



December 6, 2013

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

Re: Postal Service Comments – MSPB’s November 8, 2013 Notice of Proposed Rulemaking

Mr. Spencer:

The U.S. Postal Service submits these comments in response to the Merit Systems Protection Board’s November 8, 2013 Notice of Proposed Rulemaking, in which the Board invited public comment on its proposals to revise 5 C.F.R. section 1201.56. In general, the Postal Service supports the Board’s effort to update its regulations and clarify the requirements for establishing jurisdiction over claims and appeals.

While all four of the Board’s proposed options are well drafted, the Postal Service has significant concerns regarding each proposed option. Furthermore, all stakeholders would benefit if the Board explicitly addresses the identified concerns in the rules.

**Option A:** The Postal Service is concerned with the lack of definite standards in Option A because it introduces unnecessary ambiguity. In particular, Option A’s proposed section 1201.56(a) lacks specificity, stating only that “[g]enerally, the agency bears the burden of proof by a preponderance of the evidence.” It then lists several “common exceptions,” but does not specify whether there are other exceptions or what standard applies to those exceptions, listed or unlisted. Thus, Option A fails to give parties clear guidance.

The Postal Service understands the Board’s desire to draft a “simple” rule, so as to not “overwhelm” infrequent or unsophisticated litigants. But simplicity and clarity are not synonymous. A truly clear rule will produce predictable results, while a simple rule may not always do so. A rule may be simple, yet for lack of definiteness fail to inform parties of their respective burdens. See Lumen N. Mulligan, *Clear Rules—Not Necessarily Simple or Accessible Ones*, 97 VA. L. REV. IN BRIEF 13, 16 (2011) (“[C]larity does not necessarily coincide with simplicity or accessibility. As such,

marking a regime as complex or inaccessible does not necessarily mark the regime as unclear.”). By contrast, a complex but definite rule will produce predictable results, and thus provide parties with clear guidance. See *id.* Clarity is also distinct from accessibility. *Id.* A rule may be accessible, *i.e.*, understandable by the lay public, yet produce unpredictable results. *Id.*

And where jurisdiction is concerned, predictability is essential. Ill-defined jurisdictional rules foster uncertainty, which can in turn impose costs on all parties. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 7 (2011) (“Jurisdictional clarity can mitigate some of the litigant costs by enabling litigants to file in the proper forum more often.”). For instance, if the regulatory standard is left unclear, parties will be required to comb through the Board’s case law to glean the applicable standards. The burdens of conducting such research will fall hardest on *pro se* litigants, who are likely to lack the resources and sophistication necessary to discover and interpret on-point precedent. Moreover, by failing to establish a clear standard in the regulation, the Board would risk allowing for inconsistent application. Cf. *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) (stating, in its consideration of a California state rule, that “overly ambiguous standards almost inevitably lead to inconsistent application”). Different decision makers might interpret the regulation in distinct ways, resulting in unpredictable and inequitable results in similar cases.

Because of the lack of clarity in Option A and the consequences that its ambiguity might entail, the Postal Service recommends that the Board select a more definite option.

**Option B:** The Postal Service is concerned with the new jurisdictional standard Option B applies to failure-to-reemploy claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301–35.

The Postal Service’s understanding of Option B is that it places USERRA failure-to-reemploy claims under proposed section 1201.56, while assigning retaliation and discrimination claims to proposed section 1201.57. Specifically, 1201.56(a)(3) states that it “does not apply to . . . appeal[s] under [USERRA] in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311.” Likewise, 1201.57(a)(3) states that it does apply to “appeal[s] under [USERRA] in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311.” Thus, by Option B’s literal terms, failure-to-reemploy claims under 38 U.S.C. sections 4312 and 4313 would be governed by section 1201.56(b), while discrimination and retaliation claims would be governed by sections 1201.57(b) and (c).

This dichotomy is inconsistent with the Board's precedent. Currently, the Board treats all USERRA claims alike for jurisdictional purposes. It permits claimants to establish jurisdiction through non-frivolous allegations, regardless of whether they allege a failure to reemploy, discrimination based on military service, or retaliation based on protected activity. *Compare Silva v. Department of Homeland Sec.*, 112 M.S.P.R. 362, 370 (2009) (failure to reemploy), and *Groom v. Department of the Army*, 82 M.S.P.R. 221, 225 (1999) (same), with *Davison v. Department of Veterans Affairs*, 115 M.S.P.R. 640, 646 (2011) (retaliation), and *Hammond v. Department of Veterans Affairs*, 98 M.S.P.R. 359, 361 (2005) (discrimination). But under Option B, failure-to-reemploy claims would be subject to different jurisdictional requirements than discrimination and retaliation claims. Proposed section 1201.56(b) requires claimants to prove all "[i]ssues of jurisdiction" by a preponderance of the evidence, while section 1201.57(c) allows claimants to establish certain jurisdictional elements through non-frivolous allegations.

The Board has not stated that it intends to depart from its precedent in this manner. Rather, it indicated that it proposed Option B only to "make [its] regulations consistent with existing Board and Federal Circuit case law." Merit System Protection Board Solicitation of Public Comment, 78 Fed. Reg. 67076 (Nov. 8, 2012). That statement is not accurate. As set forth above, the change contemplated is, at least in part, contrary to Board case law.

The Board has not articulated, nor is the Postal Service aware of, any basis for departing from this precedent and treating discrimination and retaliation claims differently from reemployment claims for the purposes of jurisdiction. No such basis is apparent in the governing statute. Title 38, section 4324 of the United States Code—granting the Board jurisdiction over USERRA claims against federal agencies—does not distinguish between reemployment claims and discrimination or retaliation claims. See § 4324(c)(1) ("The Merit Systems Protection Board shall adjudicate *any* [USERRA] complaint brought before the Board . . .") (emphasis added). Indeed, section 4324(c)(2) directs the Board to grant relief to a complainant if the Board determines that the agency "has not complied with the provisions of [USERRA] relating to the *employment or reemployment* of [the complainant] by the agency." *Id.* (emphasis added). Nor is any basis for the distinction apparent in Federal Circuit case law. Rather, that court has held that the Board "*shall* adjudicate all USERRA claims brought before it," and that it "must administer the law as Congress wrote it." *Kirkendall v. Department of Army*, 479 F.3d 830, 844 (Fed. Cir. 2007) (holding that the Board could not, as a matter of administrative practice, deny USERRA claimants statutorily mandated hearings).

Accordingly, if the Board adopts Option B, the Postal Service suggests that it change Option B so that failure-to-reemploy claims will be treated like other USERRA claims for jurisdictional purposes. Alternatively, the Board should explain on what basis the Board elected to treat such claims differently. Finally, the Postal Service urges the Board to explain how Option B would affect 5 C.F.R. 1208.11–1208.16.

**Options C and D:** The Postal Service is concerned with three aspects of Options C and D: (1) their effect on the Board’s jurisdiction over discrimination claims in mixed cases; (2) their exclusion of Federal Employees’ Compensation Act (FECA) restoration claims from proposed section 1201.5(c); and (3) their repeal of the non-frivolous-allegations standard for certain types of claims.

First, based on the Postal Service’s understanding of Options C and D, as well as the Board’s precedent, it concludes that if an appellant bringing a mixed case satisfies the jurisdictional requirements of either proposed section 1201.5(b) or 1201.5(c), the presiding administrative judge will be bound to reach the merits on all attendant discrimination claims. See 5 U.S.C. § 7702(a)(1); *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, 404 (2007); *Harris v. Department of the Air Force*, 100 M.S.P.R. 452, 455–56 (2005). And because Options C and D’s jurisdictional requirements are less onerous than the standards currently in place, they will allow the Board to do so on a greater number of such claims. Because this change could affect a significant number of cases, the Postal Service believes that all stakeholders would benefit from the Board’s express comment on whether its understanding is correct and, if so, its justification for such a significant change.

Second, the Postal Service is concerned that the Board did not include Federal Employees’ Compensation Act (FECA) restoration claims under proposed section 1201.5(c). The Board indicated that, for the claims listed under 1201.5(c), appellants must make certain merits-based allegations to establish jurisdiction. But the Board’s precedent also requires such merits-based allegations for FECA restoration claims. See *Latham v. U.S. Postal Serv.*, 117 M.S.P.R. 400, 408 (2012). Moreover, the applicable regulatory language suggests that some additional merits-based assertions are necessary. See 5 C.F.R. § 353.304(c) (“An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of *whether the agency is acting arbitrarily and capriciously* in denying restoration.” (emphasis added)). Accordingly, the Postal Service urges the Board to include FECA restoration claims under section 1201.5(c).

Third, insofar as section 1201.5(c) discards the Board’s current practice of requiring non-frivolous, merits-related allegations to establish jurisdiction over certain classes

of cases, the Postal Service urges the Board to reconsider. Lowering appellants' burden in this fashion may cause the Board to assume jurisdiction over cases in which the facts would not permit the appellant to articulate a non-frivolous allegation, and thus the Board will assume jurisdiction over cases outside of its statutory jurisdiction unnecessarily. Rather than allowing such non-meritorious claims to go forward, the Board should seek to resolve them as early as possible in the process, and with the least expenditure of resources. Moreover, the existing non-frivolous-allegation requirement is not onerous, and should not prevent the Board from exercising jurisdiction over any truly meritorious cases. *Cf. Francis v. Department of the Air Force*, 120 M.S.P.R. 138, 143 (2013) (explaining that a non-frivolous allegation is only an "allegation of fact that, if proven, could establish a prima facie case that the Board has jurisdiction over the appeal").

In sum, the Postal Service urges the Board to include FECA restoration claims under section 1201.5(c), reconsider its decision to discard the non-frivolous allegation requirement for claims under that section, and comment on Options C and D's effect on the Board's jurisdiction over discrimination claims in mixed cases.

We appreciate the opportunity to comment on these matters.

Sincerely,

Eric J. Scharf