DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

JUL 20 2012

In Reply Refer To:

Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002

Dear Clerk of the Board:

The Department of Veterans Affairs provides the following comments in response to the MSPB's proposed rules contained in the Federal Register, Volume 77, No. 110, Thursday, June 7, 2012.

We also acknowledge and appreciate that the Board has revised the proposed regulations provided last fall for comment consistent with the Department's comments.

1. Proposed § 1201.4 General Definitions

The Board proposes to amend the definition of "date of service" in 5 C.F.R. § 1201.4(j) so that it has the same meaning as "date of filing" under § 1201.4(l). While we appreciate that the change will bring some clarity, our concern with the proposal is that whenever a pleading deadline is based upon the date of service of a previous document and that previous document was served by mail, "the filing deadline will be extended by 5 calendar days." An extra five days does not reflect the actual amount of time for a mailed document to arrive at VA Central Office, as VA's mail is screened by an off-site entity prior to its arrival at VA for security purposes, adding several days to the process. Other Federal agencies, including the Department of Justice, follow a similar practice. Thus, we suggest adding the following to the end of proposed § 1201.4(j): "However, if the receiving party establishes that it received the document beyond the 5-day deadline, the date of service will be the date upon which the receiving party received the document."

We also suggest that the Board consider amending the proposal to read "5 business days" instead of "5 calendar days." In current § 1201.4(l) ("date of filing), the five-day extension excludes "days on which the Board is closed for business." In other words, when counting the due date of a filing under § 1201.4(l), one uses the "business day" counting method that is commonly associated with Federal filings. However, proposed § 1201.4(j) ("date of

service") includes a deadline that "will be extended by 5 calendar days." By using calendar days in proposed § 1201.4(j), but using business days in § 1201.4(l), the Board is further muddying the waters regarding how to count days when serving or filing documents.

2. Proposed §1201.21 Notice of Appeal Rights

   The Board proposes that agencies will not only have to inform an employee about his/her rights to file a grievance upon being suspended more than 14 days or removed, but also about the right to file a whistleblower complaint with OSC; and that if they file such a complaint, it might impact his/her rights before the Board if s/he later decides to file an appeal with the Board. While we appreciate the explanation for this proposed change in the summary of changes, letters that propose removal will now contain an extensive amount of information that the agency must provide or otherwise be in violation of notice required by the Board. We therefore object to this new requirement of additional notice to employees.

   The proposed regulation also requires notice to the employee about the whistleblower rights in any decision notice "When an agency issues a decision notice to an employee on a matter that is appealable to the Board." This is unclear as to its application, as this could apply to any decision over which the Board will automatically have jurisdiction, e.g., removal of a non-probationary Title 5 employee, or cover decisions over which the Board could later have jurisdiction, or e.g. removal of a probationary employee who alleges the removal was for partisan political reasons. The Board should clarify the application of this proposed regulation.

3. Proposed § 1201.22(b)(3) Filing appeals and response to appeals; timing of filing

   We support the Board's proposed regulations which clarify service to the appellant.

4. Proposed § 1201.29 Dismissal without prejudice

   We support the Board proposed regulations which codify clearly a rule that previously required case law research to fully understand. However, we note that there appears to be a typo in the proposed § 1201.29(a). It states "Subject to the provisions of section 1201.12 of this part, a decision dismissing an appeal without prejudice shall include a date certain by which the appeal must be refiled." We believe the citation should be to § 1201.22,

not § 1201.12 since an AJ cannot set a refiling date that would be untimely under § 1201.22. Additionally, § 1201.12 (the regulation to which the proposed § 1201.29(a) cites) does not appear to have anything to do with filing or refiling an appeal.

5. Proposed § 1201.53(b) Record of Proceedings

   We oppose the imposition of this burden, which can be costly, on agencies. As noted in the comments, § 7701(a) requires the Board to maintain transcripts. When the Board determines that it or an appellant should have other than the current recorded transcript, the Board should bear the cost of providing such transcript. Moreover, it is unclear how many copies could be required, and if the agency has to provide a copy to the AJ, three for each Board member, and the appellant. We oppose this regulation insofar as it requires the agency to provide the Board unknown quantities of the hearing transcript.

6. Proposed § 1201.73 Discovery Procedures

   The Department agrees with the proposal to eliminate the initial disclosures that are currently required by § 1201.73(a). We also agree with the addition to § 1201.73(d)(4) that discovery must end no later than the prehearing conference if the AJ did not already designate a time period for discovery to end. In addition, we think § 1201.73(c)(i)'s addition of a requirement to demonstrate that the scope of a discovery request is reasonable will be helpful.

7. Proposed § 1201.114(h)

   The Agency agrees with the proposal to limit the number of pages for pleadings in a petition for review.

8. Proposed § 1201.21Notice of appeal rights and Proposed § 1209.2 Jurisdiction.

Clerk of the Board

We agree with the Board's decision to promulgate regulations that overrule *Massimino* and bring Board practice into compliance with the requirements of 5 U.S.C. § 7121(g).

Thank you for the opportunity to comment on these proposed regulations.

Sincerely yours,

Will A. Gunn
General Counsel