

NTEU

The National Treasury Employees Union

November 2, 2007

Matthew D. Shannon
Acting Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

RE: NTEU's Comments on Interim Regulatory Changes
Regarding Department of Homeland Security Personnel
System (published at 72 Fed. Reg. 56883 (Oct. 5,
2007))

Dear Mr. Shannon:

The National Treasury Employees Union (NTEU) submits these comments on the Merit Systems Protection Board's (MSPB or Board) interim regulatory changes concerning the Department of Homeland Security's (DHS or Department) personnel system. NTEU represents approximately 21,000 U.S. Customs and Border Protection employees who are to be covered by the DHS system. The interim regulatory changes implement subparts F and G of 5 C.F.R. Part 9701, the adverse action and appeals provisions of the DHS system.

As discussed below, we are suggesting modifications to several regulations that address matters not expressly provided for in the DHS system and over which the MSPB has discretion. We also continue to object on principle to several regulations reflecting MSPB's adoption of aspects of the DHS system that are inconsistent with the requirements of the Homeland Security Act, 5 U.S.C. § 9701, or are otherwise unfair or unnecessary.

1. Incorporation of DHS's Initial Service Period

We continue to object to the DHS regulation, now incorporated into the Board's regulations, authorizing DHS to establish an "initial service period" for nonpreference eligible employees lasting up to two years during which the Board would not have jurisdiction over appeals filed by DHS employees. See

5 C.F.R. § 1210.2(b), 1210.4(h), 9701.603, 9701.604(b)(1). It is unfair to deprive employees of adverse action rights when they have been employed by DHS for up to 729 days. The Board should exercise jurisdiction over appeals of adverse actions brought by DHS employees who have completed one year of continuous service, even if they continue to be in their "initial service" period according to DHS.

2. Decision Notice

MSPB regulations applicable to other agencies require the agency issuing a decision notice to an employee on a matter that is appealable to the Board to advise the employee of whether the decision can be challenged in the grievance process, in addition to or in lieu of filing an appeal with the Board. See 5 C.F.R. § 1201.21. The notice must further advise the employee whether he or she would have an opportunity to request Board review of an arbitration decision, should the employee choose to pursue a grievance. See id. at § 1201.21(d)(3). Board review of arbitration decisions, of course, is available in "mixed cases" pursuant to 5 C.F.R. § 1201.154(d).

The Board's regulations for DHS employees do not contain an express requirement that DHS include in its decision notices information about the availability of an appeal to the Board of an adverse arbitration decision. See 5 C.F.R. § 1210.10. But a Board appeal is clearly available in mixed cases pursuant to 5 C.F.R. § 9701.709. Accordingly, we urge the Board to revise 5 C.F.R. § 1210.10 to mandate that DHS include in its decision notices to employees the statement concerning Board review of arbitration decisions that other agencies are required to provide under 5 C.F.R. § 1201.21(d)(3).

3. Time for Filing an Appeal

We continue to object to the DHS regulations, now incorporated into the Board's regulations, providing a 20-day deadline for filing an appeal. See 5 C.F.R. §§ 1210.11, 9701.706(k)(1). The minimal gain in case processing time does not justify reducing by a third the time a DHS employee has to file an appeal. We urge MSPB to exercise its discretion under 5 C.F.R. §§ 1210.3 and 1210.5 liberally to permit consideration of the merits of untimely filed appeals upon a showing of good cause.

In addition, DHS should not have almost as long to respond to the appeal--15 days--as the employee has to file it. See 5 C.F.R. § 1210.11(a). DHS regulations do not specify a deadline for the Department's response. Given DHS's stated interest in expediting resolution of these cases, it should not object to a 10-day deadline for filing a response to the appeal. We urge the Board to modify 5 C.F.R. § 1210.11(a) to provide for a 10-day deadline for DHS's response.

4. Case Suspension

We also continue to object to the DHS regulation, now incorporated into the Board's regulations, requiring that case suspension requests be made jointly. See 5 C.F.R. §§ 1210.18(a); 9701.706(k)(4). It is highly unfair to require that all case suspension requests be submitted jointly, therefore giving either party veto power over requests made for legitimate reasons (such as illness or deaths in the family of the party or party's representative). We thus urge the Board to make clear in its regulations that judges may act on case suspension requests submitted unilaterally pursuant to their authority under 5 C.F.R. §§ 1210.3 and 1210.5.

5. Discovery Requirements

The Board's regulations also impose a new requirement that DHS and the appealing employee make initial disclosures within 10 days of the date of the Board's acknowledgment order. See 5 C.F.R. § 1210.14(a). NTEU applauds this requirement for the Department, because it is the one in possession of all the relevant information, and it would have already compiled that information in connection with its consideration of whether to impose an adverse action on the employee. Consequently, making these initial disclosures will impose nothing more than a *de minimis* burden on the Department.

On the other hand, subjecting the employee to similar requirements would be highly burdensome. The employee is not in possession of the relevant materials and may not even know on what documents and witnesses he or she will rely until having access to the materials produced by the Department. DHS employees, moreover, are already more pressed for time than employees of other agencies (who do not have an initial disclosure obligation) by virtue of the shorter 20-day deadline for filing an appeal.

Accordingly, we urge the Board to modify 5 C.F.R. § 1210.14(a) to give DHS employees an additional 30 days following receipt of the Department's initial disclosures to make their initial disclosures. Moreover, we suggest a further modification to that regulation so that it is clear that the Board's acknowledgment order must advise the parties of their initial disclosure obligations. Pro se plaintiffs otherwise may not be aware of the initial disclosure requirements.

6. Settlement Judge

The Board's regulations adopt DHS's concept of using a "settlement judge" in settlement discussions. See 5 C.F.R. §§ 1210.17(b); 9701.706(i)(2). We do not object to the concept of using a settlement judge. Neither the Board's regulations nor the DHS regulations make it clear, however, whether a settlement judge is automatically assigned to each case, or whether the parties must affirmatively request assignment of a settlement judge. We think the former option is the better one.

As reflected in 5 C.F.R. § 1210.17(a), the parties should be free to engage in settlement discussions without a settlement judge, if they think that would be effective. See *id.* ("[t]he parties are not prohibited from engaging in settlement discussions on their own"). Either party should also be free to invoke the services of the settlement judge. Accordingly, we suggest that the first sentence of 5 C.F.R. § 1210.17(b) be modified to read as follows:

Upon a request submitted by either party to the judge, settlement discussions will be conducted by an official specially designated by the MSPB in each case for that sole purpose.

The second sentence of the regulation would remain as it is.

7. Summary Judgment

We continue to object to the DHS regulation, now incorporated in the Board's regulations, requiring judges to resolve appeals through summary judgment when the judge concludes that no material facts are in dispute. See 5 C.F.R. §§ 1210.20, 9701.706(k)(5). This constitutes a departure from a long-standing Board policy, grounded in the legislative policy of the Civil Service Reform Act, that employees subjected to adverse actions are entitled to a hearing. Pro se employees not

trained in the complexities of civil procedure will be especially prejudiced by this provision.

Moreover, we believe a 15-day time limit for responding to a summary judgment motion is too short. See 5 C.F.R. § 1210.20(c). Under the interim regulations, the Department will have the entire discovery period to work on the motion, plus five days following the close of discovery. It is therefore unfair to limit the employee to 15 days for filing an opposition, which includes a separate response to the Department's statement of material facts. We urge the Board to amend 5 C.F.R. § 1210.20(c) to provide that responses to summary judgment motions are due 30 days after service of the motion.

8. Hearings

The Board's regulations depart from its current view that telephonic hearings are not appropriate when there are material facts in dispute. See MSPB, Judge's Handbook, at 44-45 (Oct. 2007). Instead, they leave it totally to the judge's discretion to decide whether to conduct an in-person, video, or telephonic hearing. See 5 C.F.R. § 1210.19(b).

We object to the use of telephonic hearings when material facts are in dispute. The Board's policy for non-DHS agencies, reflected in the Judge's Handbook, is sound, because a judge's resolution of a disputed material fact often turns on a credibility assessment. Credibility determinations should be made based on in-person hearings where the witness's entire demeanor can be observed. The words of the witness are only one factor in determining credibility. Body language, facial expressions, and subtle gestures can also be effective tools for assessing credibility. A telephonic hearing, therefore, is inappropriate when material facts are in dispute. We urge the Board to revise 5 U.S.C. § 1210.19(b) to reflect the policy set forth in the Judge's Handbook.

9. Time-of-Filing Rules

Within its regulation entitled "Initial decision by the adjudicating official," the Board has included rules concerning the time a document is deemed to have been filed when it is submitted to the Board by personal delivery, facsimile, regular mail, commercial delivery, or electronic mail. See 5 C.F.R. § 1210.21(a). While these time-of-filing rules are obviously relevant to calculation of the 90-day period for issuance of an

initial decision set by this particular regulation, they would also apply to any other filings with the Board. These rules, therefore, should not be buried in the initial decision regulation, as they are hard to locate there. We suggest that a better approach would be to set forth the time-of-filing rules as a separate regulation in Subpart A.

10. Penalty Mitigation

We continue to object to the DHS regulation, now incorporated into the Board's regulations, adopting a new penalty mitigation standard. See 5 C.F.R. §§ 1210.21(b), 9701.706(k)(6). That standard has been deemed unfair, and, therefore, inconsistent with the Homeland Security Act. See NTEU v. Chertoff, 385 F. Supp. 2d 1 (D.D.C. 2005). Though that holding was ultimately vacated on ripeness grounds by the court of appeals (see NTEU v. Chertoff, 452 F.3d 839, 855 (D.C. Cir. 2006)), the district court's legal analysis of the standard itself was not questioned and remains sound.

Adoption of a new mitigation standard that departs from the approach judges have used for over 25 years (see Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981)) when serious questions have been raised about the legality of that standard is wasteful and unwarranted. See Hearing Statement Submitted by Neil A.G. McPhie, Chairman, U.S. Merit Systems Protection Board, to the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, U.S. House of Representatives (March 2, 2005), at 3 (raising concerns about DHS's mitigation standard and noting the Board's 25-year history of applying Douglas factors). We therefore urge the Board to refrain from adopting the DHS mitigation standard.

11. Mandatory Removal Offenses

We continue to object to the DHS regulations, now incorporated into the Board's regulations, creating "mandatory removal offenses." See 5 C.F.R. §§ 1210.40-1210.44, 9701.703, 9701.707-9701.708. We believe that these cases can be effectively prosecuted through the regular appeals procedures, which have greater credibility among the workforce.

Moreover, the Board's regulations are premature. The DHS regulations give the Secretary unfettered discretion to identify mandatory removal offenses, subject only to the vague and overly

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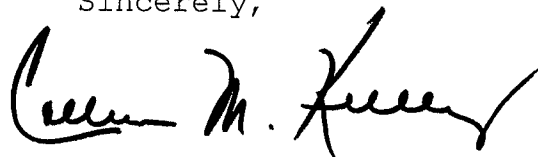
broad requirement that they have a direct or substantial impact on homeland security. See 5 C.F.R. § 9701.703. This could cover virtually anything and could result in a list containing offenses for which removal is, as judged by any impartial reviewer, too harsh a penalty. At this point, though, the Secretary has not identified these offenses. MSPB may want to consider the specific offenses identified by the Secretary as mandating removal when crafting administrative procedures for those cases. We thus urge the MSPB to revoke the regulations at 5 C.F.R. §§ 1210.40-1210.44 and to reconsider the issue when the Secretary identifies the mandatory removal offenses.

If the Board does not revoke the mandatory removal regulations, clarification is required with respect to the standards' governing review of decisions of the DHS mandatory removal panel (MRP) that involve issues of discrimination. The Board's regulations provide for application of a very limited standard of review of MRP decisions (arbitrary and capricious, harmful error, or lack of substantial evidence). See 5 C.F.R. § 1210.41(a). As a general rule, though, the Board reviews claims of discrimination *de novo*. See 5 U.S.C. § 7702(e)(3). The Board should continue to apply a *de novo* standard in discrimination cases, even when that review is triggered by an appeal of a decision of the MRP. We therefore urge the Board to modify the regulation at 5 C.F.R. § 1210.41 to reflect that a *de novo* standard of review applies to allegations of discrimination.

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We appreciate the opportunity to comment on these regulations. If you have any questions about these comments, please call NTEU Assistant Counsel Robert H. Shriver, III, at (202) 572-5553.

Sincerely,



Colleen M. Kelley
National President

cc: Robert Shriver