OF THE PREPONDERANCE OF THE EVIDENCE.

An agency cannot fire or demote an employee under § 4303 unless (a) it has a performance appraisal system which at least facially meets all the requirements of § 4302; and (b) OPM has determined that the system meets those requirements.

Regarding meeting the requirements of § 4302, *Wells v. Harris*, stated that:[4]

> Analysis of § 4303 demonstrates that it is premised on the operation of a performance appraisal system meeting all the requirements of § 4302.
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> * * *
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> . . . § 4303(a) authorizes actions under that section only against employees for failure to meet performance standards which have been established as part of § 4302 performance appraisal systems. This would mean that a removal or demotion for failure to meet standards *not* so established cannot be an action for "unacceptable performance" as defined in § 4301(3) and, therefore, is not an action authorized by § 4303(a).

Thus, the first step in any § 4303 case is production of a description of the agency's performance appraisal system; the second step is determining whether, at least

[4] 1 MSPR 208, 227, 229 (1979).

on its face, it provides for meeting each of the § 4302 requirements. Those include, for example, that the system provide for recognizing and rewarding employees whose performance so warrants,[5] and that the system provide for establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question.[6]

Distinct from the question of whether the agency's system actually meets the § 4302 requirements is whether OPM has, under § 4304, found that the system does so. Thus, for example, an agency might have an appraisal system which meets all the § 4302 requirements and which has in fact been approved by OPM under § 4304 as meeting those requirements. If the agency then makes significant changes to the appraisal system, it may not use the modified system until and unless the system has been reviewed and approved under § 4304.[7] That, of course, is a different question from whether the modified system in fact still does meet all the § 4302 requirements.

If these conditions are met, the agency prevails even if the tribunal determines that the preponderance of the

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[5] 5 U.S.C. § 4302(b)(4).
[6] 5 U.S.C. § 4302(b)(1).
[7] *Adamsen v. Dept. of Agriculture*, 563 F.3d 1326, 1331-33 (Fed.Cir. 2009); on remand, 116 MSPR 331, 342 (2011).

evidence shows that the employee met his or her performance standards, as long as the agency's erroneous claims to the contrary are supported by substantial evidence.[8] If the conditions are not met, the agency is free to fire or demote the employee under § 7512, which means proving, by a preponderance of the evidence, that the action serves the efficiency of the service.[9]

However, in *Griffin v. Dept. of Army*, the board adopted a rule with the effect that an agency can fire an employee under 5 U.S.C. § 4303 even if the trier-of-fact finds that the preponderance of the evidence establishes that the agency's appraisal system had not been approved by OPM under § 4304, as long as there is substantial evidence to support the erroneous conclusion that there was approval. The board did this by holding that the agency has the burden of proving that the conditions for using § 4303 have been met, but that the quantum of proof is substantial evidence.[10]

This holding is wrong for two reasons. First, 5 U.S.C. § 7701(c)(1)(A) creates a limited, unusual (and possibly unconstitutional) exception to the rule that public employees can be deprived of their property interest in

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[8] 5 U.S.C. § 7701(c)(1)(A).
[9] *Lovshin v. Dept. of Navy*, 767 F.2d 826, 842 (Fed. Cir. 1985)(en banc).
[10] 23 MSPR 657, 663 (1984).

continued employment only on proof of a legitimate reason for the deprivation. The exception is limited to cases brought under § 4303.

Section 7701(c)(1) was adopted as part of the Civil Service Reform Act in response to management claims that experience in performance discharge and demotion cases showed was too difficult to prove, by a preponderance of the evidence, that the adverse action would serve the efficiency of the service. Congress decided that if, but only if, certain conditions were met, the MSPB must substantially defer to the judgment of the employing agency on questions of the adequacy the employee performance. This deference as to the adequacy of the performance in a particular case cannot logically extend to deference to the judgment of the employing agency on the question of whether the agency can use § 4403 in the first place.

Until the agency proves that it is entitled to use § 4303, *i.e.,* until it proves that there has been OPM approval of the agency's current appraisal system under § 4304 and that the system meets each requirement of § 4302, the agency cannot ask that its actions be upheld on the basis of substantial evidence. Stated otherwise, the agency must prove the existence of the preconditions to use of § 4303 the way all other facts are found to exist

(absent a statutory exception), by the preponderance of the evidence.

Secondly, § 7701(c)(1) is made subject to § 7701(c)(2), and § 770a(c)(2) begins, "Notwithstanding paragraph (1)." Paragraph (2) states that an agency's decision may not be sustained if the employee "shows that the decisions was based on any prohibited personnel practice described in section 2302(b) of this title." That formulation necessarily means that anything in paragraph (2) trumps everything in paragraph (a).[11]

Firing employees under § 4303 absent an appraisal system established under § 4302 (presumably including obtaining OPM § 4304 review) is a prohibited personnel practice.[12] The decision in *Griffin* unlawfully denies the appellant her statutory right to prove, by a preponderance of the evidence, that this type of prohibited personnel practice has been committed.

The use of rule-making to correct the error in *Griffin* rather than to wait for an appropriate case in which to re-examine the issue is particularly appropriate. As the board no doubt recalls, in *Salmon v. SSA*[13] an employee in the Local 1923 bargaining unit specifically raised this

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[11] *AFGE Local 2782 v. FLRA*, 702 F.2d 1183, 1185-86 (D.C.Cir. 1983).
[12] *Wells*, 1 MSPR at 243, 248.
[13] 116 MSPR 86 (2010), *aff'd* 663 F.3rd 1378(Fed.Cir. 2012), pet. for cert. pending.

issue in her petition for review. The final board decision literally treated the argument as unworthy of notice. That perhaps reflects a board determination that the issue could better be addressed through rule-making.

CONCLUSION

The Board should, in a manner consistent with the Administrative Procedures Act, amend its rules as suggested above.

Respectfully submitted,

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Respectfully submitted,

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