To Whom It May Concern,

I, Thasha A. Boyd, have ongoing appeals filed with the Merit Systems Protection Board (“MSPB”, "Board"), and I believe that as a result of the nature of my allegations, the MSPB has resorted to seeking a revision of the regulations that govern their authority.

Specifically, on November 8, 2013, the MSPB issued a Federal Register Notice (Vol. 78, No. 217) upon which it is proposing changes regulations related to the MSPB’s jurisdiction and the burdens of proof required from appellants and agencies.

I reviewed the proposed changes and it appears that the MSPB is elevating the burden of proving jurisdiction for appellants with Individual Right of Action (“IRA”/whistleblower), Veterans Employment Opportunities Act (“VEOA”), and Uniformed Services Employment and Reemployment Rights Act (“USERRA”) appeals.

Why do I believe this proposed change to regulations relates to my pending appeals? I am a federal whistleblower and applied for employment (over six applications over the timeframe of over a year) with the Department of Homeland Security (“DHS”), United States Citizenship and Immigration Services (“USCIS”).

I met the requirements to be selected (I was a former DHS/USCIS employee and am applying for the same position(s) I held with them); however, upon conclusion of my background investigation (despite the fact that I left DHS/USCIS with a secret clearance), DHS/USCIS alleged that it did not know how long it would take to finish my background investigation because of the “issue” of the 10-day suspension issued against me by the United States Department of Labor (“USDOL”).

However, both DHS/USCIS and the Office of Personnel Management (“OPM”) would not interview anyone from USDOL regarding my tenure as an employee there - much less the 10-day suspension. Please note that I contend that the 10-day suspension (which is a subject of my other appeals with the MSPB) was issued against me by USDOL because I made disclosures of fraud, waste, and abuse during my tenure at USDOL.

Therefore, I filed my appeals with the MSPB and was issued an “Order to Show Cause” - upon which I raised the issues of jurisdiction and burdens of proof. To the date of this document, I have not received a determination from the MSPB, however, on November 14, 2013, via an article from FedSmith.com I found out that the MSPB is proposing these changes to its regulations.

If the MSPB is allowed to pass these change in regulations, whistleblowers and veterans will suffer. Every appellant and/or his/her representative knows the burden of proving their cases in front of the MSPB, and these proposed regulations will only make it more difficult. Especially when proving a case involving whistleblowers and veterans is often based on circumstantial evidence (i.e. preponderance of evidence standard).

Additionally, agencies will be allowed to continue to retaliate against federal whistleblowers through denial of employment and fallacious background investigations; and, the collusion of agencies to carry out this retaliation will only increase.

I do not agree with the any [emphasis added] of the proposed changes - to include Option B. Through Option B, the MSPB is raising the burden required of an appellant to prove his/her allegation(s)/claim(s)/appeal is/are nonfrivolous and based on "facts" of the documents and/or information in the record - before discovery even takes place. This allows the agency(ies) to fill the record with documents/information/self-serving statements/affidavits (which are often self-serving and/or incredible) to support its defense while an appellant has not even been given the opportunity to engage in discovery to obtain the documents/information/statements/affidavits to support his/her allegation(s)/claim(s)/appeal.

In Johnston v. MSPB, No. 2007-3167 (Fed. Cir. 3/3/08), the U.S. Court of Appeals for the Federal Circuit explained the fundamental difference between the requirements necessary to establish Board jurisdiction and those necessary to prevail on the merits - as follows:

To prevail on the merits, an employee must establish, by a preponderance of the evidence, that a protected disclosure was a contributing factor in an adverse personnel action. See Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 2003). At the jurisdictional threshold, however, the employee's burden is significantly lower: for individual right of action appeals "the Board's jurisdiction is established by nonfrivolous allegations that the [employee] made a protected disclosure that was a contributing factor to the personnel action taken or proposed." Stoyanov v. Dep't of the Navy, 474 F.3d 1377, 1382 (Fed. Cir. 2007) (citing Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1325 (Fed. Cir. 2006) (en banc).

The CAFC's decison in Johnson v. MSPB not only gave the MSPB clear guidelines on the requirements to: (1) establish Board jurisdiction; and, (2) to prevail on the merits, but is a decision that ensures due process and simply "makes sense".

In sum, the MSPB, in choosing Option B, is: (1) Disregarding precedent decision(s) by the CAFC; (2) Placing an unrealistic burden on an appellant to prove jurisdiction before discovery even takes place; (3) Placing the burden on an appellant to prove his/her allegation(s)/claim(s)/appeal is nonfrivolous "on the merits" - without discovery even taking place, which is a form of granting summary judgment without even allowing discovery to take place; and, (4) Allows the agency(ies) to fill the record with documents/information/self-serving statements/affidavits to support its defense - without an appellant being given the opportunity to conduct discovery to counter the agency's defense.

Therefore, I do not agree with the proposed changes to the MSPB's regulations and am appalled that the MSPB has resorted to "changing the rules of the game" - which appears to be based on arguments I raised in my ongoing appeals - to protect the agencies against appellants who already have a higher burden.

Sincerely,

Thasha A. Boyd