



Outlook

Comment on Interim Final Rule (89 FR 72957)

From Michael L. Vogelsang, Jr. [REDACTED]**Date** Thu 10/31/2024 2:09 PM**To** MSPB <MSPB@mspb.gov>

Gina K. Grippando, Clerk of the Board,

My name is Michael L. Vogelsang, Jr., I am a Principal attorney with The Employment Law Group, PC. I have represented federal employee appellants before the Board for at least 12 years.

I respectfully provide the below comments on the Boards Interim Final Rule regarding discovery procedures before the MSPB:

1. 5 C.F.R. § 1201.73(e)(2) & (e)(3): Limits on Requests for Documents and Requests for Admission

In my experience with various matters before the Board, the availability of unlimited requests for documents and requests for admission permit parties to develop the evidentiary record more fully. The lack of a cap is not indicative of misusing discovery requests. The Federal Rules of Civil Procedure do not provide caps on requests for documents or requests for admission in federal court, and those matters proceed through discovery without any more intervention by judges as than my experience in the MSPB. Furthermore, while federal court complaints require a line-by-line “admit” or “deny” Answer from the Defendant, there is no parallel Answer mechanism before the Board. This difference makes requests for admission especially more important in discovery in the MSPB.

While the EEOC has limits in place on the number of requests for documents and requests for admission, the EEOC serves a different role than the MSPB. The EEOC holds that “the hearing process is intended as a continuation of the investigative process...” See *e.g., McManus v. U.S. Postal Serv.*, EEOC Appeal No. 01A11414 at *3 (Mar. 6, 2002). That is not the function of the Board. Relatedly, before a federal employee discrimination complaint reaches the EEOC, there is a 180-day investigative period that culminates in a report of investigation or investigative file with various statements and documents from the employee, management, and witnesses collected by an independent investigator. That process does not occur before appeals are submitted to the MSPB (the unilateral Agency-curated Agency file is not an equal facsimile of an EEO report of investigation), making the MSPB discovery process even more critical. Also, should federal employees be dissatisfied with the EEOC process, they have the right to bring their discrimination claims in federal court and avail themselves of the broader discovery mechanism under the Federal Rules of Civil Procedure. Other than in the context of mixed case appeals, federal employees in the MSPB do not have this right to remove their matter to federal court.

Ultimately, I believe the limitation on requests for documents and requests for admission may lead to more, rather than less, discovery motions. The limitations will require parties

to craft more generalized, broad requests to stay within the number allotted, creating more potential disputes on how the requests should be interpreted and whether they are objectionable. The current structure permits the parties to craft narrowly specific, easily identifiable requests without fear of exceeding any limit. For these reasons, my experience is that the MSPB's prior practice of following more closely to the Federal Rules of Civil Procedure were an advantage, not detriment, to the discovery process before the Board.

2. 5 C.F.R. § 1201.72(c) & 5 C.F.R. § 1201.73(d): Time Limits for Deposition Notices

While not necessarily new to the interim Final Rule, the discovery regulations are unclear whether notices of depositions fall within the definition of "requests" that must be served within 30 days of an Acknowledgment Order and/or within 10 days of service of discovery responses. In practice, the cadre of potential deponents expands and shrinks during both written discovery and depositions themselves. The importance of a deposition may not be apparent either at the outset of discovery or even after review of initial written discovery responses. In fact, it is often that during deposition testimony of one witness the need for a new deposition arises. This would necessarily occur after the time limits set out in 5 C.F.R. § 1201.73(d). To date, I have not had MSPB Administrative Judges apply the written discovery request deadlines to deposition notices, but some agencies do attempt to use the time limits to object to depositions. Since the Board is in the process of amending its discovery regulations, I believe it would be beneficial to add clarity in this area. For example, the deadline for noticing a deposition could be no less than 20 days before the close of discovery to ensure sufficient time to confirm availability of the witness.

Please let me know if you have any follow up questions or need any clarifications. I thank you for your time and consideration.

Respectfully,

Michael L. Vogelsang, Jr.