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7400-01-P

## MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

### Practices and Procedures

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Solicitation of Public Comments.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board) invites public input concerning options the MSPB is considering to revise its regulations governing how jurisdiction is established over Board appeals.

**DATES:** Written comments are invited on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit your comments concerning this document by one of the following methods and in accordance with the relevant instructions:

Email: [mspb@mspb.gov](mailto:mspb@mspb.gov). Comments submitted by email can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML and PDF. If possible, commenters are asked to use a text format and not an image format for attachments. An email should contain a subject line indicating

that the submission contains comments to the MSPB's Federal Register Notice regarding jurisdiction. The MSPB asks that parties use email to submit comments if possible. Submission of comments by email will assist MSPB to process comments and speed future actions, including publication of a proposed rule.

Fax: (202) 653-7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's Federal Register Notice regarding jurisdiction.

Mail or other commercial delivery: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419.

Hand delivery or courier: Comments 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 5<sup>th</sup> floor reception window at this street address. Such deliveries are only accepted Monday through Friday, 9 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 made available online at the Board's website, 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 of 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](mailto:mspb@mspb.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

On June 7, 2012, the Board published a proposed rule that included a proposed amendment to 5 CFR 1201.56. 77 FR 33663. Now, as then, 5 CFR 1201.56 provides without qualification that the

Board's jurisdiction must be proved by preponderant evidence. In the proposed rule, the Board noted that 5 CFR 1201.56 is in conflict with a significant body of Board case law holding that certain jurisdictional elements may be established by making non-frivolous allegations. The Board therefore proposed to amend this regulation to allow the use of non-frivolous allegations to establish certain jurisdictional elements.

The MSPB received numerous thoughtful comments concerning the proposed amendments to this regulation and, because many of the comments addressed matters that went well beyond the scope of the original proposed rule, the Board decided to withdraw the proposed rule and reconsider the existing regulation in light of the comments and internal discussions spurred by the comments.

#### Ongoing review

Shortly after the withdrawal of the proposed amendments to 5 CFR 1201.56, the Board directed an internal MSPB working group (regulations working group) to thoroughly review 5 CFR 1201.56 and any related issues concerning the MSPB's jurisdiction. The regulations working group developed several options for the Board to

consider, and the Board has determined that it would be appropriate to seek public comment on the various options prior to taking action.

**Options developed by the MSPB regulations working group**

The exact text, summaries, and analyses of the options developed by the MSPB regulations working group are available for review at the MSPB's website

([www.mspb.gov/regulatoryreview/index.htm](http://www.mspb.gov/regulatoryreview/index.htm)). Included below is a short summary of each of the 4 options developed by the working group. In general, Options A and B are intended to make MSPB regulations consistent with existing Board and Federal Circuit case law. Options C and D would in some instances conflict with and supersede Board and Federal Circuit case law.

**Option A**

This option would amend section 1201.56(b) to state that: 1) the appellant bears the burden of proof, generally by a preponderance of the evidence, on issues of jurisdiction, and 2) an administrative judge will inform the parties of the proof required in each case. This option would also amend section 1201.56(b) to state that an appellant generally bears the burden of proof by a preponderance of the evidence on issues of jurisdiction, timeliness, and all affirmative

defenses, and make clear that the administrative judge will inform the parties of the proof required as to each defense. Finally, this option would amend 5 CFR 1201.4 by transferring definitions of “substantial evidence,” “preponderance of the evidence,” and “harmful error” from 1201.56 and adding a definition of “non-frivolous allegation.”

#### Option B

This option amends section 1201.56 to address the burdens and degrees of proof applicable in cases other than: 1) an individual right of action (IRA) appeal under the Whistleblower Protection Act, 2) an appeal under the Veterans Employment Opportunities Act (VEOA), and (3) an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311. This option would also add a new regulation, 1201.57, that would address how an appellant can establish jurisdiction in the three types of appeals not covered by revised section 1201.56. Finally, this option would amend 5 CFR 1201.4 by transferring definitions of “substantial evidence,” “preponderance of the evidence,” and “harmful error” from 1201.56 and adding a definition for “non-frivolous allegation.”

#### Option C

This option attempts to clarify how jurisdiction should be established in Board proceedings by amending the Board's regulations to state that all Board appeals include "who" and "what" jurisdictional elements that must be established by preponderant evidence, and identify the 8 appeal types that require allegations as to specific merits issues in order to establish jurisdiction. This option would also include regulatory language stating that the MSPB is not required to hold an evidentiary hearing on matters on which the appellant bears the burden of proof when there is no genuine issue of material fact to be resolved.

#### Option D

This option is the same as Option C, except that it does not include the proposed regulatory language authorizing an appeal to be decided without an evidentiary hearing when there is no genuine issue of material fact to be resolved. Option D would continue the Board's current practice of affording appellants the opportunity for a hearing, if requested, in all cases within its jurisdiction.

#### Comments requested

The Board seeks public input before taking action to amend 5 CFR 1201.56 or otherwise alter its regulations governing how a party

can establish jurisdiction over an appeal. Comments are invited concerning the 4 options developed by the regulations working group and/or any alternative approaches to improving the MSPB's regulations governing the establishment of MSPB jurisdiction over an appeal.

The Board intends to consider all public comments prior to taking further action. However, the Board does not plan to respond to the comments it receives, either directly or in a subsequent Federal Register notice.

William D. Spencer

Clerk of the Board

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