



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

Office of the
General Counsel

Honorable Susan Tsui Grundmann
Chairman, U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

DEC 9 2013

Dear Chairman Grundmann:

On November 8, 2013, the Merit Systems Protection Board (the Board) issued a Federal Register notice, 78 Fed. Reg. 67076, inviting public comment on four options the Board is considering for a revision of its jurisdictional regulations codified in 5 C.F.R. 1201.56. The Board specified a deadline of December 9, 2013 for the receipt of comments. Office of Personnel Management (OPM) hereby submits its comments.

Under 5 C.F.R. 1200.4(b), the Board has reserved for itself the option to engage in final rulemaking without notice and comment in certain circumstances. However, OPM urges the Board in this case to issue a notice of proposed rulemaking inviting public comment on whichever, if any, of the four options the Board selects, before the Board issues a final rule on its standards of proof for appellate jurisdiction. We believe that it is important to provide interested parties a full and fair opportunity to comment on the policy the Board actually expects to adopt and on that policy's underlying rationale. This will benefit the Board by allowing more focused and detailed commentary before the final rule is adopted.

OPM has reviewed the Federal Register notice and the explanatory options paper published on the Board's Web site to facilitate review. We note that all of the options appear to preserve the appellant's burden of proof in retirement cases, consistent with the current regulations. We support no change to these burdens of proof.

With respect to the four proposed options, our preference is for something like option B, which sets forth in a straightforward way the burdens of proof applicable to various statutory appeal rights. While option A, directing the Board's presiding officials to notify parties of the specific jurisdictional elements applicable to each case, appears to have the benefit of simplicity and accurate notice, its omission of precise jurisdictional rules may result in inconsistent practice.

We believe that options C and D are unnecessarily complex, although they recognize – in a way that options A and B do not – that additional jurisdictional pleading requirements may be a factor when matters are made appealable to the Board by OPM regulation rather than by statute. We recommend amending option A to reflect this concept.

OPM also believes that while it is appropriate for the Board to propose rules governing the circumstances under which claims and defenses may be resolved without a full hearing on the

merits, a rulemaking on jurisdiction is not the place to do so. We therefore disagree with option C to the extent that it combines recommendations related to jurisdictional standards with recommendations related to the hearing rights available to appellants for cases held to be within the Board's jurisdiction. A separate rulemaking on this issue would be preferable.

OPM reserves additional comments until we see a more concrete and detailed proposed rule, reflecting the Board's policy judgment on which, if any, of the four options it will adopt.

Thank you for the opportunity to comment on the thoughtful options prepared by your regulatory working group.

Respectfully,



Sharon M. McGowan
Acting General Counsel