November 6, 2024

Submitted via 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:

The National Employment Lawyers Association (NELA) 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).

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country focused on empowering workers' rights attorneys. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace, including for those employees with disabilities. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace in both the public and private sector. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments regularly on relevant proposed rules. NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. NELA, therefore, has an interest in regulations affecting proceedings before the MSPB.

NELA generally supports the MSPB's overall goal of updating and keeping its procedural regulations current, especially for those ministerial corrections designed to correct errors in cross-reference citations and the like (for example, the proposed amendment to Section 1201.3(c)(3)). However, a number of the specific proposed revisions in the Interim Final Rule raise concerns that merit further attention by the Board. NELA comments regarding specific proposed revisions are as follows:[1]

- Proposed section 1200.3(c): The MSPB should clarify the proposed regulations to more clearly state that, in the event that there are two current Board Members who are able to

[1] Unless otherwise specified, all section references in this comment (and in the Interim Final Rule) refer to Title 5, Code of Federal Regulations.

act, either Member is authorized to approve any or all of the actions specified in proposed section 1200.3(c).

- Proposed section 1200.5: NELA supports this revision.
- Proposed section 1201.22(b)(3): The proposed rule should be modified to add the words "comprehensive or" before "controlling." The proposed rule should also be clarified to qualify that the standard is that the appellant cannot "knowingly or willfully" avoid service, so as to avoid penalizing appellants who might inadvertently miss service but who are not engaged in intentional service evasion.
- Proposed section 1201.23: NELA supports this revision.
- Proposed section 1201.33: While NELA recognizes that the present amendment is merely syntactical in nature, the MSPB should consider revising this rule to no longer require use of a formal subpoena procedure for current federal agency employee witnesses; instead, analogous to the EEOC's procedures, the respondent agency should be responsible for producing its own witnesses and for arranging with the employing agency to produce other agencies' employees in official time status, without having to delay proceedings with the formality of adjudication of a motion for subpoenas. *See, e.g.,* EEOC Management Directive 110 (MD-110), Ch. 7, § II.B, *available at* https://www.eeoc.gov/federal-sector/management-directive/chapter-7-hearings. Revision in this fashion would better harmonize with the otherwise inconsistent procedures in proposed 1201.81(a) (which provides in relevant part that "Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses because Federal agencies and their employees must comply with 5 CFR 5.4 and Sec. 1201.33").
- Proposed section 1201.41: NELA supports substitution of "by appropriate method" as appearing in the proposed section, and supports reformatting to make clear that the decision to conduct the hearing is based solely upon the appellant's request. NELA also supports those revisions to this section and to proposed section 1201.183 that give the non-breaching party alleging breach the option of seeking reinstatement of the *status quo ante* as a remedial option. However, it should be noted that that the addition of the *status quo ante* remedial option is less necessary in MSPB proceedings than it is under the EEOC's enforcement procedures under 29 C.F.R. § 1614.504 because the MSPB has mechanisms to forcefully ensure specific performance (in particular, salary forfeiture under 5 U.S.C. § 1204(e)(2)) that are unavailable to the EEOC. The Board should make clear that this expansion of the toolkit available in MSPB proceedings to bring recalcitrant parties into compliance with settlements and orders does not indicate lesser availability of the strongest tools to enforce compliance in appropriate circumstances.Rather, it is designed to allow a more tailored approach where the most effective compliance mechanisms for a given circumstance are available and are used where needed.
- Proposed section 1201.56: While NELA supports the general purpose of this revision, the Board should also make clear in the text of revised section 1201.56(b)(2)(ii) that this amendment is meant to incorporate the line of longstanding Board precedent covering instances where OPM refuses to issue a final decision on reconsideration, by adding in the following underlined parenthetical text: "In appeals from final decisions of the Office of Personnel Management (OPM) involving retirement benefits (including OPM initial decisions which are deemed final decisions pursuant to MSPB precedent because OPM has refused or improperly failed to issue a final decision), if the appellant filed the application,

the appellant has the burden of proving, by a preponderance of the evidence (as defined in Sec. 1201.4(q)), entitlement to the benefits."

- Proposed section 1201.72: NELA supports clarification that discovery can extend to nonparties. However, the MSPB should also clarify that depositions as permitted under 1201.72(c) should include not just depositions of witnesses in their individual capacity, but also expressly authorize depositions of 'corporate' designee deponents for agency parties in the manner of Federal Rule of Civil Procedure 30(b)(6). which would be lost otherwise without express mention through decoupling the Federal Rule of Civil Procedure cross-reference from the preexisting rule.
- Proposed section 1201.73: NELA strongly opposes adding caps on document requests and requests for admissions in Board proceedings, and supports retention of the present rule which does not cap document requests or requests for admissions. Imposition of such caps would force more discovery activities to be sought via depositions, which is especially problematic under those MSPB appeals which fall under the default 5 U.S.C. § 7701(g)(1) fee rules, given that longstanding precedent does not allow recovery for deposition court reporter costs on fee shifts under that statue. *See, e.g., Smith v. Dept. of the Navy,* 113 M.S.P.R. 430 (2010) (*citing Bennett v. Dept. of the Navy,* 699 F.2d 1140 (Fed.Cir. 1983)). Such court reporter costs, which can often reach the vicinity of $2,000 or more per day between transcript costs and appearance fees in some major cities, can be a major burden on appellants (especially given that adverse action appellants have had their income interrupted by removal, demotion or suspension, and thus are often in strained financial circumstances). Shifting the focus of discovery from less expensive written discovery to more expensive deposition practice thus risks prejudicing appellants. NELA supports incorporation of e-mail service into the rules. NELA supports formal authorization for motions to extend discovery motions deadlines in the rules, as codifying a longstanding practice. NELA further supports extension of the deadline for discovery motions where discovery responses were served to 20 calendar days, as allowing parties a more reasonable period of time to meet-and-confer regarding discovery disputes—as well as reducing the burden of routine motions to extend discovery motions deadlines on both parties and Administrative Judges. As part of these revisions, MSPB should also adopt procedures under development at the EEOC, to grant MSPB Administrative Judges flexibility to informally opine on or adjudicate discovery disputes without having to outright file motions, in the Administrative Judge's discretion. NELA anticipates capping the number of document requests and requests for admissions will also increase the burden on Administrative Judges, either through more discovery motions practice as parties fight over the proper scope of a given discovery request (which NELA members have observed occurring in discovery motions practice in other forums, for example in the EEOC's federal sector administrative hearings process), or else through motions practice for waiver of the rules under 5 C.F.R. § 1201.12 to enlarge the number of written discovery requests. NELA members have observed no abuses of the present written discovery regulations that would require imposition of the cap, given the availability of effective mechanisms such as discovery objections, motions for protective order and oppositions to motions to compel discovery to address any outlier abuses of the present uncapped authorization for document requests or requests for admissions.
- Proposed section 1201.81: NELA opposes the proposed rule's new requirement that a party must provide a proffer on the specific testimony to be elicited from the witness for

an ordinary deposition (i.e. a deposition for an individual deponent and not for a corporate designee deposition in the manner of Federal Rule of Civil Procedure 30(b)(6)) deposition). One of the many reasons depositions as a discovery device are beneficial is that they can elicit unrehearsed testimony from witnesses through unexpected questions, and permit in-depth development of evidence through exploratory questioning (including follow-up questions prompted by a deponent's earlier answers). Requiring a proffer of this sort would undercut those benefits. The EEOC and other federal sector forums do not require such proffers for routine depositions of individual deponents, and the Board should not apply this requirement in its proceedings either. NELA members are not aware of there being any general problem with improper designation of irrelevant witnesses or improper use of deposition; to the extent that any abuses might occur in outlier cases, other preexisting mechanisms such as motions to quash deposition notices or motions for protective orders provide a fully adequate corrective remedy.

- Proposed section 1201.82: NELA supports the facilitation of filing of motions to quash by non-parties who may not be enrolled in the Board's eAppeal system.
- Proposed section 1201.85: NELA support facilitating subpoena availability for the Office of Special Counsel under proposed section 1201.85(d). However, the proposed elimination of oral motions to enforce subpoena may adversely impact the ability to seek subpoena enforcement at time-sensitive situations (for example, hearings), and so should not be curtailed.
- Proposed section 1201.113: NELA supports this revision.
- Proposed sections 1201.114 and 1201.115: NELA strongly opposes elimination of cross-petitions for appeal. Elimination of the cross-petition will likely have the perverse outcome of prompting more petitions for review being filed, rather than reducing the volume of appellate practice. For example, with some frequency, parties not wholly satisfied with an Initial Decision might be inclined to leave the Initial Decision with possible appeal grounds un-appealed, as 'good enough if the other side does not appeal,' knowing that the cross-petition would allow them to raise their concerns if the opposing party opts to appeal. Elimination of cross-petitions would force such parties to appeal to preserve their potential appeal grounds in such an otherwise 'good enough' situation.
- Proposed section 1201.116: NELA supports requiring agencies to certify implementation of interim relief with appeals, and the new specific provision for moving to dismiss agency appeals for noncompliance with interim relief requirements. For administrative efficiency in enforcing compliance, the MSPB should also add in a provision stating that granting a motion to dismiss for noncompliance on interim relief also automatically result in the case being forwarded to the appropriate Board office for appropriate enforcement proceedings on the interim relief that the agency failed to implement, rather than requiring the appellant to file a new, separate independent petition for enforcement.
- Proposed sections 1201.117 and 1201.118: While there is utility on clarifying the finality of decisions, NELA opposed elimination of the possibility of motions to reopen, submitted to either the Board or to the presiding Administrative Judge. First, such motions can provide a method for correcting clerical mistakes, oversights or omissions by the Administrative Judge without having to resort to a formal petition for review to the Board, or likewise permit correction of similar clerical mistakes, oversights or omissions by the Board without requiring appealing the case to court, and can thus promote judicial economy for the Board and its reviewing courts. Keeping the door open to such revisions

could be done by specifying a limited scope for permissible requested corrections on motion to reopen, with revisions only permitted by the Administrative Judge if the initial decision has not received a petition for review to the Board or been taken into court (in a manner analogous to Federal Rule of Civil Procedure 60(a)). Second, such motions represent in practice one of the few formal avenues for the Board to become apprised of circumstances where exercise of its discretionary authority to reopen might be warranted; absent motions to reopen, it is unclear how the Board would discover information indicating that reopening might be appropriate in a given case. More generally, NELA supports the Board's post-2012 approach concerning the proper timeframes for motions to reopen and standard for granting reopening. As the Board observed in its 2012 Final Rule which established the present version of Section 1201.118, that "The MSPB does not believe that a preset time limit for filing a request to reopen an appeal is appropriate and is confident that that current language stating that such a request must generally be filed within a short time after the decision becomes final is sufficient to guard against late-filed requests . […] reopening or reconsidering a final decision must be confined to rare and limited circumstances […]" *See* 77 Fed.Reg. 62,350, 62,359 (October 12, 2012). In the intervening 12 years, NELA members have not observed any evident problems with the Board's general approach on reopening decisions, and so there is no evident need for revising this approach (for example, to allow for more activist changes in precedent). The MSPB's authoritative status in civil service law has in part been based on the stability of its precedent and strong adherence to *stare decisis* principles (in contrast, perhaps, to certain other forums with an anecdotal reputation for shifts in precedent reflecting partisan electoral changes). In the post-*Chevron* era wrought by *Raimondo*, *Skidmore* deference is the operative standard, and *Skidmore* deference depends in part on the agency's consistency in its body of decisions. *See generally Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024). This circumstance underlines the wisdom of the Board's historical preference for stable precedent and strong adherence to *stare decisis,* and shows the benefits for the Board's continuance of that approach.

- Proposed section 1201.155: NELA supports this revision.
- Proposed section 1201.182: The MSPB should consider including a provision in this section which specifies that timely submissions filed in the wrong place to be deemed timely in mixed cases, consistent with 5 U.S.C. § 7702(f).
- Proposed section 1201.183: NELA supports clarification of the procedures to require agency proof of their compliance and so forth, as specified in this proposed rule. NELA however opposes a disparate burden between compliance proceedings for orders versus compliance proceedings for settlement agreements, as contrary to longstanding MSPB policy ensuring enforceability of settlements in order to support the viability of settlements as an option for parties to amicably resolve disputes. Once a nonfrivolous allegation has been raised of noncompliance with either a settlement or an order, the alleged noncomplying party should have the burden of showing their compliance, irrespective of whether it is compliance with a settlement or compliance with an order. Proposed section 1021.183(a)(4) should also require identification of the designated agency official for settlement enforcement cases as well as order enforcement cases, to facilitate consideration of salary forfeiture sanctions under 5 U.S.C. § 1204(e)(2) if the agency fails to obey an order to implement the settlement agreement terms.

- Proposed section 1201.204: NELA supports elimination of the requirement for pleading fees or damages before the end of the prehearing, since such remedial matters are primarily adjudicated by the Board in addendum proceedings and not in the original appeal. NELA further supports giving appellants discretion to request or not request a hearing on damages issues.

Thank you for your consideration. If you have questions or wish to discuss these matters, please contact Ashley Westby at awestby@nelahq.org or (202) 420-1123.

Sincerely yours,

Ashley Westby
Program Director
National Employment Lawyers Association