Gilbert Employment Law, P.C.

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November 7, 2024

Submitted via email to: mspb@mspb.gov

Gina K. Grippando
Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street NW
Washington, DC 20419

Re: *Interim Final Rule*; 89 Fed.Reg. 72,957-72,966 (September 9, 2024)

Dear Ms. Grippando:

Gilbert Employment Law, P.C. (GEL PC) respectfully submits the following comments concerning the Merit System Protection Board (MSPB or Board)'s Interim Final Rule as published in the Federal Register at 89 Fed.Reg. 72,957-72,966 (September 9, 2024).

GEL PC is a nationally recognized employment law firm with a proven track record of representing the rights of employees. GEL PC has more than thirty (30) practicing attorneys and a large compliment of other legal staff professionals. The founding partner, Gary Gilbert, is a former Chief Administrative Judge of the EEOC Baltimore Field Office. GEL PC's lawyers include numerous authors and authorities on federal sector employment litigation and are known for skillfully advocating for clients before the MSPB, the Equal Employment Opportunity Commission (EEOC), the Office of Special Counsel (OSC), the Office of Personnel Management (OPM), and before state and federal courts. Since its inception, GEL PC has represented and helped thousands of federal employees who have experienced unlawful treatment in the workplace. GEL PC

represents employees through all stages of the MSPB and EEOC Hearing processes. Thus, GEL PC has both an interest in any potential modifications to the Board's procedural regulations and extensive expertise regarding the practical impact of any proposed modifications.

GEL PC has reviewed the November 6, 2024 comments submitted by the National Employment Lawyers Association (NELA) in connection with the instant rulemaking. GEL PC concurs with NELA's comments and notes the following additional observations.

GEL PC is concerned that proposed Section 1201.73, as presently written, creates a potential ambiguity that the Board should rectify. The problem arises in trying to determine the correct deadline for discovery motions where the responding nonmovant party has timely served objections or responses to the movant requesting party's discovery requests, but where the movant believes those responses are evasive or incomplete, in whole or in part. In that situation, it is unclear whether the 20-day deadline under proposed Section 1201.73(d)(3)(i)(A) would apply, or the 10-day deadline under proposed Section 1201.73(d)(3)(i)(B). The MSPB's expressly stated intent in this portion of the rulemaking was to expand the deadline for filing discovery motions to permit parties a reasonable opportunity to meet and confer to attempt to amicably resolve discovery disputes. *See* 89 Fed.Reg. 72,957, 72,958 (September 9, 2024) ("It also provides parties with additional time before needing to file a motion to compel, in order to reduce the number of discovery disputes between parties.").

Accordingly, this ambiguity should be resolved in favor of a 20-day deadline, which can easily be done by striking subsection (B) from proposed Section 1201.73(d)(3)(i) and reformatting, so the subsection reads in relevant part as follows: **"Any motion for an order to compel or to issue a subpoena must be filed with the judge within 20 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired."** Rectifying proposed Section 1201.73(d)(3)(i) in this fashion would also have the benefit

of avoiding the second problem in the present text of proposed Section 1201.73(d)(3)(i)(B). Specifically, the present proposed Section 1201.73(d)(3)(i)(B) does not make clear if the "notice" which starts the 10-day time limit is notice to the requesting movant that a response was evasive or incomplete (i.e. the date that the movant became aware that the response was evasive or incomplete), or instead notice provided by the movant to the nonmovant responding party that the discovery responses were evasive or incomplete.

The former interpretation would likely result in litigation over when the movant became aware that the responses were evasive or incomplete; the latter interpretation would allow the movant to deliberately delay issuing the notice and thus potentially provide notice to the moving party of perceived evasive or incomplete responses well after 20 days have passed from receipt of those response (allowing the moving party a new 10-day filing deadline for moving to compel after that notice, and thus eliminating the time limit for motions to compel concerning evasive or incomplete responses).

Present proposed Section 1201.73(e)(2), by limiting requests for admissions and documents requests, further disparately prejudices appellants—in addition to the reasons cited by NELA in its comments—due to the structure of adverse actions appealable to the Board. Adverse actions appealed to the MSPB commonly involve high numbers of charges and specifications, and it is not unusual for an adverse action in some cases to have well more than 25 total charges and/or specifications alleged against the appellant. Limiting an appellant's requests for production of documents or requests for admissions to a specific number that can, in many cases, be less than the number of discrete charges and specifications levied by a defendant agency, can severely curtail the appellant's opportunity to fairly obtain a complete record in discovery. This is particularly so considering that in a typical appeal, the agency controls most documents and witnesses. Further, agencies commonly exclude unfavorable documents from their produced materials relied upon for

appealed adverse actions from their Agency Files, leaving it to appellants to compile the complete record of relevant documentary materials through written discovery. Appellants therefore necessarily rely upon production requests as their most valuable tool in developing the case record.

This is exacerbated further in cases where an appellant also raises various affirmative defenses, and reasonably seeks documentation in response to requests tailored to each of those defenses. In such circumstances, an appellant would have little choice but to submit extremely broad requests for production of documents to stay within a limit of 25 requests, rather than focused requests that are narrowly tailored.

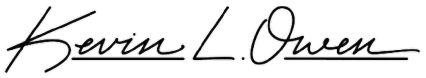
Such broad requests in practice often result in discovery disputes and discovery motions practice (as often occurs, for example, in litigation in the EEOC's administrative hearings process), burdening administrative judges and delaying litigation, a perverse result given that the Board's stated goal in limiting written discovery is "reducing discovery disputes and expediting the processing of appeals." *See* 89 Fed.Reg. at 72,958. This provides further reason to not impose a new cap on document requests.

Concerning proposed Section 1201.114 and its elimination of cross-petitions for review, GEL PC believes that a prohibition on cross-petitions for review would incentivize filing an increased number of petitions for review. Under the prior framework permitting cross-petitions, situations occur where there may be errors in an administrative judge's Initial Decision that have some impact on awarded relief, but an otherwise prevailing party elects not to petition the Board for review. The prevailing party in that circumstance may reasonably prioritize prompt finalization of resolution of their appeal rather than seeking full relief, knowing that if the opposing party files a petition for review, they retain the opportunity to address the administrative judge's error through a cross-petition.

With a prohibition on cross-petitions for review, if there is any reasonable possibility that the opposing party may file a petition for review, then the prevailing party is incentivized to file their own petition for review to ensure that any argument on relief-impacting errors is preserved on appeal. Since the prevailing party will not typically know with certainty whether the opposing party will file a petition for review, this will likely create situations where a prevailing party, in an abundance of caution, files a petition for review to ensure arguments on an error are preserved for appeal, yet the opposing party ultimately declines to file their own petition for review. This generates additional proceedings before the Board on arguments that the prevailing party would not have otherwise pursued, had the prevailing party known the opposing party would not be filing their own petition for review.

GEL PC thanks the MSPB for its consideration. If there are any questions or a desire to discuss this matter, please contact Kevin L. Owen at kowen@gelawyer.com or (301) 608-0880.

Sincerely,



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