Description of document:	A copy of each response to a Question for the Record (QFR) provided to Congress by the Merit Systems Protection Board (MSPB), 2014-2016
Requested date:	31-August-2016
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U.S. Merit Systems Protection Board

1615 M Street, NW, Suite 500

Washington, DC 20419

VIA email

September 12, 2016

Your Freedom of Information Act (FOIA) request with tracking number MSPB- 2016-000199 has been processed with the following final disposition: Full Grant. Your request was processed in accordance with 5 C.F.R. 1204 which implements the FOIA.

Your August 31, 2016 request sought electronic copies of "A copy of MSPB responses to congressional Questions For The Record (QFRs) during Calendar Years 2014, 2015, 2016."

After conducting a thorough search, we have located 2 responsive records. We are releasing in full an April 29, 2015 letter from Merit Systems Protection Board (MSPB) Chairman Susan Grundmann to Congressman Elijah Cummings, Ranking Member of the Committee on Oversight and Government Reform, and MSPB's Responses to Post-Hearing Questions for the Record related to the December 16, 2015 Reauthorization Hearing for the MSPB, Office of Government Ethics and Office of Special Counsel. The records requested are being made available to you as attachments to this email. Because MSPB is making the responsive records available to you electronically, you will not receive a CD or paper copies of these records.

If you have any questions regarding this request, or if you disagree with this disposition, in whole or part, you have the right to seek assistance from the FOIA Public Liaison, contact the Office of Government Information Services to participate in dispute resolution services, or appeal the determination.

If you wish to contact the FOIA Public Liaison, you may do so via email to foiahq@mspb.gov or telephone at (202) 254-4475. If you wish to participate in dispute resolution services, you may contact the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you wish to appeal the determination, you may do so by submitting your appeal through FOIAonline (https://foiaonline.regulations.gov/foia/action/public/home) or by mailing your appeal to: Chairman, c/o Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW Suite 500, Washington, DC 20419. Your appeal should be identified as a "FOIA Appeal" on both the letter and the envelope, if applicable. It should include a copy of your original request, a copy of this letter and your reasons for appealing this decision. You may also submit your appeal by email to foiahq@mspb.gov or by fax at (202) 653-7130. Your appeal must be filed within ninety (90) days from the date of this letter.

Sincerely,

//signed//

Karin Kelly

Government Information Specialist

Merit Systems Protection Board

U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Chairman
1615 M Street, NW
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Chairman

April 29, 2015

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Cummings:

I am writing in response to your staff's April 27, 2015, request for information from the United States Merit Systems Protection Board ("MSPB"). It is my understanding that this request is related to a hearing the Committee on Oversight and Government Reform will hold on April 30, 2015, entitled "EPA Mismanagement."

I would like to emphasize that MSPB is prohibited by statute from providing advisory opinions in any matter. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions.") As such, in response to your staff's questions, we are only providing the current state of the law, as reflected in MSPB decisions or statute. Our responses should not be construed as an indication of how an MSPB administrative judge, or the three-member Board ("Board") at MSPB Headquarters in Washington, D.C., would rule in any future case.

I would also like to emphasize that, as a quasi-judicial agency, MSPB is not involved in any managerial action or inaction by any official of a federal agency. To the extent that a federal agency chooses to impose an adverse action against an employee, and the employee exercises his or her statutory right to file an appeal with MSPB, MSPB would adjudicate the appeal in accordance with statutory law, MSPB precedent, and precedent from United States federal courts, including the United States Court of Appeals for the Federal Circuit.

The following are the questions from your staff and MSPB's answers:

Question #1

Does current law allow an agency to take adverse action (such as removal) against an employee based solely on the employee's sworn statement or admission? If so, provide relevant precedent.

Answer to Question #1

The Board has sustained adverse actions (including removal) when an employee's admission was the sole evidence presented by the agency to support its charge. In Cole v. Department of the Air Force, 120 M.S.P.R. 640 (2014), the Board reversed the decision of the MSPB administrative judge and affirmed the agency's removal of the employee based on his marijuana use. The agency charged the appellant with the "use of an illegal drug," and the only evidence in this case was the appellant's admission of marijuana use. The Board found the admission, with nothing more, sufficient to sustain the agency's charge. Specifically, the Board stated:

> [A]n agency may rely on an appellant's admission in support of its charge, Leaton v. Dept. of the Interior, 65 M.S.P.R. 331, 337 (1994) . . . , and appellant's admission to a charge can suffice as proof of the charge without additional proof of the agency. See Wells v. Dept. of Defense 53 M.S.P.R. 637 (1992) ("appellant's own admission that he engaged in alleged conduct in violation of a regulation is sufficient proof to sustain the charge of disregarding a regulation or directive."); Mascol v. Dept. of Navy, 7 M.S.P.R. 565, 567 (1981) (the appellant's admission was sufficient to sustain the charge).

Cole, 120 M.S.P.R. at 645.

The Board further stated in Cole that the "appellant's admissions [regarding his marijuana use] constitute preponderant evidence that he used an illegal drug, as charged [by the agency] . . ." Id. at 646.

Additionally, in Wells v. Dept. of Defense, 53 M.S.P.R. 637 (1992), the agency charged the appellant with, among other things, the violation of an agency regulation related to timekeeping. The appellant admitted that his conduct violated the regulation. The Board held that the appellant's admission constituted "sufficient proof of the misconduct." Id.

Question #2

Does this law apply to violation of agency policy that does not amount to a criminal violation?

Answer to Question #2

The Board has not addressed specifically - in the context of a violation of an agency policy that does not also amount to a criminal violation - whether an employee's admission, without additional evidence, can be sufficient to sustain an adverse action. Nevertheless, as stated in response to Question #1, the Board has held that admissions, without further evidence, can be sufficient to sustain agency charges and the penalty of removal.

Question #3

What is the standard of evidence required for removal in non-criminal agency policy violations?

Answer to Question #3

Removals for non-criminal violations of agency policy will typically be based on charges of employee misconduct. In cases brought pursuant to 5 U.S.C. Chapter 75 (allegations of misconduct), an agency has the burden of proof in any appeal filed at MSPB by an employee. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b). An agency must prove the alleged misconduct by a "preponderance of the evidence." 5 C.F.R. § 1201.56(b)(1)(ii). Preponderance of the evidence is defined as: "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q). The United States Supreme Court has stated that a preponderance of the evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence. In re Winship, 397 U.S. 358, 371-72 (1970).

Regarding the evidence that an agency must produce to an appellant, the Board has held that "an appellant is not entitled ... to material on which the agency did not rely" in charging the employee. Forrester v. Dept. of Health and Human Services, 27 M.S.P.R. 450, 453-54 (1985), citing Klein v. Dept. of Labor, 6 M.S.P.R. 292, 295 (1981). Thus, prior to the imposition of any adverse action, an employee is only entitled to the evidence upon which an agency intends to rely on to support its charge.

Question #4

Under current law, can an agency place an employee on indefinite suspension where alleged employee misconduct has been referred to the U.S. Attorney's Office for potential criminal prosecution? If so, does the agency need to have specific knowledge of the potential criminal violation?

Answer to Question #4

With respect to the imposition of an indefinite suspension, an agency must prove that it: 1) imposed the suspension for an authorized reason; 2) the suspension has an ascertainable end, *i.e.*, a determinable condition subsequent that will bring the suspension to a conclusion; 3) the suspension bears a nexus to the efficiency of the service; and 4) the penalty is reasonable. Hernandez v. Dept. of the Navy, 120 M.S.P.R. 14 (2013). Among the authorized reasons for imposing an indefinite suspension is an agency's reasonable belief that an employee has committed a crime for which a sentence of imprisonment could be imposed. Gonzalez v. Dept.of Navy, 120 M.S.P.R. 14 (2013). Other authorized reasons include an agency's legitimate concerns regarding an employee's serious medical condition and the suspension of an employee's access to classified information. Gonzalez v. Dept. of Homeland Security, 114 M.S.P.R. 318, 327 (2010). Regarding an agency's concern that an employee has committed a crime for which imprisonment could be imposed, the Board has held that the standard for imposing an indefinite suspension in this circumstance is not whether the agency could prevail on the criminal charge, but rather whether it had a reasonable belief that the appellant committed a crime punishable by a term of imprisonment when it imposed the suspension. Dalton v. Dept. of Justice, 66 M.S.P.R. 429, 435-36 (1995).

In Martin v. Dept. of Treasury, the Board held that "an investigation, in and of itself, is insufficient, to give rise to reasonable cause." 12 M.S.P.R. 12, 19 (1982). In Thompkins v. U.S. Postal Service, 23 MSPR 5, 10 (1984), the Board held that the mere referral to the Department of Justice, without more, would not be enough to meet the "reasonable cause" standard.

Examples that would establish "reasonable cause" under § 7513(b)(1) include: (1) an indictment; (2) an employee arrested and held for further legal action by a magistrate; (3) an arrest or investigation accompanied by such circumstances showing reasonable cause; (4) criminal information; and (5) certain egregious acts such as murder or national security offenses, which are detrimental to the agency's mission, brought to the agency's attention via the news media. Gonzales v. Dept. of Treasury, 37 M.S.P.R. 589, 591 (1988).

Question #5:

Does an agency have to wait until the U.S. Attorney's Office or the Inspector General's Office completes its investigation in order to proceed with an administrative action?

Answer to Question #5:

We cannot locate any Board decision that would prohibit an agency from imposing an adverse action against an employee (including removal) before a U.S. Attorney's Office or the Inspector General's Office completes its investigation. It is possible that, in making such a determination, an agency could have concerns in

connection with an employee's Fifth Amendment rights, or other concerns, that could impact its decision to impose an adverse action. Stated differently, the decision on when to impose an adverse action most likely depends on the facts and circumstances of each case.

Should you or your staff have any questions, please do not hesitate to contact Bryan Polisuk (202-254-4403) or Rosalyn Coates (202-254-4485) on my staff.

Sincerely,

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

c.c.:

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Post-Hearing Questions for the Record
Submitted to Susan Tsui Grundmann
Chairman, Merit Systems Protection Board

From Rep. Mark Meadows
Chairman, Subcommittee on Government Operations
Committee on Oversight and Government Reform
U.S. House of Representatives

Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization
December 16, 2015

1. **Have there been significant problems from the experiment in "all circuit" judicial review of whistleblower rulings? Do you oppose making that reform permanent?**

Under the Whistleblower Protection Act ("WPA"), the Merit Systems Protection Board ("MSPB") has jurisdiction to hear claims from federal employees when a personnel action was taken, or proposed to be taken, against such employee as a result of a protected disclosure. With the exception of cases involving certain discrimination claims (*see* 5 U.S.C. §§ 7702, 7703(b)(2)), the U.S. Court of Appeals for the Federal Circuit had been the exclusive forum for judicial review of final decisions of the MSPB since the Federal Circuit's creation in 1982. *See United States v. Fausto*, 484 U.S. 439, 449 (1988).

Section 108 of the Whistleblower Protection Enhancement Act ("WPEA"), which amended the WPA, included the so-called "all circuit review" provision, under which individuals – for a period of two years – could appeal certain final orders or decisions of the MSPB to the United States Court of Appeals for the Federal Circuit or "any other court of appeals of competent jurisdiction." 5 U.S.C. § 7703(b)(1)(B). On September 26, 2014, Congress extended this provision for three additional years. Pub. L. No. 113-170, 128 Stat. 1894 (2014).

The MSPB is not aware of any "significant problems" resulting from all-circuit review. According to the legislative history of the WPEA, the purpose of the all-circuit review provision of the WPEA was to allow Congress the opportunity to evaluate whether decisions of courts other than the Federal Circuit in whistleblower cases are consistent with congressional intent and the Federal Circuit's interpretation of WPA protections, guide congressional efforts to clarify the laws if necessary, and determine if all-circuit review should be made permanent.

As of the date of this submission, MSPB is aware of a total of 6 decisions in whistleblower cases issued by the following federal courts other than the Federal Circuit:

US Courts of Appeal for the Fourth, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuit. In each decision, the court affirmed the final decision of the MSPB. The only precedential decision was issued by the Fifth Circuit in *Aviles v. MSPB*, Case No. 14-60645.

MSPB takes no position on whether all-circuit review should be made permanent. This is a policy decision for Congress in light of its intent in enacting the all-circuit review provision of the WPEA.

2. **Approximately how many furlough appeals were filed, when were they filed, and what is the current status of those appeals? How did government-wide sequestration and the furlough appeals impact MSPB's operations and the non-furlough appeal workload? What are the challenges and long-term implications to MSPB from the receipt of a large number of furlough appeals?**

A total of 33,141 furlough appeals were filed in MSPB's regional and field offices during the spring and summer of calendar year 2013. Almost 32,000 of those appeals were filed during July and August 2013. For perspective, typically between 5,000 and 6,000 appeals are filed in MSPB's regional and field offices in a given year. As of the date of this submission, MSPB has processed and decided more than 97% of those appeals.

Regarding the impact of these appeals on MSPB's operations and non-furlough appeal workload, it was severe and long lasting. The receipt of such a high volume of appeals in such a short period of time wreaked havoc on MSPB's electronic filing system. The electronic filing system quickly became overloaded – and in one instance, more than 1,600 furlough appeals were filed on a single day[1] – causing breakdowns and delays which led to many appellants choosing to refile their furlough appeals on paper, and prohibiting appellants who were filing non-furlough appeals from accessing the system. Simply put, MSPB's electronic filing system was not built to receive such a high volume of appeals.

Once received, the influx of furlough appeals led to an overwhelming amount of initial administrative work, including docketing each furlough appeal and inputting required case information so that MSPB records would be complete and accurate. Once docketed, each furlough appeal had to be acknowledged; an operation that was shared by *all* MSPB offices nationwide. Once the acknowledgment process was completed, MSPB staff in the regional and field offices began the work of consolidating similar furlough appeals, so that they could be adjudicated as efficiently as possible. Only after all of this initial work was completed were MSPB administrative judges in the position to begin the

[1] For context, prior to the influx of these furlough appeals in 2013, a day on which 25 appeals were filed electronically at MSPB would have constituted a busy electronic filing day.

adjudication process. It should be noted that under statute, appellants in these cases had the right to a formal hearing. *See* 5 U.S.C. § 7701(a)(1) ("An appellant shall have the right … to a hearing for which a transcript shall be kept.") As stated above, 97% of these appeals have been processed and adjudicated by MSPB's administrative judges.

The impact of these furlough appeals on MSPB's non-furlough appeal workload has also been severe and long lasting. Because of the lack of any established MSPB or federal court law on this issue – and the uncertainty at the time of future budget sequestration-related furloughs – MSPB leadership decided to process the furlough appeals immediately. As a result, the processing and adjudication of many non-furlough appeals was significantly delayed. These delays continue to affect the processing of appeals that were filed in FY 2014 and 2015 and are still pending.

Finally, MSPB believes that the issues discussed above illustrate the challenges and long-term implication of budget sequestration both to MSPB and the entire federal workforce. It should not be forgotten that – in addition to MSPB's efforts to adjudicate these appeals – federal agencies named in these appeals were required to prepare and defend their decision to furlough employees in the MSPB litigation process. While it is impossible to determine the total amount of government time and resources used during this process, MSPB believes that Congress should consider whether the government-wide sequestration and the resulting mass number of furlough appeals truly achieved significant savings to American taxpayers.

3. **Has MSPB seen an increase in the number of non-furlough adverse action appeals over the last few years? Has a change in law led to an increase in appeals (*e.g.,* Veterans Access, Choice, and Accountability Act of 2014) and what is the impact/expected impact on MSPB's workload?**

From fiscal year 2008 through fiscal year 2015, the number of non-furlough adverse action appeals received by MSPB varied between about 2,500 and 2,800 per year. The average number of non-furlough adverse action appeals received each year during this period was about 2,660. So, the number of non-furlough adverse action appeals received by MSPB has remained relatively stable over recent years.

As of the date of this submission, the Veterans Access, Choice and Accountability Act of 2014 ("the 2014 Act") has not led to an increase in the number of appeals filed at MSPB. To date, MSPB has received ten separate appeals filed under provisions of the 2014 Act. The 2014 Act made significant changes to the appellate process at MSPB for covered employees, but we cannot say that the law will lead to any significant increase in the number of appeals received.

Regarding the impact of the 2014 Act on MSPB, I can confidently state that it has placed dramatic, and nearly impossible, burdens on MSPB staff. Simply put, requiring MSPB to

fully adjudicate an appeal within 21 days makes proper adjudication extremely difficult. In our limited experience adjudicating appeals filed under the 2014 Act, MSPB has observed that the appeals tend to be high profile in nature, involve complicated issues, and generally include a variety of disciplinary charges, employee defenses, and witnesses. An MSPB administrative judge could be required to address numerous discovery issues, hold a hearing, and issue a written decision, all within 21 days. Because there is no review by either the Board or a United States federal court, MSPB administrative judges understandably will feel pressured to address each and every aspect of the appeal in as thorough a manner as possible, especially given that these appeals involve federal employees who have been removed from the civil service or demoted from the Senior Executive Service. For instance, in an appeal involving a VA senior executive service employee in Phoenix, Arizona, the administrative judge in MSPB's Denver Office issued a written decision that totaled 61 pages. In another recent appeal involving the demotion of a VA senior executive, the administrative judge in MSPB's Philadelphia Office held a hearing *and* issued a written decision totaling 60 pages, both within 21 days. Plainly stated, it is difficult to imagine the same effort being sustainable in the time frames provided if this process is applied to a significant number of federal employees. If Congress deems it wise to do so, MSPB would likely need to consider significant changes to the manner in which it adjudicates such appeals.

Another significant recent change of law came with the enactment of the Whistleblower Protection Enhancement Act of 2012 ("WPEA"). In the three years since the enactment of the WPEA, the average number of Individual Right of Action (IRA) appeals filed with MSPB was 427 cases per year. This compares to an average of 246 IRA appeals filed in in the three years prior to passage of the WPEA (2010-2012). In addition to the increase in the number of IRA appeals, The WPEA has led to more and lengthier hearings in these cases, and potentially more supplemental proceedings involving damages. This is, in part, because the WPEA broadened the definition of the term "protected disclosure," which has led to more appeals surviving the jurisdictional stage and proceeding to a hearing on the merits of allegations.

4. **MSPB's legislative proposal includes a reauthorization for a five-year period as well as a provision that would provide MSPB with authority to obtain information concerning applicants for federal employment from OPM and other executive branch agencies. MSPB indicates this information would assist in conducting studies. What specific type of information are you seeking about applicants and how do you normally request and receive such information?**

Current law provides that, in studying the extent to which the civil service is managed according to the merit system principles and is free of prohibited personnel practices, *see* 5 U.S.C. § 1204(a)(3), 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). Without question this authority allows MSPB to obtain records and information concerning current and former federal employees. Nevertheless, the merit system principles apply to hiring, and applicants for employment are protected from prohibited personnel practices. *See* 5 U.S.C. §§ 2301(b) (1) & (2), 2302(a) (2)(A), (b). Thus, the requested statutory amendment is consistent with existing law. At the same time, the extent to which existing law allows MSPB to obtain records and information regarding applicants is unclear. As a result, MSPB has not attempted to gather the detailed information about applicants needed to support research into how job applicants view the accessibility, fairness, and integrity of the federal hiring process. The requested statutory amendment would provide MSPB with an important tool for understanding how ordinary citizens perceive and experience the federal recruiting and application system and would ensure that federal agencies provide MSPB the assistance it needs in fulfilling this statutory responsibility.

5. **In May 2015, MSPB issued a report titled "What is Due Process in Federal Civil Service Employment?" In the report, MSPB notes that from FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. As you are aware, there is a perception that is difficult to remove a federal employee as removal is an extremely difficult and lengthy process. Can MSPB tell us of the 77,000 discharged federal employees what percentage was removed during a probationary period?**

Of the 77,093 non-temporary employees removed from 2000 - 2014 because of misconduct or poor performance, 31,533, or 41%, were serving a probationary period at the time of removal.

Additionally, the question states that "there is a perception that it is difficult to remove a federal employee as removal is an extremely difficult and lengthy process." In this regard, the Committee may be interested in the following MSPB research findings:

- More than 90% of managers who took an adverse action against a tenured employee applied a higher standard of proof in reaching their decision than is required under the law.

- More than half of managers who supervised a probationary employee whose performance or conduct was unsatisfactory took no action during the probationary period -- when the removal process is simple and the employee's rights are very limited -- and instead allowed the unsatisfactory employee to gain tenure and full MSPB appeal rights.

- Most managers who have been involved in taking an adverse action based on poor performance or misconduct did *not* agree with the statement: "Federal employees have too many rights."

For a more detailed discussion of these and other findings related to managers' comprehension and use of the disciplinary system, please see MSPB's August 2015 publication, entitled "Adverse Actions: The Rules and the Reality," which can be found at:
http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1205509&version=1210224&application=ACROBAT

6. ***Kaplan v. Conyers***

a. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision in Kaplan v. Conyers since 2013?

In *Kaplan v. Conyers*, the Federal Circuit ruled *en banc* that MSPB has no jurisdiction to review the merits of a personnel action resulting from a determination that an employee in a "non-critical sensitive position" is ineligible to hold such a positon. The Supreme Court declined to review the Federal Circuit's decision in *Conyers*. As a result, since 2013, MSPB administrative judges and/or the full Board cannot address the merits in such appeals, and are limited to a cursory review of the procedures used by the employing agency.

b. Please provide MSPB's view of this decision.

The Federal Circuit's decision in *Conyers* represents the law on this matter. It can only be changed by the U.S. Supreme Court or congressional action.

7. Do MSPB staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?

The Office of Special Counsel conducts a "2302(c) Certification Program" which assists federal agencies in informing their workforces about the rights and remedies available under the WPA and related civil service laws. In 2014, the White House directed agencies to take affirmative steps to complete OSC's Certification Program. In order to meet the certification requirements, training on whistleblower protections and prohibited personnel practices for MSPB supervisors was conducted at MSPB Headquarters in Washington, D.C. on October 22, 2014 and the MSPB is currently certified. The PowerPoint slides and videotape of the training are available on the MSPB portal for all MSPB employees.

8. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a prima facie case of whistleblower retaliation. How many referrals, by year, has MSPB sent to OSC since this provision was enacted?

MSPB's records of referrals to OSC go back only to 2008. Referrals broken down by calendar year were as follows:

YEAR	NO. OF REFERRALS
2008	1
2009	0
2010	3
2011	8
2012*	5
2013	4
2014	4
2015	14
2016**	1
TOTAL	**40**

* The Whistleblower Protection Enhancement Act was passed in 2012.

** Year-to-date as of 2/3/16

The question states that MSPB must refer a case to OSC "to consider disciplinary action if the employee established a prima facie case of whistleblower retaliation." The relevant statute provides, however, that a referral to OSC must be made "[i]f, based on evidence presented to it under this section, [MSPB] determines that there is reason to believe that a current employee may have committed a prohibited personnel practice." 5 U.S.C. § 1221(f)(3). A "prima facie case of retaliation" is automatically deemed to have been established when a whistleblower presents limited circumstantial evidence. *See Kewley v. Department of Health & Human Services*, 153 F.3d 1357 (Fed. Cir. 1998). Based on a prima facie showing alone MSPB will not necessarily conclude that "there is reason to believe that a current employee may have committed [whistleblower retaliation]." *See Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 16 n.3 (2005).

Post-Hearing Questions for the Record
Submitted to Susan Tsui Grundmann
Chairman, Merit Systems Protection Board

From Rep. Gerald Connolly
Ranking Member, Subcommittee on Government Operations
Committee on Oversight and Government Reform
U.S. House of Representatives

Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization
December 16, 2015

1. **There is legislation introduced and pending in Congress that would apply a post-termination process similar to that mandated in the Veterans Access, Choice, and Accountability Act of 2014 to all Department of Veterans Affairs (VA) employees, and some Members of Congress are considering applying these provisions of to all federal employees.**

   a. **If these proposals were enacted into law, would you anticipate a substantial increase in new appeals?**

There is no way of knowing whether the enactment of these proposals into law would result in a substantial increase in new appeals. This would depend on the occurrence of two actions: 1) the agency taking a personnel action; and 2) the employee filing an appeal at MSPB.

   b. **What would this increased workload do to the quality and timeliness of the Merit Systems Protection Board's decisions?**

As stated above, it unknown whether enactment of these proposals would result in an increased workload in the form of appeals filed. I can confidently state, however, if these proposals were enacted and MSPB received a significant number of appeals under these new laws, it would place dramatic burdens on MSPB staff. Simply put, requiring MSPB to fully adjudicate an appeal within 21 days makes proper adjudication[2] extremely difficult.

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[2] Because of the strict timeline provided for in the statute, and because the statute provides that the VA's decision automatically becomes final if an MSPB administrative judge cannot render a timely decision, MSPB administrative judges are not in a position to grant extensions of time, even in cases where an appellant or representative experiences a serious medical issue, as was recently the case in a VA SES appeal adjudicated in MSPB's New York office. Additionally, factors such as weather can complicate matters under this time frame. For instance, as a result of the recent blizzard in Washington, D.C., securing testimony from federal employee witnesses

In our limited experience adjudicating appeals filed under Section 707 of the 2014 Act, MSPB has observed that the appeals tend to be high profile in nature, involve complicated issues, and generally include a variety of disciplinary charges, employee defenses, and witnesses. An MSPB administrative judge could be required to address numerous discovery issues, hold a hearing, and issue a written decision, all within 21 days. Because there is no review by either the Board or a United States Federal court, MSPB administrative judges understandably feel duty-bound to address each and every aspect of the appeal in as thorough a manner as possible, especially given that these appeals involve federal employees who have been removed from the civil service. For instance, in an appeal involving a VA senior executive service employee in Phoenix, Arizona, the administrative judge in MSPB's Denver Office issued a written decision that totaled 61 pages. In another recent appeal involving the demotion of a VA senior executive, the administrative judge in MSPB's Philadelphia Office held a hearing *and* issued a written decision totaling 60 pages, both within 21 days. Plainly stated, it is difficult to imagine the same effort being sustainable in the time frames provided if this process is applied to a significant number of federal employees. If Congress deems it wise to do so, MSPB would likely need to consider significant changes to the manner in which it adjudicates such appeals.

2. The Veterans Access, Choice, and Accountability Act of 2014 does not allow the administrative judge's decision to be appealed, and if the administrative judge is not able to meet the deadline, the agency's decision is final.

a. Do you believe it would raise fairness or due process concerns if an agency decision is deemed final because the administrative judge is not able to meet an arbitrary deadline?

MSPB is prohibited from issuing advisory opinions under law. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions."). Accordingly, it would be inappropriate for me to answer this question, as it raises an issue that could come before an MSPB administrative judge or the Board. I can state that the constitutionality of Section 707 of the 2014 Act is currently the subject of litigation at the United States Court of Appeals for the Federal Circuit. *Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). The plaintiff in that litigation is alleging that Section 707 is unconstitutional primarily on two grounds:

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who were scheduled to testify via video conferencing on a day when the federal government in Washington, D.C. was closed presented severe logistical problems for the presiding MSPB administrative judge in MSPB's Chicago office.

- 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 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.

3. Does MSPB monitor how long it takes administrative judges to act or rule on whistleblower cases that have been remanded after appeal to the Board?

No.

a. If so, what is the average amount of time it takes for an administrative judge to act on remand?

See answer to Question 3.

b. If not, should this be something that the MSPB tracks and monitors?

MSPB would be open to further discussions with Members of Congress and/or their staffs on this topic. I would note that the adjudication time periods of many current whistleblower appeals, whether initial appeals or appeals which have been remanded back to administrative judges by the Board, have been adversely affected by the need for MSPB administrative judges to devote time and energy to the adjudication of the more than 33,000 furlough appeals filed at MSPB during fiscal year 2013 as a result of budget sequestration. Additionally, whistleblower appeals generally raise complex issues that require review of extremely lengthy records and a great deal of legal research and consequently take longer periods of time to adjudicate.

c. What resources does the Board have to ensure the timeliness of actions or decisions of administrative judges on cases that have been remanded?

Generally, MSPB recognizes that the oldest appeals should receive priority over the more recently-filed appeals.

4. As the head of an employing agency, do you believe that MSPB has sufficient tools and authorities under existing law to discipline employees for misconduct or performance issues when necessary?

Yes.

5. **Based on your agency's experience, do you think that statutory change is needed to streamline the federal employee disciplinary process?**

With respect to MSPB, I do not think that such changes are needed. Whether statutory changes are needed to streamline the employee disciplinary process government-wide, I cannot say. MSPB does not become involved in the disciplinary process until two things happen: 1) an agency takes disciplinary action; and 2) the employee files an appeal at MSPB. The amount of time it takes an agency to discipline an employee before an appeal at MSPB is filed is not a matter that MSPB typically considers. I will note that, as a matter of statutory law, and in accordance with Supreme Court precedent, federal employees are generally entitled to notice and an opportunity to respond prior to being disciplined. This is based on a tenured federal employee's property interest in their federal employment. More information on this issue can be found in a recent report MSPB issued entitled: *What is Due Process in Federal Civil Service Employment?* A copy of this report can be found on MSPB's website at: http://www.mspb.gov/studies/browsestudies.htm