AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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U.S. Merit Systems Protection Board
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Re: Comments by AFGE Concerning Proposed Changes to MSPB Practices and Procedures, 77 Fed. Reg. 33663 (June 7, 2012)

Dear Mr. Spencer:

The American Federation of Government Employees, AFL-CIO, ("AFGE") hereby submits its comments to the changes proposed by the U.S. Merit Systems Protection Board ("Board") to the Board's adjudicatory regulations. In particular, AFGE submits it comments to the Board's proposed changes to 5 C.F.R. Part 1201, Practices and Procedures, and, to a lesser extent, 5 C.F.R. Part 1209, Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing. Changes suggested by AFGE are shown in bold.

To begin with, AFGE has identified two issues that do not appear to be covered by the Board's current or proposed regulations which, AFGE respectfully submits, the Board should address either now or in the future. The first issue concerns the handling of personally identifiable information. Although the Board's regulations make reference to how pleadings containing sensitive security information or classified information should be handled, the regulations do not appear to make any provision for the handling of personally identifiable information. Filings with the Board nonetheless frequently contain personal information such as an appellant's social security number, birth date, or medical records. As the Board is no doubt aware, this type of personally identifiable information could be used improperly in the event of an unanticipated data loss or data breach. Consequently, AFGE recommends that the Board consider promulgating a regulation that would require the redaction of personally identifiable information from

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filings with the Board. For example, the Board could add a new subparagraph (f) to 5 C.F.R. 1201.22 specifying that

> **Unless otherwise ordered by the Board or consented to by the individual concerned, any filing with the Board that contains an individual's birth date, or an individual's social security number, or an individual's financial or medical account number, may include only:**
> **(1)The year of the individual's birth**
> **(2)The last four digits of the individual's social security number**
> **(3)The last four digits of the individual's financial or medical account number.**

Because the purpose of AFGE's suggestion is solely protective, AFGE also strongly urges that if the Board adopts a redaction rule, the Board add language to section 1201.23 stating that:

> **No filing shall be found untimely based solely on a failure to comply with 5 C.F.R. 1201.22(f) and, upon notice, a reasonable time shall be granted to correct any deficiency under that subsection.**

The second issue that AFGE recommends the Board address is sealing of the record. Although the Board presently has the power to seal all or part of the record of an appeal, that power is not reflected in its regulations. *See, e.g., Hoback v. Dep't of the Treasury*, 86 M.S.P.R. 425, ¶ 12 (2000). Consequently, AFGE suggests that the Board codify *Hoback* by adding a new subsection (f) to section 1201.53 as follows:

> **Upon motion and for good cause shown, the Board or a judge may seal part or all of the record of an appeal.**

AFGE's comments to specific sections of the proposed regulations follow below.

I. Comments Regarding Changes to Part 1201

5 C.F.R. § 1201.3 Appellate Jurisdiction.

AFGE finds the overall construction of paragraph (a) to be unwieldy. For example, clearer language for the introduction to paragraph (a) might be as follows:

> (a) *Generally.* The Board's appellate jurisdiction is limited to those matters **authorized** by law, rule or regulation. The Board's **appellate** jurisdiction does not depend solely on the **label or** nature of the action or decision **appealed from** but

> may also depend on other factors, e.g. the type of appointment held by the individual, whether the individual is veterans' preference eligible. Accordingly, the laws and regulations cited below as sources of the Board's jurisdiction should be consulted when determining the existence or the extent of the Board's jurisdiction over a particular appellate matter. Matters within the Board's appellate jurisdiction include the following:

AFGE also believes that the clarity of paragraph (a)'s list of specific matters within the Board's appellate jurisdiction would benefit from the inclusion of additional sub-paragraphs following each numbered matter. For example, (a)(10) pertains to "Various Action Involving the Senior Executive Service" and lists the types of cases over which the Board has jurisdiction. A more readable way to present this information for laypersons might be as follows:

> (10) Actions Involving the Senior Executive Service
>
> (i) Removal or suspension of more than 14 days (5 U.S.C. 7511-7514; 5 CFR part 752, subparts E and F); or
>
> (ii) Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or
>
> (iii) Furlough of a career appointee (5 CFR 359.805); and

5 C.F.R. § 1201.4 Date of Service.

AFGE agrees that the definition of "date of service" provided by the existing regulation is circular, in that it is defined by reference to itself. AFGE also agrees that 5 days should be added to a deadline whenever the deadline is in response to a document that was served by mail because doing so recognizes the delays inherent in mail service. However, AFGE questions whether the provision adding 5 days might be more appropriately placed in section 1201.23, which directly concerns the computation of time, rather than in subsection (j) of this section. The definitions of "date of service" and "date of filing" both appear to be aimed at determining when something was done. "Computation of time," on the other hand, appears to be aimed at determining when something is due, making it a more natural fit for a provision that adds time to deadline calculations.

AFGE also believes that the wording of this section, wherever it is placed, would be better expressed as follows:

> **Unless a different deadline is set by the Board or its designee, five (5) calendar days are added to any filing deadline set by**

this part when the document causing the deadline was served on the responding party by mail.

5 C.F.R. § 1201.21 Notice of appeal rights.

As discussed in its comments to the changes proposed for section 1209.2, AFGE opposes the Board overruling through regulation its longstanding precedent concerning IRA appeal rights.

5 C.F.R. § 1201.23 Computation of time.

As discussed above, AFGE believes that the provision adding 5 days to deadlines arising from mail service would be more appropriately placed in this section. AFGE also believes that if the Board were to adopt a redaction rule, it would be appropriate to include language here explaining that the redaction of a pleading is unrelated to its timeliness.

5 C.F.R. § 1201.24 Content of an appeal; right to hearing.

The Board should refine its proposed language for subsection (d) of this section, *Right to hearing*. AFGE believes that the Board's use of the word "generally" in subsection (d) injects uncertainty into the subsection without providing clear guidance. It may also give parties and administrative judges the incorrect impression that an appellant who establishes Board jurisdiction over a timely filed adverse action appeal does not necessarily have a right to a hearing. Section 7701(a) of Title V of the United States Code, which this subsection arises from, states in relevant part that:

> (a)An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. *An appellant shall have the right—*
> *(1)to a hearing* for which a transcript will be kept; and
> (2)to be represented by an attorney or other representative.

(emphasis added). Section 7701(a)(1) admits of no exception to an appellant's right to a hearing for which a transcript will be kept when jurisdiction over a timely filed adverse action appeal has been established. *See generally Manning v. Merit Systems Protection Bd.*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984). Consequently, AFGE recommends that the Board use the following language for subsection (d):

> **An appellant has a right to a hearing pursuant to 5 U.S.C. 7701.**

This language addresses the Board's apparent concern with eliminating the possible inference that an appellant has an absolute right to a hearing in all circumstances while still adhering to the Board's statutory mandate contained in 5 U.S.C. § 7701(a).

5 C.F.R. § 1201.28 Case suspension procedures.

Overall, the proposed changes to this section present a more reasonable approach to Board practice by accepting the value and need for case suspensions in particular matters. AFGE believes, however, that the Board should grant its judges the power to initially suspend case processing for up to sixty days, rather than the thirty days presently allowed by subsection (a). This would provide both the Board and the parties to an appeal with greater flexibility in resolving cases through settlement.

5 C.F.R. § 1201.29 Dismissal without prejudice.[1]

This proposed section presents a much needed change to the Board's dismissal without prejudice mechanism. The language and structure of the Board's proposed changes would, however, benefit from further revision. For example, the import of subsection (a) would be clearer if it were divided into two subsections: one defining dismissal without prejudice and another addressing who may grant dismissal without prejudice. In a similar vein, the proposed subsections (b) and (c) would benefit from being merged because they appear to address the same subject. The issue of waiver would also benefit by being severed into its own subsection. The proposed changes should also address the status of an appeal that has been dismissed without prejudice. Consequently, AFGE suggests the following language:

> **(a)** ***In general.*** **Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal. An appeal that has been dismissed without prejudice is removed from the Board's docket and is rendered inactive, thereby suspending all deadlines, until the appeal is refiled or until the time for refiling has expired.**
> **(b)** ***Procedure.*** **Dismissal without prejudice may be granted on the judge's own motion or upon request by either party. The decision whether to dismiss an appeal without prejudice is committed to the sound discretion of the judge; provided that dismissal without prejudice should generally be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.**
> **(c)** ***Refiling.*** **Subject to the provisions of section 1201.12 of this part, a decision dismissing an appeal without prejudice will include a date certain by which the appeal must be refiled. The judge will determine whether the appeal must be refiled by the appellant or whether it will be**

[1] This section is titled Dismissal with prejudice in the Board's summary of proposed changes to its regulations. AFGE believes the text of both the summary and the proposed regulation make it clear that this section pertains to dismissals without prejudice and AFGE has treated it accordingly.

automatically refiled by the judge as of a certain date; provided, however, that an appeal must be automatically refiled when dismissal without prejudice is granted over the objection of the appellant.

(d) ***Waiver.*** **Requests for the waiver of a refiling deadline based upon good cause will be liberally construed when the duty to refile an appeal dismissed without prejudice was placed on the appellant.**

5 C.F.R. § 1201.34 Intervenors and amicus curiae.

The Board should include a provision stating that when the Board solicits amicus curiae briefs on its own initiative, the Board shall accomplish service of the amicus briefs upon the parties. This is merely intended to reflect the fact that when the Board solicits briefs, amici may not have the information necessary to serve all of the parties before the Board.

5 C.F.R. § 1201.41 Judges.

AFGE supports the proposed change to subsection (b) of this section. The existing language has often appeared in practice to elevate speed of processing over fairness, impartiality, and strength of reasoning as the primary considerations in appeal adjudication. The elimination of the existing regulation's "take all necessary action to avoid delay" language better reflects the Board's mission and brings its regulation into greater harmony with its authorizing statutes.

5 C.F.R. § 1201.43 Sanctions.

The Board should revise the first sentence of this section to read: "**The Board or a judge may impose sanctions upon the parties for good cause shown, and as necessary to serve the ends of justice.**" The addition of "good cause" provides additional guidance as to when sanctions may be appropriate and reflects that sanctions should be an unusual measure not to be administered lightly. The addition of "The Board" simply reflects the reality that the Board itself may also sanction parties when appropriate.

5 C.F.R § 1201.52 Public Hearings.

This proposed change might be better expressed as two subsections: one pertaining to the closing of a hearing, and another pertaining to electronic devices. The Board may also wish to consider changing the second sentence of the proposed change so that all or part of a hearing may be closed when doing so is in the best interests of **a party**, instead of limiting the inquiry to the best interests of an appellant.

5 C.F.R. § 1201.53 Record of Proceedings.

Subsections (a), (b) and (c) of the Board's proposed changes to this section appear to be both redundant and internally inconsistent. For example, the proposed changes are redundant because, while they clearly distinguish between "recordings" and "transcripts," both (a) and (c) state that copies of recordings will be provided without charge. The proposed changes appear to be internally inconsistent because, for example, proposed subsection (b) states that a party may request a transcript at that party's expense or the Board may direct an agency to purchase and provide a transcript at the agency's expense, while proposed subsection (c) states that copies of existing transcripts will be provided upon request to parties free of charge.

The following language may clarify what AFGE believes to be the intent of this proposed section:

> (a) ***Recordings.*** **A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically.**
>
> **(b) *Transcripts.* A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Judges do not prepare transcripts.**
>
> **(c) *Copies.* Copies of recordings will be provided to parties without charge upon request. Copies of existing transcripts will also be provided to parties without charge upon request. When a transcript has not previously been prepared, any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense; provided, however, that upon determining that a transcript would significantly assist in the preparation of a clear, complete, and timely decision, the judge or the Board may, in the absence of a request by a party, direct the agency to purchase a full or partial transcript from the court reporter and to provide copies of such a transcript to the appellant and the Board. Requests by parties should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Non-parties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the**

Board's regulation. A non-party may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. Non-parties may also make FOIA requests online at *https://foia.mspb.gov*.

5 C.F.R. § 1201.56 Burden and degree of proof; affirmative defenses.

AFGE is concerned that the Board's discussion of the varying degrees of proof placed on an appellant will be confusing to *pro se* appellants. A simpler way to address the issue might be for the Board to use language stating that:

> **(a)(2) *Appellant.* An appellant bears the burden of proving:**
> - **i. Board jurisdiction over an appeal**
> - **ii. Timeliness of an appeal**
> - **iii. Affirmative defenses**
> - **iv. Entitlement to retirement benefits**
> - **v. Eligibility for waiver or adjustment of an overpayment**
>
> **(3) *Degree.* Whenever a burden of proof falls on the appellant, the Board will explicitly inform the appellant in writing as to the specific degree of proof required to meet the applicable burden.**

This approach leaves the Board free to provide clearer guidance and citation to applicable case law in orders that will be served directly on the appellant or her representative. It also provides for flexibility in the event of changes in the case law.

Section (a)(2)(ii)(B) appears to incorrectly reference paragraph (c) of the existing regulation as pertaining to affirmative defenses. This citation should likely be to paragraph (b).

5 C.F.R. § 1201.73 Discovery Procedures.

The elimination of existing subsection (a)'s initial disclosure requirement makes sense given that initial disclosures were often rendered unnecessary and unduly burdensome by the submission of the Agency File.

With regard to time limits, AFGE suggests that the Board address the application of proposed subsections (d)(1) and (d)(4) to matters refiled following a dismissal without prejudice. Specifically, AFGE believes that when a matter was dismissed without prejudice before the time to conduct discovery closed, the time for conducting discovery should restart beginning on the date that the judge issues an order reinstating the appeal. Proposed subsection (d)(4) would also be improved by the addition of the word "final" immediately preceding the phrase "prehearing or close of record conference." This approach recognizes that reinstated appeals may be subject to more than one prehearing

conference. And the expansion of an otherwise open discovery period following reinstatement of an appeal that was dismissed without prejudice further eliminates any prejudice to the parties that might be caused by a dismissal without prejudice.

5 C.F.R. § 1201.113 Finality of Decision.

The first sentence of this proposed change should likely read, "The initial decision of the judge will become the Board's final **decision** 35 days after issuance."

5 C.F.R. § 1201.115 Criteria for granting petition or cross petition for review.

AFGE suggests the following change to proposed subsection (e):

> **Notwithstanding any provision of this part, the Board may identify, review and decide any issue in a pending appeal.**

AFGE believes that this language offers a clearer way to preserve the power currently exercised under existing section 1201.118, while still maintaining the new distinction created by proposed section 1201.118, i.e. that reopening is a procedure reserved for an otherwise final case that is no longer pending before the Board. AFGE's proposed language also removes any latent ambiguity in the Board's proposed change to section 1201.117(a)(1), which appears aimed at creating the same result as section 1201.115(e).

5 C.F.R. § 1201.116 Compliance with orders for interim relief.

AFGE believes that proposed subsection (f) is helpful in reinforcing that the time for filing an application for prevailing party attorney's fees does not begin to run until after the Board's decision becomes final, as reflected in section 1201.203(d).

5 C.F.R. § 1201.155 Requests for review of arbitrator's decisions.

AFGE opposes the Board's proposed change to subsection (b) of this section. The Board's proposed change to subsection (b) would limit the Board's review of mixed case arbitration awards to circumstances where the employee's claim of discrimination generating Board review was raised in the negotiated grievance procedure. The Board's proposed change would reverse more than twenty years of settled law with very little analysis and without providing any justification for the change. It should therefore be abandoned.

Moreover, the Board's reliance on *Jones v. Dep't of the Navy*, 898 F.2d 133 (Fed. Cir. 1990), is misplaced. Although that decision partially relied on the plain language of the Board's existing regulations to find that the Board must exercise jurisdiction over a

petition for review of an arbitrator's award regardless of whether discrimination was raised before the arbitrator, *Jones* was not predicated on deference to the Board's regulations but was instead premised at its core on the plain language of 5 U.S.C. §7121(d) and 5 U.S.C. § 7702(a)(1). Specifically, the *Jones* court found that:

> There is no statute or regulation that we have found, and none has been called to our attention, that requires an issue of prohibited discrimination, such as is involved in this case, to be first raised before an arbitrator before the board has jurisdiction to consider it on appeal. On the contrary 5 U.S.C. § 7702 provides that *notwithstanding any other provision of law,* an aggrieved employee may appeal to the board when he alleges that a basis for the agency action was prohibited discrimination.

Jones, 898 F.2d at 135 (emphasis in original).

Thus, while the Board's regulations lent support to the court's decision, it was section 7702's "notwithstanding any other provision of law" language that drove it in the first instance, along with the language in section 7121(d) mandating that "[s]election of the negotiated grievance procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision" of an arbitrator. Consequently, the Board's proposed change is contrary to *Jones* and should be abandoned. *Cf. Bankers Trust New York Corp. v. U.S.*, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (Executive agency may not construe a statute through regulation in a manner inconsistent with a prior definitive court ruling).

II. Comments Regarding Changes to Part 1209

5 C.F.R. § 1209.2 Jurisdiction.

AFGE opposes the Board's proposal to limit the issues before the Board when an appellant chooses to pursue an Individual Right of Action appeal. The proposed rule is an overly harsh rule that, as the Board admits, reverses longstanding Board law. It also leaves an appellant with no way to keep a case whole when the appellant chooses to pursue a claim with the Special Counsel. This makes no sense and, AFGE believes, is contrary to the statute. Nothing in 5 U.S.C. 7121(g) requires this result, and the Board's rule will subvert the will of Congress by discouraging employees from seeking the assistance of the Special Counsel. The Board should not make this change.

III. Conclusion

AFGE thanks the Board for allowing it the opportunity to submit these comments. AFGE believes that the Board's proposed regulations would benefit from incorporation of the changes suggested above. Finally, AFGE notes that by submitting these comments, AFGE does not waive any rights or challenges that it may have, now or in the future, concerning any aspect of Board's proposed regulations.

Sincerely,

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