

HOUSE COMMITTEE ON VETERANS AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
LEARNING FROM WHISTLEBLOWERS AT THE DEPARTMENT OF VETERANS AFFAIRS
JULY 23, 2019

TESTIMONY OF TRISTAN LEAVITT
GENERAL COUNSEL AND
ACTING CHIEF EXECUTIVE AND ADMINISTRATIVE OFFICER
U.S. MERIT SYSTEMS PROTECTION BOARD

Good afternoon, Chairman Pappas, Ranking Member Bergman and members of the Subcommittee. My name is Tristan Leavitt and I am the General Counsel of the U.S. Merit Systems Protection Board. Because there are no Senate-confirmed Members of the Board, I am also serving as the acting chief executive and administrative officer of the agency in accordance with the MSPB's Continuity of Operations Plan.

Thank you for this opportunity to discuss the role of the MSPB in safeguarding the federal merit principles, including the agency's role in the adjudication of whistleblower retaliation cases. As requested, my testimony will focus broadly on the process by which whistleblower cases are brought before the MSPB and the process for adjudicating these cases. I have attached two appendices to my written statement: Appendix A is a flow chart which provides a visual overview of the adjudication process for whistleblower appeals. Appendix B provides data charts which show the numbers of Department of Veterans Affairs appeals decided or dismissed for fiscal years 2015-2018 and the first half of 2019.

This year marks the fortieth anniversary of the MSPB opening its doors following the passage of the Civil Service Reform Act of 1978. The Civil Service Reform Act was the first statute prohibiting retaliation for employees of the federal government. The law opened with a series of findings, stating:

It is the policy of the United States that . . . the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system[.]

The Civil Service Reform Act explicitly recognized the value of whistleblowers. The ninth merit system principle it codified states: "Employees should be protected against reprisal for the lawful disclosure" of waste, fraud, abuse and gross mismanagement.

Although the Civil Service Reform Act was the first statute expressly protecting whistleblowers from reprisal in the federal government, the concept of avoiding personnel actions for any reason other than merit had evolved from the passage of the Pendleton Act of 1883 and the development

of a civil service system. In that sense the merit principles were not necessarily new, although previously not codified.

The MSPB was established to fill an adjudicatory role that had previously been filled by the Civil Service Commission. Its role in whistleblower cases, as in other personnel matters it adjudicates, is to provide a full and fair opportunity for both parties to develop a full record on the issues, and then to hear and decide the matters appealed based on the evidence submitted and in accordance with applicable statutes and case law. As someone who previously received many allegations of Executive Branch whistleblower retaliation when I worked on Capitol Hill, I recognize that this mission established by Congress is critical in helping distinguish which reprisal claims are meritorious. The MSPB's responsibility is to spend the time and resources carefully considering the allegations and the evidence to reach as complete a conclusion as possible.

This year also marks the thirtieth anniversary of the Whistleblower Protection Act of 1989, which changed the Special Counsel from an investigatory and prosecutorial office inside the MSPB to an independent agency in its own right, the Office of Special Counsel. OSC investigates claims of prohibited personnel practices in the Executive Branch, such as whistleblower retaliation. The MSPB plays the same role for OSC today as it did when the Special Counsel was part of the MSPB, and is the forum before which OSC litigates if they believe a prohibited personnel practice occurred.

Those particular prohibited personnel practices are found in 5 U.S.C. § 2302(b)(8) and (b)(9), and prohibit reprisal against an employee or applicant for employment based on different types of protected activity. Under the statute, in order to receive corrective action in a reprisal claim, the appellant must demonstrate that: (1) he or she made a protected disclosure; (2) the agency has taken or threatened to take a personnel action against him or her; and (3) his or her protected disclosure was a contributing factor in the personnel action. However, even after a finding that a protected disclosure was a contributing factor in the personnel action, corrective action is not granted under the law if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

Outside of cases brought by OSC, which are relatively few due to OSC's ability to informally obtain corrective action, the MSPB hears two types of whistleblower cases. The first type of whistleblower case is called an "otherwise appealable action." An otherwise appealable action appeal involves an adverse personnel action that is directly appealable to the Board, such as a removal, reduction in grade or pay, or suspension of more than 14 days. In such an appeal, both the appealable matter and the claim of reprisal for whistleblowing will be reviewed by the MSPB. The claim of whistleblower retaliation is termed an "affirmative defense"—that is, if that agency proves that it has met the evidentiary standard for taking the action, the appellant may attempt to prove that the agency took the action in reprisal for his or her protected whistleblowing activity.

The second type of whistleblower case is those cases in which the individual has filed a complaint with OSC but OSC has not sought corrective action on the individual's behalf. This is called an "individual right of action," or "IRA," appeal. Most of those cases surround personnel

actions that are not directly appealable to the Board—for example, a suspension under 14 days or a reassignment with no reduction in pay or grade. In such circumstances, the appellant is required to exhaust the administrative remedy of first filing a complaint with OSC. In an IRA appeal, the Board will not decide any aspect of the challenged personnel action other than its connection with the claim of reprisal for whistleblowing.

In both IRAs and otherwise appealable actions the proof required is the same, but in an otherwise appealable action the MSPB's jurisdiction over the matter arises from the personnel action itself and not directly from the claim of whistleblower reprisal. In connection with both forms of appeal, an administrative judge may grant a stay of the personnel action at issue under appropriate circumstances. Similarly, if OSC finds that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice, the Special Counsel may request that any member of the Board order a 45-day stay. Such a stay may also be renewed upon application. Needless to say, this authority has been significantly complicated by the lack of any current sitting Board members.

That said, despite the lack of a Board quorum since January 2017, the 60 or so MSPB administrative judges continue to hear and adjudicate cases. Of the 5,447 cases administrative judges decided in FY 2018, approximately one-fifth were from VA employees. The MSPB has decided an average of about 180 IRA claims from VA employees for the past three fiscal years, and is on track to decide approximately the same number in FY 2019.

In closing, one general trend I do want to note that is not specific to the VA is the increasing complexity of both whistleblower complaints and their adjudication. This is the result of a combination of many factors, including decisions issued by the Federal Circuit Court of Appeals and recently-enacted legislation, such as the Whistleblower Protection Enhancement Act of 2012. It is also increasingly rare to see a case in which the appellant asserts that he or she made a single disclosure, in retaliation for which the agency allegedly took just one personnel action. Rather, the typical case involves multiple allegations of several instances of alleged whistleblowing and several alleged retaliatory personnel actions. Because the multi-part test for jurisdiction over and proof of the claims must be applied to each alleged protected disclosure, whistleblower appeals are often difficult and time-consuming to hear and decide. Nevertheless, I believe the MSPB understands that Congress, the Executive Branch, and the American public are counting on it to be the front lines of sorting through these issues. Accordingly, I know the MSPB aspires to give full and fair consideration to each appeal in accordance with applicable statutes and case law.

Again, thank you for the opportunity to appear before you today. I am happy to address any questions you may have.