

Gentlemen:

I offer my comments in response to the 2012 Proposed Rulemaking Notice concerning Board practices and procedures.

#### **1200.4 Petition for Rulemaking**

This is a welcome addition to the regulations. In the past, rulemaking requests under the APA were usually responded to by the Board's Clerk with a summary denial of the petition. The regulatory change will denote more formal Agency action, consistent with the intent of the rulemaking provisions of the APA.

To avoid duplicative filings, I suggest that either by regulation or practice, the Board make public (through its website) a summary of rulemaking petitions received during the year and the responses to those petitions.

The Board may also wish to consider stating in its regulation any judicial review right available for the denial of a rulemaking petition.

#### **1201.3 Appellate Jurisdiction**

##### **(3) Termination of Probationary Employment**

The proposed regulation states that an appeal is not generally available to employees in the excepted service. That means nothing to a pro se appellant. The proposed regulation should be changed to clearly state when the right is available to an excepted service employee rather than stating an exclusion that would have to be further researched to determine the scope of the exception to the proposed rule.

##### **(9) Negative Suitability Determination**

There has been much confusion as to what constitutes an appealable suitability determination as opposed to, for example, non-selection for a position of a person who is either not qualified nor for the position or not selected because he or she is not the best qualified candidate, and to that classification can be added individuals who are discharged for performance or misconduct prior to securing sufficient service credit for regular appeal rights.

To eliminate some of this confusion, I suggest that the Board change the proposed regulation to be more specific as to what is and what is not an appealable suitability determination and by whom and how a suitability determination is made.

#### **1201.4 General Definitions**

(a) Judge

To conform the section with the statute, and to avoid the ambiguity in the word “including,” the regulation should be changed to add “any member of the Merit Systems Protection Board.” 5 USC 1204(b)(1).

Again, to conform the regulation of statute, this section should be revised to state that person’s hearing removal appeals may be considered only by individuals “experienced in hearing appeals.” 5 USC 7701(b)(1).

**1201.21 Notice of Appeal Rights**

The Board needs to define what constitutes a” grievance,” to make clear that the reference is to a grievance that is filed under a collective bargaining agreement (as opposed to an agency administrative grievance procedure) and that is in writing (as opposed to a verbal informal grievance under a negotiated procedure). The definition is probably best placed in the Board’s definitional section that 1201.4.

The matter of election of remedies is so complicated under 5 USC 7121(g), that, rather than waiting to agency’s the task of figuring out the law on a case-by-case basis (a particular problem in small agencies having limited numbers of lawyers expert in personnel law), the Board should develop in its regulation language clearly explaining the election scheme under the statute so that agencies could copy those cautionary words into their adverse action appellate rights sections.

Of particular importance is the election of remedies advice to employees pertaining to the choice between an Individual Right of Action and otherwise appealable action.

The Board’s regulatory interpretation will be given considerable deference by a reviewing court under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

It is important that the regulation make clear the distinction between a proposal and a final decision in the election scheme. More specifically, the regulation should clearly state that an individual should be able to initiate an IRA with OSC on a proposal, to obtain the possible advantage of a stay or corrective action or settlement, and be able to take a final agency adverse action or performance decision directly to the Board in an otherwise appealable action without being foreclosed from doing so by earlier resort to OSC on the proposal if the individual has not earlier sought relief through OSC as to the decision. The distinction in treatment of a proposal and a decision is made in the section of the Proposed Regulations, Sec. 1209.2, Example 4. The distinction in the example should be stated clearly in 1201.21.

This regulation requires some work to accurately state the law in a way that can be readily understood by appellants and agency officials alike. It is not sufficient to cast in generalities references to complex elections of remedies, leaving others to the task of seeking to research and possibly guess at the meaning of 7121(g), with significant potential adverse effect upon the appellants deserving of protection from OSC and appellate rights from MSPB.

If no more is done to explain the regulation by MSPB, the likely result will simply be that agencies will recite 5 USC 7121(g) in their decision notices, leaving it to appellants to determine the meaning of the statute. Given that the rate of pro se representation the board exceeds 60%, that is an unacceptable approach. What is needed is a comprehensive, plain English regulatory expressions from the Board.

### **1201.22 Filing an Appeal/Response to Appeal**

If the appellant is responsible for keeping the agency informed of the change of address, the agency needs to inform the appellant of the name, e-mail address, physical mailing address, and fax number of the agency official who will be designated to receive notice of change of address. The regulation needs to be modified to require the agency to provide that information in the proposal notice.

### **1201.24 Content of the Appeal/Right to Hearing**

The Board is placing appellant at a disadvantage through this regulatory change. Under the current practice, the appellant can submit to the board with the appeal any evidentiary material that the appellant chooses to provide. Once those materials are in the record with the appeal, that is where they stay, unless the agency or the judge moves to strike some of the materials as having no relevance to the case (a rare event). The agency response to the appeal may include materials that are directly pertinent to the appeal but it may not necessarily include materials that the appellant thinks are probative. Under the ordinary processes of prehearing preparation, the additional material that the appellant wishes to have in the record, if not earlier supplied in the appeal, is provided through listed exhibits in the prehearing submission. The agency then has the right to object to those exhibits, either during the prehearing conference or during hearing, and there is at least the possibility that a judge will exclude some of those exhibits based on the judge's view of the case. Although it is certainly possible for the appellant to later argue in a PFR that exclusion of the exhibits was improper, the judge is given a lot of discretion under Board law with respect to admission of evidence, and it takes a fair amount of time and argument to overcome a judge's ruling with respect to exhibit that was excluded during the prehearing or hearing processes. None of that time or effort has to be expended if the material automatically goes into the record as part of the appeal in the form of attachments.

The agency has a right to submit whatever it wants as part of the response to the appeal. Although, again, it is true that someone could move to strike materials submitted by the agency as part of the response to the appeal, that is also a rare event. Agencies frequently submit as part of their responses to appeals information, including exhibits and sworn declarations, that were not provided in the evidentiary file submitted to the appellant during the reply process.

To avoid placing appellants at an evidentiary disadvantage by precluding them from submitting additional materials with their appeal, the current practice should be continued. If it is abused, the judge or the other party may object to the surplusage submitted by the appellant.

At least if the appellants are to be precluded from submitting materials other than an SF-50 and a decision notice with their appeals, then in like manner agencies should be prevented, through clear regulatory language, from submitting with an appeal response any document that was not earlier furnished to the appellant with the adverse action or performance-based case proposal.

#### **1201.28 Case Suspension Procedures**

The regulatory revision removes some of the ambiguity as to the grounds for a case suspension.

The regulation should be revised to state that if both parties desire suspension of proceedings, that the suspension will be granted absent good cause shown, and that ordinarily good cause would not be predicated upon the delay in the proceedings necessitated by a suspension.

Judges should understand that they serve the interests of the parties. Judges need to ensure that parties can engage in mutual and effective cooperative efforts to manage the litigation process.

#### **1201.29 Dismissal without Prejudice**

Should cases DWOP's be automatically refiled in all cases? My preference is that occur. The Board has not offered statistics in its proposed rulemaking notice stating how many cases are DWOP'd and not refiled. Assuming the number is significant, e.g., at the magnitude of 20% or more, a liberal refiling rule would probably avoid most unintentional defaults. However, there are certain cases that should be automatically refiled so there is no possibility of an unintended default. Included in that category would be any retirement appeal.

Further, speaking of retirement appeals, to avoid the now unpredictable course of cases in which an appeal is timely filed from an OPM reconsideration decision, followed by OPM vacating the reconsideration determination and seeking a mootness or jurisdictional dismissal, further followed by endless waiting until

OPM gets around to redetermining the case, it is suggested that whenever OPM seeks to rescind a redetermination decision that the DWOP process be used and that the case be automatically refiled, subject to earlier proof to the Board that the requested benefit has been granted. OPM should not be able to determine at its pleasure either Board jurisdiction or the time in which the appellant's claim can be decided.

### **1201.31           Representatives**

Disqualification of a representative is a rare occurrence, but when it occurs, it can be a major hardship for the appellant who has limited or no funds to find substitute counsel who necessarily requires payment to duplicate the time earlier invested into the case by the disqualified attorney. For that reason, it should be the appellant's option to obtain an interlocutory appeal of a disqualification since the effect of the disqualification cannot readily be obtained through a PFR, except through the most indirect of means, e.g., a counsel fee petition for a prevailing appellant which will be contested, of course, by the agency seeking to avoid payment for that portion of the fees incurred by the disqualified counsel.

### **1201.33           Federal Witnesses**

This regulation carries forward one of the problems in the current third-party discovery processes: the need to involve the judge to get a third-party agency to cooperate in discovery. A nonparty agency or federal corporation should provide witnesses upon a notice of deposition rather than when a judge orders production of the witness. If the nonparty seeks to avoid that burden, it can object to the deposition notice and test the necessity through the moving party's motion to compel.

Additionally, the regulation is unclear in that it calls for agencies or federal corporations to make personnel available to furnish sworn statements. It is not clear under Board practice how people are produced, other than through depositions, to furnish sworn statements. There are no letters rogatory in Board practice. This section should be dropped or clarified.

### **1201.34           Intervenors; amicus**

Although it should be obvious, the request for amicus participation should be served upon the parties, assuming they are known to the amicus. The parties should have the opportunity to respond to the request. Amicus participation may increase the expense to represented parties, who then may have to respond to amicus submissions, so the parties need to know of the request for participation and be able to state their opposition to or support for amicus participation.

### **1201.43           Sanctions**

Since the right to a hearing is statutory, that right should be denied only for compelling reasons. If the hearing is terminated by reason of the conduct of counsel, the appellant should be permitted to proceed with the hearing by himself or herself, or obtain substituted counsel, as in the case of exclusion of a representative.

#### **1201.52 Public Hearings**

Concerning cell phones, judges have them and may use them during hearings. The same is true as to counsel, who may wish to check or send emails. Some of those emails may pertain to the case, e.g., contain pdfs that can be read only the cell phone. The use of cell phones to make or receive calls during a hearing should be reasonably controlled, not denied.

#### **1201.53 Record of proceedings**

Transcripts required from agencies—the Board already obtains transcripts in some cases without cost when agencies obtain the transcripts at their expense and the contract stenographer provides a copy to the Board. In those cases, the appellants should receive a copy too, and the copy should be provided or offered without request from the appellant, since the appellant will often not otherwise know that the agency has bought a transcript, a copy of which is automatically filed with the Board. But as to requiring agencies to pay for transcripts when they would not otherwise purchase them, I see no statutory authorization for the Board to shift that expense. In the past if the Board needed a transcript, it bought one itself. EEO cases are different, because the EEO case, even at the level of EEOC, is considered an agency adjudication from start to finish, i.e., the hearing is an extension of the agency investigation. Before requiring agencies to undertake an expense that 5 USC 7701 does not directly assess to agencies, it would be reasonable to obtain an opinion from the Comptroller General and avoid the problem of multiple agencies going to the Comptroller for the same type of opinion.

#### **1201.56 Burdens of Proof**

It is suggested that the phrase “jurisdictional hearing” be substituted with the word “hearing,” to avoid any suggestion that a hearing with respect to a jurisdictional element confers any fewer rights with respect to discovery and other elements of MSPB due process in a hearing on any other matter, e.g., the merits of an adverse action.

#### **1201.58 Closing the Record**

The regulation should be modified to require judges to explain in their acknowledgment orders and other orders that they issue the relationship between the timing of initiation and closing of discovery and the closing of the record on

a particular issue, e.g., jurisdiction in a constructive adverse action or timeliness of an appeal. Too often acknowledgment orders include conflicting provisions that theoretically allow for discovery but then call for the record to close on issues of jurisdiction or timeliness before discovery can be commenced and completed.

### **1201.71 Purpose of Discovery**

Timing of Motions to Compel Discovery: the Board requires the parties to confer prior to the filing of a motion to compel discovery, in an effort to resolve differences without excessive involvement by the judge. But only 10 days are allowed to file a motion to compel, and with intervening weekends, that is often not enough time to arrange for a conference with opposing counsel and review and resolve differences with respect to discovery requests to which objections have been lodged. The regulation places the moving party in a position of not only having to contact opposing counsel concerning objections and to attempt very quickly to resolve those objections, but to file a motion for an extension of time in which to file a motion to compel discovery in the event that resolution of differences cannot be accomplished within 10 days.

There is no good reason that requires a motion to compel to be filed within 10 days. Realistically, what should be required is that the motion be filed within a reasonable time prior to the prehearing conference. If the 10 day limitation must stay in the regulation, then the regulation should authorize the parties to agree upon a longer period of time in which to file the motion to compel without the necessity of filing a motion with the board in order to accomplish the same objective. In other words, if the Board wants the parties to work informally to resolve their problems, the Board should allow the parties informally to avoid unnecessary pleadings through agreements to extend the time to file a motion to compel discovery. This is the normal practice in courts.

### **1201.114 Petition for Review**

Reply to response to PFR: it is difficult to assess the value of a reply pleading when balanced against the additional delay that it will entail and considering the likelihood of a fair number of motions to strike the reply because it allegedly includes new matter. I presume that OAC has made a determination that a reply pleading would aid in the adjudication process. However, since the Board for many years has rejected the use of reply pleadings, I would suggest that the use of replies be employed on a trial basis rather than being enshrined in the Board regulations as a procedure that, once introduced, is going to be difficult to change if it proves to be less productive than expected.

Length of PFR: the regulation does not state whether the pleading is to be single or double spaced. Nor does the regulation explain exactly how one will determine the length of electronic filings, since I presume that the E filing

system does not properly format materials in terms of type size or margins or page numbers, which would mean that one would not know whether the pleading was excessive in length until after it had been completed and printed out prior to finalization on the E filing system.

I would suggest an alternative, which would be a word count. The Federal Circuit allows for briefs in 13 point type, inch margins top and bottom left and right, doublespaced, with a word count of a maximum of 14,000 words for principal brief and half that for a reply brief. It might be a lot easier to utilize a word count and provide a utility in the filing system that would provide the word count upon request, similar to a word processor.

Extensions of time to file: When read together, the provision on extension of time and late filings seem to provide that an extension request made prior to the filing deadline serves as an extension without a formal ruling by the Board, at least until such a formal ruling is made. This is the practice in the Federal Circuit when extensions are requested at least seven days prior to the filing deadline for a brief. I would suggest that the automatic extension created by the filing of an extension request be made explicit in the paragraph on “Extension of time to file.”

#### **1201.115            Criteria for PFR**

I would modify (c) to change “The judge’s rulings” to “the judge’s orders and rulings” to encompass the situation where the judge issues an inappropriate or deficient acknowledgment order, order to show cause, or prehearing order, thereby failing to advise a party on a burden of proof or requirement pertaining to jurisdiction or timeliness of an appeal.

#### **1201.116            Interim Relief**

This section is not completely clear. Do you mean to give the appellant a discretionary opportunity to request dismissal of an agency PFR for lack of proper interim relief under (d) and to provide another opportunity to challenge the completeness of interim relief under (g) in the event the agency PFR is granted?

#### **1201.182            Petition for enforcement**

(a)        Very few agencies inform the appellant when they believe that compliance is complete. Accordingly, the time limit for filing an enforcement petition will rarely be triggered by the issuance of a notice of compliance by the agency. That leaves the appellant in the position of “promptly” filing an enforcement petition. The time for filing the enforcement petition should be tied to the time of the required agency compliance notice, but Sec. 1201.181 only requires the agency to “promptly” informed the appellant of compliance.



There is too much use of the subjective term “promptly.” It is suggested that the Board provide a deadline for an agency to issue a compliance notice. If the compliance notice is issued, then provide the appellant 30 days to file an enforcement petition. If the agency does not file a compliance notice, give the appellant a reasonable period of time to file his or her petition after such notice should have been filed by the agency.

To make agencies more aware of their obligation to notify the appellant of compliance, require agencies to file their notifications of compliance with the Board.

### **1201.83            Procedures for processing petitions for enforcement**

(5)        Obviously, a copy of the initial decision should be served not only on the responsible agency official, but everyone else was already on the certificate of service. But for clarity, the regulation should probably be changed so as to make the intent clear.

### **1208.22            Equitable Tolling**

By providing examples of circumstances that could support equitable tolling, you may be limiting the circumstances that will be described by appellants. I would change the language from “examples include” to “examples include, but are not limited to.”

### **1209.5    Time of Filing**

Same comment on equitable tolling as in Sec. 1208.22 comment, above.

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