

**Hearing Statement Submitted by
The Honorable Neil A. G. McPhie, Chairman
U. S. Merit Systems Protection Board**

**United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, Postal Service,
and the District of Columbia**

Hearing:

*Ensuring a Merit-Based Employment System:
An Examination of the Merit Systems Protection Board
and the Office of Special Counsel*

July 12, 2007

**The Honorable Danny K. Davis
Chairman**

**The Honorable Kenny Marchant
Ranking Member**

Chairman Davis, Ranking Member Marchant, and Members of the Subcommittee, thank you for the opportunity to share the Board's accomplishments in safeguarding the merit system principles. These principles reflect acknowledgment on the part of the legislative and executive branches of government that the fair and equitable treatment of Federal employees and applicants is critical to the efficient and effective operation of the Federal government. I am proud and honored to serve as the 7th Chairman of the Merit Systems Protection Board, the lead agency responsible for upholding the merit system principles. I am particularly pleased that in FY 2007, the Board was voted second among small agencies in the rankings of the Best Places to Work in the Federal Government.

The Board's current authorization was enacted in 2002 and expires on September 30, 2007. The authorization of appropriations for MSPB was permanent under its enabling statute, the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. This authorization was changed under the Whistleblower Protection Act of 1989 (WPA) to a 6-year period that expired at the end of FY 1994. (Pub. L. 101-12, 103 Stat. 34, 5 U.S.C. 5509 note). In 1994, the Board's authorization was extended through FY 1997 (Pub. L. 103-424, 108 Stat. 4361), placing it on the same reauthorization cycle as that of the Office of Special Counsel. The Board was subsequently reauthorized for five years, through FY 2002, (Pub. L. 104-208, 110 Stat. 3009) and again through 2007 (Pub. L. 107-304, 116 Stat. 2364). My request for reauthorization would amend Section 8(a)(1) of the Whistleblower Protection Act to authorize the MSPB for an additional 5 years, through FY 2012.

In addition to reauthorization of appropriations, we are requesting the enactment of six legislative proposals designed to increase the efficiency and effectiveness of the Board. These proposals seek: an order of succession for the executive leadership of the agency; the authority to grant summary judgment; a limited exemption from the Sunshine Act; and three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

Since the MSPB's reauthorization in 2002, the Board Members, managers and staff have worked diligently to continue to earn the public's trust in our ability to carry out our statutory missions. I will first briefly provide an overview of the Board and highlight some of the Board's accomplishments since the last reauthorization. I will then discuss the justifications for the legislative proposals submitted for your consideration. Finally, I will discuss some of the challenges that I foresee in the Board's future.

I. THE MERIT SYSTEMS PROTECTION BOARD: MISSION AND OVERVIEW

The mission of the Merit Systems Protection Board is to protect Federal merit systems and the rights of individuals within those systems. The Board carries out its statutory functions by adjudicating certain employee appeals and conducting studies of the Federal civil service and other merit systems in the Executive Branch.

I am pleased to report that the Board is currently operating with its full complement of 3 Members. I have served as a Member of the Board since April 23, 2003 and was confirmed as Chairman on November 21, 2004. My term will expire on March 1, 2009. Mary M. Rose was confirmed as a Board Member on December 17, 2005, and designated as Vice Chair on January

27, 2006. Her term will expire on March 1, 2011. Barbara J. Sapin was confirmed as a Board Member on November 21, 2004. Her appointment expired on March 1, 2007. She continues to serve as a Member pursuant to 5 U.S.C. § 1202(c) of the Board's enabling statute which permits a member whose term has expired to continue to serve until a successor has been appointed but not longer than one year after the term has expired.

The Merit Systems Protection Board is headquartered in Washington, D.C., with 6 regional offices (Atlanta, Chicago, Dallas, Philadelphia, San Francisco, and Alexandria, Virginia) and 2 field offices (Denver, New York). The staff consists of 228 employees; approximately 60 of whom are administrative judges.

II. MSPB ACCOMPLISHMENTS: FY2002-FY2006

A. ADJUDICATION

From FY 2002 through FY 2006, the Board adjudicated 42,145 cases, for an average of 8,429 per year. More specifically, the Regional and Field Offices issued 35,214 decisions over this period (for an annual average of 7,043) and the Board issued a total of 6,931 decisions (for an annual average of 1,386). During this time period, we reduced the average processing time for initial decisions to 92 days, an improvement from the annual average of 99 days from the previous reauthorization period. In FY 2006, the regions decided 7,110 cases in an average of 89 days. We have made significant progress in reducing the case processing time for cases in headquarters. In FY 2002, the average case processing time for cases in headquarters was 205 days. In FY 2006, the average time was 154 days. These reductions are being accomplished without a loss in the quality of those decisions. During the period covered by FY2002-FY2006, the Court of Appeals for the Federal Circuit affirmed 93% of the Board decisions that were appealed to the Court.

We have employed a number of technological innovations that are designed to expedite case processing at the Board. In FY 2002, we made the option of conducting hearings through the use of video conferencing a permanent part of our adjudication process. During FY 2003, MSPB implemented an electronic appeals process (e-Appeal) that allows appellants to file an initial appeal using the Internet. Approximately 1000 appeals were filed electronically in its first year. Currently, approximately 25% of initial appeals are filed electronically.

Phase II of e-Appeal was implemented in September of 2004. Phase II permits the parties to upload filings as attachments and provides for same-day electronic distribution of filings, orders and decisions. The system also notifies the appropriate MSPB office of each filing and automatically files submissions into the Board's Document Management System (DMS). The e-Appeal program has improved the Board's efficiency in handling appeals and made it easier for appellants to file appeals and to communicate with the Board.

In addition to our successful adjudication settlement program, the Board makes its Mediation Appeals Program (MAP) available to the parties to appeals in the regional and field offices. When both parties to an appeal agree, a Board-certified mediator is appointed to mediate their dispute to a mutually beneficial conclusion. We had just begun to develop our mediation program when our reauthorization was under consideration in 2002. Although only a few years

old, MAP has enjoyed great success. Announced in 2004 as a nationwide initiative after a successful pilot project, MAP is now staffed by 20 trained, collateral duty Board employee Mediators. Settlements have been achieved in more than 100 appeals under this program. In FY 2006, 109 appeals were mediated; 45% of the cases settled. For the past two years, Board staff and management have promoted the benefits of MAP to a segment of current and potential Board customers by conducting two sessions on alternative dispute resolution at the widely-attended Federal Dispute Resolution Conference.

B. STUDIES AND OUTREACH

The Board educates appellants, federal agencies, and the general public in two important ways - - by publishing reports of its studies and conducting outreach throughout the nation. In our studies function, the Board's goal is to conduct independent, nonpartisan, objective research, based on established scientific methods, and produce reports that promote the merit system values in Title V and help ensure the public interest in a viable merit-based civil service. Based upon our recent work, we have identified and reported on some trends that we believe will affect Federal human resources management over the next several years and four areas of need based on such trends: 1) the need for succession planning; 2) the need to focus more attention on retention; 3) the need to improve recruitment and selection procedures; and 4) the need for agencies to change their methods for motivating and rewarding employees. For example, we have issued studies that advise agencies on how to navigate the complex issues that arise when determining whether an employee undergoing a probationary or trial period has appeal rights before the Board; that suggest ways to make hiring practices more effective and cost efficient; and that provide guidance on how to design an effective pay for performance compensation system.

The Board aims to publish eight study reports annually. In addition, we publish four quarterly versions of the "Issues of Merit" newsletter per year. A significant indicator of the value of our studies, reports and recommendations is the degree to which the recommendations discussed therein are reflected in government-wide policies. Recent examples of our recommendations that are reflected in current Federal civil service policies and programs include recommendations pertaining to: 1) Adoption of Category Rating to replace Rule of Three; 2) redesign of USA Jobs site and redesign of vacancy announcements; 3) emphasis on assessment tools including structured interviews; 4) development of the Federal Career Intern Program; 5) replacement of the Presidential Management Intern with the Presidential Fellows Program; 6) emphasis on Human Capital practices as a key business function; and 7) expansion of Family Friendly policies.

The Board undertakes major efforts to educate the parties to the appeals that come before it about Board practice, procedure, and law. In 2002, the Board produced a training video on MSPB appeals which is available free upon request to appellants and practitioners before the Board. During the period FY 2002 through FY 2006 more than 400 outreach presentations were conducted by Board employees and officials. Outreach activities related to the studies function included consultation with Federal Executive Boards and other stakeholders including international visitors; consultation with the Thai Civil Service Commission to create a Thai MSPB; a symposium on the Practice of Merit in agencies operating outside of Title 5; co-sponsorship of a symposium on pay for performance with the Government Accountability Office

and the Office of Personnel Management; increased coordination with OPM, GAO, the National Academy of Public Administration and the Partnership for Public Service with periodic meetings on research efforts; and our work on the electronic human resource information system initiative with OPM.

C. MANAGEMENT SUPPORT

With respect to general management issues, I am pleased to report that the Board has earned a clean audit each of the four years that Federal agencies have been required to submit a financial audit pursuant to the Accountability of Tax Dollars Act of 2002. In July 2003, we strengthened our credit card program to provide for additional safeguards in light of concerns of government-wide abuse. We decreased the number of cards issued and added a second level of review of monthly statements.

III. LEGISLATIVE PROPOSALS

In addition to reauthorization of appropriations, we are also requesting the enactment of six legislative proposals. These proposals seek: 1) an order of succession for management of the agency; 2) authority to grant summary judgment; 3) an exemption from certain requirements of the Sunshine Act; and 4) three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

A. ORDER OF SUCCESSION

One proposal seeks to amend section 1203 of Title 5 to provide for an order of succession for the leadership of the Board. In two instances since the Board was last authorized, the agency was faced with the possibility of a vacuum in its chief executive leadership. In one instance, the agency was on the brink of having no Board members at all. The uncertainty of leadership for the agency in such circumstances calls for an effective statutory solution. We are recommending that: 1) in the event that no member has been designated to serve as Chairman or Vice Chairman, the member who is an adherent of the same political party as the President shall perform the duties and functions of the Chairman; 2) if the only members currently in office are adherents of the same political party as the President and neither has been designated to serve as Chairman or Vice Chairman, the member who was first appointed to the Board shall perform the duties and functions of the Chairman; and 3) in the event that all three Board positions are vacant, the General Counsel of the Board shall perform the chief executive and administrative officer duties and functions of the Chairman. We believe that the proposed legislation recognizes the Presidential prerogative to control key appointments in the Executive branch while preserving the continuity of agency operations in the absence of the affirmative exercise of such prerogatives.

B. SUMMARY JUDGMENT

In another proposal, the Board is requesting summary judgment authority. Its governing statute, at 5 U.S.C. § 7701 (a)(1), provides that: "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 Court of Appeals interpreted this provision to mean that the Board does not have

authority to grant summary judgment. We believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process without adversely affecting the rights of appellants.

We also believe that the Board has developed, over a period of almost 30 years, a reputation for adjudicating appeals in a fair and impartial manner. As set forth in the Board's regulations, 5 C.F.R. § 1201.44, MSPB administrative judges have the responsibility and the broad authorities necessary to assure the fair adjudication of all appeals. Under our legislative proposal, a motion for summary judgment may be granted only "when it has been determined that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In all cases, the parties must be afforded the opportunity to develop the record sufficiently so that the administrative judge can determine whether those prerequisites are met in each case. 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 hearing process. We therefore believe that such authority would greatly enhance the efficiency of the Board's adjudicatory process without adversely impacting the rights of appellants.

Two additional points are worth noting. First, other Federal adjudicatory agencies, such as the Equal Employment Opportunity Commission, have the authority to issue summary judgments. Second, the MSPB will have summary judgment authority under the Department of Homeland Security's (DHS's) employee appeals process and the proposed Department of Defense (DoD) National Security Personnel System, and we recognize the complications that may develop from any adjudicatory inconsistencies that arise solely based on the respective agencies from which individual appeals arise.

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

Pursuant to 5 U.S.C. § 1203, the Chairman of the Merit Systems Protection Board 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. Notwithstanding this clear authority, one provision, § 1204(g), authorizes the Board, rather than the Chairman, to delegate the performance of administrative functions. A second provision, § 1204(k), creates an ostensible ambiguity by appearing to bestow one particular administrative function, preparation and submission of the annual budget, on the Board. Two of the technical corrections are intended to eliminate these apparent ambiguities created by these provisions read together with section 1203 by substituting the words "Chairman of the Board" for "the Board." The third technical correction adds a sentence to § 1204(j) to emphasize the Chairman's authority to delegate certain responsibilities to the employees he or she appoints.

D. ENHANCEMENT OF PETITION FOR REVIEW PROCESS

Finally, the Board requests a limited exemption from the requirements of the Government in the Sunshine Act, 5 U.S.C. § 552b, (Sunshine Act) when it exercises its adjudicatory function. 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. While Sunshine Act requirements do not apply to informal discussions between Board members or to a meeting scheduled to dispose of a particular case, the difficulty of ensuring that an informal discussion or a discussion of a particular case does not evolve into a "meeting" covered by the Sunshine Act has generally led the Board members to be wary of engaging in such discussions, thus hampering the efficiency of the MSPB's adjudicatory process.

IV. FUTURE CHALLENGES

At present, we are operating with the expectation that DHS's expedited employee appeals system will launch in the immediate future. In anticipation of the launch, we will continue our work to amend the Board's regulations to accommodate the new system. As with any other statutory or regulatory change that relates to the rights of employees within the Federal merit systems, we look forward to working with DHS on the implementation of this new system. We have already provided relevant training to the Board's AJs, staff attorneys and paralegals.

We also anticipate that several factors could result in an increase in the Board's caseload. Both the anticipated increase in Federal employee retirements and the resultant increase in hiring government-wide may account for a large portion of the increase. Additionally, changes in statutes, case law and regulations as well as the increasing need to control the Federal budget may also have a significant impact on the Board's caseload. In FY 2005, issues related to retirements accounted for approximately a quarter of MSPB's caseload. In addition to an increase in retirement claims, the MSPB's caseload may be affected by the changes in the composition of the workforce that replaces retirees. MSPB studies suggest that new employees are more likely to experience an adverse action in the first decade of their service. Younger employees also are more likely to experience an adverse action than older employees with a similar length of service. Thus, as agencies hire new employees of all ages, and particularly younger employees, the Board's adverse action appeal rates can be expected to climb.

Historically, the Board has experienced an increase in its appeals workload when long-held government policies are modified by the courts. For example, in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), the Court changed the way by which agencies accounted for military leave. The decision was responsible for a significant number of Board appeals in the past 3 years. Moreover, in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (*en banc*), the Court held that Veterans who allege a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) that is not an adverse action as defined at 5 U.S.C. § 7512 are entitled to a hearing. Thus, this case could result in an increased workload for the Board's administrative judges. Prior to *Kirkendall*, the Board interpreted the law to provide that an administrative judge could exercise discretion in determining whether to grant a hearing in a USERRA case as long as there was no adverse action

involved, the appellant had not demonstrated the existence of evidence pertaining to the credibility of the parties involved and there were no material facts in dispute.

The Board also anticipates an increase in its caseload if new legislation is enacted, such as the separate bills concerning whistleblower protections that have been introduced this year in each chamber of Congress. For example, the House of Representatives passed H.R. 985, the "Whistleblower Protection Enhancement Act of 2007," which would expand the scope of whistleblower protections and increase the number of covered employees. Additionally, the Senate whistleblower bill, S. 274, was recently reported out of the Senate Committee on Homeland Security and Governmental Affairs. The Board welcomes the opportunity to adjudicate all appeals, including those of whistleblowers, to the extent and in the manner that policymakers deem appropriate. Beyond the foreseeable increase in the Board's workload, the House bill amends the framework for judicial review of whistleblower appeals and incorporates a 180-day standard for the Board to adjudicate whistleblower appeals, both of which may create procedural uncertainties that are not clearly resolved by the bill.

Another factor that could impact the MSPB workload is the increasing need to reduce the size of the Federal budget. As this pressure continues, it may lead to the need for some agencies to reduce the size of their workforces. This, in turn, could lead to an increase in the number of employees who are involuntarily separated through reduction-in-force (RIF) procedures. If historical trends are an accurate predictor, this could lead to a potentially large increase in the number of RIF appeals to MSPB. Further, the complexity of appeals has increased with expanded appeal rights under Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) and Veterans Employment Opportunities Act of 1998 (VEOA), and the numbers of these appeals working their way to MSPB has increased. The sheer numbers of returning veterans from Iraq and Afghanistan may be predictive of an increased USERRA and VEOA caseload.

In the context of the Board's studies function, we anticipate that the DHS and DoD personnel systems will require greater study as they are implemented. The Board is developing baseline data of organizations in both DHS and DoD. This baseline data will be helpful in comparing and analyzing the personnel system changes that occur in both Departments. We will study and survey more specific impacts of the varied human resources initiatives as they are deployed.

As the Board prepares for the impact of increased retirement on its customers, we recognize that the MSPB itself will be directly affected. Within 5 years, 40 percent of the MSPB's workforce will be eligible to retire. Almost 20 percent are eligible at this moment. To prepare for these retirements, my administration has looked for creative ways to attract, develop and retain employees. For example, I have directed each office to develop a succession plan. I have also instituted developmental training programs throughout the agency. Under my leadership, MSPB managers also work to enhance employee training opportunities in a number of ways, beginning with the use of individual development plans. I am particularly proud of the MSPB Senior Management Fellows program, in which high-potential employees are identified and provided with training and developmental assignments to prepare them to become the future leaders at MSPB. We have also created a mentoring program for Board paralegals, helping them

to contribute even more to our agency's success while providing them with career enhancing training and opportunities.

V. CONCLUSION

In short, the Board Members, officials and staff have successfully fulfilled the agency's statutory missions. In addition, we have been careful stewards of the public funds that have been entrusted to us for the purpose of fulfilling those missions. The Merit Systems Protection Board has made great strides in improving all aspects of the agency's operations. However, we continue to explore ways to achieve new levels of efficiency and to better serve the American public. We believe that the proposed amendments described during this hearing will help the agency meet this goal. In these times of great change in Federal human resource management, a strong, vibrant and independent MSPB is critical. We look forward to the opportunity to continue our important work over the next 5 years.