AMERICAN CIVIL LIBERTIES UNION of the NATION'S CAPITAL

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Arthur B. Spitzer
Legal Director

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Via email to mspb@mspb.gov

William D. Spencer, Clerk
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: Comments on Interim Final Rule regarding appeal of removal or transfer of Senior Executive Service employees of the Department of Veterans Affairs, 79 Fed. Reg. 48941 (August 19, 2014)

Dear Mr. Spencer:

The American Civil Liberties Union of the Nation's Capital submits these comments in response to the Board's publication of an Interim Final Rule adapting the Board's regulations to the expedited removal or transfer provisions for Senior Executive Service employees of the Department of Veterans Affairs contained in Section 707 of the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014, Public Law 113–146.

Given our location at the seat of government, the American Civil Liberties Union of the Nation's Capital has long been engaged in protecting the due process rights of government employees. *See, e.g., Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007); *Romero v. Dep't of Defense*, 658 F. 3d 1372 (Fed. Cir. 2011); *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc) (amicus).

Our comments focus on one particular provision of the Interim Final Rule: Section 1210.12(d) ("Limits on discovery requests"), which provides that–

> Absent approval by the administrative judge, discovery is limited as follows:
> (1) Interrogatories may not exceed 10 in number, including all discrete subparts;
> (2) The parties may not take depositions; and
> (3) The parties may engage in only one round of discovery.

We appreciate that proceedings under the new statute must be seriously expedited. Nevertheless, it seems to us that these artificial and rather draconian limits are neither necessary nor advisable. We understand that they are subject to modification by the administrative judge, but it seems to us the presumption ought to be in the other

direction—that the parties ought to be able to seek full discovery under the usual rules (5 CFR §§ 1201.71 - .75), subject to limitations that may be imposed by the administrative judge if needed to comply with the statutory schedule or to avoid unreasonable burdens.

- Regarding interrogatories, disputes may easily arise regarding the proper count of "discrete subparts." For example, would the following request count as a single interrogatory or as fifteen?–

> 1. For each of the following individuals, describe in detail the individual's involvement in the decision to terminate the Employee, including but not limited to (i) the individual's participation in the meeting of June 5, (ii) the individual's participation in the meeting of June 12, and (iii) the individual's input into the memorandum of June 19:
>
> a. John Jones
> b. Henry Black
> c. William Smith
> d. Mary White
> e. Richard Roe

Would the answer be different if the drafter had employed a different style? For example–

> 1. Describe in detail the involvement of John Jones, Henry Black, William Smith, Mary White and Richard Roe in the decision to terminate the Employee, including but not limited to his or her participation in the meetings of June 5 and June 12 and his or her input into the memorandum of June 19.

Rather than providing an incentive for a responding party to object or refuse to answer based on litigious interpretations of "discrete subparts," we think it would be best not to impose an arbitrarily low limit on the use of interrogatories, but simply to allow a responding party to object if it believes that interrogatories it has received would impose an undue burden.

- The presumptive ban on depositions is particularly ill advised. Depositions are often the most important form of discovery, as responses to interrogatories and requests for admissions are drafted by counsel, and thus are often minimally revealing. Depositions are routinely taken under circumstances no less expedited than will be the case here, for example during the litigation of a motion for a preliminary injunction. Rather than requiring a party that wishes to take depositions to persuade the administrative judge that there are exceptional circumstances justifying them—thereby putting a heavy thumb on the other side of the scale, and delaying the possibility of depositions when time is short—we think a party that opposes a deposition should have the burden of objecting and persuading the administrative judge that the deposition would be more burdensome than useful. Of course the administrative judge would have discretion to limit the number, length, and scope of any depositions, as required by the circumstances and the resources of the parties.

- Similarly, the arbitrary ban on a second or additional round of discovery is likely to do more harm than good. Especially under the expedited time frame involved here, a party may hurry to serve its requests for admissions, requests for production, and interrogatories, only to realize soon afterward that important requests were omitted. Additionally, responses to a first set of discovery may make it clear that follow-up questions are necessary. There is no good reason to prohibit supplementary or follow-up discovery that would not impose an undue burden on the responding party. The ability to conduct follow-up paper discovery becomes especially essential if depositions are prohibited or limited.

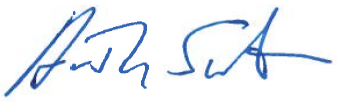
Importantly, all of these limitations will favor the government and disadvantage the employee. The agency is entirely in control of the decision to remove or transfer an employee, and also of the timing of such removal or transfer. The agency can take as much time as it wishes to gather facts, assemble documents, and interview witnesses in advance of removing or transferring an employee, and it has the legal authority to compel its employees to assist it in such efforts. The agency can even, in advance, draft requests for admissions, requests for production, and interrogatories that will be directed to a removed or transferred employee. The agency has human resources and legal staff in its employ to perform such tasks. The employee, by contrast, has no control of the timing, has no staff, has no authority to compel others to assist, and may be hurriedly seeking legal representation on a very limited budget, immediately before or even after being removed or transferred. An employee's newly-retained attorney will be playing catch-up with an agency that has vastly greater resources. The expedited time frame for an appeal to the Board is mandated by statute, but the Board should not further disadvantage the employee through unnecessary limitations on discovery, which the employee needs far more than the agency.

For the reasons given above, we suggest that Section 1210.12(d) be revised along the following lines:

> (d) *Limits on discovery requests.* The administrative judge may, as necessary to accommodate the expedited schedule required under this Part and to avoid undue burdens on the parties, impose limits on discovery, including limits on the number of interrogatories, the number, length and scope of depositions, and the number of rounds of discovery. Any such limits shall be no greater than necessary to enable the parties and the administrative judge to comply with the statutory time limits for resolution of the appeal and to avoid undue burdens.

We appreciate the Board's consideration of our comments.

Respectfully submitted,



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