



May 5, 2014

William D. Spencer, Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Dear Mr. Spencer:

The Government Accountability Project (GAP) submits the following comments in response to the Merit Systems Protection Board's (Board or MSPB) proposed changes in practices for employee appeals. 79 *Fed Reg.* 18658 (April 3, 2014). This proposal is an updated version of those proposed in 2012, for which GAP submitted attached, July 23, 2012 comments. Those comments credited ten significant, welcome nuts and bolts changes to make the Board more accessible to employees, particular those without counsel. GAP's comments also noted a serious conceptual concern: the Board gratuitously proposed to excuse agencies from their normal burdens of proof when employees file, *inter alia*, Individual Right of Action (IRA) cases alleging whistleblower retaliation.

Unfortunately, it appears that the new proposal eliminates all the positive improvements making more accessible to employees, while continuing to ease agency burdens when an employee files an IRA to allege retaliation. There is no basis in statutory language, legislative history or rational public policy to excuse agencies from accountability for the merits of its decisions in any context, whether it be an appeal, IRA or any other relevant legal proceeding. Specific comments are below.

1. Comments filed today are well-taken by the U.S. Office of Special Counsel (OSC), which challenged expanded OSC exhaustion requirements as a prerequisite for Board appeals. Without any significant benefit, the impact would be to increase employee burdens in a *de novo* proceeding to reconstruct the history of OSC action, while increasing litigation burdens and delays for determinations irrelevant to the merits.

The requirement also contradicts express congressional intent since 1994, which is consistent with the Special Counsel's reasoning. As House Civil Service Subcommittee Chairman Frank McCloskey and floor manager for 1994 WPA amendments explained,

There should not be any confusion. To exhaust the OSC administrative remedy and qualify for an individual right of action, an employee or applicant only must allege a violation of [section] 2302(b)(8). The examples fo alleged reprisals listed in the OSC complaint, and the scope of the evidence that the whistleblower presents to the OSC, are completely irrelevant to establish jurisdiction for an IRA.

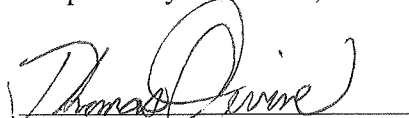
145 *Cong. Rec.* 29,353 (1994)

2. The ten positive tangible improvements in the proposed 2012 rule making the Board less aloof and more accessible to employees appear to have vanished without explanation. Those changes, such as facilitating settlement opportunities and permitting reply briefs by employees when the burden is on them in Petitions for Review, had the potential to make a significant difference. While GAP has been told that many or all were adopted independently, there is no reference in the new proposal's supplemental comments how they were resolved. The Board should disclose how they have been adopted independently, or explain why these common sense reforms making rights more user-friendly were abandoned.

3. Without *any* reference to statutory language or legislative history, the Board proposes that when employees assert whistleblower retaliation rights through the OSC and proceed to an IRA, agencies may discipline them without a preponderance of supporting evidence, or take performance-based actions without even the scintilla of substantial evidence. The functional impact will be to severely punish employees for choosing to act through an IRA instead of a Chapter 77 appeal. The public service issues of employee and agency accountability to the merit system are identical in both contexts. As seen in the earlier attached comments, it also contradicts plain statutory language.

There is no excuse to ease agency requirements to prove misconduct, merely because the employee chose to operate first through the Office of Special Counsel, often the only practical short-term option for a whistleblower whose salary has been cut off. Rather, the Board's proposed rule should specify the opposite: Chapter 43 and 75 standards for employee accountability should govern determinations of an agency's independent justification for personnel actions in whistleblower cases under 5 USC 1221.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas Devine", written over a horizontal line.

Thomas Devine
Legal Director

Government Accountability Project

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July 23, 2012

William D. Spencer, Clerk of the Board,
Merit Systems Protection Board,
1615 M Street NW., Washington, DC 20419

Dear Mr. Spencer:

The Government Accountability Project {GAP} submits the following comments in response to the Merit Systems Protection Board's proposed changes in practices and procedures for employee appeals. *77 Fed.Reg.* 337763 (June 7, 2012). GAP believes that nearly all the Board's proposed changes are useful, nuts and bolts improvements that will make due process rights more accessible, especially for employees proceeding without counsel. We are deeply concerned, however, that proposed "choice of remedy" modifications unnecessarily would force whistleblowers who first seek help from the Office of Special Counsel ("OSC") to sacrifice the most elementary employee rights in the civil service system if they proceed with an Individual Right of Action. ("IRA") shrink merit system rights of whistleblowers. There is no basis in law or public policy to force that Catch 22 choice.

POSITIVES

For federal workers without counsel, overly-formalistic, rigidly enforced procedures long have been a barrier to justice under the merit system. The Board should be commended for modernizing and streamlining employee burdens. Of particular significance, proposed sections –

- * 1201.4(j) relaxes rigid filing deadlines to account for mail delays;
- * 1201.24(a)(7) reduces employee documents attachment burdens when filing an appeal;
- * 1201.34(e)(1) applies general principles of jurisprudence to accept *amicus curiae*, or friend of the court, briefs.
- * 1201.53(b) gives Administrative Judges ("AJ's") the authority to order that agencies pay for and provide hearing transcripts to employees.
- * 1201.58(c) permits parties to rebut new evidence added just before the record closes.
- * 1201.73(a) summarizes an agency duty to cooperate, both with respect to providing witnesses and documents sought by employees in pre-hearing discovery.

* 1201.112(a)(4) and 1201.113(a) permit parties to settle and have an Administrative Judge's ruling vacated, if agreement is reached prior to the deadline for filing a Petition for Review appealing the AJ's ruling to the full Board.

* 1201.113(f) institutionalizes referrals to the Office of Special Counsel for disciplinary investigation of any employee found to have committed a prohibited personnel practice.

* 1201.114(a) permits employees to file reply briefs rebutting the agency's response to a Petition for Review.

* 1201.201(a) institutionalizes in Board regulations its authority to provide compensatory damages.

NEGATIVE

In proposed sections 1201.21(d) and 1209.2(c) and (d), the Board would strip agencies of the burden to prove the merits of its charges against employees who file Individual Rights of Action ("IRA's) or the reasonableness of its penalty, including whether termination or another personnel action "will promote the efficiency of the service." The Board's rationale is that the changes are necessary to comply with 1994 amendments to the Whistleblower Protection Act ("WPA") requiring employees to make a choice of forum. Those amendments are codified in 5 USC 7121(g)(3). Unless modified, this regulation could force employees to choose between their rights under the WPA, or their rights under the rest of the Civil Service Reform Act. There is no sound basis in policy or law to force that choice, which in terms of damage to the merit system would far outweigh the nuts and bolts benefits in the proposed regulations.

In overview, the Board's job is to protect the merit system. While it is necessary to comply with statutory requirements, the Board should not engage in any nondiscretionary actions that shrinks the scope of the merit system. That is what has happened here.

First, the provision in the 1994 amendments was meant only to apply to employees in collective bargaining agreements. ("CBA's") It provides no authority to shrink the rights of others not covered by CBA's. Nor is there any policy basis to strip OSC complainants of civil service merit system rights that govern all other Board proceedings. The choice of forum provision was enacted to prevent duplicative, parallel due process proceedings conducted by the Board (either through a direct appeal or OSC-based complaint), at the same time as a labor management conducted by the Federal Labor Relations Board through its arbitrators. There is not a word of legislative history, or any record at all, that it was intended to require inconsistent standards for employees who start with the OSC, compared to starting with the Board. Nor is there any record basis that the amendments force the Board to discard the efficiency of the service standard or create an exception to the overriding requirement of 5 USC 7701(c)(1) that an agency must prove performance-based charges with substantial evidence, and misconduct-based adverse action by a preponderance of the evidence.

Indeed, the Board does not have that authority. Prohibited personnel practices are an additive basis to reject an agency action [“notwithstanding paragraph (1)”], not substitutive. Congress has not created an “WPA OSC” exception to section 7701(c)(1), and the Board cannot do so on its own.

If the Board feels compelled to adjust regulations for the 1994 amendments, it should act in a way that minimizes dilution of the merit system. To the maximum extent possible, restructuring hearing procedures should not affect overall agency burdens. To illustrate, if an agency cannot prove the merits of its charges, that factor combined with protected activity and knowledge should satisfy the nexus element for a *prima facie* case of retaliation as a matter of law. As a matter of law, it also should defeat the agency’s clear and convincing evidence defense of independent justification, based solely on the strength of evidence criterion to assess the agency defense.

Similarly, there is no authority in law to remove an employee for reasons that do not promote the efficiency of the service. Correspondingly, the final regulation should specify that as a matter of law if there is protected activity and knowledge, a personnel action that does not promote the efficiency of the service establishes compliance with the nexus element for a *prima facie* case of retaliation, and as a matter of law defeats the clear and convincing evidence defense based solely on failure to meet the discriminatory treatment criterion.

In short, it is unnecessary to overturn longstanding Board case law and doctrines of jurisprudence, merely for compliance with a 1994 WPA amendment passed to avoid duplication between arbitrations, and OSC or Board rulings or hearings. If the Board feels compelled, however, to act within the law it must make corresponding adjustments so that it does not arbitrarily force employees pursuing their WPA rights through to Special Counsel to sacrifice the most basic rights of the civil service system.

Respectfully submitted,

Thomas Devine
Legal Director