Peter B. Broida
Attorney at Law

1840 Wilson Blvd., Suite 203
Arlington, VA 22201
(703) 841-1112
(703) 841-1006 (fax)
Peterbroida@gmail.com

April 7, 2014

William D. Spencer
Clerk
Merit Systems Protection Board
1615 M St., NW
Washington, DC 20419

Re: Proposed Rule of April 3, 2014, Concerning Jurisdiction

By e-mail PDF

Dear Mr. Spencer:

In response to the rulemaking notice of April 3, I offer comments based on my experience and not upon the supposition that I could draft a regulation better than what has been proposed.

The attempt to better define by regulation often ambiguously-stated statutory terms is laudable.

I urge, however, that as good authors you keep your readers in mind. They are never far away.

Most appellants are *pro se*. Many represented appellants appear through counsel with little experience in Board appeals. Your regulation should be tailored to be of maximum assistance to *pro se* appellants, and your efforts should be devoted to ensuring that specialist lawyers who serve as administrative judges devote their time and attention to educating *pro se* appellants and counsel with limited past Board involvement.

Of particular significance are Individual Right of Action cases and appeals involving allegedly constructive adverse actions.

The proposed regulation adopts a dual approach: the clarification of the regulatory requisites of jurisdiction and a requirement that administrative judges explain those requisites in their show cause and acknowledgment orders.

We turn first to the regulation.

At Section 1201.4, the regulation states that jurisdiction is predicated upon a legally sufficient nonfrivolous allegation, further defined to be an allegation under oath or penalty of perjury that is more than conclusory, plausible on its face, and material to the legal issues in the appeal.

Taking these elements point by point, I suggest:

A. Allegation under oath or penalty of perjury: explain in the regulation how this is done, such as a written statement under 28 USC 1746, giving an example of the necessary statutory language. And you need to clarify whether information contained in an appeal, which is submitted under the Federal False Statements Act, qualifies as a sufficient allegation under oath or penalty of perjury, or whether something else is required.

B. More than conclusory: the question of what constitutes an assertion that is"more than conclusory" is in the mind of the administrative judge. I have seen detailed allegations of whistleblower reprisal or constructively adverse resignations or demotions dismissed by administrative judges as merely "bald statements," leading to what should have been an unnecessary petition for review or Federal Circuit case, with the attendant delay and expense. The Board needs to set out by example what constitutes more than a conclusory statement.

C. Plausible on Its Face: if an allegation is more than conclusory, it should be accepted as plausible on its face; in other words, the requirement is duplicative unless the intent of the Board is to require the appellant to somehow relate a nonconclusory allegation to a legal conclusion that would support an IRA or constructive adverse action case. If the intent of the Board is to require enunciation by the appellant of the legal standard, then say so. Spell out the several statutorily defined forms of personnel actions and prohibited personnel practices that constitute a potential IRA case, and tell the appellant specifically that he or she needs to explain how the nonconclusory allegations demonstrate a personnel action, a protected disclosure, necessary knowledge by a manager, and the necessary requisites for administrative exhaustion required for an IRA case. Do the same for constructive adverse action appeals. Give examples.

D. Is Material to the Legal Issues in the Appeal: The *pro se* appellant is not too likely to understand what the legal issues are in an IRA appeal, so simply generally referring to the term does not assist the *pro se* or the representative who has little experience with complex jurisdictional issues in IRA cases. So, to educate the *pro se*, state what the legal issues are

in an IRA case and tell the *pro se* the need to explain the connection between the nonconclusory allegations and the legal issues in the appeal, as defined by the Board regulation. Do the same for constructive adverse action appeals. Give examples.

Turning to the role of the administrative judge, the show cause orders or acknowledgment orders that I see ordinarily consist of general statements of the law governing IRA or constructive adverse action cases, followed by one or more citations to cases from the Board or Federal Circuit, without placing the excerpts into the context of the allegations of the individual appeal. The language that I see is not plain English calculated to be understood in the context of a particular case. Lawyers familiar with these cases ignore the language. *Pro se* appellants very likely have no comprehension of what the language means in terms of what they must provide to the Board to survive a jurisdictional challenge.

To avoid the difficulties presented by a recitation of relatively impenetrable citations by judges who are cutting and pasting into their orders language from other Board decisions or prior orders in similar cases before them, the judges should be required to directly engage in an interactive exchange with *pro se* appellants particularly to draw out from them the information necessary, assuming it exists, to establish jurisdiction. The job of the judges is made considerably easier if the Board issues a regulation that does not use legal terminology, such as "conclusory" or "material" and instead plainly informs appellants how to go about explaining the facts and relating those facts to the legal requirements that are presented in plain English in the regulation. Even with the best-drafted regulation, there will be some people who cannot follow the regulation, and there will be more people who will try to follow the regulation but simply don't have the facts to establish a case. That is a problem in dealing with any *pro se* population, but it does not excuse the lack of regulatory clarity.

The Board must make plain in its regulations that the responsibility for establishing jurisdiction in any class of cases before it is not limited to appellants. When agencies have information bearing upon either the timeliness or jurisdiction of the case, the Board must by its own regulations ensure that the agency supplies that information in response to the appeal and in response to a show cause order issued by a judge. Further, the Board must clarify its processes so that submissions in response to show cause orders allow for, and specifically state that they allow for, a reply to new material submitted on the deadline for submissions. Neither appellants nor agencies should have to file petitions for review in order to place before the Board responsive material that should have been considered by the judge.

The Federal Circuit noted the slippery nature of the term "jurisdiction." *Spruill v. MSPB*, 978 F.2d 679, 686 (Fed. Cir. 1992). Judge Newman of that court was critical in a dissent of MSPB form "orders" that confuse rather than inform. *Mendoza v. MSPB*, 966 F.2d 650 (Fed. Cir. 1992). I urge the Board, particularly since it so infrequently amends its regulations, to craft a regulation defining how appellants

establish jurisdiction in terms that most appellants can understand and follow, particularly through the use of examples and avoidance of legal terminology, much as the Board did when it amended the regulation involving elections of remedies. And I urge that its efforts be particularly directed to IRA as well as constructive adverse action appeals.

Thanking you for your consideration, I am

Yours very truly,

Peter B Broida