Outlook

Comments on MSPB interim final rule

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Cc [redacted]

RULEMAKING
COMMENTS BY PETER BROIDA

With malice toward none and best wishes to all, we offer our comments on the Board's interim rules.

We offer these comments in two parts. First, the comments address the proposed revisions and regulations; second, there are suggestions for revisions beyond those in the proposed regulatory revisions.

I. COMMENTS CONCERNING PROPOSED REGULATORY REVISIONS

1200.3

(a) The three Board members make decisions in all cases by majority vote except in circumstances described in paragraph (b) of this section or as otherwise provided by law.

(b) When there are at least two Board members and, due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation, or other order under review may be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph (b).

CHANGE:"The Chairman" to "The Chairman or Acting Chairman"

(c) When due to vacancies, recusals, or other reasons, only one Board member is able to act, the Board member may direct the following types of matters to an administrative judge or other official:

(1) A party's request to withdraw his/ her appeal or petition for review for final disposition;

CHANGE: An AJ should not order a PFR withdrawn. That should be done by the Clerk. What will the AJ do? Will the AJ issue an initial decision for the second time? Will that initial decision then be subject to a petition for review or, possibly judicial review? The problem is eliminated by delegating the authority to the Clerk.

1200.5 Conduct policy.
The Board may issue a policy governing the conduct of the parties for all appeals before the Board and of parties and any other individuals in communications with the Board. Such policy may include rules regarding prohibited conduct and vexatious filing by a party, witness, representative, or other individual, as well as potential sanctions or other consequences for violations of the policy. Any policy established pursuant to this regulation will be made publicly available via the Board's website ([http://www.mspb.gov)/]www.mspb.gov)

COMMENT: This is not a regulation. If the Board wants to add something to its sanctioning authority under 5 CFR 1201.43, it should amend that regulation or establish another regulation that actually regulates the conduct of those with business before the Board.

It is understood that some administrative judges are (justifiably) disturbed about the degree of animus and disrespect evident in some proceedings. But this statement of intent does nothing to alleviate the problem.

The AJ already has sanctioning authority. If the MSPB really believes it needs to establish a code of conduct for all parties and their representatives, let that be done through written regulation published in the Federal Register, with opportunity for comment. But it hardly seems necessary. Most people conduct Board appeals in a passably reasonable manner; save the exceptional conduct for the exceptional imposition of sanctions after due warning to the offender.

1201.56 Burdens of Proof

The earlier provision was:

n appeals from reconsideration decisions of the Office of Personnel Management (OPM) involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q)),

entitlement to the benefits. Where OPM proves by preponderant evidence an overpayment of benefits, an appellant may prove, by substantial evidence (as defined in § 1201.4(p)), eligibility for waiver or adjustment.

The new regulation is changed to:

In appeals from final decisions of the Office of Personnel Management (OPM) involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q)), entitlement to the benefits.

COMMENT: This muddles analysis. The decision of OPM from which an appeal is taken is a reconsideration decision. That's what OPM calls it; that's what innumerable MSPB decisions call it. Why dilute the definition?

The Register comment stating that there are circumstances when initial decisions can be appealed describes rare cases. The regulatory change does not describe those cases and still leaves only a final decision appealable. If you want to state the rule and exception, state it clearly in the regulation.

And, as to overpayments and waivers, retain the distinct substantial evidence standard. It helps appellants know what their burden is, and informs judges as well. It squarely places on OPM the responsibility of proving its claim against a retiree or derivative beneficiary. The comment offers no reason to drop the reference to substantial evidence. Why alter the burden of proof, to the disadvantage of the retiree? There is nothing in the case law that suggests this was a problem in the past. If it's not broke, don't fix it.

1201.72

COMMENT ON (c):

1. you should add requests for medical/mental examination, allowed under the FRCP and *Hasler*, excluded by your enumeration.

2. So, under the new regulation, one can serve nonparties with interrogatories. (Really?)

In April of 2008, the Board amended the discovery regulations to allow interrogatories only between the parties. The Federal Register notice accompanying Board regulatory revisions on April 3, 2008, 73 Fed. Reg. 18149, stated in the comments section of the notice:

5 CFR 1201.72(c) is clarified by adding the words “to parties” after “interrogatories’” in response to a comment received from a practitioner suggesting that there may be some confusion about whether interrogatories may be served on nonparties.

Under the old (unrevised) regulation:

Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories to parties, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

Under the new regulation:

Parties may use one or more of the following methods for obtaining discovery from parties or nonparties: written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission. These methods include written interrogatories to parties, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

If interrogatories are allowed to be issued to nonparties, how will that be enforced against nonrespondents? Sanctioning a party with no control over a nonparty is not the way to go.

And what about requests for admission to nonparties? Do you think that the admission of a nonparty should be binding on an appellant or an agency? Such an approach would create evidentiary problems, as for example, a party going to an allied nonparty to gain admission that would assist the requesting party.

1201.73: Discovery Procedures

(d)(1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

COMMENT

Agencies often don’t file their responses on time. They may just be late or they may file motions to dismiss.

Suggestion: change the approach: allow each side to initiate discovery within 10 days of the actual filing of the agency response to the appeal, or in the case of a preliminary jurisdictional motion, within the time set by the judge.

1201.73: Discovery Procedures

(e) (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts.

(2) Absent prior approval by the judge, requests for documents served by parties upon another party or nonparty may not exceed 25 in number, including all discrete subparts.

(3) Absent prior approval by the judge, requests for admission served by parties upon another party or nonparty may not exceed 25 in number, including all discrete subparts.

COMMENT: Among the nation's million or more lawyers, there are likely not more than five (excepting MSPB personnel) who know what a discrete subpart is.

The term is not defined by the Federal Rules.

The lack of commonality of understanding leads to discovery objections, depending on who is counting and how the counting is done.

Suggestion: try for clarity and reduce discovery disputes. Incorporate language that tracks the notes of the FRCP Advisory Committee, which suggests in its 1993 amendments to those rules:

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

Use examples in the regulation, similar to the use of regulatory examples in describing consequences for various elections involving IRA cases.

1201.73(e)(3)

Absent prior approval by the judge, requests for admission served by parties upon another party or nonparty may not exceed 25 in number, including all discrete subparts.

COMMENT: As noted in an earlier comment, the underlying notion that a nonparty may make admissions is, well, novel.

Our dim recollection from law school was that under FRCP 36, admissions are made by parties.

Let's keep it the way the FRCP drafters wrote the rule.

1201.84

COMMENT: The structure seems wrong.

Per revision:

§ 1201.84. Proof of service.

The person who has served the subpoena must certify that he or she did so:

(a) By delivering it to the witness in person,

(b) By registered or certified mail,

(c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended, or

The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

(d) By any other method that is in accordance with applicable State law.

SUGGESTED CHANGE: move "The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered." to the end of the regulation, so it will read:

§ 1201.84. Proof of service.

The person who has served the subpoena must certify that he or she did so:

(a) By delivering it to the witness in person,

(b) By registered or certified mail,

(c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended, or

(d) By any other method that is in accordance with applicable State law.

The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

1201.114

COMMENTS:

The Federal Register notice seems to omit the revised 1201.114(a)(3).

1201.183

COMMENT:

The Board's enforcement procedures are deficient, and that's faint praise.

The Board routinely defaults appellants who are a day or two late filing an appeal or a PFR. Agencies are never defaulted. They may (rarely) be sanctioned. Relatively few appellants get to the point in adjudication of adverse action, performance, or IRA appeals of receiving a favorable initial decision (acknowledging settlements of some cases). When they do get a favorable decision, many appellants experience years of MSPB litigation before they get what should be a straightforward remedy.

In fine, in the history of the Board, there seems to be no example of a certification to the CG for salary withholding. Normally deferential to agency decisions, when an agency is finally adjudicated to be in the wrong and the Board directs a remedy, and when the

agency resists, the Board demands, pleads, cajoles, reminds, imposes reporting requirements, but never uses the one means provided by law to enforce its orders. Bureaucratically squeamish, the Board is ignored by agencies whose lawyers, paid through taxes, drag compliance into exhausting skirmishes between the Board and those agencies, with appellants always losing out.

Compliance disputes go on and on, sometimes for years, as the Board attempts to exact information from agencies, eventually finds noncompliance at the HQ level, refers matters to the Board's GC, and so on.

How to stop this? The solution is an interim payment from the agency to the appellant: if the agency challenges a compliance initial decision by a PFR, just as with reversal of an adverse action, the agency should be required to pay all or some of the amount in dispute to the appellant as a precondition of the PFR from the compliance initial decision. The amount of the payment will be within the discretion of the AJ. If the agency's payment is later found not to have be justified following adjudication of the PFR, the agency can pursue collection procedures through any means available. If the agency does not pay the amount ordered by the AJ, the compliance PFR is dismissed, the compliance initial decision becomes final and further incontestable. Then the Board, on further noncompliance, can certify the matter to the CG. Alternatively, if pay or benefits are not the issue, but job placement is, the agency can be ordered, as a condition to its PFR, to make an interim appointment absent a showing of an extraordinary reason for not making the interim appointment.

1201.204 Damages

(2) Place of filing. When the initial decision in the proceedings on the merits was issued by a judge in an MSPB regional or field office, the request must be filed with the applicable regional or field office. When the initial decision in the proceedings on the merits was issued by a judge at the Board's headquarters or when the only decision was a final decision issued by the Board itself, the request must be filed with the Clerk of the Board.

(3) Form and content of request. A request for consequential, liquidated, or compensatory damages must be made in writing and state the basis for entitlement to an award of such damages, and the amount of damages sought.

(4) Service. A copy of the request must be served on the other parties or their representatives at the time of the request. A party may respond to the request within the time limit established by the judge or the Board, as applicable.

COMMENT:

Add to these provisions that the requirements are met if the request is made through the e-appeal system, whether the underlying decision is issued at a region or at the Board's HQ.

1201.114 PFRS & CROSS PETITIONS

COMMENT: The FR notice calling for elimination of the cross petition process lacks empirical data. Of the tens of thousands of petitions for review adjudicated by the Board, how many have involved cross petitions? How many of those cross petitions have been granted? What are the relative advantages and disadvantages of the cross petition process?

Surely elimination of a significant procedural step in MSPB processes will expedite handling of cases before the Board. For example, the entire petition for review process could be eliminated and substituted with a discretionary reopening procedure, which would be constitutionally sufficient, but grossly inadequate to meet the needs of practitioners and agencies.

Let us take a simple example: an AJ mitigates a removal to a 60 day suspension, which is still a substantial penalty. The appellant may believe that the AJ missed a significant point in the adjudication, but the appellant is willing to abide with the suspension and has no intent of spending the resources and time necessary to challenge it. But then the agency files a PFR on the last permissible day. At that point, there is good reason for the appellant to raise the problem through a cross PFR of the adjudication error by the judge.

If empirical data from the Board shows that the cross petition process is rarely used and never granted, that would be a good reason for its elimination. But that information has not yet been provided by the Board.

1201.155 REQUESTS FOR REVIEW OF FINAL GRIEVANCE OR ARBITRATOR'S DECISIONS

COMMENT: what is not clear is what the Board is trying to do here.

First, there is the pre-existing regulation:

§1201.154 (1992) Time for filing appeal; closing record in cases involving grievance decisions.

. . .

(d) Contents.

. . .

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

In federal sector labor relations, all contracts must have a grievance and arbitration process. 5 U.S.C. § 7121(a)(1). The statute requires that contracts provide that any grievance not settled under the grievance process be subject to binding arbitration at the election of the union or the agency.

As a matter of practice, grievance procedures in the federal sector are usually a multistep process, starting with a grievance that can be filed by the employee or the union, going through two or three steps of resolution procedures, culminating in a final grievance decision from an agency official, with that final grievance decision being subject to possible arbitration, often under another provision of the contract, at the election of the union or the agency.

The point is that the collective bargaining contract establishes a grievance procedure that results in the final grievance decision under the contract. That grievance decision may or may not be taken to arbitration, but the grievance decision is final, and (if arbitration is elected by the union) an arbitrator reviews the final grievance decision and determines whether to sustain it, reversed, or otherwise modify it, with whatever remedy the arbitrator selects.

There is no example in MSPB decisional law showing that a grievance decision arrived at through the negotiated grievance procedure is itself subject to an MSPB appeal. Instead, what is reviewed by the Board is the arbitration decision or award that is issued after the final grievance decision from the agency is evaluated by a neutral labor arbitrator.

So the question here is whether the Board is altering its historical approach to grievances and stating that an employee can invoke the contractual grievance process, carry the grievance to the last step in the process, obtain a final decision from some management official, and then take to the Board a challenge to the outcome of that grievance in an

adverse action or performance-based action through the Board's original jurisdiction? If so, the employee would not have to convince the union to take the matter to arbitration.

Historically, the "final" decision under a grievance/arbitration procedure is the arbitrator's decision (award). E.g., Parks v. Smithsonian Institution, 39 MSPR 346 (1988) ("The final decision rendered pursuant to a negotiated grievance procedure, which is then appealable to the Board under 5 U.S.C. § 7121(d), is the arbitrator's decision in cases where the grievance procedure provides for arbitration as the last resort. See Clark v. Equal Employment Opportunity Commission, 31 M.S.P.R. 455 (1986) . See also Fierro, MSPB Docket No. HQ71218810005 at 6; Ogden Air Logistics Center, 6 M.S.P.R. at 635."); see Garland v. Dept. of Labor, 13 MSPR 629, 631 (1982); cf. Martinez v. Dept. of Air Force, 12 MSPR 251, 253 (1982); Farmer v. MSPB (Fed. Cir. No. 93-3533 1994 NP) (grievance not pursued through arbitration did not achieve the status of a "final decision," as defined by the contract, and could not be pursued to the MSPB).

If an arbitration decision is not a prerequisite to a decision under a grievance process taken to MSPB, any Federal Register notice must make the intent plain, to permit comment by Board practitioners, as well as representatives of the unions and agencies. If that is not the intent, then the concept of a final grievance decision must be further defined by the Board to mean that the decision must come from an arbitrator. There should be no guessing as to Board jurisdiction, no change in appellate processes through the change in a subheading title for a regulation. The Board's intent must be clarified.

II. SUGGESTIONS FOR FURTHER REVISIONS

Now, for our wish list.

A. PREHEARING PROCEDURES

The Board's approach to administrative litigation has been exceptionally formal for what is supposed to be informal adjudication.

Acknowledgment orders are prolix, frequently not tailored to the circumstances of an appeal.

Jurisdictional orders are formalistic, often copied, particularly in cases of Individual Right of Action appeals, from templates provided by the Board.

Mediation, although a good approach, seems to take a long time.

Discovery allows insufficient flexibility for the parties.

Prehearing submissions require extensive production of exhibits, often duplicative.

1. ACKNOWLEDGMENT ORDERS

Judges should be required to tailor acknowledgment orders to the circumstances presented in the appeal. It should be a regulatory requirement rather than an admonition in an informal publication or in the AJ's performance standards.

If the case is plainly within the jurisdiction of the Board, and if it is plainly timely, both matters being those that should be readily ascertained by the appeal itself, there is no reason for that acknowledgment order to have a paragraph talking about whether jurisdiction has been established or whether the appeal was timely.

Similarly, if a party is clearly represented by someone, there is no reason for it acknowledgment order to have a designation of representative paragraph for the party clearly already represented.

Acknowledgment orders should be not only tailored but streamlined and worded in a fashion that is readily understood by pro se appellants and individuals who are represented by people who are not frequent Board practitioners.

Jurisdictional orders or orders to show cause relating to jurisdiction or timeliness, should not be boilerplate renditions. These orders need to be tailored to the circumstances of the appeal presented. If the judge does not understand the basis for the appeal, the judge can order the appellant to provide a more definite statement of the appeal so that the judge can craft a more precise and focused jurisdictional order or order to show cause. The same is true with affirmative defense orders. Some of the precision desired in such orders can be better obtained by a status conference soon after the appeal is initiated.

2. USE OF AN IMMEDIATE STATUS CONFERENCE

Some judges are more interactive than others. But for all cases, what is needed is an introduction of the parties to the judge through a status conference that occurs soon after the agency files its response to the appeal. The first in-person contact with a judge should not be during the prehearing conference. A judge should engage the parties through an early video or telephonic conference to give the parties a sense of who the judge is and how the process is going to proceed with that judge, to allow the judge to

develop some understanding of the background of the parties, the nature of the appeal, and to allow the parties to speak with the judge about how the case is going to be processed. These types of conferences are not as necessary when the practitioners before the Board are well experienced, but initial interaction with the judge is essential in any case to build some trust by the parties in the judge and to acquaint the judge with the needs of the parties, who are, after all, the Board's stakeholders. More trust in AJs, developed through more interaction between them and the parties, will likely reduce in number the bias allegations adjudicated at the PFR level.

3. BETTER USE OF THE MEDIATION PROCESS

The Boards's mediation program has worked well. However, it also tends to work rather slowly. It takes time to select a mediator and then the mediator seemingly has an unlimited amount of time in which to conduct mediation. Mediation should be expeditious. The time for the mediation will vary, to be sure, but in no event should it last more than 60 days, and most of that time should be spent on drafting a settlement agreement.

4. ALLOW PRACTITIONERS SOME CONTROL OVER DISCOVERY

By way of example, let's take a common situation. The appellant has issued a slew of interrogatories and document requests, the agency has 20 days to respond, and the agency needs more time to complete the responses. Under the rules as they stand, setting aside the limited amount of time to file a motion to compel after a meet and confer session, it would be necessary to request by motion an order from the judge extending the time for the agency to respond.

Take another common example. The agency provides some documents within the time allowed for the document production but responds that there will be "rolling discovery" and more documents will be furnished later on. Under current board practice, the agency doesn't have the right to engage in rolling discovery, and a motion would have to be filed to permit that.

Reasonably experienced practitioners can adjust discovery deadlines amongst themselves, while keeping in mind a firm deadline for completion of discovery. Revise the regulations to permit the parties to adjust their own discovery deadlines, including the time for filing a motion to compel, while requiring the judge to set a deadline for the close of discovery.

Depositions: the use of depositions in Board practice is significant. The agencies have the advantage. They can afford to have the depositions taken by a court reporter who produces a transcript at the cost of more than several dollars per page. The Federal Rules make plain that depositions may be taken by any means chosen by the parties, including audio recording or video recording. With the MSPB, agencies frequently object to the use of alternate means for recording a deposition and insist that the deposition only be taken before a stenographer who can administer an oath. Essentially, agencies insist on stenographic transcripts.

Attempts to get judges to approve the use of means other than stenographic transcripts for depositions have proven unsuccessful. So, the appellant is forced to hire a court reporter or not take the deposition.

While it is true that some depositions, when used in lieu of hearing testimony, should be transcribed, many depositions are taken only for the purpose of gaining information. That information may or may not be useful during the course of a Board proceeding. Judges should be required to approve, or the regulation should be written to require, depositions to proceed by alternate means, without the presence of a notary, with the option of either party to have the recording transcribed. As to the use of sworn testimony, it should be sufficient to request the deponent to state that he or she is giving testimony in accordance with the Federal False Statements Act.

This is all the more important because under Federal Circuit precedent, the cost of depositions is not recoverable in the usual adverse action or performance-based action. The result will differ when there is a finding of a prohibited personnel practice or discrimination. But, absent those findings, the costs are not recoverable, and the cost can be considerable, which is all the more reason for eliminating the basis for the costs and using alternate means for recording depositions.

5. PREHEARING SUBMISSIONS

Under the current process, the parties provide as part of the prehearing submission copies of all the exhibits they intend to introduce at the hearing. Then the judge has to decide during the prehearing conference whether to review and accept or reject the exhibits then or wait until the hearing to consider their admissibility. The better practice, absent stipulations to documents, is to wait for the hearing so that the exhibits can be offered in the context of testimony that explains the necessity for or relevance of the exhibits.

In practice, both parties to a Board appeal will rely on many of the same exhibits. In short, there is a lot of duplication. The better practice would be, as is the case with EEOC

hearings, for the parties to list their exhibits rather than producing them in bulk with the prehearing submission. And then the judge would deal with the exhibits at the time of the hearing. It will often become immediately apparent that both sides are using some of the same exhibits, and they can be admitted by agreement.

6. USE OF EMAIL

The Board has made plain to judges that adjudication is not to take place by email, and that is fair enough, but email is used during the course of adjudication by other agencies for routine communications between the parties and the judge. The same should occur at MSPB.

Take a common example: the scheduling of the status conference or prehearing conference, or the hearing itself. What happens now is the judge sends out an order scheduling the conference without talking with the parties in advance. One party or both parties cannot meet with the judge or attend the hearing on the date shown. This necessitates filing requests for adjustments of the dates. It would be simpler if the judge who wants to hold a prehearing conference or hearing sends an email to the parties asking them to work out amongst themselves several dates and then allow the judge to select one of them, or for the judge to offer several dates, and allow the parties to come up with an agreement. If there is no agreement, then the judge can put things on a more formal basis. If the parties put something into an email that really should be part of the Board's record, then the judge can place the email into the record.

The point here is to expedite and make more informal Board adjudication.

B. PRECEDENTIAL AND NONPRECEDENTIAL DECISIONS

When Board decisions were first reproduced by the Government Printing Office and West Publishing, final Board decisions were accompanied by the initial decisions of the (then) presiding officials. That stopped. Then only Board final decisions were published. They were all precedential. That practice was continued in one form or another for many years, until the Board started using short form orders or nonprecedential final orders for decisions that announced a result with very little discussion of the merits (substantive comments are often included only in footnotes).

Most recently, and with the current Board, we have an amalgam of very few precedential decisions and a large number of non-precedential decisions, some of which go on for 20, 30, or 40 pages, which convey new guidance or summarize precedent in a new way.

What's the point of going to the trouble or writing and editing these decisions if they cannot be cited as precedent by judges and parties to appeals? It's essentially a de facto secretive body of law. Although the Board's weekly Case Report summarizes nonprecedential decisions of the Federal Circuit, it does not summarize Board NP decisions. It provides little guidance on Board law, since there are so few precedential MSPB decisions. The Board is not reasonably publicizing a reliable body of law.

It does little to advance discussion to try and cite every decision in the past several years that should have been precedential. We offer but a few:

Brown v. DHS, SF-0752-14-0816-A-1 (NP 1/12/2023) (includes dissent on standards award counsel fees for mitigation of adverse actions);

Wine v. Dept. of Interior, DA-1221-16-0513-W-2 (NP 2/10/2023) (guidance on retaliatory investigations);

Cadena v. DHS, DE-0432-19-0321-I-1 (NP July 15, 2024) (post-Santos Chapter 43 requirements);

Nelson v. DHS, AT-1221-22-0186-W-1 (4/5/2024) (NP) (IRA treatment of EEO allegations made to OIG or internal agency investigative units);

Talley v. NRC, DC-3443-22-0447-I-1 (3/22/2024) (NP) (adverse action jurisdiction and locality pay);

Cledera v. DOJ, DA-0752-21-0013-I-3 (3/25/2024) (NP) (due process; ex-parte information);

Flannigan v. Dept. of Air Force, DC-0752-13-0367-I-4 (3/11/2024) (NP) (expert testimony; Daubert).

Bottom line: for many people involved in Board litigation, especially but not only pro se appellants, there is no way to research the current (or past) state of Board law. Trying to find law on a particular point through a word search on the Board's website is not a productive endeavor.

But what people can do is look at recent decisions to cull out a few that may be informative. But the decisions one finds are invariably NP and cannot be relied on by researchers and they cannot be persuasively cited to AJs, the Board, or to the Federal Circuit. This is no way to run a railroad.

Given the availability of all Board decisions on its website and through commercial electronic publishing enterprises and given the absence now of any set of printed volumes containing Board decisions, there seems no reason to distinguish precedential and nonprecedential decisions for a publisher. The use of extensive nonprecedential decisions, often containing considerable discussion of legal points, leaves the parties, the public, judges, and the Board itself (not to mention its reviewing courts) in the dark as to what decisions can be reliably referenced in the course of Board adjudication.

The precedential and nonprecedential decisions are both comprehensive, both include legal citation, both reference to the record, in short, they are indistinguishable except that the precedential decisions normally address a novel point in the law, sometimes of limited application within the civil service world. Nonprecedential decisions may address novel points; significantly, they provide good summaries of the law and should be reliably cited as precedent.

Any decision of the Board should be reliable enough to be cited and relied on by others. Otherwise, what is the point of issuing decisions that contain legal analysis at the PFR level? If the distinction between precedential and nonprecedential decisions is eliminated, the Board can issue short form decisions that contain no reasoning and all other decisions that do contain reasoning. Then people can rely on the decisions and there is no disadvantage to the Board as an institution.

C. RULEMAKING PETITIONS

Rulemaking petitions are a normal process of administrative practice under the APA. The Board seems to ignore the petitions, receiving them without deciding how to treat them. Assuming a rulemaking petition is submitted as a serious effort to revise a Board practice, it should not be ignored. It can be denied. There should be some explanation. The failure to act on a rulemaking petition is generally considered judicial reviewable under the APA. See American Horse Protection Association v. Lyng, 812 F.2d 1 (D.C. Cir. 1987).

But it should not take a lawsuit for the Board properly to act on or deny rulemaking petitions. They should not accumulate in the Boards dead letterbox. If the Board wants to ensure that it is not inundated with frivolous rulemaking petitions, it can, by regulation establish the criteria for those petitions. And we urge you to do so.

D. ADVISORY COMMITTEE

The Board has been an insular organization. It does not, as does FLRA, hold (virtual) town halls. It does not, as does EEOC, hold its own public conferences (EXCEL). (We allow for

the yearly or so MSPB roundup sponsored by the Federal Circuit Bar Association, publicized to FCBA members [few of whom are MSPB practitioners]). A process for some external input into Board operations might well improve the service the Board provides to the public and increase the trust in the Board as a neutral adjudicator. It is recommended that the Board establish an advisory committee to include representatives of agencies, unions, attorneys in private practice, and academicians. The Federal Circuit has an advisory committee, and its judges must find that committee of some benefit; the same could be true for the Board. Outsider opinion, even occasional criticism, may benefit the bureaucratic process.

E. ELEVATION OF AJs TO ALJs

To avoid subjecting AJs to manipulation of their civil service appointments, to eliminate the need for MSPB to contract for ALJs when deciding cases involving ALJs or in Special Counsel cases, it is recommended that the Board request OPM to allocate to the Board sufficient ALJ positions to manage its caseload and to provide for an orderly process allowing AJs to enter the ALJ corps.

Very few AJs are removed, very few are asked to resign. Making them ALJs enhances their protections against adverse action, but as a practical matter the enhanced protections do not diminish the ability of the Board to oversee their decisions. The additional funding for ALJs would likely not be much, given that most AJs are GS-15s. That is a matter for Board study.

Respectfully submitted,

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