

STATEMENT FOR THE HEARING RECORD

SUBMITTED BY

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CHAIRMAN
U.S. MERIT SYSTEMS PROTECTION BOARD

TO THE

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON
OVERSIGHT AND GOVERNMENT REFORM

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

*MERIT SYSTEMS PROTECTION BOARD (MSPB), OFFICE
OF GOVERNMENT ETHICS (OGE), AND OFFICE OF
SPECIAL COUNSEL (OSC) REAUTHORIZATION*

WEDNESDAY, DECEMBER 16, 2015

Chairman Meadows, Ranking Member Connolly, and other Members of the Subcommittee on Government Operations (“Subcommittee”) of the Committee on Oversight and Government Reform, thank you for the opportunity to testify at this important hearing on the reauthorization¹ of our agency, the Merit Systems Protection Board (“MSPB”), along with the reauthorization of two of our sister agencies, the Office of Special Counsel (“OSC”) and the Office of Government Ethics (“OGE”). As Chairman of MSPB, it is a great honor to be here today on behalf of our dedicated workforce, along with Special Counsel Lerner and Director Shaub. The last three years have been among the most eventful and challenging in the history of MSPB. They have also been among the most rewarding. I am proud of what our agency – through its employees – has accomplished during incredibly trying times, and the role we have played in a variety of matters related to the overall operation of the federal civil service. My testimony today will address: 1) the current state of the MSPB; 2) some of MSPB’s significant accomplishments in connection with our statutory responsibilities; 3) MSPB’s current and anticipated challenges; and 4) MSPB’s request for reauthorization for Fiscal Years 2016-2020 along with a legislative proposal related to our studies function.

A. MSPB and its Role in the Federal Civil Service

The Civil Service Reform Act of 1978 (“CSRA”) created MSPB to carry on the function of the former United States Civil Service Commission to adjudicate appeals filed by federal employees in connection with certain adverse employment actions. The CSRA also granted MSPB broad new authority to conduct independent, objective studies of the federal merit systems and federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM’s regulations and review and report on OPM’s significant actions. The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles and delineated specific

¹ MSPB’s last authorization expired more than 8 years ago, on September 30, 2007. The authorization of appropriations for MSPB was originally permanent under MSPB’s enabling statute, the Civil Service Reform Act of 1978 (“CSRA”), Pub. L. No. 95-454, 92 Stat. 1111. This was changed, however, under the Whistleblower Protection Act of 1989 (“WPA”) to a 6-year period that expired at the end of Fiscal Year 1994. (Pub. L. 101-12, 103 Stat. 34,5 U.S.C. 5509 note). In 1994, MSPB’s authorization was extended through Fiscal Year 1997 (Pub. L. 103-424, 108 Stat. 4361), placing it on the same reauthorization cycle as that of OSC. MSPB was subsequently reauthorized for five years, through Fiscal Year 2002 (Pub. L. 104-208, 110 Stat. 3009), and again through Fiscal Year 2007 (Pub. L. 107-304, 116 Stat. 2364). Our request for reauthorization would amend Section 8(a)(1) of the WPA to authorize MSPB for an additional 5 years, through Fiscal Year 2020.

actions and practices as the prohibited personnel practices that were proscribed because they were contrary to merit system values. *See* 5 U.S.C. §§ 2301 and 2302. Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. Law. No. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. Law 112-199; the Veterans Access, Choice and Accountability Act of 2014, Pub. Law 113-146; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 1201.3.

B. MSPB's Adjudication Function

The statutory responsibility for which MSPB is probably most well-known is its role in adjudicating appeals filed by federal employees in connection with adverse employment actions. At the outset, I would like to point out that MSPB is not involved at any point with any action or inaction by a federal agency. Only *after* a federal agency imposes an adverse personnel action upon a federal employee, and the federal employee chooses to exercise his or her statutory right to file an appeal with MSPB, does our agency become involved. Once an appeal is filed, an MSPB administrative judge in one of MSPB's regional or field offices will issue an initial decision addressing the appellant's claims. Thereafter, either the appellant or the named federal agency may appeal the MSPB administrative judge's initial decision to the three-member Board² ("Board") at MSPB Headquarters in Washington, D.C., which will review that decision and then issue a final decision. Both the Board and MSPB administrative judges adjudicate appeals in accordance with statutory law, federal regulations, precedent from United States federal courts, including the Supreme Court of the United States and the United States Court of Appeals for the Federal Circuit, and MSPB precedent.

C. MSPB Adjudication Statistics

Among the MSPB's most significant accomplishments in recent years has been the raw volume of adjudication decisions we have issued. I am proud to report that from Fiscal Year 2012 through Fiscal Year 2015, MSPB issued

² Currently, there are only two Board members: the Chairman and the Member. The Office of the Vice Chairman has been vacant since March 2015. President Obama has nominated Mark Cohen – currently the Principal Deputy Special Counsel at the Office of Special Counsel – to be a Member of the MSPB and to be designated Vice Chairman upon appointment. Mr. Cohen's nomination has been referred to the Senate Homeland Security and Governmental Affairs Committee for consideration.

decisions in 61,017 initial appeals, petitions for review before the Board, and cases that were adjudicated by administrative law judges, with whom MSPB contracts, to adjudicate certain types of appeals. During that period, the Board issued 6,221 decisions, MSPB administrative judges in MSPB's regional and field offices issued 54,584 decisions, and administrative law judges issued 212 decisions. It should be noted that this extraordinary volume of cases resulted in large part from the receipt of almost 32,400 appeals in Fiscal Year 2013 from federal employees who were furloughed³ as a result of government-wide sequestration, pursuant to the Budget Control Act of 2011. In years prior to the receipt of these "furlough appeals," MSPB typically received between 5,000 and 6,000 initial appeals filed by federal employees or former federal employees. So, to say that the last few years at MSPB have been historic in terms of our adjudication function would be a vast understatement.

During Fiscal Years 2012 and 2013, MSPB's regional and field offices processed initial appeals in an average of 93 days. The Board issued decisions on petitioners for review in an average of 263 days during that same period. The case processing timeframes for Fiscal Years 2014 and 2015 were skewed because of the historic number of appeals received near the end of Fiscal Year 2013. During Fiscal Year 2014, MSPB's regional and field offices processed initial appeals in an average of 262 days, while the Board processed cases in an average of 287 days. During Fiscal Year 2015, MSPB's regional and field offices processed appeals in an average of 499 days, while the Board processed cases in an average of 190 days. I am pleased to report that because of the great effort of our staff in both MSPB's regional and field offices, and MSPB Headquarters in Washington, D.C., we have completed adjudication in approximately 97% of the furlough appeals MSPB received in during Fiscal Year 2014.

Additionally, the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), which became effective in December 2012, resulted in substantive changes in MSPB's adjudication and reporting of appeals involving allegations of illegal retaliation for protected disclosures. By clarifying the definition of the term "protected disclosure," the WPEA ensured that appeals over which MSPB had previously lacked jurisdiction – based on precedent of the United States Court of Appeals for the Federal Circuit – would survive jurisdiction and advance to a hearing on the merits before MSPB administrative judges. The WPEA also required MSPB to annually report the outcomes of such appeals, along with the number of such appeals filed in MSPB's regional and field offices and the number

³ Federal employees who are subject to a "furlough of 30 days or less" have appeal rights to MSPB. 5 U.S.C. § 7512(5). This means MSPB has jurisdiction over such appeals and is required, under statute, to provide appellants with a hearing if requested.

of petitions for review filed with the Board. Information on these appeals can be found in MSPB's Annual Performance Reports, which can be found on MSPB's website at: <http://www.mspb.gov/publicaffairs/annual.htm>

Finally, I would like to inform this Subcommittee that MSPB continues to issue high quality legal decisions that are viewed favorably by the United States Court of Appeals for the Federal Circuit, MSPB's primary reviewing court. During Fiscal Year 2012, the Federal Circuit left 94% of MSPB's decisions unchanged. The percentages for Fiscal Years 2013, 2014 and 2015 were 93%, 96%, and 96%, respectively. Simply put, I believe these numbers are a reflection of the tremendous talent and ability of our administrative judges and the attorneys in MSPB's Office of Appeals Counsel and Office of General Counsel.

D. MSPB's Studies Function

In addition to adjudicating appeals, MSPB is required under statute to:

Conduct, from time to time, special studies relating to the civil service and to the other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

5 U.S.C. § 1204(a)(3).

MSPB's studies, which are based on empirical research, are typically government-wide in scope and take a long-term perspective on effective management of the federal workforce. As I have said many times, our adjudication function addresses events that have occurred in the past, while our studies function is typically forward-looking in nature. The studies function complements MSPB's adjudication function and its review of OPM regulations, enabling MSPB to fulfill its role as guardian of federal merit systems. Ultimately, MSPB seeks to ensure that the federal workforce is managed in accordance with the merit system principles, *see* 5 U.S.C. § 2301, and free from prohibited personnel practices, *see* 5 U.S.C. § 2302. Among other things, MSPB studies aim to educate MSPB stakeholders, including parties to future litigation, about MSPB practice and procedure, and particular aspects of federal personnel law.

During my time as Chairman, MSPB has issued a number of studies that I believe have been of significant value to federal employees, federal agency managers and supervisors, and other MSPB stakeholders. Among the studies we have issued are:

- *Whistleblower Protections for Federal Employees* (September 2010);
- *A Call to Action: Improving First-Level Supervision of Federal Employees* (May 2010);
- *Veterans' Employment Redress Laws in the Federal Civil Service* (November 2014); and
- *What is Due Process in Federal Civil Service Employment?* (May 2015).

In February 2015, MSPB finalized its 2015-2018 research agenda, which was developed through an open and deliberative process that included a call for ideas and input, a public meeting at which the Board Members and key stakeholders discussed the proposed agenda, and formal approval by all three Board members. I am pleased to inform the Subcommittee that, among others, MSPB will be issuing reports addressing the following issues: 1) Whistleblowing After the Whistleblower Protection Enhancement Act of 2012; 2) the Incidence and Impact of Poor Performance by Federal Employees; and 3) Current Challenges Related to the Human Resources Workforce.

I encourage all Members of the House Committee on Oversight and Government Reform, and their staffs, to review these reports and contact MSPB when considering legislation related to federal personnel matters. While admittedly biased, I can state confidently that these reports will be of significant value to you. MSPB studies can be found on our website at <http://www.mspb.gov/studies/browsestudies.htm>

E. Recent Employee Viewpoint Survey Results at MSPB and MSPB's Ranking in the Partnership for Public Service's "Best Places to Work in the Federal Government" Rankings.

I am extremely proud to report to the Subcommittee that MSPB's results for the Fiscal Year 2015 Federal Employee Viewpoint Survey ("EVS") were among the most positive we have received during my tenure as Chairman. I believe this is noteworthy because Fiscal Year 2015 was among the most challenging years MSPB has ever faced from a workload standpoint.

The response rate by MSPB employees in the Fiscal Year 2015 EVS was 72%, which represents a higher response rate than the government-wide response rate. Specifically, MSPB received positive responses from its employees in 71 of the 72 core questions in the EVS. With few exceptions, this result was the highest since MSPB's 2011 EVS. The EVS questions that received the largest increases in positive responses by MSPB employees were:

- Managers communicating the goals and priorities of the agency;

- Having sufficient resources to get the job done;
- Senior leaders generate high levels of motivation and commitment in the workforce; and
- Satisfaction with the policies and practices of senior leaders

Additionally, the following EVS questions received the highest percentage of overall positive responses:

- Willingness to put an extra effort to get the job done;
- Knowing how your work relates to the agency's goals and priorities;
- Interest in looking for ways to do your job better;
- The importance of your work; and
- The overall quality of the work done by your unit.

Moreover, in the recently released “Best Places to Work in the Federal Government,” MSPB placed 8th overall among small agencies and was among the five “most improved small agencies” in the federal government. It goes without saying that MSPB leadership is both proud of, and encouraged by, these very positive results.

F. Anticipated Challenges

Although I believe that the current state of MSPB is strong, we nonetheless face significant challenges moving forward. Among our greatest challenges is the possibility of being required to adjudicate appeals for large numbers of federal employees in, at best, unreasonable time frames, under conditions which, in my opinion, call into question the constitutional validity of the entire appellate process.

In 2014, Congress passed, and the president signed into law, the Veterans Access, Choice, and Accountability Act of 2014 (“the 2014 Act”), Public Law 113-146. Section 707 of this law made significant changes to the disciplinary process at the Department of Veterans Affairs with respect to Senior Executive Service (“SES”) employees. Under section 707, SES employees subjected to adverse personnel actions are permitted to appeal to MSPB not later than seven days after the date of the personnel action. Once an appeal is filed at MSPB, MSPB is required to refer the appeal to an MSPB administrative judge, who shall “expedite” such appeal and issue a decision “not later than 21 days after the date of the appeal.” Under the law, if an MSPB administrative judge fails to issue a decision within 21 days, the Secretary’s decision to either remove or transfer the employee becomes final. Significantly, the decision of the MSPB administrative judge in any such appeal shall be final and shall not be subject to further appeal,

either to the three-member Board at MSPB Headquarters in Washington, D.C., or to any federal court.

Since the 2014 Act, a number of pieces of legislation have been introduced in both the House of Representatives and the Senate that would expand the 2014 Act's expedited MSPB appeal process for SES employees to *all* employees of the Department of Veterans Affairs. Indeed, the House of Representatives passed H.R. 1994 – the VA Accountability Act of 2015 – which did this, albeit allowing MSPB administrative judges 45 days, instead of 21 days, to issue final decisions in appeals. This same appellate process has also been included in bills applicable to federal employees outside of the Department of Veterans Affairs, such as SES employees at the Internal Revenue Service.

As an initial matter, to be clear, in no way am I suggesting that it is unwise policy for our government to ensure that our nation's veterans receive all that they deserve and to which they are entitled, or that poor performing employees have an entitlement to continued federal employment. However, any law that limits the amount of time that MSPB has to adjudicate an appeal (and issue a written decision), prevents participation by the three-member Board in the MSPB adjudication process, or requires the parties (appellants and agency representatives) to litigate cases at warp speeds is of serious concern to me and our agency.

First, for obvious reasons, requiring MSPB to docket an appeal, preside over discovery, hold a hearing, and issue a written decision within 21 (or even 45)⁴ days would pose significant, and possibly crippling, challenges to our agency. If this process were to be expanded to all employees of the Department of Veterans Affairs, or worse, all employees in the federal government, it is, plainly stated, difficult for me to see how our agency could continue to produce the same quality decisions as we have in the past.

Additionally, I would like to note that the above-referenced provisions of the 2014 Act are currently the subject of a constitutional challenge at the United States Court of Appeals for the Federal Circuit. *See Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). The plaintiff in that litigation is alleging that Section 707 of the 2014 Act is unconstitutional primarily on two grounds:

⁴ Because the 2014 Act provides that the Secretary's decision becomes final unless a decision is issued within 21 days, MSPB administrative judges are under intense pressure in these appeals to issue decisions within those 21 days.

- By permitting the Department to remove a tenured federal employee without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee's right to constitutional due process as articulated by the Supreme Court; and
- By removing the three-member Board from the MSPB appellate review process and permitting MSPB administrative judges to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

G. MSPB's Legislative Proposal

Clarification of MSPB's Authority to Collect Information Incident to Its Studies Function

MSPB's legislative proposal concerns its statutory responsibility to conduct studies. As stated above, under current law, MSPB "shall conduct . . . special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." 5 U.S.C. § 1204(a)(3). Current law further provides that, in carrying out this function, MSPB "shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from agencies as needed." 5 U.S.C. § 1204(e)(3).

Among the research methods MSPB uses to conduct studies are literature review, questionnaires to federal agencies, focus groups, statistical analysis of personnel records, interviews of experts, and surveys of federal employees. In particular, the federal employee surveys provide important insights into employee perceptions and experiences, and help MSPB round out and focus its findings and conclusions on the health of the merit systems. Information obtained from surveys has been featured in several MSPB reports, including: *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015); *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012); *Employee Perceptions of Federal Workplace Violence* (2012); *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (2011); and *Women in the Federal Government: Ambitions and Achievements* (2011).

Unfortunately, recent experience has shown that sometimes federal agencies misunderstand or resist MSPB's survey efforts. Simply stated, federal agency cooperation – in connection with surveys – is essential for MSPB to collect the data it needs. In order to conduct a successful survey, among other things MSPB must acquire a list of valid email addresses for a sample of employees in various agencies; work with agency IT departments to prevent spam filters and security screens from blocking survey invitations; and ask agency officials to inform their employees that an MSPB survey is legitimate and may be taken during work hours. I believe that amending the law to make explicit MSPB's authority to conduct employee surveys would help MSPB highlight to agencies the importance of their cooperation in surveys.

MSPB also asks that the law be amended to give it express statutory authority to gather records and information concerning applicants for federal employment. The merit system principles apply to hiring, and applicants are protected from prohibited personnel practices. See 5 U.S.C. §§ 2301(b)(1) & (2), 2302(a)(2)(A), (b). However, the extent to which MSPB's existing authority to obtain records and information in support of its studies function applies to records and information concerning applicants is something of a gray area. As a result, MSPB's research into the treatment of applicants and the applicant experience has not been as robust as it might otherwise be. The requested statutory amendment would provide MSPB with an important tool for assessing federal hiring practices and making recommendations for improvement.

H. Conclusion

This concludes my testimony. I will be happy to answer any questions that the Subcommittee has.

Susan Tsui Grundmann
Chairman, U.S. Merit Systems Protection Board

Susan Grundmann was nominated by President Obama in July 2009 to serve as a Member and Chairman of the U.S. Merit Systems Protection Board. She was confirmed by the Senate in November 2009. Her term will expire in March 2016.

Prior to her appointment as MSPB Chairman, Ms. Grundmann was General Counsel to the National Federation of Federal Employees (NFFE). At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia.

Ms. Grundmann served previously as General Counsel to the National Air Traffic Controllers Association. From 2003 to 2009, Ms. Grundmann also instructed on Federal sector law at the William W. Winpisinger Education Center in Placid Harbor, Maryland.

Ms. Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and then worked in both private practice and at the Sheet Metal Workers National Pension Fund.