Comments of DOI Solicitor's Office on MSPB's Proposed Regulations

***Note: Comments must be submitted to MSPB by July 23, 2012.**

Comments are to the MSPB's proposed changes to its regulations at 5 C.F.R. Part 1200 are addressed below following the proposed regulation cite.

1200.4 – Petition for Rulemaking

- This proposed regulation does not comply with the notice and comment requirements of the Administrative Procedure Act (APA) governing rulemaking. This disenfranchises the MSPB's customers by removing the opportunity to comment on proposed changes to rules that will impact parties' rights before the Board. It also evidences a lack of transparency, which is concerning given the Board's role as an independent, neutral adjudicative body, and could lead to heightened politicization of the Board's rules.

- We note that the HUD Regulation on which this proposed regulation is based was issued in the context of HUD's "Rulemaking -- Policy and Procedures," and HUD does not have a role as an independent adjudicative body.

1201.14 – Electronic Filing Procedures

- In an era where electronic filing is the norm, the Board should develop an e-filing system similar to the e-filing systems used by every federal court that accounts for regional time differences rather than address it in a regulation.

1201.21 – Notice of Appeal Rights

- The Board should give sample language for all types of MSPB appeal rights to ensure consistency throughout the Federal government.

- 1201.21(d): The language of the regulation and requirements the agency must meet in providing notice of appeal rights is unnecessarily vague and confusing, and lacks transparency. The Board needs to clarify for both agencies and appellants exactly what needs to be included in the notice. If the Board cannot be clearer in its regulation, it should provide sample notices addressing each election circumstance it intends to address through this revised regulation.

1201.22 – Filing an appeal and responses to appeals

- 1201.22(b)(3): Overall, this is a much needed change to address the issues of appellants failing to notify agencies of address changes, or of attempting to avoid receipt of notices (particularly an issue when the only address the agency has for an appellant is a P.O. Box).

- However, in 1201.22(b)(3)(ii), the terms "relative" and "and of suitable discretion" are overly vague and should be deleted. Further, the agency lacks control over service

performed through U.S. Postal Service or courier service. , Instead, this subpart (ii) should track most states' service rules, and allow delivery to the appellant's current address without regard to whether someone is at home, whether over the age of 18, whether "of suitable discretion" or a relative (whatever those mean), or not.

1201.24 – Content of an appeal; right to hearing

- 1201.24(a)(7): The MSPB should require that appellants in VEOA and IRA cases submit relevant documents, as these documents are almost always exclusively in the appellant's possession.

- 1201.24(d): Add right to a hearing, unless summary judgment granted. The Board should develop a mechanism for summary judgment, especially when there is no disagreement as to material facts (e.g., when misconduct is admitted and only penalty is in dispute).

1201.28 – Case suspension procedures

- We agree with the proposal to extend the case suspension period for 60 days. This is particularly helpful when parties are attempting to settle cases.

1201.29 – Dismissal without prejudice

- We agree that having the option of dismissal without prejudice is a good idea, and will enable AJs to have more flexibility in case management. Many judges have already been doing so.

1201.33 – Federal witnesses

- 1201.33(a): Agencies should not be responsible for arranging for the presence of all witnesses who are Federal employees; only its own witnesses. Providing contact information to the appellant for his/her approved witnesses should be sufficient to enable the appellant to arrange for the appearance of his/her witness.

- In the event agencies are required to arrange for the presence all approved Federal employee witnesses (including employees of non-party agencies), at a minimum, the Board should specify in its regulations that the Respondent Federal agency (not the employing Federal agency of a federal employee from another agency) is responsible for the travel and per diem costs of such employee. A Federal agency with no connection to the action being challenged before the Board except that one of its current employees used to work at a different Federal agency should not be forced to incur travel and per diem expenses (in addition to absorbing official time). Clarifying this in the regulations would avoid needless litigation concerning which agency should bear these costs.

1201.43 -- Sanctions

- 1201.43(d): Change the last sentence so that when the judge excludes **a party's** representative, the judge will afford **the party** a reasonable time to obtain another representative…" This courtesy should not be limited to appellants. Agencies do not have unlimited resources, and any new agency representative would have to familiarize himself or herself with the case. Failing to provide this courtesy to both parties undermines the Board's status as a neutral body.

1201.51 – Scheduling the hearing

- The determination of where the hearing should be held must factor in the cost to the Federal government as a whole (including costs of the Respondent agency), not solely administrative efficiencies for the MSPB. Doing otherwise could result in the MSPB inappropriately shifting its costs onto respondent agencies in circumstances where the new hearing location might save costs for the MSPB, but increase costs for the agency. This is certainly a possibility, given that the MSPB only has offices in major cities, while many Federal employees work in remote locations where travel costs can be significant.

1201.52 – Public Hearings

- Cell phones are often used as clocks; attorneys (or representatives) for the parties should be allowed to keep cell phones (in silent mode) or laptops with them during the hearing. We suggest that the AJ can issue an order at the outset of the hearing that requires representatives to comply with all terms, including not using texting, email, etc. capabilities during the hearing, and sanction any parties for not complying.

1201.53 – Record of proceedings

- 1201.53(c): The regulation notes that "[u]nless ordered by the Board, transcripts will be prepared at the requesting party's expense." In circumstances where the Board orders otherwise, the regulation is not clear about whether the Board would bear this cost for the requesting party, or if the Agency would be forced to bear this cost. If the latter, the regulation should provide an opportunity for the agency to respond to a request that it bear such costs on behalf of the appellant, and the following text should be inserted: "Absent extraordinary circumstances, the Agency shall not be ordered to pay costs of the transcript." This additional text is especially appropriate given the availability of a free copy of the hearing recording to the parties.

1201.73 – Discovery Procedures

- We agree that the initial disclosure requirement should be eliminated.

- 1201.73(d)(2): In the first sentence, replace "file" with "serve" so it is clear that discovery responses should not be filed with the Board unless in connection with a motion to compel.

- Discovery from non-parties: The regulations should require that copies of all informal discovery requests sent to non-parties be served on the opposing party; such service should not be limited to the requesting party's motion to compel or for a subpoena.

1201.113 – Finality of decision

- 1201.113(f): Referral to OSC based on a "reason to believe" a prohibited personnel practice under (b)(8) occurred is much too low and vague of a standard. In addition, this appears to exceed the Board's jurisdiction; it should not be issuing findings on issues not before it in a given appeal. Referral to OSC should remain limited to IRA appeals in which the Board found the agency retaliated against the appellant. Moreover, referral to OSC divests the agency of its responsibility to address these issues internally.

1201.115 – Petitions for Review

- We strongly suggest the Board adopt the 30-day time limit for reopening appeals to which all parties are held. This will assist in ensuring finality of decisions.

1201.116 – Compliance with orders for interim relief

- 1201.116(c) & (d): language should parallel – (d) should say that "If the agency files a petition for review or a cross petition for review **or** has not provided required interim relief…" This change from "and" to "or" makes the two regulation provisions consistent.

Additional Comments

- Even though not addressed in the regulations, we recommend increasing the amount of time an Agency has to submit the Agency File to 30 days. In addition, we recommend increasing the suggested timeframe the MSPB has to close out a case from 120 days to 180 days.

- Even though not addressed in the regulations, we recommend an increase in the size of files that can be uploaded to the e-filing system. 10 MB is not sufficient to upload an Agency File, and it becomes confusing to upload an Agency File in multiple parts.