

The Honorable Susan Tsui Grundmann
Chair
U.S. Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Re: Pension Benefit Guaranty Corporation's Comments to the MSPB's Proposed Rules

Dear Ms. Grundmann:

The Pension Benefit Guaranty Corporation (PBGC) submits these comments to the Board's proposed amendments to its rules of practice and procedure pursuant to 5 U.S.C. Sec. 553(c).

1. 1201.21 Notice of Appeal Rights.

The revisions proposed in paragraph (d) require agencies to provide extensive notices to employees in final action letters. To ensure uniformity among agencies with respect to these additional notices, as well as to avoid litigation about the adequacy of an agency's notice, PBGC suggests that the Board issue a model notice as an appendix to the rule, which agencies can reference and supplement, as needed, in their final action letters.

2. 1201.43. Sanctions. The "Summary of Changes" implies that the Board deleted the requirement that an administrative judge issue an order to show cause before excluding a party or representative for contumacious behavior because such a requirement is not feasible during a hearing. The "Summary of Changes" also implies that the Board deleted the provision for an interlocutory appeal of a sanction for contumacious behavior because of the delay such a provision would cause during a hearing. The proposed revised regulation, however, does not appear to limit the sanction of exclusion for contumacious behavior to the hearing stage, but rather the entire case.

In addition, in the "Summary of Changes," it states that "excluding parties or representatives for contumacious behavior is currently covered by 5 CFR 12-1.31 [Representatives]. The MSPB believes that this subject is better covered under 5 CFR 1201.43 [Sanctions], as exclusion or other action for contumacious behavior is a sanction." This implies that the sanction of exclusion for contumacious behavior is a sanction limited to a party or representative. The proposed revision states, however, that a "judge may exclude or limit the participation of a representative or other person in the case" (emphasis added.) It is unclear if this revision seeks to expand an administrative judge's authority to issue the sanction of exclusion for contumacious behavior to include witnesses or other persons involved in the matter, rather than just parties or representatives.

PBGC recommends the Board clarify when the sanction of exclusion for contumacious behavior can be issued (during the hearing only or at any time an appeal is pending), and to whom the sanction can be issued to (just parties and representatives or anyone involved in the appeal).

3. **1201.155. Requests for review of arbitrators' decision.** The proposed revisions add a new paragraph entitled "*Development of the Record*," whereby the Board, in its discretion, may reopen the record developed during an arbitration and retry claims of discrimination before an MSPB administrative judge. This new paragraph conflicts with the collective bargaining process and the election of the union to pursue a matter in arbitration. Once filed, the matter belongs to the arbitrator. At most, any direction to supplement the record should be directed to the parties for submission back to the arbitrator.

4. **1201.183. Procedures for Processing Petitions for Enforcement.** It appears that the proposed rule, which eliminates the "good faith" consideration in evaluating a party's compliance with a final decision, establishes a stricter standard than that provided for under Rule 70 of the Federal Rules of Civil Procedure. Specifically, case law applying Rule 70 focuses on the clarity of the order with which the party has to comply and requires clear and convincing proof that there was a failure to comply with a clear order. MSPB's proposed rule provides for no standard under which a party's compliance is to be evaluated. Rather, arguably it establishes a "strict liability" standard and does not leave open any possibility for a party's inadvertent error or inability to comply.

PBGC recommends that the good faith element be re-inserted into the regulation. There are occasions when an agency, even if it acted with diligence in attempting to comply with an order, cannot do so within the time frame specified by the order. This may occur because the agency requires information from an appellant or a third party in order to perform certain calculations (ie., offsetting a front pay award because the appellant is receiving disability retirement or offsetting a backpay award based on an appellant's earnings in a new position) or to otherwise fully comply with an order. If an agency can demonstrate that it acted with good faith in attempting to timely comply with an order, it should not be penalized.

Thank you for the opportunity to provide our comments.