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

Dear Mr. Spencer:

I oppose the April 3, 2014, rule concerning jurisdiction, because if adopted it will simply make an unjust situation worse.

I assume, first of all, that one intended effect of the amendments to 5 C.F.R. § 1201.56 is to reject appeals in constructive discharge and constructive retirement cases where the appellant fails to make sufficient allegations as defined by the regulation. I will focus on this, while hoping that other commenters will adequately addressed the new §1201.57.

Obviously, regardless of what happens with the proposed regulations, the board will cheerfully continue to hear the merits of explicit discharges based on frivolous allegations of misconduct, and supported at hearing by bogus evidence and frivolous legal arguments, and it will similarly hear the merits of explicit discharges that are challenged on frivolous grounds. But the board is going to refuse to consider the merits of claims of constructive discharges unless the appellant ultimately meets the board's idiosyncratic (not to mention bizarre) definition of preponderance of the evidence, and the board is not even going to let the appellant try to meet that standard unless at the outset the appellant makes a submission that meets other standards that would be confusing to non-lawyers and ludicrous to lawyers. The effect of this initiative will not only be to increase the number of constructively discharged employees who are unsuccessful in appealing the agency's action, but to also reduce the number who are even given an opportunity to appeal.

It seems to me that the board's objective should be to create a system which results in appellants winning when, but only when, they ought to. Employees who have been constructively discharged should be reinstated with back pay; employees who have voluntarily resigned or retired should not be. The proposed regulations, like the current practice, are inconsistent with this objective.

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Making "non-frivolous allegations" should mean nothing more nor less than alleging a set of facts which, if true, describe a case within the board's jurisdiction.

The board's regulations have long provided that the appellant has the burden of proof, by a preponderance of the evidence, with respect to [] issues of jurisdiction . . ."[1] According to the Federal Circuit, the board reads this regulation as implying a two-step process when there is some question whether the appellant has been affected by an action within the board's jurisdiction:[2]

> The existing procedure for establishing jurisdiction in an adverse action can be summarized as a two step process. If a claimant makes non-frivolous allegations, in other words, allegations that, if proven, can establish the Board's jurisdiction, then the claimant is entitled to a hearing. If at the hearing the claimant establishes the Board's jurisdiction by a preponderance of the evidence, then jurisdiction attaches to the case and the Board has the power to decide the merits of the claim. The claimant's burden of proof for establishing jurisdiction is found in the Board's regulation 5 C.F.R. § 1201.56, which states that "[t]he appellant has the burden of proof, by a preponderance of the evidence, with respect to ... [i]ssues of jurisdiction." 5 C.F.R. § 1201.56 (2004).

Confusion has obviously been created by the phrase "non-frivolous allegations." As the court unequivocally says, this means "allegations that, if proven, can establish the Board's jurisdiction." That is, it is not enough for the appellant to allege, "I was removed within the meaning of 5 U.S.C. § 7512(1);" he or she must allege facts which, if proven, would mean there was an involuntary removal. In the run of the mill case, the allegation would be, "On April 2, 2014, I received a letter from my supervisor stating that I was being removed from my position because of misconduct, effective April 7, 2014." In a constructive discharge case, in contrast, the employee would have to first allege that he or she had resigned on some specific date, and then would have to allege facts which, if true, would mean the resignation resulted from, for example, deceit or misrepresentation, an adverse action threatened without good cause, or a failure to accommodate a disability.

Using the language chosen by the board and the court, a bald claim of constructive discharge is "frivolous," and, if the employee does not sufficiently amend his or her submission after being advised how to do so, the appeal is simply dismissed for lack of jurisdiction. If, however, the factual allegations, if true, would establish a constructive discharge, they are "non-frivolous," and the board holds a hearing to determine whether in fact the allegations are true.

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[1] 5 C.F.R. § 1201.56(a).

[2] *Garcia*, 437 F.3d at 1330.

For example, "I was forced to resign because management refused to accommodate my disability," non-frivolously alleges a removal within the meaning of 5 U.S.C. § 7512(1). So does the following: "I have multiple sclerosis; my doctor has determined that if I continue to commute to work five days a week I will die within the next three years; I requested to change to part time status, *i.e.*, to work only Monday, Tuesday, and Wednesday; the nature of my position is that this would not impose any hardship on the agency; my supervisor denied my request on the ground that "cripples like you shouldn't be in the workforce in the first place."

The proposed regulation would establish silly requirements to be met by each factual allegation.

The proposed regulation focuses on whether each allegation of an underlying fact (*e.g.*, "The nature of my position is that this would not impose any hardship on the agency") is frivolous or not:

> (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.

I would add several points to the persuasive criticisms that Peter Broida, the Maryland Employment Lawyers Association, and others have levied against the details of this definition. First, some of us of a certain age won't find a definition of "conclusory" in either our general dictionaries (*e.g.*, American Heritage Dictionary, Second College Edition) or our legal dictionaries (*e.g.*, Black's Law Dictionary, Sixth Edition). I did find the following in the American Heritage Dictionary, Fourth Edition:

> 1. Conclusive; 2. *Law* Convincing, but not so much so that contradiction is impossible; not justified or supported by all the facts.

What is more nonsensical: "In order to have a hearing on your claims, you must submit sworn statements that more than conclusively establish each of the alleged facts," or "In order to have a hearing you must submit sworn statements that are more convincing than ones which are not so convincing that contradiction is impossible," or "In order to have a hearing you must submit sworn statements that are more than statements which are not justified or supported by all the facts"?

It turns out, however, that there are other definitions of "conclusory," examined in some detail in Donald J. Kochan, *While Effusive, "Conclusory" is Still Quite Elusive: the Story of a Word, Iqbal, and a Perplexing Lexical Inquiry of Supreme Importance*, Univ. of Pittsburgh L.R. 217 (2011). Some of these might make sense in this context, others

not. For example, apparently recent editions of *Black's Law Dictionary* define conclusory as "expressing a factual inference without stating the underlying facts on which the inference is based,"[3] while that authority's editor elsewhere defines it as "a statement that puts forth a conclusion but not the reasoning behind it."[4]

In addition the new regulation provides that, instead of making allegations, as the *Garcia* court held was necessary, the appellant must submit evidence, and evidence of one particular sort—a statement under penalty of perjury. In the example given above, the appellant risks five years in prison if, in fact, providing him a three-day a week schedule would impose a hardship on the agency, or if, in fact, he misunderstood the reason for denying him the accommodation, etc. And, of course, the appellant is out of luck if instead of swearing that his supervisor made the alleged statement, the appellant provides a copy of an email sent by the supervisor. I might note in this connection that in run of the mill cases the board has never, until now, required the appellant to establish jurisdictional facts through statements under oath, *i.e.*, to swear to the authenticity of the proposal letter and discharge letter which he or she required to attach to the appeal.

The board should abandon trying to define what a non-frivolous allegation is, and should instead decide jurisdiction the way federal courts do.

I am not going to join fellow commenters in urging modifications to some the proposed regulation's definition. Like federal courts, the board is a tribunal of limited jurisdiction. As in federal courts, cases are sometimes filed that are, or arguably are, outside the tribunal's jurisdiction. There is nothing in the text of the Civil Service Reform Act or in the holdings of the U.S. Court of Appeals for the Federal Circuit which bars the board from addressing jurisdictional issues the same way the federal courts do. I think the burden is on the board to show that following the judiciary's process, and using the judiciary's standards would more often result in erroneous decisions in constructive discharge cases than does the board's current approach or its proposed approach.

The board should take this opportunity to adopt the standard definition of "preponderance of the evidence.'

The proposed regulation would move, unchanged, the current definition of "preponderance of the evidence to § 1201.4(q). That definition 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:

> *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

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[3] Quoted by Kochan at 280.
[4] Quoted by Kochan at 281.

that the evidence is sufficient to find that a contested fact is more likely to be true than untrue.

Thus, the 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.

If, alternatively, the definition is supposed to mean 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 legitimate reason for creating this confusion.

There can be no dispute that "preponderance of the evidence" simply means "evidence which is more convincing than the evidence offered in opposition to it. It is degree of proof which is more probable than not."[5] 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 preponderates.

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

Conclusion

It would be easy for the board to adopt standard legal definitions of legal terms, and follow standard legal processes for deciding disputed jurisdictional issues. The board cannot possibly believe that its idiosyncratic definitions and processes are move favorable to appellants than the standard ones are. The board, therefore, has no legitimate reason to do other than to drop the current proposed amendments and to propose, instead, adoption of the federal judiciary's approach to jurisdictional questions.

Sincerely,

Phillip R. Kete

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