AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

J. David Cox, Sr.
National President

Eugene Hudson, Jr.
National Secretary-Treasurer

Augusta Y. Thomas
National Vice President for
Women and Fair Practices

7y/MSPB/332673

May 5, 2014

William D. Spencer
Clerk of the Board
Office of Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419
mspb@mspb.gov
(202) 653 – 7130 (fax)

Re: Comments by AFGE Concerning Proposed Changes to MSPB Practices and Procedures, 79 Fed. Reg. 18658 (April 3, 2014)

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. Changes suggested by AFGE are shown in bold.

Overall, AFGE commends the Board's effort to clarify and update 5 C.F.R. § 1201.56. AFGE previously expressed concern that the Board's 2012 discussion of the varying burdens and degrees of proof placed on an appellant by section 1201.56 would be confusing to *pro se* appellants. AFGE suggested, at that time, that the Board and parties before the Board might be better served by simpler language, which gave the Board greater flexibility, in part, by requiring that the Board explicitly inform appellants, in writing, as to the specific degree(s) of proof applicable to an appeal. While AFGE continues to see a need for flexibility, AFGE also believes that separating section 1201.56 into two new sections, 1201.56 and 1201.57, may help ease any potential confusion. AFGE's specific comments follow.

I. Comments Regarding Proposed Changes to Part 1201

5 C.F.R. § 1201.4 General Definitions.

(s) *Nonfrivolous allegation.*

The Board should delete the reference to "under oath or penalty of perjury" from this section because it may be misconstrued as requiring that an assertion must be made

80 F Street, N.W., Washington, DC 20001 • (202) 737-8700 • FAX (202) 639-6490 • www.afge.org

under oath or penalty of perjury in order to qualify as a non-frivolous allegation. Further, to the extent that the Board intended to create such a requirement, the Board should not require that an allegation be made under oath or penalty of perjury in order for the allegation to be considered non-frivolous for the purpose of determining whether a jurisdictional hearing is warranted. While it may go to the probative value or weight of the evidence, AFGE believes that neither statute nor case law requires that a statement be under oath or affirmed under penalty of perjury, pursuant to 28 U.S.C. § 1746, in advance of a jurisdictional hearing. Indeed, requiring that allegations be made under oath or affirmed under penalty of perjury at what is essentially the pleading stage of an appeal appears to be inconsistent with the first part of the Board's proposed definition, which defines a non-frivolous allegation as an assertion that, if proven, could establish the matter at issue, as well as with statutes the broad purpose of which are remedial. The proving of the assertion in question would presumably occur at the jurisdictional hearing.

Any requirement of oath or affirmation is thus better suited to the hearing stage because: a) the administrative judge may administer the oath or affirmation directly to the appellant or witness at that time; and b) the appellant or witness will thereafter be open to cross-examination by the opposing party and observation by the judge. Lastly, the absence of a requirement at the pleading stage need not be taken as a prohibition, nor would it prevent an administrative judge from reviewing an appellant's assertion of jurisdiction under the otherwise holistic standard proposed, and presently used, by the Board.

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

(d) *Administrative Judge.*

AFGE firmly supports the requirement that administrative judges explicitly inform the parties to an appeal of the burdens and degrees of proof applicable to the appeal. AFGE offers two further suggestions. First, AFGE suggests that proposed section 1201.56(d) and proposed section 1201.57(e) be merged into a single section and that that single section be moved to a newly-created section: 5 C.F.R. § 1201.41(d), *Proof.* Proposed 5 C.F.R. § 1201.56(d) and proposed 5 C.F.R. § 1201.57(e) concern the issuance by an administrative judge of notices that are essentially the same (concerning burdens and degrees of proof applicable to an appeal). These two proposed sections are thus likely better expressed as a single obligation on the part of the administrative judge. They are therefore likely better placed as a single paragraph under section 1201.41, which pertains to judges.

AFGE's second suggestion is that the language of sections 1201.56(d) and 1201.57(e) be unified. Although these two sections parallel each other closely, proposed section 1201.56(d) requires notice of "the proof required as to issue of jurisdiction, the timeliness of the appeal, and affirmative defenses[,]" while proposed section 1201.57(e) requires notice of "the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal." AFGE believes that improved language would be as follows:

> ***Proof.*** **The administrative judge will notify the parties to an appeal, in writing, of: a) the burdens and elements of proof applicable to the appeal, including as to the merits and any affirmative defenses; b) the jurisdictional requirements and elements applicable to the appeal; and c) the timeliness requirements and elements applicable to the appeal.**

AFGE believes that using a single section to address the topic of proof is more consistent with Board practice, and is a more elegant and effective solution. *Cf. Solamon v. Dep't of Commerce*, 119 M.S.P.R. 1, 7 (2012) ("It is well settled that an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue.").

5 C.F.R. § 1201.57 Establishing jurisdiction in appeals not covered by § 1201.56; burden and degree of proof; scope of review.

(b) *Matters that must be proven by a preponderance of the evidence.*

(3) Standing to appeal.

AFGE questions whether the term "standing" should be used to describe the issue of whether an appellant "falls within the class of persons who may file an appeal under the law applicable to the appeal." While the Board's standing inquiry may be analogous to the inquiry engaged in by a court when determining whether a plaintiff possesses prudential standing to bring a lawsuit, e.g. whether a plaintiff falls within a statute's zone of interest, the issue of standing in most Board appeals is perhaps more accurately described as a jurisdictional element that must be proven by preponderant evidence.

In other words, because the Board's jurisdiction is not plenary, an appellant must always show that she is appealing an action that "is appealable to the Board under any law, rule, or regulation." 5 U.S.C. § 7701(a). Thus, for example, the Board will never have jurisdiction over a USERRA or VEOA claim brought by an appellant who is not a veteran, and the element of veteran status (which differs in the particulars under each statute) is consequently a mandatory requirement established by the statute which provides the Board with putative jurisdiction over the appeal in the first instance. It is a *sine qua non* of the appeal. Used in this sense, "standing" is simply a mandatory element of jurisdiction that must be proven by the appellant. A more apt term might therefore be "Coverage." But, in any event, AFGE suggests that the Board consider further clarifying the meaning of "standing" as it is used in this section.

(c) *Matters that must be supported by non-frivolous allegations.*

In *Bledsoe v. Merit Sys. Protection Bd.*, 659 F.3d 1097 (Fed. Cir. 2011), ("*Bledsoe*") the United States Court of Appeals for the Federal Circuit held that in order for a petitioner to establish Board jurisdiction over an appeal filed pursuant to 5 C.F.R. §

353.304(c), she must, *inter alia*, prove by preponderant evidence that her agency's refusal to restore her to duty following her partial recovery from a compensable injury was arbitrary and capricious. To the extent that the Board now seeks to deviate from *Bledsoe* on this point by adopting a contrary regulation, AFGE agrees with the Board's decision.

The *Bledsoe* majority plainly conflated the elements required to establish Board jurisdiction with the standard for the Board's adjudication of the merits. As the dissent in *Bledsoe* correctly put it, "[t]he standard of review is not an element of jurisdiction." *Bledsoe*, 659 F.3d at 1109. AFGE suggests, however, that the Board expand on its basis for this proposed regulatory change. For example, it likely bears noting that *Bledsoe* should not be followed because the majority's reasoning is inherently circular. If an appellant must prove by preponderant evidence that an agency's failure to restore her was "arbitrary and capricious" in order to establish jurisdiction, then a losing appellant will never lose on the merits because the merits are entirely subsumed by the jurisdictional inquiry. Put another way, under *Bledsoe*, a petitioner who establishes jurisdiction cannot lose on the merits because by establishing the Board's jurisdiction, the appellant has already prevailed on the merits. This is an illogical outcome that unnecessarily raises the bar for partial restoration appellants – and it also contrary to the commonly accepted canon that remedial statutes and regulations should be broadly interpreted.

II. 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,

Andres M. Grajales
Deputy General Counsel
American Federation of Government Employees
80 F Street, N.W.
Washington, D.C. 20001