



April 23, 2013

VIA e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503  
Attention: Desk Officer for the Merit Systems Protection Board

**Re: Comments Regarding Notice Proposing Revisions to MSPB Form 185**

Dear Desk Officer:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Merit Systems Protection Board's Notice of Proposed Collection concerning modifications to MSPB Form 185, 78 Fed.Reg. 20,142 (April 3, 2013). NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and/or represent federal employees in employment law matters, and thus we have an interest in the modifications to MSPB Form 185

NELA appreciates the opportunity to comment on the proposed revisions to MSPB Form 185. NELA generally supports the Board's overall proposal to update MSPB Form 185, and agrees with many of the Board's proposed revisions appearing in the Notice and in the draft form posted by the Board for review online.<sup>1</sup> In particular, NELA notes its support for the following modifications:

- Simplification of the instructions at the beginning of the form;
- Elimination of the question appearing on the old MSPB Form 185 at Part 2, Box 19 concerning requested remedies;
- Moving the routine Privacy Act text to the back of the form;

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<sup>1</sup> See

<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=810046&version=813180&application=ACROBAT>.

- Adding Appendix B; and
- Adding Appendix A in general (although NELA does have concerns about the specific content of Appendix A, as noted below).

Concerning the minimization of the burden of the collection of information on respondents submitting MSPB appeals, as a general matter, NELA is concerned about any attempt to make MSPB Form 185 (either in its paper form, or in electronic format as it appears on the MSPB website in the form of electronic appeals filing) a mandatory part of appeals filing. Instead, we suggest that MSPB Form 185 remain optional for filing appeals—and that the Board adjust the e-Appeal system to ensure that this option is viable for all methods for appeal filing approved by 5 C.F.R. § 1201.22(d). Like many attorneys who frequently appear before the Board, some NELA members have their own standard boilerplate for drafting appeals to the Board which does not employ MSPB Form 185 but which meets all requirements of 5 C.F.R. § 1201.24(a). Under the current e-Appeal system, it is impossible to file an appeal in any form other than MSPB Form 185 (such as by uploading an appeal document in .pdf or .doc form in the same way that motions and other pleadings can be filed in the present e-Appeal system).

As a result, attorneys (such as some NELA members) who have such boilerplate must either file appeals through e-Appeal on MSPB Form 185, or else are restricted to filing appeals using their own boilerplate by other means. Allowing full use of such boilerplate promotes resolution of appeals by helping to lower attorneys' fees and costs. In NELA members' experience, appeals filed on MSPB Form 185 cannot be readily recycled and reused as boilerplate, requiring each form to be re-filled from scratch in each new appeal. The Board itself estimates that this time is significant, "vary[ing] from 20 minutes to 4 hours, with an average of 60 minutes per response." See 77 Fed.Reg. at 71,641. That time, when multiplied by an attorney's hourly billing rate, can have a material effect on early case settlement and similar issues. Allowing use of boilerplate other than MSPB Form 185 to help contain costs thus promotes the Board's wise policy of favoring settlement of cases when practicable. The Board already has the capacity for processing e-Appeal filings of appeals in this fashion, as demonstrated by the fact that e-Appeal currently allows for filing of motions and pleadings (other than appeals) through uploading .pdf documents. Finally, allowing the option of e-Appeal filings other than on MSPB Form 185 would still be subject to the requirements of 5 C.F.R. § 1201.22(d), ensuring completeness and sufficiency of the appeals filed.

Further, NELA has the following specific concerns and objections with certain modifications identified in the Notice:

- While NELA generally supports the creation of Appendix A, as noted above, we have some concerns about the content of the current draft text as under-inclusive. NELA is concerned that many appellants, in particular *pro se* appellants, may read Appendix A as currently drafted as being the exclusive and complete list of all defenses available to an appellant. This risk is compounded by the draft text for Box 16, which seems to list "harmful procedural error, [...] a prohibited personnel practice, or [...] the other claims listed in Appendix A" as the complete list of defenses available. The current draft of Appendix A omits several common claims and defenses recognized by Board precedent from the list, including excessiveness of penalty/failure to consider *Douglas* mitigation factors for Chapter 75 actions, constitutional due process violations at the agency level, and timeliness of adverse action defenses such as the statute of limitations for Chapter 43 actions under 5 U.S.C. §§ 4303(c)(2)(A), 40303(d). Instead, perhaps as some form of a

catch-all, the present revised Appendix A for Form 185 lists claims that are “Not in accordance with law: A claim that the agency's action was unlawful in its entirety, that is, there is no legal authority for the action.” NELA is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know what sorts of violations of law can constitute affirmative defenses in the context of an MSPB appeal) who might inadvertently omit these claims due to their absence in Appendix A. To remedy the problem, NELA suggests that Appendix A be expanded to list these additional common claims and defenses.

- Appendix A also omits the remaining Prohibited Personnel Practices, which NELA believes should either all be listed, or at a minimum should at least include 5 U.S.C. § 2302(b)(10) for claims of discrimination on other bases such as sexual orientation. NELA believes that this modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants) who might inadvertently omit this particular Prohibited Personnel Practice claim from their appeal due to its omission from Appendix A.
- NELA is also concerned about inaccuracies in the description at the second and third bulletpoints concerning Prohibited Personnel Practices in Appendix A. In their current form, these bulletpoints mischaracterize the scope of actions protected under 5 U.S.C. § 2302(b)(9)—protected activity which now can give rise to an Independent Right of Action appeal before the Board under Section 101 of the Whistleblower Protection Enhancement Act of 2012, Pub.L. 112-199—as “Retaliation for whistleblowing activity” even though those protections apply even when no ‘whistleblowing’ necessarily is involved. Specifically, 5 U.S.C. §§ 2302(b)(9)(B, C, D) are not limited to situations involving whistleblowing disclosures on the topics specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(B) protects witnesses supporting others in the “exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation” on *any* topic—not just disclosures concerning matters specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(C) protects employees “cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel” concerning *any* subject matter, and not just those falling within the rubric of whistleblowing as specified in 5 U.S.C. § 2302(b)(8)(A). Finally, 5 U.S.C. § 2302(b)(9)(D) protects persons subject to retaliation “for refusing to obey an order that would require the individual to violate a law”—even if no whistleblowing was involved in that refusal. By classifying these 5 U.S.C. § 2302(b)(9) protections under the caption of “Retaliation for whistleblowing activity,” the present draft revisions to Form 185 risk confusing MSPB appellants who may have a viable claim under 5 U.S.C. §§ 2302(b)(9)(B, C, D) into omitting that claim, just because no “whistleblowing” occurred in the case. NELA is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know how broad the protections under 5 U.S.C. § 2302(b)(9) are) who might inadvertently omit viable 5 U.S.C. § 2302(b)(9) claims simply because they are not “whistleblowing.” To remedy this problem, NELA suggests that the claims under 5 U.S.C. §§ 2302(b)(9)(B, C, D) be individually broken out under their own bulletpoints in Appendix A, in the same fashion as the present bulletpoint for “Retaliation for other protected activity under 5 U.S.C. § 2302(b)(9)(A)(ii).”
- Draft Box 25 on revised MSPB Form 185 calls for a narrative response, but only provides a bit less than 3 inches of space to write in the requested narrative—which NELA

suspects would not be enough space for many appellants. NELA suggests adding a note in the instructions allowing appellants to attach additional pages if necessary to allow the appellants to complete their narrative responses. Analogous text appears in the present draft at Box 16 (“Attach additional sheets if necessary (bearing in mind that there will be later opportunities to supplement your filings).”), which easily can be added to Box 25 to fix this problem. This modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants who provide an incomplete response to this question solely due to an artificial space constraint on the form.

Finally, while NELA strongly supports the Board’s efforts to reduce the burden on appellants by reducing the number documents that appellants are required to submit with their appeals, we believe that some room for improvement exists in the present draft of MSPB Form 185 in at least two respects.

- While NELA supports the simplification of the document submission request appearing at Box 16 (as part of the Board’s implementation of its revisions to 5 C.F.R. § 1201.24(a)(7)), we are concerned that the present formatting may lead some (especially *pro se*) appellants to delay filing their MSPB appeals while collecting the proposal notice, decision notice and SF-50. This risk is especially pronounced with regard to the request for the SF-50, which in our experience can be long-delayed in getting issued to appellants at times. While the present draft MSPB Form 185 includes text in the instruction section warning appellants not to delay on filing simply due to missing requested documents, NELA believes that this warning needs to also be more prominently placed right at the specific questions requesting submission of documents (Boxes 15, 16, 17, 18, 19 and 24) to avoid confusion for appellants and to effectuate the purposes of 5 C.F.R. § 1201.24(a)(7). For formatting purposes, this might be done by putting a footnote with an asterisk on the relevant questions, or by re-printing the text in the instruction section (*i.e.*, “Do not delay filing your appeal merely because you do not currently have the documents requested in this form.”). Doing so will help minimize the burden of the collection on the responding appellants.
- NELA is concerned that some of the requests for documents on the present revised MSPB Form 185 are contrary to the Board’s recently-revised procedural regulations. The Board clearly stated its intent that the initial appeal not require appellants to submit documents establishing jurisdiction in VEOA and IRA cases. As the Board explained in the Proposed Rule:

The proposed regulation does not mandate the attachment of documents that would demonstrate that the appellant has satisfied the jurisdictional requirement of exhausting an administrative procedure in IRA and Veterans Employment Opportunity Act (VEOA) appeals. Obtaining such documents is best left to acknowledgement and jurisdictional orders issued after the appeal is filed.

*See* 77 Fed.Reg. 33,665 (June 7, 2012). The Board reiterated this point in its Final Rule:

A commenter suggested that in subparagraph (a)(7), the MSPB should require that appellants in Veterans Employment Opportunity Act (VEOA) and Individual Right of Action (IRA) cases submit relevant documents, as these documents are almost always exclusively in the appellant’s possession. The MSPB believes that under current practice jurisdictional

and show-cause orders adequately address requirements for appellants to show exhaustion in VEOA and IRA appeals.

*See* 77 Fed.Reg. 62,352 (October 12, 2012). Despite this clearly-stated policy, the present draft MSPB Form 185 still asks appellants to submit documents showing exhaustion of VEOA, USERRA and IRA claims at the Department of Labor or Office of Special Counsel. *See* Revised MSPB Form 185 at Boxes 18 and 19. Similarly, the present Revised Form 185 requires appellants to submit other documentation for related processes, such as union grievance arbitration decisions, agreements to engage in ADR, and OPM decisions on requests for reconsideration of retirement denials. *See id.* at Boxes 15, 19, 24. To remain consistent with the Board's admirable goal of simplifying the paperwork requirements for filing appeals, and to help minimize the burden of the collection on respondent appellants, NELA believes that these paperwork requests need to be dropped, or in the alternative each such paperwork request should carry the warning "Do not delay filing your appeal merely because you do not currently have the documents requested in this form.", either directly in text or with an asterisk footnote.

Again, NELA appreciates the opportunity to comment on the proposed revisions to MSPB Form 185, and wishes to thank the Office of Management and Budget for its attention and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with the first name being the most prominent.

Terisa E. Chaw  
Executive Director

TEC/ehp-ajp



April 23, 2013

VIA e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)

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Washington, DC 20503  
Attention: Desk Officer for the Merit Systems Protection Board

**Re: Comments Regarding Notice Proposing Revisions to MSPB Form 185**

Dear Desk Officer:

The Metropolitan Washington Employment Lawyers Association (MWELA) respectfully submits the following comments in response to the Merit Systems Protection Board's Notice of Proposed Collection concerning modifications to MSPB Form 185, 78 Fed.Reg. 20,142 (April 3, 2013). MWELA appreciates the opportunity to comment on the proposed revisions to MSPB Form 185. MWELA generally supports the Board's overall proposal to update MSPB Form 185, and agrees with many of the Board's proposed revisions appearing in the Notice and in the draft form posted by the Board for review online.<sup>1</sup> In particular, MWELA notes its support for the following modifications:

- Simplification of the instructions at the beginning of the form;
- Elimination of the question appearing on the old MSPB Form 185 at Part 2, Box 19 concerning requested remedies;
- Moving the routine Privacy Act text to the back of the form;
- Adding Appendix B; and
- Adding Appendix A in general (although MWELA does have concerns about the specific content of Appendix A, as noted below).

Concerning the minimization of the burden of the collection of information on respondents submitting MSPB appeals, as a general matter, MWELA is concerned about any attempt to make MSPB Form 185 (either in its paper form, or in electronic format as it appears on the MSPB website in the form of electronic appeals filing) a mandatory part of appeals filing. Instead, we suggest that MSPB Form 185 remain optional for filing appeals—and that the Board adjust the e-Appeal system to ensure that this option is viable for all methods for appeal filing approved by 5 C.F.R. § 1201.22(d). Like many attorneys who frequently appear before the Board, some MWELA members have their own standard boilerplate for drafting appeals to the Board which does not employ MSPB Form 185 but which meets all requirements of 5 C.F.R. § 1201.24(a). Under the current e-Appeal system, it is impossible to file an appeal in any form other than

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MSPB Form 185 (such as by uploading an appeal document in .pdf or .doc form in the same way that motions and other pleadings can be filed in the present e-Appeal system).

As a result, attorneys (such as some MWELA members) who have such boilerplate must either file appeals through e-Appeal on MSPB Form 185, or else are restricted to filing appeals using their own boilerplate by other means. Allowing full use of such boilerplate promotes resolution of appeals by helping to lower attorneys' fees and costs. In MWELA members' experience, appeals filed on MSPB Form 185 cannot be readily recycled and reused as boilerplate, requiring each form to be re-filled from scratch in each new appeal. The Board itself estimates that this time is significant, "vary[ing] from 20 minutes to 4 hours, with an average of 60 minutes per response." *See* 77 Fed.Reg. at 71,641. That time, when multiplied by an attorney's hourly billing rate, can have a material effect on early case settlement and similar issues. Allowing use of boilerplate other than MSPB Form 185 to help contain costs thus promotes the Board's wise policy of favoring settlement of cases when practicable. The Board already has the capacity for processing e-Appeal filings of appeals in this fashion, as demonstrated by the fact that e-Appeal currently allows for filing of motions and pleadings (other than appeals) through uploading .pdf documents. Finally, allowing the option of e-Appeal filings other than on MSPB Form 185 would still be subject to the requirements of 5 C.F.R. § 1201.22(d), ensuring completeness and sufficiency of the appeals filed.

Further, MWELA has the following specific concerns and objections with certain modifications identified in the Notice:

- While MWELA generally supports the creation of Appendix A, as noted above, we have some concerns about the content of the current draft text as under-inclusive. MWELA is concerned that many appellants, in particular *pro se* appellants, may read Appendix A as currently drafted as being the exclusive and complete list of all defenses available to an appellant. This risk is compounded by the draft text for Box 16, which seems to list "harmful procedural error, [...] a prohibited personnel practice, or [...] the other claims listed in Appendix A" as the complete list of defenses available. The current draft of Appendix A omits several common claims and defenses recognized by Board precedent from the list, including excessiveness of penalty/failure to consider *Douglas* mitigation factors for Chapter 75 actions, constitutional due process violations at the agency level, and timeliness of adverse action defenses such as the statute of limitations for Chapter 43 actions under 5 U.S.C. §§ 4303(c)(2)(A), 40303(d). Instead, perhaps as some form of a catch-all, the present revised Appendix A for Form 185 lists claims that are "Not in accordance with law: A claim that the agency's action was unlawful in its entirety, that is, there is no legal authority for the action." MWELA is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know what sorts of violations of law can constitute affirmative defenses in the context of an MSPB appeal) who might inadvertently omit these claims due to their absence in Appendix A. To remedy the problem, MWELA suggests that Appendix A be expanded to list these additional common claims and defenses.
- Appendix A also omits the remaining Prohibited Personnel Practices, which MWELA believes should either all be listed, or at a minimum should at least include 5 U.S.C. § 2302(b)(10) for claims of discrimination on other bases such as sexual orientation. MWELA believes that this modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete

responses from MSPB appellants (in particular, *pro se* appellants) who might inadvertently omit this particular Prohibited Personnel Practice claim from their appeal due to its omission from Appendix A.

- MWELA is also concerned about inaccuracies in the description at the second and third bulletpoints concerning Prohibited Personnel Practices in Appendix A. In their current form, these bulletpoints mischaracterize the scope of actions protected under 5 U.S.C. § 2302(b)(9)—protected activity which now can give rise to an Independent Right of Action appeal before the Board under Section 101 of the Whistleblower Protection Enhancement Act of 2012, Pub.L. 112-199—as “Retaliation for whistleblowing activity” even though those protections apply even when no ‘whistleblowing’ necessarily is involved. Specifically, 5 U.S.C. §§ 2302(b)(9)(B, C, D) are not limited to situations involving whistleblowing disclosures on the topics specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(B) protects witnesses supporting others in the “exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation” on *any* topic—not just disclosures concerning matters specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(C) protects employees “cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel” concerning *any* subject matter, and not just those falling within the rubric of whistleblowing as specified in 5 U.S.C. § 2302(b)(8)(A). Finally, 5 U.S.C. § 2302(b)(9)(D) protects persons subject to retaliation “for refusing to obey an order that would require the individual to violate a law”—even if no whistleblowing was involved in that refusal. By classifying these 5 U.S.C. § 2302(b)(9) protections under the caption of “Retaliation for whistleblowing activity,” the present draft revisions to Form 185 risk confusing MSPB appellants who may have a viable claim under 5 U.S.C. §§ 2302(b)(9)(B, C, D) into omitting that claim, just because no “whistleblowing” occurred in the case. MWELA is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know how broad the protections under 5 U.S.C. § 2302(b)(9) are) who might inadvertently omit viable 5 U.S.C. § 2302(b)(9) claims simply because they are not “whistleblowing.” To remedy this problem, MWELA suggests that the claims under 5 U.S.C. §§ 2302(b)(9)(B, C, D) be individually broken out under their own bulletpoints in Appendix A, in the same fashion as the present bulletpoint for “Retaliation for other protected activity under 5 U.S.C. § 2302(b)(9)(A)(ii).”
- Draft Box 25 on revised MSPB Form 185 calls for a narrative response, but only provides a bit less than 3 inches of space to write in the requested narrative—which MWELA suspects would not be enough space for many appellants. MWELA suggests adding a note in the instructions allowing appellants to attach additional pages if necessary to allow the appellants to complete their narrative responses. Analogous text appears in the present draft at Box 16 (“Attach additional sheets if necessary (bearing in mind that there will be later opportunities to supplement your filings.”), which easily can be added to Box 25 to fix this problem. This modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants who provide an incomplete response to this question solely due to an artificial space constraint on the form.

Finally, while MWELA strongly supports the Board’s efforts to reduce the burden on appellants by reducing the number documents that appellants are required to submit with their appeals, we

believe that some room for improvement exists in the present draft of MSPB Form 185 in at least two respects.

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The proposed regulation does not mandate the attachment of documents that would demonstrate that the appellant has satisfied the jurisdictional requirement of exhausting an administrative procedure in IRA and Veterans Employment Opportunity Act (VEOA) appeals. Obtaining such documents is best left to acknowledgement and jurisdictional orders issued after the appeal is filed.

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*See* 77 Fed.Reg. 62,352 (October 12, 2012). Despite this clearly-stated policy, the present draft MSPB Form 185 still asks appellants to submit documents showing exhaustion of VEOA, USERRA and IRA claims at the Department of Labor or Office of Special Counsel. *See* Revised MSPB Form 185 at Boxes 18 and 19. Similarly, the present Revised Form 185 requires appellants to submit other documentation for related processes, such as union grievance arbitration decisions, agreements to engage in ADR, and OPM decisions on requests for reconsideration of retirement denials. *See id.* at Boxes 15, 19, 24. To remain consistent with the Board's admirable goal of simplifying the paperwork requirements for filing appeals, and to help minimize the burden of the collection on respondent appellants, MWELA believes that these paperwork requests need to be dropped, or in the alternative each such paperwork request should carry the

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warning “Do not delay filing your appeal merely because you do not currently have the documents requested in this form.”, either directly in text or with an asterisk footnote.

Again, MWELA appreciates the opportunity to comment on the proposed revisions to MSPB Form 185, and wishes to thank the Office of Management and Budget for its attention and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Edward H. Passman". The signature is written in a cursive style with a long, sweeping underline.

Edward H. Passman

A handwritten signature in black ink, appearing to read "Andrew J. Perlmutter". The signature is written in a cursive style with a long, sweeping underline.

Andrew J. Perlmutter  
Passman & Kaplan, P.C.

EHP/ajp

**PASSMAN  
&KAPLAN**  
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Edward H. Passman (DC, MD)  
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\* Practice in DC limited to matters and procedures before federal agencies

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VIA e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503  
Attention: Desk Officer for the Merit Systems Protection Board

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Dear Desk Officer:

Passman & Kaplan, P.C. (P&K) respectfully submits the following comments in response to the Merit Systems Protection Board's Notice of Proposed Collection concerning modifications to MSPB Form 185, 78 Fed.Reg. 20,142 (April 3, 2013). P&K appreciates the opportunity to comment on the proposed revisions to MSPB Form 185. P&K generally supports the Board's overall proposal to update MSPB Form 185, and agrees with many of the Board's proposed revisions appearing in the Notice and in the draft form posted by the Board for review online.<sup>1</sup> In particular, P&K notes its support for the following modifications:

- Simplification of the instructions at the beginning of the form;
- Elimination of the question appearing on the old MSPB Form 185 at Part 2, Box 19 concerning requested remedies;
- Moving the routine Privacy Act text to the back of the form;
- Adding Appendix B; and
- Adding Appendix A in general (although P&K does have concerns about the specific content of Appendix A, as noted below).

Concerning the minimization of the burden of the collection of information on respondents submitting MSPB appeals, as a general matter, P&K is concerned about any attempt to make

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<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=810046&version=813180&application=ACROBAT>.

MSPB Form 185 (either in its paper form, or in electronic format as it appears on the MSPB website in the form of electronic appeals filing) a mandatory part of appeals filing. Instead, we suggest that MSPB Form 185 remain optional for filing appeals—and that the Board adjust the e-Appeal system to ensure that this option is viable for all methods for appeal filing approved by 5 C.F.R. § 1201.22(d). Like many attorneys who frequently appear before the Board, P&K has its own standard boilerplate for drafting appeals to the Board which does not employ MSPB Form 185 but which meets all requirements of 5 C.F.R. § 1201.24(a). Under the current e-Appeal system, it is impossible to file an appeal in any form other than MSPB Form 185 (such as by uploading an appeal document in .pdf or .doc form in the same way that motions and other pleadings can be filed in the present e-Appeal system).

As a result, attorneys such as P&K who have such boilerplate must either file appeals through e-Appeal on MSPB Form 185, or else are restricted to filing appeals using their own boilerplate by other means. Allowing full use of such boilerplate promotes resolution of appeals by helping to lower attorneys' fees and costs. In P&K's experience, appeals filed on MSPB Form 185 cannot be readily recycled and reused as boilerplate, requiring each form to be re-filled from scratch in each new appeal. The Board itself estimates that this time is significant, "vary[ing] from 20 minutes to 4 hours, with an average of 60 minutes per response." *See* 77 Fed.Reg. at 71,641. That time, when multiplied by an attorney's hourly billing rate, can have a material effect on early case settlement and similar issues. Allowing use of boilerplate other than MSPB Form 185 to help contain costs thus promotes the Board's wise policy of favoring settlement of cases when practicable. The Board already has the capacity for processing e-Appeal filings of appeals in this fashion, as demonstrated by the fact that e-Appeal currently allows for filing of motions and pleadings (other than appeals) through uploading .pdf documents. Finally, allowing the option of e-Appeal filings other than on MSPB Form 185 would still be subject to the requirements of 5 C.F.R. § 1201.22(d), ensuring completeness and sufficiency of the appeals filed.

Further, P&K has the following specific concerns and objections with certain modifications identified in the Notice:

- While P&K generally supports the creation of Appendix A, as noted above, we have some concerns about the content of the current draft text as under-inclusive. P&K is concerned that many appellants, in particular *pro se* appellants, may read Appendix A as currently drafted as being the exclusive and complete list of all defenses available to an appellant. This risk is compounded by the draft text for Box 16, which seems to list "harmful procedural error, [...] a prohibited personnel practice, or [...] the other claims listed in Appendix A" as the complete list of defenses available. The current draft of Appendix A omits several common claims and defenses recognized by Board precedent from the list, including excessiveness of penalty/failure to consider *Douglas* mitigation factors for Chapter 75 actions, constitutional due process violations at the agency level, and timeliness of adverse action defenses such as the statute of limitations for Chapter 43 actions under 5 U.S.C. §§ 4303(c)(2)(A), 40303(d). Instead, perhaps as some form of a catch-all, the present revised Appendix A for Form 185 lists claims that are "Not in accordance with law: A claim that the agency's action was unlawful in its entirety, that is, there is no legal authority for the action." P&K is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know what sorts of violations of law can constitute affirmative

defenses in the context of an MSPB appeal) who might inadvertently omit these claims due to their absence in Appendix A. To remedy the problem, P&K suggests that Appendix A be expanded to list these additional common claims and defenses.

- Appendix A also omits the remaining Prohibited Personnel Practices, which P&K believes should either all be listed, or at a minimum should at least include 5 U.S.C. § 2302(b)(10) for claims of discrimination on other bases such as sexual orientation. P&K believes that this modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants) who might inadvertently omit this particular Prohibited Personnel Practice claim from their appeal due to its omission from Appendix A.
- P&K is also concerned about inaccuracies in the description at the second and third bulletpoints concerning Prohibited Personnel Practices in Appendix A. In their current form, these bulletpoints mischaracterize the scope of actions protected under 5 U.S.C. § 2302(b)(9)—protected activity which now can give rise to an Independent Right of Action appeal before the Board under Section 101 of the Whistleblower Protection Enhancement Act of 2012, Pub.L. 112-199—as “Retaliation for whistleblowing activity” even though those protections apply even when no ‘whistleblowing’ necessarily is involved. Specifically, 5 U.S.C. §§ 2302(b)(9)(B, C, D) are not limited to situations involving whistleblowing disclosures on the topics specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(B) protects witnesses supporting others in the “exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation” on *any* topic—not just disclosures concerning matters specified in 5 U.S.C. § 2302(b)(8)(A). 5 U.S.C. § 2302(b)(9)(C) protects employees “cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel” concerning *any* subject matter, and not just those falling within the rubric of whistleblowing as specified in 5 U.S.C. § 2302(b)(8)(A). Finally, 5 U.S.C. § 2302(b)(9)(D) protects persons subject to retaliation “for refusing to obey an order that would require the individual to violate a law”—even if no whistleblowing was involved in that refusal. By classifying these 5 U.S.C. § 2302(b)(9) protections under the caption of “Retaliation for whistleblowing activity,” the present draft revisions to Form 185 risk confusing MSPB appellants who may have a viable claim under 5 U.S.C. §§ 2302(b)(9)(B, C, D) into omitting that claim, just because no “whistleblowing” occurred in the case. P&K is concerned that the present draft text risks degrading the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants (in particular, *pro se* appellants who may not know how broad the protections under 5 U.S.C. § 2302(b)(9) are) who might inadvertently omit viable 5 U.S.C. § 2302(b)(9) claims simply because they are not “whistleblowing.” To remedy this problem, P&K suggests that the claims under 5 U.S.C. §§ 2302(b)(9)(B, C, D) be individually broken out under their own bulletpoints in Appendix A, in the same fashion as the present bulletpoint for “Retaliation for other protected activity under 5 U.S.C. § 2302(b)(9)(A)(ii).”
- Draft Box 25 on revised MSPB Form 185 calls for a narrative response, but only provides a bit less than 3 inches of space to write in the requested narrative—which P&K suspects would not be enough space for many appellants. P&K suggests adding a note in the instructions allowing appellants to attach additional pages if necessary to allow the appellants to complete their narrative responses. Analogous text appears in the present draft at Box 16 (“Attach additional sheets if necessary (bearing in mind that there will be later opportunities to supplement your filings).”), which easily can be added to Box 25 to

fix this problem. This modification will help avoid the degradation of the quality and clarity of the information to be collected, specifically through avoiding incomplete responses from MSPB appellants who provide an incomplete response to this question solely due to an artificial space constraint on the form.

Finally, while P&K strongly supports the Board's efforts to reduce the burden on appellants by reducing the number documents that appellants are required to submit with their appeals, we believe that some room for improvement exists in the present draft of MSPB Form 185 in at least two respects.

- While P&K supports the simplification of the document submission request appearing at Box 16 (as part of the Board's implementation of its revisions to 5 C.F.R. § 1201.24(a)(7)), we are concerned that the present formatting may lead some (especially *pro se*) appellants to delay filing their MSPB appeals while collecting the proposal notice, decision notice and SF-50. This risk is especially pronounced with regard to the request for the SF-50, which in our experience can be long-delayed in getting issued to appellants at times. While the present draft MSPB Form 185 includes text in the instruction section warning appellants not to delay on filing simply due to missing requested documents, P&K believes that this warning needs to also be more prominently placed right at the specific questions requesting submission of documents (Boxes 15, 16, 17, 18, 19 and 24) to avoid confusion for appellants and to effectuate the purposes of 5 C.F.R. § 1201.24(a)(7). For formatting purposes, this might be done by putting a footnote with an asterisk on the relevant questions, or by re-printing the text in the instruction section (*i.e.*, "Do not delay filing your appeal merely because you do not currently have the documents requested in this form."). Doing so will help minimize the burden of the collection on the responding appellants.
- P&K is concerned that some of the requests for documents on the present revised MSPB Form 185 are contrary to the Board's recently-revised procedural regulations. The Board clearly stated its intent that the initial appeal not require appellants to submit documents establishing jurisdiction in VEOA and IRA cases. As the Board explained in the Proposed Rule:

The proposed regulation does not mandate the attachment of documents that would demonstrate that the appellant has satisfied the jurisdictional requirement of exhausting an administrative procedure in IRA and Veterans Employment Opportunity Act (VEOA) appeals. Obtaining such documents is best left to acknowledgement and jurisdictional orders issued after the appeal is filed.

*See* 77 Fed.Reg. 33,665 (June 7, 2012). The Board reiterated this point in its Final Rule:

A commenter suggested that in subparagraph (a)(7), the MSPB should require that appellants in Veterans Employment Opportunity Act (VEOA) and Individual Right of Action (IRA) cases submit relevant documents, as these documents are almost always exclusively in the appellant's possession. The MSPB believes that under current practice jurisdictional and show-cause orders adequately address requirements for appellants to show exhaustion in VEOA and IRA appeals.

*See* 77 Fed.Reg. 62,352 (October 12, 2012). Despite this clearly-stated policy, the present draft MSPB Form 185 still asks appellants to submit documents showing exhaustion of VEOA, USERRA and IRA claims at the Department of Labor or Office of

Special Counsel. *See* Revised MSPB Form 185 at Boxes 18 and 19. Similarly, the present Revised Form 185 requires appellants to submit other documentation for related processes, such as union grievance arbitration decisions, agreements to engage in ADR, and OPM decisions on requests for reconsideration of retirement denials. *See id.* at Boxes 15, 19, 24. To remain consistent with the Board's admirable goal of simplifying the paperwork requirements for filing appeals, and to help minimize the burden of the collection on respondent appellants, P&K believes that these paperwork requests need to be dropped, or in the alternative each such paperwork request should carry the warning "Do not delay filing your appeal merely because you do not currently have the documents requested in this form." either directly in text or with an asterisk footnote.

Again, P&K appreciates the opportunity to comment on the proposed revisions to MSPB Form 185, and wishes to thank the Office of Management and Budget for its attention and consideration.

Respectfully submitted,



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EHP/ajp