

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Proposed Amendment to the Rule Regarding the Filing of Constructive Removal Complaints by Administrative Law Judges

AGENCY: Merit Systems Protection Board.

ACTION: Proposed rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or “the Board”) is revising its regulation governing actions filed by an administrative law judge (ALJ) who alleges a constructive removal under 5 U.S.C. 7521. The revision repeals the standard stated by the regulation for establishing such a removal in light of the Board’s determination in recent cases that the ALJ must show involuntary separation from the position of ALJ. As discussed below, the revised standard for establishing the constructive removal of an ALJ is addressed in the Board’s cases and will not be incorporated in the revised regulation, which is retained solely to provide procedural guidance for ALJ-initiated actions alleging violation of section 7521.

DATES: Written comments should be submitted on or before October 17, 2005.

ADDRESSES: Send or deliver comments to the Office of Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Bentley M. Roberts, Jr., Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: The Board added 5 CFR 1201.142 to its regulations governing actions against ALJs “to cover the situation in which a complaint is

filed by an administrative law judge rather than an agency.” 62 FR 48450 (Sept. 16, 1997). As promulgated, section 1201.142 provides that an ALJ “who alleges that an agency has interfered with the judge’s qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart.” The regulation reflects the Board’s holding in *In re Doyle*, 29 M.S.P.R. 170 (1985), that an ALJ may be constructively removed for purposes of 5 U.S.C. 7521 by agency actions that interfere with the ALJ’s qualified decisional independence.

In *Tunik v. Social Security Administration*, 93 M.S.P.R. 482 (2003), the Board held that to establish a constructive removal on this basis the ALJ must also be separated from the position of ALJ. The Board based its decision on the ordinary meaning of “removal” and the need to read this term consistently with the interpretation given by the case law to the same term in 5 U.S.C. 7512. The *Tunik* holding was followed by the Board in *Dethloff v. Social Security Administration*, 93 M.S.P.R. 574 (2003), and *Schloss v. Social Security Administration*, 93 M.S.P.R. 578 (2003).

The U.S. Court of Appeals for the Federal Circuit reviewed the Board’s *Tunik*, *Dethloff*, and *Schloss* decisions in a consolidated appeal, *Tunik v. Merit Systems Protection Board*, Nos. 03-3286, -3330, -3331 (Fed. Cir. May 11, 2005). The court agreed with the Board’s conclusion that the plain language of section 7521 reasonably can be read to apply only to cases of actual separation from employment as an ALJ. However, the court found that because 5 CFR 1201.142 was issued pursuant to the notice and comment requirements of 5 U.S.C. 553, the Board lacked authority to overrule the regulation in an adjudication, outside the procedural requirements of section 553(b). The court reversed in part, vacated in part, and remanded the case, finding that the regulation incorporating the *Doyle* standard applied to the petitioners whose claims were not moot. However, the court stated that its conclusion did not foreclose the Board from repealing the rule in accordance with section 553(b).

Accordingly, the Board is proposing to revise section 1201.142 to delete the

stated standard for establishing constructive removal of an ALJ and thereby to repeal the *Doyle* rule. The revised regulation will be retained solely to provide procedural guidance for an ALJ who wishes to file a complaint alleging constructive removal or other violation of section 7521. The standard for establishing a constructive removal claim is set forth in *Tunik v. Social Security Administration*, 93 M.S.P.R. at 493: the ALJ must establish “that his decision to leave the position of ALJ was involuntary under the test for involuntariness used for appeals implicating section 7512.” Reference should be made to the Board’s developing case law for further elaboration of this standard in connection with claims based on interference with an ALJ’s qualified decisional independence.

List of Subjects in 5 CFR Part 1201

Administrative personnel, Actions against administrative law judges, Actions filed by administrative law judges.

For the reasons set forth in the Preamble, the MSPB proposes to amend 5 CFR 1201.142 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

Subpart D—Procedures for Original Jurisdiction Cases

2. Revise § 1201.142 to read as follows:

§ 1201.142 Actions filed by administrative law judges.

An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and serving requirements of § 1201.37 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

Bentley M. Roberts, Jr.,
Clerk of the Board.

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