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MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201 and 1208

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) hereby amends its rules of practice and procedure in order to correct several minor errors inadvertently introduced into the Board's regulations during a recent comprehensive revision of the Board's adjudicatory regulations.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On June 7, 2012, the Merit Systems Protection Board (MSPB or Board) proposed amendments to its regulations following a lengthy internal review of all MSPB adjudicatory regulations. 77 FR 33663. On October 12, 2012, the

MSPB published a final rule that made numerous amendments to the Board's regulations. 77 FR 62350. The MSPB has determined that it inadvertently included several minor drafting errors in the regulatory language of the final rule. These errors affect four paragraphs in the following regulations:

§ 1201.74(a) – This final rule amends 5 CFR 1201.74(a) to correct certain references to 1201.73 contained therein. The MSPB's recent amendments to its adjudicatory regulations resulted, in part, in the transfer of provisions previously set forth at 1201.73(e)(1) and (f)(4) to 1201.73(c)(1) and (d)(3). The final rule therefore amends 1201.74(a) to insert corrected citations to 1201.73.

§ 1201.112(a)(4) – The amendment to this subparagraph was intended to make clear that a judge's authority to vacate an initial decision to accept a settlement agreement into the record extended to a situation where the settlement agreement was filed by the parties prior to the deadline for filing a petition for review but not received by the judge until after the date when the initial decision would become the Board's final decision. However, the language employed in this amendment can be read as limiting a judge's authority to vacate an initial decision in order to accept a settlement into the record to an

instance where the settlement agreement was filed by the parties prior to the deadline for filing a petition for review and not received by the MSPB until after the initial decision became final. This was not the Board's intent. This subparagraph has thus been amended to make clear that an administrative judge may vacate an initial decision in order to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review, and that the judge has the authority to act even if the settlement agreement is not received until after the date when the initial decision becomes final under § 1201.113 of this part.

§ 1201.114(k) – The final sentence in this regulatory provision states that “[o]nce the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.” To ensure the greatest possible clarity, the MSPB believes that this sentence should be modified to note the requirement that new evidence and argument must be material as defined in 1201.115(d). The MSPB also has amended the final sentence to make clear that it applies to evidence “or argument” that was not readily available before the record closed.

§ 1208.22(c) – This regulatory provision is amended to correct a drafting error that inadvertently identified a 60-day deadline for filing a Veterans Employment Opportunities Act of 1998 (VEOA) appeal. The applicable filing deadline is 15 days. 5 U.S.C. 3330a(d)(1)(B).

The amendments contained in this final rule are intended to correct minor non-substantive drafting errors that were inadvertently introduced into MSPB's regulations during the Board's recent comprehensive revision of its adjudicatory regulations. The MSPB is foregoing the use of notice and comment rulemaking and is instead publishing these amendments in a final rule.

The rulemaking process must involve the notice-and-comment procedures outlined in the Administrative Procedure Act (APA) unless the proposed rule falls into the category of an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice. 5 U.S.C. 553(b)(3)(A). Three of the minor changes contained in this final rule address MSPB procedures and practices for the conduct of discovery, the filing of petitions for review, and the authority granted to a judge to reopen an initial decision. The remaining amendment merely corrects a typographical error in a regulation discussing the extraordinary circumstances under which the

doctrine of equitable estoppel may apply to an untimely filed VEOA appeal. Accordingly, pursuant to 5 U.S.C. 553(b)(3)(A), MSPB may proceed without following the APA's notice and comment procedures.

In addition, 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 "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). Here, the amendments contained in the final rule are insignificant and amount to little more than routine technical corrections to a 25-page final rule that became effective on November 13, 2012. Accordingly, MSPB finds that its decision to exempt the regulatory changes set forth herein from notice and comment rulemaking requirements is supported by good cause in that the amendments contained herein are routine determinations, insignificant

in nature and impact, and inconsequential to federal employees and the public.

Finally, MSPB also elects to make the amendments set forth herein effective immediately upon publication of this 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, and in light of the importance of promptly removing and correcting any inconsistent, incorrect, and confusing material inadvertently introduced into MSPB's adjudicatory regulations, the Board finds that good cause exists to waive the 30-day publication requirement.

List of Subjects in 5 CFR Parts 1201 and 1208

Administrative practice and procedure, Government employees.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR parts 1201 and 1208 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 § 1201.74, revise paragraph (a) to read as follows:

§ 1201.74 Orders for discovery.

(a) *Motion for an order compelling discovery.* Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(1) and (d)(3). An administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 CFR 1201.73(c)(1) and (d)(3).

* * * * *

3. In § 1201.112, revise paragraph (a)(4) to read as follows:

§ 1201.112 Jurisdiction of judge.

(a) * * *

(4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review, even if the settlement agreement is not received until after the

date when the initial decision becomes final under § 1201.113 of this part.

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4. In § 1201.114, revise paragraph (k) to read as follows:

§ 1201.114 Petition and cross petition for review – content and procedure.

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(k) *Closing the record.* The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless it is new and material as defined in § 1201.115(d) and the party submitting it shows that the evidence or argument was not readily available before the record closed.

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**PART 1208—PRACTICES AND PROCEDURES FOR APPEALS
UNDER THE UNIFORMED SERVICES EMPLOYMENT AND**

**REEMPLOYMENT RIGHTS ACT AND THE VETERANS
EMPLOYMENT OPPORTUNITIES ACT**

5. The authority citation for 5 CFR part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204(h), 3330a, 3330b; 38 U.S.C. 4331.

6. In § 1208.22, revise paragraph (c) to read as follows:

§ 1208.22 Time of filing.

* * * *

(c) *Equitable tolling; extension of filing deadline.* In extraordinary circumstances, the appellant's 15-day deadline for filing an appeal with the MSPB is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

William D. Spencer

Clerk of the Board

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