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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim Final Rule.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) hereby amends its rules of practice and procedure to allow federal agencies, when issuing a decision notice to an employee on a matter that is appealable to MSPB, to satisfy the obligation to provide a copy of the MSPB appeal form (MSPB Form 185) to an employee by providing the employee with access to a copy of the appeal form, i.e., in paper or electronic form.

DATES: This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Submit written comments concerning this interim final rule on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments concerning this interim final rule by one of the following methods and in accordance with the relevant instructions:

Email: Comments submitted by email should be addressed to mspb@mspb.gov and can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML or PDF. Commenters are asked to use a text format and not an image format for attachments. The email should contain a subject line indicating that the submission contains comments on MSPB's interim final rule. The MSPB asks that parties use email to submit comments if possible;

Fax: Comments submitted by fax should be sent to (202) 653-7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning MSPB's interim final rule;

Mail or other commercial delivery: Mailed submissions should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419;

Hand delivery or courier: Hand-delivered submissions should be addressed to William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419, and delivered to the 5th floor reception window at this street

address. Such deliveries are only accepted Monday through Friday, 9:00 a.m. to 4:30 p.m., excluding federal holidays.

Instructions: As noted above, MSPB requests that commenters use email to submit comments, if possible. All comments received will be included in the public docket without change and will be made available online at the Board's website (<http://www.mspb.gov>), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information whose disclosure is restricted by law. Those desiring to submit anonymous comments must submit comments in a manner that does not reveal the commenter's identity, include a statement that the comment is being submitted anonymously, and include no personally-identifiable information. The email address of a commenter who chooses to submit comments using email will not be disclosed unless it appears in comments attached to an email or in the body a comment.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC, 20419; phone: (202) 653-7200; fax: (202) 653-7130; or email: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION:

This interim final rule amends 5 CFR 1201.21(c). Currently, this regulation requires that, when a federal agency issues a decision notice to an employee on a matter that is appealable to MSPB, the federal agency must provide the employee with “[a] copy of the MSPB appeal form . . .” The amendment set forth herein will allow federal agencies to provide employees “[a] copy, or access to a copy, of the MSPB appeal form . . .” This amendment will make paragraph (c) similar to paragraph (b), which requires a federal agency to provide the employee with “[a] copy, or access to a copy, of the Board’s regulations” under the same circumstances.

The initial impetus to amend this regulation arose when MSPB realized that, under our current regulations, federal agencies that furlough their employees as a result of the implementation of government-wide “sequestration” on March 1, 2013, would be required to distribute potentially hundreds of thousands of copies of the 9-page MSPB appeal form to employees along with the furlough notifications. The existing MSPB regulations were not drafted with such a situation in mind. Moreover, widespread access by federal employees to the Internet, electronic mail, and MSPB’s electronic

filing system, e-Appeal Online (<https://e-appeal.mspb.gov>), ensure, in the vast majority of cases, that the distribution of thousands of paper copies of the MSPB appeal form by federal agencies is unnecessary.

This interim final rule is intended to avoid the costly duplication of hundreds of thousands of paper copies of the MSPB appeal form and to allow federal agencies to make better use of electronic means of making documents available to employees.

The Board is further convinced that this minor amendment to its regulations will not impose any hardship or disadvantage upon employees who receive a decision notice regarding a matter that is appealable to MSPB. A federal agency's obligation under 1201.21 (b) and (c) to provide access to MSPB's regulations and the MSPB appeal form must be effective under the circumstances. For example, if a federal agency attempts to satisfy to 1201.21(b) and (c) by providing an employee access to MSPB's regulations and appeal form via the Internet or electronic mail and the employee informs the agency that he or she lacks Internet access, the agency would be required to take other steps to ensure that the employee has actual access to these documents, including providing the employee with a copy of these documents upon the employee's request. Thus, the regulation, as

amended, continues to ensure that all employees subject to a final decision appealable to MSPB will have effective access to the MSPB appeal form.

The rulemaking process must normally observe notice-and-comment procedures outlined in the Administrative Procedure Act (APA). However, an exemption from notice and comment rulemaking requirements exists under 5 U.S.C. 553(b)(3)(B) where an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The good cause exception “is to be narrowly construed and only reluctantly countenanced.” Mack Trucks, Inc. v. Environmental Protection Agency, 682 F.3d 87, 93 (D.C. Cir. 2012) (citations omitted).

Regarding the “impracticable” prong, the United States Court of Appeals for the District of Columbia has held that agency action could be sustained on this basis if it addresses an “imminent hazard” to persons or property of the United States, Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004), or if the rule in question is of “life-saving importance.” Council of the S. Mountains, Inc. v. Donovan, 653 F.2d

573, 581 (D.C. Cir. 1981). The Board does not believe that the circumstances surrounding the publication of this interim final rule render the use of APA notice and comment procedures impracticable.

The “unnecessary” prong of the agency’s good cause inquiry is “confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.” Mack Trucks, Inc. v. Environmental Protection Agency, 682 F.3d 87, 94 (D.C. Cir. 2012) (citation omitted). As is noted above, the amendment set forth herein will not relieve federal agencies of the responsibility to ensure that employees who receive notice of an action appealable to MSPB have actual and effective access to the MSPB appeal form. Rather, the amendment simply recognizes that a document such as the MSPB appeal form can reliably be made available to employees via the Internet or other means. Moreover, if a federal employee requests that he or she be provided a copy of the document, the agency would be required to provide it. The MSPB therefore finds that the amendment set forth herein is sufficiently routine, insignificant in nature and inconsequential to warrant a finding of good cause to exempt this amendment from the normal APA notice-and-comment procedures.

The public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest. Mack Trucks, 682 F.3d at 95. This exception is therefore invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal. Id. Here, the reproduction costs this amendment seeks to avert are significant. If, for example, 800,000 Department of Defense employees are issued furlough notices, we estimate that the cost of giving each employee a paper copy of the MSPB appeal form could be on the order of \$720,000 (800,000 employees x 9-page MSPB appeal form x \$0.10 per page reproduction costs). Additional costs would be imposed upon other federal agencies. Given that an unprecedented and sizeable number of furlough notices could be issued in the days and weeks to follow, MSPB finds that the purpose of this amendment – saving significant needless expense in a time of severe budgetary constraints – would be defeated if normal notice and comment procedures were utilized. Therefore, the Board concluded that the public interest is served by a determination to exempt this interim final rule from the normal APA notice-and-comment procedures.

Finally, MSPB also elected to make the amendment set forth herein effective immediately upon publication of this interim final rule. Under 5 U.S.C. 553(d)(3), "the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule." For the reasons identified above, MSPB further finds that good cause exists under 5 U.S.C. 553(d)(3) to waive the 30-day publication requirement and implement this amendment immediately.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for 5 CFR part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Revise paragraph (c) of § 1201.21 to read as follows:

§ 1201.21 Notice of appeal rights.

* * * * *

(c) A copy, or access to a copy, of the MSPB appeal form available at the Board's website (<http://www.mspb.gov>), and

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William D. Spencer

Clerk of the Board

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