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U.S. MERIT SYSTEMS PROTECTION BOARD

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

Phone: (202) 653-7105; Fax: (202) 653-7208; E-Mail: vc@mspb.gov

Vice Chairman

April 26, 2018

The Honorable Harold W. Gowdy
Chairman, Committee on Oversight and
Government Oversight
House of Representatives
Rayburn House Office Building, Room 2157
Washington, DC 20515

Dear Chairman Gowdy:

I am pleased to submit the enclosed legislative proposals and justifications to accompany legislation being drafted in the U.S. House of Representatives Committee on Oversight and Government Reform, to reauthorize the U.S. Merit Systems Protection Board (hereinafter MSPB or Board) for a period of five years. Reauthorization of the MSPB for a period of five years is an effective and efficient means of ensuring that the employment policies and procedures of the Federal government are consistent with statutorily mandated merit principles. The MSPB's most recent authorization was enacted in 2002 and expired on September 30, 2007. Pursuant to the Congressional Budget Act of 1974 as amended, 31 U.S.C. § 1110, the MSPB has submitted requests for reauthorization to the Congress several times since the last authorization expired.

Established by the Civil Service Reform Act of 1978 (CSRA) (Pub. L. No. 95-454) as a successor agency to the U.S. Civil Service Commission, the MSPB is an independent, quasi-judicial agency that adjudicates employee appeals of certain adverse personnel actions. The majority of the cases brought to the MSPB are appeals of agency adverse actions—that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Challenges to Office of Personnel Management determinations in retirement matters are also a major category of appeals that are adjudicated by the Board. Other types of actions that may be appealed to the MSPB include: performance based removals or reductions in grade, denials of within grade salary increases, reduction in force actions, OPM suitability determinations, denials of restoration or reemployment rights, individual rights of action appeals under the Whistleblower Protection Act and certain terminations of probationary employees. The MSPB also hears complaints of alleged violations of the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act.

In addition to adjudicating employee appeals, the MSPB's second statutory mission is to conduct studies of the Federal civil service and other merit systems in the Executive Branch to ensure that these systems are free from prohibited personnel practices. The MSPB conducts independent, nonpartisan, objective research that supports the merit system values, enhances human resources management, and promotes the public interest in a viable merit based civil service. Our studies and reports are based on objective, independent research using established scientific methods. The MSPB has traditionally issued four to six reports a year and publishes periodic newsletters annually.

Under the CSRA, the MSPB's enabling statute, authorizing appropriations for MSPB was permanent. Subsequently, under the Whistleblower Protection Act of 1989 (WPA), the MSPB's authorization was changed to a 6 year period that expired at the end of FY 1994. (Pub. L. No. 101-12, 13 Stat. 34, 5 U.S.C. 5509 note). In 1994, the MSPB's authorization was extended through FY 1997 (Pub. L. No. 103-424, 108 Stat. 4361), placing it on the same reauthorization schedule as that of the Office of Special Counsel. The MSPB was subsequently reauthorized for five years, through FY 2002 (Pub. L. No. 104 208, 110 Stat. 3009) and again through FY 2007 (Pub. L. No. 107-304, 116 Stat. 2364).

It is important that agencies and Federal employees have an avenue of appeal that provides for the fair and prompt review of adverse personnel actions. Reauthorization of the MSPB will reaffirm the Federal government's commitment to merit based employment and to an independent, fair, neutral, and timely process for review of adverse Federal agency employment actions. By safeguarding and monitoring the integrity of the nation's Federal employment systems, the MSPB plays a major role in assisting all Federal agencies to achieve their missions. While the MSPB has jurisdiction over Executive branch agencies and limited jurisdiction over state government agencies, its decisions are often used as guidance by Federal agencies in the legislative and judicial branches of government and by state government agencies.

The thirteen legislative proposals accompanying this letter are all designed to bring more efficiency to the MSPB adjudication process, better organization to its other statutory responsibilities and clarification to some current statutory ambiguities. Notably, I do not believe these proposals will cost American taxpayers one cent.

As you may know, the MSPB has lacked a quorum of Senate-confirmed members since January 8, 2017. Two nominees are now pending Senate consideration. I have not discussed the reauthorization process or the recommended legislative proposals with either of them.

I am available to discuss the agency's reauthorization request and the additional legislative proposals with you at your convenience. Your staff may contact Rosalyn L. Coates, Legislative Counsel, at (202) 254-4485.

Sincerely,

Mark A. Robbins

Mark A. Robbins
Vice Chairman*

Enclosures

MAR/rlc

* Because the office of Chairman currently is vacant, the functions of the chief executive and administrative officer of the Merit Systems Protection Board are vested in the Vice Chairman pursuant to 5 U.S.C. § 1203(b).

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Phone: (202) 653-7105; Fax: (202) 653-7208; E-Mail: vc@mspb.gov

Vice Chairman

April 26, 2018

The Honorable Mark Meadows
Chairman, Subcommittee on
Government Operations
House of Representatives
6460 Thomas P. O'Neill, Jr. Federal
Office Building
200 C Street SW
Washington, DC 20024

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MERIT SYSTEMS PROTECTION BOARD
JUSTIFICATIONS FOR LEGISLATIVE PROPOSALS

Relating To

REAUTHORIZATION IN 2018

The current authorization of the U.S. Merit Systems Protection Board (MSPB or Board) expired on September 30, 2007. In addition to reauthorization of appropriations, we are requesting the enactment of 13 legislative proposals. These proposals seek to: 1) exempt adjudicatory deliberations of the MSPB from the Government in the Sunshine Act of 1976; 2) permit reappointment of Board members to additional terms; 3) raise the threshold for appeal to the MSPB of budget-related furlough actions; 4) allow the MSPB to institute a modest filing fee; 5) grant the MSPB summary judgment authority while eliminating the guaranteed right to a hearing for every appellant who establishes MSPB jurisdiction; 6) amend the Fiscal Year 2017 National Defense Authorization Act to revoke the right to MSPB appeal of certain notations in an employee's Official Personnel File; 7) clarify the MSPB's authority to conduct surveys of other Federal agencies and employees; 8) overrule the U.S. Supreme Court's decisions in *Kloeckner v. Solis* and *Perry v. Merit Systems Protection Board* to restore and clarify judicial appeal rights in "mixed cases"; 9) eliminate the Special Panel (which is authorized to decide conflicting decisions of the MSPB and Equal Employment Opportunity Commission), and make other adjustments to the balance of "mixed cases" between these two agencies; 10) clarify the duties and responsibilities of the MSPB Chairman; 11) require all competitive-service employees, government-wide, to serve a 2-year probationary period; 12) amend the MSPB's judicial review statute to expressly revoke all-circuit review, which expired in December 2017; and 13) delete specific references to MSPB administrative judges from the Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017.

We believe that these proposals will enhance the effective and efficient operation of the agency and the Federal civil service.

1. EXEMPT THE MSPB FROM THE GOVERNMENT IN THE SUNSHINE ACT OF 1976

We propose exempting the MSPB from the Government in the Sunshine Act of 1976 (Sunshine Act), 5 U.S.C. § 552b. When adjudicating cases and exercising other statutory and regulatory authority, the responsibilities of the three members of the MSPB are analogous to those of an appellate court panel. In discharging their duties,

members of an appellate court panel typically read the record and the parties' briefs and then meet to discuss the merits of the appeal. Meeting privately to discuss the merits of the appeal affords all panel members an opportunity to present and freely debate competing viewpoints, and facilitates speedy resolution of the appeal. At the end of this process, the appellate panel publishes an opinion that reflects the results of its deliberations. The Sunshine Act, however, imposes constraints upon the Board that hamper the efficiency of its adjudicatory function because it does not allow the Board to function in the efficient manner employed by an appellate court.

The Sunshine Act's objective is to provide the public with information regarding a Federal agency's decision-making processes, to improve those processes, and to protect the rights of individuals and the ability of the government to carry out its responsibilities. *See* Randolph May, Reforming the Sunshine Act, 49 ADMIN. L. REV. 415, 421 (1997). The Sunshine Act requires Federal agencies headed by a collegial body, a majority of whose members are appointed by the President and confirmed by the Senate, to hold open meetings. *Id.* While Sunshine Act requirements do not apply to informal discussions between members of the MSPB, the difficulty of ensuring that an informal discussion does not evolve into a "meeting" covered by the Sunshine Act generally has led the Board members to be wary of engaging in informal discussions regarding the adjudication of specific cases and other responsibilities. Accordingly, we propose that joint deliberations conducted by the MSPB members be excluded from the definition of a "meeting" under the Sunshine Act.

The Sunshine Act defines the term "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e)."[1] The Act permits agencies to hold meetings that are closed to the public when those meetings specifically concern the agency's disposition of a particular case of formal agency adjudication or determination on the record after opportunity for a hearing. *See* 5 U.S.C. § 552b(c)(10). Pursuant to this authority, the three-member

[1] Subsection (d) of the Sunshine Act sets forth the process for a vote of the majority of the agency membership to close portions of a meeting as permitted by Subsection (c). Subsection (e) sets forth the public notice requirements regarding whether meetings will be open or closed to the public.

Board holds closed meetings from time to time to deliberate on certain matters under adjudication.

Given concerns that the line between informal discussions and "meetings" covered by the Sunshine Act is often difficult to discern, the Board members typically avoid meeting to discuss any specific petitions for review. Instead, the Board members circulate various draft opinions until a final resolution is reached among all sitting members of the Board.[2] This inefficient process slows the work of the Board and unnecessarily stifles free and thoughtful discussion and interaction by the Board members.

For the reasons discussed above, the Board requests that the definition of "meeting" for Sunshine Act purposes be amended to exclude joint deliberations of MSPB members. Alternatively, if the Committee would prefer not to alter the definition of "meeting", the Board requests a simple blanket exemption from Sunshine Act requirements when it exercises its statutory function.

2. PERMIT REAPPOINTMENT OF BOARD MEMBERS TO ADDITIONAL TERMS

We propose amending the statute providing for appointment of Board members to remove the limitation on such members serving more than one term. Under 5 U.S.C. § 1202(c), "[A]ny member appointed for a 7-year term may not be reappointed to any following term ..." We propose that this text be stricken from the statute as it serves no significant public policy interest. The legislative history of the Civil Service Reform Act of 1978 (CSRA), which established the MSPB, is silent on the justification or purpose for this limitation. Importantly, there is no similar limitation on the reappointment of the Director of the Office of Personnel Management (OPM) (*see* 5 U.S.C. § 1102(a)), or Special Counsel as head of the Office of Special Counsel—an agency that also was established under the CSRA (*see* 5 U.S.C. § 1211(b)). Similarly,

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[2] This process of "sequential consideration" was specifically approved in the Conference Report. *See* Joint Explanatory Statement of the Committee of Conference, 94th Cong., 2d Sess. 9-10, *reprinted in* 1976 U.S.C.C.A.N. 2245, 2247. "... [M]embers shall not jointly conduct or dispose of agency business in a meeting other than in accordance with § 552b. The prohibition does not prevent agency members from considering individually business that is circulated to them sequentially in writing." (emphasis added). However experience has shown this process to be highly inefficient.

there is no such limitation on reappointing members of the Federal Labor Relations Authority (*see* 5 U.S.C. § 7107(c)), the Director of the Office of Government Ethics (*see* 5 U.S.C. Appendix 4, § 402), or the Commissioners of the Equal Employment Opportunity Commission (*see* 42 U.S.C. § 200e-4(a)).

3. RAISE THE THRESHOLD FOR DEEMING FURLOUGHS APPEALABLE ADVERSE ACTIONS

We propose revising 5 U.S.C. § 7512(5)—which currently provides MSPB adverse action appeal rights for "a furlough of 30 days or less"—to provide adverse action appeal rights for "a furlough of more than 14 days but less than 31 days." This change would raise the threshold for appealing a furlough action to the MSPB. Currently, a furlough of even a single day can be appealed. We believe that raising the threshold amount of days would more appropriately reflect Congress's intention that only serious adverse actions be appealed to the MSPB. A furlough of a single day, or even a handful of days should not be considered a serious adverse action. Amending the definition as we propose would parallel the threshold for disciplinary suspensions, which may be appealed only if they exceed 14 days. 5 U.S.C. § 7512(2).

In the alternative, or in addition, we propose limiting MSPB appeal rights to furloughs imposed for reasons other than Congressional budget action or inaction. This would severely curtail the filing of *pro forma*, plainly meritless appeals filed due to sequestration or a lapse in appropriations.

Eliminating short-term and budget-related furlough appeals would enhance the MSPB's efficiency by providing additional time to decide its other cases in the event of future mass furloughs. It also would result in a significant cost savings by reducing the need to hire additional attorneys at Federal agencies to litigate—and at the MSPB to adjudicate—the furlough appeals, which exceeded 33,500 following the FY 2013 agency sequestration furlough actions. Over the course of the following 4 years, the MSPB found some merit in fewer than 100 of these filings.

4. INSTITUTE A FILING FEE

We propose instituting a modest filing fee—not to exceed that imposed by Federal courts—for appellants who file MSPB appeals. The fee would be refunded to any appellant who is a prevailing party, as determined under the same standards applied by the Board for the award of attorney fees. *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 426 (1980). In addition, the fee likely would be subject to various exceptions, such as for

indigent appellants or cases in which no filing fee may be assessed for judicial appeals (e.g., appeals filed under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*).

Currently, no fee is required to file at the MSPB. While the MSPB receives many appeals that are within its jurisdiction, the MSPB also receives numerous appeals each year that either are clearly outside its jurisdiction, frivolous, or vexatious. We believe that imposing a modest fee will reduce the number of plainly meritless appeals filed and permit the MSPB to concentrate its resources more fully on potentially meritorious cases.

5. PROVIDE SUMMARY JUDGMENT AUTHORITY AND LIMIT HEARING ENTITLEMENT

We recommend amending the Board's governing statute, 5 U.S.C. § 7701(a), to expressly provide summary judgment authority for appeals to the MSPB and to limit appellants' entitlement to a formal hearing. The statute provides: "An appellant shall have the right to a hearing for which a transcript will be kept." In *Crispin v. Department of Commerce*, 732 F. 2d 919 (Fed. Cir. 1984), the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) interpreted this provision to mean that the Board does not have authority to grant summary judgment. The court relied heavily on the CSRA's legislative history in reaching this conclusion. The conference committee report rejected the Senate version of the bill, which would have granted summary judgment authority to the Board, and adopted the House version, which did not.[3]

We believe, however, that the Board has developed, over a period of almost 40 years, a reputation for adjudicating appeals in a fair and impartial manner. The Board has instituted numerous mechanisms, formal and informal, which serve to ensure that all potential appellants have an opportunity to present an appeal for adjudication. The Board's role as a neutral adjudicator of employment disputes compels it to take all reasonable measures to ensure that all parties are afforded a fair opportunity to fully participate in the adjudicatory process. Providing summary judgment authority in appeals in which no issue of material fact is presented would improve the efficiency of

[3] H.R. Rept. No. 95-1717, 95th Cong. 2d Sess. 137 (1978), U.S. Code Cong. & Admin. News 1978, pp. 2723, 2871.

the Board's decision making by saving the time involved to hold a hearing when no evidentiary hearing is in fact needed.

We note that other Federal adjudicatory agencies, such as the Equal Employment Opportunity Commission, have the authority to issue summary judgments. Moreover, the MSPB is not the final word on serious adverse actions; appellants may seek judicial review of the MSPB's decisions in appropriate Federal courts.

6. REPEAL MSPB REVIEW AUTHORITY OVER NOTATIONS IN OFFICIAL PERSONNEL FILES

Under 5 U.S.C. § 3322, when a Federal employee who is the subject of a personnel investigation resigns prior to the investigation being resolved, the head of the employing Federal agency is required to make a permanent notation in the (now former) employee's official personnel file if there is an adverse finding resulting from the investigation. The (former) employee is entitled to appeal to the MSPB under 5 U.S.C. § 7701 the decision to make this notation.

We propose that this appeal right be repealed for several reasons. First, the basis for the appeal right is unclear. The statute provides that the former employee may appeal the *decision* of the agency head to place the notation in the former employee's official personnel file. In fact, the statute does not grant any discretion or decision-making authority with the agency head as to whether or not to place the notation in the personnel file. The statute *directs* the agency head to take such action.

Second, the standard of the Board's review is unclear. Since the agency head must place a notation in the former employee's file, would the MSPB review the substance of the notation (for example, a notation that states the agency issued a proposed removal for a positive drug test) to determine whether it accurately reflects the findings of the investigation? By what standard would either the former employee or the agency prevail?

In short, the appeal right granted under this provision is unworkable and should be repealed.

7. CLARIFY THE BOARD'S AUTHORITY TO COLLECT INFORMATION INCIDENT TO ITS STUDIES FUNCTION

This proposal concerns the Board's statutory mission to conduct special studies relating to the civil service and to other merit systems in the executive branch. For decades, the

Board has interpreted the existing statutory provision, 5 U.S.C. § 1204(e)(3), as conferring authority on the MSPB to survey Federal employees. In planning for its most recent major surveys in 2016 and 2010, however, some agency officials seemed confused about the MSPB's authority and were hesitant to coordinate activities as necessary to facilitate participation in the surveys by their employees. Surveys are one of several research tools that the MSPB uses to help it assess the health of the merit systems and gauge the prevalence of prohibited personnel practices. Clarifying the statute to give the MSPB express authority to survey Federal employees would promote smooth administration of future MSPB surveys.

We propose the following amendment to 5 U.S.C. § 1204(e)(3), striking the word where indicated and adding the underscored words and punctuation:

> In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management, ~~and~~may require additional reports from other agencies as needed, and may conduct surveys of Federal employees.

8. OVERRULE *PERRY* AND *KLOECKNER* TO REINSTATE THE PRIOR RULE REGARDING JUDICIAL REVIEW OF MSPB MIXED CASES

We recommend proposing legislation overruling the recent U.S. Supreme Court's decisions in *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017), and *Kloeckner v. Solis*, 568 U.S. 41 (2012), to restore the Federal Circuit's authority over mixed cases dismissed by MSPB on jurisdictional and procedural grounds. Mixed cases are those involving both an action appealable to the Board—such as a removal, a suspension of more than 14 days, or a reduction in grade or pay—and a claim of prohibited discrimination. Thus, issues of civil service law and prohibited discrimination need to be resolved in those cases. Under 5 U.S.C. § 7703 (MSPB's judicial appeal statute) mixed cases "shall be filed" with the U.S. district courts, while non-mixed cases (no allegations of discrimination being raised) "shall be filed" with the Federal Circuit.

For decades, the MSPB and the Federal Circuit interpreted 5 U.S.C. § 7703 as requiring mixed cases the Board *decided on the merits* of the action appealable to the Board—and thereby administratively exhausted—be reviewed by the U.S. district courts. Alternatively, mixed cases that the Board *dismissed on jurisdictional and procedural grounds* would be reviewed by the Federal Circuit. However, in 2012, the Supreme Court cast doubt on this distinction in *Kloeckner*, holding that mixed cases *dismissed on*

procedural grounds would seek review in the U.S. district courts. Subsequently, both the Federal Circuit and the D.C. Circuit held that mixed cases *dismissed for lack of MSPB jurisdiction* were not truly mixed because they did not satisfy the statutory requirement that the employee or applicant "has been affected by an action ... [which he] may appeal to the Merit Systems Protection Board." These courts thus held that mixed cases *dismissed on jurisdictional grounds* should continue to seek review in the Federal Circuit. *Conforto v. Merit Systems Protection Board*, 713 F.3d 1111 (Fed. Cir. 2013); *Perry v. Merit Systems Protection Board*, 829 F.3d 760 (2016). In 2017, however, the Supreme Court reversed the D.C. Circuit's decision in *Perry*, holding that mixed cases dismissed for any reason—regardless of the MSPB's findings regarding jurisdiction over the case—should be reviewed by the U.S. district courts. In our view, this ruling is a plainly erroneous reading of the statute, one that fails to give effect to the requirement that the action complained of is one that the appellant "may appeal" to the MSPB.

Restoring the Federal Circuit's authority over these cases would promote consistency to the Board's jurisdictional and procedural rulings. Moreover, allowing cases dismissed by MSPB on jurisdictional or procedural grounds to proceed directly to trial *de novo* before a district court arguably evades the purpose of administrative exhaustion, as the Board would not have addressed the merits of the appealable action. Finally, although the Supreme Court appeared to believe that its decisions in *Kloeckner* and *Perry* would simplify appeals from MSPB decisions, we believe the opposite is true. MSPB cases frequently involve multiple types of claims with separate and sometimes mutually exclusive appeal rights. As long as mixed cases dismissed on jurisdictional or procedural grounds were appealed to the Federal Circuit, the convoluted nature of the judicial review scheme could be largely minimized, because the Federal Circuit is the appropriate venue for review of USERRA, whistleblower retaliation, and other claims over which the district court lacks jurisdiction. But under *Perry* and, to a lesser extent, *Kloeckner*, an appellant whose case includes discrimination claims may be faced with a thicket of contradictory appeal rights if his case raises types of claims over which the district court lacks jurisdiction. For these reasons, we recommend revising 5 U.S.C. §§ 7702 and 7703 to expressly state that mixed cases that are dismissed on jurisdictional or procedural grounds are to seek review with the Federal Circuit.

9. ALTER MIXED CASE SCHEME

Mixed cases are those involving both a major adverse action—such as a removal, a suspension of more than 14 days, or a reduction in grade or pay—and a claim of prohibited discrimination. The process by which mixed cases are adjudicated can be

both lengthy and procedurally complex. There are a number of possible reforms that could make the mixed-case process simpler and more efficient.

At the initial stage, an employee may choose to file either an appeal with MSPB or an equal employment opportunity (EEO) complaint with the employing agency. If the employee chooses to file an EEO complaint, the agency investigates and issues a Final Agency Decision (FAD). If the employee is dissatisfied with the FAD, he can then file an MSPB appeal. With either option, the employee retains the right to seek further review of the Board's decision before the EEOC and/or a U.S. district court. Having all mixed cases begin with an MSPB appeal could streamline the process at the early stages, avoid duplication of process, and also could reduce confusion among employees.

Currently, an employee who is dissatisfied with MSPB's decision in a mixed case may seek review of that decision before EEOC. If EEOC does not concur in MSPB's decision, it issues a new decision and refers the case back to MSPB. MSPB then must either concur in EEOC's decision or certify the case to a Special Panel consisting of one member each of EEOC and MSPB, as well as a chairman appointed by the President. The Special Panel then issues a decision and refers the case back to MSPB to carry out the decision. One possible reform would be to eliminate all further administrative review of MSPB final decisions in mixed cases; the employee would still have the option of seeking a *de novo* adjudication of his claim in district court. Another possible reform would be to eliminate the Special Panel. Rather than referring the matter to the Special Panel, MSPB's decision following referral from EEOC would become the final administrative decision in the case, subject to judicial review.

In mixed cases, MSPB is authorized to adjudicate a discrimination claim only if it has jurisdiction over the underlying personnel action. In cases in which an adverse action appealable to the Board and prohibited discrimination are alleged, an MSPB administrative judge may fully develop the record on both the civil service law issues and the discrimination claim. Under current law, if the judge dismisses the appeal upon finding that the employee did not prove that the personnel action was within the Board's jurisdiction, MSPB is unable to adjudicate the discrimination claim. To resolve the discrimination claim, the employee would pursue it anew before the EEOC. Congress could authorize MSPB to adjudicate a discrimination claim when a nonfrivolous allegation of an adverse action appealable to the Board has been made and MSPB finds that such an underlying personnel action was beyond its jurisdiction. This could result in a more efficient administrative process for appellants, particularly if MSPB administrative judges are given summary judgment authority.

Employees have the ability to seek judicial review of unfavorable administrative decisions involving claims of discrimination, regardless of whether the underlying personnel action is appealable to MSPB. Generally, employing agencies do not have the ability to seek such judicial review. The Director of OPM may seek review of an MSPB decision with the Federal Circuit if the Director determines that the decision would have a "substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d). Congress could create a comparable process by authorizing an official, such as the Director of OPM or the Solicitor General, to seek judicial review of an administrative decision that has a substantial impact in discrimination law.

10. TECHNICAL CORRECTIONS - AUTHORITIES OF THE CHAIRMAN OF THE BOARD

This proposal concerns three provisions of the Board's authorizing statute that relate to the MSPB Chairman's powers and duties. Pursuant to 5 U.S.C. § 1203, the MSPB Chairman serves as the chief executive and administrative officer of the agency. As such, the incumbent of this position is vested with the authority to make all decisions relating to the administration and management of the agency's operations. For example, Section 1204(j) specifies that the Chairman has the authority to exercise independent hiring authority on behalf of the Board.

Sections 1204(g), 1204(k), and 1204(*l*) appear to bestow such management authority upon the Board members collectively, rather than solely upon the Chairman. Section 1204(g) reads: "The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board." Section 1204(k) reads: "The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31." Section 1204(*l*) reads: "The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title." These provisions involve administrative responsibilities that are within the sole purview of the Chairman, as chief executive and administrative officer of the agency pursuant to 5 U.S.C. § 1203. Thus, the amendments contained in the legislative proposal, which substitute the words "the Chairman of the Board" for "the Board," seek to correct and clarify any ambiguity that may exist in the Chairman's authority as described in Section 1204.

11. EXTEND TWO-YEAR PROBATIONARY PERIOD TO ALL COMPETITIVE-SERVICE EMPLOYEES

We propose an amendment to 5 U.S.C. § 3321 to establish that the length of a probationary period for all appointments in the competitive service and initial appointments as a supervisor or manager shall not be less than 2 years. We also propose that 5 U.S.C. § 3393(d) be amended to establish a 2-year probationary period for new appointees to the Senior Executive Service.

The Government Accountability Office (GAO) recommended in a report published in 2015 that OPM and possibly Congress consider whether longer probationary periods might be appropriate for some employment positions in the Federal government.[4] Additionally, several bills have been introduced in Congress that would increase the probationary period for employees, managers and supervisors as well as new appointees to the Senior Executive Service to 2 years.

We support an increase in the probationary period. The current 1-year period does not provide adequate time for the employee to learn and demonstrate requisite proficiency in skills necessary to successfully fulfill the responsibilities of his or her position. Likewise, this time period often does not give the supervisor enough time to assess the employee's proficiency.

This request duplicates provisions of the EQUALS Act (H.R. 4182) passed by the House on November 30, 2017, and currently pending consideration in the Senate Committee on Homeland Security and Governmental Affairs.

12. AMEND JUDICIAL REVIEW STATUTE TO REMOVE PROVISIONS RELATING TO ALL-CIRCUIT REVIEW

We propose amending the MSPB's judicial review statute, 5 U.S.C. § 7703, to delete the provision authorizing appeal of whistleblower-related MSPB decisions outside the Federal Circuit. The Whistleblower Protection Enhancement Act of 2012 (WPEA) inserted this provision; previously, all non-mixed cases—that is, cases not including discrimination claims—were appealed to the Federal Circuit. The WPEA added a

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[4] GAO, *Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, GAO-15-191 (Mar. 9, 2015), pp. 30-31, cited in *Issues of Merit*, Spring 2015, p. 5.

temporary right to appeal whistleblower retaliation cases to other Federal circuit courts. This "all-circuit review" expired on December 27, 2017, and has not been renewed in any act of Congress. We recommend that it not be renewed or reenacted because funneling all whistleblower retaliation appeals to the Federal Circuit—as had been the case for decades—promotes consistency and certainty in case law applicable to Federal whistleblowers. This proposal would require deleting 5 U.S.C. § 7703(b)(1)(B) in its entirety and deleting the references to this provision from 5 U.S.C. § 7703(b)(1)(A) and 5 U.S.C. § 7703(d)(2).

13. AMEND VA ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017 TO REMOVE REFERENCES TO ADMINISTRATIVE JUDGES

We propose amending certain provisions of the VA Accountability and Whistleblower Protection Act of 2017, Public Law No. 115-41 (June 23, 2017), to remove the requirement that the MSPB refer cases appealed under 38 U.S.C. § 714 to an MSPB administrative judge pursuant to 5 U.S.C. § 7701(b)(1). We believe this provision contravenes the discretion granted to the Board in section 7701(b)(1) to assign cases internally in the manner it believes will best carry out its adjudicatory mission.

Section 7701(b)(1) grants the Board discretion to hear any case appealed to it *or* to refer it to an administrative law judge or other employee of the Board. In practice, the Board refers most cases for review and initial decision by Board employees known as "administrative judges" (who are attorneys, but not administrative law judges appointed under 5 U.S.C. § 3105). This practice is discretionary, not mandatory. The Board's regulations, paralleling section 7701(b)(1), provide that the Board may designate an administrative judge or other Board employee to hear cases, depending on the circumstances. 5 C.F.R. §§ 1200.3(c), 1201.4(a). Because this practice is discretionary, the Board also may choose not to exercise its discretion and to hear a case directly itself. The VA Accountability and Whistleblower Protection Act of 2017 removes this discretion for appeals filed under 38 U.S.C. § 714, requiring the Board to refer the appeals to an administrative judge.

We recommend striking this language as contravening the discretion granted the Board in its governing statute, and making housekeeping edits as necessary to related provisions.