7400-01-P

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) hereby amends its regulations governing how jurisdiction is established over Board appeals.

DATES: Effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], and applicable in any appeal filed on or after [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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: The Board has been considering for several years changes to its regulations governing how jurisdiction is established over MSPB appeals. On June 7, 2012, the Board proposed amendments to 5 CFR 1201.56. 77 FR 33663. In that 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.

On October 12, 2012, after receiving numerous thoughtful comments concerning the proposed rule, the Board withdrew its proposed amendments to 5 CFR 1201.56 in order to reconsider the matter. 77 FR 62350. The Board thereafter directed the MSPB regulations working group to thoroughly reevaluate the Board's regulations relating to the establishment of jurisdiction. The MSPB regulations working group developed four options (A-D) and on November 8, 2013, the Board published a request for public comments in the Federal Register. 78 FR 67076.

On April 3, 2014, after considering each of the four options developed by the MSPB regulations working group and comments from the public, the Board published a proposed rule. 79 FR 18658. This proposed rule included a section-by-section analysis of the proposed amendments to the Board's regulations.

Comments, responses, and changes to the proposed amendments.

In response to publication of the proposed rule, the MSPB received 104 pages of comments from 19 commenters. These comments are available for review by the public at:

www.mspb.gov/regulatoryreview/index.htm. As explained below, the Board carefully considered all public comments and has decided to adopt the proposed rule as final with several relatively minor changes.

A commenter criticized the MSPB for failing to explain in the proposed rule why it had rejected the other options (A, C, and D). This commenter further suggested that the proposed rule therefore would not be entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (setting forth the legal test for determining if a court should grant deference to a Federal agency's interpretation of a statute which it administers).

The Board appreciates the commenter's observation. The Board did indeed consider all options, A-D. The Board used the MSPB regulations working group (a committee of seasoned MSPB employees formed for the accomplishment of this important task) to carefully review and present options for the Board's consideration. The options initially developed by the regulations working group were presented to the Board and published for public comment in the Federal Register on November 8, 2013. Following several months of additional review by the regulations working group, the options and public comments were presented to the Board Members for a decision regarding how to proceed. Following extensive review, the Board Members unanimously selected a revised option B as the best choice and published it as a proposed rule on April 3, 2014.

The Board Members selected revised option B because it was largely consistent with current precedent and would clarify certain matters without requiring potentially disruptive changes that, in the end, would contribute little to the transparency and efficiency of MSPB adjudications. For these reasons, the Board Members also believed that option B was much less likely than options C and D to be successfully challenged on appeal. Finally, the Board determined that option B was unlikely to cause possible unintended consequences or process disruption that would adversely affect the parties who appear before the Board. Thus, in selecting option B, the Board decided that it was the best option for all parties concerned, including pro se and represented appellants, agencies, unions, attorneys, and the MSPB itself.

Option A set forth a general framework for jurisdictional determinations and informed the parties of only the general rules the Board follows in allocating burdens of proof. This option also stressed the important role that administrative judges play in explaining applicable burdens of proof and requirements for establishing MSPB jurisdiction. As to the latter point, option B likewise envisions an important role for administrative judges. The Board declined to adopt option A because this option, while consistent with current law and practice, included minimal additional information but not the helpful information contained in option

B. Therefore, option A did not satisfy the Board's intention to make the Board's regulations more comprehensive and user-friendly.

The Board Members also carefully considered options C and D but decided against adopting them for several reasons. First, as noted above, the Board determined that the numerous major changes suggested in options C and D would change the current scheme in a manner inconsistent with long-standing precedent and procedures without offering any real advantage to the Board or MSPB litigants. The Board also was concerned that adoption of the more radical changes in these two options might not be accorded *Chevron* deference and that the lack of any real advantage to options C and D made running such a risk unappealing.

The Board Members thus chose the option that they believed would most efficiently serve the Board's critical mission of adjudicating appeals. In addition, the Board, as the promulgator of these regulations, has considerable discretion regarding, and is particularly well-suited to speak to, its intent in adopting these regulations and thus is entitled to *Chevron* deference as to its interpretation of these regulations. *See, e.g.*, *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009); *Gose v. U.S. Postal Service*, 451 F.3d 831, 837 (Fed. Cir. 2006).

Finally, the MSPB would further note that other commenters, such as the Office of Personnel Management (OPM), lauded the careful

consideration exhibited by the Board and had no significant objection to the Board's selection of option B.

A commenter expressed the concern that new section 1201.57 would improperly bar appellants from raising the "principles" embodied in affirmative defenses in individual right of action (IRA), Veterans Employment Opportunities Act of 1998 (VEOA), and Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) appeals as required under 5 U.S.C. 7701(c)(2).

This commenter chiefly relies upon a nonprecedential Board decision (*Robinson v. Department of Housing and Urban Development*, MSPB Docket No. CH-3330-11-0845-I-1, 119 M.S.P.R. 21 (Table), Nonprecedential Final Order (Dec. 26, 2012)), that appears to state that an affirmative defense under 5 U.S.C. 7701(c)(2) may be raised in a VEOA appeal. Such a holding is, however, inconsistent with longstanding Board precedent. *Ruffin v. Department of the Treasury*, 89 M.S.P.R. 396, ¶ 12 (2001) (in a VEOA appeal the Board cannot consider a claim of prohibited discrimination under 5 U.S.C. 2302(b)(1) because VEOA does not grant the Board the authority to consider claims for violations of laws other than veterans' preference rules). Thus, the Board will not amend the proposed rule as suggested by this commenter.

A commenter expressed concern regarding the clarity of MSPB regulations, especially for pro se litigants and inexperienced counsel. The

commenter requested that the Board explain in the regulations how a nonfrivolous allegation of jurisdiction under oath or penalty of perjury is done. This commenter also suggested that the MSPB redraft the proposed definitions related to jurisdiction in section 1201.4 and include examples illustrating how an appellant can establish MSPB jurisdiction by making nonfrivolous allegations. The commenter also suggested that such examples should address how to establish MSPB jurisdiction over constructive adverse actions and IRA appeals.

While we are cognizant that the regulations contain legal concepts that may be complex and difficult to understand, especially for pro se litigants, the complexity of the regulations is a product of the complexity of the law itself. The Board has found that attempting to clarify some concepts by restating them in plain English, or by providing illustrative examples of them, may create a misleading or incomplete definition of the concept. In particular, providing examples of some of the circumstances that could support jurisdiction over constructive action appeals raises a danger that they may limit the circumstances that will be described by pro se appellants to establish jurisdiction. Furthermore, the statement in the regulation is not intended to be a detailed substantive description of an appellant's burden in a particular type of appeal. Rather, the regulations generally inform the reader that the appellant is expected to provide specific factual allegations that describe a matter within the Board's

jurisdiction. Under court and Board precedent, the Board already expects that MSPB administrative judges will fully inform an appellant with specificity of his or her burden of proving the claim, the burden of going forward with the evidence, and the types of evidence necessary to make a nonfrivolous allegation. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643–44 (Fed. Cir. 1985). In addition, the statement that the allegations "generally" should be under oath or penalty of perjury is not an absolute evidentiary requirement. Where appropriate, the Board may still find a nonfrivolous allegation of jurisdiction based solely upon the documentation in the appeal file without relying on a verified factual statement from the appellant. Furthermore, making a statement under penalty of perjury is not a significant hurdle. For example, in cases filed using the Board's e-Appeal Online system (*https://e-appeal.mspb.gov*), the appellant can easily meet it by merely checking a box in the initial appeal to verify under penalty of perjury that the information being asserted on the form is true and correct, based on the appellant's information and belief.

In response to sections 1201.56(d) and 1201.57(e), which require the MSPB administrative judge to provide the parties with information relating to the requirements for establishing jurisdiction and other relevant information, a commenter expressed a concern that show cause orders issued by administrative judges are generally not tailored to the facts of the particular appeal or written in plain and easily understood language.

Administrative judges frequently must issue jurisdictional orders that provide complex legal information early in the processing of a case, when they still have only a partial understanding of the factual basis of the appeal. As a result, the orders by necessity often must be general and cannot be tailored to the specific appeal. In addition, as with these regulations, it often is not possible to define the applicable jurisdictional standards with precision, while still using plain English. The administrative judges, however, are expected to provide further explanation of the Board's jurisdictional standard in appropriate cases. *See Parker v. Department of Housing and Urban Development*, 106 M.S.P.R. 329, ¶ 7 (2007) (while the general statement on jurisdiction in the acknowledgment order was appropriate when it was issued, the appellant's reply necessitated an additional show cause order setting forth a more explicit explanation about the evidence and arguments he would need to present to nonfrivolously allege that his appeal fell within the Board's jurisdiction).

A commenter suggested that the Board include a provision in its regulations setting forth an agency's responsibility to disclose relevant information to an appellant when an issue of jurisdiction or timeliness is raised in a show cause order.

The Board agrees with the commenter that an agency is obligated to disclose information relevant to the issue of jurisdiction. This obligation has already been recognized in MSPB precedent, and appellants are entitled

to discovery of matters relevant to jurisdiction. *See Parker*, 106 M.S.P.R. 392, ¶ 8. The Board, however, does not feel it is necessary to codify this precedent in these regulations. With regard to issues of timeliness, the agency generally completes its duty to disclose relevant information once it establishes that it provided the appellant with the appropriate notice of appeal rights.

A commenter stated that it was unrealistic to require an appellant to establish jurisdiction without first engaging in discovery and that the proposed amendments would make it more difficult to rely upon circumstantial evidence to establish MSPB jurisdiction.

We believe that the proposed amendments will not result in making it more difficult for an appellant to show that the Board has jurisdiction over his appeal. As noted in our response to an earlier comment, administrative judges issue acknowledgement orders and additional orders if needed to inform the parties of their burdens. The Board requires its administrative judges to provide a fair and just adjudication and to rule on relevant evidence. 5 CFR 1201.41; *see also, e.g.*, *Hall v. Department of Defense*, 119 M.S.P.R. 180, ¶¶ 4, 5 (2013). Administrative judges also have wide discretion in matters pertaining to discovery, and an administrative judge's discovery rulings will not stand if they are too restrictive. *See, e.g., Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 27 (2012).

A commenter questioned why the Board did not include USERRA reemployment claims under proposed section 1201.57 and suggested that this section be amended to cover such claims.

From 1979 until 1994, a claim that an agency violated an individual's right under USERRA's predecessor statute to return to civilian employment following military duty was within the Board's appellate jurisdiction under regulations issued by OPM. *See* 1979 through 1993 versions of 5 CFR Part 353, Subparts C & D. Such reemployment appeals were governed by section 7701 procedures. *See Britton v. Department of Agriculture*, 23 M.S.P.R. 170, 173 (1984). USERRA, enacted in 1994, made, among other things, the basis for Board jurisdiction over reemployment appeals statutory. *See* 38 U.S.C. 4324.

The Board has no basis for concluding that in enacting USERRA Congress meant to bring reemployment appeals outside the coverage of 5 U.S.C. 7701; the effect of such a change would have been to place the burden of proof on the merits on the appellant, when under section 7701(c)(2)(B) it is on the agency, *Britton*, 23 M.S.P.R. at 173, and to eliminate an appellant's right to raise an affirmative defense under section 7701(c)(2). Such changes would have been to the detriment of individuals seeking to vindicate their reemployment rights following military duty, and there is no indication that in enacting USERRA Congress intended such changes to Board procedures. Accordingly, the Board will

not include USERRA reemployment appeals in section 1201.57, as that section covers appeals in which the appellant bears the burden of proof on the merits and may not raise affirmative defenses.

Nevertheless, the commenter is correct in stating that the Board has taken jurisdiction in USERRA reemployment appeals based on nonfrivolous allegations. *See Silva v. Department of Homeland Security*, 112 M.S.P.R. 362, ¶ 19 (2009); *Groom v. Department of the Army*, 82 M.S.P.R. 221, ¶ 9 (1999); *accord DePascale v. Department of the Air Force*, 59 M.S.P.R. 186, 187 n.1 (1993) (arising under USERRA's predecessor statute). The current regulatory revisions generally aim to codify the case law-based methods for establishing jurisdiction in different types of appeals, however, and there is no reason to use this occasion to place a higher jurisdictional burden than currently exists on appellants in USERRA reemployment appeals. Thus, it is appropriate to except USERRA reemployment appeals from the requirement at section 1201.56(b)(2)(A) that jurisdiction be established by preponderant evidence. The final rule provides an exception to section 1201.56(b)(2)(A) for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312-4314.

Several commenters expressed a concern that the MSPB was raising jurisdictional standards in constructive adverse action cases without any stated rationale for such action.

The Board understands the commenters' concerns regarding the proposed rule § 1201.4(s), but the rule neither raises jurisdictional standards in cases before the Board, nor alters Board precedent concerning the type of documentation that can be used to satisfy the burden of making a nonfrivolous allegation. It is merely to remind the parties of obligations imposed by 18 U.S.C. 1001(a). The definition of "nonfrivolous allegation" in the first sentence of proposed rule § 1201.4(s) is based on longstanding Board precedent. The second sentence in the proposed rule further explains that, when an allegation is made under oath or penalty of perjury, it will generally be considered nonfrivolous if it is more than conclusory, plausible on its face and material to the legal issues in the appeal. The Board furthers note that, in this context, an allegation is made under oath or penalty of perjury if it is accompanied by the following: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on (date). (Signature)." *See* 28 U.S.C. 1746; *Cobel v. Norton*, 391 F.3d 251, 260 (D.C. Cir. 2004).

Several commenters stated that the MSPB was inappropriately limiting the type of evidence that could be used for satisfying the burden of making a nonfrivolous allegation. A commenter was concerned that the Board was improperly limiting such evidence to a statement under penalty of perjury while disallowing the use of evidence, such as an email.

We disagree with the commenter's statement that the Board is inappropriately limiting the type of evidence that could be used for satisfying the burden of making a nonfrivolous allegation.

Several commenters questioned whether the MSPB could modify the definition of "nonfrivolous allegation" in a regulation because that term has already been defined in controlling U.S. Court of Appeals for the Federal Circuit precedent interpreting jurisdiction-conferring statutes and OPM regulations.

As previously stated, the definition of "nonfrivolous allegation" in proposed rule 1201.4(s) is based on longstanding Board precedent. Further, while we are cognizant of the U.S. Court of Appeals for the Federal Circuit's precedent analyzing the Board's case law applying nonfrivolous allegation standards, we disagree with the commenters' conclusion that this precedent is binding. The court has routinely held that the Board has properly applied the nonfrivolous allegation standard. We believe this court review is instructive, rather than directive. In addition, we believe it is not appropriate to determine here whether the court owes deference to the Board's interpretation of its own jurisdiction under this particular regulation and instead believe such matters should properly be handled in due course on a case-by-case basis. *See Chevron*, 467 U.S. at 842-45.

Several commenters asked the Board to amend 5 CFR 1201.56 to add a new subparagraph (e) addressing when an appellant is entitled to a jurisdictional hearing. A commenter also suggested that the MSPB include in the final rule a procedure under which the Board would not be required to hold an evidentiary hearing on matters on which an appellant bears the burden of proof when there is no genuine issue of material fact to be resolved.

The Board believes that this proposed amendment is not necessary because the general definition of a nonfrivolous allegation in the proposed regulations and the show cause orders that administrative judges routinely issue in appeals tailored to a specific case are sufficient to inform an appellant of what he or she will be required to do to obtain a jurisdictional hearing.

A commenter suggested that the MSPB reconsider drafting section 1201.5 from option C because in the commenter's opinion option C more clearly identified matters that must be proven by preponderance of the evidence.

The Board carefully considered the four options (A-D) and decided against incorporating the referenced language contained in option C because a) such information is already communicated to appellants in show cause orders, and b) the inclusion of the level of detail set forth in the referenced section of option C would require frequent updates to the

Board's regulations to reflect changes in the law and bind the Board to the contents of its regulations when the flexibility to reconsider past decisions is sometimes needed.

A commenter identified the jurisdiction matrix produced by the MSPB regulations working group as a useful tool and proposed that the MSPB include this document in its regulations or on its website.

The Board appreciates that the commenter found this table so useful and will undertake to maintain a similar document summarizing MSPB jurisdiction on the MSPB website.

A commenter suggested that the Board should replace the term "nonfrivolous allegation" with a term that, according to the commenter, could be more easily understood and which has the same meaning.

While the Board understands the commenter's concern, it believes that it would simply be impractical to change this well-established legal term at this stage. The term has been adopted in case law by both the Board and the U. S. Court of Appeals for the Federal Circuit. Moreover, revised 5 CFR 1201.4(s) provides a definition for this term that the Board expects will be easily understood by practitioners and appellants, including pro se appellants.

A commenter suggested section 1201.4(s) would be improved if the MSPB added examples of a "conclusory statement" and a statement that the MSPB would consider to be "more than conclusory."

The Board appreciates that examples are often an effective means of communicating legal concepts and so has included examples elsewhere in its regulations. However, at the present time, the Board believes it most appropriate to develop the meaning of these terms through case law and perhaps add examples to its regulations at a later date.

A commenter criticized the proposed rule for failing to recognize that all MSPB appeals include "what" and "who" jurisdictional elements that always require proof by preponderant evidence.

This comment appears to recommend that the Board adopt a major structural element of option C, a potential approach to making jurisdictional determinations that was previously published on the Board's website but that the Board Members chose *not* to propose in this rulemaking. The main structural element of option B, the approach that the Board *has* proposed (with minor modification), is to distinguish between categories of appeals that are covered by 5 U.S.C. 7701 procedures and those that are not. Options B and C were formulated as comprehensive methods for making jurisdictional determinations, and the Board sees no compelling reason to import a major element of option C into option B.

A commenter questioned whether the MSPB erred by failing to justify requiring nonfrivolous allegations of jurisdictional elements that are also merits issues in IRA, VEOA, USERRA, and other types of appeals. This commenter explained that requiring nonfrivolous allegations in such

appeals was inappropriate where the relevant statutes provide that an individual who “alleges,” “claims,” “believes,” or “considers” that an agency acted in a particular way is entitled to appeal to the MSPB. Therefore, the commenter concluded that the Board’s requirement of raising nonfrivolous allegations to establish jurisdiction in these appeals would be found “not in accordance with law” under the Administrative Procedures Act (APA), 5 U.S.C. 706(2)(A).

The proposed revision in the regulations is primarily intended to accurately reflect current, controlling Board and court precedent for establishing MSPB’s jurisdiction in various types of appeals. We doubt that this precedent would be subject to collateral attack in an APA proceeding because it already has been subjected to years of court review. In addition, the Board carefully considered a comprehensive reform of our jurisdictional standards (options C and D) but concluded that introducing such changes in our standards would not be the best option to follow.

A commenter expressed his preference for option C and noted his concern that the proposed rule improperly treated purely merits issues as jurisdictional issues and left undisturbed case law in which the MSPB and the U.S. Court of Appeals for the Federal Circuit improperly classified merits issues as jurisdictional requirements.

The Board does not agree with the comment that the requirement of raising nonfrivolous allegations to establish jurisdiction in certain appeals

would be found not in accordance with law. The Board has proposed revisions to its jurisdictional regulations to clarify the burdens on parties and to insure that the Board's regulations are consistent with both statutes and case law. The Board is not revising its jurisdictional regulations for the purpose of reversing controlling precedent. Therefore, we agree that the regulations codify and endorse Board and U.S. Court of Appeals for the Federal Circuit precedent. The Board believes that such consistency and clarification are helpful to the parties it serves. Also, as noted earlier, the Board expects an administrative judge to provide notice to an appellant of the specific jurisdictional burdens raised in an appeal.

A commenter stated that the proposed rule improperly treated the exhaustion requirement in IRA and VEOA appeals as a jurisdictional requirement.

According to the commenter, U.S. Supreme Court precedent treats administrative exhaustion requirements that are "analogous to those in IRA and VEOA appeals" as "claim processing rules" and not jurisdictional requirements. The Supreme Court has never directly opined on the nature of administrative exhaustion requirements in the IRA or VEOA context. Furthermore, *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001), an appellate court decision that is binding on the Board, squarely holds that exhaustion of the Office of Special Counsel (OSC) complaint process is a jurisdictional prerequisite to an IRA appeal.

The *Yunus* decision is consistent with other appellate court decisions holding that filing of an administrative claim is a jurisdictional prerequisite to suing the government in tort, *GAF Corp. v. United States*, 818 F.2d 901, 904 (D.C. Cir. 1987), in contract, *Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010), and for discrimination in employment, *Hays v. Postmaster General*, 868 F.2d 328, 330-31 (9th Cir. 1989). The Board is not persuaded that it is "improper" to treat the exhaustion requirement in IRA and VEOA appeals as jurisdictional prerequisites to filing such appeals.

A commenter observed that the Board may not affirm any agency action or decision, including in IRA, VEOA, and USERRA appeals, where the agency violated the appellant's constitutional rights.

The commenter does not cite any decision in which the Board has either considered or declined to consider a constitutional claim in an IRA, VEOA, or USERRA appeal. Moreover, the commenter does not point to any portion of the laws conferring jurisdiction over these three types of appeals that gives the Board the authority to consider constitutional claims. While it is true that in appeals governed by 5 U.S.C. 7701 -- i.e., appeals other than IRA, VEOA, and USERRA appeals -- the Board will consider constitutional claims, in doing so the Board will identify the constitutional interest at stake as part of its analysis. For example, the Board will consider a claim that an agency removed an individual without affording

him minimum due process in accordance with the Fifth Amendment, so long as the individual was the type of employee with a constitutionally-protected property interest in continued Federal employment. *E.g., Clark v. U.S. Postal Service*, 85 M.S.P.R. 162, ¶ 1 (2000). At least with respect to VEOA and USERRA appeals, it is not clear what constitutionally-protected interests might be implicated in the most frequently-arising fact patterns, where individuals seek to vindicate statutory interests such as the right to veterans' preference in initial employment, the right to compete for employment, the right to reemployment following military duty, and the right to be free of discrimination in employment based on prior military service or a present obligation to perform such service. For these reasons, the Board believes that the basis and scope of its authority to adjudicate constitutional claims in IRA, VEOA, and USERRA appeals is best left to development in the case law.

A commenter suggested that 1201.57 should be amended to state with greater specificity the standards of proof for each of the appeals covered by that regulation.

The Board has proposed the revisions to its jurisdictional regulations to insure that they are consistent with statutes, other regulations, and case law. The Board considered stating the specific standards or elements for establishing jurisdiction for each type of appeal in the revised regulations but ultimately concluded that the inclusion of this information may have

the unintended effect of confusing the reader, especially a pro se appellant. In addition, the Board's jurisdiction is a continually evolving concept. As a result, the Board also was concerned that the regulations would quickly become obsolete or inaccurate if specific standards for establishing jurisdiction in each type of appeal were provided in the regulations. Finally, as noted several times earlier, the Board expects administrative judges to provide notice to the appellant of the specific jurisdictional burdens raised in the appeal.

A commenter recommended that section 1201.57(e) should be amended to require the jurisdictional notice to be issued as soon as practicable and to allow the parties additional time, if needed, to complete discovery before the jurisdictional question is resolved.

The Board appreciates the commenter's valid concern. As the commenter correctly notes, administrative judges typically do issue jurisdictional show cause orders as soon as practicable, often within weeks after an appeal is filed. However, in certain cases, new questions of jurisdiction materialize only after the parties file pleadings that highlight emerging issues. As a result, the Board believes that its practice is working well for most cases and that, as a rule, administrative judges usually issue jurisdictional notices at the appropriate time. As for the comment about allowing the parties additional time to complete discovery before the jurisdictional question is resolved, the Board believes, as stated

earlier, that such matters are best left to the administrative judges' discretion on a case-by-case basis.

A commenter suggested that the Board should undertake additional study to determine whether its regulations should address any additional jurisdictional pleading requirements that may arise when matters are made appealable to the Board by OPM regulation, rather than by statute.

The commenter notes that options C and D, previously posted on the Board's website as potential approaches to jurisdictional determinations, contained detailed pleading requirements for some types of appeals authorized by OPM regulations. The Board is aware that case law sets forth specific substantive requirements for establishing jurisdiction over certain kinds of regulatory appeals, such as those brought by probationers or that challenge employment practices, that may not be applicable in other kinds of cases. All appeals authorized by OPM regulations are covered by 5 U.S.C. 7701, however, and the purpose of the current rulemaking is to distinguish broadly between how jurisdiction is established in appeals that are covered by, and those that are not covered by, section 7701. Laying out substantive jurisdictional tests for different kinds of appeals within one of those categories is best left to developing case law.

A commenter suggested that the Board reorder paragraphs (b) and (c) of 1201.57 to reinforce the rule that the Board cannot bypass a jurisdictional question to reach the merits of a case.

The Board agrees with this suggestion and will make the minor edit necessary by switching the order of the paragraphs.

A commenter found the language in 1201.57(c) was ambiguous where it states that the paragraph applies "[e]xcept for matters described in subsections (b)(1) and (3) of this section above."

We agree and have amended this provision to make it clearer.

A commenter proposed a revision of 1201.57(c) on the grounds that an appellant should be required to make more than a nonfrivolous allegation that the appeal was timely filed and that the preponderance of the evidence standard should apply to timeliness issues.

The Board believes that the current language in the regulations is appropriate and protects the rights of appellants to show by preponderant evidence that their appeals were timely filed or to establish good cause for an untimely filing, consistent with long-established precedent. The current language also accurately reflects that, for an appellant to be entitled to a hearing on the timeliness issue, he or she must raise a nonfrivolous allegation that the appeal was timely filed. That said, the commenter correctly notes that timeliness and jurisdictional questions are not always inextricably intertwined and so administrative judges need to carefully review the record in such cases to provide the parties with the proper notice and determine if a hearing is warranted under the circumstances.

A commenter asserted that the amendments to the Board's regulations would increase the number of constructively discharged employees who are unsuccessful before the Board both on the merits and in establishing the MSPB's jurisdiction.

The Board does not agree. The regulatory revisions under discussion are certainly not intended to make it more difficult to establish jurisdiction or to prevail in a constructive adverse action appeal. Instead, the Board is attempting to codify principles in case law that are not fully reflected in the Board's regulations. The commenter's true concern appears to be that the Board's "current practice" results in appellants not "winning when . . . they ought to" in constructive adverse action appeals. However, this rulemaking is not intended to work a fundamental change in the way the Board approaches such appeals.

A commenter objected to Board's use of the term "conclusory" as well as the Board's definition of that term.

The Board believes that the use of the term is clear to convey the idea that something is conclusory if it is an inference that has no proof but is stated nonetheless. In other words, something is conclusory if it consists of or relates to a conclusion or assertion for which no supporting evidence is offered. The definition of "conclusory" is easily obtained with an online search although the word may not be found in older or abridged dictionaries. Yet as the commenter correctly notes, recent editions of

Blacks' Law Dictionary define conclusory as "expressing a factual inference without stating the underlying facts on which the inference is based." BLACK'S LAW DICTIONARY (7th ed. 1999); *id*. (8th ed. 2004); *id*. (9th ed. 2009).

A commenter suggested that the Board should abandon trying to define what a nonfrivolous allegation is, and should instead decide jurisdiction the way Federal courts do.

The commenter does not specify how he believes the Board is determining questions of jurisdiction differently than do Federal courts. Nonetheless, the commenter correctly observes that the Board is a tribunal of limited jurisdiction and so the Board believes that it is properly adjudicating jurisdictional issues that come before it, including determining if a nonfrivolous allegation has been raised.

A commenter suggested that the Board should revise its definition of "preponderance of the evidence" by adopting "the standard law dictionary definition."

The Board currently defines "preponderance of the evidence" as "[t]he 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." The proposed rule would move this definition from section 1201.56 to section 1201.4 but would leave the substance of the definition unchanged. Citing a law dictionary, the

commenter suggests that the Board change the definition to "evidence which is more convincing than the evidence offered in opposition to it. It is [the] degree of proof which is more probable than not." The commenter believes that the current definition creates confusion because it is framed in terms of what a "reasonable person" would find rather than what an administrative judge should find.

The Board declines to adopt this suggestion. Over a period of decades, the Board's primary reviewing court has cited and applied the Board's definition of "preponderance of the evidence" without questioning its validity or clarity. *E.g.*, *Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002); *Jackson v. Veterans Administration*, 768 F.2d 1325, 1329 (Fed. Cir. 1985). Changing the definition would allow parties to argue before the court that the new definition has a different meaning than the old one, and the Board would then need to convince the court that no change in meaning was intended. If the Board agreed with the commenter that the current definition creates confusion, then it might be worth the risk of having the court find that a revised definition has a new meaning, but the Board is not aware of widespread confusion over the wording of the current definition.

In fact, the current definition of "preponderance of the evidence" stands in clear contrast to the definition of "substantial evidence." The former definition focuses on what a reasonable person "would accept" as

sufficient to prove a contested fact, whereas the latter focuses on what a reasonable person "might accept" as sufficient to prove a contested fact "even though other reasonable persons might disagree." This clear contrast would be lost if the reference to a "reasonable person" were removed from the definition of "preponderance of the evidence" as the commenter suggests.

A commenter stated that the Board lacks authority to issue 5 CFR 1208.23(b) limiting the right to an evidentiary hearing to cases that are timely filed and within the Board's jurisdiction.

The commenter appears to object to the Board's reference to 5 CFR 1208 if an individual would like additional information regarding VEOA or USERRA appeals. However, 5 CFR 1208 is not a proposed rule and therefore is not subject to the notice and comment of the regulations at issue. Furthermore, the Board's proposed regulations do not provide for summary judgment. It is well settled that a VEOA complainant does not have an unconditional right to a hearing before the Board, and a USERRA claimant is entitled to a hearing on the merits only upon establishing Board jurisdiction over his appeal. *Downs v. Department of Veterans Affairs*, 110 M.S.P.R. 139, ¶¶ 17-18 (2008). The Board may decide a VEOA appeal on the merits without an evidentiary hearing only where there is no genuine dispute of material fact and one party must prevail as a matter of law. *Jarrard v. Department of Justice*, 113 M.S.P.R. 502, 506 (2010).

A commenter, citing *Kirkendall v. Department of the Navy*, 479 F.3d 830, 834 (Fed. Cir. 2009), asserted that 5 U.S.C. 7701 applies to VEOA appeals and questioned the Board's citation to *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660 (2005), for the proposition that the Board lacks jurisdiction to adjudicate an affirmative defense under 5 U.S.C. 7701(c)(2) in these appeals.

After reviewing *Kirkendall*, *Goldberg* and related precedent, the Board remains convinced that it lacks jurisdiction over affirmative defenses in a VEOA or USERRA appeal. In particular, we note that the U.S. Court of Appeals for the Federal Circuit found in *Kirkendall* that the failure of Congress to specifically reference section 7701 in a statute, such as USERRA, demonstrates that it did not necessarily want all provisions of section 7701 to apply to the Board's review of the claim. Furthermore, we note that the court has affirmed the Board's interpretation of the VEOA statute. For instance, in a veterans' preference case, which was decided on the merits, the court affirmed the Board's finding that it did not have jurisdiction over the appellant's affirmative defenses of discrimination and harmful procedural error. *Graves v. Department of the Navy*, 451 F. App'x 931 (Fed. Cir. 2011). Accordingly, the Board declines to change its position that it lacks jurisdiction over affirmative defenses in a VEOA or USERRA appeal.

A commenter asserted that the Board may not "overrule" section 1201.56 in VEOA appeals by adjudication because the Board lacks the delegated authority to do so.

At the outset, the Board notes that it has the authority to review or modify its regulations. 5 U.S.C. 1204(h) and 7701(k).

The commenter, though, suggests that the Board tried to "overrule" 5 CFR 1201.56 by adjudication in the cases of *Donaldson v. Department of Homeland Security*, 119 M.S.P.R. 489 (2013) (Table); *Donaldson v. Department of Homeland Security*, 119 M.S.P.R. 244 (2013) (Table); *Donaldson v. Department of Homeland Security*, 118 M.S.P.R. 219 (2012) (Table); *Donaldson v. Department of Homeland Security*, 117 M.S.P.R. 609 (2012) (Table); *Donaldson v. Department of Homeland Security*, MSPB Docket No. DC-1221-12-0356-B-1 (Initial Decision, Jan. 9, 2013); *Donaldson v. Department of Homeland Security*, MSPB Docket No. DC-300A-12-0619-I-1 (Initial Decision, Sep. 17, 2012); *Donaldson v. Department of Homeland Security*, MSPB Docket No. DC-1221-12-0356-W-1 (Initial Decision, June 28, 2012); *Donaldson v. Department of Homeland Security*, MSPB Docket No. DC-3330-11-0636-I-1 (Aug. 10, 2011); and *Donaldson v. Department of Homeland Security*, MSPB Docket No. DC-3330-11-0637-I-1 (July 29, 2011).

According to the commenter, the Board's decisions in *Donaldson* contravened the U.S. Court of Appeals for the Federal Circuit's holding in

Tunik v. Merit Systems Protection Board, 407 F.3d 1326 (Fed. Cir. 2005). The Board disagrees with the commenter's characterization of what the Board did in the *Donaldson* cases. In any event, the U.S. Court of Appeals for the Federal Circuit repeatedly concluded that the Board correctly decided the *Donaldson* cases, including the jurisdictional determinations therein. *See Donaldson v. Department of Homeland Security*, 528 F. App'x 986 (Fed. Cir. 2013) (Table) (the court affirmed the Board's decision that the appellant was not entitled to relief under VEOA); *Donaldson v. Merit Systems Protection Board*, 527 F. App'x 945 (Fed. Cir. 2013) (Table) (the court held that the Board correctly ruled that it lacked jurisdiction over the appellant's whistleblower claim); *Donaldson v. Department of Homeland Security*, 495 F. App'x 53 (Fed. Cir. 2012) (Table) (the court affirmed the Board's decision that the agency did not violate USERRA and VEOA when it failed to select him for positions). Notwithstanding the Board's holdings in the *Donaldson* appeals, the court in *Tunik* pointed out that there are "numerous exceptions" to the notice and comment rulemaking requirements of 5 U.S.C. 553. *Tunik*, 407 F.3d at 1341-45. In particular, the court in *Tunik* indicated that the Board is authorized to repeal a regulation through notice and comment procedures, which is exactly what the Board is doing here. *Tunik*, 407 F.3d at 1345. The commenter appears to concede this point, when he notes that the Board is not precluded from repealing the regulation in accordance with section 553(b).

A commenter questioned the validity of 5 CFR part 1208 and 1201.57 because these regulations allegedly inadequately protect veterans' preference rights.

The commenter asserts that Congress intended greater protection for preference-eligible veterans than the aforementioned regulations provide, but the commenter does not provide any examples. Again, the main purpose of this rulemaking is to make the Board's regulations consistent with how the Board actually makes jurisdictional determinations, as explained in the case law.

A commenter questioned why the Board had abandoned beneficial amendments proposed in 2012, such as allowing litigating parties to file reply briefs and steps to facilitate settlement.

The amendments proposed by the Board in 2012 (77 FR 33663) were not abandoned. These proposed amendments were adopted in a final rule published later that year (77 FR 62350). The final rule authorized the filing of reply briefs (5 CFR 1201.114(a)) and included steps to facilitate settlement (5 CFR 1201.28).

A commenter objected to the Board's proposal to limit the issues that may be raised in an IRA appeal. The commenter specifically objected to the fact that agencies no longer need to establish the justification for a personnel action in an IRA appeal.

The Board does not agree with the commenter that the Board's regulations ease an agency's requirement to prove misconduct if an employee has first chosen to file with the OSC. The Board reminds the commenter that 5 U.S.C. 1221 indicates that corrective action will not be ordered even if an individual establishes that he/she has disclosed that a protected disclosure was a contributing factor in a personnel action, if an agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. The agency is thus still required to justify its personnel action.

A commenter suggested that the Board move proposed paragraph 1201.56(d) and 1201.57(e) to a newly created section "1201.41(d) Proof."

The Board considered merging into a single provision this requirement for administrative judges to provide the parties notice of the proof required as to the issues in each type of appeal. However, we ultimately determined that the parties, particularly pro se appellants, would be less likely to be confused if it were set forth separately in 1201.56 and 1201.57.

A commenter argued that the term "standing" in 1201.57(b)(3) was an inappropriate way to describe a jurisdictional element that must be established by a preponderance of the evidence. The commenter suggested that the term "coverage" would be more appropriate.

As the commenter points out, under 1201.57(b)(3), a party must prove, by preponderant evidence, that he or she "[h]as standing to appeal" an action, but only "when disputed by the agency or questioned by the Board." The regulation defines "standing" to mean that the individual "falls within the class of persons who may file an appeal under the law applicable to the appeal." The Board believes that the term "standing" under 1201.57(b)(3) is appropriate and consistent with court and Board precedent. Standing is a threshold requirement that implicates jurisdiction and is "'perhaps the most important' condition for a justiciable claim." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Therefore, the question of standing is a preliminary issue that may be raised by the agency or the Board, to be explored as part of the Board's inquiry into whether it has jurisdiction over a case. *Silva*, 112 M.S.P.R. 362, ¶ 6 & n.2

A commenter expressed a concern that the Board's regulations and case law will impair the ability of appellants in IRA appeals to establish jurisdiction by requiring the production of documents, such as an OSC decision to terminate its investigation, to satisfy the OSC exhaustion requirement. This commenter noted that 5 U.S.C. 1221(f)(2) states that OSC's decision to terminate its investigation may not be considered in an IRA appeal.

The commenter does not actually seem to take issue with any portion of the proposed regulations. Instead, the commenter's true concern is that

the Board has changed the test for OSC exhaustion in recent Board precedent. The Board believes that such matters are best addressed in developing case law.

A commenter suggested that information concerning the degree and burden of proof borne by the appellant should come exclusively from the administrative judge and the Board should overturn case law that allows such advice to be exclusively communicated to an appellant in an agency's motion to dismiss.

It is well-settled that an administrative judge's failure to provide proper notice, as required by *Burgess*, 758 F.2d at 643-44, can be cured if the agency's pleadings contain the notice that was lacking in the acknowledgement order or if the initial decision itself puts the appellant on notice of what to do to establish jurisdiction, thus affording the appellant with the opportunity to meet the jurisdictional burden in a petition for review. The Board believes that restricting notice to that which is provided in the acknowledgement order would unfairly limit the opportunity to later clarify matters that are complicated or unclear when first filed during the processing of an appeal.

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. In § 1201.4, add paragraphs (p), (q), (r), and (s) to read 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, except for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312 - 4314;

(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 new § 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 supported by nonfrivolous allegations*. Except for proving exhaustion of a required statutory complaint process and standing to appeal (paragraphs (c)(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.

(c) *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.

(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 and B.

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

William D. Spencer,

Clerk of the Board.

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