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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Actions Filed by Administrative Law Judges

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its regulation governing actions filed by an administrative law judge (ALJ) under 5 U.S.C. 7521 to repeal the standard for establishing a constructive removal under the statute that was formerly incorporated in the regulation. The standard for establishing a constructive removal is addressed in the Board's case law. The amended regulation provides procedural guidance for ALJ-initiated actions alleging violation of section 7521.

DATES: *Effective Date:* June 14, 2006.

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 under 5 U.S.C. 7521 to cover actions filed by an ALJ rather than an agency. As promulgated in 1997, the regulation codified the Board's holding in *In re Doyle*, 29 M.S.P.R. 170 (1985), that a sitting ALJ may be constructively removed under 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 overruled *Doyle* and held that to establish a constructive removal the ALJ must have left the position of ALJ and must show that the decision to leave was involuntary under the test for involuntariness used in appeals under 5 U.S.C. 7512. In a consolidated appeal reviewing *Tunik* and cases following it, the U.S. Court of Appeals for the Federal Circuit approved the Board's conclusion that the plain language of section 7521 can reasonably 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. The court stated that its conclusion did not foreclose the Board from repealing the rule in accordance with section 553(b). *Tunik* v. *Merit Systems Protection Board*, 407 F.3d 1326 (Fed. Cir. 2005).

Accordingly, the Board proposed this amendment to section 1201.142 and published it for comments at 70 FR 48081 (August 16, 2005). The time for comments was subsequently extended to November 25, 2005, at 70 FR 61750 (October 16, 2005). The Board has received comments from two associations, an agency and two individuals. After careful consideration of the comments received, the Board is adopting the rule as proposed.

1. Four of the commenters urged the Board to retain the *Doyle* standard permitting constructive removal actions by sitting ALJs as necessary to protect the their decisional independence and the due process rights of claimants before them. Two of the commenters argued more specifically that under the amended rule punitive actions could be taken against ALJs in order to intimidate them from taking actions or to get them to alter their decisions.

The Board does not find this argument persuasive. Congress has protected the independence of ALJs by enacting the statutory requirement that there be an MSPB finding of good cause before a removal from the position of ALJ (or other specified adverse action) can be taken. Since the Board's case law precludes a finding of good cause under section 7521 for an action based on how an ALJ decides a case, this protection permits ALJs to resist the most serious agency pressures that could undermine their independence. The Board sees no justification for extending its jurisdiction to provide additional protection beyond what Congress has provided through the authority given to the Board in the statute.

2. One commenter suggested that the amended regulation is inconsistent with the definition of removal under section 7521 found in 5 CFR 930.202(f) because under that regulation of the Office of Personnel Management, the definition includes reassignment to a non-ALJ position.

This suggestion is based on a mistake. The amended regulation requires involuntary separation from the position of ALJ, not separation from the civil service. Reassignment to a non-ALJ position is clearly covered by the new standard, which is therefore not inconsistent with the definition in § 930.202(f).

3. One commenter suggested that the amended rule is unnecessary because the Board's decisions applying the *Doyle* standard have not found a constructive removal in cases involving routine management actions. This commenter suggested that the *Doyle* standard should be retained because it has deterred agency interference with ALJ independence. The commenter also suggested that under the new standard, sitting ALJs may, instead, challenge interference with their independence through actions based on the First Amendment in district court, with an adverse effect on judicial economy due to the loss of the Board's expertise in the decision of those cases.

The Board finds that the fact that its case law under the *Doyle* standard is largely made up of nonmeritorious cases is not a reason for retaining the old standard, nor does it show that the old standard has deterred improper agency actions. Moreover, in *Tunik* the court approved the Board's determination that it was unlikely that in enacting section 7521 Congress intended to require agencies to obtain a good cause finding from the Board before taking such routine actions as assigning cases and implementing training requirements. *Tunik*, 407 F.3d at 1340. The Board finds that, to whatever extent the First Amendment rights of ALJs are actionable in district court, it has no bearing on the Board's interpretation of section 7521.

4. One commenter suggested that the *Doyle* standard should be retained in order to permit sitting ALJs to claim constructive removal based on alleged

violations of the case assignment rotation requirement in 5 U.S.C. 3105.

The Board finds that this suggestion fails to state a persuasive objection to the amendment of its regulation since the revised standard would permit consideration of an ALJ's involuntary resignation claim that is based on the agency's improper interference with his decisionmaking by assigning cases out of rotation.

5. One commenter supports the proposed amendment and urges the Board to provide upon issuance of the amended regulation that it will be applicable to pending cases.

The Board finds that retroactive application of the amended regulation would be contrary to the court's decision in *Tunik*, which held that the cases in that consolidated appeal were subject to the standard stated in the former regulation because it could not be repealed in an adjudication. Under *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), the Board must have express statutory authority to make a substantive rule retroactive, authority which the Board does not have. The amended regulation that the Board is issuing is such a rule because it repeals the substantive standard for constructive removal stated in the old regulation and makes effective the standard for such a removal now contained in the Board's case law.

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 is amending 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

■ 1. The authority citation for 5 CFR part 1201 is revised to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

■ 2. Accordingly, the Board revises 5 CFR 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 5 CFR 1201.37 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

Dated: June 8, 2006.

Bentley M. Roberts, Jr.,

Clerk of the Board.

[FR Doc. E6–9239 Filed 6–13–06; 8:45 am]

BILLING CODE 7400–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1210

[Doc. No. FV–05–704–IFR]

Watermelon Research and Promotion Plan; Redistricting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule invites comments on changing the boundaries of all seven districts under the Watermelon Research and Promotion Plan (Plan) to apportion producer and handler membership on the National Watermelon Promotion Board (Board). This will make all districts equal according to the previous three-year average production records. Pursuant to the provisions of the Plan and regulations, these changes are based on a review of the production and assessments paid in each district and the amount of watermelon import assessments, which the Plan requires at least every five years.

DATES: Effective June 15, 2006. Comments must be received by July 14, 2006.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Programs (FV), Agricultural Marketing Service (AMS), USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244; fax (202) 205–2800; e-mail: *daniel.manzoni@usda.gov*; or Internet: *http://www.regulations.gov*. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or can be viewed at: *http://www.ams.usda.gov/fv/rpb.html*.

FOR FURTHER INFORMATION CONTACT: Daniel Rafael Manzoni, Research and Promotion Branch, FV, AMS, USDA, Room 2535–S, Stop 0244, 1400 Independence Avenue, SW., Washington, DC 20250–0244; telephone (202) 720–5951 or (888) 720–9917 (toll free); fax: (202) 205–2800; or e-mail *daniel.manzoni@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under the Watermelon Research and Promotion Plan (Plan) [7 CFR part 1210]. The Plan is authorized under the Watermelon Research and Promotion Act (Act) [7 U.S.C. 4901–4916].

Executive Orders 12886

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

In addition, this rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

The Act allows producers, producer-packers, handlers, and importers (if covered by the program) to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not established in accordance with law. In any petition, the person may request a modification of the Plan or an exemption from the Plan. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's ruling, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act [5 U.S.C. 601 *et seq.*], AMS has examined the economic impact of this rule on the small producers, handlers, and importers that would be affected by this rule.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than $6.5 million. Under these definitions, the majority of the producers, handlers,