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Attn: NMB Dkt. No. 2003-01N

As arbitrators currently on the NMB's Roster of Arbitrators, we respectfully ask that you consider our comments regarding §1210.5 of the proposed rules, which addresses "listing on the roster; criteria for listing and retention". The majority of §1210.5 of the proposed rules provides fair and careful standards for ensuring that the NMB Roster of Arbitrators is composed of qualified professional neutrals who are free from impermissible conflicts of interest. Our comments are limited to §1210.5(e)(1), which disqualifies arbitrators who have some employment relationship with a Federal, State, county or municipal government. We believe this provision would unnecessarily preclude qualified and experienced arbitrators from the Roster.

As presently drafted §1210.5(e)(1) disqualifies from listing on the NMB's Roster of Arbitrators those individuals currently employed by the United States Government "or any State, municipal, county or other governmental entity within the United States, its territories, protectorates or possessions." The proposed rule specifies that the disqualification from listing on the NMB's Roster of Arbitrators includes those individuals whose government employment is "full-time, part-time, ad hoc, per diem" or in any other "periodic capacity."

This proposed rule would exclude many arbitrators currently listed on the NMB's Roster of Arbitrators, largely due to their employment at State colleges and universities as faculty members or ad hoc faculty members teaching courses such as labor law, employment law, collective bargaining and other labor relations topics, economics, etc. Affected arbitrators currently listed on the NMB's Roster of Arbitrators are on faculty at State universities including, but not limited to, George Mason University and Rutgers University. The proposed rule, as presently drafted would disqualify those individuals as well as individuals serving as faculty members at public universities such as the University of California system, the University of Michigan, the University of Minnesota, and the New York State School of Industrial and Labor Relations at Cornell University. Moreover, it would preclude arbitrators from participating in lectures,

seminars and programs at public institutions where they might receive compensation for their participation. Some public institutions require participants in certain programs to accept pay for services.

Review of the proposed §1210.5 in its entirety shows that the rule is designed to ensure that those arbitrators listed on the NMB's Roster of Arbitrators are neutral and have no impermissible conflicts of interest that would compromise their ability to render fair and neutral awards. Teaching at the college and university level is widely viewed as acceptable neutral activity. Indeed, proposed rule §1210.5(d)(1) expressly exempts from the definition of "advocacy" those individuals "engaged only in joint education or training or other non-adversarial activities."

Since there is no similar disqualification for those arbitrators who maintain a teaching relationship with private colleges and universities, we conclude that those arbitrators who are on faculty at public colleges and universities were inadvertently included in the general disqualification of other government employees. We note that the Federal Mediation and Conciliation Service also maintains a Roster of Arbitrators. FMCS's rule addressing the Criteria for Listing and Retention on the Roster of Arbitrators does not disqualify arbitrators teaching at public colleges or universities or any other individuals based solely upon their status as employees of any governmental entity. 29 CFR §1404.5.

In order for the NMB's Roster of Arbitrators to include the widest range of individuals who have demonstrated their professionalism, competence, neutrality and acceptability to the parties, the disqualifications to proposed rule §1210.5(e)(1) should be amended to clarify that those individuals who teach at public colleges and universities are not disqualified solely by virtue of their status as a member of the faculty at a public college or university.

Proposed rule §1210.5(e)(1) also addresses payment from a governmental entity for work as a neutral as follows:

The receipt of compensation from a governmental entity for service as an arbitrator, fact finder, or other neutral, or ad hoc service as an arbitrator in cases in which a governmental entity is a party, shall not constitute a disqualifying relationship for the purpose of this part.

This provision, on its face, provides that there is no disqualification from listing on the NMB's Roster of Arbitrators based upon service as a neutral in cases where a governmental entity is a party. However, many arbitrators provide neutral services as ad hoc hearing officers, hearing examiners, mediators, and fact-finders for State and local labor relations agencies. Additionally, several Federal agencies, including but not limited to the U.S. Postal Service and the Equal Employment Opportunity Commission, provide compensation to neutrals under

contract providing mediation services in employment disputes. As presently drafted, it is unclear whether this exemption from disqualification would apply to arbitrators who also provide such services to governmental agencies. The rule should be amended to make clear that these individuals are not disqualified based solely upon their neutral activities for compensation by a governmental entity. Many state and local labor relations agencies rely upon qualified and experienced arbitrators to provide neutral hearing and mediation services on an ad hoc or other basis. If the proposed rule is not modified or clarified to include arbitrators providing neutral services to governmental agencies, qualified and experienced arbitrators may be precluded from the Roster and the NMB's Roster will be unduly restricted.

Proposed rule §1210.5(e)(1) also appears to disqualify arbitrators who may perform a public service in their community for which they receive a stipend or other minor compensation, such as membership on a local board or commission, for example a historic preservation board or an environmental commission.

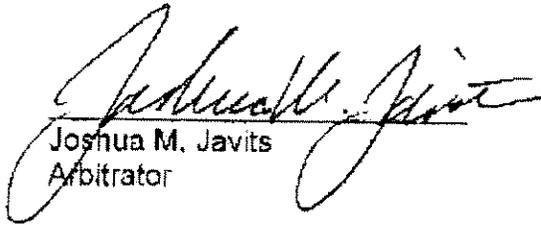
For all of these reasons, we believe that a blanket disqualification of all arbitrators who provide services for compensation to all governmental entities is overbroad. Such a blanket disqualification, even with the limited exceptions included in the proposed rule, bears no rational relationship to an arbitrator's qualifications or neutrality and would unduly restrict inclusion of qualified and experienced arbitrators on the NMB's Roster. As noted above, FMCS's rule addressing the Criteria for Listing and Retention on the Roster of Arbitrators does not disqualify arbitrators based solely upon their status as employees of any governmental entity. 29 CFR §1404.5. For these reasons, we urge that you eliminate subsection (1) from proposed rule §1210.5(e).

In the alternative, if compelling reasons exist to limit inclusion on the NMB's Roster based upon an individual's receipt of compensation for services from a governmental entity, we urge you to review the disqualifications listed in proposed rule §1210.5(e)(1) and to amend the proposed rules to clarify that those individuals who teach, instruct or lecture at public colleges and universities are not disqualified solely by virtue of their status as a member of the faculty or ad hoc teaching activities at a public college or university. Further, we urge you to review the provision addressing the provision of neutral services for compensation by a governmental entity to insure that individuals who provide such services are not disqualified solely based upon their provision of neutral services for compensation by a governmental entity. Accordingly, if subsection (e)(1) is retained in the final rule, we urge that it be modified to provide:¹

(e) Other circumstances precluding placement on the NMB's Roster of Arbitrators. An individual will not be placed on the NMB's Roster if any one of the following disqualifying conditions is applicable:

¹ New proposed text is boldface and text to be struck out is noted by a line through it.

(1) The individual is currently employed by the United States Government or is an employee of any State, municipal county or other governmental entity within the United States, its territories, protectorates or possessions. This disqualification applies to governmental employment in a full-time, part-time, ad hoc, per diem or other periodic capacity. Approval by the governmental employer for the individual to engage in arbitration will not lift or modify this restriction. The receipt of compensation from a governmental entity for service as an arbitrator, mediator, fact finder, or other neutral, or ad hoc service ~~as an arbitrator in cases in which a governmental entity is a party~~, shall not constitute a disqualifying relationship for the purpose of this part. **The receipt of compensation from a governmental entity for service as a faculty member, professor, lecturer, instructor, panel member, or trainer shall not constitute a disqualifying relationship for the purpose of this part.**


Joshua M. Javits
Arbitrator


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Arbitrator