

Mr. Spencer:

We submit this comment in response to the Federal Register Notice, Vol, 78, No. 217, in which the Merit Systems Protection Board (MSPB) solicited public input concerning options to revise its regulations governing how jurisdiction is established over appeals.

Of the four options developed by the MSPB Regulations Working Group, we believe that Option B is the best proposal for two reasons. First, it clarifies the burdens of proof on appellants and agencies concerning both jurisdiction and merits issues for each type of MSPB appeal. Second, it adds a clear definition of “non-frivolous allegation” that will apply to individual right of action (IRA) appeals under the Whistleblower Protection Act (WPA), appeals under the Veterans Employment Opportunities Act (VEOA), and appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In our opinion, Option D has the least merit of the four options developed by the MSPB Regulations Working Group because it does not include appropriate mechanisms to eliminate unmeritorious claims before a full-blown hearing. In this regard, Option D explicitly states that jurisdictional requirements relating to the merits in certain types of appeals (including but not limited to IRA appeals, VEOA appeals, and USERRA appeals) need not be established with “non-frivolous allegations.” Moreover, Option D does not include a summary judgment procedure, unlike Option C. Accordingly, Option D likely would cause agencies to expend more resources on litigating unmeritorious claims, which otherwise could be disposed of at the jurisdiction stage before discovery or at a new summary judgment stage after discovery but before a hearing.

Thank you for the opportunity to comment on the MSPB’s proposals.

Best regards,

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