AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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November 7, 2024

Gina K. Grippando
Clerk of the Board
Merit Systems Protection Board
1615 M Street NW
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mspb@mspb.gov
By email only

Re: Comments by AFGE Concerning Interim Final Rule Updating MSPB Adjudicatory and Operational Regulations, 89 Fed. Reg. 72957 (Sept. 9, 2024)

Dear Ms. Grippando:

The American Federation of Government Employees, AFL-CIO ("AFGE") hereby submits its comments to the above-captioned interim final rule concerning updates to the Merit Systems Protection Board's ("MSPB" or "Board") adjudicatory and operational regulations (the "Interim Final Rule"). The MSPB issued the Interim Final Rule on September 9, 2024, and it went into effect on October 7, 2024. The Interim Final Rule amends several regulations in 5 CFR Parts 1200, 1201, 1203, and 1209.

While AFGE generally supports the goals of simplifying MSPB regulations, making the appeals process more efficient, and providing stability in the event the Board lacks a quorum in the future, we believe that many provisions of the Interim Final Rule fail to accomplish these goals as intended (and, in some cases, are counterproductive to them). Our concerns and suggested revisions to the Interim Final Rule, as well as comments to other regulations governing the MSPB, are included below.

COMMENTS

5 C.F.R. § 1200.3 How the Board Members Make Decisions
89 Fed. Reg. 72960-61

This amendment modifies the authority of Board members or Board staff to take certain actions when the Board otherwise would be unable to act due to vacancies, recusals, or other reasons. Under the new regulation, when there is only one Board member able to act, that member may direct to "an administrative judge or other official" specific matters such as further development of a record or review of a settlement that occurred after the issuance of an initial decision. Where there are no Board members able to act, the amendment gives the same delegation authority to the Clerk of the Board.

AFGE recommends that matters delegated under this regulation go only to "an administrative judge," not "an administrative judge or other official." It is unclear what constitutes an "other official", and the vagueness of the term could jeopardize the validity of actions taken under this regulation, subjecting the parties to further litigation. If there are "other

officials" besides administrative judges who should be given the authority to act under this provision, they should be specifically identified in the regulation and stakeholders should have an opportunity to comment on their inclusion.

5 C.F.R. § 1200.5 Conduct Policy
89 Fed. Reg. 72961

This addition to the MSPB's regulations would permit the Board to issue "rules regarding prohibited conduct and vexatious filing by a party, …as well as potential sanctions or other consequences for violations of the policy." Although potentially beneficial, policies governing conduct carry a risk of subjective, inconsistent application and the creation of a chilling effect, particularly regarding pro se appellants. Whether this is the case will depend on the policy's specific terms, and § 1200.5 gives little indication of what those will be. For that reason, AFGE believes that § 1200.5 needs to be amended to direct the Board to make any proposed policy available for review and comment by stakeholders prior to implementation.[1]

5 C.F.R. § 1200.6 Self-Represented Appellants

The Board has a longstanding policy to "make special efforts to accommodate pro se appellants."[2] However, this policy does not derive from MSPB regulations, which are silent as to the treatment of pro se appellants. AFGE recommends that § 1200.6 be added to Subpart A of the Board's regulations and unambiguously state that the MSPB will make special efforts to accommodate pro se appellants. Some examples that the new provision could include are: (1) that an administrative judge will not reject filings by pro se appellants for failing to comply with technical requirements unless the violations are repeated after a clear warning; (2) that an administrative judge should schedule a status conference early in the appeals process to explain what will be required of the pro se appellant and provide a point of contact for any questions the appellant may have; and (3) that an administrative judge should give wider latitude to a pro se appellant in questioning witnesses and in giving testimony.

5 C.F.R. § 1201.23 Computation of Time
89 Fed. Reg. 72961

This amendment provides that, "at MSPB's discretion," filing deadlines for all pending appeals can be "changed" due to events that broadly affect the MSPB process, such as technical outages or government shutdowns. However, it is unclear as written whether the Board would require a chairperson and/or a quorum to exercise this discretion. To account for this, AFGE recommends that this regulation be further amended to provide that: (1) if there is a single Board member, that member may extend or toll deadlines consistent with this regulation; and (2) if there are no Board members, the Clerk of the Board may extend or toll deadlines consistent with

[1] In its current form, § 1200.5 would simply require the Board to make its policy on conduct publicly available via the Board's website.

2 *See* U.S. Merit Systems Protection Board, *Judges' Handbook* at 11 (Nov. 5, 2024), www.mspb.gov/appeals/files/ALJHandbook.pdf. *See also Miles v. Department of Veterans Affairs*, 84 M.S.P.R. 418, 421 (1999) (providing that administrative judges should give more guidance to pro se appellants and interpret their arguments in the most favorable light).

this regulation. Similar to the amendments to § 1200.3, above, this change would help mitigate disruption if the Board lacks a quorum in the future.

5 C.F.R. § 1201.73 Discovery Procedures
89 Fed. Reg. 72961-62

This amendment significantly modifies the Board's discovery procedures, both procedurally and in substance. AFGE supports the Board's desire to simplify service requirements by eliminating the need to request permission to serve discovery responses electronically. We also agree with giving the parties additional time before needing to file a motion to compel.

However, AFGE does not think it is appropriate to set a new limit of twenty-five for document requests and requests for admissions. For context, we note that the Federal Rules of Civil Procedure include no numerical limitation to these methods of discovery, and many states have similarly chosen not to impose a numerical cap.[3] Jurisdictions which have chosen to include a limitation have generally set the number above twenty-five. We also note that 5 C.F.R. § 1201.72(d) already provides a sufficient mechanism for managing the scope of document requests and requests for admissions. Specifically, administrative judges have the authority to impose limitations on such requests if: (1) the discovery sought is cumulative or duplicative; (2) the party seeking discovery has already had sufficient opportunity to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit.

Contrary to the Board's goals of reducing discovery disputes and expediting the processing of appeals, limiting document requests and requests for admission to twenty-five will increase the frequency with which the parties will need to seek involvement from the Board during basic discovery. And, because admissions streamline hearings on the merits by eliminating the need to litigate uncontested issues, limiting the number of admissions will in fact complicate hearings by requiring additional witnesses and testimony. For these reasons, AFGE believes that limitations on document requests and requests for admission should be removed from this amendment.

5 C.F.R. § 1201.84 Proof of Service
89 Fed. Reg. 72962

This amendment builds on the currently permissible methods of service by adding "any other method that is in accordance with applicable State law." AFGE believes that creating fifty different rules for service is unwise and will cause confusion. Many parties to an MSPB appeal, especially pro se appellants and those who do not practice regularly, will not know how to find their state's law on this matter. For those who practice regularly but in multiple jurisdictions, fifty different rules will result in errors or, at minimum, require additional time to be spent ensuring conformity. For that reason, we recommend removing "any other method that is in accordance with applicable State law."

[3] Under MSPB regulations, the Federal Rules of Civil Procedure are "instructive" and "may be used as a general guide for discovery practices in proceedings before the Board." *See* 5 C.F.R. § 1201.72(a).

Instead, AFGE recommends borrowing from Rule 5(b)(2)(F) of the Federal Rules of Civil Procedure and adding "By any other means that the person consented to in writing" as a permissible method of service. This rule would allow for flexibility in service without requiring esoteric knowledge of State law and can be applied easily by parties of any experience level. To accommodate rare circumstances in which the current methods of service are insufficient, but the person does not consent in writing to another method, we also recommend adding "By any other means permitted by the administrative judge or Board if good cause is shown." Combined, these revisions should provide sufficient methods of service without causing confusion.

5 C.F.R. § 1201.85 Enforcing Subpoenas
89 Fed. Reg. 72962-63

This amendment eliminates the ability to file an oral motion to enforce a subpoena, instead requiring the moving party file a written motion that includes a document certifying that the subpoena was served and an affidavit describing the alleged refusal or failure to obey the subpoena. AFGE believes that these technical requirements are prejudicial to pro se appellants, who are more inclined to file oral motions or who may not have the knowledge or skills necessary to satisfy the requirements of the written motion. As a result, we recommend that the regulation remain as-is. The stated goal of "further develop[ing] a written record" can be accomplished just as effectively by having the administrative judge fully document the oral motion and solicit any information necessary to make the motion compliant with regulations.

5 C.F.R. § 1201.114 Petition for Review—Content and Procedure
89 Fed. Reg. 72962-63

This amendment, among other things, eliminates the ability of parties to file cross petitions for review. AFGE disagrees with this elimination and recommends that the ability to file cross petitions for review be retained. Although the stated goal of eliminating cross petitions is to simplify the petition process by requiring parties to raise all issues by the initial petition for review deadline, we believe that it will have the opposite effect: it will unnecessarily increase the frequency with which parties seek review.

Specifically, without the ability to file a cross petition for review, parties will feel compelled to preemptively appeal a decision—even one that they are generally satisfied with. This is because declining to petition for review will result either in the *status quo* (because the other party also declined to petition for review, or the other party sought review and was unsuccessful) or a worse outcome (because the other party petitioned for review and was at least partly successful). Preemptive filing, on the other hand, would at least add the potential for an improved result. Put another way, eliminating cross petitions for review will encourage parties to appeal decisions "just to be safe."

By keeping the ability to cross petition for review, however, a party does not risk having to defend against a challenge without being able to raise their own challenge in response. Parties can therefore litigate reactively and only over issues that they have determined warrant the time and expense of further litigation. Because this is the most efficient result for everyone—employee, Agency, and the MSPB alike—AFGE believes that the final rule should not include the elimination of cross petitions for review.

5 C.F.R. § 1201.115 Criteria for Granting Petition for Review
89 Fed. Reg. 72963

This amendment reflects the elimination of cross petitions for review, which AFGE opposes as discussed above. Because there is no need to amend this section but for the elimination of cross petitions for review, AFGE also opposes the amendment to this section.

5 C.F.R. § 1201.118 Board Reopening of Final Decisions
89 Fed. Reg. 72964

This regulation authorizes the Board "at any time" to reopen "any appeal," but "only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final." Although this portion of the regulation is not changed by the Interim Final Rule, AFGE recommends that it be further amended. First, "at any time" should be removed from the regulation; while we do not recommend setting an arbitrary amount of time in which an appeal may be reopened, neither do we think the Board's authority to reopen a case should exist in perpetuity. Second, we recommend adding language that allows the reopening of an appeal only in an unusual or extraordinary circumstance *and* if doing so would not cause unfair prejudice to a party. For example, a party's detrimental reliance on the implementation of a Board decision should prevent the Board from reopening that appeal.

5 C.F.R. § 1203.12 Granting or Denying the Request for Regulation Review
89 Fed. Reg. 72966

This amendment seeks "to better communicate what action the Board will take when it grants a request to review an OPM regulation." Specifically, it revises 5 C.F.R. 1203.12(b) to provide that, "[i]f the Board grants a request, it will review the regulation to determine whether any provision, whether on its face or as implemented by the agency, would require any employee to violate 5 U.S.C. 2302(b)." In doing so, however, it needlessly removes procedures directing the Board to identify the agency or agencies involved; cite the regulation at issue; and provide a description of the issues, the docket number, and instructions covering the review proceedings.

AFGE recommends that the new language supplement the information originally laid out in 5 C.F.R. 1203.12(b), not replace it. This could be done by retaining 5 C.F.R. 1203.12(b) in its current form and adding the new language as 5 C.F.R. 1203.12(c). Alternatively, the new language could be included as part of the information already provided by 5 C.F.R. 1203.12(b).[4] We also recommend two changes to the new language, wherever it ultimately is placed. First, it should include reference to 5 U.S.C. 1204(f), the section which directs the Board to perform this type of review. Second, we recommend changing "the agency" to "an agency", which more closely aligns with the pertinent language in 5 U.S.C. 1204(f).

CONCLUSION

AFGE appreciates the opportunity to submit these comments and believes that the Interim Final Rule and the MSPB's regulations would benefit from the changes suggested above.

[4] Either option would require some amount of nonsubstantive redrafting.

Finally, AFGE notes that by submitting these comments, AFGE does not waive any rights or challenges that it may have, now or in the future, concerning any aspect of the amended regulations.

Thank you for your consideration of these comments.

Sincerely,

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/s/Christopher Blessing
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