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Via Email
William D Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street NW
Washington DC 20419

Re: Proposed Amendments to MSPB Rules of Practice and Procedure
77 Fed. Reg. 33663 (June 7, 2012)

Dear Mr. Spencer:

The U.S. Office of Special Counsel (OSC) submits the following comments concerning the proposed rules commencing on page 33663 in the Federal Register (Vol. 77, No. 110), dated Thursday, June 7, 2012. The proposed changes involve the election of remedies for appellants alleging that they have been subjected to otherwise appealable personnel actions (suspensions of 15 days or more, demotions, or removals) because of whistleblowing and the burden of proof that would apply in establishing jurisdiction in an Individual Right of Action (IRA) appeal.

Election of Remedies

At the proposal stage of an adverse action, the employee has limited options for redress. Whistleblowers facing proposed adverse actions can seek assistance from OSC by filing a claim under 5 U.S.C. § 1214 alleging that the proposal was a threat of a personnel action, which, if retaliatory, would violate the whistleblower protections in 5 U.S.C. § 2302(b)(8). In such a case OSC will seek to have the proposal rescinded. However, if the proposed action results in a final decision of a 15-day suspension or more, demotion, or removal, these new regulations would require the employee to withdraw the OSC complaint and file an Otherwise Appealable Action (OAA) appeal with the Board to preserve the right to assert certain affirmative defenses and require the agency to bear the burden of proof in proving its charges.

OSC is concerned that these proposed regulations will result in significant resource inefficiencies, i.e., OSC will devote significant resources and staff to investigate proposed retaliatory actions, only to have the matter withdrawn once the proposed action becomes final. Alternatively, to avoid such inefficiency and misallocation of resources, OSC may decline to pursue proposed retaliatory actions, which could undermine protection for whistleblowers.

To lessen the impact of the proposed regulations on OSC's whistleblower enforcement program, we recommend that the Board include in its regulations a provision that permits an employee who has challenged a proposed personnel action in an OSC complaint prior to the issuance of a final agency decision to continue to pursue that complaint under 5 U.S.C. § 1214, and not have the complaint considered an election of remedies under 5 C.F.R. §§ 1201.21 and 1209.2, should the employee later file an appeal under 5 U.S.C. § 7701.

This provision would enhance OSC's ability to protect whistleblowers. Without such a provision, OSC would be faced with the nearly impossible task of having to complete its investigation before the employee is forced to elect a remedy under the new regulations. And, it is likely that OSC would be unable to help whistleblower complainants who are victims of retaliation before the time to elect a remedy expires under 5 U.S.C. § 7701. Given the time it takes to adequately conduct an investigation, it is only in the exceptional case that OSC would be able to make its statutory finding that whistleblower retaliation had occurred before the time for filing a Board appeal has expired. Even where OSC completes its task before the statutory time period has run, OSC's own statute requires it to provide the employer a reasonable time to review OSC's findings and respond before OSC may initiate its own corrective action on behalf of the whistleblower under 5 U.S.C. § 1214(b)(2)(C).

We recognize that some OSC complainants may file an appeal under 5 U.S.C. § 7701 while OSC continues to investigate the validity of the underlying proposed action for whistleblower retaliation. If past experience holds, it is unlikely that this overlap would have any significant impact on the Board's orderly processing of appeals involving whistleblower retaliation claims. We are aware of no case decided under the WPA where the overlap of jurisdiction between our agencies has resulted in separate appellate and original jurisdiction filings. Moreover, under traditional preclusion doctrines, a whistleblower who is unsuccessful in an OAA appeal could not easily collaterally attack that result through an individual right of action appeal were we to subsequently close the OSC complaint. *Sabersky v. Department of Justice*, 91 M.S.P.R 210 (2002), *aff'd*, 61 F. App'x 676 (Fed. Cir. 2003) (unpublished).

Burden of Proof

OSC also suggests some further clarification of the burden that IRA appellants must meet to establish jurisdiction so as to avoid the dismissal of meritorious IRA appeals at the jurisdictional stage. In particular, the Board could clarify in the Summary of Changes that administrative judges should not weigh the evidence resolving conflicting assertions of jurisdiction, consistent with the recent holding in *Ingram v. Department of the Army*, 114 M.S.P.R. 43 (2010):

> In assessing whether the appellant has made nonfrivolous allegations, the administrative judge may consider the agency's documentary evidence; however, to the extent the agency's evidence constitutes mere factual contradiction of the appellant's allegations, the administrative judge may not weigh evidence and resolve conflicting assertions, and the agency's evidence

> may not be dispositive. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 19 (2010). Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Drake v. Agency for International Development*, 103 M.S.P.R. 524, ¶ 11 (2006); *see also Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 11 (2008) (any doubt as to whether the appellant made a nonfrivolous allegation of wrongdoing should be resolved in favor of finding jurisdiction).

Ingram, 114 M.S.P.R. 43, ¶ 10.

In addition, the Board could clarify that establishing a nonfrivolous allegation of jurisdiction in an IRA appeal merely requires that the appellant show that the employee made a protected disclosure that was a contributing factor to the personnel action taken or proposed,[1] and specifically that the test for a non-frivolous allegation of a protected disclosure may be satisfied if "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA."[2] The test for a non-frivolous allegation of contributing factor may be satisfied if the protected disclosure was a "factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[3] Alternatively, the test for a non-frivolous allegation of contributing factor may be satisfied by an allegation that "the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor."[4]

This clarification would illustrate for appellants and practitioners that the legal burden to establish the merit-based jurisdictional elements of a whistleblower case is minimal. It also would help avoid any potential confusion about application of the heightened pleading standards established by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S .Ct. 1937 (2009), which OSC contends do not apply in proceedings before the Board. Indeed, the Department of Labor's Administrative Review Board, which adjudicates claims under approximately twenty-one similar whistleblower protection statutes, has expressly declined to apply the *Iqbal/Twombly* heightened pleading standard in Sarbanes-Oxley whistleblower retaliation cases. In *Sylvester v. Parexel Intern'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 and 42 (ARB May 25, 2011), the ARB held that that the ALJ erred in applying the heightened *Iqbal/Twombly* plausibility pleading standard, noting that "SOX claims are rarely suited for Rule 12 dismissals" in that "[t]hey involve inherently factual issues such as 'reasonable belief' and issues of 'motive.'" *Sylvester*, ARB No. 07-123 at 13. Similarly, an assessment of whether

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[1] *Stoyanov v. Dep't of the Navy*, 474 F.3d 1377, 1382 (Fed. Cir. 2007)
[2] *Usharauli v. Dep't of Health & Human Servs*., 116 M.S.P.R. 383, ¶ 21 (2011) (citing *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999)) (emphasis added).
[3] *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed.Cir. 1993).
[4] *Usharauli*, 116 M.S.P.R. 383, ¶ 31 (citing 5 U.S.C. § 1221(e)(1); *Lane v. Dep't of Homeland Security*, 115 M.S.P.R. 342, ¶ 34 (2010)) (emphasis added).

an IRA appellant has established jurisdiction involves inherently factual issues, including motive for taking a personnel action, and therefore the MSPB should not impose an undue burden on IRA appellants to establish jurisdiction.

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

U.S. Office of Special Counsel