



MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Proposed rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board), following an internal review of MSPB regulations and after consideration of comments received from MSPB stakeholders, is proposing to amend its rules of practice and procedure by amending its regulations governing how jurisdiction is established over Board appeals.

DATES: Submit written comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

Email: 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 Board's proposed rule regarding jurisdiction. The Board 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 final 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 Board's proposed rule 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 5th 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 Web site, 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*.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 2012, the Board published a proposed rule proposing amendments 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 proven 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 nonfrivolous allegations. The Board therefore proposed to amend this regulation to allow the use of nonfrivolous allegations to establish certain jurisdictional elements.

The Board received numerous thoughtful comments concerning the proposed amendments to this regulation. 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. 77 FR 62350.

Continuing review

Shortly after the withdrawal of the proposed amendments to 5 CFR 1201.56, the Board directed an internal MSPB working group (MSPB regulations working group) to thoroughly review 5 CFR

1201.56 and any related issues concerning the Board's jurisdiction. The MSPB regulations working group thereafter developed several options for the Board to consider. On November 8, 2013, the Board published a solicitation of public comments in the **Federal Register** seeking additional public comment on the various options developed by the MSPB regulations working group. 78 FR 67076. Pursuant to this solicitation of public comments, the text, summaries, and analyses of the options developed by the MSPB regulations working group were made available for review at the Board's Web site (www.mspb.gov/regulatoryreview/index.htm). In response to the request for public comment, the Board received 72 pages of comments from 26 commenters. The options prepared by the MSPB regulations working group and all comments received in response to the request for comments are available on the Board's Web site and will remain posted there under the heading "Regulatory Review Initiative" through the completion of this rulemaking.

Summary of Proposed Changes/Section-by-Section Analysis

Following a review of the proposals submitted by the MSPB regulations working group and the public comments received by the

Board in response to its request for comments, the Board has decided to propose the following amendments to its regulations governing how jurisdiction is established over Board appeals.

Section 1201.4 General definitions.

The Board proposes to transfer the definitions of “substantial evidence,” “preponderance of the evidence,” and “harmful error” from 5 CFR 1201.56(c) to this regulation as paragraphs (p), (q) and (r) to consolidate important definitions in one regulation. None of these definitions are otherwise changed. The Board also proposes to add a new definition of “nonfrivolous allegation” in paragraph (s) that defines this term as an assertion that, if proven, could establish the matter at issue. The definition further explains that an allegation made under oath or penalty of perjury will be considered nonfrivolous when it is more than conclusory, plausible on its face, and material to the legal issues in the appeal. This definition is consistent with current Board case law.

Section 1201.56 Burden and degree of proof.

5 CFR 1201.56 currently provides that the appellant bears the burden of proving jurisdiction by preponderant evidence; that the agency bears the burden of supporting a performance-based action by substantial evidence and supporting any other action by preponderant evidence; and that the appellant will prevail if he or she can establish a successful affirmative defense under 5 U.S.C. 7701(c)(2) (specifically, that the agency action was based on a harmful procedural error, constituted a prohibited personnel practice, or was not in accordance with law). The foregoing principles do not apply, however, in four categories of appeals: An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221; an appeal under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a(d); an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and an appeal of denial of restoration under 5 CFR part 353.

To correct this anomaly, this proposed rule would amend section 1201.56 to limit its applicability to appeals other than IRA appeals, VEOA appeals, USERRA discrimination and retaliation

appeals, and denial of restoration appeals and insert a new regulation, revised section 1201.57, to address the burden and degree of proof and scope of review in such appeals.

The Board further proposes to transfer the definitions of “substantial evidence,” “preponderance of the evidence,” and “harmful error” from 5 CFR 1201.56 to 5 CFR 1201.4. Finally, the Board also proposes to add a new requirement that the administrative judge inform the parties of the proof required as to the issues of jurisdiction, the timeliness of the appeal, and affirmative defenses.

The following authorities justify the Board’s proposed rule limiting the coverage of section 1201.56 to appeals other than IRA, VEOA, USERRA (discrimination and retaliation), and denial of restoration appeals, as well as the proposed creation of a new regulation (section 1201.57) covering such appeals: *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (to establish jurisdiction in an IRA appeal, the appellant must prove that he has exhausted his remedy before the Office of Special Counsel and make nonfrivolous allegations that he engaged in whistleblowing activity by making a protected disclosure and the disclosure was a contributing factor in the agency’s decision to take or fail to take a

personnel action); *Williams v. Department of the Air Force*, 97 M.S.P.R. 252, ¶ 6 (2004) (to establish jurisdiction in a VEOA appeal involving a claimed violation of veterans' preference rights, the appellant must show that he exhausted his remedy with the Department of Labor and make nonfrivolous allegations that he is a preference eligible and the agency violated his rights under a statute or regulation relating to veterans' preference); *Weed v. Social Security Administration*, 112 M.S.P.R. 323, ¶ 13 n.5 (2009) (to establish jurisdiction in a VEOA appeal involving a claimed violation of the right to compete, the appellant must show that he exhausted his remedy with the Department of Labor and make nonfrivolous allegations that he is a veteran as described in 5 U.S.C. 3304(f)(1) and the agency denied him the right to compete under merit promotion procedures for a vacant position for which the agency accepted applications from outside its own workforce); *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 10 (2012) (to establish jurisdiction in a USERRA discrimination case, the appellant must make nonfrivolous allegations that an executive agency committed discrimination based on his past military service or obligation to perform service); *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, ¶ 12 (2011)

(the appellant bears the burden of proof on the merits in an IRA appeal); *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 13 (2006) (the appellant bears the burden of proof on the merits in a VEOA appeal); *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 6 (2005) (the appellant bears the burden of proof on the merits in a USERRA discrimination case); *Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991) (in an IRA appeal, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. 7701(c)(2)), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table); *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 11 (2005) (in a VEOA appeal, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. 7701(c)(2)); *Bodus v. Department of the Air Force*, 82 M.S.P.R. 508, ¶¶ 14-17 (1999) (in a USERRA discrimination case, the Board lacks authority to adjudicate an appellant's affirmative defense under 5 U.S.C. 7701(c)(2)).

The Board justifies the proposed rule excluding denial of restoration appeals from the coverage of section 1201.56 as follows. Until recently, the Board had held that jurisdiction over a restoration appeal was established by nonfrivolous allegations that the agency violated the appellant's restoration rights under 5 CFR part 353. *Chen*

v. U.S. Postal Service, 97 M.S.P.R. 527, ¶ 12 (2004). In *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097 (Fed. Cir. 2011), the court affirmed the Board’s dismissal of a restoration appeal for lack of jurisdiction, but found that the Board’s jurisdiction must be established in such appeals by preponderant evidence as required by 5 CFR 1201.56, citing *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc). As a result, the Board found it necessary to overrule *Chen in Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 10 (2012) and to apply the preponderance of the evidence standard for jurisdictional determinations in restoration appeals. However, the court also stated in *Garcia* that, if the Board has a sufficient basis, it may adopt a nonfrivolous allegation standard for an appeal by changing its regulation on jurisdiction in accordance with notice and comment rulemaking procedures. 437 F.3d at 1343. The Board finds that it is appropriate in restoration appeals to apply the nonfrivolous allegation standard.

Section 1201.57 Establishing jurisdiction in appeals not covered by section 1201.56; burden and degree of proof; scope of review.

This proposed regulation, which the Board proposes to insert in place of existing section 1201.57, would make clear that, in contrast to an appeal governed by section 1201.56, in IRA appeals, VEOA appeals, USERRA discrimination and retaliation appeals, and denial of restoration appeals, the appellant is not required to establish all jurisdictional elements by preponderant evidence and bears the burden of proof on the merits. This proposed regulation also contains a provision requiring administrative judges to provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal, as well as a provision directing the parties to statutes and regulations that contain additional information concerning such appeals.

Sections 1201.57, 1201.58, and 1201.59

In order to allow the insertion of new section 1201.57, the Board proposes to redesignate existing section 1201.57 as section 1201.58 and existing section 1201.58 as section 1201.59.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board proposes to amend 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. In § 1201.4, add new paragraphs (p), (q), (r), and (s) as follows:

§ 1201.4 General definitions.

* * * * *

(p) *Substantial evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(q) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would

accept as sufficient to find that a contested fact is more likely to be true than untrue.

(r) *Harmful error*. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

(s) *Nonfrivolous allegation*. A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that:

- (1) Is more than conclusory;
- (2) Is plausible on its face; and
- (3) Is material to the legal issues in the appeal.

3. Revise § 1201.56 to read as follows:

§ 1201.56 Burden and degree of proof.

(a) *Applicability*. This section does not apply to the following types of appeals which are covered by § 1201.57:

- (1) An individual right of action appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;
- (2) An appeal under the Veterans Employment Opportunities Act, 5 U.S.C. 3330a(d);
- (3) An appeal under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and
- (4) An appeal under 5 CFR 353.304, in which the appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence.

(b) *Burden and degree of proof.* (1) *Agency.* Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (c) of this section, the agency bears the burden of proof and its action must be sustained only if:

- (i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence (as defined in § 1201.4(p)); or
- (ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence (as defined in § 1201.4(q)).

(2) *Appellant.* (i) The appellant has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), with respect to:

(A) Issues of jurisdiction;

(B) The timeliness of the appeal; and

(C) Affirmative defenses.

(ii) In appeals from reconsideration decisions of the Office of Personnel Management (OPM) involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q)), entitlement to the benefits. Where OPM proves by preponderant evidence an overpayment of benefits, an appellant may prove, by substantial evidence (as defined in § 1201.4(p)), eligibility for waiver or adjustment.

(c) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to reverse the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (b) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision (as defined in § 1201.4(r));

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(d) *Administrative Judge*. The administrative judge will inform the parties of the proof required as to the issues of jurisdiction, the timeliness of the appeal, and affirmative defenses.

§§ 1201.57 and 1201.58 [Redesignated as §§ 1201.58 and 1201.59]

4. Redesignate §§ 1201.57 and 1201.58 as §§ 1201.58 and 1201.59, respectively.

5. Add § 1201.57 to read as follows:

§ 1201.57 Establishing jurisdiction in appeals not covered by § 1201.56; burden and degree of proof; scope of review.

(a) *Applicability*. This section applies to the following types of appeals:

(1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;

(2) A request for corrective action under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a(d);

(3) A request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and

(4) An appeal under 5 CFR 353.304, in which an appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence (denial of restoration appeal).

(b) Matters that must be proven by a preponderance of the evidence.

An appellant who initiates an appeal covered by this section has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), on the following matters:

(1) When applicable, exhaustion of a statutory complaint process that is preliminary to an appeal to the Board;

(2) Timeliness of an appeal under 5 CFR 1201.22;

(3) Standing to appeal, when disputed by the agency or questioned by the Board. (An appellant has “standing” when he or she falls within the class of persons who may file an appeal under the law applicable to the appeal.); and

(4) The merits of an appeal, if the appeal is within the Board’s jurisdiction and was timely filed.

(c) Matters that must be supported by nonfrivolous allegations.

Except for matters described in paragraphs (b)(1) and (3) of this section, in order to establish jurisdiction an appellant who initiates an appeal covered by this section must make nonfrivolous allegations (as defined in § 1201.4(s)) with regard to the substantive jurisdictional elements applicable to the particular type of appeal he or she has initiated.

(d) Scope of the appeal. Appeals covered by this section are limited in scope. With the exception of denial of restoration appeals, the Board will not consider matters described at 5 U.S.C. 7701(c)(2) in an appeal covered by this section.

(e) Notice of jurisdictional, timeliness, and merits elements. The administrative judge will provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal.

(f) Additional information. For additional information on IRA appeals, the reader should consult 5 CFR part 1209. For additional information on VEOA appeals, the reader should consult 5 CFR part 1208, subparts A & C. For additional information on USERRA appeals, the reader should consult 5 CFR part 1208, subparts A & B.

For additional information on denial of restoration appeals, the reader should consult 5 CFR part 353, subparts A & C.

William D. Spencer,

Clerk of the Board.

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