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NOMINATIONS OF TERRENCE A. DUFFY, SUSANNE T. MARSHALL, AND NEIL A.G. McPHIE

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON THE

NOMINATIONS OF TERRENCE A. DUFFY TO BE A MEMBER OF THE FEDERAL RETIREMENT THRIFT INVESTMENT BOARD; SUSANNE T. MARSHALL, TO BE CHAIRMAN OF THE MERIT SYSTEMS PROTECTION BOARD; AND NEIL A.G. MCPHIE TO BE A MEMBER OF THE MERIT SYSTEMS PROTECTION BOARD

MAY 15, 2003

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NOMINATIONS OF TERRENCE A. DUFFY, SUSANNE T. MARSHALL, AND NEIL A.G. McPHIE

THURSDAY, MAY 15, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:03 p.m., in room S–143, U.S. Capitol, Hon. Peter G. Fitzgerald, presiding.

Present: Senators Fitzgerald, Levin, Akaka, and Durbin.

OPENING STATEMENT OF SENATOR FITZGERALD

Senator FITZGERALD. The Committee will come to order. Senator Akaka is at a meeting but he gave us dispensation to begin without him. He will be here shortly.

Today we consider the nominations of Terrence Duffy to be a member of the Federal Retirement Thrift Investment Board; Susanne Marshall to be chairman of the Merit Systems Protection Board; and Neil McPhie to be a member of the Merit Systems Protection Board. I would like to welcome our nominees today. Each of you has a distinguished background and record of service. The President has selected you for important positions in our government, and I congratulate you on your nominations.

I would also like to welcome our distinguished colleagues from Illinois and Virginia, Senator Durbin and Senator Allen, who are with us today to introduce two of our nominees.

Mr. Duffy, Ms. Marshall, and Mr. McPhie have filed responses to the Committee's biographical and financial questionnaire, answered prehearing questions submitted by the Committee, and had their financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record with the exception of the financial data which are on file and available for public inspection in the Committee offices.

In addition, I personally have reviewed the FBI background investigation reports on each of the nominees.

On our first panel today we will hear from Mr. Duffy, whom I have had the pleasure of knowing personally for several years now. President Bush nominated Mr. Duffy to be a member of the Federal Retirement Thrift Investment Board, which was established as an independent agency to administer the Thrift Savings Plan. Mr. Duffy has served as chairman of the Chicago Mercantile Exchange Inc. since April 2002, and has been a member of the Chicago Mercantile Exchange Inc. for over 20 years.

On our second panel we will hear from Susanne Marshall, and Neil McPhie, whom the President has nominated to the positions of chairman and member, respectively, of the Merit Systems Protection Board. Both Ms. Marshall and Mr. McPhie currently serve in those positions on the board through recess appointments.

The Merit Systems Protection Board was created in 1978 to serve as a guardian of Federal merit systems principles. The board plays a critical role in protecting the rights of whistleblowers, who have presented some of the most compelling evidence of government abuse and in fiscal mismanagement, saving the taxpayers hundreds of millions of dollars.

Both the Federal Retirement Thrift Investment Board and Merit Systems Protection Board are vital agencies in our Federal Government. The nominees are being considered for important positions of leadership in these agencies, and we appreciate their presence today before this Committee.

Before we proceed with their statements, I would first like to call on my colleague from Illinois, Senator Durbin, to introduce Terrence Duffy, if that is OK with Senator Allen.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Thank you, Mr. Chairman. I am pleased to be here this afternoon and honored that Terry Duffy would ask me to introduce him to this Committee. Of course, he needs no introduction to you personally. We both know of Terry Duffy and his contribution to the business community and the city of Chicago. I think he is an excellent choice to be a member of the Federal Retirement Thrift Investment Board. I know that he is accompanied here by his spouse, Jennifer, and his mother, Barbara Duffy, and his assistant, Joyce Balkus. I am certain that he appreciates their presence and support at this important hearing.

This is a critical appointment to an important position. The Federal Retirement Thrift Investment Board may be obscure to some, but it is not to the millions of Federal retirees and current Federal employees who are saving a portion of their earnings in anticipation of retirement. This is an independent agency which administers the Thrift Savings Plan and it has an important mission. Currently the Thrift Savings Plan has approximately 3 million participants and assets of over $100 billion, including the family fortune of the Durbin family, so I am particularly interested in making certain that Mr. Duffy does a great job in his new position.

As you said, Mr. Chairman, he has an excellent background. A native of Chicago, he graduated from the University of Wisconsin at Whitewater, and worked as a broker assistant for RB&H Commodities in Chicago. Since November 1981, Terry Duffy has been president of TDA Trading, Inc., a trading broker association, most recently serving as chairman of the prestigious Chicago Mercantile Exchange Holdings Board and the board of the Chicago Mercantile Exchange Inc. itself.

I have had an opportunity to look at his responses to the policy questions which this Committee has posed, and there is no question he is well-prepared and well-positioned to serve this Nation well in this capacity. I heartily endorse his nomination.

Senator FITZGERALD. Thank you, Senator Durbin.

I would now like to recognize my colleague from Virginia, Senator George Allen who will introduce Mr. McPhie on panel two.

Senator Akaka is here. Do you want to let Senator Allen introduce Mr. McPhie first and then you can make your opening statement?

Senator AKAKA. Yes.

Senator ALLEN. If I may, I will introduce Mr. McPhie and also Susanne Marshall.

Senator FITZGERALD. You certainly may.

STATEMENT OF HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Let me start first with Susanne Marshall as she is appointed to be chairperson of the U.S. Merit Systems Protection Board. I am pleased to introduce her. She is a resident of the Commonwealth of Virginia. She is well-known to many of you already having served on the Governmental Affairs Committee staff for Senator Roth of Delaware, Ted Stevens of Alaska, and Fred Thompson of Tennessee. As you may know, she was confirmed as a member of the Merit Systems Protection Board in November 1997 under former President Clinton, and now President Bush has nominated her to serve as chairman for the remainder of her term.

I can go into her Virginia heritage, that I know you would all love to hear, since her father's side of the family came to Virginia in 1650 a few years after it first was founded in 1607. That makes her one of the first families of Virginia.

She does have an expert record having served here on Capitol Hill as a staffer for more than 15 years in both the House of Representatives and the Senate, ending only upon her appointment to the Merit Systems Protection Board. Mr. Chairman, Senator Akaka, I recommend her very highly to you as an outstanding public servant and respectfully ask that she be confirmed as chair of the Merit Systems Protection Board.

While her family is not here with her, they are all here in spirit and very proud of her.

Mr. Chairman, Senator Akaka, I am also pleased to introduce Neil McPhie, who has been nominated to be a member of the U.S. Merit Systems Protection Board. I am confident that when you look at his record in the Commonwealth of Virginia and his service to the community, you will recognize that President Bush selected the right person for this job.

I am pleased to be recommending him because I do know of his service. He helped me when I was Governor of the Commonwealth of Virginia. He has served most recently as senior assistant attorney general in Virginia since 2002 where he has shown himself to be a very seasoned and effective litigator. He also served the Commonwealth of Virginia as executive director of the Virginia Department of Employment Dispute Resolution.

Now I mention my service as Governor. Right as my term ended, *Governing* magazine rated Virginia as one of the best managed States. Any CEO or executive will tell you, the executive is fine, but you need good people and a good cabinet. You need good leaders. Mr. McPhie, his attention to detail, his superb leadership skills really played an important role in Virginia getting that high honor

from *Governing* magazine. It was not just to me. It was to my cabinet secretaries, to a variety of State agencies, and also to the attorney general's office.

You will see from his education and his background, he unquestionably has way more than the necessary qualifications to undertake the charge President Bush has asked of him. He has a wealth of knowledge in employment law issues that will enable him to successfully meet the challenges he will face an adjudicator of the board. I would like to take a quick moment to recognize Neil's wife, Regina, holding young Sydney there. This is Abigail here. So he has a fine family and I urge each of you all on the Committee to move as quickly as possible to get Mr. McPhie to work for the people of the United States.

I thank you, Mr. Chairman, Senator Akaka, for your willingness to pull together this hearing so that you can move forward in these deliberations. Thank you, all.

Senator FITZGERALD. Thank you for being here. Hope you did not miss any votes.

Senator ALLEN. Me too. If you will excuse me.

Senator FITZGERALD. Thank you, Senator Allen.

Now the Chair would call upon Senator Akaka for an opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. I want to welcome all of you here and add my welcome to all of you. Ms. Marshall, it is good to see you again after all these years. Mr. McPhie, and Mr. Duffy, welcome to this Committee.

Before I begin I want to compliment the Chairman of this Committee. Today is one of those days when everything is upended. He was able to pull this hearing together despite a day-long voting session. I had some problem finding this room, but I finally found it, and I want to thank him for moving so quickly and so well.

I would ask that my full statement be placed in the record. I just want to say that the positions to which our witnesses have been nominated are among the most important to Federal employees. Let me highlight that. You have a tough job ahead of you. But it is important for our country.

If confirmed, Mr. Duffy will have authority over the government's retirement savings plan which serves over 3 million participants with assets of about $100 billion. Likewise, Ms. Marshall who is the acting chair of the Merit Systems Protection Board and Mr. McPhie who will join her, will play a critical role in safeguarding Federal employees from abuse by agency management. Those are important jobs. In the next 7 years it is going to be critical for our Nation, but we will talk about that later.

I will submit the rest of my statement, Mr. Chairman.

Senator FITZGERALD. Without objection, Senator Akaka's statement will be provided in the record.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Thank you, Mr. Chairman. It's a pleasure to be with you this afternoon, and I join you in welcoming Ms. Marshall, Mr. McPhie, and Mr. Duffy to our Committee.

The positions to which our witnesses have been nominated are among the most important to Federal employees. If confirmed, Mr. Duffy will have authority over the government's retirement savings plan, which serves over 3 million participants with assets of about 100 billion dollars. Likewise, Ms. Marshall, who is the acting chair of the Merit Systems Protection Board, and Mr. McPhie, who will join her, will play a critical role in safeguarding Federal employees from abuse by agency management.

As the sponsor of legislation to strengthen Federal whistleblower statues, I believe that one of the key tenants of the Federal merit system principles is the ability of employees to report waste, fraud, and abuse without the fear of retaliation. Reporting government mismanagement is a basic obligation of a Federal employee. As our witnesses know, the MSPB shares great responsibility to ensure that employees are protected when they come forward to report waste, fraud, or abuse.

Since enactment of the WPA in 1989, Congress has revisited the law to address actions taken by the Federal Circuit Court of Appeals, the MSPB, and the Office of Special Counsel that have been inconsistent with congressional intent. I plan to reintroduce whistleblower legislation shortly, and I welcome the opportunity to discuss this with Ms. Marshall and Mr. McPhie. I am also interested in your views on the new Department of Homeland Security and the Department of Defense proposal to exempt itself from many civil service laws, including MSPB appeal rights.

I don't want Mr. Duffy to think I am ignoring him. You have had a distinguished career as a member of the Chicago Mercantile Exchange Inc. where you now serve as its chairman. As head of the Nation's largest futures exchange, I am hopeful that you will impart your knowledge and expertise with your fellow Thrift Board members.

Mr. Chairman, I wish to thank you for holding today's hearing.

Senator FITZGERALD. I am going to recommend that Senator Akaka and I leave to vote. The vote started at 2:10, so we are a few minutes into it, and they are only 10-minute roll calls. We will immediately return and then we will proceed with Mr. Duffy and then to the Merit Systems Protection Board. We will try and conduct this hearing rapidly given the time constraints we are under today. So we will recess for a few moments and we will be back shortly.

Thank you.

[Recess.]

Senator FITZGERALD. I would like to call the meeting back to order.

At this point I would like to call on our first witness, Terry Duffy. Why don't you come up here, Terry. Our Committee rules require that all witnesses at nomination hearings give their testimony under oath, so I am going to ask you to remain standing and raise your right hand.

[Witness sworn.]

Senator FITZGERALD. Thank you. You may be seated.

Before you begin your opening statement, Terry, I wonder if you would like to again recognize your wife and mother and assistant who are here? I know Senator Durbin briefly referred to them but maybe you would like to introduce your family members.

TESTIMONY OF TERRENCE A. DUFFY,[1] TO BE A MEMBER OF THE FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Mr. DUFFY. I appreciate that, Senator. With me today I have my wife Jennifer, my mother Barbara, and my good friend and assist-

[1] The biographical and professional information of Mr. Duffy appears in the Appendix on page 28.

Pre-hearing questionnaire appears in the Appendix on page 32.

ant, Joyce Balskus, along with two young ladies that represent us out here in our Washington office, Lita Frazier and Lanae Denney.

Senator FITZGERALD. Welcome to all of you. You may go ahead and give your statement.

Mr. DUFFY. Thank you, Mr. Chairman. I appreciate it very much. Senator Akaka, I appreciate it. Good afternoon. As Senator Fitzgerald has said, my name is Terry Duffy and it a great honor for me to be nominated to serve as a member of the Federal Retirement Thrift Investment Board.

I understand the gravity of the responsibilities that I will be required to fulfill if my nomination is approved. Three million Federal employees have invested more than $100 billion to assure a successful and productive retirement after diligently serving the government and its uniformed services. I have discussed my duties and responsibilities with the staff and the board. I have reviewed the pending litigation involving the board and its director. I am confident that my background in the financial services industry will permit me to perform the duties of this high office as intended by Congress.

I believe that my experience in the financial industry equips me to perform the important fiduciary duties for which I have been nominated. My professional life has been connected to the Chicago Mercantile Exchange Inc., which is now the largest, most successful futures exchange in the United States. I began my career at the very bottom of the ladder as a runner in 1980. In 1981, I became a CME member and was able to work as a floor broker and a trader. I have formed and been a president of my own company, TDA Trading, Incorporated since 1981. In 1995, I was elected to the CME's board, in which capacity I have served since that time. In 1998, I was elected vice chairman of the board, and in 2002 I was elected chairman of the board.

In that time I led a very successful effort to execute an initial public offering to make the Chicago Mercantile Exchange Inc. the first publicly traded exchange in the United States. I have served or currently serve on the executive compensation, nominating, strategic planning, and regulatory oversight committees. My professional life has equipped me to understand tools available for modern risk management. In my leadership role at the CME, I have participated directly in the creation of new risk management tools, and I have managed financial risk in all segments of our economy.

Retirees are a major element of our economy, and their economic welfare depends on the safety and the soundness of their retirement plans. In 2002, I was appointed by President Bush to serve on the National Saver Summit on retirement savings. I understand the serious responsibilities that are invested in the thrift board. I will bring to bear all my experiences and knowledge to serve the interest of the beneficiaries of the thrift board's actions.

Again, I am extremely honored to be here today and look forward to answering any questions that you may have for me. Thank you.

Senator FITZGERALD. Mr. Duffy, thank you very much. I would begin with customary Committee questions, and we will limit questions to 6 minutes each, if that is OK. We will probably have another vote shortly.

Is there anything that you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. DUFFY. No, sir.

Senator FITZGERALD. Do you know of anything personal or otherwise that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. DUFFY. No, sir.

Senator FITZGERALD. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Mr. DUFFY. Yes.

Senator FITZGERALD. Senator Akaka, do you have questions that you want to ask at this time?

Senator AKAKA. Yes, I do, Mr. Chairman.

Mr. Duffy, let me start off by saying how impressive your background is.

Mr. DUFFY. Thank you, sir.

Senator AKAKA. It appears that you have been in the right place at the right time and moved up well, and here you are again, another place at another time. I did review your papers and everything seems to be in order.

My question to you is one that interests me tremendously because I have been trying to move our country to be more financially literate. My question will be along that line.

Federal employees, for instance, depend a lot on the thrift savings program for a significant part of their retirement savings. As life expectancy in the United States continues to increase and people are living longer, as they do in Hawaii, they must make sure that their retirement savings meet their future needs. Federal workers cannot afford to make mistakes on their TSP, the allocations, or miss opportunities presented by TSP or other retirement investment options. Employees of all agencies should be informed about different retirement options.

My question to you is, what can be done to improve financial literacy among Federal employees to ensure that they are making educated and informed decisions about their retirement investment options, especially their use of TSP?

Mr. DUFFY. Senator, I think that is an excellent question. The way I would respond to it, I think that I would go about it the same way I do about running a public company today, and that is through the education process. I think education and communication are key. If you can have what I believe—I do not know the other board members of the TSP, but you have to have independence. When you have independence, then the participants who are in that plan will have more confidence in you and they will be more willing to listen to you when you try to educate them.

So I think education, communication, and independence are critical to getting more people to participate in plans, and give them the confidence. This has been a very difficult time over the last 3 to 4 years with markets and market conditions. I think the American public, and I do not think the government workers are immune to it, have been affected by it. I think that they need to have

the confidence reinstalled in them to let them know that there are legitimate people looking out for their best interest, and we should educate them, Senator.

Senator AKAKA. Mr. Chairman, I have other questions but I will submit them for the record.

Thank you very much for your response.

Senator FITZGERALD. I was wondering, Mr. Duffy, if you had been following the dispute that the TSP board has had with its contractor who had been working on its computer system. There subsequently was a suit filed by the board. Subsequent to that, a new board has come in at TSP and they have suggested that the executive director of TSP should not have filed that suit, and should have gone through the attorney general.

There is a dispute about the level of independence that the TSP board should have from both Congress and the administration. This morning there was an article in the *Washington Post* that contained a recommendation or relayed a recommendation that the GAO had made regarding how greater accountability could be placed on the TSP board, having them made more accountable to the Department of Labor. Apparently, the Department of Labor could sanction a private pension fund that was violating its fiduciary responsibilities, but in the case of the TSP board the Department of Labor could find a violation but they could not do anything to the TSP board.

So there is a tension between walling off the TSP board from the political process on the one hand to prevent it being used for political purposes. But on the other hand, there is a danger that the board not be accountable to anyone if there are violations of fiduciary obligations by the board of directors.

I would like to ask if you had given any thought to whether the board should just totally be out on its own? If a member of Congress or the administration calls you and makes a recommendation, should you get your hackles up and be very concerned, or do you feel that it should be more accountable to Congress? This is a tough question, and I do not mean to throw a tough question to such a good friend, but it is an important issue.

Mr. DUFFY. I welcome it, Senator. Actually, I think there are several questions in your statement. I will address the latter part of it on the issue of whether the board should be accountable to Congress. Again, I am not on the board right now. I just know by what I read through the press and what is available in the public domain.

As a chairman of a publicly traded company, I think independence is critical. To come under pressure from either side of the aisle of Congress does not seem to suit $100 billion very well because it just does not seem to work. These are decisions that have got to be made in the best interest of these government workers and I do not think that Congress should have too much influence over how that works. Obviously, there has got to be somebody that they have to be accountable to. When you talk about fiduciary responsibility, I think that is where the accountability comes in. I think that is why you hold these hearings and you try to find the best people to represent a substantial amount of money like this which is a good part of the savings of these people.

So I think it is critical to have accountability. Whether it should be Congress or not, I do not know. I guess I would have to read into it a little bit more. I know that the Labor Department has some oversight on this.

As far as the litigation is concerned, I am not a lawyer by trade, but as a chairman I worked in litigation with our lawyers. Just when you think you have got it figured out, there is another side of the story. That is one thing I have learned about lawsuits. So for me to make a comment on the litigation I do not think would be fair because I do not have the information the rest of the board has or the staff has. I only have what is in the public domain. I do know one thing for certain. Whatever is in the public domain, there is another side of that story, and there might be two more sides to that story.

Senator FITZGERALD. I can attest to that.

Mr. DUFFY. So I think it is important that you have all the information.

Senator FITZGERALD. That is right. I like your answer. I think you recognize the fiduciary responsibilities of the members on that board. That is an awful lot of money, $100 billion. It is a big responsibility to be one member of that board who is overseeing so much in retirement funds for so many people. It is an awesome responsibility. You are certainly one who is up to the task, and I think you have a proven record of success in the business world, and certainly at the Chicago Mercantile Exchange Inc., which was the most successful initial public offering in all of 2002 in our entire country. We really could not have someone much better than you here. So I congratulate you and wish you well.

I would leave it open to Senator Akaka for any final questions you may have before we proceed to the others.

Senator AKAKA. May I ask one more?

Senator FITZGERALD. Yes.

Senator AKAKA. Mr. Duffy, along the same line. The Federal Thrift Investment Board is seeking a new executive director. Given the current debate over independence and authority of the executive director as raised in the American Management System lawsuit over completion of the new TSP recordkeeping system, my question to you is, how would you define the roles and responsibilities of the executive director as compared to thrift board members?

Mr. DUFFY. I look at it, Senator, in a couple ways. But I would say again, I use my experience chairing a public company board, that the buck stops there. We are ultimately accountable to our shareholders. The Thrift Savings Board is ultimately accountable to its participants. So I could sit there and tell you that I think that the management made a bad decision. They say, that is great, but you are accountable. You are the board of directors. That to me is doing my fiduciary duty to the participants.

It is no different from you today as being the chairman of the largest U.S. exchange. I have a duty to my shareholders, fiduciary responsibility. So I have to stay completely independent of my management. I think that is critical to the success, not only of private business, but also in the public and the private sector.

Senator AKAKA. Thank you very much for that response.

Mr. Chairman, thank you.

Senator FITZGERALD. Senator Akaka, thank you very much. Mr. Duffy, thank you for your testimony. Thank you for bringing your family here, today. We wish you well. We will not take any more of your time. We will now go on to Ms. Marshall and Mr. McPhie. Thank you very much for coming.

Mr. DUFFY. Thank you, Senator Fitzgerald. Thank you, Senator Akaka. I appreciate it very much.

Senator FITZGERALD. Thank you.

Another vote just started. We are going to take another break. We will not be long. A quick vote and we will be right back, and then we will swear in Ms. Marshall and Mr. McPhie.

[Recess.]

Senator FITZGERALD. I call the hearing back to order. I would like to swear both of the witnesses.

[Witnesses sworn.]

Senator FITZGERALD. Thank you. You may be seated.

Mr. McPhie, I understand you want to introduce your family, too. I know that Senator Allen briefly introduced your family, but maybe you want to introduce them, and then I will allow Ms. Marshall to start with her statement.

Mr. MCPHIE. Yes, sir. There are a number of people who came from Richmond that I will recognize, if I may.

Senator FITZGERALD. Absolutely.

Mr. MCPHIE. First my family. My wife Regina McPhie is right here. My daughter Abigail, and my son Sydney.

Senator FITZGERALD. What grade is Sydney in?

Mr. MCPHIE. Sydney is in third, but sometimes I think he is in sixth or seventh. I am very proud of those folks, and they have stood by dad, and my wife by me, through ups and downs. Without them, I would not be here and I am grateful for that.

As I said, there are some folks who I really owe a lot to as my career has progressed. I do appreciate them taking time off and coming up here from Richmond, Virginia. There are some people from the Attorney General's office in Richmond, and then there are some folks from my agency over there, the Employment Dispute Resolution Agency that have come up here. And then there are two other persons who knew me when I was a little guy in my native country of Trinidad, and they are both here. I feel very grateful to be here with people like that around me. I appreciate the opportunity to say that on the record.

Senator FITZGERALD. Welcome to all your friends, and thank you for being here. At this point, Ms. Marshall, I would welcome you to the Committee. Do you have a statement you would like to make at this time?

TESTIMONY OF SUSANNE T. MARSHALL,[1] TO BE CHAIRMAN OF THE MERIT SYSTEMS PROTECTION BOARD

Ms. MARSHALL. Yes, Senator. Thank you and your staff for coordinating the hearing this afternoon with so much going on. I also

[1] The prepared statement of Ms. Marshall appears in the Appendix on page 21.

The biographical and professional information of Ms. Marshall appears in the Appendix on page 43.

Pre-hearing questionnaire with attachments appears in the Appendix on page 48.

Post-hearing questions submitted for the Record by Senator Akaka appears in the Appendix on page 181.

want to thank Senator Allen for taking the time to be here to provide the introduction for both Mr. McPhie and myself. I have to thank President Bush for the honor of nominating me to be chairman of the Merit Systems Protection Board.

In order to save the Committee time, I will provide a more lengthy statement for the record.

Senator FITZGERALD. Without objection, we will submit your prepared comments for the record.

Ms. MARSHALL. Thank you. It is very hard for me to believe, having been a Committee staffer, that it has been 5½ years since I have been here in the Capitol building. It is really an honor for me to be here today, and quite a treat to see some of my former colleagues and friends. I do not have family here, but I would acknowledge friends that are here from the Hill as well as from the MSPB. So, I just would acknowledge that for the record.

In 1997, when I was confirmed, my goal, as I stated at that time, was to prove myself worthy of the confidence that had been placed in me. As I come here 5½ years later, I hope that my record and my reputation speak for itself, and that I have the support of members on both sides of the aisle.

In every effort that I have made as a member, as vice chair, as acting chair, and now as chairman, I look forward to being able to lead the agency throughout the remainder of my term. It is a terrific agency. It is very small, very efficient, with hard-working and dedicated civil servants. That is what I look forward to. I appreciate the opportunity to be here today.

Senator FITZGERALD. That is great.

Mr. McPhie, you may also submit your written comments for the record and we will make that a part of the Committee's transcript, or you may read them if you wish, or you may talk off the top of your head.

TESTIMONY OF NEIL A.G. McPHIE,[1] TO BE A MEMBER OF THE MERIT SYSTEMS PROTECTION BOARD

Mr. MCPHIE. In the spirit of intimacy and speed I would submit—I have already submitted a prepared statement for the record and I would ask that it be placed into the record.

Senator FITZGERALD. Without objection.

Mr. MCPHIE. Rather than just read it, I just want to highlight some other things. I am extremely grateful to be here. I am honored by the confidence placed in me by the President of the United States. I am honored by the effort this Committee went through, and the opportunity for me to come before you at this time. I appreciate the questions that were asked of me, some very probing questions by your staffers some of whom are here. I tried to answer them as forthright and as best I could. I hope I have succeeded in doing that. I look forward to a relationship based on openness, candor, and forthrightness.

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[1] The prepared statement of Mr. McPhie appears in the Appendix on page 27.

The biographical and professional information of Mr. McPhie appears in the Appendix on page 157.

Pre-hearing questionnaire appears in the Appendix on page 167.

Post-hearing questions submitted for the Record by Senator Akaka appears in the Appendix on page 186.

If confirmed, I pledge to do everything within my power and to the best of my abilities to decide these important cases in a fair and objective basis, controlled by the facts, the law and the policies and nothing else.

I intend to give this position all I have and to work with Chairman Marshall in a collaborative effort and a common goal to make the Merit Systems Protection Board better than I found it. I know the staffers by their questions had certain issues that they raised. I intend to follow up on some of these concerns and see if we cannot get cases in and out of that place as quickly as we can and as fairly as we can. I look forward to acquitting those responsibilities in that fashion.

I would be more than happy to answer any questions you or anyone else may have, sir.

Senator FITZGERALD. Thank you, Mr. McPhie.

Ms. Marshall, you began serving as acting chairman in February 2002, and then as the board's chairman since August 2002?

Ms. MARSHALL. Yes.

Senator FITZGERALD. Given your experience in these capacities, what new initiatives have you undertaken, and what new policies have you implemented to improve the operations of the Merit Systems Protection Board?

Ms. MARSHALL. Initially, because our main function is the adjudication of a large volume of cases, it was to try to determine how we could move more quickly, particularly with our complex cases. Oftentimes, these cases were reviewed so extensively in our Office of Appeals Counsel or Office of General Counsel before they came up to the board members that we were left with a short timeframe to act on them.

Senator FITZGERALD. How many cases do you have?

Ms. MARSHALL. At Board headquarters, we process, on average, about 1,700 cases annually. In those cases that are more difficult and more time-consuming, that have multiple claims or different sets of facts, we have tried to get them to the board members earlier so that we have enough time to give direction to the staff to work those cases.

Senator FITZGERALD. Have you been able to do that?

Ms. MARSHALL. Yes. We actually have color-coding, putting them in green folders so that we can make notes as they come into our office that this case has a particularly difficult issue and we need to give it expeditious review so that we can determine what direction it should take if it needs any more work.

Senator FITZGERALD. Assuming your confirmation, are there any additional initiatives or policies that you want to implement?

Ms. MARSHALL. One of the major initiatives that we are working on implementing is our e-Appeal process. It will be an interactive electronic process for filing an appeal. The user will be able to navigate it in a manner similar to TurboTax. Questions will be asked as to the action being appealed. Is it an adverse action? Is it a retirement decision? Then the user can follow a set of questions for the action being appealed, as opposed to having to deal with a very lengthy form.

Senator FITZGERALD. To get rid of the paperwork.

Ms. MARSHALL. Yes, it would also do that. We hope to have e-Appeal implemented by October.

Senator FITZGERALD. So do you see the biggest challenge of the MSPB the caseload numbers and how to speed the cases along? Is that one of the biggest challenges?

Ms. MARSHALL. That certainly is our daily challenge, something that we face on a regular basis. Right now, we also must deal with the challenge of the Department of Homeland Security, the Department of Defense, and plans that would take certain employees out from under Title 5 protections. I think the board must work to make sure that the role that we play in protecting employee rights is understood. We provide the neutral third party review. So, I think that our biggest challenge over the next year is going to be educating the public and other agencies as to the role that we play.

Senator FITZGERALD. Do you think the MSPB has sufficient resources to do its job now?

Ms. MARSHALL. Currently we operate adequately. We meet our needs. I would not want to see our budget cut. I think we are right at the edge. We have reduced our staff dramatically, with almost a 25-percent cut in personnel 5 years ago. So, we have to hold our own. I do not want to see us reduced. We operate, I think, very efficiently with the resources that we have.

Senator FITZGERALD. Are there any legislative remedies that you would recommend that Congress consider to help the board at this time?

Ms. MARSHALL. At this time I would say that it would be preserving the merit principles as Congress looks at the future of civil service protections for Federal employees. I have one proposal that I described in my written responses that deals with a legislative fix in the handling of FERS disability cases so that we do not have to have repayment issues occur. That is something I would be happy to provide additional information on if the staff wishes to follow up on this suggestion.

Senator FITZGERALD. Part of the MSPB's work involves hearing cases that fall under the Whistleblower Protection Act as it was amended in 1994. The act was intended to strengthen protections for Federal employees when they disclose information pertaining to wrongdoing within a particular agency or department. This act is an integral part of the MSPB's mission and operations.

Ms. Marshall, would you please share your assessment of the current effectiveness of this Whistleblower Protection Act including any particular strengths and weaknesses?

Ms. MARSHALL. I think probably the greatest value of the act is something that we cannot measure. That would be the deterrent effect. I believe that by its very existence and the enforcement of it over the years that it has probably led many agency managers and supervisors to be much more careful in the actions that they take. They know that there will be enforcement by the Office of Special Counsel and the Merit Systems Protection Board.

I personally am not supporting any particular legislative remedies. I know that there have been a number of provisions reviewed by the Committee and currently under review by the Committee. I have found, as an adjudicator, that the more recent amendments, when Congress emphasized the use of "any"—and a very broad

reading of the language—allows the adjudicator to look at all the particular facts of the case and any violation of any law, rule, or regulation or any significant change in duties. So I think it is our enforcement of a broad reading of the statute, the plain language of the statute that I find most useful.

Senator FITZGERALD. Do you believe that whistleblower rights are adequately protected now?

Ms. MARSHALL. I think it has been very effective.

Senator FITZGERALD. Do you think they are adequately protected now? Do you know how many whistleblowers have been helped through settlements or board rulings providing relief, or what the win-loss track record for decisions is?

Ms. MARSHALL. OSE considers all WPA claims first, but I think for cases that have come to the board, say over the past year, perhaps we have had 130 cases that have not been dismissed that we have looked at the merits of the issue. A little over 50 percent of that, maybe 60 percent, we have made a finding of a nonfrivolous allegation of whistleblowing.

But even if we had a finding of potential whistleblowing, the agency still has the opportunity to prove by clear and convincing evidence that they would have taken the personnel action anyway. So you may have a valid whistleblower as an appellant, but it does not always lead to relief.

Senator FITZGERALD. Thank you.

Mr. McPhie, as has been noted by Senator Allen, you have a wealth of experience in dispute resolution through your work in the Virginia Department of Employment Dispute Resolution and at the EEOC. Based on your background and experience, what specific initiatives would you like to pursue as a confirmed member of the Merit Systems Protection Board?

If we could interrupt you for one second, Mr. McPhie, I would like to welcome Senator Levin. Thank you for coming here. Senator Levin, would you have any opening comments? We are on Susanne Marshall and Neil McPhie, who are nominated for the Merit Systems Protection Board, and we were discussing the whistleblower laws.

Senator LEVIN. I have some questions but no opening statement.

Senator FITZGERALD. OK. Mr. McPhie, would you like to go back and answer that question. Based on your background and experience, what specific initiatives would you like to pursue as a confirmed member of the Merit Systems Protection Board?

Mr. MCPHIE. First, sir, I want to tell you, I do not have any specific agenda. I came here with a wide open mind. The bottom line is, I want to be known and ultimately remembered as a member who decided cases objectively on the facts, applying the relevant law and policies and nothing else. I think the board has got to be impartial when it speaks. I think the board has a history of being impartial. I intend to continue that.

Some of the things that I have picked up over the years is, whenever you run a system and you have a lot of pro se people in the system, those cases to me are the most difficult cases to decide. Not because the law or the facts are complex. Sometimes it is a clear loser. But because of the human emotion, and lack of understanding.

It seems to me any system worth its salt, has to stay away from outcomes. I never carried around a win-loss record because then you get caught up in this one side should win more than it should be winning, and I think that is not healthy. But what I do try is to assure the folks who come before that system, win or lose, really feel that they have gotten a shot; somebody listened. Many times these disputes are between people who ultimately are going back to the same job situation and the expectation is from both sides that they are going to be friends, and they are going to be productive, and they are going to continue a relationship.

So many times it is not about taking prisoners, who can use cross-examination to make the other person look bad and so on and so forth. You have to find a way to preserve that working relationship, albeit in difficult circumstances.

So it seems to me, top and bottom, the board has got to reflect that kind of culture. I think we have got to understand, and I am going to try my best to employ some of it, is that you can do a case quickly and you can still assure quality. They are not necessarily two different items. They can coexist quite nicely. But if you do not get the folks from the front end to the back end to buy into that then it is not going to happen.

I personally think the administrative judges in that system, have perhaps one of the most important jobs. I think the way people feel about the MSPB turns a lot of what happens to them in front of those administrative judges.

I had the pleasure of going to a conference recently where I met the administrative judges for the first time in their element. These guys are not afraid to talk. And I listened to them. I will tell you it concerns them when cases take too long. It concerns them when people complain that they are not being fair. It concerns them when they get, in their view, scattershot directions from court precedent. These folk impressed me as people who understand the importance of their job, who want to do a good job, and will indeed do a good job. Some will tell you there are some resource issues. I do not know anything about that so——

Senator FITZGERALD. I am afraid I am going to have to interrupt you because I am going to have to run to the floor for a vote. Senator Levin, I do not know if you have voted.

Senator LEVIN. I did, thank you.

Senator FITZGERALD. I will turn it over to you, Senator Levin, you could ask some questions, and I will go vote. Thank you.

Mr. MCPHIE. Senator Levin, those are some of the things I would do.

Senator LEVIN. I just have a few questions for you, Ms. Marshall, because you have been there. Mr. McPhie, you are going to get off the hook a little bit here because you are new. I am intrigued by your comment that the people who appear before the board should feel that they have had a fair hearing, because that is what I think everybody's goal would be. That is a constant search and a constant struggle for whistleblowers.

Some of the questions that I have of Ms. Marshall have been addressed to you, but for the record I want to clarify your answers to some of those questions. First is a case which was decided by the Federal Circuit in 1999, and maybe Mr. McPhie could listen to

this. Even though you have not been on the board I would be interested in your reaction in any event.

In the *LaChance* case, *LaChance vs. White,* the Federal Circuit said that in order to establish a reasonable belief of gross mismanagement, the whistleblower, the appellant, had to overcome a presumption that the management of the Department of the Air Force had acted "correctly and fairly and in good faith, and in accordance with the law and governing regulations." So that the agency is given a presumption of good faith to begin with which the whistleblower needed to overcome.

But then the court added the following, which was truly unusual. That the presumption would stand unless Mr. White provided irrefragable proof to the contrary. Now that is almost an irrebuttable presumption, to use another word. If you have to prove or disprove a presumption with irrefragable proof, you have got to show that what you allege is incontestable, incontrovertible, incapable of being overthrown, undeniable. That is what irrefragable means. So this standard is extreme. It contradicts Congressional intent in the whistleblower law. And it, frankly, I think almost stands alone in the law, as far as I can tell, in terms of what evidence would be needed to overcome a presumption.

Now in your answers, you state that in your view the irrefragable standard applies only in limited circumstances so that it may not be necessary to amend the act to make it clear that we are talking about reasonable belief on the part of the whistleblower, and not having to prove something which is undeniable, indisputable, and so forth. Some of the experts that we have consulted with have already said that the *LaChance* decision has had an impact on a broad array of whistleblower cases and that we need to clarify the law.

So I would ask you, Ms. Marshall, whether you would agree that is appropriate for Congress to pass legislation which clarifies the whistleblower statute and overturns the erroneous standard in the *LaChance* case?

Ms. MARSHALL. Far be it from me to say Congress does not have the appropriate authority to take that action if it deemed it appropriate.

Senator LEVIN. But would you recommend——

Ms. MARSHALL. I have not necessarily recommended it on *LaChance vs. White.* I do not look at the holding as being as strong as it has been interpreted by some others. As you said, the case was decided in 1999. Irrefragable had not been referred to prior to or after in any other whistleblower decision. I do not think it is a standard that the board has used, and I do not believe it is an appropriate standard, as you say, impossible to refute.

Senator LEVIN. You do not think that is the appropriate standard for the board?

Ms. MARSHALL. No. We would not be able to adjudicate under irrefragable in the sense that no one would ever be able to prove anything. So, in that sense, I understand the seriousness and the use of the term in that decision. Actually, the case is still pending before us on a remand decision, and it is something that we will be looking at again. As to whether Congress should deal specifically with irrefragable, I said as an adjudicator, earlier that, I prefer the

broad language of the statute, which covers "any" violation of law, rule, or regulation. I think that is because we need to be able to look at all the facts of the case.

Senator LEVIN. If the board does not follow the irrefragable standard, and I am glad to hear it does not, why should then there be any doubt that the Congress should make sure that is not the standard?

Ms. MARSHALL. I should not say the Board does not follow a decision of the Federal Circuit because it is our reviewing court. I think it is the context in which language is used. I think there have been some initial decisions where "irrefragable proof" is quoted because it is quoted as having been from the Federal Circuit decision, so perhaps that is somewhat of a misstatement. Since I have been a member of the board, we have not seen the language as requiring proof that was irrefragable.

Senator LEVIN. There is a lot of uncertainty here which needs to be cleared up. You have a court decision and I think the board is bound by it; are you not?

Ms. MARSHALL. We are bound by the decisions of the Federal Circuit. They are precedential, very definitely.

Senator LEVIN. So how then can you not follow that decision, even though it is wildly wrong?

Ms. MARSHALL. I would say, without going too far, that in reading the *White* case, the holding in the case is that there should be an objective versus a subjective standard for a finding of gross mismanagement. The sentence in which irrefragable was used appeared in a following paragraph. It does not seem to me to be the main holding of the case. That is just my view as a member of the board.

Senator LEVIN. Now has the legal——

Ms. MARSHALL. It is still pending before the board and it is something that we have been researching and continues to research.

Senator LEVIN. Is there a counsel to the board who has given you advice on this issue?

Ms. MARSHALL. Yes.

Senator LEVIN. Has that counsel said that the irrefragable standard is not binding upon you, is not the holding in the case?

Ms. MARSHALL. As the case is ongoing, it is hard to say that we have a final conclusion on that. That would obviously take a majority vote of the board. I have had some interesting discussions with your staff. As I said, if there were action by the Congress specifically to overturn the use of irrefragable proof, I see that only as upholding what I currently consider to be the law.

Senator LEVIN. And what you consider to be appropriate for the board to follow.

Ms. MARSHALL. Yes.

Senator LEVIN. So that you do not believe the board should follow the irrefragable standard. But if Congress decided to adopt that belief into law you would——

Ms. MARSHALL. I think it would simply reinforce what I believe is what the board practices and what is appropriate.

Senator LEVIN. A couple additional questions. Senator Akaka and I have the bill which would do just that and I would hope that the subcommittee could consider that bill given this court opinion

which is so extreme on this subject, so unusual and is not apparently even viewed as a holding by the board, thank God. So perhaps the subcommittee will be able to take a look at the bill which Senator Akaka and I have introduced for possible consideration.

Just two other questions, Ms. Marshall, for you. It relates to the question of somebody whose security clearance has been revoked because they have been a whistleblower. That is part of the retaliation, and as to what the board can do to reverse that decision revoking the security clearance of an employee. Your written answers suggest that there is no ability to reverse a security clearance revocation itself, therefore whatever the board might do would be viewed as an advisory opinion which the board cannot issue.

First of all, I think that the board can do much more than just give an advisory opinion that the whistleblower was retaliated against. The board has the ability to invoke other remedies against the employer, the agency that discriminates against the whistleblower or retaliates against the whistleblower, other than ordering the removal of a security clearance. There are other remedies which are permitted including back pay, reassignment of the employee to a new position, attorney fees, and other relief. So how would that be viewed then as an advisory opinion?

Ms. MARSHALL. In the written responses, I was looking at the fact, that the board's opinion in finding retaliation could be used by another agency to try to determine whether or not to restore a security clearance. It seemed to me that would be giving the board's opinion to another agency as to what we find and that this ought to be considered. I have met with your staff and had more detailed discussions on this. The way the bill is written, as a matter of law, we would have a final decision of the board providing relief. Then, it might trigger another action, but the decision is not advice from the board to the other agency. So I would agree, as a matter of law, that there is a distinction, yes.

Senator LEVIN. And you would agree that the board in a security clearance revocation retaliation case, can order other remedies.

Ms. MARSHALL. We could provide relief under the legislation, not under current law.

Senator LEVIN. Under current law, do you not agree that the board could, if somebody was retaliated against in the form of revocation of security clearance, could remedy that in other ways than ordering the restoration of the security clearance, including attorneys fees, back pay, and so forth? Are there not other remedies?

Ms. MARSHALL. We would be looking at retaliation, perhaps under an individual right of action case that might come to us. Generally, we are not going to look behind a security clearance issue. So, there might be a finding of retaliation for some other related reason, but we look at the due process rights for an individual under a security clearance revocation right now. We do not look at underlying issues.

Senator LEVIN. You are saying under current law you cannot look at an allegation that somebody's security clearance was removed because of a retaliatory motive for whistleblowing; that you are not allowed to look at that.

Ms. MARSHALL. We have not been reviewing security clearance issues under retaliation.

Senator LEVIN. So our bill would give you the authority.

Ms. MARSHALL. The legislation would provide that, yes.

Senator LEVIN. So that is another reason why I would hope the subcommittee would look at the bill. But I would disagree with you. I think that you can look at other remedies under current law besides the restoration of the security clearance.

Ms. MARSHALL. It would be possible for the board to look at other remedies.

Senator LEVIN. Then finally, your written answers state that the legislation requiring the board to review security clearances would have an impact on how the board conducts its normal business and that the board would need to establish procedures and a separate process for handling and reviewing security clearance matters as well as classified and/or sensitive material. I understand that subsequently you reviewed the board's handling of past cases involving classified information and concluded that the board did and does have an information security manual which establishes official board policies for handling classified information; is that correct?

Ms. MARSHALL. Yes, there is a manual. But we currently do not have employees with the necessary background checks. It has not been an issue during the 5½ years that I have been at the board. So, we would need to reinstitute and restore some of those practices.

Senator LEVIN. By the manual——

Ms. MARSHALL. The manual exists. We have a process. We just do not have the employees right now.

Senator LEVIN. Thank you, Mr. Chairman.

Senator FITZGERALD. Senator Akaka, do you have any questions of the witnesses?

Senator AKAKA. Thank you very much, Mr. Chairman. I pose this question to both Ms. Marshall and Mr. McPhie. The Department of Defense has proposed legislation to waive a number of provisions in Title 5, including those relating to a Federal employee's right to appeal to the MSPB. Appeals from DOD constitute approximately one-third of MSPB's caseload according to your 2001 annual report.

Now here is the question. If the Defense Department proposal is enacted, how would this change impact the MSPB? And what does this trend signal for the public's trust in the civilian workforce?

Ms. MARSHALL. Certainly, DOD is the largest agency in terms of the number of civil service employees. What is not clear in the legislation as drafted is whether or not DOD employees would be in a different internal review process, or what their due process rights would be. As I said, we are trying to educate others as to our systems and how we have gained credibility with the civil service workforce for our independence.

I use the example of the FAA. The board currently has the ability with FAA, as we do with the Internal Revenue Service, the Patent and Trademark Office, and other personnel systems that have provisions outside of Title 5, to adjudicate appeals from employees of those agencies. Our have to look at the particular regulations that govern in the particular personnel system that may be unique. The board has the ability to provide those services and I would just like to sell what I think is the very effective work of the board.

Senator AKAKA. Mr. McPhie.

Mr. MCPHIE. I was asked that question by your staff. The answer involves a discussion of due process, what it is and how you protect it. Once you give people a right, then the Constitution says, before you can take it away you have to give them this dispute process. What it means simply is notice and opportunity to be heard; a hearing being the key. A hearing that is effective, a hearing that makes sense, you cross-examine, do all those kinds of things.

Out there exists a number of due process models, some with review to third parties, some without. State and Federal courts broadly speaking, have held such models to be constitutional. So you would have, for example, a decisionmaker reviewing his or her own decision and it is constitutional.

The question for me is, does it make good sense? The answer to that, based on my experience, is no. If you have an internal, a completely internal process, your process tends to lose credibility. If it has no credibility, in a sense you have no process because you end up with more disputes, not less. So in my judgment, at a minimum, you have to have some external body.

Should it be the MSPB? I think Congress will put it wherever Congress wants. But if you have an MSPB and based on its history and its record, it is operating, with some criticisms but in the main it is operating well, why would you want to create another body to do that? It would not make a lot of sense to me. But again, I defer to the wisdom of Congress on that.

Senator AKAKA. Thank you very much for your response.

Mr. Chairman, thank you very much.

Senator FITZGERALD. I now will ask you both the standard questions that the Committee always asks. You may respond together.

Is there anything you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. MARSHALL. No.

Mr. MCPHIE. No.

Senator FITZGERALD. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Ms. MARSHALL. No, sir.

Mr. MCPHIE. No.

Senator FITZGERALD. Do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Ms. MARSHALL. Yes.

Mr. MCPHIE. Yes.

Senator FITZGERALD. If Senators have no further questions, and I gather there are no other Senators here, I want to thank you both very much for coming. Without objection, the hearing record will remain open for any additional statements or questions from Senators through 5 p.m. tomorrow. If there is no other business to come before the Committee, this hearing is adjourned.

[Whereupon, at 3:31 p.m., the Committee was adjourned.]

APPENDIX

STATEMENT OF
SUSANNE T. MARSHALL
NOMINATION TO BE CHAIRMAN, MSPB

May 15, 2003

I appreciate the opportunity to appear before the Governmental Affairs Committee today for this confirmation hearing. It hardly seems possible that five and a half years have passed since I had the role of sitting behind the Committee Chairman and peering over at the witnesses from that vantage point.

Since joining the Board in November, I have served in all three positions on the Board— as Member from 1997 until February 2002, as Vice Chairman and Acting Chairman from February until August 2002, and as Chairman since receiving my recess appointment from President Bush in August of last year.

Because I had served on the staff of the Senate Governmental Affairs Committee for 12 years prior to my appointment to the Board, I was thoroughly familiar with Federal workforce issues and the functions of the Board when I came to MSPB. During my time as a member of the Board, I have learned that the law applied by the Board can be extremely complex. And, it has become even more complex during my tenure.

In my experience, cases that present a significant, unresolved legal issue or a complex and potentially controversial set of facts tend to take the most time for Board review. After I became Chairman, I directed our Office of Appeals Counsel to screen incoming cases to identify especially complex cases and forward them to the Board sooner than they would be sent under standard procedures. My expectation is that this will help reduce the time such cases are pending before the Board.

Another initiative to speed the processing of cases that I took soon after I became Acting Chairman last year was to transfer our Expedited Petition for Review Pilot Program from the Office of the Clerk of the Board to the Office of Appeals Counsel. I believed that with the additional legal resources available in the Office of Appeals Counsel, the operation of this pilot program could be improved substantially. This indeed was the case, with the overall average processing time at headquarters reduced by almost two months after the transfer of the pilot program.

At the regional level, our new Mediation Appeals Project—or MAP—was launched under my leadership last year. Under this pilot program, the parties to an appeal can elect to have their dispute submitted to one of our

mediators, all of whom are MSPB employees who have been trained in transformative mediation techniques. If the mediation does not result in a resolution, the appeal is returned to the regular adjudication process. MAP will be evaluated later this year, after the pilot period is completed, and we will then determine whether to continue the program. Regardless of that decision, I believe the training and new skills given to MSPB employees has been very valuable.

Also, since I assumed the leadership of the Board, we have made significant progress in our development of an electronic option for filing appeals with MSPB. Our web-based e-Appeal application is being tailored to the circumstances of the individual appellant as much as possible. Rather than dealing with a long, paper form containing all of the questions that apply to the various types of appeals, a person filing through e-Appeal will select the type of appeal to be filed and then be presented with only the questions that apply to that type of appeal. We expect to implement e-Appeal by October of this year, which will comply with the Government Paperwork Elimination Act.

Recently, we launched a redesigned MSPB website that we believe will be much easier for our customers to navigate. Information on the website is now better organized, and the most frequently accessed information is only one or two clicks away from the home page. All Board decisions issued since 1994, when the website was launched, and key precedential decisions issued before 1994 are available in a searchable database on the website. Furthermore, users may now subscribe to two listservs and receive e-mail notification when a new Board decision or a new report of a merit systems study is posted to the website.

Soon after I became Acting Chairman, I filled several vacant Senior management positions by appointing new heads of the Office of Regional Operations, the Office of Policy and Evaluation, the Office of the Clerk of the Board, and the Northeastern Regional Office – all career SES positions. Since becoming Chairman, I have filled two more SES positions that were vacated last year by appointing a new career General Counsel and a non-career Director of the Office of Appeals Counsel.

The foregoing are all examples of the progress I believe the Board is making to become even more efficient in its operations. I look forward to confirmation by the Senate so that I can continue to carry the duties of the office of MSPB Chairman through the remainder of my term.

Thank you for your consideration. I will be happy to respond to any questions the committee members might have.

U.S. MERIT SYSTEMS PROTECTION BOARD

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Chairman

May 16, 2003

TO: Elise Bean, PSI
Joe Bryan, Senator Levin

FROM: Susanne T. Marshall

SUBJECT: Classified Information/Security Clearance Issues

I have checked in more detail on the Board's history with handling classified information. There have been no such cases during my tenure with the Board. Information from the Clerk's office indicates that there have been only two cases were the issue arose during the history of the Board.

In 1980 appellants from the Dept. of the Navy appealed to the Board from OPM's reconsideration decisions denying them service credit for periods of employment with the Dept. of the Navy. The disputed service was with a unit created by the Navy to perform intelligence functions. Because classified information was necessary to the determination of the merits of the case (the personal services contracts), it was assigned to the Board's Chief Administrative Law Judge (CALJ). A closed hearing was held. *Raymond Acosta, et al., v. Office of Personnel Management and Department of the Navy* 19 MSPR 101 (1984).

The second case, *Priscilla M. Gusler v. Department of the Navy*, DC-0752-96-1081-I-1, DC-0752-96-1081-C-1, was a removal action. It was filed on September 9, 1996 and assigned to the CALJ, who settled the case on March 18, 1998. There was some SECRET information submitted by the agency in this case.

The Board established an Information Security Manual in 1992 setting forth a policy for handling classified information. Therefore a policy for handling such cases does exist. However, the Board currently does not employ a Chief Administration Law Judge. When Judge Streb retired, Former Chairman Beth Slavet entered into a contract arrangement that provides for Administrative Law Judges (ALJs) from the NLRB to hear MSPB cases when deemed necessary. In general, ALJs undergo a background check concerning suitability for employment, not for a security clearance.

U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Chairman
1615 M Street, NW
Washington, DC 20419-0002

Phone: (202) 653-7103; Fax: (202) 653-7299; E-Mail: chairman@mspb.gov

Chairman

May 21, 2003

The Honorable Peter G. Fitzgerald, Chair
U.S. Senate Committee on Governmental Affairs
Subcommittee on Financial Management,
The Budget and International Security
Room 446 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Fitzgerald:

It was an honor to appear before you and your colleagues on the Committee during my confirmation hearing on May 15, 2003. During that hearing, a brief reference was made to legislation currently pending before Congress that would affect the right of a significant number of Federal employees to appeal employment disputes to the Merit Systems Protection Board. Due to the press of time, we could not fully discuss the Board's record in adjudicating employee appeals efficiently and in a timely manner. Therefore, I would like to submit this letter and the accompanying chart for inclusion in the record of the confirmation hearing.

The enclosed chart provides a comparison of the Board's timeframes for processing appeals and petitions for review with the case processing timeframes for three other agencies that have similar statutory functions. Those agencies include the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the National Labor Relations Board. Data shown for the MSPB are all actual average processing times. For the other agencies, the chart shows timeliness goals where actual performance data was not available.

As the chart demonstrates, the MSPB completes adjudication of its cases more expeditiously than do agencies with similar responsibilities. It should also be noted that approximately 80 percent of appeals processed by the MSPB are completed at the regional and field office level and thus, become the Board's final decision. Only 20 percent of the initial decisions issued by administrative judges in our regional and field offices are appealed to the Board at headquarters on petition for review. Thus, fully 80 percent of our appeals caseload is completed in an average of just over 90 days.

The successful settlement program that we have operated in our regional and field offices also contributes to the efficiency of our case processing at this level. Of the appeals that are not dismissed for lack of jurisdiction, untimely filing, or other reasons, about half are settled. The average processing time for settled appeals in FY 2002 was 83 days. Furthermore, our administrative judges frequently achieve global settlements that dispose of not only the MSPB appeal but also a related EEO complaint or court case.

Of the 20 percent of appeals brought to the Board at headquarters on petition for review of the initial decision, approximately 25 percent are closed under the Expedited Petition for Review Pilot Program. Decisions on petitions for review under this program are issued in approximately 60 days.

We understand that proposed revisions to the employee appeals process reflect a concern on the part of agency managers with the length of time that it takes to complete the process. We suggest, however, that careful consideration be given to the overall impact on Government operations if each major Federal agency were granted the authority to establish its own "independent appeals process." We submit that the efficiency of the Government would be greatly diminished as a result of such action. Multiple appeals processes would be largely duplicative of the process Congress established when it created the MSPB.

The Board already has experience applying different personnel rules in different agencies in its adjudication of appeals. For example, in addition to adjudicating appeals from DOD employees under the normal Title 5 rules, we have adjudicated appeals from DOD employees covered by the Department's various personnel demonstration projects. We also adjudicate appeals from employees of the Internal Revenue Service and the Federal Aviation Administration, where significant variations from Title 5 are in effect. The personnel system being developed for the Department of Homeland Security will undoubtedly present us with a new set of rules to apply. In short, the MSPB can apply whatever rules relating to personnel actions and appeals are operative in a particular agency. Multiple appeals agencies, therefore, are unnecessary.

Sincerely,

Susanne T. Marshall

Enclosure

CASE PROCESSING TIMES FOR SELECTED AGENCIES - May 19, 2003			
	FY 2000	FY 2001	FY 2002
Equal Employment Opportunity Commission (From FY 2003 Annual Performance Plan)	N/A	19.4% of Hearings Cases resolved within 180 days 39.5% of appeals cases resolved within 180 days	Average processing time for completion of hearings: 420 days Average processing time for closure of appeals: 465 days Established goal of resolving 20% of hearings cases within 180 days Established goal of resolving 20% of appeals cases within 180 days
Federal Labor Relations Authority (From FY 2000 Performance Report)	Processing from receipt by OGC to initial dispositive action: 90 days Processing in OALJ from filing of complaint to hearing. 20 days OALJ hearing to OALJ decision: 90 days Processing by Authority for decision: 273 days Total: 573 days.	N/A	N/A
Merit Systems Protection Board (From Board Performance Reports for Fiscal Years 2000-2002)	Average case processing time for the regional and field offices: 89 days (7,370 total cases)* Average case processing time for H Q: 176 days. (1,463 total cases) Total: 265 days	Average case processing time for the regional and field offices: 92 days (7,073 total cases)* Average case processing time for H Q: 214 days. (1,261 total cases) Total. 306 days	Average case processing time for the regional and field offices: 96 days (7,101 total cases)* Average case processing time for H Q: 205 days (1,197 total cases) Total. 301 days
National Labor Relations Board (From FY 2003 Annual Program Performance Plan and FY 2001 Annual Performance Report)	Open hearings upon issuance of a ULP complaint: 132 median days Average length of hearing: 3 days Issuance of ALJ decision: 56 median days Total. 191 median days Board Decisions: Achieved reduction of average age of cases to 30 months for 78% of cases	Open hearings upon issuance of a ULP complaint: 140 median days Average length of hearing: 3 days Issuance of ALJ decision: 42 median days Total: 185 median days Board Decisions: Achieved reduction of average age of cases to 24 months for 100% of cases	Goal: Open hearings upon issuance of a ULP complaint within 160 median days Average length of hearing: 3 days Goal: Issue ALJ decision within 62 median days Projected total: 225 median days Board Decisions: Goal: Reduce average age of cases to 20 months for 100% of cases

***Note:** Approximately 80% of the regional decisions are final MSPB decisions since only 20% of the regional decisions are appealed to the 3-member Board on petition for review.

U.S. Senate Committee on Governmental Affairs
Confirmation Hearing
Statement for the Record Submitted by
Neil A. G. McPhie, Nominee
to be a
Member of the U. S. Merit Systems Protection Board

May 15, 2003

Good afternoon Mr. Chairman and members of the Committee. Thank you for this opportunity to appear before you today as you consider confirmation of my nomination to be a Member on the U. S. Merit Systems Protection Board. I am honored by the confidence President Bush has placed in me as demonstrated by his nomination of me to this important position. I pledge that, if confirmed, I will discharge the responsibilities of this position in accordance with applicable laws, rules and regulations and to the best of my abilities.

The Merit Systems Protection Board's statutory mission is to ensure the integrity of the Federal civil service system through its adjudicatory and studies functions. The timely and fair adjudication of employment disputes is vital to the efficient operation of the Federal government. Federal managers and line employees must have confidence in the application of merit principles to their respective workplace situations. The Board's record for deciding initial appeals in less than a year and for having more than 93% of its decisions left unchanged upon appeal to the U.S. Court of Appeals for the Federal Circuit, provides a solid basis for confidence in the MSPB appeals process. Even as Congress explores avenues for improving certain aspects of the civil service system, the Board's important role as an independent and neutral arbiter of fairness and adherence to merit principles by Executive branch agencies remains vital to the effective and efficient operation of the Federal government. If confirmed, I will work to build upon the Board's impressive record.

As a Member of the MSPB, my primary role would be to adjudicate cases in a fair and objective manner, consistent with the governing statutes, regulations, case law and policies. My role with respect to my fellow Board Members would be to work towards a common goal of processing cases in a fair and expeditious fashion. I will work to ensure that the Board fulfills its adjudicatory, studies, and regulatory oversight functions. In addition, I would assist the Chair, upon request, with any administrative responsibilities affecting the operations and mission of the Agency and to assume such responsibilities in her absence.

I am proud of my many years of public service. I will bring to this position approximately 27 years of experience as an employment lawyer. I have worked in federal and state government, and represented the interests of both management and line employees. Through this experience, I have become intimately familiar with the myriad of issues that give rise to workplace disputes. I have counseled clients in both categories and managed programs for the effective resolution of such disputes. I look forward to meeting the challenges and opportunities for service that these new responsibilities foretell.

BIOGRAPHICAL AND FINACIAL INFORMATION REQUESTED OF NOMINEED

A. BIOGRAPHICAL INFORMATION

1. Name:

   Terrence A. Duffy

2. Position to which you are nominated:

   Member of the Federal Retirement Thrift Investment Board

3. Date of Nomination:

   Received intent to approved: 11/13/2002

4. Address:

   Office: 30 S. Wacker Drive
   Chicago, Illinois 60606

5. Date and place of birth:

   August 15, 1958, Chicago, Illinois

6. Marital status:

   Married: Jennifer Jurgens Duffy

7. Name & ages of children:

   None

8. Education:

   Leo High School - 1972-1976
   St. Xavier University - 1977-1978
   University of Wisconsin, Whitewater - 1978-1980
   St. Xavier University - currently in MBA program 2002-present

9. Employment record:

9/9/80 - Broker Assistant - RB&H Commodities, 30 S. Wacker Drive, Chicago, Illinois 60606

11/81 - Present -	Member - Chicago Mercantile Exchange Inc. President, TDA Trading 30 S. Wacker Drive Chicago, Illinois 60606
4/02 - Present -	Chairman of the Board Chicago Mercantile Exchange Inc. 30 S. Wacker Drive Chicago, IL 60606

10. Government experience:

National Saver Summit on Retirement Savings (appointed by President Bush in 2002)

11. Business relationships:

Chairman of the Board - Chicago Mercantile Exchange Inc.

12. Chairman, Chicago Mercantile Exchange Inc.

13. Political affiliations and Activities:

a. None
b. None
c. Please see attached list.

14. Honors and awards:

None

15. Published writings:

None

16. Speeches.

None

17. Selection:

    (a) Experience
    (b) Financial experience

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. No.

2. Yes - President, TDA Trading
   Chairman, Chicago Mercantile Exchange Inc.

3. Yes.

4. No.

5. Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. None.

2. None.

3. Yes.

D. LEGAL MATTERS

1. No.

2. No.

3. No.

4. None

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFADAVIT

Terrence A. Duffy being duly sworn, hereby states that he has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his knowledge, current, accurate and complete.

Subscribed and sworn before me this 4 day of February, 2003.

"OFFICIAL SEAL"
ELLEN SUE FEINBERG
COMMISSION EXPIRES 07/30/03

Notary Public

U.S. Senate Committee on Governmental Affairs
Prehearing Questionnaire for the
Nomination of Terrence A. Duffy to be
A Member of the
Federal Retirement Thrift Investment Board

I. Nomination Process and Conflicts of Interest

1. *Why do you believe the President nominated you to serve as a Member of the Federal Retirement Thrift Investment Board (FRTIB)?*

   I believe that the President nominated me to serve as a member of the Federal Retirement Thrift Investment Board (FRTIB) because I have a great deal of business and leadership experience on several levels which will allow me to bring a unique perspective to issues facing the FRTIB. First, as an entrepreneur and small businessman, I have served as President of T.D.A. Trading, Inc., which is a broker association at Chicago Mercantile Exchange Inc. (CME), since 1981. Also, I have served on the Board of Directors of CME for a number of years and I am currently the Chairman of the Board of CME. CME is a diverse public corporation with over 1000 employees, approximately 3000 shareholders with special trading privileges and many other shareholders that own CME Stock. As a result of owning my own business as well as serving as the Chairman of the Board of the largest futures exchange in the United States, I believe I can offer unique business insights to the FRTIB and can draw on past experiences to assist the FRTIB in its decision-making.

2. *Were any conditions, expressed or implied, attached to your nomination? If so, please explain.*

   No.

3. *What specific background and experience affirmatively qualifies you to be a Member of the FRTIB?*

   My experience and background as a Board member and Chairman of CME provides me with the necessary qualifications to serve as a Member of the FRTIB. CME is a diverse corporation with many talented individuals with varying skill sets. CME employs over 1000 individuals whose varied jobs include trading floor market reporters, information technology professionals, health care workers, auditors and executive staff. CME provides benefits such as a 401(k) plan, a pension plan, and health care and dental coverage for these individuals. The Board of Directors and various committees I serve on help determine which investment plans, health plans and other benefits the staff will receive and participate in. The programs in place at CME for staff as well as the systems used to administer those programs, have always been well received and they operate efficiently and effectively for staff.

4. *Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member? If so, what are they and to whom have the commitments been made?*

No.

5. *If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.*

None that I am currently aware of.

6. *To your knowledge, did persons representing interests that could be influenced by the FRTIB actively support or endorse your nomination? If so, please explain.*

None that I am currently aware of.

7. *Do you have any interest in any corporation, partnership, association, or other entity whose interest may be affected significantly by the Board?*

None that I am currently aware of.

II. Role and Responsibilities of a Member of the FRTIB

8. *How do you view the role of a Member of the FRTIB?*

I view the role of a Member of the FRTIB as an independent fiduciary with respect to all activities regarding the Thrift Savings Plan (TSP). Accordingly, all decisions that are made regarding the TSP must be prudent and solely in the interest of the TSP participants and their beneficiaries.

9. *What challenges do you believe the FRTIB will face? How will you as a Member address these challenges and what will be your top priorities?*

As a decision-making body, I believe that the FRTIB faces many of the same challenges that other Boards of Directors encounter. The FRTIB must maintain and foster effective and independent leadership in its role as a fiduciary for the TSP. The FRTIB must also continue to evaluate administrative and financial decisions brought to it by staff and be able to analyze those alternatives and make definitive and appropriate choices on how to proceed. Once a decision is made on how to proceed, clear and concise directions must be provided by the FRTIB to staff regarding how such decisions shall be implemented. I believe that my role as the Chairman of the Board of CME provides me with a great deal of experience and ability to recognize issues, evaluate alternatives and execute on a plan. The

execution of CME's recent initial public offering, which involved a planning process of several years and many difficult business, legal, tax and regulatory decisions, is an example of an experience I can draw on to help address the challenges of the FRTIB.

10. *How do you plan to communicate to the staff at the FRTIB on efforts to address relevant issues?*

As the Chairman of the Board of CME and as a Chairman of many CME committees over the years, I have always maintained an "open door" policy for staff and members of CME. By fostering a collegial and professional atmosphere at CME, staff and members have been willing to discuss new, inciteful and cutting edge ideas that make CME an extremely well run company. I would maintain the same type of effective open door policy with the FRTIB staff. I would also meet in person with the appropriate staff on a regular basis and also communicate more frequently, if necessary, by email or telephone with staff.

11. *What do you believe are the most important responsibilities of the position to which you are nominated and what challenges do you expect to face?*

I believe that the most important responsibilities of the position of a Member of the FRTIB are to act prudently, independently and in an effective manner when dealing with any issue involving the TSP. The individuals working for the federal government place their trust and a portion of their financial future in the hands of the FRTIB. Such a responsibility is not one that I would take lightly. I believe that the challenges facing the FRTIB involve the ability of the FRTIB to be an effective and efficient communicator, decision-maker and leader given the enormous size of the TSP and the number of participants in the TSP.

12. *What objectives would you like to achieve in your tenure as a Member? Why do you believe these objectives are important to the Board and to the government?*

I would like to achieve several objectives in my tenure as a Member of the FRTIB. First, I believe that the issues associated with the TSP recordkeeping system must be resolved. This includes having in place a fully functioning system that provides federal employees the options and information they need to manage their financial affairs. Resolution of the recordkeeping system issues also includes bringing closure to or having a clear plan for resolution of the current litigation involving American Management Systems, Inc. I believe the recordkeeping issue needs to be resolved so the FRTIB can move forward and focus its attention on its core responsibilities of administering the TSP.

As a second goal, I would like to increase participation in the TSP by federal employees through more effective education and communication efforts regarding the TSP. Finally, I would also seek to review the investment choices available through the TSP and determine if additional investment options would benefit

federal employees. I believe that increasing employee participation in the TSP and increasing investment choices for employees will allow such employees to develop larger retirement funds and have a more prosperous retirement. By increasing the retirement savings of millions of federal employees, governmental resources may not be as overburdened as these federal employees move into retirement.

III. Policy Questions

Governance/Oversight

13. *What, if any changes should the Congress consider to enhance the governance and accountability of the FRTIB?*

As an independent government agency, the FRTIB is truly a unique body. It must manage the funds held in trust by the TSP independent of political or even social influences. For this reason, considerations as to what Congress might do to enhance the governance and accountability of the FRTIB must be carefully reviewed. I believe the FRTIB is currently governed appropriately and is accountable for its actions. As with any body managing a large amount of money, however, regular and detailed audits must be conducted by independent authorities to ensure that funds are not being mismanaged in any manner.

14. *Discuss the oversight responsibility of the Department of Labor with respect to the Thrift Savings Plan and any changes to FERSA that Congress may want to consider.*

By law, the Department of Labor has the authority to establish a program whereby audits will be performed to determine whether the TSP is being managed in an appropriate and fiduciary manner. These audits may be conducted by qualified non-governmental entities or by the Comptroller General. The decision as to who conducts these audits is made by the Secretary of Labor. One area that Congress may wish to consider reviewing with respect to the Federal Employee's Retirement System Act of 1986 (FERSA) is clarifying how legal actions should be commenced on behalf of the TSP. At this time, there appears to be a disconnect or a lack of clarity as to the appropriate entity to decide and move forward with respect to legal action on behalf of the TSP. This issue is demonstrated by the issues associated with the American Management Systems, Inc. lawsuit.

15. *What steps should the FRTIB take to improve cooperation with the Department of Labor and its oversight responsibilities for the TSP?*

I believe that the relationship between the FRTIB and the Department of Labor has historically been positive. I also believe that open lines of communication will always benefit a working relationship between individuals and entities

because trust and a common understanding are developed through such efforts. In light of the independence of the FRTIB, however, any efforts to increase lines of communication could only occur in areas where the two entities could communicate without the FRTIB violating any of its fiduciary responsibilities.

16. *How do you view the role and responsibilities of the Thrift Board?*

I view the role and responsibilities of the FRTIB to primarily act as a fiduciary with respect to the TSP and to act in the best interests of the federal employees participating in the TSP and their beneficiaries. The FRTIB must be independent and make any decision affecting the TSP in a completely impartial manner.

17. *The Thrift Board is an independent agency. What do you consider to be the proper relationship between the Board and (1) the President and (2) the Congress?*

As an independent agency, the FRTIB must manage the funds in the TSP and make decisions regarding the TSP without political or social considerations. Accordingly, the relationship between the FRTIB and the President and Congress must be viewed as an arm's length business relationship similar to the way any two companies would deal with each other in the private sector. The FRTIB should deal with the President and Congress in a professional manner in order to advance the goals of the TSP, however, it must not have even an appearance of impropriety or its credibility and independence will be lost.

Information Management Systems

18. *Given the problems that the FRTIB has experienced in developing a new record keeping system, what actions do you plan to take to ensure that this system is completed soon and delivers the new features promised?*

In light of the significant delays in the launch of the new recordkeeping system over the past several years, I would not force a premature launch of the system at this time. I believe that detailed testing should be completed and the recordkeeping system should be launched when all known functionality issues are resolved. As part of the testing process, FRTIB technology staff should also be closely involved in the process to ensure the system delivers the functionality promised. Final payment to the consultant should not be made until the system is operating as expected by the FRTIB. In addition, I would recommend contemplating the purchase of a maintenance program for the system so that currently unknown bugs can be repaired or work-arounds can be developed.

19. *What actions would you take to ensure that the Thrift Savings Plan (TSP) has first class information technology with systems that offer features comparable to those of mutual funds and other pension plans?*

I believe that it is very important to have skilled and knowledgeable staff in all areas of an organization. However, in today's electronic world, skilled information technology staff are more important than ever. I know this to be true based upon my experiences at CME. CME has a very complicated electronic trading system called GLOBEX® that is maintained and updated by an experienced and skilled group of information technology professions. The TSP must seek to attract top tier information technology professions through competitive pay structures and competitive benefit packages. In addition to competitive pay, an attractive non-compensation working environment must also be made available to prospective information technology professions. These non-compensation benefits include things such as flexible working hours and competitive vacation time.

Also, the TSP systems must be constantly tested to ensure that they are functioning correctly and perform at the same levels of mutual funds of other pension plans. The use of outside consultants to check system functionality on a regular basis will also allow a comparison to be made between the TSP systems and those offered by mutual funds and other pension plans.

20. *What are your views on the pros and cons of outsourcing the TSP recordkeeping operations versus developing an internal solution? What approach do you believe would be preferable at this point? What do you believe is the significance in this regard that several major players apparently already have web-enabled applications that can accurately allow individuals to transfer balances between investment accounts and change how investment funds are allocated to new investments?*

I believe it is preferable to maintain the TSP recordkeeping operations internally instead of outsourcing the operations. By maintaining the operations in-house, I believe system upgrades and modifications can be performed more expeditiously and at a lower cost. In order for this approach to succeed, internal expertise regarding the operations of the system must be developed. Outsourcing the operations can certainly be done but my experience has been that such an approach leads to more costly and time consuming upgrades and system repairs.

At this time, I believe it would be most preferable to maintain an internal recordkeeping system. A large financial commitment has already been made by the FRTIB and it appears that the recordkeeping system will be operational very soon. For the reasons set forth above, I believe that developing internal expertise is the preferable course of conduct.

The major players that already have web-enabled applications that have attractive functionality can be looked to for guidance with respect to the operation of an internal recordkeeping operation. However, I do not believe that the FRTIB should change course at this time and outsource recordkeeping services to a third

party when its own system is close to being operational. I believe that an internal solution is preferable based upon the reasons stated above.

Administrative Costs/Fees

21. *Mutual funds pay a management fee that usually represents some percentage of assets under management to cover certain overhead costs. Furthermore, mutual funds are required to disclose their costs of operation so that an investor can compare the actual rates of return. Index funds historically have a low expense ratio. Should the TSP be measured against these kinds of industry benchmarks? If so, what factors should be taken into account that would allow meaningful measurement?*

Measuring the TSP against index fund industry benchmarks would be appropriate given the composition of the TSP fund alternatives. With the exception of the Government Securities Investment Fund (G Fund) which invests in short-term nonmarketable U.S. Treasury Securities, each of the other four funds, the Fixed Income Investment Fund (F Fund), the Common Stock Index Investment Fund (C Fund), the Small Capitalization Stock Index Investment Fund (S Fund) and the International Stock Index Investment Fund (I Fund), all have related indexes that can be used for benchmarking purposes.

The factors that should be taken into account that would allow meaningful measurement of the performance of the funds include their rate of return, net earnings after deduction of accrued administrative expenses as well as trading costs and investment management fees.

22. *How will you evaluate the value of the services provided by the financial institution managing the TSP relative to the fees it receives?*

The value of the services provided by the financial institution managing the TSP relative to its fees can be evaluated like any other financial institution managing funds. At a minimum, the rate of return should be reviewed, the level of customer service, the frequency of errors in providing daily operations, and the cost of the services should all be considered during an evaluation of the financial institution managing the TSP.

Miscellaneous

23. *In 2001 the Thrift Board requested legislation which, in its view, would clarify that the Executive Director of the Board may bring suit in the U.S. District Court on behalf of the Thrift Savings Fund. As a nominee to the Board, what are your views on independent litigating authority for the Executive Director?*

Initially, I believe it is important to have the issue as to whether or not the Executive Director of the FRTIB may bring suit in the U.S. District Court on

behalf of the TSP resolved, in order to provide clarity for all parties involved. To date, a great deal of energy and expense has been devoted to attempt to resolve this issue with respect to the lawsuit filed against the original recordkeeping service provider, American Management Services, Inc.

The FRTIB clearly has a unique position in the Federal government since it is an entity created to be independent of political and social considerations. The reason for the establishment of the FRTIB as an independent agency is to allow it to operate for the benefit of federal employees and not be subject to pressures from the legislative or executive branches. In order to maintain this independence, I believe that the FRTIB Executive Director should have the ability to bring suit in the U.S. District Court on behalf of the TSF. If another individual or entity had such authority, the independence that the FRTIB has will be lost. The FRTIB could potentially be placed in a position where it is required to compromise its independence in order to persuade a third party to file suit on its behalf.

24. *When the Federal Employees' Retirement System (FERS) was designed, the Thrift Savings Plan (TSP) portion of the FERS retirement benefits package was intended to provide a large part of the retirement incomes of those who complete Federal service careers. While active participation in the TSP among FERS employees has gradually increased in the years since its inception, a significant number of FERS employees – many of whom are newer, lower-salaried employees – are not actively participating.*

(A) *What actions, if any, do you believe the Board should take to increase participation in the TSP?*

I believe that the most important consideration for the FRTIB to consider to increase participation in the TSP would be to increase education of federal employees as to the benefits of participation. Although the FRTIB cannot provide specific investment advice to federal employees, providing education as to the general benefits of investing on a consistent basis through dollar cost averaging over many years would be appropriate. The FRTIB could provide incentive and motivation for federal employees to participate in the TSP by providing literature about the various funds available to federal employees as well as statistics to show how even small contributions made on a regular basis can grow to large amounts over a number of years.

(B) *Do you think there are attributes of the current TSP that actually discourage FERS employees from program participation? Are there ways the TSP can and should be made more attractive to employees?*

The attributes of the current TSP that may discourage FERS employees from program participation would be the failure of the recordkeeping system to be operational. For several years, federal employees have been

told that the new recordkeeping system is getting closer to being launched, however, unfortunately none of those completion dates have been met. By implementing the recordkeeping system, federal employees will be able to make transactions quicker and easier and also be able to track their holdings on a daily basis. These options will make participation in the TSP much more attractive.

25. *Last year, Congress passed a measure to allow TSP participants age 50 or older to contribute additional amounts ("catch-up" contributions) toward their retirement allowing the federal government's tax-deferred plan to do what private sector plans can choose to do. Now that this legislation has been enacted –*

(A). *What is your assessment of the current competitiveness of the TSP relative to other employer-sponsored retirement investment/savings plans?*

I believe that the current competitiveness of the TSP relative to other, employer sponsored retirement investing/savings plans is very comparable. By allowing TSP participants over the age of 50 to contribute additional amounts to "catch up," as well as offering funds in five of the major investment areas, the TSP is comparable to many other employee sponsored retirement investment/savings plans.

(B) *What actions can you and the Board take to ensure that Congress maintains the TSP's competitiveness relative to the benefits and features of other plans?*

By keeping track of what entities in the private sector are doing with respect to benefits and features of employee sponsored retirement investment and savings plans, the FRTIB can educate Congress on the kinds of benefits being offered to employees in the private sector. The number of federal employees participating in the TSP is very large, and by making the program more attractive to these employees, additional employees will begin to participate or participate in greater dollar amounts. By gaining additional employees participation in the TSP, they will establish a larger retirement fund that they can access at their retirement. To the extent that these individuals have larger retirement funds available to them, the financial burden on governmental systems will potentially be reduced.

(C) *What administrative and legislative modifications, if any, to the TSP do you think should be considered?*

With respect to modifications to the TSP, I believe that an evaluation should be done as to whether or not additional funds should be offered through the TSP. Currently, the five funds that are offered by the TSP are fairly broad in scope and cover basic investment options for investors.

However, I believe that by offering more diverse investment options, additional federal employees may be attracted to the TSP. This is an area that needs further research before any specific proposals are considered.

IV. Relations with Congress

26. *Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?*

Yes

27. *Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?*

Yes

V. Assistance

28. *Are these answers your own? Have you consulted with the FRTIB or any interested parties? If so, please indicate which entities.*

Yes

I, TERRENCE A. DUFFY, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided herein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 24 day of March, 2003.

Notary Public

3168.txt

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

January 29, 2003

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

Under the Ethics in Government Act of 1978, Presidential nominees requiring Senate confirmation who are not expected to serve in their Government positions for more than 60 days in a calendar year are not required to file public financial disclosure reports. The Act, as amended, however, contains a provision in section 101(b) which allows the committee with jurisdiction to request any financial information it deems appropriate from the nominee.

We understand that your committee desires to receive a financial disclosure report from any Presidential nominee for a position on the Federal Retirement Thrift Investment Board, along with a written opinion from this Office regarding any possible conflicts of interest. Therefore, I am forwarding a copy of the confidential financial disclosure report (OGE Form 450) of Terrence A. Duffy, who has been nominated by President Bush for the position of Member, Federal Retirement Thrift Investment Board.

We have reviewed the report and have obtained advice from the Federal Retirement Thrift Investment Board concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe that Mr. Duffy is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Amy L. Comstock
Director

Enclosure

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:**
Susanne Thomas Marshall
Susanne Marshall Chilton (married name, 1976-85)

2. **Position to which nominated:**
Chairman, Merit Systems Protection Board

3. **Date of nomination:**
January 9, 2003

4. **Address:**

Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419 (business)

5. **Date and place of birth:**
May 12, 1951; Coronado, CA

6. **Marital status:**
Divorced

7. **Names and ages of children:**
None

8. **Education:**

1965-69	McLean High School, McLean, VA; diploma, 6/9/69
1960-70	University of Maryland, Munich, GER; no degree
1970-71	Washington School for Secretaries, Washington, DC; diploma
1982 (Fall)	American University, Washington, DC; APEL (Assessment of Personal Experiential Learning) program

9. **Employment record:**

11/97 to pres	**Merit Systems Protection Board, Washington, DC 20419** Chairman, 9/30/02 to present (Recess Appointment) Vice Chairman, 2/7/02 to 9/30/02 Member, 11/9/97 to 2/7/02
12/85–11/97	**Senate Committee on Governmental Affairs, Washington, DC 20510** Professional Staff, Senator Fred Thompson, 1/97 to 11/97 Professional Staff, Senator Ted Stevens, 9/95 to 12/96 Deputy Staff Director, Chairman William V. Roth, Jr., 1/95 to 9/95 Minority Exec Asst/ Dpty Staff Director, Ranking Member Roth, 1/87 to 12/94 Majority Executive Assistant, Chairman Roth, 12/85 to 12/86
02/83-12/85	**House Committee on Government Operations, Washington, DC 20515** Staff Assistant, Ranking Republican Member Frank Horton
04/81-07/82	**U.S. House of Representatives** Legislative Assistant, Congressman Billy Lee Evans (*8th District, GA*)

01/78-03/81 **Mullis, Reynolds, Marshall, Horne & Phillips, Macon, GA**
Administrative Assistant to Attorney W. Carl Reynolds

09/76-12/77 **Kelly Services, Atlanta and Macon, GA**
Secretarial Temp Services

10/71-06/76 **Law Office of James E. Mack, Washington, DC**
Secretarial/ Administrative Services
Firm represented three national trade associations: National Confectioners Association; Peanut Butter Manufacturers Association; National Association of Mirror Manufacturers

10. **Government experience:**
None other than listed above.

11. **Business relationships:**
None

12. **Memberships:**
None

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate. **None**

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years. **Volunteer services in connection with the 1988 and 1994 re-election campaigns of Senator William V. Roth, Jr. of Delaware and related activities of the Delaware State Republican Committee.**

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years. **None**

14. **Honors and awards:**
None

15. **Published writings:**
Decisions of the MSPB are published by West Publishing Company. Majority decisions and separate opinions are available in volumes beginning November 1997.

16. **Speeches:**
I have spoken to numerous groups over the years discussing my position at the Board and highlighting significant decisions. I have selected a variety of presentations given over the past five years. I have not maintained a file of each and every speech.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I believe I was selected based on my experience and understanding of federal work force issues and a commitment to preserving the merit principles in the federal personnel system. During the past five years, I have developed my expertise and working relationship with the employees of the Board that makes me uniquely qualified to lead the agency.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
No, confirmation is to affirm my present position as Chairman of the MSPB.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.
No

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?
No

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?
No

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?
Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.
None

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.
None

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?
Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details. **Following is a list of cases in which I have been named in an official capacity. I have not been involved directly or personally in any case. Details may be obtained from the MSPB Acting General Counsel, Marty Schneider, at (202) 653-6772 x1286.**

Donald W. Duncan v. William J. Henderson, et al., Docket No. 99-1328-AS (D. Oregon).
Complaint dismissed May 3, 2000.
Affirmed on appeal, No. 00-35451 (9th Cir. May 10, 2001). Rehearing denied on Aug. 17, 2001.

Jason H. Herzfeld v. MSPB, et al., Docket No. 00-M-1105 (D. Colo.)
Case dismissed November 28, 2000.

Randolph S. Koch v. Susanne T. Marshall and Beth S. Slavet, Docket No. 1:01CV00875 (D.C.)
Complaint filed April 20, 2001.
Summary judgment motions pending.

William E. Benston v. Department of Commerce and Susanne T. Marshall, et al., Docket No. 02-1106 PLF (D.D.C.)
Complaint filed July 2, 2002.
Motion to substitute Director of Patent & Trademark Office as sole defendant and to dismiss, or for change of venue, pending.

Barbara Walton v. Beth S. Slavet and Susanne T. Marshall, Docket No. 02-CV-356 (N.D. Ga.)
Complaint filed February 7, 2002.
Motion for summary judgment pending.

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.
No

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.
No

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.
None

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

___**Susanne T. Marshall**_____ being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Susanne T. Marshall

Subscribed and sworn before me this _____5_____day of _____Feb._____, 20_03_____

Notary Public

NOTARY PUBLIC
DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES JANUARY 31, 2004

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Susanne T. Marshall to be
Chairman of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as Chairman of the Merit Systems Protection Board (MSPB)?

   Answer

   I believe the President nominated me to serve as Chairman of the Merit Systems Protection Board based on my demonstrated experience, first as a member of the Board for the past five years and, during the past year, as Acting Chairman and then Chairman.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

   Answer

   No.

3. What specific background and experience affirmatively qualifies you to be Chairman of the MSPB?

   Answer

   As a member of the Board for the past five years, I have gained intimate knowledge of the administrative operations of the MSPB. I have also developed a mastery of Board case law during that time. In the past year, as Acting Chairman and then Chairman, I have demonstrated my leadership abilities with respect to both the agency's administrative operations and the statutory functions of the Board.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as Chairman of the MSPB? If so, what are they and to whom have the commitments been made?

   Answer

   I have made no commitments—other than my commitment to the President and the United States Senate to fully and faithfully execute the duties of my office.

5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

Answer

No.

II. Role and Responsibilities of Chairman of the MSPB

6. What is your view of the role of Chairman of MSPB? How have your experiences as Chairman, Acting Chairman, and Board member informed your view?

Answer

The Chairman, by law, is the chief executive and administrative officer of the MSPB. Therefore, the Chairman has administrative responsibilities in addition to the adjudicatory responsibility that is vested in each Board member. Although I had no administrative responsibilities until I became Acting Chairman, I did gain intimate knowledge of the administrative operations of the agency during that time, and that knowledge informs my view of the role of the Chairman.

7. In your view, what are the major internal and external challenges facing MSPB? What would you plan to do, specifically, to address these challenges?

Answer

With respect to external challenges, I believe the principal challenge the Board will face over the next several years is to ensure that the public interest in a merit-based civil service is protected as various alternatives to the existing civil service system are considered and implemented. In recent years, we have seen significant exemptions or variations from Title 5 rules enacted into law for the Federal Aviation Administration (FAA), the Internal Revenue Service, and the Patent and Trademark Office. When the Transportation Security Administration (TSA) was created, the law establishing that agency provided for its employees to be covered by the same human resources management system as FAA employees, but provided a significant exception for TSA screeners. The head of the TSA was essentially given unreviewable authority to hire and fire TSA screeners. Most recently, of course, the Homeland Security Act has provided the Department of Homeland Security (DHS) with new human resources management flexibilities. Further, the Department of Defense has announced that it intends to seek authority to establish a separate human resources management system for its civilian

workforce. While the desire of these agencies to be freed from the constraints of certain Title 5 civil service rules is understandable, policymakers should take care to ensure that the merit system principles are adhered to, that prohibited personnel practices are prevented to the extent possible, and that due process with respect to adverse personnel actions is afforded to employees. In that regard, it is encouraging to note that the Homeland Security Act provides that the statutory merit system principles and prohibited personnel practices may not be waived in the DHS human resources management system.

One of the ways in which the Board carries out its statutory responsibility to protect the public interest in a merit-based civil service is through its merit systems studies function. That responsibility requires that we provide an unbiased, non-partisan evaluation of critical human resources management issues to policymakers. Our studies function has become increasingly important as new governmentwide flexibilities and unique agency authorities are considered and implemented. Through this function, we provide assessments and recommendations to ensure adherence to merit system principles, provide lessons learned and best practices to policymakers, and inform and advise policymakers as legislation and program guidance is developed to reform the civil service.

Another significant external challenge is to convince Federal managers and supervisors that the MSPB appeals process should not be a deterrent to taking appropriate personnel actions against problem employees. As explained more fully in my answer to question #10, many managers and supervisors believe that taking action will almost always result in an appeal to the MSPB and that the agency's action is likely to be reversed. In fact, our experience and our case statistics do not support that belief. Therefore, we must try through our outreach efforts and other means to convince these managers and supervisors that the appeals process should not deter them from taking appropriate action against employees who present conduct or performance problems.

As to internal challenges, our principal challenge is to continually expand the knowledge of our adjudicatory staff so that they can deal with the increasing complexity of MSPB appeals. As a result of the enactment of the Whistleblower Protection Act in 1989, the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, and the USERRA Amendments and the Veterans Employment Opportunities Act in 1998, personnel actions that were not previously appealable may now be brought to the MSPB if the appellant alleges a violation of one or more of these laws. It is not unusual for an appellant to allege a violation of more than one of these laws in an appeal. Also, our attorneys must now be prepared to adjudicate appeals of personnel actions taken under different rules in different agencies that have been granted exemptions or variations from the Title 5 civil service rules that once governed most Federal employment. In short, being an MSPB administrative judge or headquarters attorney is a considerably harder job today than it was a decade ago. It is a continuing challenge to ensure that our adjudicatory staff are made aware of new and revised laws that affect MSPB appeals and are properly trained to apply those laws in their adjudication of appeals.

Finally, the MSPB shares with many other agencies the internal challenge of an older workforce, many of whom are eligible to retire now or will be in the next several years. In our workforce planning, we are bringing on new employees, especially attorneys, who can be mentored by our more experienced workers. Our hope is that, by the time many of our experienced employees retire, we will have a trained cadre of younger workers who will enable the MSPB to continue to perform to the standards of quality and efficiency that we have maintained for almost 25 years.

8. How do you plan to communicate to the MSPB staff on efforts to address relevant issues?

Answer

On most issues, I communicate to the MSPB staff through the agency's senior managers. Regular meetings of the Senior Staff are held biweekly, and case management meetings with the heads of the headquarters legal offices are held at least monthly. In addition, I have personally visited all of our regional and field offices, meeting with the entire staff of each office. An especially valuable communications vehicle is the biennial legal conference, in which we bring together the administrative judges from the regional and field offices, headquarters attorneys, and other appropriate staff to meet with the Board members and experts from outside the agency. Within available resources, we also try to hold a management conference and a Regional Directors' conference at least annually. The MSPB also has a periodic employee newsletter through which I can communicate directly with every MSPB employee. Finally, because the MSPB is a small agency, I see employees at headquarters on a daily basis and frequently have informal discussions with them.

III. Policy Questions

9. Do you believe that it would be beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that if acted upon by Congress, agencies, and employees would improve the federal government's civil service system and personnel practices, and reduce the need for and costs of litigation? If so,

- How might MSPB go about identifying such systemic and recurring issues?
- How might Congress, agencies, and employees be made aware of these issues?
- Please explain whether you have any concerns that such activities might be inappropriate in light of the Board's quasi-judicial mission.

Answer

Generally, it is not the role of an adjudicatory agency to make legislative policy determinations about substantive matters within its jurisdiction. Rather, its role is to apply the statutes that reflect policy determinations made by Congress and any regulations

implementing those statutes. Thus, proposing a legislative or regulatory solution concerning a substantive matter within the Board's adjudicatory jurisdiction could be seen as inconsistent with the limitations inherent in the Board's adjudicatory role. However, when the issues involved are systemic or when they are technical, rather than substantive, I believe the Board can help remedy such problems without impairing its independent adjudicatory role or infringing upon OPM's regulatory role. Further, proposing legislative or regulatory corrections in such instances adds to Government efficiency and effectiveness and demonstrates the Board's commitment to equity and to improving customer service. Two examples of actions that I initiated come to mind—one concerning the timeliness of appeals under the Veterans Employment Opportunities Act (VEOA) and the other dealing with recovery of OPM overpayments to disabled FERS annuitants.

In the VEOA matter, I brought to the attention of the Assistant Secretary for Veterans' Employment and Training at the Department of Labor a problem we identified in certain VEOA appeals that the MSPB dismissed as untimely filed. The redress system enacted by the VEOA requires that a preference eligible file a complaint alleging that an agency violated a law or regulation relating to veterans' preference with the Department of Labor (DOL), where such complaints are investigated by the Veterans' Employment and Training Service (DOL/VETS). If DOL/VETS provides written notification to a VEOA complainant that the complaint has not been resolved, the complainant may then file an appeal with the MSPB. However, the law requires that such an appeal be filed no later than 15 days after the date on which the complainant receives the written notification from DOL/VETS. The VEOA does not provide for a waiver of this time limit.

We found that in certain VEOA appeals that were dismissed as untimely because they were filed after the 15-day deadline, the appellants claimed they never received notice from DOL/VETS of the time limit for filing an appeal with the MSPB. They also claimed they had been given an MSPB Appeal Form that indicated a 30-day filing time limit. This was surprising, because MSPB staff and DOL/VETS staff had worked together on implementation matters following the enactment of the VEOA and had agreed that it was crucial that DOL/VETS advise complainants of the 15-day filing time limit in their closing letters. Further, we had revised the instructions in the MSPB Appeal Form to include a statement that a 15-day filing time limit applies to VEOA appeals and had announced the availability of the revised form to agencies.

Following a ruling by the Board that the VEOA does not permit the MSPB to adjudicate a late-filed appeal, even under the circumstances described above, I wrote to the Assistant Secretary to bring this matter to his attention. I recommended that DOL/VETS take steps to ensure that all closing letters to VEOA complainants notify them of the 15-day time limit for an appeal to the MSPB and that the current version of the MSPB Appeal Form be provided to them. The Assistant Secretary was grateful for my having notified him of this problem and assured me that the necessary steps would be taken. Further, he requested information on the specific cases that had been dismissed as untimely under

these circumstances so that DOL/VETS could identify the investigators involved and ensure that they follow DOL policy on VEOA complaints in the future. Thus, in this matter, we were able to help remedy an inequitable situation without compromising the Board's impartiality as an adjudicatory agency.

In the case of overpayments to disabled FERS annuitants, we found in our adjudication of retirement cases raising this issue that OPM's practice was to send unreduced FERS payments to these annuitants promptly upon their retirement. Later, when the Social Security Administration approved disability insurance benefits for the annuitant, the offset of the Social Security payment had to be recovered from the FERS retirement payments already made. On my recommendation, an internal MSPB report was prepared that reviewed the pros and cons of proposing a legislative solution to this problem and included draft legislation. The former Chairman, however, decided that it was not appropriate for the Board to submit this draft legislation. I continue to believe that this problem needs to be addressed and that the Board may submit the draft legislation without compromising its role as an impartial adjudicator. I would be happy to provide it to you for the committee's consideration.

10. The appeals process administered by MSPB has been characterized as being legally complex, with court-like features.

- The process has been described as not always being user friendly. Do you believe that MSPB, as an administrative agency rather than a court, must achieve a balance between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? If so, how can that balance be achieved?

  Answer

  I do believe that the Board must achieve a balance between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it. Over the years, the Board has taken a number of steps to help achieve that balance. We require that our administrative judges provide explicit information to each appellant on what is required to establish Board jurisdiction over the appeal, the appellant's affirmative defenses, and all matters on which the appellant has the burden of proof, including the kind of evidence they must provide. Our regulations require administrative judges to ensure that the record is fully developed and to see that there is a fair and impartial adjudication of each appeal. They are specifically directed by the Board's regulations to hold conferences with the parties to simplify the issues in the appeal. The name and phone number of the administrative judge is provided to every appellant in response to the appeal so that, from the beginning of the process, the appellant knows who is handling the case and whom he or she can call with questions. In the absence of the administrative

judge, a paralegal or legal clerk can assist appellants with less complex inquiries. We also conduct extensive outreach to unions and other employee groups, agencies, and other organizations to explain the appeals process, and we participate in training courses sponsored by the many organizations that offer training to Federal employees.

More recently, the Board has provided additional guidance through its website and through a new video on the appeals process that is made available to the public. The Board also uses new technology to assist appellants, such as making available the option of a video-conference hearing. We are currently planning to enhance the user-friendliness of the appeals process by implementing an inter-active electronic filing option.

- The appeals process can be daunting for appellants, particularly those not represented by an attorney. Should MSPB assist *pro se* appellants in exercising their rights to due process? If so, what assistance should MSPB provide? What else can and should MSPB do to reduce the burden on appellants?

  Answer

  The Board does assist *pro se* appellants in exercising their rights to due process. The Board has stated that it will not hold *pro se* appellants to the same standards in pleadings as appellants who are represented and that its administrative judges will provide *pro se* appellants with greater assistance to ensure their rights are protected. The Board also makes continuing efforts to write its regulations and legal documents in "plain English."

  Where an appellant is represented in an appeal, the Board may not interfere in the attorney-client relationship. Nevertheless, the Board will not hold a represented appellant accountable for the representative's errors if the appellant's diligent efforts were thwarted by the representative's deceptions or negligence. Also, the Board has developed a line of case law that attempts to protect the rights of those appellants who are not represented and who may be suffering from a mental impairment that renders the appellant incapable of fully comprehending the proceedings and participating in them. In such instances, the Board attempts to protect the appellant's rights by arranging for representation, ensuring that the agency has met its obligation to file for disability retirement on the appellant's behalf, if appropriate, and putting in place a cooperative effort to ensure the proper processing of that application. If all of these measures still fail to protect the appellant's rights, the Board will direct that no final order contrary to the appellant's interests be issued.

- Some survey data show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. Do you believe that this is a valid concern, and, if so, what, if anything, do

you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Answer

MSPB's research—as well as that of other organizations—does indicate that many Federal supervisors and managers are reluctant to take appropriate actions against problem employees. However, our research also clearly shows that there are reasons for this reluctance other than the Board's appeals process itself. These reasons include insufficient training and knowledge, a belief that higher-level managers will not support taking action, and agency-imposed procedures and documentation requirements. All of these matters are within an agency's control. Accordingly, the Board strongly encourages agencies to provide necessary training to their supervisors and managers, to address conduct and performance problems actively when they occur, and to avoid creating unneeded barriers to addressing such problems.

There are also misperceptions about the appeals process itself that contribute to managers' reluctance to take action. One is that supervisors and managers tend to believe that taking an appealable action will almost always result in an appeal to the MSPB. In fact, officials at Government agencies estimate that only about 20 percent of all removals and demotions, the most frequently appealed actions, are actually appealed to the MSPB. About 75 percent of appeals to the MSPB are dismissed or settled, and in the appeals that are decided on the merits, the agency action is affirmed in 70 to 80 percent. Therefore, in our outreach to agencies, we emphasize that managers' responsibility to take appropriate personnel actions should not be avoided because of fears that the action may be appealed to the MSPB and that the agency action will be reversed.

Another factor that may contribute to managerial reluctance to take action is that an employee may be able to contest a particular personnel action in a number of ways and in a number of forums, such as MSPB, EEOC, and, for bargaining unit employees, any applicable grievance procedure. When this happens, a manager may have to devote a great deal of time and effort to obtain closure on a given action, even though the complaints or appeals in each individual forum are addressed expeditiously. Whether employees have too many ways to challenge a personnel action taken against them is an issue for the Congress to decide.

11. Some cases require lengthy and complex decisions. What will you do to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

Answer

I am committed to promoting a policy of writing decisions in "plain language" so that they can be easily understood by the parties and the Board's customers. I will encourage the Board's administrative judges and staff attorneys, as well as my fellow Board members, to keep the reader in mind when analyzing and explaining the sometimes complex issues and laws involved in our cases. To this end, I intend to ensure that the Board's administrative judges and headquarters attorneys regularly attend legal writing courses that emphasize a clear writing style. I plan to assess the Board's success in this regard by seeking feedback through regular contacts and periodic customer surveys.

12. MSPB's fiscal year 2003 performance plan states that MSPB obtains feedback from customer surveys regarding the adjudicatory process. Can you describe the surveys and the nature of the feedback received, both complimentary and critical of the adjudicatory process? Have survey results informed MSPB policies and procedures and, if so, how? Is there feedback that is critical of the adjudicatory process that MSPB cannot or has not been able to address? If so, please explain.

Answer

The Performance Plan goal to which this question refers covers both formal customer surveys and informal means of seeking customer feedback on the Board's adjudicatory process. The committee now has our Performance Plan for FY 2004, filed on February 3, 2003, which indicates that in the current fiscal year, our regional and field office staff are seeking feedback from the parties to proceedings at the regional level. They will provide that feedback to our Office of Regional Operations, which is currently engaged in developing a set of "best practices" for regional adjudication. Also in the current fiscal year, we are surveying the participants in our pilot Mediation Appeals Project (MAP) to obtain input on their satisfaction with the process. The results of that survey will be considered in our evaluation of the MAP pilot.

Our formal customer surveys in recent years have focused on our pilot programs for bench decisions and video-conference hearings and on our new appeals process video. The results of the survey of customers of the appeals process video that we conducted last year were very favorable, with most respondents indicating that they found the video helpful. The Board has committed itself to adopt customer suggestions received from that survey if it produces another such video or similar product.

Results of the customer surveys on the bench decision and video-conference pilot programs, conducted in FY 2000, indicated that appellants and representatives were generally very positive about bench decisions and agreed that the practice should be continued. Feelings were more mixed concerning video-conference hearings. Although some appellants had favorable opinions and were very impressed with the innovation, others saw problems with the hearings and wished the hearing had not been conducted by video-conference. Agency representatives, on the other hand, had very positive views of

video-conference hearings. As a result of both of these surveys, the Board provided additional guidance to its judges through the Administrative Judges' Handbook, generally clarifying the circumstances in which use of bench decisions and video-conference hearings is appropriate. With respect to video-conference hearings, the Board has also developed additional guidance for both its judges and the parties through case law. The results of these customer surveys were an important factor in the Board's decision to incorporate both of these pilots into standard MSPB adjudicatory procedures.

Other examples of actions the Board has taken in response to either formal customer surveys or informal feedback include the development of a Petition for Review Form and the development of a pilot suspended case procedure that allows the parties to an appeal additional time for discovery and settlement efforts. The Petition for Review Form has been available to customers on the MSPB website since 1999, and the suspended case procedure was incorporated into standard MSPB adjudicatory procedures last year.

Prior to my joining the Board, some customer surveys were conducted to measure the satisfaction of parties with the MSPB appeals process in general. Results of those surveys generally indicated that appellants, representatives, and agencies were satisfied with the treatment they received from MSPB employees. There was a great deal of variation, however, in how they viewed the Board's decisions. Not surprisingly, those receiving more favorable decisions responded more positively to the survey questions. The results also suggested that further efforts were warranted to help appellants, representatives, and agencies better understand the Board's regulations, procedures and decisions, and these results have informed our outreach appearances and other public information efforts.

13. The time taken by MSPB administrative judges to process initial appeals has remained fairly stable since FY 1995, averaging about 100 days. However, according to MSPB's 2001 Performance Report, the average time the Board has taken to review initial appeals stood at 214 days in FY 2001, up from 176 days in FY 2000. What would you propose to expedite Board review?

Answer

In the Board's FY 2002 Performance Report, which was filed on February 27, 2003, we reported that the average processing time for petitions for review at headquarters was 205 days. That number was within 5 percent of the goal of 195 days established in our FY 2002 Performance Plan and, in accordance with OMB instructions for agency Performance Reports, the goal was considered met. In addition, the 205-day average processing time represents a reduction from the 214-day average processing time in the previous fiscal year. For both FY 2003 and FY 2004, we have reduced the goal in our Performance Plan to 190 days to provide further encouragement to both the Board members and the headquarters legal offices to continue to improve case processing

timeliness.

The 176-day average processing time in FY 2000 was something of an anomaly. The Board's Performance Report for that fiscal year attributed the result, in part, to the fact that there was a vacancy on the 3-member Board for the last half of the fiscal year. In theory, cases should take less time to process when they must be reviewed by only two Board members rather than three. However, our average processing time of 205 days in FY 2002, while a reduction from FY 2001, did not approach the FY 2000 level even though we had only two Board members for the last 9 months of the fiscal year. In fact, when there are only two members, there is an increased likelihood that some cases will take an unusually long time to close because the two members cannot agree on the disposition. Such cases undoubtedly had an impact on our average processing time in FY 2002. In an effort to reduce the processing time under similar circumstances in the future, we have instituted a procedure whereby decision-writing attorneys in our headquarters legal offices engage in earlier consultations with the Board members' staffs to devise dispositions to achieve a resolution that is satisfactory to both members. Of course, the best way to avoid similar circumstances in the future is to have a fully functioning 3-member Board.

During the time I have been a member of the Board, we have undertaken a number of initiatives to improve the processing time at headquarters. As an alternative to asking the headquarters legal office that prepared a proposed decision for a rewrite, a Board member may use the local area network (LAN) to make proposed edits and share them with the other members. This reduces the processing time that would otherwise be required for a rewrite by the legal office and additional review by the Board members. We also hold regular case management meetings to review cases that have been pending for more than 300 days in order to focus the attention of the Board members and the headquarters legal offices on closing those overage cases. In addition, we have a PFR settlement program, which achieves a settlement in about 25 percent of the PFRs selected for the program.

The Board is also conducting a pilot project to expedite petitions for review that are determined, on first look, to be the least problematic to resolve. When the project began, it was located in the Office of the Clerk of the Board, with one attorney assigned to identify suitable cases and forward them to the Board with a recommendation. When I became Chairman, I reassigned the project to the Office of Appeals Counsel (OAC). My thinking was that OAC had more resources to identify and work those cases. During the period October 1, 2002, through January 31, 2003, the Expedited Petition for Review Program in OAC reduced the overall average case processing time by 54 days, or nearly two months. This compares to a reduction of about a month (33 days) in the average case processing time during the period October 1, 2001, through January 31, 2002, when the program was located in the Clerk's Office.

In January of this year, I initiated a pilot project that allows senior OAC attorneys to "peer

review" one another's work. I also have opened the way for senior OAC attorneys to send more recommendations directly to the Board without having those recommendations reviewed by a supervisory attorney. The goal of these initiatives is to try and get more cases more quickly to the Board without compromising quality.

I believe that the headquarters legal offices are doing an excellent job in processing PFRs. Their work in reviewing the file in the case under review, conducting necessary legal research, and writing a proposed decision for the Board, however, accounts for only part of the overall processing time at headquarters. The proposed decisions those offices send forward must be reviewed by each Board member. While our Performance Plan goal of 190 days allows about 35 days for the completion of PFR cases by the Board members, no time limit is imposed on an individual member. In some cases, particularly those presenting novel or complex issues, more time may be required as the Board members make their arguments to each other and try to reach a disposition on which they can agree. Additional processing may be required if a rewrite is requested and the case must be returned to the legal office that prepared the decision.

The fact that PFRs at headquarters have a longer average processing time than initial appeals in the regional offices is essentially attributable to two factors. The cases that are brought to the Board on PFR are at times more complex than other cases, and each PFR must be considered by the full Board rather than by a single administrative judge. Therefore, it can be expected that the average processing time at headquarters will exceed the average processing time in the regional offices. Nevertheless, I assure you that I will continue to do all that I can to expedite the processing of cases at headquarters.

14. The average processing time takes into account cases that are dismissed or settled. However, cases that are heard by an administrative judge and fully reviewed by the Board take longer, on average. The last time MSPB published its Report on Cases Decided, data showed that in fiscal year 1999, the average time for a decision from a hearing of an initial appeal was 171 days, and the average time for the Board to decide cases in which a petition for review was granted was 390 days, for a total of about 560 days. In addition to attempting settlement, what other options would you suggest to reduce the length of time to decide such cases?

Answer

The average processing time for initial appeals in which a hearing is held is about twice that for initial appeals in which there is no hearing. For example, in FY 2002, the average processing time for initial appeals with hearings was 164 days, compared to 82 days for initial appeals in which no hearing was held. That ratio has been very consistent over the years. At headquarters, the average processing time for PFRs that are granted exceeds that for PFRs that are settled or denied for failure to meet the criteria for review. The average processing time for PFRs that are granted also exceeds that for PFRs that are

dismissed, but not always by as much as you might think. In FY 2002, for example, the average processing time for PFRs that were granted was 358 days, while that for PFRs that were dismissed was 264 days. Also in FY 2002, the average processing time for PFRs that were denied for failure to meet the criteria for review but simultaneously reopened by the Board was 382 days, which exceeded the average processing time for PFRs that were granted. Despite some year-to-year variations with respect to PFR processing times, however, those that are granted generally have the longest average processing time. The number cited in this question, therefore, relies on combining the average processing time for the cases that take the longest time to process in the regional offices with that for the cases that, generally, take the longest time to process at headquarters.

To place this question in context, I would note that initial appeals that go to hearing constituted only 18 percent of the total initial appeals decided in the regional offices in FY 1999. For initial appeals decided in FY 2002, that figure was 16 percent. Of all initial appeals decided in the regional offices, just under 20 percent result in a PFR to the Board. Of the PFRs decided by the Board, only 14 percent were granted in FY 1999, and that figure was 8 percent in FY 2002. Thus, the number of cases to which the scenario described in this question applies is exceptionally small. In FY 1999, only 70 cases, or 4 percent of all PFRs decided by the Board, were cases in which there was both a hearing on the initial appeal and a decision by the Board to grant the PFR. The comparable number for FY 2002 was 37 cases, or 3 percent of all PFRs decided by the Board.

Although the percentage of cases to which the scenario described in this question applies is small, I am pleased to report that the average processing times in FY 2002 represent an improvement over the FY 1999 numbers cited in the question. The average processing time for initial appeals that went to hearing was 164 days, and the average processing time for PFRs that were granted was 358 days. Combining those average processing times results in a total of 522 days, compared to the 560 days in FY 1999.

As to what we can do, in addition to settlement, to reduce the length of time it takes to decide cases of this type, I believe the numbers cited above make it clear that cases of this type constitute a very small percentage of all cases processed by the Board. In the regional offices, our efforts are focused more on expanding our use of ADR as an alternative to the formal hearing process rather than on reducing the length of time it takes to process the small percentage of cases in which a hearing is held. As explained in my answer to Question 13, the Board has undertaken a number of initiatives in recent years to reduce the time it takes to process PFRs at headquarters, although those efforts are focused on all PFRs rather than the small percentage of PFRs that are granted. I would also note that initial appeals in which a hearing is held are likely to be the more complex cases at the regional office level, while PFRs that are granted are generally the most complex cases reviewed at headquarters. Thus, there may not be a great deal more that can be done to reduce the average processing time for this small cohort of cases.

Having been a Board member for several years, however, I have determined that cases presenting a significant, unresolved legal issue or a complex and potentially controversial set of facts tend to spend the most time on review. These cases also are the most likely to result in either a grant of review or a reopening on the Board's own motion. In light of this experience, I directed OAC late last year to screen petitions for review with an eye toward identifying those kinds of cases and to send them to the Board with a recommendation sooner than they would have been sent under standard procedures. It is my expectation that this process will reduce the time that such cases are pending before the Board.

Of course, when *all* cases processed in the regional offices and *all* PFRs decided by the Board are considered, the result is a very respectable average processing time of just over 300 days—or about 10 months (96 days for initial appeals + 205 days for PFRs = 301 days).

15. MSPB's performance plan for fiscal years 2002 and 2003 contains processing time goals for issuing decisions and also contains goals for quality (*e.g.*, maintaining or lowering the percentage of cases remanded or reversed). Are case review timeliness goals and quality goals linked to the MSPB's performance standards for administrative judges and attorneys? What do you consider to be the advantages and disadvantages of such a linkage?

Answer

The performance standards for administrative judges and headquarters attorneys are indeed linked to the processing time and quality goals in the Board's Performance Plan. The performance standards for administrative judges contain critical elements concerning the quality of decisions, the number of decisions produced per year, and case management, which includes timeliness requirements. The performance standards for headquarters attorneys who prepare recommended decisions for the Board contain critical elements regarding the quality of legal analysis, the quality of legal writing, and the number of decisions produced each year. The standards of headquarters attorneys do not presently include specific timeliness requirements because the production requirements are designed to ensure that cases are worked at the maximum reasonable rate.

For administrative judges, the case management critical element requires that a judge issue at least 93 percent of his or her decisions within 120 days. Issuing fewer without showing good cause is considered unacceptable performance. Moreover, to exceed fully successful performance, not only must an administrative judge meet the 120-day goal 93 percent of the time, but he or she must also issue at least 85 percent of decisions within 110 days. Administrative judges are also subject to a critical element for case production. To be fully successful under it, a judge must issue between 85 and 100 initial decisions

per year (again, unless good cause is shown). These two complementary requirements ensure swift adjudication of almost all appeals because, given sufficient workload, to meet the timeliness goals will require the issuance of a large number of decisions. Equally true, issuing decisions in a number sufficient for success under the standards is an invaluable component in meeting the timeliness requirement. Thus, the standards contribute directly to the Board's success in meeting its Performance Plan goals of timeliness and quality.

With respect to the percentage of cases which the Board remands to an administrative judge or the percentage of cases in which the court reverses the Board, it would be difficult, if not impossible, to measure an individual employee's performance based on numbers alone. The substance behind each remand or reversal must be considered. As an illustration, an administrative judge may do an outstanding job of writing an initial decision and analyzing the facts in a very complex case, but the administrative judge could miss one thing that requires a remand. Or, to take that same example, the legal standard could change between the time the initial decision was issued and the time the Board reviews the case, necessitating a remand to consider the appeal under the new standard. The same kinds of situations occur at headquarters. An attorney may recommend a disposition on a case that presents a novel issue of law and the Board adopts that recommendation, but the Federal Circuit may find that an alternative legal approach is the one that should have been used and issue a decision reversing the Board. Because these sorts of developments are outside the control of an administrative judge or headquarters attorney who diligently prepares initial decisions or recommended decisions, a performance standard that includes a critical element based on remands or reversals may be problematic. However, supervisors and senior managers regularly review remands and reversals to determine to what degree there may have been error.

The advantage to linking the Board's quality and timeliness Performance Plan goals to the performance standards for administrative judges and headquarters attorneys is to ensure that those employees share directly in the responsibility for achieving the agency's established goals. The disadvantage to such linkage results from a certain amount of tension between the two goals when the Board's caseload increases but the number of administrative judges and headquarters attorneys remains relatively the same. As more cases must be adjudicated within the same time requirements with the same number of attorneys, quality can suffer. Because these employees have no control over the size of the Board's caseload, there is an element of unfairness in placing some of the responsibility on them for simultaneously achieving both the goal of timeliness and the goal of quality in such a situation.

Even though the two goals are somewhat in conflict, the Board has taken steps to assist employees in meeting both goals at the same time. For example, the Board issued a regulation last year that allows administrative judges to suspend processing of a case for up to 30 days at the joint request of the parties while the parties pursue discovery or

discuss settlement. An extension may be granted for an additional 30 days if the parties jointly request it. This should help take some of the time pressure off both the administrative judge and the parties and allow the administrative judge to focus on writing initial decisions in cases that are ready to be decided.

16. Efforts to achieve quality in decisions can be at odds with case processing time goals. How can the competing goals of quality and timeliness be balanced?

Answer

The competing goals of quality and timeliness must be balanced in different ways depending on the circumstances. As the pending caseload diminishes, the achievement of both goals, more or less equally, becomes less problematic. As the pending caseload grows, both goals become more difficult to achieve. There is a level of quality that must be maintained, however, regardless of the size of the caseload. Thus, at some point, the balance must favor quality over timeliness because the Board must put the goal of reaching the right result and explaining it in a well-written decision above the goal of getting out as many cases as possible as quickly as possible. The challenge that I face, along with my fellow Board members, is fashioning innovative ways of maintaining the necessary balance while achieving both goals, regardless of the size of the Board's pending caseload. One way that I plan to do that is to provide our administrative judges and headquarters attorneys with the tools necessary to do their jobs efficiently and well.

I am committed to continually upgrading the Board's legal research systems. Our attorneys have access to on-line research such as Westlaw and to an internal searchable database of the Board's decisions. The Board continues to add to its electronic "bank" of standard orders, statements of law, and case citations, so that attorneys can strike one or two keys on the keyboard and insert a standard paragraph, complete case citation, or established statement of law into a document. These electronic tools should save time that our employees spend in writing and researching so they can devote more time to the quality of their writing and analysis.

17. One factor that helps reduce average case processing time is that MSPB settles more than half of the initial appeals it receives that are not dismissed. This percentage is even higher in adverse action cases—72 percent in fiscal year 2001. There are concerns from federal agency and plaintiff representatives that there is an undue emphasis and pressure to settle cases. What are your views on settling a case without a hearing on the merits? In this regard, what guidelines do you think should be followed to help ensure that parties are not being forced into settlements that might be unfair, unwise, or without due process?

Answer

If both parties are amenable to it, settling disputes as early in the process as possible is a desirable outcome. It is most efficient as far as time and resources are concerned, and it tends to create fewer hard feelings between the parties, thereby helping to salvage their relationship and make the appellant's return to duty both more likely and smoother if it occurs. Because only the appellant has a right to a hearing (in most cases), it is solely the appellant's right to enforce or waive, based on a determination of what would be in his or her best interest. As Board decisions often point out, the law has long favored the settlement of disputes for many reasons. It must be assumed that in the vast majority of cases, an appellant will waive the right to a hearing only after deciding that it is in his or her best interest to do so.

Guidance on settling appeals has been provided by numerous Board decisions issued over its nearly 25-year history, which have set minimum standards that must be met. In addition, before an appeal may be dismissed as settled, the judge must document for the record that the parties reached a settlement agreement and understood its terms. Before accepting a settlement agreement into the record for enforcement purposes, the judge must determine that the agreement is lawful on its face and that it has been freely entered into by the parties. The Board has also provided the proper guidelines for settlement to its employees through education and training.

The Board has, for some time, provided parties the opportunity to appear before a settlement judge who will not adjudicate the appeal if it does not settle. In addition, the Board is now engaged in a pilot Mediation Appeals Project (MAP) that is testing the use of transformative mediation techniques to resolve MSPB appeals. In our evaluation of the MAP pilot, we will be looking at whether this alternative dispute resolution process makes the parties more comfortable with both the proceeding and the result.

Equally important, the Board itself serves as a check against improper settlements. Because the MSPB may not be the advocate or the adversary of either party, and because the private concerns of any individual who may choose to settle an appeal are unknown, it is often not apparent whether a settlement is "unfair" or "unwise." Even if it may seem apparent, the Board may not stop a party from agreeing to settle any case. Nor can anyone be forced to sign a settlement agreement. If a party feels that he or she has done so under duress imposed by the administrative judge, the petition for review process allows those concerns to be addressed. The standard for setting aside an agreement based on duress or coercion is high, as required by law. The Board's experience has been that most of the duress felt by an appellant comes not from any pressure applied by an administrative judge, but from personal factors. These include being out of a job that is needed to take care of a family, facing an appeals process with which the agency is more familiar and comfortable, and being confronted—perhaps for the first time—with the realities of the extent of the agency's evidence and the likelihood of the agency's success on the merits.

18. According to MSPB's fiscal year 2001 Annual Report, MSPB's Alternative Dispute Resolution (ADR) Working Group (established by the former Chairman in fiscal year 2000) continued its work in FY 2001. The Group has a twofold purpose—to explore ways in which the Board can expand its existing ADR program with respect to appeals *after* they are filed with MSPB, and to prepare for the possible enactment of legislation authorizing the Board to conduct a voluntary early intervention ADR pilot program to try to resolve certain personnel disputes *before* they result in a formal appeal to MSPB. In fact, at the end of FY 2001, the Board entered into a contract with two ADR experts to develop a proposal for expanding the Board's use of ADR techniques and to conduct mediation training. However, several other entities also are involved in resolving disputes (e.g., the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel) or encouraging the use of ADR (e.g., OPM, the Interagency ADR Task Force, and the Federal Mediation and Conciliation Service). Given these circumstances:

- Do you believe that MSPB should play a role in promoting the use of ADR and training federal staff in ADR techniques?
- If so, how should that role be exercised?
- How should MSPB's role be coordinated with, or differentiated from, the role of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

Answer

The committee now has both the Board's FY 2003-FY 2004 Performance Plan, filed on February 3, 2003, and our FY 2002 Performance Report, filed on February 27, 2003. As explained in those documents, we have discontinued the performance goals related to the proposed legislation to authorize the Board to conduct a voluntary early intervention ADR pilot program to test the use of ADR processes in personnel disputes *before* they result in an appeal to MSPB. That legislation was introduced in both the 106th and the 107th Congress but was not enacted, and it has not been reintroduced in the 108th Congress. Should such legislation be reintroduced and enacted, I would, of course, ensure that the Board carries out the pilot program. However, I do not share my predecessor's belief that conducting an ADR program at the agency level, before a personnel action has been effected, is an appropriate role for the Board. Under the Administrative Dispute Resolution Act, it is the responsibility of individual Federal agencies—not the Board—to establish ADR programs to try to resolve personnel disputes before they result in a formal filing with the Board or another adjudicatory agency such as the EEOC or FLRA. We will, of course, continue to emphasize the benefits of early use of ADR in personnel disputes in our outreach to the Federal community, and we will be glad to share lessons learned from our own ADR programs with agencies and employee organizations.

As noted in this question, the ADR Working Group had a twofold purpose, with expanding our use of ADR in MSPB proceedings *after* an appeal has been filed as the second purpose. As it became more apparent that the ADR pilot program legislation would probably not be enacted, the focus of the ADR Working Group turned more to this second purpose. That focus resulted in the Board entering into a contract with two ADR experts at the end of FY 2001 to develop a pilot program to test the use of mediation in the Board's appellate proceedings and conduct mediation training for our employees.

As reported in our FY 2002 Performance Report, the Mediation Appeals Project (MAP) was developed and launched as a pilot during FY 2002. The pilot period continues into the current fiscal year. Under the MAP, the parties to an appeal filed with an MSPB regional or field office are offered the opportunity to submit their dispute to a trained mediator. If the dispute cannot be resolved through that mediation, the appeal is returned to the regular adjudication process. Therefore, the MAP is a supplement to, not a replacement for, the Board's existing settlement programs. During FY 2002, the Board announced MAP to all MSPB employees and solicited applications to be a mediator. This resulted in 15 MSPB employees being trained in transformative mediation techniques. Each of those trained mediators is to conduct three co-mediations with one of the contractors during the pilot period. Currently, three of our regional offices are serving as pilot sites. With the assistance of the contractors, the Board has also promoted the MAP through outreach activities and established a MAP marketing program. During the current fiscal year, the co-mediations are continuing and, at the end of the pilot period, the results achieved by the pilot program will be evaluated. After the evaluation has been completed, we will look at the results and determine whether the MAP will be continued.

In the agency's Performance Plan for FY 2003-FY 2004, a new goal for conducting and evaluating the MAP has been added in place of the former goal dealing with the efforts of the ADR Working Group to incorporate additional ADR techniques into MSPB settlement programs.

19. MSPB's strategic and performance plans contain objectives to have a highly motivated MSPB workforce that works well together to accomplish MSPB's mission. However, a report issued some years ago by GAO discussed concerns of MSPB employees about workplace fairness and equity.[1] Since the report was issued, has MSPB developed a process for gathering information on its employees' attitudes about their work environment? If so, what has been learned and what has MSPB done in response to those findings? Generally, what has MSPB done to address the issues described in the report?

Answer

[1] Merit Systems Protection Board: Mission Performance, Employee Protections, and Working Environment (GAO/GGD-95-213, Aug. 15, 1995).

First, let me state that I am firmly committed to ensuring the MSPB's compliance with all applicable statutes, regulations and policies that protect the civil rights of our employees and provide equal employment opportunity, regardless of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, or political beliefs. Shortly after I became Acting Chairman, I updated and reissued the Board's policy prohibiting sexual harassment in the workplace. I am currently reviewing an update of the Board's policy prohibiting unlawful discrimination in the workplace, which will be reissued in the near future. Last year, we also initiated a 3-year plan for conducting agency-wide EEO training for all Board managers and employees, and we are developing an EEO training module to train managers on use of the Schedule A hiring authority as it relates to hiring persons with disabilities. In addition, the Board contracts for the investigation of internal EEO complaints filed by MSPB employees, which enhances the perception of fairness and impartiality of our internal complaints processing program. And a successful alternative dispute resolution program for internal EEO complaints, conducted by mediators from the Equal Employment Opportunity Commission, has been in effect for the past three years. Finally, Board employees at all levels have worked cooperatively for the last several years to plan and implement ethnic and cultural special emphasis programs that acknowledge and celebrate the diversity of America's population.

The GAO Report to which this question refers was issued two years before I joined the Board and reflected the results of a survey conducted in 1994. As you know, the GAO found that, at that time, 24 percent of MSPB employees overall viewed their workplace as discriminatory and 45 percent of the agency's minority employees held that view. The report stated that these findings should be of concern to the agency because of its role as protector of Federal merit systems and the standard it set for itself in its 1992 vision statement. That statement calls for the MSPB "[t]o promote and protect, by deed and example, the Federal merit principles in an environment of trust, respect and fairness." As Chairman, I have found that while the agency took a number of actions in response to the GAO report, it has not instituted a formal process for gathering information about MSPB employees' attitudes toward their work environment. Therefore, I plan to initiate such a formal process very soon. Given my commitment to a workplace free of discrimination, I sincerely hope that a new survey will show a significant improvement in employees' attitudes. I also hope that my successors as Chairman will continue this formal process so that any identified perceptions of a discriminatory work environment can be dealt with quickly and effectively.

20. Another objective included in MSPB's strategic and performance plans is to develop and implement an integrated automated agencywide case management system to assist in effective case processing, management, and program evaluation. MSPB's fiscal year 2001 performance report indicated some problems and delays in developing and deploying the system (called Law Manager). The 2002/2003 performance plan had goals

of implementing the system in fiscal year 2002 and making enhancements to integrate with other systems and provide more capabilities to end users in fiscal year 2003. What is the status of the system's implementation and is the system meeting MSPB's and the user communities' expectations?

Answer

The status of the new Law Manager case management system (CMS) is that it has not yet been implemented and probably will not be until late this year. One of my principal concerns after I became Chairman was the status of this project, which was obviously experiencing significant delays. Therefore, I made it a priority to investigate the complete background of the contracting for the project and the problems encountered in the performance of the contract to determine why the new system had not yet been delivered. I will review briefly what my investigation found.

The new case management system is one component of the MSPB's planned electronic case processing system. The MSPB initially obtained, through FEDSIM at the General Services Administration (GSA), the services of two contractors to work jointly on the design, software selection, and implementation of the various components of the system. The first components, a document management system called Docs Open and a document assembly system called Hot Docs, both commercial off-the-shelf (COTS) products, were selected and implemented under that contract. In FY 2000, the agency moved to the next phase, selection of a COTS product to replace the current case management system, which is a custom application developed in 1991. The selection of the Law Manager software was made by a group of MSPB users, managers, and information technology staff, assisted by the contractors.

The plan was to customize Law Manager so that it would provide all of the features of the current CMS and several major enhancements, including end-user query and reporting capability, an interface with Docs Open and Hot Docs, and an interface with the Board's e-mail and calendar system. The contractors told the MSPB that because Law Manager was a COTS product, configuration to meet any unique requirements of the MSPB would be minimal, and they provided a completion date of September 2001. By the end of FY 2000, however, it became clear to our IT staff that the contractors did not have the expertise to complete the project. At that time, they were working on the design task, but no award for development had been made. Therefore, the MSPB had the option of selecting another contractor for the development.

In January 2001, the MSPB awarded a new contract for development of the CMS to the Law Manager Company, the developer of the Law Manager software. Initially, that company expected to complete the project by the previous contractors' scheduled date of September 2001. After getting into the project, however, they realized that much custom configuration would be needed to provide the same functionality as the existing CMS and

the enhancements required by the MSPB. The contractor extended the delivery date several times, with a final estimated date of September 2002. By that date, however, the contractor had not delivered a complete system and could not provide an estimate of when the project would be completed.

From what I had learned about the project by that time, I concluded that there were several factors that contributed to the delay. One was that when an agency uses FEDSIM for a contract award, it is FEDSIM—not the agency—that is the party to the contract. Therefore, there was little that MSPB staff could do to exert pressure directly on the contractor. Also, the contract was a "time and materials" contract, so there simply was not enough of an incentive for the contractor to provide realistic estimates or delivery dates. Finally, the Law Manager Company had been acquired by another company after beginning work on our project. Following the acquisition, Law Manager employees continued to work on specific components of our project, but there was no individual project manager with the overall responsibility for ensuring its completion.

After the contractor failed to meet the September 2002 delivery date, we initiated a series of meetings involving my Chief of Staff, the director and staff of our IT operation, the FEDSIM official responsible for management of our contract, and staff of the Law Manager Company. We also stopped payment on the contract. As a result of those meetings and further direct contacts between our IT staff and the contractor's staff, we have reached agreement on a number of steps to ensure completion of the project. The contractor has assigned a project manager to coordinate the project, and the FEDSIM manager is focused on the need for completion of the project. We have also reached agreement on a new firm-fixed price contract to complete the remaining work. That contract is to be signed during the week of March 17, 2003. We expect that the Law Manager system will be delivered by September, and we hope to be able to implement it by the end of the year. The implementation date, however, will depend on the quality of the product delivered and the amount of time the contractor will need to correct errors to meet the requirements specified in the design documents. With a firm-fixed price contract, the contractor must deliver in accordance with the stated price, but the contractor may need additional time to resolve any identified problems.

21. Legislation[2] creating the Department of Homeland Security, which will assimilate some 170,000 federal employees from 22 agencies, allows the Secretary of Homeland Security flexibility in establishing the department's personnel system. The enabling legislation authorizes the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish a human resources management system for the Department that may waive, modify, or otherwise affect certain employee appeal rights to MSPB.[3] But the legislation establishes specific

[2] P.L. 107-296.

[3] Section 841.

requirements for any such regulations, and requires the Secretary to consult with the MSPB before issuing such regulations. The legislation also specifically provides that any such regulations may modify procedures under chapter 77 of title 5, United States Code (dealing with employee appeals to the MSPB) only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department. Given these requirements, what are your views with regard to –

- what role the MSPB should play in assisting the Department of Homeland Security in developing regulations for employee appeals, and
- the nature of the modification to the procedures under 5 U.S.C. chapter 77 that may be considered as furthering the fair, efficient, and expeditious resolution of matters involving the Department employees.

Answer

The Board has not yet been contacted by the Secretary of Homeland Security and the OPM Director regarding the consultation with respect to appeal rights for DHS employees that the Homeland Security Act requires. While the nature of the Board's role will be determined largely by the questions that are ultimately posed to us by those officials, I can say at this time that our principal concern will be ensuring that DHS employees are afforded adequate due process with respect to adverse personnel actions. The Board's experience in dealing with employee appeals over the years can provide a valuable perspective as those officials develop the regulations for a human resources management system, including procedures for appeals, that address the unique requirements of this critical department.

We have done some preliminary work in preparation for the required consultation by soliciting suggestions from our senior managers regarding possible modifications to the appeals procedures of 5 U.S.C. chapter 77 that might further the fair, efficient, and expeditious resolution of matters involving DHS employees, while ensuring due process. Because we have not yet discussed the various suggestions received and determined what recommendations we might make to the Secretary and OPM Director, I cannot identify any specific modifications that we intend to recommend at this time.

As the committee knows, a number of proposals to exempt various agencies from Title 5 civil service rules have been discussed in recent years and, in several cases, have resulted in legislation that has been considered by Congress. In the case of one agency, the Federal Aviation Administration (FAA), legislation was enacted in late 1995 that authorized that agency to establish a human resources management system, exempt from most provisions of Title 5, as of April 1, 1996. Under the system established by the FAA, employees no longer had the right to appeal personnel actions to the Board. In response

to FAA employees' concerns with their internal appeals system (Guaranteed Fair Treatment), however, Congress enacted legislation in April 2000 that restored MSPB appeal rights to those employees. As a result of the enactment of that legislation, FAA employees may now elect among their internal system, an appeal to the MSPB, or—if the employee is in a bargaining unit—a grievance under the negotiated grievance procedure.

Legislation granting personnel flexibilities to the Internal Revenue Service and the Patent and Trademark Office has also been enacted in recent years, but MSPB appeal rights for employees of those agencies were not affected. Generally, such legislation in the years since the FAA was authorized to establish its human resources management system has focused on providing flexibilities in hiring and compensation rather than on curtailing MSPB appeal rights. This may, in part, stem from a recognition that the Board has established a reputation as a fair and impartial adjudicator of Federal employee appeals of personnel actions and that its appeals process is reasonably expeditious, especially when compared to other administrative adjudicatory agencies. We hope that, in the end, DHS employees will retain the right to appeal at least the most serious adverse personnel actions to the Board. We recognize, however, that—like the intelligence agencies—this new department has unique needs that may require some modification in the appeal rights and procedures that are available to most other Federal employees.

22. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues. What is your understanding of the differences Congress intended in how each agency should perform this role? What is your understanding of the difference in how each agency currently performs these roles? Is it desirable and possible to consolidate these roles and if so, how would you recommend doing so? Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

Answer

The Office of Personnel Management's merit system oversight activities are a part of its larger responsibility to provide leadership to Federal agencies in the management of the Federal workforce. That agency also has a broad mandate to conduct research on civil service issues. The Board's role is more focused. Our statutory authority to conduct periodic studies of the civil service and other merit systems in the Executive Branch is aimed at ensuring that Federal agencies comply with the merit system principles and avoid prohibited personnel practices. Unlike OPM, which must be responsive to the Administration and an advocate for Administration programs, the Board can provide bipartisan, independent oversight of Federal merit systems. Because of its independence, the Board approaches its work as neither an advocate of particular programs nor as a respondent to particular constituencies. The Board relies on objective findings as the basis for our judgments about the merit systems and the effect that human resource management policies have on the management of the Federal workforce.

Because the merit system oversight functions performed by OPM and the Board are different, I believe that both agencies should retain those responsibilities. OPM must be able to obtain feedback from agencies about how its policies are working, while the Board's mandate provides a means though which Government leaders can obtain well-founded, unbiased perspectives that can provide needed insight to improve the public service. I want to assure the committee, however, that the Board's Office of Policy and Evaluation coordinates with OPM's research staff, as well as with GAO and other entities, to avoid duplication in the subject matter of our merit systems studies to the extent possible.

23. On July 25, 2001, the International Security, Proliferation and Federal Services Subcommittee of this Committee held a hearing on S. 995 – the Whistleblower Protection Act Amendments. After the hearing, Senator Levin submitted two follow-up questions to Beth S. Slavet, who was then Chairman of the MSPB and had testified at the hearing, and she responded with written answers, relevant excerpts of which are restated below. Do you agree with her answers? Do you believe that the Board should maintain the positions with respect to whistleblower protections that were articulated by Chairman Slavet in those answers? If you believe the Board should modify its positions as stated by Chairman Slavet, please describe those modifications and your rationale for them.

> **Question:** When a Whistleblower either directly or through the Special Counsel brings a claim of reprisal to the Merit Systems Protection Board, is there a presumption that the public officers involved in the allegations of reprisal performed their duties properly? If so, what is the scope of and basis for that presumption?
>
> **Slavet Response:** . . . As interpreted by the Board, the [whistleblower protection] statute requires whistleblowers to prove their claim that a protected disclosure was a contributing factor in an adverse personnel action, but it does not require them to overcome a presumption in favor of the alleged retaliating official.
>
> **Question:** To address the problems created by the Federal Circuit in *Lachance v. White* with respect to the dicta on "irrefragable" proof, would it be helpful to affirmatively state in law that there is no presumption of appropriate behavior by federal agencies with respect to the allegations of reprisal in whistleblower cases?
>
> **Slavet Response:** Because the presumption cited in *Lachance v. White* would increase whistleblowers' burden of proving their claims, such legislation would be useful if the presumption is contrary to Congress's intent. . . . .

Answer

Rather than limiting my response to the questions presented in previous testimony dated

July 25, 2001, I wish to take this opportunity to more fully respond with my position on the issues under discussion that day. For the record, it may be helpful to summarize the elements of an individual right of action (IRA) appeal, the burdens of proof regarding each element, and who bears the respective burdens of proof. Recent developments in the Board's case law are also relevant to the topics discussed at the July 2001 hearing.

The elements of an IRA appeal and who has the burden of proving each element and by what standard are derived from the Whistleblower Protection Act (WPA). To be entitled to corrective action from the Board, the appellant must prove by preponderant evidence that: (1) he made a protected disclosure; (2) the agency took a "personnel action," as defined by the Act; and (3) the protected disclosure was a contributing factor in the personnel action. An appellant, however, is not entitled to corrective action if the agency proves by clear and convincing evidence that it would have taken the personnel action in any event. Last September, the Board issued a decision that I believe simplifies the adjudication of IRA appeals without changing the elements of an IRA or the ultimate burdens of proof. That decision is *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002).

In *Rusin*, the Board stated that an appellant establishes Board jurisdiction over an IRA appeal by simply exhausting proceedings before the Office of Special Counsel and making non-frivolous allegations that he made a protected disclosure that was a contributing factor in a covered personnel action. The earlier jurisdictional test, as set forth in *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994), stated that the Board did not have jurisdiction over an IRA appeal until the appellant actually proved by preponderant evidence that he made a protected disclosure, that the agency had taken a personnel action, and that he had exhausted Special Counsel proceedings as to those matters. By now requiring only non-frivolous allegations of a protected disclosure, a personnel action and contributing factor, the *Rusin* standard potentially should allow the Board to take jurisdiction over a greater number of IRA appeals and, consequently, decide those cases on the merits rather than dismissing them for lack of jurisdiction.

I was the first Board member to circulate a draft opinion that contained a *Rusin* analysis. In fact, my proposed draft would have gone even further by finding that the Board's jurisdiction over an IRA appeal is established if the appellant merely showed that he exhausted proceedings before the Special Counsel. In the end, I adopted the *Rusin* approach because, as mentioned above, it strikes a balance between taking jurisdiction when the pleadings contain the required non-frivolous allegations and dismissing cases in which such allegations are lacking. The Board's decision in *Rusin* has implications for the court's decision in *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999).

Comments at the July 25, 2001, hearing indicated concern over the court's statement in *White* regarding "irrefragable proof." As I read the decision in *White*, the statement on irrefragable proof relates to only one element of an IRA appeal—the question of whether

the appellant had a reasonable belief that he was disclosing a matter protected by the WPA. I think it would be responsive to the committee's question to provide a background to the court's decision in *White*.

Before the Office of Personnel Management sought Federal Circuit review in *White*, the Board had, in three separate opinions, stated that Mr. White proved that he reasonably believed that the Air Force's policy regarding certain quality standards amounted to gross mismanagement. *White v. Department of the Air Force*, 78 M.S.P.R. 38, 43 (1998); *White v. Department of the Air Force*, 71 M.S.P.R. 607, 614 (1996); *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95-98 (1994). I was on the Board only when the last decision was issued. By that time, the Board had already found that the Air Force had retaliated against Mr. White, and OPM was asking the Board to reconsider the standard by which it found that Mr. White had a reasonable belief.

In response to OPM's arguments, the Board explained that its finding of reasonable belief was based on Mr. White's description of the alleged mismanagement, on his familiarity with the subject matter of the disclosure, and on documentary evidence showing that persons who were similarly situated to White also shared his views. 78 M.S.P.R. at 43. In taking exception to the Board's analysis, the Federal Circuit questioned whether Mr. White could have reasonably believed that the Air Force's policy amounted to gross mismanagement because, according to the court, there is a presumption that agency officials perform their duties correctly, fairly, in good faith and in accordance with law. 174 F.3d at 1381. The court went on to say that "this presumption stands unless there is 'irrefragable proof to the contrary.'" *Id.*

As is the case with some Board decisions, there is a tendency to read Federal Circuit decisions too broadly. At times, the court's statements are taken out of context and applied in situations where they clearly do not apply. That appears to be what happened with the statement on "irrefragable proof" in *White*. The narrow issue before the court in *White* was whether the appellant had a reasonable belief that agency officials committed gross mismanagement. In such limited situations, the court held that there is a presumption that managers do not mismanage. However, there is no basis on which to take that presumption and use it in the clear and convincing evidence element of an IRA appeal to mean that an appellant loses if he does not rebut it. Such an expansion of the court's statement would be contrary to the plain language of the statute that it is the agency's burden to show by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure. The Board's recent decision in *Rusin* has the potential for further limiting what I view as an already limited application of *White*.

Under *Rusin*, if an appellant makes a non-frivolous allegation that he had a reasonable belief that he was disclosing a matter protected under the WPA, he does not have to actually prove that he had a reasonable belief for the Board to reach the merits of his

appeal, as was the case when the court decided *White*. Instead, the administrative judge can take jurisdiction based on non-frivolous allegations of reasonable belief and the other jurisdictional elements, assume that the appellant had a reasonable belief, and decide the ultimate issue of whether the agency would have taken the personnel action in the absence of the presumed whistleblowing activity. In such a situation, the appellant will receive a decision on the merits without having to rebut the presumption established by *White*.

The Board's decision in *Rusin* has lowered the barriers to having an IRA appeal decided on the merits. Therefore, I would modify any previous testimony by saying that, even if Congress concludes that the presumption cited in *White* is contrary to congressional intent, a change to the WPA provisions on reasonable belief may not be needed in light of *Rusin*. Moreover, I believe we must read and apply judicial opinions in context. As fully explained above, the court applied the "irrefragable proof" standard to one element of an IRA appeal, the one involving whether a disclosure was protected. In addition, the court used that standard to evaluate one subpart of that element, which is whether an appellant had a reasonable belief. What is more, the court's decision in *White* was restricted to a subpart of that subpart, namely, whether the appellant had a reasonable belief that agency officials took part in gross mismanagement. In that very limited context, the court found that officials are presumed to manage their agencies correctly and properly until proven otherwise. Since the WPA puts the burden on the appellant to prove that he made a protected disclosure, 5 U.S.C. § 1221(e)(1), the court's holding is not necessarily contrary to the statute. As a Board member, that is how I read *White*. The limited circumstances in which the Board would ever apply the holding in *White* regarding gross mismanagement is yet another reason why it may not be necessary to amend the WPA provision dealing with reasonable belief.

24. On May 9, 2000, the MSPB held that the Office of Special Counsel (OSC) could be held liable to pay attorney fees in disciplinary action cases if the accused agency officials were ultimately found "substantially innocent" of the charges brought against them.[4] It has been argued that sanctioning an award of fees in such cases, even where the decision to prosecute was a reasonable one, has a chilling effect on OSC's ability to bring charges due to budget constraints and is against the public interest and contrary to congressional intent of the Whistleblower Protection Act. In order to address these concerns, on November 19, 2002,[5] the Senate Committee on Governmental Affairs favorably reported S. 3070 which contained a provision requiring the employing agency, not OSC, to reimburse the prevailing party for attorney fees in a disciplinary proceeding brought by OSC.

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[4] *Santella v. Office of Special Counsel*, 86 MSPR 48 (2000).

[5] S. Rep. No. 107-349 (2002).

OSC has expressed serious concern about the impact that the May 9, 2002, decision could have on OSC's ability to seek the discipline of agency officials who violate the Whistleblower Protection Act. What is your view of OSC's concern? Do you agree with the provisions of S. 3070 that address this issue?

Answer

In *Santella v. Office of Special Counsel*, 86 M.S.P.R. 48 (2000), the Board held that the Office of Special Counsel (OSC), rather than the employing agency, was responsible for payment of the petitioners' attorney fees under 5 U.S.C. § 1204(m). OSC's concerns about that decision are only one side of an issue that has at least two sides. My views on the issue are set forth in my concurring opinion in *Santella v. Office of Special Counsel*, 90 M.S.P.R. 172 (2001), which is attached and incorporated by reference in this answer.

I believe the purpose of the statute was a make-whole remedy for Federal employees who prevailed defending against a disciplinary action brought by OSC. It was considered unfair for an employee to be personally liable for fees that resulted from an employee carrying out the duties of his or her position. While OSC argues that a potential award of fees may have the effect of deterring them from bringing or pursuing actions, OSC should act based on an evaluation of the evidence when it pursues a disciplinary action. In my opinion, OSC should have reevaluated the record evidence in *Santella* once the standard of proof was modified by a Federal Circuit opinion.

With respect to an award of attorney fees in Special Counsel cases, S. 3070 would replace the term "agency involved" with the term "agency where the prevailing party is employed or has applied for employment." Because the purpose of an attorney fees award is not to punish the Government, but to lessen the burden on a prevailing employee who retained counsel to defend a charge brought by OSC, that purpose would be served no matter whether the fees are paid by the Special Counsel or by the employing agency. Thus, it is a public policy question as to whether OSC should continue to be liable for fees or whether that responsibility should be placed on the employing agency. It is noteworthy that, in *Santella*, the employing agency agreed to pay the petitioners' attorney fees through the remand phase of the case because the agency's own investigation showed that they had done nothing wrong. 90 M.S.P.R. 172, Concurring Opinion ¶ 3. Therefore, in this particular case, the employing agency paid the majority of the fees.

In *Santella*, the Board found that the Office of Special Counsel Reauthorization Act of 1994 did not define the term "agency involved." Since the statute was silent on the meaning of the term, the Board had to determine what Congress intended. In its inquiry, the Board considered the way in which a similar provision in the 1978 Civil Service Reform Act had been interpreted, examined the legislative history of the 1994 Reauthorization Act to see if Congress had indicated how the term should be construed, and applied established rules of statutory construction to find that Congress most likely

meant OSC when it used the term "agency involved." 86 M.S.P.R. 48, ¶¶ 12-18. I endorse that analysis because it is the approach that I take in every case where the Board is asked to interpret a statute.

25. In 2000, the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing.[6] The Court held that the MSPB may neither review a security clearance determination nor require the grant or reinstatement of a clearance, and that the denial or revocation of a clearance is not a personnel action. As a result of this decision, an employee's security clearance may be suspended or revoked in retaliation for making protected disclosures, the employee with a suspended or revoked clearance can be terminated from his or her federal government job, and MSPB may not review the revocation. According to the OSC, revocation of a security clearance is a way to camouflage retaliation.

To address this situation, the Senate Committee on Governmental Affairs favorably reported S. 3070 on November 19, 2002,[7] which contained a provision making it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle. The bill further stated that the MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance.

What would be the impact on the MSPB if such a proposal were to become law? How would MSPB handle the expedited process?

Answer

The Supreme Court has stated that the authority to withhold security clearances rests solely with the employing agency, which has been delegated that authority by the President. *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818 (1988). The Federal Circuit has in turn held that the Board is authorized to determine whether the employee was given notice of the reasons why his access to classified information has been denied and a meaningful opportunity to respond. *King v. Alston*, 75 F.3d 657, 661-62 (Fed. Cir. 1996). Thus, in an appeal of either a removal or an indefinite suspension brought under Chapter 75, the Board has the authority to decide whether the appellant was afforded due process in the revocation or suspension of a security clearance. A full discussion of this issue is contained in my dissent in *Lambert v. Department of the Navy*, 85 M.S.P.R. 130 (2000), which is attached and incorporated by reference in this answer.

[6] *Hesse v. State*, 217 F. 3d 1372 (Fed. Cir. 2000).

[7] S. Rep. No. 107-349 (2002).

The Board, therefore, already has a meaningful role to play in cases involving revocations or suspensions of security clearances. S. 3070, however, would have the Board also determine whether the revocation or suspension of a security clearance was based on retaliation for whistleblowing. The proposed law provides that the Board cannot order the restoration of a security clearance, but can order declaratory or other appropriate relief. It seems unclear how meaningful such relief would be since the Board is not allowed to undo the action that led to the removal or suspension in the first place. Rather, the proposed legislation says that if the Board "declares" that a revocation or suspension of a security clearance violates the WPA, the affected agency shall review the action and give "great weight" to the Board's decision. This suggests that the Board's decision would be advisory only. If so, the proposed law apparently would conflict with 5 U.S.C. § 1204(h), which states that "[t]he Board shall not issue advisory opinions." This would be one impact on the Board's adjudicatory function if S. 3070 were enacted.

S. 3070 requires the Board to take evidence showing whether the agency would have suspended or revoked the security clearance absent the alleged protected disclosure. It can be expected that, in a fair number of appeals, administrative judges and Board members would be required to examine classified or sensitive documents before determining whether an agency violated 5 U.S.C. § 2302(b)(8). Delving into national security matters would certainly have an impact on how the Board conducts its normal business.

Under 5 U.S.C. § 2302(a)(2)(C)(ii), individuals are not covered under the Whistleblower Protection Act (WPA) if, "as determined by the President," they work in a "unit [of an Executive agency] the principal function of which is the conduct of foreign intelligence or counterintelligence activities." Many, if not most, of those individuals probably have a security clearance. Congress provided whistleblower protection to employees who are not covered by the WPA in the Intelligence Community Whistleblower Protection Act of 1998, Title VII of Pub. L. 105-272, 112 Stat. 2413, generally codified at 50 U.S.C. § 403q and 5 U.S.C. App. 3. Rather than involve the Board in cases that likely will require review of classified and sensitive material, the perceived "gap" in the WPA could be dealt with by extending the Intelligence Community Whistleblower Protection Act, or some variation thereof, to all Federal employees who claim that actions on their security clearances constituted retaliation for whistleblowing.

If these particular provisions of S. 3070 become law, the Board would need to establish procedures and a separate process for handling and reviewing security clearance matters, as well as classified and/or sensitive material, through either regulation or case law. I anticipate that the Board would set up such procedures as soon as practicable after the enactment of any legislation so as to carry out the intent of Congress that security clearance cases be reviewed and expedited under the WPA.

IV. Relations with Congress

26. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Answer

Yes.

27. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

Answer

Yes.

V. Assistance

28. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

Answer

The answers are my own. In responding to the policy questions in part III, I consulted with appropriate subject matter experts on the MSPB staff.

AFFIDAVIT

I, Susanne T. Marshall, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Susanne T. Marshall

Subscribed and sworn before me this 14th day of March, 2003.

Notary Public

Venessa M. Gray
Notary Public, District of Columbia
My Commission Expires 04-14-2007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK SANTELLA,
JOSEPH JECH
Petitioners,

v.

SPECIAL COUNSEL,
INTERNAL REVENUE SERVICE
Respondents,

and

OFFICE OF PERSONNEL
MANAGEMENT,
Petitioner.

DOCKET NUMBER
CB-1215-91-0007-R-1
CB-1215-91-0008-R-1

DATE: September 21, 2001

Rafael Morell, Esquire, Washington, D.C., for petitioner Office of Personnel Management

William L. Bransford, Esquire, and Diana J. Veilleux, Esquire, Washington, D.C., for petitioners Santella and Jech.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

Chairman Slavet issues a separate opinion concurring in part and dissenting in part.

Member Marshall issues a concurring opinion.

OPINION AND ORDER

¶1 The Director of the Office of the Personnel Management (OPM) seeks reconsideration, pursuant to 5 U.S.C. § 7703(d), of the Board's final decision in *Santella v. Special Counsel*, 86 M.S.P.R. 48 (2000) (*Santella III*), in which the Board awarded petitioners Santella and Jech attorney fees and costs in the amount of $32,996.68 from the Office of Special Counsel (OSC). For the reasons set forth herein we DENY the Director's petition.

* * * * * * * * * * * * *

CONCURRING OPINION OF SUSANNE T. MARSHALL

in

Frank Santella & Joseph Jech v. Office of Special Counsel, Internal Revenue Service, and Office of Personnel Management

MSPB Docket Nos. CB- 1215-91-0007-R- 1, CB- 1215-91-0008-R- I

¶1 While I agree fully with the majority opinion denying the Director's petition for reconsideration, I write separately to express my opinion that an award of attorney fees in this case is also warranted under the "clearly without merit" standard. *See Allen v. U.S. Postal Service,* 2 M.S.P.R. 420, 434-35 (1980). Petitioners Santella and Jech argued that fees are warranted under both the "clearly without merit" standard and the "substantially innocent" standard. Attorney Fees File, Tab I at 6. However the Board, upon finding fees warranted under the "substantially innocent" standard, did not address the "clearly without merit standard." *Santella v. Office of Special Counsel,* 86 M.S.P.R. 48, 60 n.8 (2000).

¶2 Fees may be awarded under the "clearly without merit" standard when an agency prolongs litigation after it becomes clear that the agency cannot prevail on the merits. and thereby causes an employee to incur additional attorney fees. *Keely v. Merit Systems Protection Board,* 760 F.2d 246, 249 (Fed. Cir. 1985); *Short v. Office of Personnel Management,* 71 M.S.P.R. 136, 140-41 (1996); *Robinson v. Department of*

Health & Human Services, 37 M.S.P.R. 547, 551 (1988). I believe that the Office of Special Counsel (OSC) so acted when it continued its prosecution after the Board vacated the recommended decision of the Chief Administrative Law Judge (CALJ) sustaining the Special Counsel's charges, and remanded the case for application of the correct standard of proof. *Special Counsel v. Santella,* 65 M.S.P.R. 452 (1994) *(Santella I).* In the first recommended -decision, the CALJ sustained the Special Counsel's charges against petitioners Santella and Jech, finding that the Special Counsel demonstrated that protected whistleblowing disclosures were a contributing factor in several personnel actions taken by the petitioners, and that the petitioners did not demonstrate by clear and convincing evidence that they would have taken the same actions absent the whistleblowing disclosures. *Id.,* at 455. The Board held that the CALJ should have required the Special Counsel to prove that the whistleblowing disclosures were a significant factor in the personnel actions in accordance with the Federal Circuit's precedent in *Eidmann v. Merit Systems Protection Board,* 976 F.2d 1400, 1405 (Fed. Cir. 1992). *Id.,* at 456. This resulted in a higher standard than the contributing factor standard applied by the CALJ. Id., at 456-59. The Board found that the significant factor analysis includes a showing, by preponderant evidence, that the petitioners would not have taken the personnel actions absent the whistleblowing disclosures, in contrast to the contributing factor analysis, which required the petitioners to prove this defense by clear and convincing evidence. *Id.* Additionally, the Board identified several material issues that the CALJ had failed to address. Id, at 466-67.

¶3 After the remand decision was issued, OSC should have undertaken a review of the record to assess whether it could prevail under the significant factor analysis. The evidentiary record in this case is extensive, including an I 1-day hearing. While petitioners Santella and Jech made some intemperate remarks regarding the whistleblowers, the record demonstrates that the petitioners would have taken the same personnel actions in the absence of the whistleblowing

disclosures. Indeed, they took some of the actions because of supervisory pressure upon them that had nothing to do with the whistleblowing disclosures. Before OSC filed its complaint, the petitioners' employing agency undertook an internal investigation of OSC's charges and determined that the evidence did not support a finding that the petitioners retaliated against subordinate employees for whistleblowing. For this reason, the agency agreed to pay the petitioners' attorney fees incurred through the Board's remand decision. Given the record, I believe that OSC should have withdrawn its complaint following the Board's remand decision, and I would find that its failure to do so subjected it to liability under 5 U.S.C. § 1204(m)(1) for attorney fees incurred by the petitioners after the remand decision. *See Keely,* 760 F.2d at 249; *Robinson,* 3 7 M.S.P.R. at 55 1.

¶4 1 agree with the Director's contention that the *Allen* categories should not be treated as a one-size-fits-all analysis for determining whether attorney fees are warranted in the interest of Justice. I have no doubt that the Board will in future cases further refine the interest of Justice standard as applied to disciplinaryactions. For, whether an award of fees is warranted in the interest of justice depends on the particular facts and circumstances of each case. *See Allen,* 2 M.S.P.R. at 434. However, unlike Chairman Slavet, I do not believe that OSC's limited discretion in framing charges warrants a more stringent interpretation of the substantially innocent standard (or any other *Allen* category) in disciplinary action cases. When OSC considers bringing a disciplinary action, just as when an agency considers disciplining one of its employees, It must decide whether the evidence it has gathered, considered under the appropriate legal standard, supports its charges.*[SM] When OSC or an employing agency brings charges that the evidence does not support, it may be liable for attorney fees under the substantially innocent standard. *See, e.g., Massa v. Department of Defense,* 833 F.2d 991, 993 (Fed. Cir. 1987). The agency may be liable for fees under the substantially innocent standard even in a close case. *See, e.g., Boese v. Department of the Air Force,* 784 F.2d 388, 391 (Fed. Cir. 1986). *See also Thomson v. Merit Systems Protection Board,* 772 F.2d 879, 881 (Fed. Cir. 1985) (holding that close cases do not

automatically fall into the class in which fees are not warranted in the interest of Justice).

¶5 In no way should the Board's decision or my comments be read as punishing OSC or discouraging the Special Counsel from vigorously protecting federal employees against prohibited personnel practices. The purpose of an award of fees under the interest of justice standard is not to punish the agency, but to minimize the burden on an employee of defending himself against an unsubstantiated accusation. *Yorkshire v. Merit Systems Protection Board, 746* F.2d *1454, 1457* (Fed. Cir. 1984). Here, OSC did not prove any of its prohibited personnel practice charges against petitioners Santella and Jech. Under the circumstances of this case, I believe that the interest of Justice requires the Government, in the role of the Special Counsel, to pay the attorney fees the petitioners incurred in defending the managerial actions they took on behalf of the Government.

SEP 2 1- -2001

Date

Susanne T. Marshall
Member

*SM I recognize that when OSC filed its complaint in this case, It was required to prove its charges under the contributing factor analysis, and that the Board made OSC's case somewhat more difficult in the remand decision by adopting the significant factor analysis. However, OSC is not liable for any fees incurred before the remand decision because the petitioners' employing agency paid those fees.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARICK O. LAMBERT,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-98-0778-1-2

DATE: February 14, 2000

Alejandro P. Gutierrez, Esquire, Hathaway, Perrett, Webster, Powers & Chrisman, Ventura, California, for the appellant.

John A. Townsend, San Diego, California, for the agency.

BEFORE

Ben L. Erdreich, Chairman Beth S. Slavet, Vice Chair Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion; Member Marshall issues a dissenting opinion.

OPINION AND ORDER

¶1 The agency has filed a petition for review asking us to reconsider the administrative judge's initial decision. The appellant has filed a motion to dismiss the agency's petition on the ground that the agency has not complied with the initial decision's interim-relief order. For the following reasons, we GRANT the appellant's motion and DISMISS the agency's petition.

* * * * * * * * * * * * * * *

DISSENTING OPINION OF MEMBER SUSANNE T. MARSHALL
IN
GARICK O. LAMBERT V. DEPARTMENT OF THE NAVY MSPB DOCKET NO.
SF-0752-98-0778-1-2

¶1 I do not challenge my colleagues' conclusion that the agency did not restore the appellant retroactively to the date of the Initial Decision and thus has not fully complied with the administrative judge's interim-relief order. However, under the circumstances of this case, I would not dismiss the agency's petition for review for failure to comply with that order. Unlike the majority, I am not prepared to forego exercising the Board's review authority over this initial decision concerning matters affecting national security just because the agency did not fully comply with an order that should not have been given in the first place. Because the administrative judge

should not have ordered interim relief, I would grant the petition for review, reverse the initial decision, and sustain the agency's action which indefinitely suspended the appellant for failure to meet a mandatory condition of employment -- the holding of a security clearance.

¶2 During the relevant time period, the appellant occupied the position of Electronics Engineer in the Launching Systems Department at the Port Hueneme, California, Naval Surface Warfare Center. Initial Appeal File (IAF), Tab 14, Subtab 4g. The position requires a security clearance. Refiled Appeal File (RAF), Tab 14.

¶3 In its June 26, 1996 memorandum, the agency notified the appellant that, based on police and incident reports showing that he had threatened coworkers, his access to classified and sensitive information was immediately suspended pending adjudication of his clearance eligibility by the Department of the Navy Central Adjudication Facility (DON CAF). IAF, Tab 14, Subtab 4e, Ex. F-6.In its August 15, 1996 memorandum, the agency notified the appellant of its intent to suspend his security access based on the reported threats. The notice gave the appellant the opportunity to respond to questions regarding the alleged threats. It also informed him that the Commanding Officer would use police and incident reports, along with any response from him, in deciding whether his security access would be suspended permanently. IAF, Tab 14, Subtab 4e, Ex. F-7.

¶4 On November 5, 1996, the agency informed him that it was continuing to suspend his security access pending a final determination by DON CAF as to whether lie could hold a security clearance. IAF, Tab 14, Subtab 4e, Ex. F-9. The agency also indicated that, despite several opportunities to provide information regarding the alleged threats, it had not received his response. Id.

¶ 5 On November 22, 1996, the agency proposed to indefinitely suspend the appellant. RAF, Tab 14. The reason for the proposed action was the appellant's "failure to meet a mandatory condition of employment" given that his access to classified material remained "suspended pending a final determination as to whether [be] can hold a security clearance" in view of the threats he allegedly made in the workplace. Id. On March 14, 1997, the agency informed the appellant that, after considering his oral reply and the other information in its file, it was indefinitely suspending him effective March 17, 1997, for the reasons stated in the proposal notice. IAF, Tab 14, Subtab 4e, Ex. F-l').

¶6 The administrative judge reversed the indefinite suspension, finding that the appellant was denied minimum due process because the agency "fail[ed] to specifically notify [him] of the condition subsequent that would terminate his indefinite suspension." Initial Decision at 14. She ordered interim relief. I strongly disagree with that decision.

¶7 In Department of the Navy v. Egan, 484 U.S. 527, 108 S. Ct. 818 (1988), the Supreme Court held that the government has a "compelling interest" in withholding national security information from unauthorized persons, that a it clearance may be granted only when 'clearly consistent with the interests of the national security,'" and that the authority to grant or withhold clearances rests solely with the employing agency, which has been delegated that authority by the President. Id. at 527-29, 108 S. Ct. at 824 (citation omitted).

¶8 The Court of Appeals for the Federal Circuit has found that the Board is only authorized to determine whether the employee was provided with notice of the reasons for the suspension of his access to classified information when that is the reason for placing the employee on enforced leave pending a decision on the employee's security clearance." King v. Alston, 75 F.-')d 657, 661 (Fed. Cir. 1996). Tile Board's inquiry extends only as far as determining whether tile notice "provides the employee with an adequate opportunity to make a meaningful reply to the agency before being placed oil enforced leave." Id. at 662.

¶9 The Board itself, in recent decisions, has found that the state of its law governing security clearances remains unchanged, that is, the Board has limited jurisdiction over adverse actions involving security clearances, such as the indefinite suspension at issue here. Hesse 1,. Department of Slate, 82 M.S.P.R. 489, 492 (1999), citing Roach v. Department of the Army, 82 M.S.P.R. 464, ¶¶ 48-54 (1999).

¶10 The statute makes it plain that the decision to grant interim relief is a matter of the Board's discretion. 5 U.S.C. § 7701(b)(2)(A)(i). The Board also has stated that it is not precluded from finding that interim relief is not appropriate In a particular class of cases. Steele 1,. Office of I-lei-sonnel Management, 57 M.S.P.R. 458, 463 (199'), aff'd, 50 F.3d 21 (Fed. Cir. 1995) (Table). Because the Board has limited jurisdiction over adverse actions involving security clearances, in my view, it is inappropriate for an administrative judge to order interim relief in an appeal involving a security clearance.

¶11 As discussed above, the Board's authority in cases such as this extends only to determining if the appellant was provided with notice of the reasons for the suspension sufficient to allow him to make a meaningful reply before the proposed action took effect. King, 75 F.3d at 661. In this case, the agency provided the appellant with the due process to which he was entitled involving clearance access/security clearance matters. The agency's pre- notices to the appellant, the notice of the proposed indefinite suspension, and the decision letter all informed the appellant that his access to classified information was being suspended because the agency had received reports that he had threatened other employees. Further, the appellant was given a chance to reply to the allegations, and be did so.

¶12 In his reply to both the suspension of his access to classified material and to the proposed indefinite suspension, the appellant addressed the allegations that lie threatened his co-workers. IAF, Tab 14, Subtab 4i; RAF, Tab 27 at 6'). He therefore knew why these actions were being proposed, and lie had an opportunity to make a meaningful reply to them. In my view, there is no question that the agency provided the appellant with minimum due pi-ocess before it effected the indefinite suspension.

¶13 Moreover, the agency plainly set forth the condition subsequent in its notices to the appellant. The agency's June 26, 1996 memorandum informed the appellant that his access to classified and sensitive information was suspended pending adjudication of his clearance eligibility by DON CAF; its November 5, 1996 notice advised him that the suspension of access was being continued pending a final determination by DON CAF as to whether he could hold a security clearance; the notice of the proposed indefinite suspension told him that his access to classified material remained suspended pending a final determination as to whether he can hold a security clearance; and the decision letter referred to the proposal notice.

¶14 It is clear from these documents that the suspension would continue until a final determination was made regarding whether the appellant could hold a security clearance. Further, in his response to the proposed indefinite suspension, the appellant acknowledged that he understood he was being suspended until a final determination was made on his security clearance by DON CAF. IAF, Tab 14, Subtab 41, Response at 7. The administrative judge therefore erred in finding that the agency did not advise the appellant of the event that would end the indefinite suspension. Accordingly, I would reverse the initial decision and sustain the agency's action.*

FEBRUARY 14, 2000

Susanne T. Marshall

* The record indicates that the agency kept the appellant in pay status through March 16, 1997. RAF, Tab 14, id., Tab 27 at 13 and 48; IAF, Tab 14, Subtab 4e, Ex. F-I 3. If the agency's petition for review is dismissed and the initial decision reversing the agency's action becomes the Board's final decision, the appellant would receive back pay for the short period of time from the date of the initial decision through the date the agency placed him in pay status in an attempt to comply with the interim-relief order, he would also receive back pay for the period March 17, 1997, through April 8, 1999, the day before the initial decision was issued. By dismissing the agency's petition for review, the majority is ordering the agency to award the appellant back pay for a period of over 2 years despite the fact that he received due process when the agency suspended his security clearance.

REMARKS OF SUSANNE T. MARSHALL

Department of the Navy
March 17, 1999

Thank you for the invitation to join you today. I consider it the luck of the Irish to have the opportunity to be here in Hawaii on St. Patrick's Day!

Let me start today by first acknowledging my personal connection with the Navy. My father was a 30-year career Naval aviator, who retired as a Captain in 1972. So, in addition to this great location, another highlight of this invitation was telling my father that the office had advised me that as a Presidential appointee, protocol made me the equivalent of an Admiral, so I finally outranked him!

As the newest Member of the Board, I have found people are generally curious about my background and how I reached my current position. As indicated in my bio, for sixteen years prior to joining MSPB, I worked on Capitol Hill -- both in the House and the Senate. I am not an attorney, and in general, legislative experience would not appear to equate to the adjudicatory role of MSPB Board Member. However, I served on the staff of the Governmental Affairs Committee in the Senate for 12 years. That is the committee with jurisdiction over all postal and federal civil service laws. So it is my direct experience in writing the laws, that has now led me to a position where I work to enforce those same laws.

You are all very familiar with the initial stages of the appeal process before the Board, and may also have been involved with filing Petitions for Review with the Board. I thought you might be interested in hearing a bit about what happens once the PFR is received.

After review in the Clerk's office, most cases are directed to the Office of Appeals Counsel, which has over 20 attorneys who review the case files. After analyzing the issues raised on PFR, OAC will draft an Order for the Board's consideration. Each case is then sent to the Board Members. Since we consider each case independently, in seriatim, case assignments are sent up randomly on a rotating basis. In other words, no member is first up on all cases; so even as the newest member, I still have first review on one-third of all cases.

I have my own staff of three attorneys, and an Executive Assistant. My assistant divides up the case assignments. The attorneys do an initial review of the case file, the recommended O&O, and provide me with a summary. I use that summary as a guide for my review of the record, which sometimes means reading the entire case file. I find at times the information available in a document may not have been cited previously, but is material to a correct disposition of a case. I also directly review a substantial number of cases, which can be disposed of largely based on the rationale in the Initial Decision.

In the cases where an O&O is to be issued, and I agree with the recommended decision, I vote to adopt. When I disagree with the recommended disposition, I will then propose an alternative disposition through a rewrite instruction. The file is then

transferred to the office of the next member, where they then consider both the draft decision and any rewrite or edits proposed. Each case circulates between the members, with each of us having the opportunity to consider all suggested options proposed -- and eventually we'll have at least two votes to adopt.

Occasionally, Board members will feel it is necessary to issue a separate opinion or dissent. Actually, when a dissent is circulated, it may influence a member to change their position as well. I have issued a handful of dissents, and sometimes have been successful in persuading my colleagues to reconsider their positions. However, there are a few instances where I will continue to strongly disagree and issue a dissent for publication.

That's a simplistic description of how we operate, but should shed some light on why it takes so long to reach a final decision in some cases.

In January, the Board celebrated its 20th Anniversary. This was actually the anniversary of the Civil Service Reform Act of 1978. It was that Act that sought to protect federal employees and limit abuse by government officials. It also created the fundamental protections for whistleblowers that disclosed fraud, abuse and mismanagement. It is the '78 Act that established merit systems principles and articulated prohibited personnel practices.

Reflecting on the progress of the agency over the past 20 years, it is significant to note that the Board has provided a valuable body of rules that can be referred to and relied upon, which is generally accessible to all parties.

While the composition of the Board has changed over time, and these changes have resulted in some modification to Board precedent, the Board's law is still a largely stable body of precedent and rule.

In the last 20 years, the Board has established and adopted adjudicatory procedures patterned after a judicial model, emphasized the role of precedent in its decisions, encouraged participants to approach the Board as an adjudicatory body, improved the qualifications of trial level officials, and introduced many of the restraints that limit trial and appellate courts in their deliberations. Although there are important differences between the Board and Courts, the last 20 years have established the Board as a respected adjudicatory agency. The Board's studies of the federal civil service are also well received.

As noted in more than one MSPB study, a creative tension exists between the concept of a "pure" merit system and some of the public personnel policies contained in law. This includes policies such as those calling for a representative workforce, veterans preference, reduction in force rules that use seniority, welfare-to-work, and so on. Each public policy objective is worthy and has a rationale, but the actions taken to achieve those objectives must be carefully implemented to avoid conflicts with the values embodied in a merit system.

An area where the creative tension of the CSRA is clearly evident is the merit principle that requires that we retain employees based on the adequacy of their performance and that we separate (fire) employees who "cannot or will not improve their performance to meet required standards." At the same time, however, the merit principles also require that federal employees be protected against arbitrary personnel actions, personal favoritism, reprisal for whistleblowing, or coercion for partisan political

purposes. It was to help achieve a balance in this area that in 1978, MSPB was assigned its role as an objective, bi-partisan, and independent adjudicator of appeals from employees facing adverse personnel actions.

While the CSRA was clearly intended to achieve a better balance than was perceived to exist prior to 1978 with regard to removing poor performers, 20 years later, we still have the same issues being raised, including the allegation that it is "too hard" to fire a poor performer. This is in spite of the fact that close to 10,000 federal employees are involuntarily separated from their jobs each year NOT counting those removed through reduction in force. This includes about 3,000 employees on average, who resign, but whose personnel records indicate that their supervisors had initiated action against them for poor performance, misconduct or both. Further, only about 20 percent of all adverse personnel actions are appealed to MSPB; and when they are, the agency decision is upheld close to 80% of the time or more.

Now I would like to address some issues of particular significance.

The first is Falsification. Last year the Supreme Court considered Lachance v. Erickson, (118 S.Ct. 753 (1998) which came shortly after I arrived at the Board, so I had the opportunity to attend the oral arguments on the case. It was interesting to note that the Court was impatient with the government's argument that an employee could not be separately charged and penalized for making false statements during an agency's investigation into his work-related misconduct. Now, as a result of the Supreme Court decision, the Board has to consider cases where it had followed Federal Circuit precedent in Grubka, (Grubka v. Dept. of Treasury, 858 F. 2d 1570, 1988) now overruled. The Board is faced with deciding whether, if the falsification charge is now sustained and added back in, the agency's original penalty determination was reasonable. Since some of these cases are now several years old, it makes these decisions harder to evaluate on an equitable basis.

Another topic I thought very relevant today, is the Board's current review of the treatment of a Security Clearance determination where there is a claim of whistleblower reprisal. Egan v. Navy (484 U.S. 530-31 (1988) limited the Board's authority in cases involving security clearance determinations. However, due to Congressional enactment of the 1994 Whistleblower Protection Act amendments, the issue of the Board's authority to review security clearance revocations is being revisited. The Board requested amicus briefs, and we have now received comments from DOD, CIA, Justice, and the Office of Special Counsel. You might like to know that only the OSC seems to support the position that the Board may look into the agency's action on a security clearance!

The problem has arisen because the '94 amendments did not explicitly list security clearance under the definition of a personnel action. However, there is legislative history in the committee reports and floor statements that seems to suggest that was the intent of Congress.

Under legislation that followed the '94 WPA amendments, the Intelligence Committee required due process appeal rights to cover employees when a clearance was revoked or denied, so I don't know where the Board will end up on this.

I know another area where agencies have some concerns involves the Board's actions in mitigating the penalty selection --- especially where the Board has not sustained all charges. OPM has challenged the Board's holding in White (White v. US Postal

Service, 71 MSPR 521 (1996), where the Board did not defer to the agency. Lachance v. Devall (Devall v. Navy 77 MSPR 468 1998) was argued before the Federal Circuit in January, so a decision should be forthcoming at any time.

As a practical matter, this has probably resulted in no change in most cases. Still, the Board has been criticized for improperly making management decisions. As a body whose function is to afford appellate review, it seems to me that the Board should review penalty determinations only to see if an agency has abused its discretion. So, in cases where we do not sustain all the charges, we should start from the agency's choice and see if it still is a fitting penalty given the sustained charges. If not, then the Board should impose, as it always did pre-White, the maximum reasonable penalty. In so doing, the Board does not attempt to act in the place of the agency and still accords deference to the agency.

Another concern I want to discuss is the issue of Interim Relief. I was surprised to find that when I arrived at the Board, it was rigid in interpreting its own interim relief regulations. I found it particularly troublesome that the Board was dismissing cases for technical reasons, and ignoring the merits of a case. I was really disturbed because, in most instances, there was adequate evidence regarding compliance with interim relief to allow the Board to proceed to a review of the merits. I did not understand why the Board was unwilling to exercise some discretion in this area. I am pleased that my colleagues were receptive to my concerns. And we are now in the process of revising our regulations. I anticipate their publication in the near future. However, I would like to give you all a word of advice today. It is always in the best interest of an agency to use the magic words "undue disruption" whenever an employee is not returned to his exact same position with the exact same duties.

In general, I would like to acknowledge that the Navy has done a very good job in some areas. Early in my tenure, I reviewed the Pearl Harbor RIF cases. I remember that the Navy's argument and evidence was clearly presented and provided undisputed support for the actions taken. Similarly, some commissary RIF cases were well defended. And actually, they have now provided the guidance in the definition of competitive area.

The Navy also had some of the lead cases in the requests for Law Enforcement Officer (LEO) retirement status. (Fitzgerald v. DOD, 80 MSPR 1 (1998) The primary issue we resolved was jurisdictional, but now most pending cases involve evaluating evidence to determine whether individuals have shown that they occupy sufficiently rigorous positions. What we have seen are a number of positions with the title "Police Officer", where many are really security positions and their duties do not rise to the level of the rigorous LEO standards.

As you can see from this review, the Board's body of law is not static. We are forever evolving as we consider and decide new cases, which builds upon the past as we move to the future.

I think I'll wrap things up now, so we have time for some questions.

Mahalo.

Remarks of Susanne T. Marshall
Sponsored by Government Training Institute
Atlanta, Georgia
June 25, 1999

Good morning. It's a pleasure for me to be here with you today as the newest member of the Merit Systems Protection Board. It's really not all that often that I have the chance to appear before a group such as this, so I appreciate having the opportunity to show you that there is a human face that goes with the name that appears on the thousands of decisions that have been issued since I joined the Board in November of 1997.

Some of you may be familiar with my background by now -- and I'm sure everyone has seen my bio. The most important aspect is my experience serving on the staff of the Senate Governmental Affairs Committee, which has jurisdiction over all federal civil service laws. It is that direct experience in writing the laws, that has now led me to a position where I work to enforce those same laws.

While the field of MSPB law may seem narrow in the sense that it is limited to federal employees, it covers quite a variety of issues when it comes to enforcing the fundamental merit principle of termination only for cause.

You have been discussing a number of topics in detail during this training program, but I will suggest some general rules you might want to follow in practicing before the Board. Be on time, be accurate and precise, argue policy and fairness, rely on Board precedent, cite to the record, write plainly, and know the criteria for review contained in the Board's regulations. That's all it really takes.

In January, the Board celebrated its 20th Anniversary, which marks the anniversary of the Civil Service Reform Act of 1978. It was that Act that sought to protect federal employees and limit abuse by government officials. It also created the fundamental protections for whistleblowers who disclosed fraud, abuse and mismanagement, and it is the '78 Act that has strengthened the merit systems principles and articulated the prohibited personnel practices that guide our decision-making process.

Reflecting on the progress of the agency over the past 20 years, it is significant to note that the Board has provided a valuable body of case law which is generally accessible to all parties.

While the composition of the Board has changed over time, and these changes have resulted in some modification to Board precedent, the Board's law is largely stable even as it evolves.

Over the last 20 years, the Board has established and adopted adjudicatory procedures patterned after a judicial model, emphasized the role of precedent in

its decisions, encouraged participants to approach the Board as an adjudicatory body, improved the qualifications of trial level officials, and introduced many of the restraints that limit trial and appellate courts in their deliberations. Although there are important differences between the Board and Courts, the last 20 years have established the Board as a respected adjudicatory agency. The Board's studies of the federal civil service are also well received.

As noted in more than one MSPB study, a creative tension exists between the concept of a "pure" merit system and some of the public personnel policies contained in law. This includes policies such as those calling for a representative workforce, veterans preference, reduction in force rules that use seniority, welfare-to-work, and so on. Each public policy objective is worthy and has a rationale, but the actions taken to achieve those objectives must be carefully implemented to avoid conflicts with the values embodied in a merit system.

An area where the creative tension of the CSRA is clearly evident is the merit principle that requires that we retain employees based on the adequacy of their performance and that we separate (fire) employees who "cannot or will not improve their performance to meet required standards." At the same time, however, the merit principles also require that federal employees be protected against arbitrary personnel actions, personal favoritism, reprisal for whistleblowing, or coercion for partisan political purposes. It was to help achieve a balance in this area that in 1978, MSPB was assigned its role as an objective, bi-partisan, and independent adjudicator of appeals from employees facing adverse personnel actions.

From the program, I see you have a number of sessions that focus on specific aspects of practicing before the Board and this includes a discussion of significant Board cases. So I'll try to avoid repetition. I figured the one thing no one else could speak to was how I do my job. You might have an opinion, good or bad, about a position I take -- but whether or not you agree with the result, I want to assure you that I seriously consider all the evidence presented in a case.

You are all familiar with the initial stages of the appeal process before the Board, and have likely been involved with filing Petitions for Review as well. In many cases, the majority of your work precedes the PFR stage, but that's just when my job starts. So let's look at the process from that point.

After review of the PFR in the Clerk's office, most cases are directed to the Office of Appeals Counsel, which has over 20 attorneys who review the case files. After analyzing the issues raised on PFR, OAC will draft an Order for the Board's consideration. Each case is then sent to the Board Members. Since we consider each case independently, in seriatim, case assignments are sent up randomly on a rotating basis. In other words, no member is first up on all cases; so even as the newest member, I still have first review on one-third of all cases.

I have my own staff of three attorneys, and an Executive Assistant. My assistant divides up the case assignments. The attorneys do an initial review of the case file with the recommended O&O, and provide me with a summary. I use that summary as a guide for my review of the record, which can mean reading the

entire case file. At times I have found the information available in a document, which may not have been cited to previously, is material to a correct disposition of a case. I also directly review a substantial number of cases, which can be disposed of largely based on the rationale in the Initial Decision.

In the cases where an O&O is to be issued, and I agree with the recommended decision, I vote to adopt. When I disagree with the recommended disposition, I will propose an alternative disposition through a rewrite instruction. The file is then transferred to the office of the next member, where they then consider both the draft decision and any rewrite or edits proposed. Each case circulates between the members, with each of us having the opportunity to consider all suggested options proposed, any additional legal analysis or advisory opinions -- and eventually we'll have at least two votes to adopt.

Occasionally, Board members will feel it is necessary to issue a separate opinion or dissent. Actually, when a dissent is circulated, it may influence a member to change their position as well. I have issued a handful of dissents, and sometimes have been successful in persuading my colleagues to reconsider their positions. However, there are a few instances where I will continue to strongly disagree and issue a dissent for publication.

That's a simplistic description of how we operate, but should shed some light on why it takes so long to reach a final decision in some cases.

The greatest challenge for all of us at the Board -- for the Members, Headquarters counsels, and the Administrative Judges in the regions -- is dealing with the tremendous volume of cases with limited resources. This will undoubtedly continue to be true, and forces us to constantly evaluate our manner of adjudication and internal processes.

This has led the Board to upgrade our technology, increase the use of video conferencing, and experiment with issuing Bench Decisions.

These are efforts to streamline processes within our existing framework. But looking to the future, an area that could do more than all the others combined is the push for Alternative Dispute Resolution. While the concept of ADR is not new, if federal agencies increased the focus on resolving disputes at an early stage informally, MSPB could benefit in a big way if it reduced the number of cases filed. In this regard, to show our support for ADR, we recently issued a new regulation to allow additional time for filing to parties who first participate in ADR.

While the CSRA was clearly intended to achieve a better balance than was perceived to exist prior to 1978, it is obvious that civil service reform is continually evolving. And the Board must remain equipped to deal with those changes.

Some of the more significant issues during my tenure have included the Supreme Court's decision in Lachance v. Erickson, (118 S.Ct. 753 (1998)). I had the opportunity to attend the oral arguments in that case. It was interesting to note that the Court was impatient with the argument that an employee could not

be separately charged and penalized for making false statements during an agency's investigation into his work-related misconduct.

Another topic of particular interest to me was the Board's treatment of a Security Clearance as a personnel action where there is a claim of whistleblower reprisal. Egan v. Navy (484 U.S. 530-31 (1988)) limited the Board's authority in cases involving security clearance determinations. However, due to Congressional enactment of the 1994 Whistleblower Protection Act amendments, the issue of the Board's authority was revisited. The Board received briefs from DOD, CIA, Justice, and the Office of Special Counsel.

The dispute arose because the '94 amendments did not explicitly list security clearance under the definition of a personnel action. However, there is legislative history in the committee reports and floor statements that strongly suggests that was the intent of Congress. We recently issued a unanimous decision -- finding that legislative history was not sufficient to overcome the standard directed by Egan. Congress must give the Board explicit authority to review a security clearance determination if that is the intent.

Another issue where we have devoted a lot of energy over the past year has been consideration of Law Enforcement Officer (LEO) retirement status. (Fitzgerald v. DOD, 80 MSPR 1 (1998)). The primary issue we resolved was jurisdictional, but then we moved on to evaluating evidence to determine whether individuals have shown that they occupy sufficiently rigorous positions. What we have seen are a number of positions with the title "Police Officer", where many are really security positions and their duties do not rise to the level of the rigorous LEO standards.

Another issue that has been important to me is the Board's handling of interim relief. I was surprised to find that when I arrived at the Board, it was rigid in interpreting its own interim relief regulations. I found it particularly troublesome that the Board was dismissing cases for technical reasons, and ignoring the merits of a case. This was disturbing because, in most instances, there was adequate evidence regarding compliance with interim relief to allow the Board to proceed to a review of the merits. I did not understand why the Board was unwilling to exercise more discretion in this area. I am pleased that my colleagues were receptive to my concerns, and we have revised our regulations accordingly. I hope this will clarify the appellant's rights to interim relief, as well as an agency's obligation to provide that relief.

Another point I want to touch on is the recent Federal Circuit decision regarding the Board's authority to review penalty selections --- especially where the Board has not sustained all charges. In Lachance v. Devall (Devall v. Navy 77 MSPR 468 1998)), OPM challenged the Board's holding in White (White v. US Postal Service, 71 MSPR 521 (1996)), where the Board held that in a case where it did not sustain all the charges, it would independently arrive at it's own penalty determination rather than defer to the agency's penalty selection. Both White and Devall were cases decided by the Board prior to my tenure. However, OPM's request for reconsideration was pending when I was sworn in. I'm mentioning it today, because there was an odd footnote in the Court's decision

about my position. While I voted with the majority to reject OPM's reconsideration decision, this was not meant as a substantive vote on White, and it was not a substantive vote on Devall. When reconsideration of Devall was presented to me, the majority of the Board still supported reliance on White. White had been Board precedent for two years. The only way for OPM to overturn White would be in the Court of Appeals. Therefore, as a practical matter, I voted to support the Board's precedent and not delay the case.

So my vote in denying the reconsideration request, really had less meaning than may have been attributed to it. Regardless, in overturning White, I don't believe it will make a major difference in the outcome of most cases. The Board will still rely on the Douglas factors and whether the agency has selected the maximum reasonable penalty, so I don't expect major changes as result of that decision.

Actually, I believe we should consider the Court's opinion in Devall as a reminder of the delicate balance envisioned in the Civil Service Reform Act. The penalty selection is a management decision, and our role at the Board is to afford review of that penalty selection to see if an agency has abused its discretion. So, in cases where we do not sustain all the charges, we will start from the agency's choice to determine if it still is a fitting penalty given the sustained charges. If not, then the Board should impose, as it always did pre-White, the maximum reasonable penalty. In doing so, the Board does not attempt to act in the place of the agency.

In closing, I would like everyone to reflect a bit on the history of the federal government's merit system. Some may have forgotten that there was a time when it was permissible under the merit system for an agency to restrict jobs to "men only" at its discretion. And until the classification Act of 1923, it was perfectly legal to pay women a lower salary than men with the same experience doing the same work. It wasn't until 1962 that the Civil Service Commission issued regulations requiring that all appointments in the Government be made without regard to sex, except in very limited circumstances. More recently, we have seen changes in the rights and protections for the disabled -- such as the requirements to provide accommodations under the Rehabilitation Act and a move to provide increased work opportunities for the mentally handicapped.

As you can see from those examples -- and the review of issues today -- neither civil service reform nor the Board's body of law is static. We are forever evolving as we consider and decide new cases, implement Executive policy directives and legislative changes. We are constantly building upon the past to move us into the future.

I consider it a privilege to be a part of this process, and thank you for the opportunity to share some of my thoughts with you today.

Thank you.

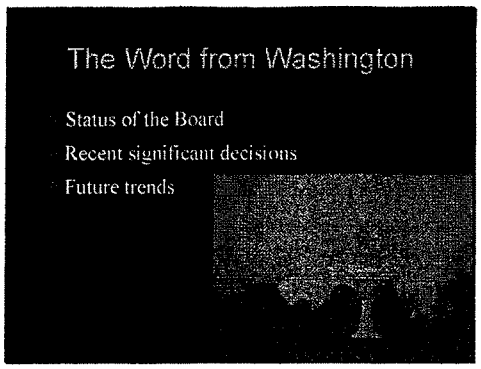
Presentation Summer/fall 2000

Slide 2

It's a pleasure to be here. I really don't get away from Washington often enough, and I very much appreciate having the opportunity to show you that there are human faces that goes with the names that appears on the thousands of decisions that MSPB has issued since I joined the Board in November 1997.

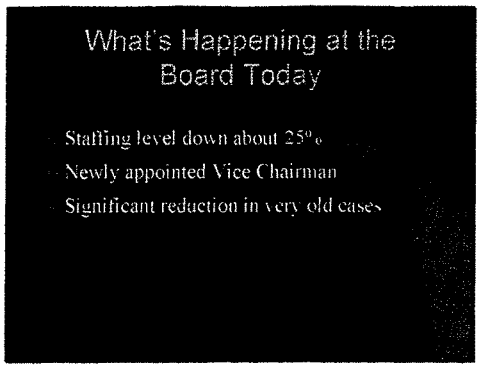
As one of the three Presidentially-appointed, Senate-confirmed Board members, it is my responsibility to contribute to the Board's final decision in every case which is appealed to us. My staff and I review every petition that is filed, and consider all the evidence and argument, before I make a decision. Usually, the Board members agree to the proper outcome of an appeal, and we will issue a unanimous opinion. However, when we can't agree, a case may take longer to circulate and require a separate opinion.

Slide 3



Today -- bringing the Word from Washington -- I plan to cover three areas.
First -- a snapshot of how the Board is doing as an organization -- our resources and how we're doing in getting decisions issued.
Second -- I want to mention a few specific decisions and some issues that are important to me.
And finally, I'll attempt to predict what changes you can expect to see at the Board over the next year or so.

Slide 4



Perhaps the most important change at the Board is that our staffing level has been reduced over the past five years by 25%. Fortunately, most of those cuts have come in the area of administrative support rather than in our administrative judge corps. Even though we've been able to protect our core adjudicatory function, we've had to undergo some internal changes to be able to continue adjudicating cases in a timely manner.

The most recent organizational change at the Board is that we finally are back to full strength with three members. Since the retirement of former Chairman Erdreich in March of last year, we had been operating with only two board members. With no third member to break the tie, a case may have taken longer and resulted in a non-precedential "split vote" decision

that affirmed the administrative judge's initial decision. Now that we have a third member, we will see if we can operate more effectively.

As for our overall productivity, I'm pleased to be able to tell you that over the past two years, the Board has made significant inroads into our backlog of very old cases, particularly cases over a year on appeal. When I was first appointed to serve as a Board member in 1997, we had almost a hundred cases at headquarters that had been pending for more than a year; some almost two years. Today, we are down to half that number. Overall, this is a significant accomplishment when you look at the Board's history over the past 20 years.

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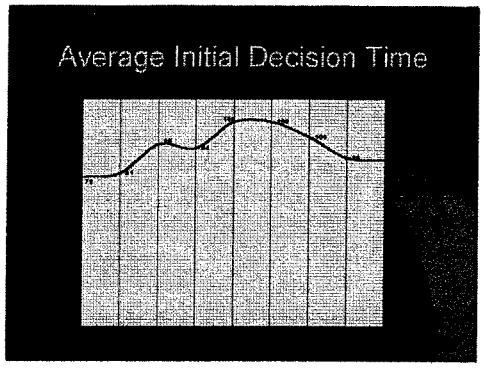
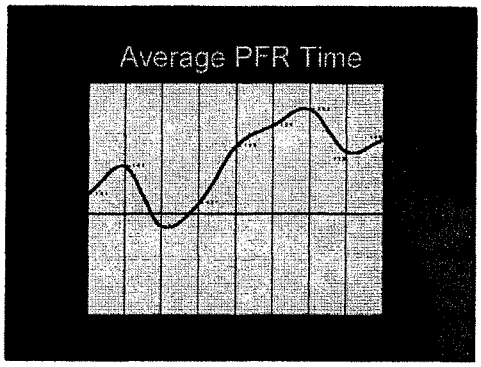


In addition to reducing our inventory of very old cases, we're also making significant progress in reducing the average period of time that it takes us to adjudicate all cases. From this slide you can see that average processing time for initial appeals has dropped from 108 days when I took office -- to just 88 days today. Hopefully, this trend will continue downward.

Slide 6



Here the Board members get mixed reviews. We have improved our efficiency in issuing final decisions in cases on petition for review from two years ago when we were taking on average 222 days to fully adjudicate a PFR. Today we're averaging about 190 days. We still have room for improvement in this area, and the recent upward trend is a concern, but this may have occurred in the past due to the difficulty in reaching a majority with only two members. Hopefully, by this time next year, our graphs will reflect a renewed reduction in appeal processing times.

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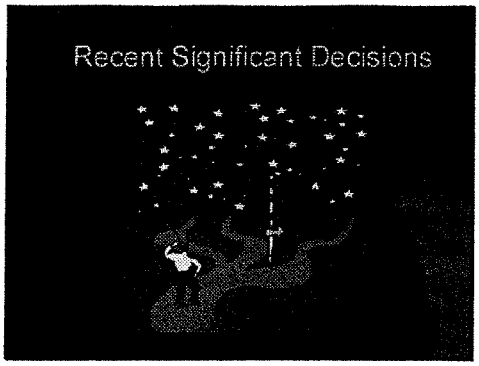

So that's the snapshot of where we are at the Board today as far as our success at getting decisions out. Now I'd like to discuss a few of those decisions, and how they might affect your work.

Also, since I plan to remain as a Board member for the three years left on my term, it may be helpful for you to hear about some of the issues I believe are important.

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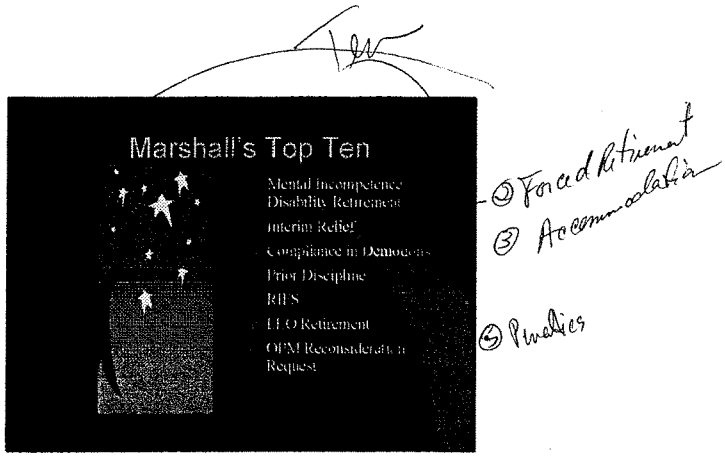

I'm going to briefly address the topics listed here because I believe they are significant, as well as areas of evolving case law. I encourage you to be familiar with what we have done in these cases and to watch for future decisions – some of which may require resolution by our reviewing court.

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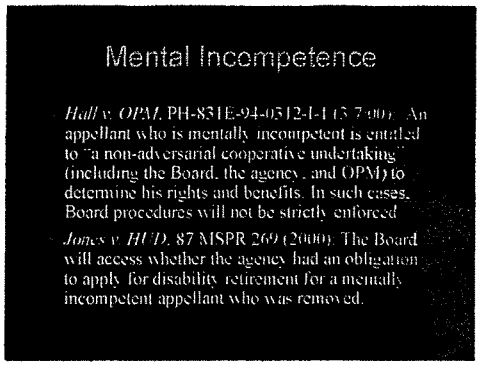
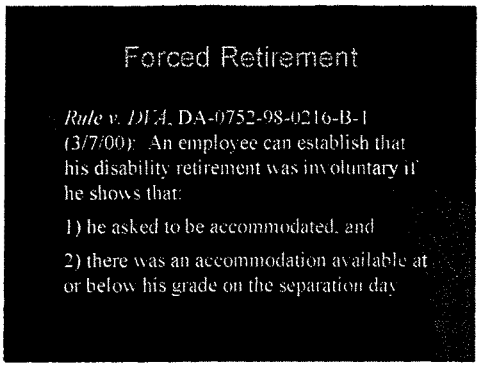


One important area of evolving case law is dealing with appellants who appear from the record before us to be incompetent. In some ways, as an adjudicator it would be easy to ignore the evidence of mental instability and simply dismiss an appeal for failure to meet some procedural deadline or other error that a mentally incompetent appellant is likely to make. On the other hand, I personally believe that the government has a special obligation to people such as this who are in need of assistance because of a psychological disease. Fortunately, the Court of Appeals and I are in agreement, such that the Board should take steps to provide assistance to these appellants. The *Hall* decision I have given you here restates our policy that the involved government agencies should work together to help an appellant such as this to apply for disability retirement benefits.

In this particular case, the Board assisted the pro se appellant in obtaining pro bono legal representation, waived the late filing, and remanded the case. I heard that the case settled shortly after remand with the award of disability retirement benefits to Ms. Hall.

In *Jones*, the Board stated that it would review whether an appellant met the regulatory requirements to have the agency file for a disability retirement on his behalf. If he does, and the agency did not apply, then the Board will direct that it do so. Both of these cases taken together show that the Board is beginning to build significant case law that will assist mentally incompetent individuals in pursuing their rights to a disability retirement annuity.

Slide 10

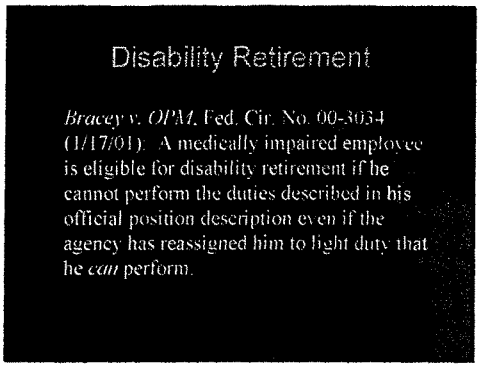


The principle in this decision was suggested in *Lorenzo v. USPS*. However, it was not until we issued *Rule* that the Board specifically articulated both points here. This case clarifies: If an employee becomes disabled from performing in his present position and then asks that he be reassigned to another position in which he can perform, the agency has an obligation to reassign him. If it does not and the employee subsequently is forced into disability retirement, on appeal to the Board, we will reverse that disability retirement as coerced and involuntary.

The beginnings of this principle first arose in *Nordhoff v. Navy,* a 1998 decision. There, the Board recognized for the first time that an individual could claim entitlement to disability retirement while simultaneously claiming that there was another

position available to which he could have been reassigned as an accommodation. On the surface, these two claims appear to be contradictory. However, in reality there is no way within the disability retirement application process that an individual can challenge the agency's certification to OPM that there is no reassignment available. The disability retirement applicant submits evidence only as to his inability to perform in his *present* position; the procedures leave it up to the agency to certify to OPM relative to *other* positions which might be available. *Nordhoff* and *Rule* provide an important right to an employee who believes that he can continue to work productively, even with his disability.

Slide 11

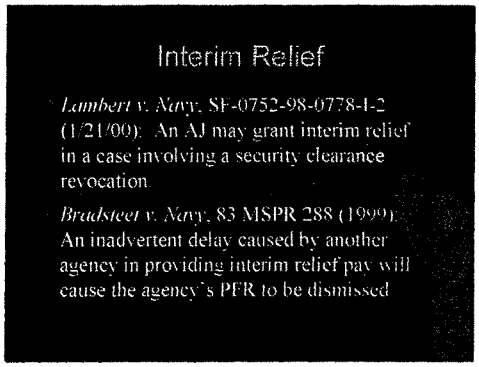


This recent Federal Circuit decision has the potential for adverse consequences throughout government. Mr.Bracey became injured and unable to perform as an Electronics Worker. To enable him to remain employed, the agency detailed him without loss in pay to the light duty shop, performing tasks that were not those of an Electronics Worker. When Mr. Bracey applied for disability retirement, OPM held that he was not entitled because he was providing "useful and efficient service" in the light duty shop. The Board affirmed OPM's decision. However, the court decided that the law entitles an employee to disability retirement if they cannot perform the duties of their official position description. Since Mr. Bracey had been assigned to an unclassified set of duties unlike those duties in his Electronics Worker

position description, the court awarded him a disability retirement.

On the surface, this appears to be a pro-employee decision, allowing Mr. Bracey to receive the disability retirement he claimed. However, the policy considerations are significant. In our society, we believe that it is best for all of us that people with disabilities be retained in the workforce, rather than discharged from employment and removed from productivity. For many years, federal agencies have provided injured and disabled employees with light duty so that they could remain employed. Unfortunately, this decision says to agencies that an injured employee has a right to a disability retirement annuity even if there is productive work that the employee could perform. The incentive for agencies to try to find adequate light duty has been reduced, and the number of people who are separated from government service on disability retirement will increase. Hopefully, OPM will develop guidance for agencies to try to work around the problems caused by this decision.

Slide 12



Another issue that has been important to me is the Board's handling of interim relief. I was surprised to find that when I arrived at the Board, it was rigid in interpreting its own interim relief regulations. I found it particularly troublesome that the Board was dismissing cases for technical reasons, and ignoring the merits. This was particularly disturbing because, in most instances, there was adequate evidence regarding compliance with interim relief to allow the Board to proceed to a review of the merits. I did not understand why the Board was unwilling to exercise some discretion in this area. While I am pleased that my colleagues were receptive to my concerns, and agreed to revise our regulations accordingly, I continue to find myself in the minority in a few aspects of interim relief.

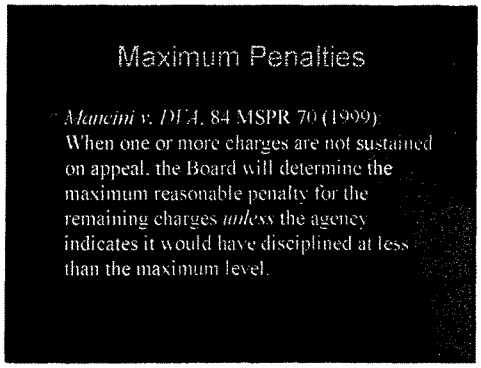
These two cases are examples of decisions in which I dissented from the majority opinion because the majority denied the agency's PFR for failure to provide interim relief. In *Lambert*, the AJ reversed the appellant's indefinite suspension which was based on the suspension of his security clearance. On PFR to the Board, it was clear that the agency had misunderstood its interim relief obligation, and had failed to reinstate the appellant effective the date of the initial decision. However, I concluded that the agency's error was immaterial because it was improper for the AJ to order interim relief in a case in which the action on appeal is based on a security clearance revocation or suspension. The Supreme Court and the Congress have been clear, in my opinion, that we are to give special deference to agency decisions relative to matters of national security. I would do so here, and I would hold that the order for interim relief was improper.

As for *Bradstreet*, the Navy delayed paying the appellant about three weeks of interim relief salary, that period between the initial decision and appellant's actual return to the worksite. It was clear to me that the delay was not intentional, and was the result of accounting procedures at the Defense Finance and Accounting Service, a separate agency

within the Department of Defense that was responsible for issuing back pay checks. Although the majority concluded that the delay in making the back pay award to the appellant warranted dismissing the agency's PFR, I would have held that under the circumstances, the Navy was without fault and that the sanction of dismissal was simply inappropriate in this situation.

As long as I hold my position as a Member of the Board, I will continue to fight to avoid the dismissal of appeals from either side based on an inadvertent technical violation that does not do significant harm to the other party.

Slide 13



This is the case in which the Board implemented the Federal Circuit's decision in *LaChance v. Duvall,* which reversed the Board's holding in *White v. USPS.* In 1996, under *White*, the Board had said that if some of the charges fall out on appeal, MSPB can then select the "appropriate" penalty. Upon review of this principle in *Duvall*, the court reversed, reminding the Board that it is the agency who selects the penalty, and the Board's responsibility is limited to reviewing that penalty for reasonableness. Here in *Mancini*, we implement *Duvall* and conclude that we will determine the maximum reasonable penalty for whatever charges are sustained. In the rare situation in which the agency somehow indicates to us that it would have selected something less than the maximum reasonable penalty, we will most likely have to remand the case to the agency for another

penalty selection. However, this situation has not occurred.

And, as a practical matter, the Board's handling of our review of the penalty is really not much different from what it was prior to *White* being issued.

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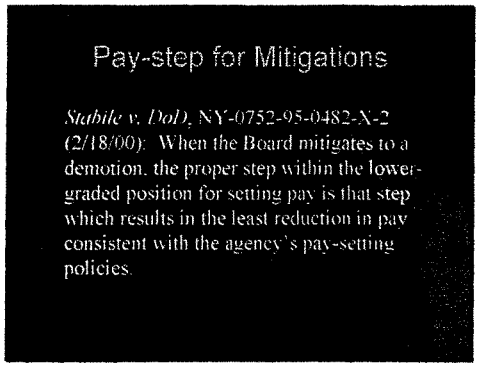

When we first began to consider *Stabile*, there was some argument that a demoted appellant's pay should always be set at the highest step in the lower graded position that did not exceed the appellant's salary in his original position. However, as we thought about the issue, we came to recognize that different agencies have different pay-setting policies that cover the situation in which an employee is demoted for misconduct or poor performance. Since our goal in these cases is to place the employee in the position he would have been in if the agency had selected demotion as the proper penalty in the first instance, we concluded that it was only fair that we allow the agency to use its own regulations for determining the proper step.

However, we continue to wrestle with this issue within the Board, particularly in situations in which the agency's pay-setting policies allow for managerial discretion in selection of the proper level from within some defined range. Should the agency be allowed to exercise that discretion when we mitigate to a demotion, or should the Board have a policy that directs that a particular pay level be selected? I believe that this will continue to be an evolving issue, but you can take a hint as far as my position being one that is consistent with the guidance received by the Board in Duvall to give deference to managerial discretion, with the Board review being one of whether the agency abused that discretion.

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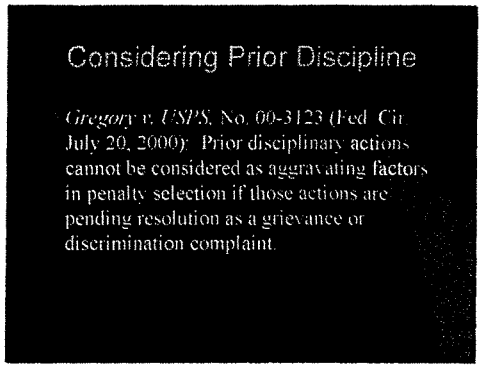
This decision is important because of some confusion that resulted after the Board reversed the big Postal Service reorganization several years ago. In a few of those cases, the Board held that even though some of the Postal employees had accepted reassignments after they were told they soon would be released from their positions, they could still appeal their release as a RIF. This caused some confusion because the Board has always held that a voluntary action cannot be the subject of an appeal, and that an action has to actually be effected, not just proposed, before it can be appealed. *Johnson* hopefully clears up the matter: If an employee wants to appeal a RIF, the RIF must actually take place. Mere notice that the agency intends to release the employee at some date in the future does not cause appeal rights to vest. Employees should be on notice that if they voluntarily accept a reassignment offer while a RIF notice is pending, they will not be able to appeal the RIF to the Board.

Slide 16



Gregory, as a decision from the Federal Circuit has raised a significant issue for all of us. Because it appears to set aside a 20-year-old principle of Board law. We will have to deal with this as the issue arises in new cases to determine the ultimate impact. However, it does seem to raise the possibility that agencies may forego progressive discipline, and just rack up charges until there is enough to justify removal in one action brought to the Board. Or, in the alternative, either party may move for dismissal of a pending appeal until the issue of the prior discipline is resolved through the grievance or complaint process. In considering how agencies might deal with this is to cite to the prior disciplinary actions as having put an employee on notice of certain behavioral deficiencies. So, rather than relying on the discipline imposed, which may be

pending appeal, emphasize the fact that regardless of the outcome of any pending discipline, the agency had made the employee aware of – say proper leave requesting procedures or habitual tardiness – or whatever the offense may be.

Presently, briefs are pending with the U.S. Supreme Court requesting that it review and reverse this decision, and the Board is considering several issues related to the implementation of the *Gregory* decision. This is not yet a settled issue, and practitioners should stay abreast of its development.

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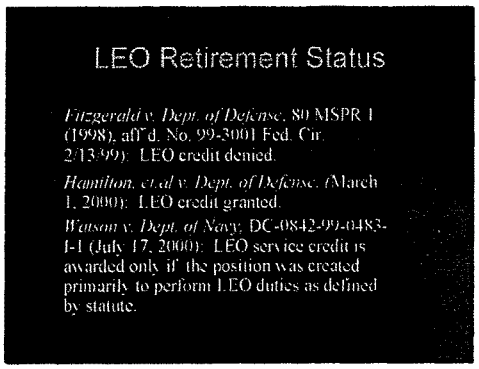

In contrast, we have been considering the issue of entitlement to LEO retirement credit for GS-083 police officers in a piecemeal fashion from various parts of the country, which had led to confusing and inconsistent final decisions from the Board. It seemed to me that when the Court of Appeals affirmed the Board's majority decision in *Fitzgerald*, there was clear guidance to follow. However, our Administrative Judges subsequently interpreted individual cases inconsistent with *Fitzgerald*, and a majority of the Board affirmed a standard different from that upheld by the Court. After wrestling with the facts and arguments as provided in the variety of cases and then standing back from the individual cases and looking at the issue as a whole, I came to the conclusion that the Board's entire approach to the issue had been flawed. I expressed my views in a

Dissenting Opinion issued in *Hamilton.* We continued to receive individual cases with voluminous records, and was recently very pleased when I convinced my colleague to reconsider her previous position in an effort to provide a single, clear guidance on the issue. This was done in *Watson.* However, I do wonder if we could have achieved this result sooner if we had had the benefit of looking at the records in the broad variety of cases at the same time as we did in the GSA cases.

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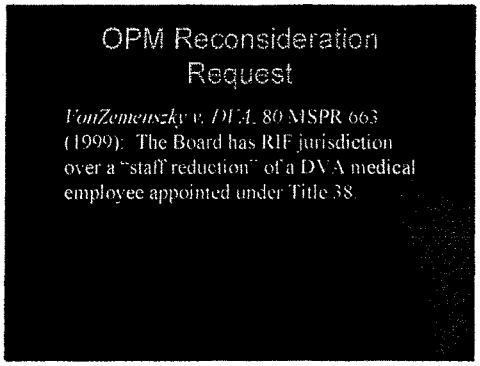

As you are well aware, the Board's jurisdiction comes mainly from Title V. Certain employees at the Veterans Administration, mainly doctors and nurses, are appointed under a unique appointment authority found in Title 38. As such, the Board does not have jurisdiction over adverse actions taken against such employees. In this decision, however, the Board held that we do have jurisdiction over Title 38 employee RIF's.

I've highlighted this decision for you for two reasons. First, for those of you who may work with Title 38 employees, you need to know that the Board has said that we have RIF jurisdiction. Second, however, you should know that OPM requested that we reconsider this decision. We reconsider decisions we have issued as final several times a year at OPM's request

-- and on occasion, we modify or reverse our prior holding.

Our review process on this case was not completed prior to the departure of the former Chairman, so this represents the first major policy issue where the two members do not agree on the outcome and a "split vote" decision has retained the initial decision. I originally adopted the majority opinion; however, upon further research and analysis, and receiving new arguments from OPM and DVA, I reversed my position and issued a Dissenting Opinion. OPM has petitioned the Federal Circuit on this case, and it has been accepted for hearing. So while you have a majority opinion, you should recognize that this may change. Because, of course, I believe the Court will show great wisdom and adopt the position set forth in my dissent.

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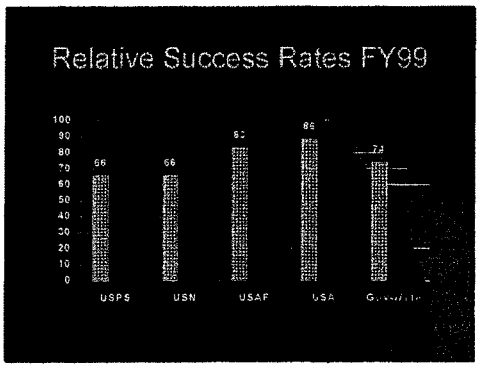

And, as a special bonus for those of you in DoD, I thought that you might like to see your most recent report card. As you can see from this chart, compared to our biggest customer at the Board, the Postal Service, and compared to your sister components within the Department of Defense, the Army did very well last year. Of the appeals filed with us that were actually adjudicated on the merits, not dismissed or settled, the Army's action was sustained 88 percent of the time. That's out of 428 appeals, the fifth largest number of appeals filed with us from any agency. However, please keep in mind that this is just a one-year snapshot. Success or failure in a single consolidated action involving many appellants (such as a large RIF or LEO appeal) can skew the numbers significantly. For example, for the previous three years, the Army's success rate has been 80, 84, and

83 percent respectively, a consistent and impressive success rate. In comparison, the Navy's success rate for the previous three years has varied from 56 to 91 then back to 86 percent. I suggest you check out your score each year when our statistics are published; just remember that you can get statistics to say just about whatever you want them to say.

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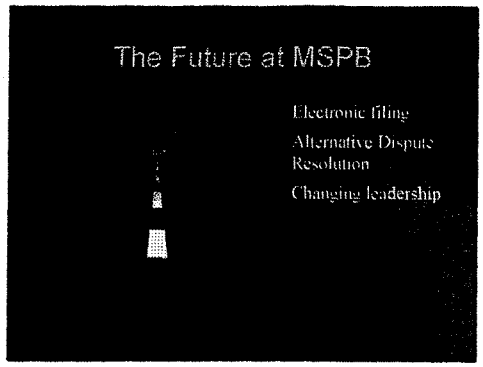

In closing, I would like to mention three areas in which you should expect to see the Board make significant progress within the next year or two.

One of the biggest projects the Board has undertaken recently is the initiation of a major computer and software upgrade to allow the Board's clients to submit and receive filings electronically. Today, at the discretion of the administrative judge, the parties and their representatives can file certain documents by email. The feedback we have received suggests that this instantaneous method of communication greatly improves the ability of the parties to reach compromise and have their motions ruled on quickly. If the current effort stays on track, within a couple of years, you may well see the entire file transformed

into an electronic document, accessible by the parties either on the internet or perhaps on a CD.

Secondly, you will see the Board continue to explore and encourage alternative dispute resolution. Last year, we began sponsoring a two-week certification course in ADR techniques. In addition, we have extended the time period for filing by an extra 30 days for those parties who choose to engage in the agency's ADR program prior to filing an appeal with us. We also allow parties to "suspend" the processing of their case through mutual agreement, should they believe that the extra time will possibly lead to settlement. You can expect the Board to continue to be active in this area, perhaps even developing new initiatives as alternatives to our current procedures.

Finally, you should remember that the Board is a dynamic organization with a change in its membership about every two years. Former Vice Chair Beth Slavet has assumed the position of Chairman by action of a recess appointment that will expire when the Congress adjourns this fall. Our new Vice Chairman's term will expire at the same time. Of course, you should also keep in mind that there will be a new Board Chairman appointed by President Bush and confirmed by the Senate that will

usher in another new phase for the Board. So the Board will continue its development under changing leadership for the immediate future -- and you won't get rid of me until March 2004.

As just illustrated, both the Board composition and our case law are not static. We are forever evolving as we consider and decide new cases, implement Executive policy directives and legislative changes. We are constantly building upon the past to move us into the future.

I consider it a privilege to be a part of this process, and thank you for the opportunity to share some of my thoughts with you today. Thank you.

SUSANNE T. MARSHALL
REMARKS TO THE FEDERAL CIRCUIT JUDICIAL CONFERENCE
APRIL 8, 2002
WASHINGTON, DC

I will briefly discuss a decision by the United States Court of Appeals for the Federal Circuit and an opinion by the Board that explain why, in limited circumstances, the terms of a settlement agreement will not be enforced if a public policy outweighs the private interest in enforcing the agreement. Although those two decisions were not linked directly to the events of September 11, they are in keeping with the spirit of protecting the national interest.

A sheet with the case cites has been distributed.

I now want to turn to a discussion of settlement agreements and public policy. The first pair of cases -- Fomby-Denson and Gizzarelli – deals with the question of whether to enforce a term in a settlement agreement if that term runs contrary to public policy concerns. The second pair of cases – Jordan and Parker – involves the validity of settlement agreements where public policy issues are implicated.

The appellant in Fomby-Denson was terminated in part on a charge of forgery. On appeal to the Board, the parties reached a settlement agreement providing that the agency would purge the appellant's Official Personnel File of all records relating to the termination and would not publicize or divulge the terms of the agreement except as necessary to administer those terms. The agency, however, divulged the terms of the agreement to local law enforcement authorities when they referred her case for investigation and possible criminal prosecution on the forgery charge. The question was whether the agency breached the settlement agreement by referring the underlying misconduct for possible criminal prosecution.

The court found no breach. Rather, it found that public policy concerns trumped the settlement agreement. Specifically, the court held that, as a matter of public policy, a settlement agreement couldn't be construed as barring criminal referrals based on the underlying conduct.

To my knowledge, Fomby-Denson was the first time that the Federal Circuit, in a Board case, applied a public-policy exception to the general rule that contracts will be enforced as written. Finding the reasoning of Fomby-Denson instructive and relying on cases from other courts of appeals, the Board in Gizzarelli found that public policy concerns outweighed the interest of the appellant in having the terms of a settlement agreement enforced.

The record in Gizzarelli showed that the Military Police found probable cause to believe that the appellant had committed the criminal offenses of receiving stolen property, larceny and embezzlement, and fraud. During the course of the Board appeal, the parties entered into a settlement agreement, which stated that only certain types of information would be revealed to potential employers. The Military Police report was not listed among the kinds of documents that could be disclosed. Nonetheless, the agency released the police report to the Office of Personnel Management during the course of an OPM background check related to the appellant's acceptance of position with the Social Security Administration. As in Fomby-Denson, the question was whether the release of the report breached the agreement.

The Board found that the appellant's reliance on the terms of the agreement was outweighed by the strong public policy in ensuring that persons who apply for positions of public trust are suitable to hold such positions. Since OPM had the legal right to know about the appellant's criminal record history, it would be against public policy to deny OPM access to the Military Police report. Thus, the settlement agreement was not a bar to the release of the report, and the agreement was not breached.

Cases like Fomby-Denson and Gizzarelli are especially relevant after the events of September 11. With increased security measures and the hiring of more federal employees to take on security duties, it is important for the court and the Board to have recognized that sometimes public well-being takes precedence over a nondisclosure provision in a settlement agreement, particularly where the request for background information on criminal history comes from an agency with a legitimate need to know, like OPM.

Gizzarelli isn't the Board's only recent venture into public policy issues involving settlement agreements. Unlike Gizzarelli, where the Board placed the public good over a term in a private settlement agreement, the Board did the opposite in Jordan versus the Office of Personnel Management by finding that a settlement agreement takes precedence over the public's interest in seeing that the retirement laws are properly adhered to. Although I was in the majority in the Board's first decision in Jordan, OPM's arguments on reconsideration caused me to change my mind.

The Department of Justice removed Miss Jordan in July 1992. She appealed to the Board. A settlement agreement was reached in June 1994. Under the agreement, Justice reinstated Miss Jordan in a leave-without-pay status for a two-year period beginning with the removal and going 90 days past the date of the settlement. The appellant in turn promised to resign at the end of the 90-day period, which she did. Five months after she resigned, she filed for a disability retirement.

The statute provides that a disability application must generally be filed within one year of separation. Thus, if Miss Jordan's separation date were July 1992 when she was removed, her application would be untimely. However, because of the "new" separation date created by the settlement agreement, her application was timely.

As I explained in my separate opinion, the settlement agreement created a fictitious separation date merely for the purpose of evading the statutory filing deadline. The parties obviously had no intention of having Miss Jordan physically return to work. She merely was placed on LWOP so that her personnel records would reflect a separation date that would, at least on paper, allow her to file a timely retirement application.

By giving Miss Jordan a fictitious separation date in exchange for her agreement to settle the appeal, the employing agency was, in my view, thwarting one purpose of the statute, which is to prevent stale claims. Since she had not worked for over two years prior to the creation of the new separation date, it would be more difficult to determine what her medical condition was when she actually last worked.

It appears that Justice used the settlement process to offer Miss Jordan a separation date that would transform what would have been an untimely disability application into a timely one in return for not having to litigate the removal. In my separate opinion, I quote from the Federal Circuit's opinion in Pagan versus the Department of Veterans Affairs, where the court expressed its doubts about so-called

"clean record" settlement agreements. In the court's view, such agreements can foster a practice of one agency "palming off" an unacceptable employee on another agency. The settlement agreement in Jordan, in my view, "palmed off" an unsatisfactory employee on OPM and the retirement system.

My separate opinion in the reconsideration decision in Jordan also discusses why such agreements thwart the goals of the Rehabilitation Act. Using Jordan as an example, I discussed how the sham reinstatement with a guarantee of resignation ruled out any attempt to accommodate the alleged disabling condition by putting the appellant back to work.

However, beyond the particular facts in Jordan, the Board's majority opinion precludes OPM from carrying out its statutory mandate to administer the retirement laws by saying OPM has no right to look behind the terms of the agreement. OPM was not a party to the agreement, and I do not believe the Board should order them bound by an agreement if the terms are not legal.

The Board has said numerous times that it favors settlement agreements. Settlement agreements are, in general, good public policy.

Before leaving the Jordan issue, I wanted to mention Parker versus the Office of Personnel Management. While I will not comment on the merits of Parker because it may be back before the Board on OPM's request for reconsideration, I will note that a majority of the Board in Parker expanded the principle in Jordan to actually award a retirement benefit based on the terms of a settlement agreement.

The Board has said numerous times that it favors settlement agreement. I agree that settlement agreements are, in general, good public policy.

Remarks by Susanne T. Marshall
Acting Chairman, U.S. Merit Systems Protection Board
FPMI - New Orleans - June 4-6, 2002

I am pleased to be here today. My last appearance at an FPMI conference was two years ago – of course, there have been a lot of changes since then – both for FPMI and the MSPB. I'm particularly pleased that one of those changes means that I appear today as the Acting Chairman of the Board.

Today I want to address what I envision as the goals for the MSPB. This will include some projects that are already underway and others that are in the planning stage. I will then discuss principles that I use when reviewing cases. I will conclude with a summary of significant opinions issued by the Supreme Court, the Federal Circuit, and the Board. But first, a brief introduction to the work of the Board.

In 1978, with the passage of the Civil Service Reform Act, the federal government experienced its first comprehensive reform of civil service law in nearly 100 years. Among its important and far-reaching reforms, the Act created the Merit Systems Protection Board. The Board began operations in January 1979.

The MSPB serves as an independent forum where federal employees can seek a fair and rapid resolution to workplace disputes. The Board also provides an important oversight function by studying and reporting on issues of interest to agency managers and employees. This dual role of adjudicator and evaluator of the merit systems makes the MSPB an important and unique part of the reforms introduced by the 1978 Act.

Let me explain a little bit about the current status of the Board's makeup. It was in early February of this year that the President designated me as the Vice-Chairman of the MSPB. Because the Board did not have a Chairman at that time, I became the Acting Chairman by operation of statute. On May 13, President Bush submitted my nomination to the Senate for confirmation to be the Board's Chairman. Thus, even though the nomination is pending, I have been and will continue to be the head of the agency.

As most of you know, the makeup of the Board has change directed by statute through its system of staggered terms and Board Members cannot be reappointed. However, we have been going through an unusual pattern of change following the departure of Former Chairman Ben Erdreich in the spring of 2000.

We were a 3-member Board last year – Beth Slavet was Chairman and Barbara Sapin was Vice Chairman by recess appointment of President Clinton. Those appointments expired when Congress adjourned last December. So Beth Slavet reverted to the position of Member last December, and Barbara Sapin left the Board. Ms. Slavet's 7-year term appointment officially expired in March; however, statute allows for a holdover for up to one year. So, Beth and I are once again operating as a two-member Board. Some of you may recall when a similar situation occurred following the departure of Ben Erdreich. Therefore, you will likely see some more "split vote" orders being issued when we cannot reach a unanimous

decision. Under this procedure, we basically agree to disagree, which results in the Initial Decision becoming the final decision of the Board. Either one or both of us may issue Separate Opinions setting forth our respective views on the case – or at times, I may not issue an opinion if I agree with the Initial Decision and the Administrative Judge has provided a complete and thorough analysis that can stand alone. The advantage for our customers – both appellants and agencies – is that the decision is not delayed waiting for a tie-breaking vote. The parties can proceed – either appealing further to the Court of Appeals for the Federal Circuit – or simply move on accepting the Initial Decision as final.

While there may be some concern in our civil service constituency while the Board is going through this transition, I want to assure you that I will continue to make every effort to ensure that the work of the Board continues without disruption.

Over the last four months, I have initiated or moved forward on a number of projects. In determining a vision for the Board, I am aware that my term officially ends on March 1, 2004. I also must realistically anticipate funding which will be at or near our present appropriations. I will try my hardest, within budget limits and the time I have left on the Board, to see to it that we continue to provide the highest level of service to federal employees and managers.

It came to my attention recently that the Board would observe its 25th anniversary during my term of office. It is too early to begin planning for how to celebrate that milestone. However, it is my hope that the initiatives and improvements in the Board's operations, which I will address in just a moment, will be part of my contribution to the Board's silver anniversary. With that said, let me move on to my views on the future of the Board.

First, President Bush's vision for the federal government is one that I share for the Board, and the principles he employs are ones that match my own. I therefore will have no difficulty in striving to meet the goals of the President's Management Agenda. That Agenda promotes a government, which is citizen centered and results, oriented. Two specific goals in that Agenda are to better manage human capital and to expand electronic government, which is also known as e-government. Thus, those two topics figure prominently for the future.

With regard to human capital, I plan to recruit and retain a highly qualified, motivated, and productive staff. I am committed to providing a comprehensive training program to employees who want additional training and who demonstrate the need for such training. The alternative dispute resolution initiative that I will discuss illustrates how the Board can provide developmental training for its employees while at the same time offering a more complete range of services to its customers. This is an example of how government can run better by using the resources that it already has, which is another element of the President's Agenda.

With respect to specific personnel actions, since I became Acting Chairman, Bill Boulden has been appointed as the new Regional Director for the Northeastern Regional Office, which includes Philadelphia and Boston. Some of you may be familiar with Bill, as he was an administrative judge in the Washington Regional Office and, to my thinking, an excellent one. I have also recently filled three senior management positions at the Board's headquarters.

Deborah Miron joins the MSPB as its Director of Regional Operations. Deborah has over 20 years of legal experience. Her most recent position was Deputy Assistant General Counsel for the Department of the Navy, where she served as a senior legal advisor on civilian and military personnel issues. She has many years of experience managing multiple field offices throughout the US and Europe for the Navy.

Steve Nelson is the Board's new Director of Policy and Evaluation. OPE is the office that conducts studies and prepares reports on improving government effectiveness and efficiency. Steve comes to the Board from the Department of Agriculture where he was the Director of Human Resources Management for the Forest Service. It is my hope that his first-hand experience in personnel management will have a positive impact on our studies.

Bentley Roberts, a long-time MSPB employee and most recently it's Deputy for the Office of Regional Operations, was selected to be Clerk of the Board. The Clerk's name appears on the thousands of decisions issued by the Board, so that is a name that will certainly become a familiar one.

Related to the subject of Board personnel, I make the public commitment, as well as a personal commitment here at the conference, to Elaine Kaplan, that I intend to make sure that the Board is in full compliance with the 1994 Whistleblower Protection Act (the WPA) and the Notification and Federal Employee Antidiscrimination Act of 2002, known as "No FEAR."

The Office of Special Counsel will certify that an agency is in compliance with those Acts if it meets 5 requirements. The requirements are to place informational posters about prohibited personnel practices and whistleblower protections at agency facilities, provide information about these protections to new employees at their orientation, periodically give employees information about their rights and remedies under the WPA, train supervisors on the relevant law, and create a hyperlink from the agency's website to the Special Counsel's website. OPM was the first federal agency to receive Special Counsel certification. I expect that the Board will not be far behind.

With regard to the Board's studies function, I would like the public to be given current information about OPE's activities. I believe this can be done by posting notices on our website explaining what issues OPE is examining and which ones it plans to examine. The website can have a place for comments on proposed studies. I believe that input and feedback from our customers can be of immense value in helping us develop and conduct studies. In many ways, you are the ones in the best position to comment on and suggest studies. As a way of immediately implementing the goal of public disclosure, I am going to tell you about some of the matters that OPE is currently looking into. Of course, these are works in progress and as I indicated, we have a new Director for that office, so there may be some modifications to this list in the future.

OPE is currently conducting several studies on the recruitment of federal employees. These studies stem from a concern expressed by the President and the Congress over what is being called a "crisis in human capital." In fact, the General

Accounting Office has placed this issue on its "high-risk" list, which is reserved for the most urgent problems facing the government.

The separate issues the Board is examining on this crisis are interrelated. I will therefore attempt to tie them together.

Since at least 1995, the number of people who were separated from the federal workforce has been higher than the number of new hires. It was not until sometime in early 2000 that the number of new hires exceeded the number of employees who were being separated. Even though new hires now exceed separations, the net loss of employees in the period from 1995 through early 2000 is in the tens of thousands. In addition, almost one-third of the federal workforce will be eligible to retire before the end of the year 2006, and almost three quarters of those individuals say that they are likely to retire when they are eligible for an annuity. Thus, not only has the government undergone significant downsizing over the last decade, it appears likely that a quarter of all current federal employees will retire by the middle of this decade.

It is not the purpose of the study to say whether government should or should not be downsized or whether government services could be contracted out. Rather the issue is how can managers plan for this projected personnel shortage, particularly in positions requiring technical knowledge. For instance, the information we have gathered to date shows that some employees who have been given the job of overseeing contractors were not hired to perform that type of work and may not be the best persons for the job.

Further, there is no doubt that information-based technology such as the Internet and e-mail is being used more and more by government. Yet, the government has to compete with the private sector for employees who can lead our country into the information age. OPE's ongoing studies indicate problems in the hiring process used by federal agencies. We intend to suggest ways that agencies can operate better and smarter in the hiring process.

Preliminary findings show that vacancy announcements can be too complex, too long, and not particularly helpful to applicants. They may contain inaccurate information or do not present a complete picture of the position. In short, vacancy announcements can be off-putting and may not sell either the agency or the job. Qualified individuals therefore might pass up the opportunity to apply for a federal job, which further contributes to the crisis in human capital.

Another problem is that agencies may be too slow to make hiring decisions. Many agencies require paper applications that are sent by mail and then go through a lengthy screening process. Applicants lose interest in the job or find other work while the hiring process drags on. Electronic completion and submission of applications might be a better way to conduct business.

The White House website contains an example of an on-line job application. The White House on-line application form guides the applicant through a series of screens that contain boxes in which relevant information is entered. The application requests information such as the applicant's name and address, the type of position desired, education, employment history, the types and dates of any prior government service, and references. The form also indicates which questions are mandatory and

which are not. It also has drop down menus that allow applicants to choose from various selections; for example, it has a list of agencies and geographical areas from which applicants can select preferences. Such a process saves times for the applicant, gets the application to the hiring authority instantaneously and provides a uniform format for comparing candidates for positions. Although on-line applications may not be something that applicants can be forced to use, it seems to be a recruiting tool, which is both citizen centered and results oriented.

OPE is also looking into the standard techniques used to rate applicants and the effectiveness of those methods in measuring the potential for long-term success in the position and in government service generally. It appears from initial data that things like grade point averages and prior experience may not be very good measures of potential long-term success. Rather, for many positions, a structured interview process could be a better way of predicting success. As I understand it, such an interview consists of a series of questions put to all interviewees. Some questions test problem-solving skills by describing situations that can occur on the job and asking how the person would deal with those situations. The answers are then scored, and the individuals are ranked by total score.

Before I leave the topic of the Board's studies, I want to say that it is my goal to provide agencies with practical and specific advice and suggestions. I also want to explore how we might contribute to the debate on civil service through the use of more limited studies. Because such studies would be narrower in focus, the Board probably could get more of these done each year than the large-scale reports that we typically issue.

It is also my view that if the Board recommends an innovation in a study or report, the Board itself should consider implementing that recommendation where appropriate. Wanting the Board to be a model agency, we should strive to be at the forefront of improvements in government. Thus, if the Board recommends electronic application forms as an alternative to paper applications, if we suggest that vacancy announcements be reviewed and revised, or if we find that structured interviews are one of the best predictors of future success, I will make it my goal to conform the Board's hiring process to any such recommendations.

I would now like to turn to a discussion of how the Board is using technology to serve its customers.

New technologies are a useful tool in making government more citizen centered and results oriented. As mentioned above, the term "e-government" has been used to describe the initiatives undertaken by the President and Congress in using technology to make government more accessible to our citizens. I am committed to having the Board as a partner in the new e-government. This means complete access to the Board and Board resources through the Internet and e-mail. To that end, let me take a few minutes to tell you about a project that will allow appeals to completed and filed electronically, and about the Board's goal of an all-electronic filing system.

The Board is in the process of revising its appeals form, which is the most common way to file a case. At the same time, we are working on a procedure that will allow individuals to access and file the new form on our Web site. The plan is

to allow a user to pull up the form through the Internet and be guided through a series of questions. This essentially would be an interactive interview.

For example, if an appellant accesses the form and gets to a question about the type of action being appealed, a list of possible actions would appear. The appellant can then select the action which most nearly fits his situation, or he can chose to describe the action in his own words. For purposes of illustration, if the appellant selects suspension as the action being appealed, the form would take him to a sub-question asking whether the suspension was for more than 14 days. If the answer is no, the administrative judge could use that information to custom tailor an order notifying the appellant of a possible jurisdictional issue since suspensions of 14 days or less are not generally appealable to the Board. Or, if the appellant indicates that he works for the Postal Service, the electronic form might ask him whether he is a preference eligible or a supervisor, since those are two categories of Postal Service employees with Board appeal rights. Because the new electronic appeals form is still in the developmental stage, these are merely examples of how it might work.

When the electronic form is completed the appellant can send it electronically to the appropriate regional or field office with the click of a button. His appeal is started immediately. In fact, in the example I just gave you about the 14-day suspension, not only can the administrative judge issue an order specific to the jurisdictional question, he can do it the same day that the appeal is filed.

Whether an appeal is filed electronically or not, the Board is committed under the Government Paperwork Elimination Act to make it possible for all documents in an appeal to be filed and received electronically. October 2003 is the target date for this all-electronic filing system. I hope to meet or exceed that goal.

The Board's website is also undergoing an overhaul and update. One change involves the OAC Report, which is generally issued weekly and contains summaries of cases issued by the Board. Individuals can sign up on the Board's website and have copies of the Report sent to them by e-mail.

Starting March 1, the case summaries in the OAC Report include a hyperlink to the case itself. Moreover, we have made an effort to keep the summaries shorter while still providing information that describes what the case was about. Thus, if you read a summary of a case that deals with a topic of interest, you can just click on the hyperlink for that case and you will get the complete text of the opinion, which you can print out.

We are also expanding the range of Board resources that will be available to the public. We are currently in the process of creating a database of every significant decision issued by the Board since its beginning in 1979 and putting that database on our website. Opinions since about 1994 are already on the Board's website. Electronic versions of significant decisions from 1979 and 1980 have been created, and we are in the process of working on decisions for 1981. When the database of all significant Board decisions is finished, it will not only be easily accessible, it also will be completely searchable. Many appellants are pro se and do not have ready access to a set of published MSPB reporters. This new database will

allow them to access, search and get copies of all significant Board decisions on-line.

Under my direction, the Board is redesigning its website to make it more user friendly. I want users to be able to navigate it with the minimum number of clicks. For instance, the present configuration of the Board's website requires three clicks to get from our home page to the page with information on my office and me. The goal is to redesign the site so that it would take only one click to access that information.

In reviewing issues surrounding our website, I was given statistics on the hundreds of hits that were occurring each day. It really seemed a little high. I mean, I know we're a popular agency -- but I found it hard to believe we were really that popular! I also knew that anytime I accessed the Internet, as with most Board employees, by default we were taken directly to the Board's website. That meant that anytime a Board employee logged onto the Internet, another hit was registered for our website. Obviously, this resulted in an artificially high number of hits for our site. This deflated some of the boasting from our office of IRM. But this problem has now been fixed, so that future data on the number of hits to the Board's website will now be more accurate, and we continue to make improvements to it.

As the previous example indicates, I am not afraid of looking at established procedures and asking if they measure what they are intended to measure. One area that I plan to review concerns the Board's performance goals. The performance goals that I want to briefly talk about deal with the processing of petitions for review, or PFRs as we call them.

There are essentially 2 goals relating to the processing of PFRs. One goal aims at reducing the number of cases, which have been pending before the Board for more than 300 days. The other goal attempts to maintain or reduce the average processing time for decisions issued by the Board. When examined more closely, those goals appear incompatible. That is to say, for every case over 300 days old that the Board decides, the average processing time goes up. This is so because the time it took the Board to process an older case is added to the average processing time when the older case is decided thereby increasing the overall average processing time.

I want to consider whether there is a more meaningful and balanced way of measuring the Board's progress. One possibility is not to measure the average processing time for cases, but instead to measure the average age of the cases that are pending at the Board. Such a goal would be aimed at results and would be responsive to our customers since, as opinions are issued in the oldest cases, the average age of the pending cases would go down.

I am now going to talk about an exciting new program we are undertaking at the MSPB. It involves providing mediation services to litigants.

Reflecting my commitment to alternative dispute resolution (ADR), I am overseeing the design and implementation of a pilot project that will provide parties in select cases with a trained mediator after an appeal is filed. This approach differs somewhat from a proposal, which has been discussed in Congress that would involve the Board in the mediation process before a disciplinary action is taken. However, if

such legislation is enacted, the program that is now being planned could provide a basis for implementing that legislation.

Our administrative judges have an excellent record in settling appeals. However, the ADR pilot project will attempt to identify those cases that usually do not lend themselves to settlement. Additionally, the project will use techniques aimed at improving the relationship between the parties to reduce the possibility of future disputes.

The Board's ADR project recognizes that not all problems are solved just because the appeal has ended. Indeed, the employment relationship between the agency and the appellant continues after many Board appeals. That relationship may be hampered by the same problems that predated the appeal. The project that I envision would facilitate communication and mutual understanding between the parties to try and help resolve any underlying, often non-legal, issues that could lead to more problems and appeals down the road. It is my hope, and my belief, that the Board's ADR pilot project will serve as an example of how ADR can complement existing kinds of dispute resolution, like settlement efforts.

Although the ADR project is still the planning stage, I want to share my thoughts on how it might work.

There likely will be a screening process in the Regional office to select cases that appear suitable to mediation. Participation in the ADR project will be voluntary. Only trained mediators will be used. To that end, I am committed to providing specialized training to MSPB employees who have demonstrated an interest in the project and who have shown an aptitude for mediation. That training will begin nest week. The training will consist not only of formal courses, but will also include hands-on work with experienced mediators. Initially, the pilot program will be conducted in the Chicago and Atlanta regions. However, we may also look to our Washington Regional Office to identify possible cases – since it is convenient in location to the headquarters staff involved in the project.

As with all of the initiatives that I plan to take during my tenure as Chairman, I expect to establish a way of measuring the success of the ADR pilot project. I want to get the data necessary to make informed decisions about the progress of program and to find out why some things worked and others did not. AS I indicated, the project is a work in progress.

In keeping with the goal of being responsive to our customers and of achieving results, I have also directed my attention to the handling of PFRs that are filed with the Board. When I became Chairman, the Board had in place a pilot project to identify PFRs that could be handled more quickly than others. These PFRs were put on an expedited track and would be reviewed sooner than they might otherwise have been. Those cases, however, still receive full and careful review.

Under my predecessor, the expedited case project had only one attorney assigned to it. The Board's Office of Appeals Counsel, however, has teams of lawyers who could work these expedited cases. I involved all of these attorneys in the expedited PFR program. Before this change, about 18% of all PFRs went through the expedited project. Now, over 26% of all PFRs go through the process.

Before the change, the average case processing time for PFRs in the expedited program was reduced by 33 days from the average. After I made this change, the average processing time was reduced by 47 days. That is a gain of 2 full weeks in the processing of all expedited PFRs, which is 26% of the cases received at headquarters. This was done without significantly affecting the processing of cases that are not on the expedited track since only about 2 days have been added to the processing time of those cases after the change. This shows how the Board can work smarter with the resources it has, can work for results, and can be oriented to serve the needs and expectations of its customers.

Before I move on to my philosophy of adjudication and a discussion of significant cases, I will be glad to answer any questions or take any comments you may have on this part of my talk. [Seventh Inning Stretch]

After assuming my duties as Acting Chairman, my first comments to the senior staff pointed out that they had responsibility for the day-to-day management of the staff. I already had a full-time job handling the adjudication of cases. So now I turn to that part of my job, and will discuss a few significant cases and the principles that I use when considering Petitions for Review.

The first principle concerns the way I view initial decisions.

The Board members are the only individuals directly authorized by statute to hear appeals. However, Congress allowed the Board to delegate this responsibility to other officials. Those officials are the administrative judges who work in the Board's regional and field offices.

In my view, the Board's delegation to the administrative judges of its authority to conduct hearings and issue initial decisions means that the Board owes a certain degree of deference to those decisions. It does not make sense to tell someone that you have permission to act in my place, and then constantly look to criticize or second-guess that decision. Thus, when I read an initial decision, I am first and foremost looking to see whether the administrative judge's findings and conclusions are reasonable and supportable. I am not looking to find ways to overrule the judge's decision merely because, if I had issued it, I might have handled it differently or perhaps even reached a different conclusion.

If the administrative judge made an error that affects the outcome, I almost certainly will agree that the Board should issue an opinion to correct the error. And where I feel strongly about an issue, I am obligated to disagree with findings in an initial decision that do not correspond to my views. However, for the most part, I will start by giving deference to an administrative judge's findings.

The second principle that I follow in deciding cases is to always go back to the language of the statute or regulation. With regard to regulations, I generally will give deference to an agency's interpretation of a statute where Congress has entrusted that agency with implementing the statute. I have chosen four cases to illustrate how I have consistently applied this principle.

The first case concerns Dr. Elizabeth Von Zemenszky, who worked for the Department of Veterans Affairs (the DVA). Under a provision of Title 38 of the United States Code, the DVA separated Dr. Von Zemenszky from her job as a Physician. That provision allows the DVA to conduct "staff adjustments." Dr. Von

Zemenszky claimed that the staff adjustment was really a Title 5 reduction in force, or RIF for short. She therefore contended that the action was within the Board's jurisdiction.

In my separate opinion, I considered the language of the statute giving the DVA authority to make staff adjustments. I also considered the legislative history. I took into account the fact that OPM, which was given the authority to implement Title 5 RIF law, said that what happened to Dr. Von Zemenszky was not a Title 5 RIF. The DVA and OPM therefore both agreed that DVA had the authority to conduct Title 38 staff adjustments, and that Dr. Von Zemenszky was terminated by a nonappealable Title 38 staff adjustment. I deferred to OPM's and DVA's interpretation of the statutes, which they were entrusted to implement, and concluded that the action was not within the Board's jurisdiction. My colleague and the Federal Circuit disagreed and found that the action was an appealable Title 5 RIF. The Director of OPM has requested until June 17, 2002, to decide whether to seek rehearing of the court's decision. So we may see more on this case in the future.

The next case I will discuss also went to the Federal Circuit. It involves the test for establishing whether a federal employee who is not in a law enforcement position can nonetheless be covered under the special retirement program for law enforcement officers. This is commonly referred to as LEO service credit.

The Board spent several years trying to figure out how to determine if an employee in a non-LEO position is entitled to LEO credit. Finally, in Watson and at my prompting, the Board went back to the statute and OPM's implementing regulations to decide how such a determination should be made. My review of the statute and the regulations showed that instead of looking at what the incumbent of a position does day to day, the beginning point is to ask why the position exists. In a nutshell, if a non-LEO position exists to carry out primarily LEO duties on a regular and recurring basis, the incumbent may be entitled to LEO service credit for the time he occupies that position.

I therefore proposed a position-oriented approach based on the plain language of the statute and the implementing regulations. That approach was adopted by the full Board and affirmed by the Federal Circuit in a precedential decision.

The last point I want to make on this subject relates to whistleblower appeals. As you may know, Congress in the 1989 amendments to the WPA allowed individuals to bring cases directly to the Board if they were alleging retaliation for whistleblowing activity. Whistleblowers no longer had to rely on the Special Counsel to bring cases on their behalf. Such an appeal is called an individual right of action appeal, or IRA.

Years ago the Board held in Geyer that an appellant establishes jurisdiction over an IRA appeal only if he actually proves that he made a protected disclosure, that the agency took or failed to take a personnel action, and that he raised these issues before the Special Counsel. The Federal Circuit has taken what appears to be a somewhat different approach. More recently, in Yunus and other cases, the court has indicated that the Board has jurisdiction over an IRA appeal if an appellant shows that he exhausted Special Counsel proceedings and makes nonfrivolous

allegations that a protected disclosure was a contributing factor in a personnel action. Under this test, an appellant does not need to actually prove the jurisdictional elements, as he must do under Geyer. Rather, he only needs to make nonfrivolous allegations regarding those elements.

The Board has not yet issued an opinion discussing Geyer in light of Yunus. Obviously, as yet the two members have been unable to agree. However, it seems that the statute contains only one jurisdictional element – exhaustion of Special Counsel proceedings. Whatever the Board decides on the Yunus and Geyer issue, I assure you that I will base my decision on congressional intent to the extent such intent can be determined from the language of the statute and its legislative history.

A third principle I have found helpful in my review of PFRs is to consider cases with similar issues together. The advantages to this approach are illustrated by the GSA buyout cases and cases related to Von Zemenszky. The LEO cases, on the other hand, show the problems that can arise when this approach is not followed.

A few years ago, GSA developed a relatively sophisticated procedure for encouraging employees to take early outs. However, several employees who signed up for early outs had a change of heart and tried to withdraw their impending retirements or resignations. GSA refused to honor the requests, and the employees filed Board appeals claiming that their separations were involuntary.

The decisions issued by the Board in each individual case are not as important to this part of my discussion as the process used in reaching those decisions. Those cases fortuitously arrived at the Board at about the same time. I recall spreading the files out on my office floor and reviewing each one individually, making notes along the way on the similarities and differences in the facts. This eventually led to a complete and consistent lead opinion, with case-specific issues dealt with as necessary. This is the type of decision-making and guidance that I believe is of the greatest value to our customers.

The Von Zemenszky cases provide another example of the benefits of reviewing similar cases simultaneously.

When the court issued its decision in Dr. Von Zemenszky's case, at least 8 appeals involving DVA staff adjustments were pending before the Board. Fortunately, those appeals had not yet been issued when the court decided Von Zemenszky. A review of the records in those cases has revealed potentially significant differences from the facts in Von Zemenszky. Also, the DVA has explained in greater detail in subsequent cases how and why it conducts staff adjustments. By awaiting the court's decision in Von Zemenszky, and comparing the facts there to the facts in pending appeals, the Board is in a much better position to issue a set of decisions that are consistent and complete, and that will provide the most useful guidance to the DVA and its employees.

In contrast, the LEO cases were decided in a piecemeal fashion. The 1998 opinion in Fitzgerald would have benefited, in my view, from being compared to other LEO cases then pending before the Board. Instead, Fitzgerald was considered in isolation.

After wrestling over the years with the facts and arguments in subsequent cases, I came to the conclusion that the Board's entire approach to the LEO issue

had been flawed. I first expressed my views in a dissenting opinion in Hamilton. Following Hamilton, the Board received cases with voluminous records and with initial decisions that sometimes appeared inconsistent with Fitzgerald. Finally, as referred to earlier, in Watson, the Board arrived at a definitive holding on how requests for LEO credit should be adjudicated. However, the Board is still not finished with LEO issues because my colleague and I disagree on what the so-called timeliness regulations mean. If the records in a wider range of LEO cases had been considered at the same time, as was done in the GSA cases, I believe that a more consistent and complete set of decisions on LEO coverage could have been issued earlier. Experience has taught me that, whenever possible, cases that raise similar legal issues or factual disputes should be considered together. I will be encouraging our Office of Appeals Counsel to be on the lookout for similar situations where cases should be considered as a group.

I will now turn to Supreme Court and Federal Circuit cases that have or could have a significant impact on Board law. I will begin with Gregory. I'm sure you're familiar with this one.

In Gregory, the Federal Circuit found that the Board could not consider prior discipline that was the subject of an ongoing grievance proceeding when assessing the reasonableness of a penalty. The Supreme Court agreed to review the Federal Circuit's decision, and ultimately disagreed with the Federal Circuit. In doing so, the Supreme Court recognized the practical difficulties with the Federal Circuit's approach. First, an agency would have to delay taking a removal action until the conclusion of all grievances relating to prior discipline. Second, if the agency decided to go ahead with a removal while grievances were pending, it would have to do so without relying on the prior discipline, even though prior discipline is an important factor in determining a penalty. The Federal Circuit's rule would discourage progressive discipline since the agency would not be able to rely on prior discipline if the employee grieved the discipline and the grievance was ongoing. The Supreme Court therefore held that the agency and the Board might consider prior discipline even if the discipline is the subject of a pending grievance.

While Gregory was pending before the Supreme Court, the Federal Circuit issued an opinion finding that agencies and the Board may consider prior discipline that is the subject of proceedings before the Equal Employment Opportunity Commission. That case was Blank versus Department of the Army.

In Buckhannon, the second case, the Supreme Court rejected the so-called "catalyst theory" of attorney fees. That theory holds that an appellant is a prevailing party and may be entitled to attorney fees if he receives relief that materially alters the legal relationship between the parties. The Court instead held that a "prevailing party" for purposes of attorney fees must either have received court-ordered relief or have entered into a settlement agreement enforced through a consent decree.

In Sacco, the Board found that Buckhannon applies to the award of attorney fees in adverse action appeals. Therefore, where an agency unilaterally rescinds an adverse action, as happened in Sacco, the appellant is not a prevailing party because the rescission was not the result of a consent decree, judgment, order or enforceable settlement agreement. At this point, it appears to me that only legislation from

Congress can supersede the Court's definition of prevailing party, assuming Congress is unhappy with that definition.

The third Supreme Court decision that I wish to discuss is Toyota versus Williams. Williams suffered from nerve compression and inflamed tendons, which caused pain in her upper extremities. She was performing successfully in her factory job until she was given tasks, which required holding her hands and arms at shoulder height for extended periods. She claimed that the new duties caused pain in her neck and shoulders, and she asked to be relieved of the new duties. Toyota declined, and she was fired for poor attendance.

Williams sued under the Americans with Disabilities Act, alleging that Toyota should have accommodated her condition. Under the ADA, an employer must make reasonable accommodation to the known physical or mental disability of an employee. A "disability" is a physical or mental condition that "substantially limits" a "major life activity." A unanimous Court held that to be substantially limited in performing manual tasks, an individual must have a permanent or long-term impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. According to the Court, where manual tasks are concerned, the question is not whether the employee is unable to perform the tasks of her job. Instead, the question is whether she is unable to perform the tasks central to most people's daily lives, for instance, performing household chores, bathing and brushing one's teeth. The Board has not had occasion to apply Toyota, but it seems that the Toyota analysis applies to claims of disability discrimination brought in Board appeals.

The final part of my presentation will deal with a pair of issues that are of interest to me, and that have seemed to appear with more frequency on review. Those issues are whether the Board will enforce a settlement agreement when there is a countervailing public policy, and whether OPM can refuse to recognize the terms of settlement agreement where those terms appear to create sham personnel actions that manipulate the civil service retirement laws.

In Fomby-Denson, the issue of whether public policy overrides the terms of a settlement agreement was addressed by the Federal Circuit for the first time in a case related to federal employment. There, the employee was terminated for forgery and other misconduct. On appeal to the Board, the parties reached a settlement agreement, which provided that the agency would purge the appellant's Official Personnel File of all records relating to the termination and would not publicize or divulge the terms of the agreement except as necessary to administer those terms. Agency officials, however, divulged the terms of the agreement to local law enforcement authorities when they referred her case for investigation and possible criminal prosecution on the forgery charge.

The court found that the agency did not breach the agreement by referring the underlying misconduct for possible criminal prosecution. According to the court, the public's interest in prosecuting the alleged criminal behavior outweighed the employee's private interests in having the settlement agreement enforced.

The Board in Gizzarelli was guided by the reasoning in Fomby-Denson. The record in Gizzarelli showed that the Military Police at the Base where the appellant

worked had probable cause to believe that she had committed the criminal offenses of receiving stolen property, larceny and embezzlement, and fraud. During the Board appeal, the parties entered into a settlement agreement, which stated that only certain types of information would be revealed to potential employers. The Military Police report was not among the documents that could be disclosed. Nonetheless, the agency released the police report to OPM as part of a background check related to the appellant's acceptance of position with the Social Security Administration. The appellant claimed that the agency breached the agreement by releasing the police report to OPM.

The Board found that the appellant's reliance on the terms of the agreement was outweighed by the strong public policy in ensuring the trustworthiness of persons who apply for positions of public trust. Since OPM had the legal right to know about the appellant's criminal record history, it would be against public policy to deny OPM access to the Military Police report. The Board therefore did not enforce the nondisclosure provision in the settlement agreement in Miss Gizzarelli's case.

Cases like Fomby-Denson and Gizzarelli are especially relevant after the events of September 11th. With the hiring of more federal employees to take on security duties, it is important to recognize that sometimes the public interest takes precedence over nondisclosure provisions in private settlement agreements. When given a choice between giving OPM access to the criminal records of applicants for airport screener jobs or denying OPM access to those records because of a settlement agreement, I would prefer to let OPM have the records.

Another area of law involving settlement agreements concerns the question of whether OPM must accept personnel actions that are taken pursuant to settlement agreements when those actions are blatant attempts to manipulate the retirement laws. I want to discuss two cases on this point. The first case is Jordan.

Miss Jordan was removed in July 1992. She appealed to the Board. A settlement agreement was reached in June 1994. Under the agreement, her employing agency reinstated her and put her in a leave-without-pay status for a two-year period beginning with the removal and extending 90 days past the date of the settlement. In exchange, Ms. Jordan promised to resign at the end of the 90-day period, which she did. Five months after she resigned, she filed an application for a disability retirement.

The statute provides that a disability application must generally be filed within one year of separation. Thus, if Jordan's separation date were July 1992 when she was removed, her application would be untimely. However, based on the separation date created by the settlement agreement, her application was timely.

I ultimately concurred with OPM that the settlement agreement created a fictitious separation date merely for the purpose of evading the statutory filing deadline. The parties obviously had no intention of having Ms. Jordan physically return to work. Instead, she was returned to work only on paper so that she would have a new separation date allowing her to file a timely application for a disability retirement.

By giving Miss Jordan a fictitious separation date in exchange for her agreement to settle the appeal, the employing agency was, in my view, thwarting one purpose of the statute, which is to prevent stale claims. The settlement process was being used as a way of avoiding litigation over the removal action and in essence palming the employee off on the retirement system. It also thwarted the letter and spirit of the Rehabilitation Act because the agency had no intention of accommodating any disability that Ms. Jordan may have had. It just wanted to put her back on its rolls so she would have a new separation date for purposes of meeting the statutory filing deadline for a disability retirement.

The Jordan issue arose again in Parker versus OPM. There, the Board majority expanded Jordan by actually awarding a retirement benefit based on sham personnel actions taken pursuant to a settlement agreement. The facts in Parker are complex and set forth at length in my dissenting opinion.

In brief, Parker separated from his civilian National Guard position in 1985 when he went into full-time military service for the Guard. . At that time, he withdrew all of his CSRS retirement contributions. In July 1991, he left the military and tried to return to a civilian job with the National Guard. When the Guard refused to appoint him to a civilian position, Parker filed a Board appeal claiming that he had restoration rights. In a settlement agreement, the National Guard promised to appoint him to a civilian position. It did so in late February 1992, but cancelled the appointment 3 days later. Parker then filed for a discontinued service annuity. OPM disallowed the application.

It is undisputed that when the National Guard appointed Parker to a civilian position in 1992, he had lost his Guard membership. Membership in the Guard is a statutory requirement for appointment to a civilian Guard position. As discussed in my dissenting opinion, that fact alone made the appointment illegal. My dissent points out a number of other reasons why Parker is not entitled to an annuity, even assuming the appointment was valid. Among them are the fact that Parker never engaged in the performance of a federal function under the supervision of a federal employee after he was allegedly appointed, and he lacked the necessary creditable and covered service for entitlement to an annuity even if the appointments were legal.

My dissent in Parker also mentions another fact, which you might find interesting. When OPM told the National Guard that Parker's 1992 appointment would not entitle him to an annuity because the 3-day period was far short of meeting the statutory requirement that he have at least 1 year of covered service in the 2 years preceding his separation, the Guard made the appointment retroactive to June 1990. In June 1990, Parker was still a full-time officer in the military. This action led me to further question whether these appointments were sham actions taken solely for the purpose of evading the retirement laws.

OPM has asked the Board to reconsider its decision awarding Mr. Parker an annuity. I look forward to reviewing both OPM's brief and the response.

Jordan and Parker involved settlement agreements that seemingly altered personnel records to circumvent retirement laws. The Board favors settlement agreements, and resolving disputes by means of settlement is generally a good public

policy. However, OPM has been entrusted with safeguarding the civil service retirement system. In that role, it should be allowed to question settlement agreements that appear to establish fake employment records to bypass the retirement laws. My view on this matter is consistent with my belief that the statute and congressional intent should control. It is not for the Board to determine OPM's role in retirement cases. OPM was not a party to the settlement agreement and they should properly question whether an individual meets statutory requirements for an annuity. The Board's role is to review the OPM determination.

I would like to conclude my remarks with a summary of my guiding principles. I would say that I am a person that tries to adhere to the principles of consistency, commonsense, and practicality.

I prefer to review groups of cases, which present the same legal or factual issues because this process promotes consistency. I have also been consistent in deciding cases based on the language in the relevant statute or regulation. This is the same consistency that I plan to bring to my role as Chairman.

In deciding cases, I ask myself what result makes the most sense. I also ask how useful the Board's guidance will be to the parties and the civil service. My separate opinion in Von Zemenszky illustrates this approach. The same commonsense principles will guide the way in which I will handle my duties as Chairman. Commonsense and practicality may not sound legalistic. The Board, however, should not only be concerned with the fine points of legal debate. It should also be concerned with the affect that its decisions will have on the civil service and the ability of agencies to carry out their missions. The Board should likewise carry out its studies and oversight function by providing practical and commonsense advice to agencies.

With that, I will conclude my remarks. It has been my pleasure to share this time with you and I thank you for your courtesy and attention.

Draft Remarks for
The Honorable Susanne T. Marshall,
Chairman, U.S. Merit Systems Protection Board
FDR Conference, August 2002 Plenary Session

Introduction

- Good morning. I am pleased to be with you today. I want to thank Jerry Shaw and the FDR leadership for being such gracious hosts. It is an honor to serve as a member of such a distinguished panel and I am looking forward to this morning's discussion.
- This is my first opportunity to address such a large group as Chairman of the MSPB. As many of you know, I was named the Acting Chairman of the Board in February of this year and my nomination to be Chairman was sent to the Senate in May. On August 6th, the President recess appointed me as Chairman.
- There are a number of issues that are going to be addressed today. I thought I would use my time to provide a general overview of the challenges facing the federal workforce today as well as to discuss some of the priorities of I have set for my tenure as Chairman.

Role of the Board

- As you know, in 1978, with the passage of the Civil Service Reform Act, the federal government experienced its first comprehensive reform of civil service law in nearly 100 years. Among its important and far-reaching reforms, the Act created the Merit Systems Protection Board. The MSPB serves as the guardian of Federal merit systems and is an independent forum where federal employees can seek a fair and rapid resolution to workplace disputes. The Board also provides an important oversight function by studying and reporting on issues of interest to agency managers and employees.

Changing Nature and priorities of the Federal Workforce

- The world is a very different place from when the FDR conference met last year in New Orleans. The events of September 11 changed drastically the priorities of the federal government. Such a seismic shift in priorities means that the federal government has to change the way it does business. To date, these changes include the creation of the Transportation Security Administration, the proposed creation of the Department of Homeland Security, as well as the reorganization of the national security agencies. The difficulty of implementing these major organizational changes is

exacerbated by the government's human capital crisis. Even before 9/11, the General Accounting Office had placed this issue on its "high-risk" list, which is reserved for the most urgent problems facing the government.

- The statistics are compelling. Since at least 1995, the number of people who were separated from the federal workforce has been higher than the number of new hires. It was not until sometime in early 2000 that the number of new hires exceeded the number of employees who were being separated. Even though new hires now exceed separations, the net loss of employees in the period from 1995 through early 2000 is in the hundreds of thousands. In addition, almost one-third of the federal workforce will be eligible to retire before the end of the year 2006, and almost three quarters of those individuals say that they are likely to retire when they are eligible for an annuity. Thus, not only has the government undergone significant downsizing over the last decade, it appears likely that a quarter of all current federal employees will retire by the middle of this decade.

- In fact, 33 percent of those federal workers who will become employees of the proposed Department of Homeland Security will be eligible for retirement in the next five years. This mass exodus translates into a dramatic loss of institutional knowledge and expertise. It is imperative for government managers to plan for such a loss and to be given the flexibility they need to address shifting priorities.

- There has been and will continue to be a great deal of debate on how policy makers can best address these pressing issues. The specifics regarding a number of these matters are still undecided. Undoubtedly, such drastic changes produce a great deal of anxiety for the worker and manager alike. One key strategy to lessen people's fears and anxieties is to ensure that there is a communication and outreach effort to affected individuals to inform them of continuing developments.

- This panel provides an important opportunity for outreach to the federal employment community. Specifically, there is a great deal of interest in what worker and whistleblower protections will be provided to the employees of the Department of Homeland Security. It is my understanding that Elaine Kaplan will provide further input on that issue. Additionally, Chairman Dominguez will discuss her preliminary ideas of how the EEOC can better serve federal employees through a revamped EEO process. However, due to the quasi-adjudicatory mission of the Board, I will not comment of the specifics of pending legislation that affects directly the Board's jurisdiction, nor will I comment on policy recommendations regarding a specific agency. I will speak to the

contributions that the Board can make to assist federal employees and managers in meeting these challenges.

The Board's Adjudicatory Function

- The Board's core mission is its adjudicatory function. As Chairman, it is my responsibility to ensure that the Board continues to issue high quality decisions in a timely manner. In FY 2001, the MSPB regional and field offices maintained their excellent record of case processing timeliness with an average processing time of 92 days. In addition, the rate at which initial appeals were settled by AJs increased to 57 percent. At headquarters, the Board members and legal offices continued to focus on reducing the number of overage cases, targeting cases that had been pending for more than 300 days. In FY 2001, the Board had reduced the number of such cases to 45 – a substantial reduction from the 92 cases that were pending for more than a year at the end of FY 1999. This year, the Board is well on its way to meeting its goals for FY 2002. Despite the progress the Board has made over the past few years, there is still more the Board can do to improve service to its customers.

- One way the Board is moving forward on improving customer service is to focus on new technologies. Such technologies are a useful tool in making government more citizen-centered and results oriented. The term "e-government" has been used to describe the initiatives undertaken by the President and Congress in using technology to make government more accessible to our citizens. I am committed to having the Board be a full participant in the new e-government. This means complete access to the Board and Board resources through the Internet and e-mail.

- Currently, the Board is in the process of revising its appeals form, which is the most common way to file a case. At the same time, we are working on a procedure that will allow individuals to access and file the new form on the Web. The plan is to allow a user to pull up the form on the Internet and be guided through a series of questions. This essentially would be an interactive interview similar to the "turbo tax" application.

- The Board's website is also undergoing an overhaul and update. One change involves the OAC Report, which is usually issued weekly and contains summaries of decisions issued by the Board on PFR. Individuals can sign up on the Board's website and have copies of the Report sent to them by e-mail.

- In addition to improving the way our customers access Board information, we are also making a concerted effort to improve the method by which the Board resolves disputes. I am overseeing the design and implementation of an alternative dispute resolution pilot project that will provide parties in select cases with a trained mediator after an appeal is filed. This approach differs somewhat from a proposal that has been discussed in Congress that would involve the Board in the mediation process before a disciplinary action is taken. However, if such legislation is enacted, the program that is now being planned should provide a basis for implementing that legislation.

- The Board's administrative judges have an excellent record in settling appeals. However, the ADR pilot project will attempt to identify those cases that usually do not lend themselves to settlement. Additionally, the project will use techniques aimed at improving the relationship between the parties to reduce the possibility of future disputes.

- Similar to the approach the EEOC takes in its ADR program, the Board's ADR project recognizes that not all problems are solved just because the appeal has ended. Indeed, the employment relationship between the agency and the appellant continues after many Board appeals. That relationship may be hampered by the same problems that predated the appeal. The project that I envision would facilitate communication and mutual understanding between the parties to try and help resolve any underlying, often non-legal, issues that could lead to more problems and appeals down the road. It is my hope, and my belief, that the Board's ADR pilot project will serve as an example of how ADR can complement existing kinds of dispute resolution, like settlement efforts.

- To date, the Board has trained 22 MSPB employees as mediators. More intensive training is underway for a core group of mediators. I am pleased to announce that the Board's first mediation under the pilot program will take place at the end of this month.

Policy and Evaluation Function

- In addition to improving the Board's adjudicatory function, I plan to put a stronger emphasis on the Board's policy and evaluation function. Since its inception, the Board's Office of Policy and Evaluation ("OPE") has issued high quality studies on a number of issues related to federal employment and personnel matters. During this time of unprecedented transition in the federal government, OPE is taking on a significant role in working with policy and decision makers inside and outside of government to develop

solutions to many of the problems federal employees and managers are facing. OPE will be submitting some of its recommendations to the Brookings Institution, National Commission on the Public Service, headed by Paul Volcker.

- OPE's ongoing studies indicate problems in the hiring process used by federal agencies. We intend to suggest ways that agencies can operate better and smarter in the hiring process.

- Preliminary findings show that vacancy announcements can be too complex, too long, and not particularly helpful to applicants. They may contain inaccurate information or present an incomplete picture of the position. In short, vacancy announcements can be off-putting and may not sell either the agency or the job. Qualified individuals therefore might pass up the opportunity to apply for a federal job, which further contributes to the crisis in human capital.

- Another problem is that agencies may be too slow to make hiring decisions. Many agencies require paper applications that are sent by mail and then go through a lengthy screening process. Applicants lose interest in the job or find other work while the hiring process drags on. Electronic completion and submission of applications might be a better way to conduct business.

- OPE is also looking into the standard techniques used to rate applicants and the effectiveness of those methods in measuring the potential for long-term success in the position and in government service generally. It appears from initial data that things like grade point averages and prior experience may not be very good measures of potential long-term success. Rather, for many positions, a structured interview process could be a better way of predicting success.

- Before I leave the topic of the Board's studies, I want to say that it is my goal to provide agencies with practical and specific advice and suggestions. For instance, recent wildfires in our Western states have highlighted the need for more firefighters in the federal workforce. The Board might gather information which would help agencies like the Forest Service attract and retain qualified firefighters.

The Board as a Model Employer and Follower of Merit System Principles

- Lastly, I would like to address my vision for making the Board a model employer and a follower of merit system principles. If the Board's mission is to pass judgment on how other federal employers are adhering to merit

system principles, then, quite simply, it is imperative that the Board practice what it preaches.

- Like other federal employers, the Board must grapple with the fact that 40 percent of its workforce is eligible for retirement in the next 5 years. Each Office Director has been tasked to develop plans to confront this issue. I plan to recruit and retain a highly qualified, motivated, and productive staff. I am committed to providing a comprehensive training program to employees who want additional training and who demonstrate the need for such training.

- Additionally, the Board is currently working with the Office of Special Counsel to meet the requirements of its Certification Program that allows federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act (WPA), and related civil service laws.

- I also intend to make sure that the Board is in full compliance with the Notification and Federal Employee Antidiscrimination Act of 2002, known as "No FEAR." If it turns out that the Board is not in compliance, we will comply as soon as possible.

- Moreover, for the first time in a long time, the Board has undertaken the project of developing an employee handbook that will detail the rights and responsibilities of each individual employee. (May not want to make this public).

- It is also my view that if the Board recommends an innovation in a study or report, the Board itself should consider implementing that recommendation where appropriate. As a model agency, the Board should strive to be at the forefront of improvements to government. Thus, if the Board recommends electronic application forms as an alternative to paper applications, if we suggest that vacancy announcements be reviewed and revised, or if we find that structured interviews are one of the best predictors of future success, I will make it my goal to conform the Board's hiring process to any such recommendations.

- It has been my pleasure to share this time with you, and I thank you for your courtesy and attention.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

May 15, 2002

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Susanne T. Marshall, who has been nominated by President Bush for the position of Chairman, Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the Merit Systems Protection Board concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe Ms. Marshall is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Amy L. Comstock
Director

Enclosure

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.)
   Neil Anthony Gordon McPhie
2. **Position to which nominated:**
   Member, Merit Systems Protection Board
3. **Date of nomination:**
   July 9, 2002
4. **Address:** (List current place of residence and office addresses.)

   Office: MSPB, 1615 M Street, N.W., Washington, D.C. 20419
5. **Date and place of birth:**
   June 13, 1945, Port of Spain, Trinidad, West Indies
6. **Marital status:** (Include maiden name of wife or husband's name.)
   Married to Regina Chow McPhie whose maiden name is Regina Lee Chow
7. **Names and ages of children:**

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
   Queen's Royal College (Trinidad) 1957 - 1962, Senior Cambridge Certificate 1962
   Howard University 1970 - 1973, B.A., Magna Cum Laude, 5/12/73
   Georgetown University Law Center, Juris Doctor 5/23/76
9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
   1970 - 1976: Worked at various jobs part-time during the school year and full time during the summer months at Arent, Fox. Kintner, Plotkin and Kahn, 1815 H St., N.W. Wash., D.C. (Xerox Room night supervisor in large law firm); Office of Law, Prince Georges County, Main Street, Upper Marlboro, Md. Law clerk for County Attorney's Office. Duties included legal research, drafting pleadings and briefs for assistant county attorneys; Legal intern, Office of Attorney General, Richmond, Va. Legal research and writing.

   1976 - 1982: Equal Employment Opportunity Commission, 2401 E. St., N.W., Washington, D.C. Attorney in the Appellate and Legal Counsel Divisions. Duties included representing the Commission in employment cases before federal trial and appellate courts and administrative tribunals, amicus curiae participation in employment cases involving private parties, drafting and responding to employment law questions posed by private persons.

   1982 - 1998: Office of the Attorney General of Virginia, 900 East Main Street, Richmond, Va. 23219. Assistant Attorney General (1982 - 1990) Tried jury and non-jury cases defending state agencies and officials in state and federal courts. Tried cases under the Virginia Tort Claims Act, defended judges from extraordinary writs of prohibition and mandamus, the state from significant damage awards in breach of contract claims involving building construction projects, and represented the Virginia State Bar in disciplinary cases.
   Senior Assistant Attorney General (1990-1998) As Chief of the Employment Law Section, supervised a team of attorneys, paralegals and secretaries while maintaining an independent case load.

   1998 - 2002: Executive Director, Virginia Department of Employment Dispute Resolution, One Capitol Square, 830 East Main Street, Suite 400, Richmond, Virginia.
   Public Service Management
   Directed implementation of EDR's statewide grievance, mediation, training and consultation programs for

state employees. In the 2000 General Assembly, led a successful effort to obtain General Assembly approval for legislative reform involving employees' grievance rights to include a right of appeal, attorneys' fees and costs, publication of grievance decisions, and utilization of full-time EDR Hearing Officers. Oversaw the internal management of EDR to include the strategic planning process, staffing and budget. Initiated significant improvements to EDR's personnel and operating policies while maintaining employee support and enthusiasm. Improved EDR's organizational infrastructure and realigned resources to achieve planning goals. Developed and implemented effective budget tracking processes. Maintained employee morale and programs focus in the face of declining state revenues and budget cuts. Developed and implemented two new self-funded programs.

Administrative Adjudicator

Issued letter rulings in grievance cases. Supervised the work of hearing officers who hear grievance cases and render written opinions. Grievance cases cover a broad range of issues from compensation, performance, workplace harassment, discrimination, retaliation and compliance with statewide personnel policies.

April 2002 - November 2002: Senior Assistant Attorney General. As Chief of the Finance and Government Section, I supervised a team of lawyers and support personnel who represented personnel, financial, gaming and other agency clients.

January 2003 - Present: Senior Attorney, Merit Systems Protection Board. Review proposed case decisions and other tasks as directed by the Chairman.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.
As stated above

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.
None

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Bar Admissions

Virginia, District of Columbia, New York, Iowa, United States Supreme Court
United States Court of Appeals for the 4th, 7th, 8th, 9th and 10th Circuits
United States District Court for the District of Columbia, and the Eastern and Western Districts of Virginia.

Bar Committees

Public Liaison, Virginia Bar Association, Labor and Employment Section (1/98 to 2001)
Member, E.D. Va. Advisory Group, Civil Justice Reform Act of 1990 (1991-1995)
Chair, Virginia State Bar Special Committee to Reduce Litigation Costs and Delays (1989-1991)
Vice Chair, ABA Government Lawyers Committee, and General Practice Section (1990-1991)
Vice Chair, ABA Minority Lawyers Committee, General Practice Section (1990-1991)
Vice Chair, ABA Litigation Committee, General Practice Section (1989-1990)
Member, ABA Steering Committee, Construction Management, Design/Build (1988-1990)

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.
None

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.
None

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years.

2003	None	
2002	Republican National Committee (RNC)	50
	Black Republican Summit	25
	RNC	100
	Cantor for Congress	100
2001	Republican Party of Virginia	150
	Virginians for Blacks in Government(VBIG)	100
	Richmond Republican Committee	35
	Virginians for Jerry Kilgore	50
	Virginians for Jerry Kilgore	25
	VBIG	25
	Friends of Jerry Kilgore	150
2000	Republican Party of Virginia	165
	Cantor for Congress	50
	Steve Martin for Congress	50
	Hedgepeth for Council	25
1999	Republican Party of Virginia	55
	Richmond Republican Committee	35
1998	None	

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.
Academic Scholarship Howard University
Phi Beta Kappa Howard University
International Honor Society in Economics
Special Achievement Award at EEOC
Distinguished Service Award Office of the Attorney General of Virginia
Meritorious Service Award Office of the Attorney General of Virginia

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.
Speeches and Publications
Speaker/Moderator, "Summary of Recent Federal and State Cases Involving Employment and Labor Law Issues," Virginia Bar Association Annual Conference on Labor Relations and Employment Law (1996, 1997, 1998, 1999, 2000, 2001)
Speaker, "Due Process Update: Conducting A Liability-Free Public Sector Discipline Process," Council on Education in Management (2000)
Speaker, "Advising the State Government Employee," Old Dominion Bar Association (1999)
Speaker, "Sexual Harassment In the Workplace," Old Dominion Bar Association (1996)
Speaker on various employment law topics and general litigation before state government audiences

16. **Speeches:** Provide the Committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.
None

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?
I believe I was chosen for this position because of my knowledge and expertise in employment law and strong management skills.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I bring to this position, years of experience as an employment law litigator and administrative adjudicator. I have represented the interests of management and employees. As an administrative adjudicator, I have taken positions guided by principles of objectivity, fairness and an unbiased interpretation and application of the law and personnel policies. I have also demonstrated the ability to lead an organization through change and tough economic conditions.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
   Yes
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.
   No
3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?
   No
4. Has anybody made a commitment to employ your services in any capacity after you leave government service?
   No
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?
   Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.
   None
2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.
   In my capacity as Executive Director of the Virginia Department of Employment Dispute Resolution, I had the responsibility to monitor and where necessary to influence the passage or defeat of legislation affecting the grievance procedure for state employees. In that capacity I drafted and worked for the passage of legislation reforming the grievance process for state employees.
3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?
   Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.
   McPhie v. McPhie, no fault divorce (Alleghany County, PA., Court of Common Pleas 12/79)
   Marie Assa'ad Faltas v. Commonwealth of Virginia et al. Record No. 930435 (Sup. Ct. of Va. 1993)

Disgruntled former state employee brought suit against her agency employer, supervisors, co-workers, and defense counsel alleging violations of federal law in the termination of her employment. Dismissed.
Kennedy v. McPhie, Civil Action No. 3:99CV358(E.D. Va. 1999)
Denial of due process claim brought by hearing officer who was removed for cause from hearing grievance cases brought by state employees. Case dismissed.

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.
No
3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.
No
4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.
I have enclosed a copy of my resume, and a letter of recommendation from United States District Judge James R. Spencer.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

NEIL A.G. McPhie being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this 6th day of February, 20 03

Notary Public

My Commission Expires 09/14/05

NEIL ANTHONY GORDON MCPHIE

3021 Archdale Road
Richmond, VA 23235
Home: (804) 272-7994
Cell Phone: (804) 350-4691
E-mail addresses: neil.mcphie@mspb.gov; nmcphie@aol.com

Education

J.D., Georgetown University Law Center, 1976

B.A., Economics, Howard University, 1973
Magna Cum Laude, Phi Beta Kappa, Dean's List, Academic Scholarship, International Honor Society in Economics

Experience

Public Service Management

As Executive Director of the Virginia Department of Employment Dispute Resolution (EDR) directed implementation of EDR's statewide grievance, mediation, training and consultation programs. Maintained effective working relationships with officials and subordinates in all branches of government, while simultaneously managing significant changes to policies affecting state agencies. In the 2000 General Assembly, led a successful effort to obtain General Assembly approval for legislative reform involving employees' grievance rights, to include a right of appeal, attorneys' fees and costs, publication of grievance decisions, and utilization of full-time EDR Hearing Officers.

Oversaw the internal management of EDR to include the strategic planning process, staffing and budget. Initiated significant improvements to EDR's personnel and operating policies while maintaining employee support and enthusiasm. Improved EDR's organizational infrastructure and realigned resources to achieve planning goals. Developed and implemented effective budget tracking processes. Implemented technology upgrades. Maintained employee morale and programs focus in the face of declining state revenues and budget cuts. Developed and implemented two new self-funded programs, and in the process effected positive change to the culture of Virginia state goverment.

Leadership style includes active listening, involving stakeholders in decisionmaking, creative thinking and planning and embracing policies that are grounded in common sense.

Co-managed outreach efforts by Virginia's Governor to state employees through town hall meetings, which helped, establish Virginia as one of the best-managed states in the country according to Governing Magazine.

Administrative Adjudicator

As Executive Director of EDR, issued letter rulings regarding qualification of grievance cases for administrative hearings. These rulings may be appealed to a state Circuit Court. Issued letter rulings on compliance issues that are final and binding. Rulings are investigated, researched and drafted by EDR Consultants, and contain a recitation of relevant facts and analysis of case law and policies. Generally, approved and signed rulings after careful review and deliberation. Supervised the work of hearing officers who hear grievance cases and render written opinions that are binding on the parties. Hearing Officer decisions may be appealed by either party to a Circuit Court and the Court of Appeals. EDR adjudicates grievance disputes that cover a broad range of issues from compensation, performance, workplace harassment, discrimination, retaliation and compliance with statewide personnel policies.

Legal Counsel

As an Assistant Attorney General with the Virginia Attorney General's Office, tried jury and non-jury cases defending state agencies and officials in state and federal courts. Tried cases under the Virginia Tort Claims Act. Successfully defended Virginia judges from extraordinary writs of prohibition and mandamus, the state from significant damage awards in breach of contract claims involving building construction projects, and represented the Virginia State Bar in disciplinary cases before the Virginia Supreme Court and prosecuted individuals for the unlawful practice of law.

As the Senior Assistant Attorney General and Chief of the Employment Law Section, supervised a team of attorneys, paralegals and secretaries while maintaining an independent caseload. Defended employment discrimination claims brought under the United States Constitution, and a variety of Civil Rights Statutes to include Title VII, The Americans with Disabilities Act, The Equal Pay Act, The Age Discrimination in Employment Act, The Family and Medical Leave Act and wrongful discharge state law claims. Represented state officials in administrative due process grievance hearings. As Senior Assistant Attorney General and Chief of the Finance and Government Section, I supervised a team of lawyers and support personnel who represent personnel, financial, gaming and other agency clients. Also consulted with OAG leadership regarding internal management policies and decisions.

Provided legal advice to the Governor's Office, Cabinet Secretaries, the Attorney General and state agencies.

As a trial and appellate attorney with the Equal Employment Opportunity Commission, tried employment cases in federal trial and appellate courts and administrative proceedings.

Bar Admissions

Virginia, District of Columbia, New York, Iowa, United States Supreme Court

United States Court of Appeals for the 4th, 7th, 8th, 9th and 10th Circuits

United States District Court for the District of Columbia, and the Eastern and Western Districts of Virginia

Bar Committees

Public Liaison, Virginia Bar Association, Labor and Employment Section (1/98 to 2001)

Member, E.D. Va. Advisory Group, Civil Justice Reform Act of 1990 (1991-1995)

Chair, Virginia State Bar Special Committee to Reduce Litigation Costs and Delays (1989-1991)

Vice Chair, ABA Government Lawyers Committee, and General Practice Section (1990-1991)

Vice Chair, ABA Minority Lawyers Committee, General Practice Section (1990-1991)

Vice Chair, ABA Litigation Committee, General Practice Section (1989-1990)

Member, ABA Steering Committee, Construction Management, Design/Build (1988-1990)

Speeches and Publications

Speaker/Moderator, "Summary of Recent Federal and State Cases Involving Employment and Labor Law Issues," Virginia Bar Association Annual Conference on Labor Relations and Employment Law (1996, 1997, 1998, 1999, 2000, 2001)

Speaker, "Due Process Update: Conducting A Liability-Free Public Sector Discipline Process," Council on Education in Management (2000)

Speaker, "Advising the State Government Employee," Old Dominion Bar Association (1999)

Speaker, "Sexual Harassment In the Workplace," Old Dominion Bar Association (1996)

Speaker on various employment law topics and general litigation before state government audiences

Employment History

2002:	Merit Systems Protection Board 1615 M street, N.W. Washington, D.C. Senior Attorney
2002:	Office of the Attorney General of Virginia 900 East Main Street, Richmond, Va. Senior Assistant Attorney General
1998 to 2002:	Director, Virginia Department of Employment Dispute Resolution 830 East Main Street, Richmond, Va.
1982-1998	Office of the Attorney General of Virginia 900 East Main Street, Richmond, Va. Senior Assistant Attorney General (1990 – 1998) Assistant Attorney General (1982-1990)
1976 to 1982:	Trial and Appellate Attorney United States Equal Employment Opportunity Commission Office of the General Counsel, Washington, D.C.

Personal Information

Married to Regina Chow McPhie. We have two children, Abigail, age 12, and Sydney, age 9. I am the primary caregiver for my 82-year old mother who lives with me. I enjoy working on home and garden projects and spending quality time with my family.

I enjoy the law, helping organizations and people solve disputes, and learning new areas.

References

Available on request

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
LEWIS F. POWELL, JR. COURTHOUSE BUILDING
SUITE 307
1000 EAST MAIN STREET
RICHMOND, VIRGINIA 23219-3525

CHAMBERS OF
JAMES R. SPENCER
DISTRICT JUDGE

TELEPHONE
(804) 916-2250

December 8, 2000

TO WHOM IT MAY CONCERN:

I have been asked to comment on the legal abilities of Neil McPhie, Esquire. I hereby gladly and enthusiastically respond to that request.

Mr. McPhie is an excellent lawyer who is blessed with many fine qualities and talents. Over the course of fourteen (14) years on the bench, I have had numerous opportunities to observe Mr. McPhie at work in the courtroom. He is, in my estimation, a top performer. His preparation for trial is always complete and consistent. Likewise, his grasp of the law is thorough and impressive. I have also found his written work product to be clear, concise and persuasive.

While always a passionate advocate for his client's cause, he is unfailingly professional and courteous to both the Court and opposing counsel. His technical legal skills become even more effective when combined with his good judgment, even temperament and common sense. Mr. McPhie has earned the respect of this Court and I offer my unqualified and positive assessment of his lawyering skills.

Thank you for your kind attention.

Sincerely,

/s/

James R. Spencer
United States District Judge

JRS/jf

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Neil McPhie to be
a Member of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as a Member of the Merit Systems Protection Board (MSPB)?

Answer: I believe that the President nominated me to serve on the MSPB because I am qualified to perform the duties of the position. I believe that my selection was based on my demonstrated expertise in employment law, my experience in government, and my education.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

Answer: No.

3 What specific background and experience affirmatively qualifies you to be a Member of the MSPB?

Answer: I bring to this position approximately 27 years experience as an employment lawyer. I have represented the interests of management and employees. Through this experience, I have become intimately familiar with the myriad of issues that give rise to workplace disputes and counseled clients on effective measures to resolve such disputes. For four years, (1998-2002) I ran a state agency that handled grievance cases. As an administrative adjudicator, I have taken positions guided by principles of objectivity, fairness and an unbiased interpretation and application of the law and personnel policies. I successfully led that organization through significant organizational change and tough economic conditions.

4 Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member of the MSPB? If so, what are they and to whom have the commitments been made?

Answer: I have made no such commitments.

5 If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

Answer: I cannot think of any issue that would create a conflict of interest. However, should any issue arise during my tenure that might raise any ethical questions relating to my participation, I would consult with the appropriate ethics officers, and, if it were appropriate, recuse myself.

II. Role and Responsibilities of a Member of the MSPB

6 What is your view of the role of a member of MSPB?

Answer: As a Member of the MSPB, my basic role would be to adjudicate cases in a fair and objective manner, consistent with the governing statutes, regulations, case law and policies. My role with respect to my fellow Board Members would be to work towards a common effort of handling cases in a fair and expeditious fashion. I look forward to a collegial and professional relationship with Chairman Marshall and the third Member, upon his/her nomination by the President and confirmation by this Body. I will work to ensure that the Board fulfills its adjudicatory, studies, and regulatory oversight functions. In addition, my role would be to assist the Chair with any administrative responsibilities affecting the operations and mission of the Agency.

7. In your view, what are the major challenges facing MSPB? What do you plan to do, specifically, to address these challenges?

Answer: I do not profess to know the major challenges facing the MSPB. I expect that a major challenge facing the MSPB is to continue to adjudicate and process cases carefully, fairly, judiciously, and expeditiously. I believe also that the Board should continue to assess its case management processes to identify additional improvements that would further the more efficient adjudication of cases without compromising due process and the quality of its decisions. I intend to work diligently with all Board members to successfully address any challenges that arise during my tenure on the Board.

8. How do you plan to communicate to the MSPB staff on efforts to address relevant issues?

Answer: I believe in open communication. It has been my experience that this communication style fosters the open exchange of ideas. I therefore intend to have an open door policy at the MSPB. I intend to work through the Office of the Chairman on administrative matters. On matters involving case review and advice, I intend to deal directly with MSPB attorneys and supervisors through memoranda, e-mails, oral discussions and other available means of communication.

III. Policy Questions

9. What lessons learned, if any, can you bring to the federal employee redress system based on your experience as the Director of the Virginia Department of Employment Dispute Resolution or other relevant experience in the positions you have held?

Answer: I believe that the federal employee redress system will benefit significantly from the many lessons I learned from previous positions I have held and as Director of the Virginia Department of Employment Dispute Resolution (EDR). My long and intimate exposure to real life employment disputes has sensitized me to the need to ferret out and effectively address the underlying reasons for workplace disputes. As an advocate, I worked painstakingly to develop the relevant facts and to mold persuasive legal argument around clear themes. I bring that skill and thoroughness to the Board. At EDR I honed those skills necessary to be an effective impartial adjudicator. I learned the importance of not taking or giving the appearance of taking sides in a dispute. I also came to understand more clearly the importance of fostering meaningful relationships with the legislative branch of government based on candor and openness. I developed more fully a leadership style based on active listening, encouraging involvement on the part of stakeholders, and creative thinking and planning. I learned the importance of developing common sense policies. I believe, for example, that the Board should constantly reevaluate its internal systems to ensure that all Board members participate fully in significant management decisions.

10. Do you believe that it would be beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that if acted upon by Congress, agencies, and employees would improve the federal government's civil service system and personnel practices, and reduce the need for and costs of litigation? If so,

- How might MSPB go about identifying such systemic and recurring issues?
- How might Congress, agencies, and employees be made aware of these issues?

- Please explain whether you have any concerns that such activities might be inappropriate in light of the Board's quasi-judicial mission.

Answer: I believe that agency management and employees would benefit greatly from the adoption of measures that improve the civil service system and personnel practices and reduce the need for and costs of litigation. For that reason, I believe that MSPB should continue to play a role in identifying and reporting on areas in need of such improvement. However, because MSPB's mission is quasi-judicial, these efforts must be carefully managed.

I am not familiar with MSPB data collection efforts. In connection with its studies function, it seems to me that in order to identify problem areas in the civil service system as a whole, MSPB must have access to meaningful data. MSPB should develop mechanisms to work collaboratively with universities and private think tanks. Thus, I would begin by reviewing the scope of the data collected by, or available to MSPB. For example, MSPB cases may suggest certain recurring problems in the frequency and type of discipline administered by agencies. In the state system, and probably in the federal system, most disciplinary actions are uncontested. MSPB should therefore have access to all disciplinary actions taken whether or not they are grieved.

MSPB cannot make its observations in cases. It has to confine its observations and recommendations to reports to the President, Congress and other interested parties.

The Board's quasi-judicial mission should not be compromised. Therefore I believe that the Board must continue to carefully monitor its reporting activities so as not to give the appearance of having predetermined its rulings on certain issues based on conclusions published in its studies reports. MSPB has the statutory obligation to conduct periodic studies of the civil service and other merit systems. This obligation is important and must be carried out. However, in selecting studies, the civil service system may benefit from the Board's inclusion of topics that are linked to the Board's adjudicatory functions.

11. The appeals process administered by MSPB has been characterized as being legally complex, with court-like features.

    The process has been described as not always being user friendly. Do you believe that MSPB, as an administrative agency rather than a court, must achieve a balance between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? If so, how can that balance be achieved?

    The appeals process can be daunting for appellants, particularly those not represented by an attorney. Should MSPB assist *pro se* appellants in exercising their rights to due

process? If so, what assistance should MSPB provide? What else can and should MSPB do to reduce the burden on appellants?

Some survey data show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. Do you believe that this is a valid concern, and, if so, what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Answer: Accessibility is a fundamental tenet of Anglo-American jurisprudence. Therefore it is imperative that judicial courts and administrative forums be perceived as accessible, be accessible in fact, and by extension, user-friendly to all parties. I believe that it is a difficult challenge for an administrative tribunal (and a court) to strike the appropriate balance between assisting either party and maintaining impartiality. I do not believe that a blanket rule can be established for all cases. I believe that the degree of MSPB assistance to either party, should vary from case to case depending on a variety of factors such as the nature of the issues, the sophistication of the parties, and whether or not the parties are represented by counsel. The guiding principle for MSPB must continue to be impartiality. MSPB cannot be viewed as an advocate for either party, otherwise its decisions would lack credibility.

MSPB can do (and probably is already doing) a number of things systemically to assist appellants. MSPB should continually reexamine its procedures to ensure that they are easily understandable, not cumbersome, and not a trap for the unwary. MSPB should continue to develop and disseminate free of charge, brochures, FAQ's, and other informational materials on how to take a case through its process. MSPB judges should issue comprehensive pretrial orders. MSPB should ensure that its judges receive training in recent developments in the law, docket and case management, and possess appropriate judicial temperament. The Board should continue to build a culture around the maxim that "win or lose, a party must feel that he/she has been heard."

I do not know whether a burdensome MSPB appeals process deters managers from taking appropriate personnel actions. If the appeals process does that then it should be streamlined. I suspect however, based on my state agency experience, that that perception is more myth than reality. EDR discovered that the majority of disciplinary actions are not grieved. And the majority of disciplinary actions grieved are decided in favor of management. I anticipate that the statistics are similar in the federal system. I believe that the misperception exists for a number of reasons. Some managers do not understand personnel rules and procedures. Others don't understand how and when to discipline and terminate employees. Still others avoid taking discipline because they do not want to be perceived as a 'bad guy." Agencies have a continuing obligation to ensure

that their managers are properly trained. I believe that MSPB should collect and share case data to dispel such myths. In addition, I believe that MSPB should educate the users of the system to the understanding that consistent decisions are fostered through the application of legal standards, some of which are unavoidably complex

12. Some cases require lengthy and complex decisions. What will you do to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

Answer: The Board has already taken steps to improve the quality of its opinions. It has, for example developed a uniform decision format, developed and maintain templates on recurring issues that are easily accessible to MSPB attorneys and judges. I believe that the Board has to continue to look for ways to further improve quality. I would recommend that the Board clearly communicate to MSPB attorneys, its expectations for writing opinions. I believe that opinions must be written in plain English, use fewer acronyms and footnotes with substantive text, and organized around clearly defined issues.

13. The time taken by MSPB administrative judges to process initial appeals has remained fairly stable since FY 1995, averaging about 100 days. However, according to MSPB's 2001 Performance Report, the average time the Board has taken to review initial appeals stood at 214 days in FY 2001, up from 176 days in FY 2000. What would you propose to expedite Board review?

Answer: In 1989-91 I chaired the Virginia State Bar's (VSB) Special Committee to reduce Litigation Costs and Delays. As a result of my committee's recommendation, the VSB adopted for the first time, time standards for civil cases. I was also a member of the Eastern District Virginia Advisory Group (1991-95) that conducted a similar review under the Civil Justice Reform Act for the federal district court. Having practiced for 16 years in the "rocket docket," as the Fourth Circuit is commonly described, I believe that cases can be decided quickly without sacrificing quality or fairness.

I believe that the majority of MSPB cases can and should be decided expeditiously. I would recommend that the Board establish, based on historical and realistic numbers, the time it should take to decide an MSPB case. I know that a number of factors may influence the time it takes to decide a particular case, as for example. complexity, volume, case tracking and management systems, quality and quantity of reviewing personnel, agency culture etc. I would propose that the Board conduct a study to determine which factors are contributing to delay and work creatively to eliminate any systemic cause for the delay. I would also create a strike force to address the current backlog. I would ensure that the Board has an effective case docketing and tracking system, and require that managers and reviewing attorneys be held accountable for

expediting cases for Board review. Finally, in order that the Board itself may be held accountable for expediting decisions, I would propose the adoption of a performance time standard for Board members.

14. The average processing time takes into account cases that are dismissed or settled. However, cases that are heard by an administrative judge and fully reviewed by the Board take longer, on average. The last time MSPB published its Report on Cases Decided, data showed that in fiscal year 1999, the average time for a decision from a hearing of an initial appeal was 171 days, and the average time for the Board to decide cases in which a petition for review was granted was 390 days, for a total of about 560 days. In addition to attempting settlement, what other options would you suggest to reduce the length of time to decide such cases?

Answer: In addition to the strategies discussed in my answer to Question 13, I would suggest that MSPB judges be properly trained in case management techniques, and have the ability and resources necessary to produce timely, well reasoned and well written opinions. I would streamline the Board's internal procedures to avoid duplication of responsibilities. I would examine the Board's rules to seek to streamline and speed up the case procedures. For example, I would recommend that the Board consider adopting a rule that continuances are rarely granted and only in extreme circumstances such as the death of a party etc.

15 MSPB's performance plan for fiscal years 2002 and 2003 contains processing time goals for issuing decisions and also contains goals for quality (*e.g.*, maintaining or lowering the percentage of cases remanded or reversed). What are your thoughts about linking case review timeliness goals and quality goals to MSPB's performance standards for administrative judges and attorneys? What do you consider to be the advantages and disadvantages of such a linkage?

Answer: At EDR, (and other state agencies) the goals expressed in the agency's strategic plan are major factors in performance plans for individual employees, as appropriate to that employee's position. That linkage has worked well. I believe that it would work as well at MSPB. Advantages include educating individual staff on their role in fulfilling the overall mission, promoting a shared responsibility for fulfilling the mission and goals of the agency, building an esprit de corps through all levels of employment, and fostering a culture of accountability.

Some cautions must be considered. Since the full scope of the individual s performance must be considered, timeliness goals and quality should be major factors, never the sole factors. The goals must be realistic and feasible. Managers must have the flexibility to take into account the ebb and flow of cases and resources and other setbacks that could not be anticipated. Also, it takes time and resources to develop and implement

good performance measures. The success of such a plan would depend on the ability of MSPB officials to persuade staff to accept the merits of the plan. Such acceptance would require good communication and knowledgeable managers.

16 Timeliness is one measure of performance. Quality of decisions is another measure. What are appropriate indicators that could be used to measure the quality of MSPB decisions? How can the competing goals of timeliness and quality be balanced?

Answer: As I intimated in my response to Question 13, I do not view the goals of timeliness and quality necessarily to be mutually exclusive. Nevertheless MSPB managers and Board members must be vigilant in ensuring that one is not sacrificed in favor of the other for no compelling reason. For example, an administrative judge may issue excellent decisions but he or she may not be good at managing their docket. The challenge in such a situation may be to help the judge manage his docket rather than extending the timeline. It seems to me the Board has to work hard to nurture a culture wherein the twin goals of timeliness and quality are not only compatible but desirable and attainable. And as I observed in Question 15, the goals must be realistic and feasible. Managers must have the flexibility to take into account the ebb and flow of cases and resources and other setbacks that could not be anticipated.

A variety of indicators may measure the quality of MSPB decisions. Reversal rates can measure the Board's ability to issue legally correct opinions. But there are other quality issues embedded in opinions that reversal rates will not measure. The Board should conduct periodic surveys of a statistically viable sample of parties to determine such things as professional demeanor, conduct of hearings, timeliness of hearing and written decision, knowledge, familiarity with relevant procedures and policies, and the readability and understandability of the written decision.

17. One factor that helps reduce average case processing time is that MSPB settles more than half of the initial appeals it receives that have not been dismissed. This percentage is even higher in adverse action cases—72 percent in fiscal year 2001. There are concerns that there is an undue emphasis and pressure to settle cases. What are your views on settling a case without a hearing on the merits? In this regard, what guidelines do you think should be followed to help ensure that parties are not being forced into settlements that might be unfair, unwise, or prevent due process from being served?

Answer: As a trial lawyer, I have been strong-armed into settling cases. It has left me with misgivings. I have sometimes felt that the judge had predetermined the outcome and that my client would not get a fair trial if settlement were rejected. The decision to settle a case has to be voluntary and works best when the parties are fully informed. Otherwise, a party may feel cheated and would complain of being forced or duped into settlement through misrepresentation, coercion or duress. However, properly

administered settlement processes can be effective tools for resolving disputes. I believe that MSPB can help parties reach informed decisions to settle cases through such processes as mediation, early neutral evaluation, and settlement conferences by non-MSPB third parties. In this way, MSPB can maintain its neutrality and at the same time help the redress system.

18. According to the MSPB's Fiscal Year 2001 Annual Report, MSPB's Alternative Dispute Resolution (ADR) Working Group (established by the former Chairman in fiscal year 2000) continued its work in FY 2001. The Group has a twofold purpose—to explore ways in which the Board can expand its existing ADR program with respect to appeals *after* they are filed with MSPB, and to prepare for the possible enactment of legislation (H.R 1965) authorizing the Board to conduct a voluntary early intervention ADR pilot program to try to resolve certain personnel disputes *before* they result in a formal appeal to MSPB. In fact, at the end of FY 2001, the Board entered into a contract with two ADR experts to develop a proposal for expanding the Board's use of ADR techniques and to conduct mediation training. However, several other entities also are involved in resolving disputes (e.g., the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel) or encouraging the use of ADR (e.g., OPM, the Interagency ADR Task Force, the Federal Mediation and Conciliation Service). Given these circumstances:

•Do you believe that MSPB should play a role in promoting the use of ADR and training federal staff in ADR techniques?
•If so, how should that role be exercised?
•How should MSPB's role be coordinated with, or differentiated from, the role of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

Answer: First I want to state clearly that I am a proponent of ADR. At EDR I ran a mediation program that relied on volunteer mediators that were trained by EDR. I believe that MSPB should play a role in promoting the use of ADR in MSPB cases. I am less certain that MSPB should play a role in training federal employees in the use of ADR techniques for situations that are not linked to grievance rights, e.g., an allegation that "I cannot get along with my coworker." In my view MSPB should avoid duplicating the resources currently available for ADR training generally. Rather MSPB should develop strategies to promote collaboration with existing resources.

19. Legislation[1] creating the Department of Homeland Security, which will assimilate some 170,000 federal employees from 22 agencies, allows the Secretary of Homeland Security

[1] P.L. 107-296.

flexibility in establishing the department's personnel system. The enabling legislation authorizes the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish a human resources management system for the Department that may waive, modify, or otherwise affect certain employee appeal rights to MSPB.[2] But the legislation establishes specific requirements for any such regulations, and requires the Secretary to consult with the MSPB before issuing such regulations. The legislation also specifically provides that any such regulations may modify procedures under chapter 77 of title 5, United States Code (dealing with employee appeals to the MSPB) only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department. Given these requirements, what are your views with regard to –

- what role the MSPB should play in assisting the Department of Homeland Security in developing regulations for employee appeals, and
- the nature of the modification to the procedures under 5 U.S.C. chapter 77 that may be considered as furthering the fair, efficient, and expeditious resolution of matters involving the Department employees.

Answer: As the statute recognizes, the MSPB has an important role to play in the development of an appeals process that adequately protects the due process rights of DHS employees. MSPB can provide meaningful advice with respect to the promulgation of regulations to provide for the fair, efficient and expeditious resolution of workplace disputes. I would recommend that the Board proactively consult with OPM and DHS to determine whether the Secretary intends to establish a separate Human Resources Management System for DHS and, if so, to advise them on best practice provisions and procedures. That consultation should begin early in the process so that OPM and DHS could get the full benefit of MSPB's expertise before regulations are finalized.

20. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues. What is your understanding of the differences Congress intended in how each agency should perform this role? What is your understanding of the differences in how each agency currently performs these roles? Is it desirable and possible to consolidate these roles and if so, how would you recommend doing so? Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

[2] Section 841.

Answer: I do not have sufficient information or knowledge to answer this question fully. Rather I would offer some observations based on my prior experience at EDR. Consolidation can promote efficiencies but not if core functions are different. OPM creates the fabric of personnel rules. MSPB resolves disputes when those rules are breached, and through its studies function, examines the implementation of those rules. With such fundamentally different core functions, it may be difficult or impossible to consolidate functions. Then there is the perception issue that could be exacerbated by consolidation. Because OPM creates the fabric of rules, it may be viewed by employees as an organ of management. Because MSPB adjudicates cases initiated by employee appeals, it may be seen by management as an organ of employees. It may be that the review process is best served by having both agencies continue to evaluate the merit system through their respective lenses.

21. On May 9, 2000, the MSPB held that the Office of Special Counsel (OSC) could be held liable to pay attorney fees in disciplinary action cases if the accused agency officials were ultimately found "substantially innocent" of the charges brought against them.[3] It has been argued that sanctioning an award of fees in such cases, even where the decision to prosecute was a reasonable one, has a chilling effect on OSC's ability to bring charges due to budget constraints and is against the public interest and contrary to congressional intent of the Whistleblower Protection Act. In order to address these concerns, on November 19, 2002,[4] the Senate Committee on Governmental Affairs favorably reported S. 3070 which contained a provision requiring the employing agency, not OSC, to reimburse the prevailing party for attorney fees in a disciplinary proceeding brought by OSC.

OSC has expressed serious concern about the impact that the May 9, 2002, decision could have on OSC's ability to seek the discipline of agency officials who violate the Whistleblower Protection Act. What is your view of OSC's concern? Do you agree with the provisions of S. 3070 that address this issue?

Answer: As the Federal agency with the lead responsibility for enforcing the Whistleblower Protection Act, I can understand OSC's concern about any decision that might impair its ability to protect the rights afforded by the statute. On the other hand, I firmly believe that the effective administration of justice requires that a balance be achieved between the protection of such rights and the discouragement of frivolous

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[3] *Santella v. Office of Special Counsel*, 86 MSPR 48 (2000).

[4] S. Rep. No. 107-349 (2002).

claims. If an action is frivolous when filed, and the filing attorney knows or should have known that the claim lacks merit, the attorney is required to voluntarily dismiss the case. Sanctions may be appropriate where an attorney filed or failed to dismiss a non-meritorious action. However, because I am not familiar with the circumstances of the case cited, I respectfully decline to speculate regarding the bona fides of OSC's concern or the responsiveness of legislation to address that concern.

22. In 2000, the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing.[5] The Court held that the MSPB may neither review a security clearance determination nor require the grant or reinstatement of a clearance, and that the denial or revocation of a clearance is not a personnel action. As a result of this decision, an employee's security clearance may be suspended or revoked in retaliation for making protected disclosures, the employee with a suspended or revoked clearance can be terminated from his or her federal government job, and MSPB may not review the revocation. According to the OSC, revocation of a security clearance is a way to camouflage retaliation.

To address this situation, the Senate Committee on Governmental Affairs favorably reported S. 3070 on November 19, 2002,[6] which contained a provision making it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle. The bill further stated that the MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance.
What would be the impact on the MSPB if such a proposal were to become law? How would MSPB handle the expedited process?

Answer: I do not know MSPB's operations well enough to respond adequately to this question. As a general proposition, whistleblowers ought to be protected from retaliatory discipline or termination. On the other hand, the President ought to have the ultimate authority to determine whether the security clearance of a particular individual must be restored. The legislation strikes the balance by authorizing declaratory and other appropriate relief, but does not mandate the restoration of the security clearance. Thus to the employee, the remedy may be inadequate.

I imagine that the legislation would have an impact on MSPB's resources in that it would give the Board jurisdiction over a new category of cases. Again, because I am not

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[5] *Hesse v. State*, 217 F. 3d 1372 (Fed. Cir. 2000).

[6] S. Rep. No. 107-349 (2002).

sufficiently familiar with the Board's operations, I cannot speculate as to how MSPB would handle the expedited process should the bill become law. I can say, however, that if the bill is enacted, and I am confirmed as a Member of the Board, I would work to ensure that appellants receive full and fair consideration of their claims.

IV. Relations with Congress

23. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Answer: Yes.

24. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

Answer: Yes.

V. Assistance

25. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

Answer: These are my answers. I consulted with MSPB staff with respect to some questions in Section III.

AFFIDAVIT

I, Neil A. G. McPhie, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 20th day of March, 2003.

Notary Public

Venessa M. Gray
Notary Public, District of Columbia
My Commission Expires 04-14-2007

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

July 11, 2002

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Neil A. McPhie, who has been nominated by President Bush for the position of Member of the Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the Merit Systems Protection Board concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe that Mr. McPhie is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Amy L. Comstock
Director

Enclosure

Questions Submitted for the Record by
Senator Daniel K. Akaka
for the Nomination of
Susanne T. Marshall
to be Chairman of the Merit Systems Protection Board (MSPB)

May 16, 2003

1. The Department of Homeland Security (DHS) has been granted flexibility to waive chapter 77 of Title 5 relating to federal employee appeals. As you know, the Federal Aviation Administration (FAA) was granted similar authority in 1996. However, Congress reinstated MSPB appeal rights in 2000 after FAA employees and managers expressed concern that the internal process was unfair and biased. Employees were also concerned over how the new system would interpret civil service laws since there was no requirement to follow MSPB case law.

Based on your knowledge and experience in employee rights and appeals, what are some best practices that should be included in <u>any</u> appeals system?

Answer:

Any appeals system should guarantee due process for the appellant and ensure fair treatment of both parties. It should also be understandable to the parties and provide for expeditious resolution of their dispute. To that end, I believe that an appeals system should provide for an employment dispute to be resolved by a neutral, disinterested third party. It should provide the appellant a right to a hearing, once jurisdiction has been established, unless there are no material facts in dispute. The appellant also should have the right to a representative of his or her choice. The system should clearly set forth the burden and degree of proof required of each party, and it should provide for enforcement of the neutral third party's decision.

Beyond that, there are a number of modifications to the appeals procedures prescribed by Chapter 77 of Title 5 that could be made, where warranted for a particular agency. For example, the right to judicial review could be limited to cases involving significant issues affecting civil service law. There are also modifications that could be made to the appellate procedures prescribed by the Board's regulations. For example, a time limit could be established for the parties to complete discovery. I believe that the purpose of the requirement in the Homeland Security Act that the Secretary and OPM Director consult with the MSPB prior to implementing regulations governing appeals in DHS is to allow us to explore such modifications with those officials. This consultation should contribute to the development of an appeals system for DHS that retains basic due process rights for DHS employees while providing for expeditious processing of DHS appeals.

2. One of the main reasons agencies give for seeking a waiver from chapter 77 of Title 5 is the

length of time it takes to remove or discipline poor performers or those employees who engage in actionable misconduct. What factors contribute to the length of time it takes to discipline or remove these employees? Do you believe that the average time it takes for a matter to be resolved by the MSPB is reasonable?

Answer:

In response to the first question, I believe that many of the factors identified in the National Performance Review (NPR) 10 years ago still contribute to the length of time it takes to discipline or remove poor performers or employees who engage in actionable misconduct. The NPR findings have been substantiated by several MSPB studies on poor performers and two major reports by OPM since the time the NPR issued its report in 1993. These studies found that in both performance and misconduct cases, lack of management support for taking appropriate action is a contributing factor. As I stated in my answers to the pre-hearing questions, this may stem, in part, from a misperception by agency managers that taking action will almost always result in an appeal to the MSPB and that the agency's action is likely to be reversed. In fact, our experience and our case statistics do not support that belief. These studies showed that in addition to the lack of management support, managers cited too little time, a lack of confidence in the system, a lack of training, and a dislike of confrontation as reasons for not taking personnel actions. Thirty to forty percent of managers reported that they had difficulty defending a decision to take action within their agencies. They also reported difficulties in developing performance improvement plans and having discussions with employees about performance problems. They stated that there was little incentive to take on performance problems because they were not penalized in terms of staff reductions and, in fact, were often faced with the prospect of not being allowed to replace an employee removed for poor performance.

The NPR also concluded that the 30-day notice period required by law before taking action is too long. With respect to performance cases, it cited as the most frequent reason for the difficulty in removing poor performers, inadequately developed performance standards. The report also stated that the length of time poor performers are given to demonstrate improved performance is often excessive. To deal with these problems, the NPR made the following recommendations: (1) reduce the notice period required by law to 15 days; (2) extend the waiting time for a within-grade pay increase by the amount of time an employee's performance does not meet expectations; (3) develop an agency culture that supports taking action against poor performers; and (4) provide training for agency managers in performance management. The first two recommendations, as well as changes to the statutory requirements for performance improvement periods, can be accomplished through legislation. It is much more difficult, however, to bring about changes in agency cultures. Also, development of effective performance management systems and training for managers in operating those systems will require sufficient financial and human resources.

In response to the second question, I believe that the average time it takes for a matter to be resolved by the MSPB is reasonable. About 80 percent of all appeals filed with the MSPB are completed at the regional/field office level, when an initial decision issued by an administrative judge becomes final. In FY 2002, the average processing time for cases in the regional/field

offices was 96 days—just over 3 months. The successful settlement program in our regional/field offices also contributes to the efficiency of our case processing at that level. Of the appeals that are not dismissed for lack of jurisdiction, untimely filing, or other reasons, about half are settled. The average processing time for settled appeals in FY 2002 was 83 days. Furthermore, our administrative judges frequently achieve global settlements that dispose of not only the MSPB appeal but also a related EEO complaint or court case. Of the 20 percent of appeals that are brought to the Board at headquarters on petition for review of the initial decision, approximately 25 percent are closed in approximately 60 days. While the Board's average processing time for all petitions for review was 205 days in FY 2002, that number reflects the fact that for most of that year, the Board had only two members. In addition, the MSPB average processing times at both the regional/field office level and the Board headquarters level are considerably better than the processing times at other agencies dealing with various types of disputes between employees and their employers.

3. A number of Federal Circuit Court interpretations of the Whistleblower Protection Act are inconsistent with congressional intent. A primary example is the meaning of the term 'any disclosure.' In 1994, the Committee on Governmental Affairs reaffirmed language from the 1988 Senate Committee report and explicitly stated that 'any' means 'any.'

> OSC, the Board and the Courts should not erect barriers to disclosure that will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures only to be protected if made for certain purposes, to certain employees or only if the employee is the first to raise the issue....The plain language of the WPA extends to retaliation for 'any' disclosure, regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. (S. Rept. No. 100-413, at 13 and S. Rept. No. 103-358, at 18.)

Nonetheless, the Federal Circuit has erected nearly every barrier listed in the Committee report.[1] As a member of the MSPB, how do you reconcile this contradiction?

Answer:

As the Committee knows, the Board is bound to follow the precedent of the Federal Circuit. Further, it is not necessarily my role to defend or criticize the decisions of the Federal Circuit. With that in mind, I have the following thoughts on your question concerning the court's opinions in *Horton*, *Willis* and *Meuwissen*. Rather than discuss those three decisions, I will discuss the court's opinion in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed.

[1]See *Horton v. Dept. of Navy*, 66 F. 3d 279 (Fed. Cir. 1995) (stating that disclosures to co-workers, the wrong-doer, or to a supervisor are not protected), *Willis v. Dept. of Agriculture*, 141 F. 3d 1139 (Fed. Cir. 1998) (stating that disclosures made in course of normal job duties are not protected), and *Meuwissen v. Dept. of Interior*, 234 F. 3d 9 (Fed. Cir. 2000) (stating that disclosures of information previously known are not protected).

Cir. 2001), which was issued after *Horton*, *Willis* and *Meuwissen*. There, the court set forth one of its most comprehensive statements regarding the meaning of the term "any disclosure" in the WPA. The court also tried to explain its earlier decisions in *Horton* and *Willis*.

As I read *Huffman*, the court was not saying that "any" does not mean "any." Instead, the court focused on what Congress meant when it used the word "disclosure." Thus, any disclosure is protected if it is in fact a disclosure.

The term "disclosure" is not defined in the WPA. The court therefore used a commonly employed principle of statutory interpretation by looking at the ordinary meaning of the word "disclosure." *Id.* at 1349. Using dictionary definitions, the court found that the word means something that was hidden or not known, the act of uncovering something that was hidden from view, revealing facts not previously known, or laying open to view. *Id.* at 1349-50. The court found it "quite significant" that Congress in the WPA did not use a word that, in the court's view, had a more expansive meaning, such as "report" or "state."

The court examined congressional intent in light of what it found to be the ordinary meaning of the word "disclosure." The court acknowledged that Congress intended the WPA's coverage to be broad. *Id.* at 1350. The court, however, concluded that Congress, in using the word "disclosure," did not intend the WPA to be so broad as to include every complaint made by an employee to a supervisor about the supervisor's conduct. *Id.* According to the court, such disagreements are a normal part of everyday work life. Thus, the court reasoned that if every report to a supervisor about the supervisor's own alleged misconduct were a protected disclosure, "virtually every employee who was disciplined could claim the protection of the Act." *Id.* In *Huffman*, the court admitted that its case law on the issue of what is a "disclosure" "has not always been clear." *Id.* at 1351-52. To clarify its case law, the court examined the legislative history of the WPA and, with the exception of a statement made in 1994 by Representative McCloskey, found no "clear evidence" that the WPA was designed to protect employees for reports made as part of their of normal duties. *Id.* at 1353. When the court looked at the legislative history of the 1978 and 1989 Acts, it found that the drafters intended to protect disclosures made to entities such as Congress or the press. *Id.*

As for the 1994 statement by Representative McCloskey, the court found that the disclosure provisions were not amended to conform to Representative's McCloskey's view of the scope of the WPA. *Id.* It was "significant" to the court that Congress in 1994 did not amend the WPA to address the issue of what is a "disclosure." From all of this, the court concluded that Congress meant to leave the matter of what is a "disclosure" to "judicial resolution under the existing language of the Act." *Id.*

The court found that there could be a "disclosure" within the meaning of the WPA where an employee reports alleged wrongdoing outside of normal channels or where the report is not part of the employee's regular duties. *Id.* at 1354. The court found that Mr. Huffman's claims of falsification of Government documents and illegal hiring practices were sufficiently serious to be disclosures of either gross mismanagement, gross waste of funds, or abuse of authority. *Id.* at 1355. It therefore sent the case back to the Board for further proceedings.

In my responses to the Committee's pre-hearing questions regarding the court's decision in *LaChance v. White*, I stated my view that a Federal Circuit decision should not be overread and should be limited to the holding and facts of the case which was before the court. This principle was set forth in *Askew v. Department of the Army*, 88 M.S.P.R. 674 (2001). There, I and my fellow Board members cautioned that "*Willis* should not be cited for broad propositions, nor should isolated statements from *Willis* be posited as general rules." *Id.* ¶ 12. "Rather, the unique facts of *Willis* limit its usefulness in determining whether a disclosure was protected whistleblowing." *Id.* The same goes for *Huffman*.

In my earlier written submission to the Committee, I also described the Board's recent decision in *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002). In *Rusin*, the Board stated that an appellant establishes Board jurisdiction over an IRA appeal by simply exhausting proceedings before the Office of Special Counsel and making non-frivolous allegations that he made a protected disclosure that was a contributing factor in a covered personnel action. Thus, *Rusin* permits the Board to reach the merits of a whistleblower appeal if the Board finds that the appellant has made non-frivolous allegations of a protected disclosure, personnel action, and contributing factor. *Rusin* is relevant to your question for the following reasons.

First, if it is arguable whether a disclosure is protected under *Horton*, *Willis* or *Huffman*, the Board can give the appellant the benefit of the doubt, find that he made a non-frivolous allegation that his disclosure was protected, take jurisdiction over the appeal, and decide the case on the merits. The Board's remand decision in *Huffman* is a good illustration of how *Rusin* can work. The evidence in *Huffman* made it debatable whether the appellant could have had a reasonable belief that he was making a disclosure protected by the WPA. In particular, the wording of his memoranda indicated that he may have only been speculating about alleged improprieties. *Huffman v. Office of Personnel Management*, 92 M.S.P.R. 429, ¶¶ 10 and 11 (2002). Nonetheless, the Board stated: "Any doubt or ambiguity as to whether the appellant made a non-frivolous allegation of a reasonable belief should be resolved in favor of affording the appellant a hearing [on the merits]." *Id.* ¶ 13 (emphasis added). The Board took note of the possibility that whistleblowers may understate their accusations if they are bringing sensitive matters to the attention of their supervisors or if the disclosures are "likely to engender a defensive or angry reaction from superiors." *Id.* Applying *Rusin* and common sense, the Board gave the appellant the benefit of the doubt and remanded for a hearing.

Second, assuming some of an appellant's disclosures are not protected under *Horton*, *Willis* or *Huffman*, the Board can, under *Rusin*, take jurisdiction over the entire case and give the appellant a decision on the merits if he makes a non-frivolous allegation that at least one of his disclosures was protected. For instance, in *Schmittling v. Department of the Army*, 92 M.S.P.R. 572 (2002), it appeared that one of the appellant's reports might not have been protected under the court's decision in *Huffman*. *Id.* ¶ 12 n.1. Using a *Rusin* analysis, however, the Board took jurisdiction over the appeal based on a finding that the appellant made non-frivolous allegations that at least two other disclosures were protected. *Id.* ¶¶ 12 and 28. The Board therefore remanded to the administrative judge with instructions to make additional findings on the agency's claim that it would have reassigned the appellant absent the presumed protected disclosures. *Id.* ¶ 31. On remand, the parties settled. Thus, despite *Huffman*, the case proceeded on the merits, and the parties were able to reach a settlement agreement.

Questions Submitted for the Record by
Senator Daniel K. Akaka
for the Nomination of Neil McPhie
to be a Member of the Merit Systems Protection Board (MSPB)

May 16, 2003

Question:

1. The Department of Homeland Security (DHS) has been granted flexibility to waive chapter 77 of Title 5 relating to federal employee appeals. As you know, the Federal Aviation Administration (FAA) was granted similar authority in 1996. However, Congress reinstated MSPB appeal rights in 2000 after FAA employees and managers expressed concern that the internal process was unfair and biased. Employees were also concerned over how the new system would interpret civil service laws since there was no requirement to follow MSPB case law.

Based on your knowledge and experience in employee rights and appeals, what are some best practices that should be included in <u>any</u> appeals system?

Answer:

Based on my knowledge and experience as an employment trial and appellate lawyer, any appeals system must provide both parties with the opportunity to be heard by a neutral, independent adjudicatory body in order to ensure that both parties are treated fairly. Any appeals system should provide the parties with the right to a hearing if jurisdiction is established and there are material facts in dispute. In order for the appeals process to be meaningful, the parties must be notified of their respective burdens and degrees of proof. The appellant must have the right choose a representative of his or her choice during that process. Any appeals system must also provide the appellant with due process. In the employment law context, this includes ensuring that a tenured public employee receives oral or written notice of the charges against him or her, an explanation of the employer's evidence, and a pre-termination opportunity to present the employee's side of the story. Finally, any appeals system should provide an effective mechanism for enforcing its decisions.

More specifically, if the Secretary of Homeland Security intends to establish a separate human resources system for DHS, I recommend that DHS and the Office of Personnel Management (OPM) confer closely with the Merit Systems Protection Board (MSPB) during the developmental phase of this system. Given the MSPB's extensive experience with adjudicating federal employment matters, the MSPB can provide invaluable advice and insights into how to resolve workplace disputes fairly and efficiently while protecting the due process rights of DHS employees. The MSPB has an important role to play in the development of a fair and effective appeals process for DHS. I recommend that these agencies begin consulting with one another as quickly as possible so that OPM and DHS can receive the full benefit of the MSPB's expertise before DHS finalizes its regulations.

Question:

2. One of the main reasons agencies give for seeking a waiver from chapter 77 of Title 5 is the length of time it takes to remove or discipline poor performers or those employees who engage in actionable misconduct.

- What factors contribute to the length of time it takes to discipline or remove these employees?
- Do you believe that the average time it takes for a matter to be resolved by the MSPB is reasonable?
- Has your time working at the MSPB generated any ideas, in addition to those expressed in the pre-hearing questionnaire, regarding suggestions for streamlining the appeals process without reducing employees' trust and confidence in the Board?

Answer:

With regard to first question, the MSPB and other organizations have conducted a number of studies on the factors that contribute to the length of time it takes to discipline and remove employees who are poor performers or who engage in misconduct. These studies indicate that that many managers lack the necessary knowledge, skills, and agency support necessary to timely discipline problem employees.

These studies are in line with my own experience working with state agencies. As the Director of the Virginia Department of Employment Dispute Resolution (EDR), I found that some managers lack basic management and communications training. Some mangers do not understand personnel rules and procedures or do not understand how and when to terminate or discipline employees. Others are hesitant to come off as "the Bad Guy" or are fearful that their decision will be grieved.

To reduce the length of time it takes to discipline problem employees, agencies must equip managers with effective management tools. Agencies should develop performance standards that are clearer and more measurable, and encourage managers to identify poor performers. Managers must ensure that employees are aware of the standards against which they will be measured and notify employees about agency disciplinary policies. Managers need training in performance management techniques and should give employees regular feedback on their performance. Agencies should design more effective approaches for helping poor performers improve their performance, even if poor performers are given less time in which to improve their performance. Ensuring that managers have the skills and organizational support they need to take appropriate disciplinary action is a major step toward reducing the length of time it takes to discipline and remove problem employees.

With regard to the second question, I believe that the MSPB does resolve the matters before it within a reasonable time. About 80 percent of all appeals filed with the MSPB are resolved at the MSPB regional or field office level when an initial decision issued by an administrative judge becomes final. Currently, these cases are completed in an average of 96 days. The remaining 20 percent of appeals filed with the MSPB typically are cases in which one or both of the parties petition the full Board for review of an initial decision. Of this 20 percent, the Board resolves one quarter within about 60 days. Although the average processing time for all petitions for review during Fiscal Year 2002 was 205 days, the MSPB's case processing time at both the regional/field office and Board level is still substantially better than the processing times of other agencies which deal with employment disputes. Thus, I believe that the MSPB resolves the matters before it within a reasonable time.

Nevertheless, based on approximately 27 years of experience as an employment lawyer and on my time working with the MSPB, I believe that there are opportunities for streamlining the appeals process at the Board without reducing the trust and confidence that federal managers, employees, and practitioners have in the Board. If confirmed, I would work with the Chairman to create a strike force to address the Board's current case backlog. Concurrently, I would propose that the Board periodically reevaluate its system to determine which factors contribute to case processing delays and help the Board think creatively about how to speed up resolving cases. Among other things, I would like to clarify whether the Board should make changes to its case tracking and docketing system and whether the administrative judges have the ability, training, and resources they need for effective case management. I am also a proponent of using alternative dispute resolution methods, such as mediation, to resolve cases more expeditiously. Additionally, I would consider proposing the adoption of a performance time standard for Board members. Through these and other means, I will actively work to streamline our appeals process.

Moreover, I believe we can reduce the Board's processing time while maintaining the trust and confidence of the parties before us. We cannot sacrifice fairness in our quest for timely resolutions. To this end, we must ensure that Board opinions remain of the quality that our reviewing court continues to leave the vast majority of Board decisions unchanged on appeal. Additionally, the Board should conduct periodic quality checks of how parties to Board appeals view their experiences with the Board. These surveys would help us determine whether the parties understood the proceeding and the outcome, and whether they were fairly treated during that process. By considering the Board's reversal rate and these "experiential" quality issues while working to streamline the appeals process, we can keep the Board's dual goals of timeliness and quality in balance.

Question:

3. A number of Federal Circuit Court interpretations of the Whistleblower Protection Act are inconsistent with congressional intent. A primary example is the meaning of the term 'any disclosure.' In 1994, the Committee on Governmental Affairs reaffirmed language from the 1988 Senate Committee report and explicitly stated that 'any' means 'any.'

> OSC, the Board and the Courts should not erect barriers to disclosure that will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures only to be protected if made for certain purposes, to certain employees or only if the employee is the first to raise the issue....The plain language of the WPA extends to retaliation for 'any' disclosure, regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. (S. Rept. No. 100-413, at 13 and S. Rept. No. 103-358, at 18.)

Nonetheless, the Federal Circuit has erected nearly every barrier listed in the Committee report.[1] As a member of the MSPB, how do you reconcile this contradiction?

Answer:

This is an important issue. I recognize Congress's commitment to ensuring that federal employee whistleblowers are protected from retaliation. I also understand that it has been a longstanding matter of congressional concern that the Federal Circuit reads the Whistleblower Protection Act (WPA) too narrowly and in a manner contrary to congressional intent.

As a general proposition, the Board is bound to follow the Federal Circuit's precedent. Given my limited experience with the WPA, I respectfully decline to speculate as to whether or why the Federal Circuit may have misinterpreted Congress's intent regarding the WPA. However, to the extent that there is a conflict between Congress's intent regarding the WPA and the Federal Circuit's interpretation of that Act, I will work hard, within existing parameters, to resolve this conflict as a Board member. I will seriously and conscientiously consider each and every appeal, including whistleblower appeals, which comes before me. Be assured that I will be vigilant to ensure that my decisions are consistent with the purposes of the WPA and will remain receptive to congressional guidance if Congress enacts legislation to amend the statute.

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[1]See *Horton v. Dept. of Navy*, 66 F. 3d 279 (Fed. Cir. 1995) (stating that disclosures to co-workers, the wrong-doer, or to a supervisor are not protected), *Willis v. Dept. of Agriculture*, 141 F. 3d 1139 (Fed. Cir. 1998) (stating that disclosures made in course of normal job duties are not protected), and *Meuwissen v. Dept. of Interior*, 234 F. 3d 9 (Fed. Cir. 2000) (stating that disclosures of information previously known are not protected).