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The Special Counsel

May 5, 2014

Via E-mail: mspb@mspb.gov

Mr. William D. Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Re: Proposed Amendments to MSPB Rules of Practice and Procedure
79 Fed. Reg. 18658 (April 3, 2014)

Dear Mr. Spencer:

The U.S. Office of Special Counsel (OSC) submits the following comments concerning the Board's proposed rule commencing at page 18658 of volume 79 of the Federal Register, dated April 3, 2014. The Board has proposed regulations concerning establishing jurisdiction in certain appeals, including individual right of action (IRA) appeals. My office's primary mission is to safeguard the merit system in federal employment by protecting employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing and protected activity. OSC therefore has a particular interest in ensuring that federal employees who challenge alleged prohibited personnel practices in IRA appeals enjoy the full protections of law.

With the passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Congress expressed strong concern that many Federal Circuit and Board decisions and practices imposed legal hurdles that were inconsistent with the broad protection of the Whistleblower Protection Act (WPA) and prevented IRA appellants from having their cases decided on the merits. To address these concerns, Congress legislatively overturned these decisions and removed the Federal Circuit's exclusive appellate jurisdiction over Board appeals for two years.[1] To be sure, Congress left undisturbed many other Federal Circuit and Board decisions applying the WPA. Nevertheless, Congress's intent to preserve "very broad protection" for whistleblowers is clear. S. Rep. 112-115, at 5 (2012).

OSC is deeply concerned that the Board's proposed new regulation to address how jurisdiction is established in IRA appeals will impair the ability of IRA appellants – most of whom are *pro se* – to have a fair opportunity to present their cases to the Board and obtain a decision on the merits. Specifically, in accordance with 5 U.S.C. § 1214(a)(3), the Board should

[1] *See, e.g.*, S. Rep. 112-155, at 4-5 (2012) ("Clarification of what constitutes a protected disclosure"); *id*. at 11-12 ("All-circuit review"); *id*. at 23-24 ("Right to a full hearing").

not impose onerous burdens on IRA appellants to prove exhaustion of their administrative remedy at OSC. Likewise, under 5 U.S.C. § 1221(f)(2), when determining whether an IRA appellant has proved exhaustion, the Board must not consider in any way OSC's decision to terminate its investigation.

The statutory exhaustion requirement for an IRA appeal is not burdensome. As set forth at 5 U.S.C. § 1214(a)(3), an IRA appellant need only "seek corrective action from the Special Counsel before seeking corrective action from the Board." The contours of what it means to "seek corrective action from Special Counsel" and what evidence the appellant must submit to prove exhaustion have been developed solely through case law.

The proposed regulation, 5 C.F.R. § 1201.57, codifies existing case law, specifically *Yunus v. Dep't of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001), holding that to establish jurisdiction in an IRA appeal, the appellant must prove by preponderant evidence that he has exhausted his remedy before OSC. *Yunus*, 242 F.3d at 1371 & n.1. The proposed regulation leaves open to further interpretation, however, how the appellant will meet the burden of proving exhaustion.

Until recently, the test for exhaustion under relevant precedent was whether the IRA appellant had "inform[ed] the Special Counsel of the precise ground of his charge of whistleblowing[,]" thereby giving OSC sufficient basis to pursue an investigation which might lead to corrective action. *Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1377 (Fed. Cir. 2001) (citation omitted); *see also Swanson v. Gen. Servs. Admin.*, 110 M.S.P.R. 278, ¶ 7 (2008) (to meet exhaustion requirement appellant "must articulate with reasonable clarity and precision before OSC the basis for his complaint of whistleblowing reprisal") (citing *Briley*, 236 F.3d at 1377). In other words, an IRA appellant as a complainant at OSC needed only to *state allegations* that would give OSC a sufficient basis to pursue an investigation that might lead to correction action. *See Briley*, 236 F.3d at 1378 (disagreeing with Board's analysis of appellant's allegations to OSC); *Swanson*, 110 M.S.P.R. 278, at ¶ 8 (appellant "specified with reasonable clarity and precision the content of the disclosure, the individual to whom it was made, the nature of the personnel actions that were allegedly taken in retaliation, and the individuals responsible for taking those actions. These essential details were sufficient to provide OSC with a basis for an investigation that might have led to corrective action.")

However, the Board recently changed the test for exhaustion from a simple allegation-stating requirement to an actual information-submitting requirement, which is significantly more burdensome. In *Clarke v. Department of Veterans Affairs*, the Board found that "because the information that the appellant provided to OSC was insufficient for it to pursue an investigation that might lead to corrective action concerning those alleged disclosures, the appellant failed to exhaust his administrative remedy with respect to them." *Clarke v. Dep't of Veterans Affairs*, 2014 MSPB 11, ¶ 14 (Feb. 27, 2014). As noted by the dissent, the Board in *Clarke* has fundamentally changed the test for exhaustion in IRA appeals. *See Clarke*, 2014 MSPB 11, at ¶¶ 5-6 (Vice Chair Wagner dissenting). Furthermore, the Board appears to have disregarded the

statutory requirement that OSC's decision to terminate its investigation "*may not be considered*" in an IRA appeal. 5 U.S.C. § 1221(f)(2) (emphasis added).

OSC urges the Board to modify its proposed jurisdictional regulation for IRA appeals to recognize the statutory requirements and to reflect Congress's expressed intent to provide very broad protection for federal employees who blow the whistle or otherwise engage in protected activity. The regulation should recognize that:

- In most cases, an IRA appellant should meet the preponderant evidence burden of proving exhaustion simply by providing a copy of the complaint filed with OSC. *See* 5 U.S.C. § 1214(a)(3) (IRA appellant need only "seek corrective action from the Special Counsel before seeking corrective action from the Board.")

- In occasional cases, such as where the complainant submits new allegations to OSC after the initial complaint, an IRA appellant may need to submit the IRA letter from OSC, which sets forth the alleged disclosures and/or protected activity and the alleged retaliatory personnel actions. *See* 5 U.S.C. § 1214(a)(2)(B) (OSC's termination letter "may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement"); *Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, ¶ 10 (2006) (Board may order an appellant to submit a copy of OSC's termination letter, but the order must contain an explanation of why the letter is necessary and give the appellant the opportunity to consent).

- In no case should the Board require IRA appellants to submit correspondence from OSC or other information that reflects OSC's investigative processes or the basis for OSC's discretionary decision to terminate an investigation at the complaints examination stage. *See* 5 U.S.C. § 1221(f)(2) (OSC's decision to terminate its investigation "may not be considered" in an IRA appeal); *Bloom*, 101 M.S.P.R. 79, at ¶ 10 (same); *see also Carson v. Special Counsel*, 633 F.3d 487, 493-94 (6th Cir. 2011) (decision whether to pursue an investigation beyond the preliminary examination of the complaint is solely within the Special Counsel's discretion); *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 599 (1986) (same), *rev'd on other grounds*, *Harvey v. Merit Sys. Prot. Bd.*, 802 F.2d 537 (D.C. Cir. 1986).

Thank you for this opportunity to comment on the proposed regulations. If the Board has any questions regarding these comments, please direct them to Eric Bachman, Deputy Special Counsel for Litigation and Legal Affairs. He can be reached at (202) 254-3606, or by e-mail at ebachman@osc.gov.

Respectfully,

Carolyn Lerner

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