

Subcommittee on Government Operations
Committee on Oversight and Reform
U.S. House of Representatives

Hearing on the U.S. Merit Systems Protection Board

Prepared Statement of
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Chairman Connolly, Ranking Member Meadows, distinguished members of the Subcommittee:

My name is Mark A. Robbins and I currently serve as the Acting Chairman of the U.S. Merit Systems Protection Board. Thank you for the invitation. I welcome the opportunity to present to you the current status of the MSPB and to report on its activities.

The year 2019 marks the 40th anniversary of the MSPB opening its doors in January 1979. While that would normally be an occasion for celebration, tomorrow the Board may face a condition unprecedented in its 40-year history: all three Board seats will become vacant when my term expires. The MSPB has not had to fill three seats simultaneously since the first Board was seated in 1979, and even then the incumbents were drawn from the Civil Service Commission, which was replaced in part by MSPB. Indeed, the Civil Service Reform Act of 1978, which established the Board, structured the Board's makeup precisely to prevent that possibility. The statute set seven-year terms (with a one-year extension possible) for the three Board seats to begin and end on staggered dates. Thus, under ordinary conditions, only one vacancy would arise at a time. The Board has only lacked a quorum of two members once before, a period in 2003 that only lasted four and a half weeks.

That the Board currently has two vacancies and one impending results from a number of factors in combination. The terms of the other two most recent Board members expired in 2015 and 2017. Counting from the first vacancy in 2015 to the impending vacancy of my own seat covers two

administrations and three Congressional terms. That we are where we are today is attributable to the timing of the seats' turnover; the time necessary for the proper background investigation of a Presidentially-nominated, Senate-approved nominee; the Senate's legislative calendar; and a host of other unfortunate circumstances. It is not an issue that can be laid at any one doorstep.

Regardless of the causes, the impact of lacking a quorum over the past two years has been deeply felt at the MSPB. The Board has the responsibility to protect the over 2 million Federal workers whose employment is subject to national laws protecting whistleblower disclosures and the hiring of veterans; Federal practices that assure employment based on merit; rules that require deficient employees to show improvement in order to continue in their positions; or to Titles 5, 38 and 39 of the United States Code, which cover various aspects of federal employment law and benefits. The MSPB also reviews the cases of Federal civil service retirees who question their annuity or disability payments. In short, Federal employees past and present are protected in law by the Board's oversight of the Merit Systems Principles and Prohibited Personnel Practices—guidance over each Federal agency's personnel actions.

Not all of this work came screeching to a halt when we lost our quorum in January 2017. Authority delegated by the Board when it had a quorum allowed administrative judges to continue hearing cases even after the loss of a quorum at the Board level. During the past two years, our eight regional and field offices have continued to receive cases and conduct hearings, and have issued over 11,000 initial decisions. Under the MSPB's regulatory framework, employees who wish to appeal the decision of an administrative judge have two avenues. Should they choose, an appellant can take a case directly to the U.S. Court of Appeals for the Federal Circuit, or in the case of certain whistleblower appeals, to any U.S. Court of Appeals in the country. In addition, an appellant who has raised discrimination claims can take his or her case to a Federal District Court. However, court appeals can be costly, and most appellants are not represented in their claims by counsel. Thus, most appellants choose the second avenue, which is

to file an administrative petition for review to be decided by the Presidentially-nominated, Senate-confirmed Board. In late 2016, when the possibility of losing a quorum became apparent, MSPB staff added notices to all pending and newly-received appeals that a final decision on a petition for review with the Board might take longer than the usual timeframe. Since that time, MSPB staff have continued to reiterate to all appellants the right to pursue a decision directly with the courts. Nevertheless, petitions for review to the Board over the past two years have not deviated from historic trends, and now number over 1,900. Those appeals of regional decisions have been filed, reviewed by our attorney staff, and had decisions drafted. Until recently, I have continued to review those draft decisions and cast my own vote on them. Yet throughout this timeframe, the Board has been unable to issue any decisions on petitions for review due to the lack of at least one other Board member. This has no doubt imposed significant hardship on those 1,900 appellants and their families, and the government departments and agencies with management responsibilities and priorities.

Lacking a quorum since the beginning of 2017 has also prevented the Board from fully completing its mission in other ways during this time. Without a quorum, the agency could not release studies of the civil service or conduct reviews of the Office of Personnel Management's rules and regulations.

Additionally, we have been unable to issue regulations that might provide guidance to federal agencies and employees, such as how to implement the requirements of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.

Notwithstanding these challenges, our staff have continued to be busy meeting our obligations in every way that we could. In addition to the work of our administrative judges, our General Counsel's office continues to defend our earlier decisions in cases in Federal court, and to monitor other court decisions for relevant judicial precedents. Our Mediation and Appeals Program continues to offer appellants the opportunity to resolve their disputes via settlement or mediation, in lieu of the standard adversarial

proceedings. Our Office of Policy Evaluation delivers the *Issues of Merit* newsletter routinely, as well as other publications addressing human capital issues, but without the policy commentary delivered in MSPB reports that require a quorum to release. We engage opportunities to participate with stakeholder organizations in the Federal employment community. Our Information Resources Management staff have maintained plans for improving service and communication capabilities through technology upgrades. Our Facilities and Administration Management department provides our appellants and offices with accessible and secure facilities. Our staff strive to meet our responsibilities under the Freedom of Information Act. We have met or exceeded requirements for reporting to Congress, complied with appeals courts decisions, introduced procedures to comply with legislative updates, continued obligations for staff-wide training in No FEAR, FISMA, and ethics, and integrated the management commitments imposed by the Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch. The MSPB's dedicated and hardworking staff have continually adapted their practices to address the uncertainty and changed conditions at the agency.

Although the prospect of a fully vacant Board is disconcerting, the agency's Continuity of Operations Plan (COOP) does address what will happen when I leave. The COOP creates orderly succession for the executive and administrative functions of the agency during simultaneous vacancy of all three Board seats. Under such a circumstance, the Board's General Counsel will become the acting agency administrative and executive officer. While he would not be reviewing the decisions of administrative judges or voting cases, which are adjudicative functions reserved to the Board members, he will be able to exercise the executive and administrative functions necessary to keep the agency running. Just as they have under existing delegations in the absence of a quorum, our regional administrative judges and contract administrative law judges will continue to issue initial decisions in the current manner.

Therefore, the practical impact on the agency of having no Board members will largely be limited to the former Board office and the General Counsel's office.

One significant change if no members sit on the Board is that the MSPB will be unable to approve or extend personnel action stay requests from the Office of Special Counsel. Such stays allow OSC greater time to investigate alleged retaliation against whistleblowers and other improper actions. This is a particular shame given Congress's work in the past two years to protect whistleblowers by ensuring the Board could continue to grant stays. When the Board lost a quorum in early 2017, Congress swiftly amended Title 5 to allow a single Board member to extend such stays, an action which previously required a quorum. Without at least one member, however, even this is not possible.

MSPB's staff are certainly focused on preparing for the eventual return of a quorum so the final step in case deliberations—Board decisions—can proceed efficiently and expeditiously. Nevertheless, even once a quorum is regained, the impact of the past years' vacancies will be felt at the Board for years as new members try to address the resulting backlog of cases. As the MSPB faces these unprecedented challenges to fulfilling its mission, I deeply appreciate the Subcommittee's interest in the Board's status and operations. This hearing is an invaluable opportunity to reassure those directly affected by the Board's mission as well as our stakeholder communities.

Seven years ago, it was my honor to be nominated and confirmed to a seat on the Board. In recent years I have also been privileged to be named by President Trump as Vice Chairman of the Board, and then recently to serve concurrently as General Counsel of OPM, for a limited time. While my service at the MSPB will come to an end as I move full-time to the role of OPM General Counsel, a position I am very comfortable in from having held it previously, my service at the Board has been one of the highlights of my career. I am grateful to have had the opportunity to offer my services to the American people, the

Federal civil service, and the Title 5 community. Over the past two years, the Board and I have followed the words of former President Theodore Roosevelt: “Do what you can, with what you have, where you are.” I know the MSPB will also continue to do all it can to fulfill its mission for the American people.

Thank you.