

Plain Language

Action & Information Network

"Plain Language for An Informed Nation"

Roland Watkins, Director of Arbitration
National Mediation Board
1301 K Street, NW, Suite 250 East
Washington, D.C. 20005

Reference: NMB Docket No. 2003-01N

Dear Sir:

I'm commenting on your August 9, 2004, proposed rule as the Chair of the Plain Language Action and Information Network (PLAIN), a group advocating the use of plain language in Government communications. Many of the members of PLAIN work for Federal Government agencies.

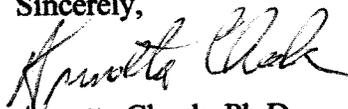
Executive Orders 12866 and 12988 and the Presidential Memorandum of June 1, 1998 (61 FR 31885), require Federal agencies to use plain language in drafting regulations. Plain language has a solid record of reducing misunderstanding, improving compliance, fostering public trust government, and advancing other goals of Federal programs.

On behalf of PLAIN, I am enclosing detailed comments and recommendations for changes. We feel very strongly that our suggestions would improve the clarity of your proposal and result in better compliance with your requirements.

PLAIN is very interested in helping all agencies comply with the requirements of the Executive Orders and the Presidential Memorandum. To this end, we would be happy to work with you to change your proposal or provide ongoing drafting and reviewing assistance to your agency.

Please feel free to contact me by e-mail or telephone.

Sincerely,



Annetta Cheek, Ph.D.

Chair

Enclosure

Dr. Annetta Cheek, Chair, PLAIN

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Comments on NMB NPRM

Proposed § 1210.4 Roster and status of arbitrators.

Words of authority are words legal and regulatory drafters use to set forth duties, rights, prohibitions, recommendations and discretionary actions. If the legal drafter uses these important words inconsistently or imprecisely, there is a good possibility for creating confusion among readers. For example, if you use two different words to establish requirements, the reader may not perceive that your intent is the same in both cases. Or, if you fail to use present tense consistently throughout your regulatory text, the reader may perceive any use of future tense as something stronger than a statement of fact. Your NPRM caused us a great deal of confusion due to your inconsistent use of words of authority, combined with unnecessary use of future tense.

Proposed § 1210.3(b) states “The NMB’s Director of Arbitration Services ... maintains a Roster of Arbitrators” This appears to be a simple statement of fact, assigning the responsibility for maintaining the Roster to the Director. However, compare this with proposed 1210.4(a) which states “The Director of Arbitration Services shall maintain the NMB Roster” Since you have already assigned the responsibility for the Roster, your use of “shall” in paragraph (a) is confusing. Are you simply stating your intention as to what the Director will do in the future? Or, are you using “shall” to redundantly create a duty for the Director?

We know that some legal drafting experts have recommended using “shall” to create a duty. Reed Dickerson, *The Fundamentals of Legal Drafting*, p. 214 (2nd ed., 1986). However, more recent guidance recommends avoiding “shall” entirely because it can have several different meanings. Sometimes it expresses future action (The lease *shall* terminate if payment is not received). Sometimes it expresses an obligation (The court *shall* enter an order for the relief sought). Sometimes it expresses an entitlement (The secretary *shall* be reimbursed for all expenses). Sometimes it gives or denies permission (Such time *shall* [or *shall* not] be further extended [for cause]). . Richard C. Wydick, *Plain English for Lawyers*, p. 67 (4th ed., 1998) and Bryan A. Garner, *Legal Writing in Plain English*, p. 105 (2001). Our interpretation is that your use of “shall” in proposed 1210.4(a) is not to redundantly create a duty, but simply to express your intention regarding future activities of the Director. If so, we wonder why you are using future tense. It’s a well-settled precept of legal drafting to write in the present tense. Dickerson, *supra*, p. 185.

For these reasons, we recommend revised wording for proposed § 1210.4(a). Either “The Director of Arbitration Services maintains the NMB Roster ...”—to be consistent with proposed § 1210.3, or “The NMB Roster consists of ...”—omitting the redundant assignment of responsibility.

Proposed § 1210.4(b) contains two “shall” statements: “Persons listed on the Roster shall comply ...” and “Arbitrators shall conform” Your use of “shall” is confusing because of its inherent ambiguity. Are you creating duties for the persons listed and the arbitrators, or are you expressing an idea about the future? If you are creating duties here, we recommend substituting “must” for “shall” in these two sentences for purposes of clarity.

Proposed § 1210.4(f) states “No person shall have any right to be listed or to remain listed on the Roster.” If you compare this use of “shall” with paragraph (b) of this section, you will see that there is clearly some inconsistency. In (b) you are plausibly creating duties, but in (f), you seem to be negating the right to be listed. However, you use “shall” in both cases. By assigning different meanings to the same word, especially when it’s a word of authority, you cause unnecessary confusion for the reader. We recommend you change the sentence to one of the following: Either “No person is entitled to be listed or to remain listed on the Roster.” Dickerson, *supra*, p. 214 (“To negate a right, say ‘is not entitled to.’”). Or, “No person has the right to be listed or to remain listed on the Roster.”

Proposed § 1210.5 Listing on the Roster; criteria for listing and retention.

The length of this proposed section makes it difficult for the reader to find information. Often the reader is looking for something specific, not reading for general information. This long section with few headings forces the reader to wade through material that is not relevant simply because there are few signposts or navigational aids present. It would be relatively easy to break this one long section into 4 or 5 shorter sections with accompanying section headings. This would have the added benefit of making the table of contents for part 1210 more useful. For example, proposed § 1210.5(a) could be a stand-alone section titled, “Applying for listing on the Roster.” Proposed § 1210.5(b) through (f) could be stand-alone sections using their proposed italicized headings. Proposed § 1210.5(g) could be a stand-alone section titled, “Suspension from the Roster.” You would have to renumber proposed §§ 1210.6 through 1210.12 to accommodate the insertion of the new sections.

Proposed § 1210.5(a) illustrates the problems created when words of authority aren't used consistently. In this one paragraph, you use "must," "will," and "shall" in a way that is confusing to the reader. The paragraph begins by appropriately using "must" to create a duty for those seeking to be listed on the Roster. However, by this action, you create a reasonable expectation that you will create all other duties in the paragraph similarly. The second sentence says, "The Director of Arbitration Services will review the application." Are you obligating the Director to review it, or are you expressing a mild intention? We assume you aren't creating an obligation since you didn't use "must," in which case, why the future tense? The introductory phrase "Upon receipt of an executed application" establishes the sequence of events. This is an obvious case where present tense is entirely clear and appropriate. As Dickerson says, "A provision of continuing effect ... speaks as of the time it is being read, not merely as of the time it took effect." Dickerson, *supra*, p. 185. We recommend changing the sentence to read, "Upon receipt of an executed application, the Director of Arbitration Services reviews the application, assures that it is complete, and makes such inquiries as are necessary."

The next two sentences of paragraph (a) state that the Director "shall" make all final decisions and each applicant "shall" be notified. What is the reader to think? He or she is expecting to see "must" used to create a duty. Since you didn't use "must," you must have had some other meaning in mind. But what? Is it future tense again? Not likely since you just used "will" for that purpose in the preceding sentence. The reader is perplexed. Further confusion arises because you used the passive voice in the last sentence—"Each applicant shall be notified" Who does the notifying? The reader must guess. For clarity, we recommend the following wording: "The Director of Arbitration Services ... makes all final decisions" And, "The Director of Arbitration Services notifies each applicant in writing of his/her listing."

Proposed § 1210.5(b) states that "Applicants will be listed on the Roster" We find this confusing because we don't understand why you are using future tense. Since the general rule is to use present tense, there must be a reason for not doing so. Are you trying to establish an entitlement to listing? We think not, but can't be sure. If you are merely stating a fact, for clarity, we recommend the following alternate wording: "Applicants for the Roster are listed on the Roster"

Proposed § 1210.5(d)(1) states "Consultants ... will not be considered as advocates." Again, use of future tense is confusing. The general rule is to use present tense in regulatory and legal drafting. The first two sentences of this paragraph appropriately use present tense. Why the shift to future in the last sentence? In addition to future tense, your use of passive voice in this sentence further obscures its meaning. Who will not consider consultants as advocates? You force the reader to speculate about who is involved. For clarity, we recommend the following alternate wording: "The Director of Arbitration Services does not consider consultants ... to be advocates."

Proposed paragraph 1210.5(e)(1) states "Approval ... will not lift or modify this restriction. The receipt ... shall not constitute a disqualifying relationship" Your inconsistent use of "will" and "shall" in these two sentences in the same paragraph causes confusion for the reader. The reader wonders why "will" in one place and "shall" in another. Is there some nuance or shade of meaning that is not readily apparent? For clarity, we recommend the following alternate wording: "Approval ... does not lift or modify this restriction. The receipt ... does not constitute a disqualifying relationship" We have the same comment on your use of "shall" in the last sentences of proposed § 1210.5(e)(3), (4), and (6). We recommend simply using present tense in those sentences for clarity.

Proposed § 1210.5(f) and § 1210.7

These portions of the proposed rule exemplify the inconsistency that permeates your proposed rule. You seem to be using "shall" and "will" interchangeably without regard to the confusion this creates for the reader. For the reasons discussed earlier and for clarity, we recommend you use present tense throughout to eliminate confusion and to adhere to the generally accepted rule of regulatory drafting.

Proposed § 1210.10 Decision and award.

This section is another example of inconsistency in use of "shall" and "will." You have used "will" four times in the section and "shall" seven times. There appears to be no logic behind the varying usage. For example, in paragraph (b)(5), consecutive sentences state "the Director ... will appoint an arbitrator The arbitrator shall hear the case" We strongly recommend you avoid future tense by using present tense and, eliminate the word "shall" by using "must" to create requirements.

Please note that none of our recommended changes are substantive. They are editorial in nature and are aimed at increasing the clarity of the regulations and decreasing the confusion that the proposed rule is causing.

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