

Written Testimony of John M. Palguta

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Prepared for

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Subcommittee on Government Operations**

Hearing Entitled

“Effects of Vacancies at the Merit Systems Protection Board”

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Chairman Connolly, Ranking Member Meadows, Members of the Subcommittee, thank you for the opportunity to appear before you today. I am John Palguta and from December 1979 to December 2001 I had the privilege of working in the Office of Policy and Evaluation (OPE) for the U.S. Merit Systems Protection Board (MSPB). For the last four and one half years of my tenure with MPSB, I served as the Director of OPE and was a career member of the federal senior executive service.

Prior to joining the MSPB, I held various positions in the U.S. Office of Personnel Management and, prior to its abolishment under the Civil Service Reform Act of 1978, I worked in the U.S. Civil Service Commission beginning in 1970. Upon my retirement from the federal government in December 2001, I joined the non-partisan, non-profit Partnership for Public Service as the Vice President for Policy, where I worked for 14 years until February 2016. I am currently an Adjunct Professor for the McCourt School of Public Policy at Georgetown University.

First of all, I want to commend the Subcommittee for calling this hearing to focus on a relatively small federal agency, but one that has a disproportionately large and important role to play in ensuring the presence of a strong and vibrant federal workforce. I chose to spend 22 years of my federal career at the independent, bipartisan MSPB because I believe in the importance of its mission and the beneficial impact it can and should have on effective workforce management and government operations throughout the executive branch. I have been asked by the Subcommittee to share my views on three issues currently threatening the ability of the MSPB to carry out that mission.

1. What has been the impact on the MSPB mission given that two of the three Board Member positions have been vacant for over two years?

In short, the impact of the extended vacancies has been devastating. MSPB has an extremely important role to play in protecting and enhancing a merit-based civil service system designed to provide the executive branch with a highly qualified and motivated workforce. The current situation has substantially undermined MSPB's ability to fulfill its statutory mandate to provide due process for federal employees and to protect the public interest in a civil service free of prohibited personnel practices, including actions taken for discriminatory or partisan political purposes.

A little background on why MSPB was created may be helpful in understanding its role and importance. From 1883 to 1978, the central personnel authority in the executive branch was the U.S. Civil Service Commission. The Commission was created in reaction to the well documented excesses and corruption of the spoils system. Its mandate was to

establish a civil service system wherein hiring would be based on the relative qualifications of the candidates without regard to their partisan political affiliation. Further, the resultant civil service workforce was to be protected from coercion for partisan political purposes.

The Civil Service Commission operated effectively for many years but as the demands upon government grew and its many missions became more complex and specialized, the approach to acquiring and managing a highly skilled federal workforce needed updating. In the late 1970's, it was proposed that the deliberative but somewhat slow-moving bipartisan Commission be replaced by a new central personnel agency that would be more responsive to the management needs of government. That new agency, the Office of Personnel Management, would be headed by a single Senate-confirmed Director, appointed by and serving at the pleasure of the President, with a four-year, renewable term.

In the debates leading up to the Civil Service Reform Act of 1978, good-government advocates expressed concern that the design of the then proposed OPM posed a danger. The concern was that a future Presidential Administration might be more concerned with ensuring that career federal employees are responsive to political goals rather than the nonpartisan accomplishment of agency missions, and that a politically responsive OPM might be acquiescent. That concern was addressed by the establishment of the MSPB as a successor agency to the Civil Service Commission, and as a safeguard against any potential for abuse.

The MSPB was given the same nonpartisan structure as the Commission, i.e. three presidentially-appointed, Senate-confirmed members, with no more than two from the same political party. Moreover, to ensure the independence of the Board, the law provided for 7 year, non-renewable terms for Board member and specified that those members can be removed only for cause.

A major part of MSPB's mission is to serve as a quasi-judicial agency that hears and adjudicates appeals from federal employees facing specified adverse personnel actions. This is to ensure that federal employees are removed or disciplined only for cause. Removal for partisan political reasons or because an employee blew the whistle on fraud, waste, or mismanagement, for example, is prohibited and can be overturned by the Board. The appeals process established by MSPB is basically a two-step process for most appeals. There is an initial appeal that is heard by an administrative judge who issues a decision that, if uncontested, is final. However, if the employee or the agency involved disagrees with that initial decision, they may file a petition for review (PFR) with the Board Members.

As an additional check and balance on OPM, the 1978 Reform Act assigned MSPB the responsibility to provide oversight of OPM. The Board is thus charged with periodic review of OPM rules and regulations and the authority to declare invalid any that might cause the commission of a prohibited personnel practice. The Board also has responsibility to review other OPM “significant actions” and it provides an annual report to Congress and the President with an analysis of whether those actions are in accord with merit system principles.

Finally, MSPB is also charged with conducting periodic studies of the civil service and reporting to Congress and the President as to whether the public interest in a civil service free of prohibited personnel practices is being maintained. In fulfilling this mandate, the MSPB has issued ground-breaking studies on such issues as the extent of sexual harassment in government, the degree to which there are reprisals against whistleblowers, the effects of discrimination based on gender, race, or sexual orientation, and problems with the federal hiring system. Many of MSPB’s recommendations for improvement in these areas have been implemented.

For the first 38 years of its operation, MSPB compiled a commendable record of mission accomplishment, sometimes under difficult circumstances. For the last two years, however, the lack of a quorum due to the two vacant Board positions has severely undermined that mission. More specifically,

- a. There are now over 2,000 petitions for review for which decisions cannot be issued since at least two Board members must concur. This backlog, once new Board members are confirmed, could easily take up to two years to resolve and new PFR’s will continue to be filed in the meantime. That means some appellants may have to wait several years to obtain justice.
- b. No reports of MSPB studies or OPM oversight activities have been issued in the last two years and it may take an extended period of time once new Board members are confirmed for them to have time to review and approve the completed reports and to provide direction for future studies.
- c. A single Board member may grant a 45 calendar day stay of action requested by the Special Counsel (for example, to provide time for the Special Counsel to investigate whether a proposed personnel action is reprisal for whistleblowing), and may provide an requested extension of that stay. However, in the event there are no Board members after March 1, 2019, no stays can be granted.

- d. Over the last two years, due to a lack of a quorum, MSPB has been unable to issue new regulations amending its internal operating procedures to address changes in the law. So, changes in its regulations that MSPB should make to accommodate changes in the law for employee appeals from the Department of Veterans Affairs, for example, have not yet been made.

2. Is the independence of MSPB in question given that its sole Member has been appointed to serve concurrently as General Counsel of the Office of Personnel Management?

At a minimum, there is a clear appearance of a conflict of interest when the Acting Chairman of the MSPB is concurrently serving as the General Counsel of OPM. This conflict is due to the nature of MSPB's unique role regarding OPM, including the Board's statutory oversight authority over OPM.

There are occasions when MSPB and OPM may disagree on an issue before them, for example, the validity of an OPM rule or regulation or the soundness of an OPM decision brought before MSPB on appeal. My understanding is that Mark Robbins, the current Acting MSPB Chairman and OPM General Counsel, is recused and otherwise insulated from any involvement in the resolution of any issues jointly involving OPM and MSPB. Nonetheless, an outside party may reasonably question, for example, whether there is subtle, even if unintentional, influence being exerted upon MSPB staff members involved in reviewing or judging an OPM action when the head of their agency, the MSPB, is also OPM's General Counsel.

It's doubtful that Congress, in creating OPM and MSPB in 1978, ever envisioned such a scenario. On an historical note, it's informative to consider that the 1883 Civil Service Act (aka the Pendleton Act) which created the predecessor to the MSPB, the Civil Service Commission, made it clear that "...Commissioners shall hold no other official place under the United States." Similar language was used in the 1978 Civil Service Reform Act with one change. While the current law does stipulate that "No member of the Board may hold another office or position in the government..." it goes on to state "...except as otherwise provided by law or at the direction of the President." It is safe to assume, however, that the authors of this language did not anticipate that a future President would direct the sole remaining MSPB member to concurrently serve as OPM's General Counsel.

3. The impact on the continuing operations on MSPB if there are no Members left when the term of the sole remaining Member expires on March 1, 2019?

There are competing opinions and legal analyses regarding the impact on MSPB Operations in the event that the term of the sole remaining Member expires without any Senate-confirmed replacements. I'll leave it for the legal scholars to determine exactly how much legal authority, if any, remains for MSPB to continue operation under non-Senate confirmed leadership.

What is clear, however, is that with no Members left, the MSPB would be in even worse shape than it is currently. MSPB will still be unable to act on the more than 2,000 pending petitions for review and it will still be unable to issue any reports from its Office of Policy and Evaluation. Moreover, MSPB will be unable to issue any stays of adverse personnel action – even for an initial 45 days – brought to it by the Office of Special Counsel on behalf, for example, of an agency whistleblower. It is also difficult to believe that there will be any positive impact on the engagement and retention of career MSPB staff given the uncertainty of their leadership.

Today, February 28, 2019 is the last day of the Acting MSPB Chairman's term. It is also worth noting that nominees for two of the vacant Board positions were approved on a bipartisan vote by the Senate Homeland Security and Governmental Affairs Committee on February 13 of this year. The Chairman of that senate committee, however, has indicated that he will not submit the nominees for full Senate confirmation until there is a third nominee. In my opinion, there is no logical reason to delay confirmation of the two nominees who are ready for a vote. One nominee is a Democrat and one is a Republican. Presumably, a third nominee will also be a Republican on the bipartisan MSPB. Delaying nomination to ensure the desired political balance is achieved would be understandable if it made a difference in the operation of the agency. However, in the case of the MSPB, it does not make a difference. Two members independently vote on matters before them and, if they agree, the matter is resolved. If they disagree, the matter simply awaits a third member to break the tie.

In conclusion, it is clearly in the public interest to have a fully functional MSPB. The best possible course of action is for the Senate and the Administration to come to agreement on three qualified nominees for the MSPB, and to have those nominees confirmed as soon as possible. Absent a third nominee for the moment, the two nominees who are awaiting final confirmation should be forwarded to the full Senate without delay. Finally, if tomorrow, March 1, dawns with all three MSPB Board positions vacant, then every effort needs to be made to determine how best to enable this vitally important agency to continue operating at whatever level is possible under the law.