UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

November 8, 2024

Gina K. Grippando
Clerk of the Board
Merit Systems Protection Board
mspb@mspb.gov

RE: Comments on September 9, 2024, Interim Final Rule, FR Doc No: 2024-19933 (89 FR 72957)

Dear Ms. Grippando:

The U.S. Office of Personnel Management (OPM) serves as the chief human resources agency and personnel policy manager for the Federal government. Among other responsibilities, the OPM Director has authority under 5 U.S.C. § 7701 to intervene in or seek reconsideration of certain decisions of the Merit Systems Protection Board that have a substantial impact on any civil service law, rule, or regulation. As part of its responsibilities under the Civil Service Reform Act of 1978, OPM also advises and issues policy guidance to federal agencies on labor-management relations matters.

We appreciate the opportunity to comment on the Board's September 9, 2024, Interim Final Rule (IFR). As explained below, several provisions of the IFR affect OPM, both as a federal agency that appears regularly before the Board, as well as in our governmentwide role overseeing the integrity of the civil service system and advising federal agencies on personnel policy.

5 C.F.R. § 1201.114: The Board modified 5 C.F.R. § 1201.114, "Petition for review—content and procedure," to remove the provision allowing cross petitions for review, explaining that this change will simplify the petition for review process by encouraging parties to raise all issues by the initial petition for review deadline. Cross petitions are a useful tool for both private parties and the government. Their elimination could incentivize the filing of petitions for review that would not have been filed absent an initial petition for review by the opposing party. Moreover, OPM is concerned that the revised regulation could create challenges for the OPM Director in exercising the Director's § 7701 authority. The elimination of cross petitions not only has the effect of reducing the amount of time in which the Director can become involved in a case, but also deprives OPM of an important data point for its decision-making. Because initial decisions are nonprecedential, the Director may choose to forgo filing a petition for review of an erroneous decision if one of the parties has not already done so. It is not feasible for the Director to file petitions in the first instance in all cases in which the Director might need to invoke the § 7701 authority. Accordingly, if the Board declines to allow cross petitions for all parties, then we respectfully suggest that it consider creating an exception for cross petitions by Federal entities with authority to file a petition for review in cases in which they are not a party.

5 C.F.R. § 1201.155: The Board modified the title of 5 C.F.R. § 1201.155, "Requests for review of final grievance or arbitrator's decisions," by adding the words "grievance or," explaining

"[t]his amendment is primarily made to the title of the section and is made to clarify that requests for review of decisions arising out of negotiated grievance procedures are not limited to decisions issued by arbitrators." However, the Board provided no rationale or justification for deviating from its own precedent on such matters. The Board has repeatedly held that an arbitrator's decision is required for board jurisdiction of appeals under from the negotiated grievance procedure. *See, e.g., Jones v. Dep't of Just.*, 53 M.S.P.R. 117, 120 (1992); *Fernandez v. Dep't of Defense*, NY-0752-17-0013-I-1, ¶ 11 (June 12, 2023); *Knuckles v. Dep't of the Army*, CB–7121–14–0025–V–1 (May 27, 2015); *Martinez v. Dep't of Just.*, No. SF-0752-97-0522-I-1, ¶ 12 (Feb. 24, 2000); *Parks v. Smithsonian Institution,* 39 M.S.P.R. 346, 349-350 (1988); *Clark v. Equal Employment Opportunity Commission,* 31 M.S.P.R. 455 (1986); *see also Farmer v. MSPB*, 17 F.3d 1444 (Fed. Cir 1994).

These holdings are consistent with chapter 71 of title 5, which provides that negotiated grievance procedures as contained in collective bargaining agreements shall be subject to binding arbitration. *See* 5 U.S.C. § 7121(b)(1)(C)(iii). Moreover, the legislative history of section 7121 evidences Congress' intent to require employees choosing the negotiated grievance procedure to first proceed to an arbitrator before appealing to the Board. S. Rep. 95-969, at 770 (1978), July 10, 1978, reprinted in 1978 U.S.C.C.A.N. 2723, 2832. The final step of the statutory grievance process is the submission of a grievance to an arbitrator for adjudication, a decision that is vested in the exclusive representative and not the employee. *Id*. ("[7121(d)] provides that a negotiated grievance procedure must provide for arbitration as the final step of the procedure. . . However, arbitration can only be invoked by the agency or the exclusive representative. Thus, an aggrieved employee does not have a right to arbitration."). Thus, authorizing an employee who elected the negotiated grievance procedure to appeal directly to the Board without first obtaining a decision from an arbitrator would be incongruent with the Civil Service Reform Act.

5 C.F.R. §§ 1201.82 and 1201.85: The Board modified 5 C.F.R. §§ 1201.82 and 1201.85 governing motions to quash subpoenas and the enforcement of subpoenas. Section 1201.82 allows "[a]ny person to whom a subpoena is directed, or any party" to file a motion to quash a subpoena. Section 1201.85 requires a party to serve a copy of any motion for enforcement upon, and gives a right to respond, to "the person who is alleged to be in noncompliance." OPM is concerned that these uses of the word "person" do not clearly encompass nonparty federal agencies. Because there is language elsewhere in these rules that applies to nonparties, we understand the Board to have intended to cover nonparty Federal agencies in addition to "persons." OPM recommends clarifying these rules, either by adding "or nonparty" after references to a "person" or by substituting "nonparty" for "person."

5 C.F.R. § 1201.73: The board modified 5 C.F.R. § 1201.73, "Discovery procedures." The asterisks used in the regulatory text as set forth in the IFR do not appear to retain § 1201.73(d)(4). However, that section still appears in the Code of Federal Regulations. We recommend clarifying whether the Board intended to retain that section.

Thank you for the opportunity to provide these comments.

Sincerely,

TIMOTHY CURRY

Digitally signed by TIMOTHY CURRY
Date: 2024.11.08 16:13:09 -05'00'

Timothy F. Curry
Deputy Associate Director, Accountability
and Workforce Relations
Workforce Policy and Innovation