National Employment Lawyers Association
Advocates for Employee Rights

September 16, 2014

***VIA* e-mail to mspb@mspb.gov**

William D. Spencer
Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: Response to Interim Final Rule, 79 Fed.Reg. 48,941-48,946
Docket No. MSPB-2014-0007-0001

Dear Mr. Spencer:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Merit Systems Protection Board's Interim Final Rule implementing Section 707 of the Veterans' Access to Care through Choice, Accountability and Transparency Act of 2014, Pub.L. 113-146 ("Section 707"), published in the Federal Register on August 19, 2014, 79 Fed.Reg. 48,941-48,946 (as amended 79 Fed.Reg. 49,423 (August 21, 2014)).

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees, and thus we have an interest in the modifications to MSPB's procedural regulations.

NELA appreciates the opportunity to provide suggestions concerning potential modifications to the Board's procedural regulations for adverse action appeals. NELA strongly opposes Section 707 as an abrogation of due process and as a slippery slope to eroding civil service protections; these comments on the Interim Final Rule should not be construed as any sort of endorsement by NELA of Section 707 itself, but instead merely NELA's observations to assist the Board in its burdensome task of trying to implement Section 707 for as long as the statute remains on the books. NELA broadly concurs with the Board's well-stated concerns regarding the likely unconstitutionality of Section 707. NELA also supports the Board's attempt—in the face of harsh statutory restrictions—to preserve the semblance of the Board's hearing process to the

extent not prohibited by Section 707. NELA also strongly supports the language of 5 C.F.R. § 1210.20(c) that renders Section 707 decisions nonprecedental and un-citeable outside the Section 707 context as perhaps the best way to limit the likely adverse impact of Section 707 decisions on the rest of the Board's body of precedent.

NELA requests that the Board amend the interim 5 C.F.R. Part 1210 regulations to clarify that Section 707 procedures stand independent of—and do not truncate—causes of action which give rise to independent causes of action subject to procedural elections (for example, EEO claims, (b)(8) and (b)(9) Prohibited Personnel Practice claims subject to an Independent Right of Action appeal, and USERRA claims) because they could also be raised as affirmative defenses in Otherwise Appealable Actions under Board jurisdiction. Given that the procedures under Section 707 so severely truncate the process normally due to review removals, it is unfair to deem a Section 707 appeal as a procedural election to such proceedings. **Accordingly, NELA urges the Board to adopt a new 5 C.F.R. § 1210.20(e) stating that, "5 CFR §§ 1201.3(c), 1201.154(a), 1208.11, 1209.2(d) shall have no application to appeals under Section 707, and Section 707 appeals shall not be considered to be an election of remedies barring pursuit of other statutory or regulatory appeal or complaint processes."** The effect of this proposed rule would be to preserve for whistleblowers the right to pursue a claim of reprisal under the Whistleblower Protection Act even if the Section 707 proceeding resulted in an adverse outcome (such as failure of the MSPB hearing judge to issue a decision within 21 days), to preserve the right of employees to pursue claims of discrimination through the EEOC-governed EEO process, and to preserve the rights of veterans to pursue their USERRA claims.[1]

Further, to prevent independent claims from being impaired by factual findings coming from Section 707 proceedings—and to give full effect to the non-citation provision of 5 C.F.R. § 1201.20(c), **NELA urges the Board to amend 5 C.F.R. § 1201.20(c) to state also that "A decision by an administrative judge under this Part shall not have the effect of *res judicata* or collateral estoppel in any proceeding not filed pursuant to 38 U.S.C. § 713(e)(2)."** This rule flows naturally from the concept that *res judicata* cannot attach to proceedings that fail to comport with basic due process. See *Hansberry v. Lee*, 311 U. S. 32, 40 (1940). **Finally, NELA also urges the Board to modify Part 1210 to state that Section 707 in no way modifies the Office of Special Counsel's prosecutorial authority under 5 U.S.C. § 1215.** NELA notes that these proposed modifications represent a reasonable interpretation of Section 707 under two familiar canons of legislative interpretation. First, both the Board and its chief reviewing court, the U.S. Court of Appeals for the Federal Circuit, recognize the common law canon of *expressio unius est exclusio alterius. See, e.g., Delalat v. Dept. of the Air Force,* 557 F.3d 1342, 1344 (Fed.Cir. 2009); *Edwards v. Dept. of Homeland Security,* 110 M.S.P.R. 243 (2008). Had Congress intended to abrogate fully the WPA, EEO statutes, or other laws for those employees covered by Section 707, or to truncate OSC's prosecutorial authority, it could have easily done so in the same fashion that it abrogated the Board's stay authority in 38 U.S.C. § 713(e)(4)

[1] NELA contends it would be a perverse result for Pub.L. 113-146—a statute intended by Congress to protect veterans—to have the effect of stripping veterans of their protections for discrimination based on their uniformed service by truncating their rights to raise USERRA claims (and similarly objects to truncating rights arising under other anti-discrimination statutory remedies applicable to broader classes of employees, as more fully explained *infra*).

Second, as the Board teaches, "It is a cardinal principle of statutory construction that repeals by implication are strongly disfavored and will not be found unless the intention of the legislature to repeal is clear and manifest." *Schott v. Dept. of Homeland Security,* 97 M.S.P.R. 35 (2004) (*citing Rodriguez v. United States,* 480 U.S. 522, 524 (1987)). No provision of Pub.L. 113-146 expressly abrogates Title VII, the Age Discrimination in Employment Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, the Whistleblower Protection Act or USERRA with regard to SES employees at the Department of Veterans Affairs, and so it is necessary to preserve affected employees' rights under those statutes in order to avoid repeal by implication.

Turning to the issue of developing the factual record for Section 707 appeals, NELA recommends several modifications to strengthen the Part 1210 regulations. NELA commends the Board's decision to require production of the Response File with the initial adverse action decision and prior to appeal under 5 C.F.R. § 1210.5(c). NELA urges the Board to help ensure a complete document production in the response file by amending the definition of "response file" in 5 C.F.R. § 1210.2(c) as follows (using standard editing notation for additions and ~~deletions~~ to text):

> The term *response file* means all documents and evidence the Secretary of the Department of Veterans Affairs, or designee, used or created in making the decision to remove or transfer an employee covered by this part. It also ~~may~~ shall include any additional documents or evidence that the agency would present in support of the Secretary's determination in the event that an appeal is filed as well as any exculpatory evidence known to the Department of Veterans Affairs, and shall also include a copy of the employee's official personnel file and performance file, names of all decision-makers and advisors on the decision, non-privileged intra-agency communications (including email) about the decision, Department of Veterans Affairs policies related to the decision, and any available data on comparator employees.

This additional information would need to be produced by the Department of Veterans Affairs either in the initial disclosure or in discovery under 5 C.F.R. § 1210.12.[2] Because the written record in an adverse action is selectively collated by agency management solely to substantiate their adverse action decision, an expansive production not solely delimited to what the Department of Veterans Affairs wants to produce to justify its action is necessary to give a clear picture of the decisional process *in lieu* of the more expansive discovery process afforded under normal Board discovery procedures in 5 C.F.R. Part 1201. Further, a more expansive response file production may hypothetically reduce the burden on the Board in Section 707 cases through pre-appeal production of documents to employees that may well convince them that appeal in a given case might be unmeritorious, obviating the need for the appeal; absent this expanded

[2] In the case of the official personnel folder and performance file, the employee would be also entitled to this information under the Privacy Act, 5 U.S.C. § 552a(d).

definition, the employee would only receive that information after an appeal had been filed and discovery was underway.

As has been most often observed, depositions are the most valuable form of discovery for a number of reasons (including, for example, the ability to ask follow-up questions of the witness and the ability to lock in the witness' testimony for purposes of trial preparation). Depositions are a unique discovery tool in their ability to explore issues of credibility by delving into the details of the recollections, motives, beliefs and experiences of the witness. It is natural that courts have favored depositions. *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition and absent extraordinary circumstances, such an order would likely be in error"); *accord Simmons Foods, Inc. v. Willis, et al*., 191 F.R.D. 625, 630 (D. Kan. 2000) ("Courts do not favor thwarting a deposition"). Allowing the parties depositions would partially rebalance the procedural inequities among the parties. As in any adverse action the agency always has the ability to procure pre-adverse action witness statements and witness interviews through its internal investigations while the employee has no such opportunity. **Because of the centrality of depositions to any discovery effort and these concerns of fairness, NELA strongly opposes the present 5 C.F.R. § 1210.12(d)(2), and urges the Board to add a new 5 C.F.R. § 1210.12(c)(4) permitting depositions.** By enacting Section 707, Congress has expressed a sense of elevated importance for management of veterans' services. That is all the more reason to assure that contested issues of performance, retaliation or deviations from policy be fully explored. If the Board deems some limit on depositions necessary, NELA proposes a limit of three (3) depositions for each side. In employment litigation, management actions are often the result of collaboration among managers and their superiors. Any number less than three would prevent an increasing number of appellants from finding key evidence of reprisal, disparate treatment or other highly relevant matters. **Because of the lead time necessary to schedule depositions practicably, the Board should modify 5 CFR § 1210.12(c)(4) more specifically to allow the parties to note depositions prior to the initial status conference.** NELA believes that, by doing so, it would be practicable for parties to complete depositions prior to hearing.[3]

On the related issue of discovery motions practice, the shortened time deadlines of a Section 707 case present unique risks not fully addressed in the Interim Final Rule. In Section 707 cases, the normal information asymmetry in employment cases is further exacerbated by the short timeframes for discovery—leaving agencies the potential to sandbag appellants on discovery issues in hopes of running out the 21-day clock for the administrative judge to issue a decision on the appeal. To partially countervail this risk of prejudice, and to ensure that discovery objections are decided as soon as possible in this unique context**, the Board should modify 5 CFR 1210.12(b) to place the burden specifically on the Agency to move for a protective order if they are refusing to respond to a discovery request, rather than force the appellant to have to move to compel discovery.** This modification would meaningfully put into force 38 U.S.C. § 713(e)(6) by placing the burden of responding to discovery squarely on the Department

[3] If the Board should decide to not authorize depositions (which NELA strenuously objects to as agency-biased), it should clearly instruct administrative judges a party's scope of permitted questioning at hearing should be the same as it would be at a deposition.

of Veterans Affairs, as intended by Congress. **Because additional documents are likely to be produced in discovery and additional witnesses identified in discovery, the Board should modify 5 C.F.R. § 1210.11(b) to allow parties to seek modification of their exhibit lists and witness lists prior to hearing.** Finally, in the interest of gender neutrality in use of pronouns, NELA requests that the Board modify Example C from 5 C.F.R. § 1210.18(a) by rephrasing its last sentence to read "If the agency has not unduly delayed or refused to engage in discovery, the administrative judge may decline to impose sanctions and proceed to hearing for a determination on the merits."

Because of the limits on hearing time in Section 707 matters, NELA is concerned about the risk of employees not being given adequate time to present their case. The Board instructs that "The party having the burden of proof usually presents its case first. The other party then presents its case, including any affirmative defenses." MSPB Judges' Handbook, Ch. 10, § 9.b. With the agency holding the burden of proving its charges in Section 707 cases, it would be far too easy for the agency's case in chief to consume the entire hearing day, leaving the employee no chance to present their own case in chief. In normal appeals, that risk is avoided because hearings can be easily continued into multiple days, but the statutory limits of Section 707 preclude that flexibility. **To avoid depriving the employee of the chance to present a case in chief at hearing, NELA urges the Board to revise Part 1210 to add new sections 1210.17(f, g) as follows:**

> **(f) Each side in the hearing shall be afforded at least three (3) hours which the party may allocate to opening statements, witness examination (including such direct, cross, redirect and recross examinations as the party may undertake), objections and arguments thereon, and closing arguments.**
> **(g) If the witness has not been deposed by the examining party, the examination of a witness may include such examination as would ordinarily occur at a deposition and shall be permissible so long as questions are reasonably calculated to lead to admissible evidence.**

While the statutory time pressure of Section 707 creates some inherent constraints on the hearing, administrative judges should do their best to allow each side to present their case as they see fit, and not micromanage the parties' presentation of their respective cases. If the pressure is one of presentation time, then that time limit should be the only additional constraint (other than the normal rules of evidence) on the subjects, witnesses, evidence and issues a party can present. Accordingly, **NELA urges the Board to modify Part 1210 to instruct administrative judges expressly to not bar parties from presenting subjects, witnesses, evidence or issues to the greatest extent practicable.** Errors of this sort in the normal hearings process can be fixed by the Board on Petition for Review; with Section 707 barring Petitions for Review and making the administrative judge's decision final, there is no opportunity to fix an improper exclusion or limitation later, necessitating the Board laying out a bright line rule in advance to correctly instruct its administrative judges.

The second two sentences of 5 C.F.R. § 1210.18(a) deviate from the statutory burdens of proof and thus NELA strongly urges their repeal. The language in question states:

> […] Proof of misconduct or poor performance shall create a presumption that the Secretary's decision to remove or transfer the appellant was warranted. The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case.

This provision is not required by the plain text of Section 707 itself, and NELA believes that it is not only unnecessary, but unfairly shifts the agency's burden of proof onto the employee. Adding an explicit presumption in favor of the Agency flatly violates Section 707. Specifically, 38 U.S.C. § 713(d)(2) applies 5 U.S.C. § 7701 to Section 707 proceedings—and Section 7701 (as long construed by the Board and the Federal Circuit) places the burden of proof on the underlying adverse action on the Agency. *See, e.g.*, *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) ("By seeking 'review,' an employee puts the agency in the position of a plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges."). The first sentence of 5 C.F.R. § 1210.18(a) adequately states the agency's burden of proof, broadly tracking the burdens of proof under Section 7701[4]:

> Under 5 U.S.C. 7701(c)(1), and subject to exceptions stated in paragraph (c) of this section, the agency (the Department of Veterans Affairs) bears the burden of proving that an appellant engaged in misconduct, as defined by 38 U.S.C. 713(g)(2), or poor performance, and the Secretary's determination as to such misconduct or poor performance shall be sustained only if the factual reasons for the charge(s) are supported by a preponderance of the evidence.

Sentences 2-3 of 5 C.F.R. § 1210.18(a), however, do violence to this assignment of burdens of proof under 38 U.S.C. § 713(d)(2) and 5 U.S.C. § 7701. Expecting an agency to carry its burden is minimally reasonable within the civil service merit principles that still apply, even in the Section 707 context. **For similar reasons, 5 C.F.R. § 1210.18(d) should also be quashed, as inconsistent with 38 U.S.C. § 713(d)(2), as shifting the burden of showing the reasonableness of the penalty from the agency to the employee, and as preventing the application of the mitigation analysis in the Board's signal case of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) when not expressly required to do so by Section 707.**

Turning to the issue of hearing transcripts, NELA advises the Board of an omission in the Part 1210 procedures that needs clarification. Specifically, 5 C.F.R. § 1210.17(e) provides that court reporters will be present at the hearing and 5 C.F.R. § 1210.19(b) authorizes transcribed bench decisions, but neither section provides what will happen to transcripts after the hearing in the same fashion as 5 C.F.R. § 1201.53 or similar provisions do outside of the Section 707 context**. To address this, NELA urges the Board to promulgate a new 5 C.F.R. § 1210.17(g): "The agency shall pay for transcription of the hearing, and copies of the transcript and exhibits will be provided to the MSPB, all parties, the Inspector General of the Department of Veterans Affairs and the chair and ranking member of the House and Senate committees**

[4] *Compare, e.g.,* 5 C.F.R. § 1210.18(a) (first sentence) *and* 5 C.F.R. § 1210.18(c) *to* 5 U.S.C. § 7701(c).

overseeing the Department of Veterans Affairs." Through this rule and distribution of the fact-finding record, the expedited process will serve its proper role in the holding of all agency officials accountable for the actions addressed in the hearing. Providing for mandatory transcription and transmittal to Congress is also a natural extension of the active oversight role that Congress retained for itself in Section 707 cases, as specified in 38 U.S.C. § 713(c).

Finally, NELA understands that Section 707 reflects an apparent congressional frustration with what it (erroneously) perceived as lengthy delays in the Board's appeal processes. NELA members, however, have historically observed no such delay in cases they have litigated before the Board, at least prior to the furlough appeals from the 2013 sequestration. NELA firmly believes that difficulties presented in implementing adverse actions against SES employees at the Department of Veterans Affairs were based upon then-agency management's unwillingness to utilize the preexisting ample statutory mechanisms for discipline of SES employees.[5] The agency's failure to initiate adverse actions was thus caused by a defect in agency managerial culture and lack of supervisory intent to hold other managers accountable, and not caused by any defect in preexisting civil service law. To the extent that the Board—due chiefly to backlogs related to furlough appeals from the 2013 sequestration—has suffered delays recently, they have been far less than those observed by NELA members elsewhere, such as in the federal-sector EEOC complaints process or in proceedings before the Department of Labor's Office of Administrative Law Judges (OALJ). NELA believes that provision of adequate funding and resources to administrative adjudication agencies, and not evisceration of substantive civil service protections or due process rights, is the solution for reducing delays in these administrative adjudications.

Again, NELA appreciates the opportunity to respond to the Advance Notice of Proposed Rulemaking, and wishes to thank the Board for its attention and consideration.

Respectfully submitted,

Terisa E. Chaw
Executive Director

[5] While the congressional response found at Section 707 and in the Interim Final Rule are designed with the hope that they will be used to root out abusive managers, this mechanism can just as easily be used by agency management to protect abusive managers and to suppress those who would tolerate whistleblowers in the interest of hiding corruption rather than reporting it. The Board needs to ensure that its administrative judges have an adversarially-developed record based on the most thorough discovery practicable to prevent the Department of Veterans Affairs from taking unjustified Section 707 actions, and thus resuming its *modus operandus* of shooting the messenger to hide continuing corruption from Congress and the voters.