The Power of the MSPB Chairman

Background and Proposals. Under current law, the full board may delegate the performance of any of its administrative functions under the act to any employee of the board.[87] That subsection would be amended to allow such delegations in the sole discretion of the chairman.

Under current law the chairman is authorized to appoint "such personnel as may be necessary to perform the functions of the Board.[88] A proposed amendment would allow the chairman to delegate officers and employees under this subsection "authority to perform such duties and make such expenditures as may be necessary."

Under current law the full board is to prepare and submit simultaneously the board's annual budget to the President and to the appropriate congressional committees. A proposed amendment would vest the preparation of the annual budget submission solely in the chairman.

Under current law, the Sunshine Act[89] and its open meeting requirements and its special procedures for covered agencies to close limited categories of business meetings is applicable to MSPB. A proposed new subsection of Section 1204 would allow the Chairman, at his or her sole discretion, to call a business meeting of the board "without regard to section 552b."[90]

Agency Justification. MSPB suggests that since the current legislation makes the chairman "the chief executive and administrative officer of the Board," all "management authority" should be vested in that office. In this view, the failure to vest sole authority in the chairman, rather than the board, in subsection 1204(g) with respect to delegation of the performance of the board's "administrative function," to board employees, and the failure to vest the preparation and submission of the board's annual budget in the chairman, rather than in the board, is an "ambiguity" in the language of the statute. To remedy those flaws, it suggests that the language of those subsections "should be clarified" to reflect that the functions of delegation of statutory authority and budget preparation authority are "administrative responsibilities" under the "sole purview" of the chairman. For similar reasons, the proposed amendment to subsection 1204(j), which permits the chairman to hire personnel, "merely emphasizes the Chairman's authority to delegate certain responsibilities [to perform unspecified "duties" and "make such expenditures as may be necessary"] to the employees he or she appoints." These three proposals are designated "technical corrections."

A final proposed enhancement of the chairman's authority is an amendment that would allow the chairman, "in his or her sole discretion, [to] call a meeting without regard to section 552b (the Sunshine Act) at which members may jointly conduct or dispose of agency business." MSPB's justification is that this new authority would be applicable only "when it exercises its adjudicatory authority." If that is its purpose, the proposed amendatory language is not so limited and appears to allow the chairman to decide whether or not to hold a business meeting at his or her sole discretion. A subsequent section will discuss the question of whether, if the

---

[87] 5 U.S.C. § 1204(g).

[88] 5 U.S.C. § 1204(j).

[89] 5 U.S.C. § 552b.

[90] Section 552b is the Sunshine Act (5 U.S.C. § 552b).

proposed amendment is actually limited to the discussion of adjudicatory issues, it is really necessary under current law.

Analysis. Rather than being "technical corrections," as characterized by MSPB, these amendments may be viewed as substantive enhancements of the power and authority of the office of the chairman. Indeed, the MSPB chairman, in his written responses to Member queries following the Senate's March 2007 reauthorization hearing, candidly expressed his view that as chairman he occupies "a position of responsibility that is superior, and not co-equal, to that of the other 2 Board members,"[91] and that he is the "head of the agency.[92] He asserts that since the statute makes the chairman "the chief executive and administrative officer of the Board" under Section 1203(a), the vesting of budget preparation and submission to the President and Congress in Section 1204(k) to the full board is " inconsistent" with the chairman's 1203(a) authority, and creates " an ambiguity in the relative roles and responsibilities of the 3-Member Board and Chairman of the Board."[93] The proposal to vest budget preparation and submission authority in the Chairman is asserted not to be a "ratification" or "approval, sanctioning, or an endorsement" of the chairman's views but merely to "clarify the apparent ambiguity" and to reflect past agency practice.[94] Although the statute provides that the board is required to simultaneously submit to the President and each House of Congress any legislative recommendations relating to the Title 5 functions, Chairman McPhie stated that pursuant to his authority as chief executive and administrative officer he "develops and submits legislative recommendations with input from individual Board members and program managers."[95] With respect to the promulgation of regulations, the chairman stated that he "consults with Board members and other program managers as appropriate in developing and prescribing regulations that govern the general operation and management of the agency."[96] Section 1204(b) provides that the Board should have the authority to prescribe such regulations as may be necessary for the performance of its function.

The rationale proffered as the basis of the proposals — that congressional designation of the chairman of MSPB as "chief executive officer and administrative officer of the Board" encompasses sole authority over such matters as budget formulation and delegation of substantive board functions — is contrary to the history of the development of the position of chairperson of multi-member agencies and the law that has evolved in relationship to that development. It is well established that chairpersons are not the "heads" of federal collegial bodies, such as MSPB, in a legal sense.[97] The MSPB chairman "exercises the executive and

---

[91] McPhie responses, supra note 66, at 11.

[92] Id. at 13.

[93] Id. at 10, 13.

[94] Id. at 10

[95] Id. at 12.

[96] *Id.*

[97] See *Freytag* v. *Commission of Internal Revenue*, 501 U.S. 868,887 note 4, 916-920(1991)(See also Scalia, concurring, arguing that the term "Head of Department," for the constitutional purposes of the appointment of inferior officers, encompasses collegial bodies such as the Securities and Exchange Commission, the Federal Communications Commission, and the Commodities Futures Trading Commission acting as a body); *Silver* v. *U.S. Postal Service*, 951 F. 2.d. 1033(9th Cir. 1991) (concluding that the nine governors of the (continued...)

administrative functions of the Board," which may be defined or limited by a majority vote of the board. Congress could have defined the terms "executive and administrative" functions to encompass the budget, delegation, or other substantive functions, but it did not, and we are unaware of it doing so with the chairs of similar independent agencies in the past.

More particularly, a close examination of the historical evolution of the position of chair of independent regulatory agencies indicates that the chairman of no other multi-member independent agency is in any constitutional or legal sense the "head" of such a collegial body. The concept of providing for appointment of the MSPB chairman by the President from among its members, and making the chairman subject to at-will removal from the chairmanship by the President (but not as a member), traces back to the recommendations of the first Hoover Commission that such multi-member commissions would function more efficiently with respect to housekeeping and day-to-day operations by placing primary responsibility for such affairs with a chairperson, but was understood not to have meant to effect a large-scale transfer of significant substantive powers and authorities to the chairperson from the body as a whole. President Truman, in submitting the Reorganization Plans creating chairpersons for the SEC and other independent regulatory agencies for congressional approval in 1950, emphasized that "the plans only eliminate multi-headed supervision of internal administrative functioning. The Commission[s] retain policy control over administrative activities since these are subject to the general policies and regulatory decisions, findings and determinations of the commissions."[98]

Moreover, a consistent and unbroken series of Department of Justice Office of Legal Counsel decisions have held that even when legislation provides that a collegial body chairperson "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board," such language does not encompass the substantive and policymaking functions of the body as prescribed by the enabling statute. "The chairperson, in other words, superintends and carries on the day-to-day activities necessary to effectuate the Board's substantive decisions. He does not, absent some Board approval (such as an express delegation by the Board or the Board's acquiescence in the chairperson's actions) make those decisions by himself."[99] There is no basis, in law or practice, for deeming the chair of a collegial regulatory body as either a superior officer or the "head" of that body in a constitutional sense. A commission like MSPB substantively acts only as a collegial body, with

---

[97] (...continued)
Postal Service constitute the "head of department" and may constitutionally appoint the Postmaster General and the deputy Postmaster General, who are inferior officers subject to the authority of the Board. Finally, strong support is given this view of the law in this area by the Department of Justice. See 20 Op. OLC 124, 151-153, 164-165(1996) ("The Appointments Clause does not forbid the exercise of authority by a decisionmaking body that consists of principal officers and an inferior officer removable by them."). (Dellinger Opinion)

[98] "Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950," Public Papers of Harry S. Truman, 199, 202 (1950). See also, David M. Welborn, "Governance of Federal Regulatory Agencies," 9 (1997) (discussion of reorganizations).

[99] "Division of Power and Responsibilities Between the Chairperson of the Chemical Safety Board and the Board as a Whole," Memorandum Opinion for the General Counsel of the Chemical Safety and Hazard Investigation Board from Randolph B. Moss, Acting Assistant Attorney General, Office of Legal Counsel, DOJ (June 26, 2000) at 3, 5-8.

each member exercising one vote. A chairman's exercise of "the executive and administrative functions" of such a body may be defined and limited by a majority of such body.[100]

A 1996 opinion by then Assistant Attorney General Walter Dellinger[101] asserted the Office of Legal Counsel's agreement with the Ninth Circuit's ruling in *Silver v. U.S. Postal Service*[102] that the Postmaster General was an inferior officer who could be appointed by the Board of Governors of the Postal Services.[103] With respect to the scope of the term "Head of Department," Dellinger noted that "[e]arlier Attorneys General had accorded the term a broad construction, citing "Authority of the Civil Service Commission to Appoint a Chief Examiner."[104] In that 1933 opinion the Attorney General noted that the Commission "ha[d] certain independent duties to perform," was "responsible only to the Chief Executive," and was "not a subordinate Commission attached to one of the so-called executive departments." As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense."[105] Dellinger stated that "We find this opinion persuasive and note that the Court's opinion in *Freytag* ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers."[106]

Arguably then, the alterations suggested by these "technical corrections" would affect substantively the overall scheme of independence of MSPB. By vesting budget preparation and submission authority solely in the chairman, together with the assertions by the chairman of the exclusive control of MSPB powers vested in the board by law, the collegial nature of the board, and its political balance, could be jeopardized. With less need to negotiate with fellow board members, the chair might be more aligned with the viewpoint of the President who selected him or her. The ability to delegate substantive agency functions to persons appointed by the chairman, including "expenditure authority," concomitantly diminishes the heretofore presumed equality of the other members. Such authorities would appear to effect a significant change in the independent nature of the board.

Appellate Procedures and Summary Judgment

Section 4 of the draft legislation relates to appellate procedures and section 5 relates to powers and functions of MSPB. Section 7701(a)(1) of Title 5, United States Code, "Appellate Procedures," currently provides that:

---

[100] Ibid.

[101] Dellinger Opinion, *supra* note 97.

[102] 951 F.2d 1033 (9th Cir. 1991), discussed above at n. 97.

[103] Dellinger Opinion at 29-30, 31 note 97.

[104] 37 Op. Att'y Gen. 227 (1933).

[105] Id. at 229-231.

[106] Dellinger Opinion at, supra n. 97 at 151-153.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right —

(1) to a hearing for which a transcript shall be kept; . . . .

Section 4 of the draft bill would amend this language to state that:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board under any law, rule, or regulation. An appellant shall have the right —

(1) to a hearing for which a transcript will be kept, subject to the provisions of section 1204(b) of this title as amended by this Act; and . . . .

Section 5 would redesignate section 1204(b)(3) of Title 5 of the U.S. Code as subsection (b)(4) and insert after subsection (b)(2)(B) a new subsection (b)(3) to read as follows:

(B)(3) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee designated by the Board may, with respect to any party, grant a motion for summary judgment when it has been determined that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Summary Judgment Background. Summary judgment authority permits an agency to dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that there is no genuine dispute as to any material fact, and that the party seeking the motion is entitled to a judgment, in whole or in part, as a matter of law.[107] "In an adjudicative context, an agency has discretion to forgo a hearing through summary judgment. It is proper to do so where there is no genuine issue of material fact."[108]

"Summary judgment in administrative adjudications is well accepted."[109] Administrative agencies, like courts, hold hearings for the purpose of weighing evidence to determine whether to give credence to facts asserted by one party or the other before deciding which law should apply to them. If pleadings and other documents presented before a hearing, however, reveal that the parties agree, i.e., there is "no genuine issue" on some or all of the "material" facts, an adjudicating official can dispense with an evidentiary hearing completely or limit one only to disputed facts. A summary judgment in whole or in part for one party can be entered by applying the appropriate law to the undisputed facts. If the parties agree on eight of 10 facts, for example, an adjudicating official can issue a summary judgment on the undisputed ones, but

---

[107] See Charles H. Koch, Jr., *Administrative Law and Practice* § 5.42 (2d ed. 1997) (hereinafter Koch) and Federal Rule of Civil Procedure 56(c) in 28 *U.S. Code Appendix*.

[108] Koch at § 5.42.

[109] Ibid., citing *Puerto Rico Aqueduct Sewer Authority v. Environmental Protection Agency*, 35 F.3d 600 (1st Cir. 1994), *cert. denied* 513 U.S. 1148 (1995). The Puerto Rico case indicated that many agencies have promulgated regulations to allow them to issue summary judgments. These agencies include the Nuclear Regulatory Commission, the Federal Trade Commission, the Food and Drug Administration, the Federal Communications Commission, the Environmental Protection Agency, the National Labor Relations Board, and the Occupational Safety and Health Administration, but not the Securities and Exchange Commission. See 35 F.3d at 606 for the citations to summary judgment authorities for these agencies in the *Code of Federal Regulations*.

holds an evidentiary hearing to determine which party's version of the two disputed facts should be accepted before applying the appropriate law and entering a judgment.

Agency Justification. As noted above, Section 7701(a)(1) of Title 5 of the United States Code, in relevant part, currently provides that, ". . . An appellant shall have the right — (1) to a hearing for which a transcript shall be kept; . . . ." The board's justification accompanying the draft bill states that the Court of Appeals for the Federal Circuit has held that this unqualified grant of "a right to a hearing" denies the board authority to issue summary judgments.[110] The court reached this conclusion because the joint explanatory statement to the conference report to the Civil Service Reform Act of 1978 (P.L. 95-454) reveals that the House position granting an appellant a right to a hearing was included in the final bill; the Senate position, which would have granted the board summary judgment authority, was rejected.[111]

The justification asserts the board's belief that it has developed, over a period of almost 30 years, a reputation for adjudicating appeals in a fair and impartial manner and that the board intends to use its summary judgment authority, if granted, sparingly. With this authority, the board, according to the justification, will be able (1) to terminate lengthy appeals without going to a hearing, thereby avoiding the cost and delay of further proceedings; (2) to require parties to show proof of their claims or defenses instead of resting on their pleadings; (3) to narrow the issues to be addressed during the hearing by disposing of particular claims or defenses through a partial summary judgment; and (4) to encourage parties to consider settlement by targeting areas in which parties are most vulnerable.

Analysis. MSPB's justification states that the Crispin case held that the board does not have summary judgment authority because the conference managers to the bill enacted as the Civil Service Reform Act of 1978 rejected the Senate's proposal that would have granted it, but it does not elaborate on the text of that proposal. That text merits attention because it reveals some safeguards that the 2006 MSPB draft legislation does not expressly provide.

Section 5 of the draft bill would amend Section 1204 of Title 5 by adding a new subsection (b)(3) to state that a board adjudicating official ". . . may, with respect to any party, grant a motion for summary judgment 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." This text is silent on issues such as what standard and what evidence an adjudicating official at the board would use to determine whether or not "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." Moreover, it does not address the stage of an appeal when this determination would be made. For example, would an adjudicating official rule on a motion for summary judgment immediately after an appellant has filed an appeal and an agency has filed its answer? Would the determination that there is no genuine issue as to any material fact be based solely on the pleadings, or would a party who has not filed a motion for summary judgment be given an opportunity to obtain information needed adequately to respond to it?

---

[110] "Merit Systems Protection Act Board Reauthorization Act of 2006: Justifications for Legislative Proposals" at 3, citing *Crispin v. Department of Commerce*, 732 F.2d 919 (Fed. Cir. 1984).

[111] See H. Rept. 95-1717 at 137 (1978), quoted in *U.S. Code Congressional and Administrative News* 2723, 2871 (1978).

The draft bill differs with the text of the summary judgment subsection of the bill, S. 2640, 95th Congress, 2nd session, the Civil Service Reform Bill of 1978, that was reported to the Senate. Section 205 of the Senate bill, amending 5 U.S.C. Sections 7701(b) and (c), provided that:

> Section 7701. Appellate procedures.
>
> > (b) The Board may refer any case appealable to it to an administrative law judge appointed under section 3105 of this title, or to an appeals officer, who shall, except as provided in subsection (c) of this section, render a decision after conducting an evidentiary hearing with an opportunity for cross-examination.
> > . . . .
> >
> > (c) At any time after the filing of the appeal, any party may move for summary judgment. The adverse party shall have a reasonable time, fixed by regulations of the Board, to respond. If the response of the adverse party shows that he cannot for reasons stated present facts essential to justify his opposition, the motion may be denied or a continuance may be ordered to permit affidavits to be obtained or depositions to be taken or discovery to be had. If the administrative law judge or appeals officer finds, based on the written submission of the parties and other materials in the record that there are no genuine and material issues of fact in dispute, the administrative law judge or appeals officer shall grant a summary decision to the party entitled to such a decision as a matter of law. The administrative law judge or appeals officer may, at the request of either party, provide for oral presentation of views in coming to a decision under this subsection.[112]

The description of this language in the Senate report states that:

> Sections 7701(b) and (c) govern the type of hearing an employee must receive before the Board. The committee amended this provision of the bill to make it absolutely clear that an employee would receive a full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact — that is, a dispute as to facts which must be resolved before a decision can be reached, and which may be most appropriately considered and resolved through the traditional adjudicatory methods used in evidentiary hearings. This would include, for example, where oral testimony and cross-examination is the best way to test the credibility of witnesses. The bill was amended by the committee to specifically provide that in such cases an evidentiary hearing should include the traditional right of cross-examination . . . .
>
> Where there is no dispute about the facts, the presiding officer may avoid holding an evidentiary hearing since in these cases a full hearing is unnecessary. The committee amendment specifies the procedure either party must follow if it requests summary judgment on the grounds there are no factual disputes in the case. The wording adopted by the committee assures the employee a full opportunity to present his case before a decision is made. The presiding officer may authorize the conduct of discovery procedures so that the employee has a chance to assemble his case before a decision on the summary judgment is rendered. This is especially important because often the agency alone will possess the records the employee needs to successfully

---

[112] S. Rept. 95-969, pp. 223-224.

argue his case. The administrative law judge or appeals officer may afford the parties the right to an oral argument before a decision is reached on the summary judgment motion.[113]

This report passage highlights some safeguards for possible consideration concerning whether to grant summary judgment authority to the board. It suggests that an employee or applicant who appeals an adverse action with the board may be at an informational disadvantage if an agency, in response to an appeal, should move for a summary judgment based solely on the pleadings. The passage adds that an appellant should be afforded an opportunity to obtain affidavits or take depositions or conduct discovery because "often the agency alone will possess the records an employee needs to successfully argue his case."[114] These processes would enable an appellant to respond in an informed way to a summary judgment motion before a board adjudicating official rules on it.

A commentator on administrative law has observed that:

> Summary judgment in the administrative context is linked inextricably to Federal Rule 56 [of the Federal Rules of Civil Procedure]. As incorporated in Rule 56 of the Federal Rules, a summary judgment makes possible the prompt disposition of a case on its merits without a formal trial if there is no 'genuine issue as to material fact.' The motion may be made as to some or all of the claim in order to claim that 'as a matter of law' the moving party should prevail.[115]

Rule 56 permits a party seeking to recover on a claim or a defending party to "move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof," i.e., a claim. Like the language in the Civil Service Reform Bill that was reported to the Senate in 1978, Rule 56 prescribes a procedure that may be followed when a party who has not moved for a summary judgment, i.e., an adverse party, lacks information on which to base a response. Rule 56(f) states that:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment and may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

---

[113] Ibid., at 53-54 (Emphasis supplied.). The corresponding explanation of language that was reported to the House in section 205 of H.R. 11280 in the committee report states that, "An employee or applicant is entitled to a hearing on the record and may be represented by an attorney or other person[,]" but does not elaborate on the reason. See H. Rept. 95-1403 at 22 (1978).

[114] See 5 U.S.C. § 7513, which indicates that an employee who has been the subject of a major adverse action such as a removal is entitled to a written decision from the agency and the reasons that it imposed an adverse action; the agency is required to maintain copies of a notice of a proposed adverse action, the employee's answer when written or a summary if made orally, and any order effecting an adverse action, together with supporting materials and to furnish these materials to MSPB and to the affected employee upon request. Under Section 7513, an employee does not have an absolute right to a hearing in an adverse action; the section provides that, "An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer under subsection (b)(2) of this section." See also 5 C.F.R. § 1201.24, a provision of MSPB regulations, which identifies the information that an appellant must include in an appeal document.

[115] Koch at § 5-42.

The text of a portion of the text in the Senate bill relating to this matter is identical to the text of Rule 56(f).

In its draft legislation, MSPB has proposed to Congress amendments to some statutory provisions to enable the board to issue summary judgments. As noted above, this proposal does not address issues such as the standard that an adjudicating official would use to grant or deny a summary judgment or the stage of an appeal when a decision would be made. If Congress should adopt the language that the board has proposed, it is possible that the board in the future may address these issues by promulgating regulations.

Two agencies that have been granted authority by Congress to develop new personnel systems and to waive provisions of Chapter 77 ("Appeals") of Title 5 of the United States Code — the Department of Homeland Security (DHS) and the Department of Defense (DOD) — have issued final regulations that prescribe conditions under which an evidentiary hearing will be required in the new DHS and DOD personnel systems. Both departments were required by law to consult with MSPB before issuing regulations relating to appellate procedures.[116]

The Secretary of DHS and the Director of OPM jointly promulgated regulations, codified at 5 C.F.R. 9701.706(a), relating to MSPB appellate procedures. It provides, in relevant part, that, "A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented by an attorney or other representative, and to a hearing if material facts are in dispute . . . ." (emphasis supplied). Section 9701.706(k)(5) states that, "When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept."

The Secretary of DOD and the Director of OPM jointly issued regulations, codified at 5 C.F.R. 9901.807(e)(2), relating to decisions without a hearing under appellate procedures. The regulations state that:

> Decisions without a hearing. If the AJ [administrative judge] determines upon his or her own initiative or upon request of either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, including filing evidence and/or arguments, within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

The DHS regulation (5 C.F.R. § 9701.706(k)(5)), which mandates that an MSPB adjudicating official must render a summary judgment without a hearing when no material facts are in dispute, was challenged by the National Treasury Employees Union and other plaintiffs on the ground that it exceeded authority that Congress had granted the department in a provision of the Homeland Security Act of 2002. Codified at 5 U.S.C. § 9701(f)(2), this provision states that appellate regulations must be consistent with due process requirements and advance fair, efficient, and expeditious handling of departmental matters. The District Court for the District of Columbia rejected this assertion in National Treasury Employees Union v. Chertoff.[117] The court held that granting DHS summary judgment authority by regulation was reasonable,

---

[116] 5 U.S.C. § 9701(f)(1)(B)(ii) and (2)(A) for DHS and 5 U.S.C. § 9902(h)(1)(B)(ii) for DOD.

[117] 385 F.Supp.2d 1 (D.D.C. 2005).

consistent with the statutory purpose, and entitled to deference.[118] The Court of Appeals for the District of Columbia Circuit affirmed this holding in *National Treasury Employees Union* v. *Chertoff*.[119]

The Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees* v. *Gates*[120] held that some of the appeals procedures met the "fair treatment" standard, reversing the decision of the district court, and that others were not ripe for judicial review until the Department of Defense exercised them. Like the district court, the court of appeals did not address the summary judgment procedure.

These provisions of the DHS and DOD regulations illustrate the approaches that agencies have taken with respect to summary judgment authority and the right of parties to a hearing. The DHS regulation provides that if a board adjudicating official finds that there is no genuine issue or dispute on material facts, the official "must render a summary judgment." It does not expressly provide an opportunity for a party to respond before an adjudicating official makes this decision. The DOD regulation also states that an adjudicating official may limit the scope of a hearing or decide an appeal without a hearing if the official determines that some or all material facts are not in genuine dispute, but conditions this authority on giving the parties an opportunity to respond in writing and to file evidence and/or arguments before the official reaches a decision.

In deliberating on the board's proposed language to grant summary judgment authority, Congress may wish to consider whether to adopt or reject the language that the board has proposed or to grant this authority with some modifications to enable parties to obtain information that would permit them to respond to a summary judgment motion before a board adjudicating official rules on it. The board has indicated that it would be willing to consider including in regulations or in the proposed bill safeguards similar to those that appeared in the 1978 Senate bill and in Rule 56 of the Federal Rules of Civil Procedure. These safeguards would enable a party to obtain information needed to respond in an informed way to a motion for summary judgement.

Exemption from the Government in the Sunshine Act

Proposal and Background. Section 5(j) of the draft legislation would authorize the chairman, "in his or her sole discretion, [to] call a meeting of the members of the Board without regard to section 552b [of Title 5 of the *United States Code*] at which the members may jointly conduct or dispose of agency business." In effect, this proposed provision would exempt MSPB from the Sunshine Act.

The Sunshine Act, initially enacted in 1976, covers federal executive agencies headed by collegial bodies with two or more members, a majority of whom are appointed by the President

---

[118] 385 F.Supp.2d at 37.

[119] 452 F.3d 839 (D.C.Cir. 2006). See CRS Report RL33052, *Homeland Security and Labor Management Relations: NTEU v. Chertoff*, by Thomas J. Nicola and Jon O. Shimabukuro, for a discussion of the decisions by the District Court and the Court of Appeals.

[120] No. 06-5113a (May 18, 2007), available at www.cadc.uscourts.gov by decision date.

with the advice and consent of the Senate.[121] It has been estimated that more than 60 federal collegial bodies, such the Securities and Exchange Commission, the National Museum Services Board, and the National Labor Relations Board, either are covered by the act or have voluntarily adopted some of its provisions.[122] The act provides that covered agencies must hold certain meetings in public. In general, these include meetings during which "deliberations determine or result in the joint conduct or disposition of official agency business."[123] Although such meetings must be open to public observation, agencies are not required by the act to allow public participation.[124]

Under the Sunshine Act, agency meetings are presumed to be open. An agency must publish a public notice prior to an agency meeting, indicating the time, location, and subject of the meeting; whether the meeting is open or closed; and the name and telephone number of the official designated to respond to requests for information about the meeting.

An agency may close a portion or all of a meeting and withhold information if the meeting involves any of 10 exemptions:

(1) national defense or foreign policy matters that are specifically authorized by an executive order to be protected and are properly classified;
(2) internal personnel rules and practices;
(3) matters specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) formal censure or accusation of a crime;
(6) clearly unwarranted invasion of personal privacy;
(7) law enforcement investigatory records or information;
(8) information contained in, or related to, reports used by agencies responsible for the regulation or supervision of financial institutions;
(9) information whose premature disclosure would:
    (a) lead to financial speculation or significantly endanger a financial institution; or
    (b) significantly frustrate a proposed agency action; or
(10) issuance of a subpoena or other related judicial matter.

An agency must follow a prescribed set of procedures when closing a meeting, including a majority vote of the members and certification by the general counsel that the meeting may properly be closed. The act also provides that "[w]henever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public" under exemption (5), (6), or (7) "the agency, upon request of any one of its members,

---

[121] 5 U.S.C. § 552b(a)(1).

[122] Richard K. Berg, Stephan H. Klitzman, and Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act*, 2nd ed. (Chicago: ABA Publishing, 2005), p. xv.

[123] 5 U.S.C. § 552b(a)(2).

[124] See *We the People, Inc. of the United States* v. *Nuclear Regulatory Commission*, 746 F. Supp. 213, 217 (D.D.C. 1990).

shall vote ... whether to close the meeting."[125] An agency's action to close a meeting is subject to judicial review.

Agency Justification. The justification for the draft legislation notes that, "[w]hen adjudicating cases, the responsibilities of the Board's three members are analogous to those of an appellate court panel." It asserts that MSPB's functioning in this capacity is impaired by the constraints imposed by the Sunshine Act. It states that, "[t]he procedures mandated by the Sunshine Act make it practically impossible for the Board to meet to consider the merits of even a small portion of its appellate caseload." The justification acknowledges that discussions of appellate cases are exempt, but reports that the Sunshine Act problem arises from the intermingling of such discussions and the larger issues:

> Portions of a meeting pertaining to the agency's disposition of a particular case are exempt from the requirement of public observation. However, a meeting scheduled to dispose of a particular case could lead to discussions of subject matters that are subject to the public observation requirement. Moreover, the open nature of such meetings necessarily impedes free discussion of complex and sensitive issues. Given the Board Members' 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. This inefficient process slows the work of the Board and unnecessarily stifles free and thoughtful discussion and interaction by the Board members.

Analysis. MSPB sums up its justification for this proposed change by stating, "the Board requests an exemption from the requirements of the Sunshine Act when it exercises its adjudicatory function." Yet the legislative language seemingly would apply to any meeting of the board, and not merely those at which adjudication is conducted. If it is solely the adjudicatory function that MSPB would like to shield from the Sunshine Act, the legislative language could be more narrowly tailored for that purpose. Otherwise, the provision would seemingly apply to meetings of the board that have no relation to the adjudication of individual cases.

It appears, however, that the problem that this proposed provision purports to solve relates to MSPB's operational patterns. As the chairman acknowledged in recent Senate testimony, subsection (b)(10) already allows adjudicatory meetings to be closed.[126] But MSPB has argued that deliberations of the board at adjudicatory meetings could lead to deliberations about broader issues that require such meetings to be re-opened. MSPB has not been alone in facing this issue. Close observers of the implementation of the Sunshine Act summarize the issue and the current legal thinking in this area:

---

[125] 5 U.S.C. § 552b(d)(2).

[126] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight and Government Management, the Federal Workforce and the District of Columbia, *Safeguarding the Merit System Principles: A Review of the Merit Systems Protection Board and the Office of Special Counsel*, hearing, 110th Cong., 1st sess., Mar. 22, 2007. According to a transcript of the hearing prepared CQ.com, with regard to closed adjudicatory meetings, Chairman McPhie stated, "Well, you can do it under (b)(10), but you still have to do everything the Sunshine Act requires of you. You've got to give the notice. You've got to have an agenda, say what the agenda is. And you can close that portion of the meeting and engage in a discussion" (p. 23).

> A recurring issue in Exemption 10 cases is whether, and to what degree, an agency may blend its discussion of a particular case with a discussion of broader issues. A threshold inquiry is whether agency deliberations will deal with the specifically enumerated topics that trigger the exemption — for example, whether the agency deliberations will deal with "the agency's participation in a civil action." But the mere fact that an agency meeting may be devoted in part to exempt matters does not automatically permit the agency to close the meeting in its entirety. Agencies are required to "make every reasonable effort to segregate the exempt from the nonexempt." However, the D.C. Circuit has recognized that "[f]or purposes of Exemption 10 . . . there can be no hard-and-fast distinction between litigation strategy and policy questions; what matters is simply that the agency deliberations in question deal with 'the agency's participation in a civil action.'" In other words, agencies are not required to segregate a discussion of a civil action into the litigation and policy aspects necessarily implicated in that action and open up the discussion of the policy aspect. This is not to say, however, that an agency may avoid public discussion of policy questions merely because the policy developed might be implemented through civil actions. Indeed, the General Counsel of the Federal Trade Commission has suggested that "[t]he conventional wisdom . . . is that the agency may not meet in closed session to develop a consistent approach for application in future cases.'"[127]

It could be argued, then, that the Sunshine Act, as interpreted, might be sufficiently flexible to allow MSPB to meet on adjudicatory matters and occasionally venture into policy discussions, as long as such discussions do not lead to the establishment of new policies.

MSPB also states that members might feel inhibited from engaging in candid discussions in public. They are also not alone in expressing this concern. Some research has suggested that open meeting requirements may have reduced collegiality by creating meeting conditions that discourage frank discourse. The results of one study of multi-member agency officials suggested that reluctance to discuss substantive issues at open meetings is common.[128] Citing former officials' recollections of pre-Sunshine Act processes, some hold that better, more informed decision making would result from a more collegial process. They have advocated amending the act to provide for a pilot project in which agencies would have greater leeway to close a meeting. Under the proposal, a "detailed summary" would be made available to the public within five days of the meeting. In the event that such a project were successful, Congress could incorporate such changes government-wide.[129]

Some researchers question the view that collegial decision making was more deliberative and meaningful prior to the implementation of the Sunshine Act. Decisions from that era, they assert, "frequently reflected more the influence of staff or of chairpersons in association with staff than a true amalgamation of member views informed by staff expertise."[130] They also

---

[127] Richard K. Berg, Stephan H. Klitzman, and Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act*, 2nd ed. (Chicago: ABA Publishing, 2005), pp. 94-95, footnotes omitted. The omitted footnotes to the text cite several district and appellate court opinions supporting the authors' points.

[128] David M. Welborn, William Lyons, and Larry W. Thomas, "Implementation and Effects of the Federal Government in the Sunshine Act," *Administrative Conference of the United States: Recommendations and Reports 1984* (Washington: GPO, 1985), pp. 199-261.

[129] Administrative Conference of the United States, "Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act," *Administrative Law Review*, vol. 49, spring 1997, pp. 421-428.

[130] David M. Welborn, William Lyons, and Larry W. Thomas, "The Federal Government in the Sunshine Act (continued...)

argue that evidence suggests that "members are inclined to prepare more thoroughly for open meetings than for closed ones,"[131] and are, therefore, better informed in their decision making than they were prior to the act. Opponents of altering the Sunshine Act to give agencies more leeway in closing meetings have also suggested that it is incumbent upon members of multi-member agencies to shed their reluctance to deliberate more meaningfully in public meetings.[132]

Should the MSPB chairman be empowered to close any board meeting, at his or her discretion, to avoid the need to potentially re-open the meeting or the inhibition of frank discussion? It could be argued that the inherent inconvenience to, and inhibition of, members and staff, resulting from this method of complying with Sunshine Act requirements should be weighed against the government policy embodied in the act, that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."[133] One question, in this case, is whether or not the public interest in knowing the philosophy and reasoning of the board is outweighed by the operational difficulties the Sunshine Act requirements might introduce.

As a practical matter, it is worth noting that MSPB has, in effect, appeared to have avoided Sunshine Act requirements since the end of 2001, when the last Sunshine Act meeting of the board was held. The board reports that the "adjudication of cases is not generally done in a meeting. Rather each member of the Board adjudicates cases independently."[134] Other matters, such as management issues, strategic plans, and workload are generally discussed in meetings of the senior staff which are attended by the board's office heads and the chief counsels to the board members. While board members generally do not attend meetings of the senior staff, any one of the board members may, on occasion, sit in on the meetings.[135] The chief of staff then briefs the chairman, and chief counsels brief the other members. Perhaps, if the chairman were able to "in his or her sole discretion, call a meeting of the members of the Board" without regard to the Sunshine Act, the board would conduct some of its business through direct meetings of the principals.

The draft legislation presented by the board does not seek to dismantle the Sunshine Act for all agencies. As noted above, however, MSPB is not alone in noting the potential operational difficulties associated with compliance with its provisions. Nor is it the only agency to seek exemptions from its requirements. Some agency leaders have asked Congress to amend the statute to allow boards and commissions greater flexibility to close their deliberations.[136] To the

---

[130] (...continued)
and Agency Decision Making," *Administration and Society*, vol. 20, Feb. 1989, p. 470.

[131] Ibid., p. 472.

[132] This position is ascribed to representatives of the press by Randolph May in "Reforming the Sunshine Act," *Administrative Law Review*, vol. 49, spring 1997, p. 418.

[133] P.L. 94-409, § 2.

[134] MSPB July 2006 Response to CRS.

[135] MSPB Aug. 2006 Response to CRS.

[136] See, e.g., "Letter from Michael K. Powell, Chairman, and Michael J. Copps, Commissioner, Federal Communications, to the Honorable Ted Stevens, Chairman, Senate Committee on Commerce, Science, and Transportation, February 2, 2005," in Berg, Klitzman, and Edles, pp. 344-346.

degree that the Sunshine Act exemption arguments raised by MSPB are persuasive, Congress might elect to revisit the act and its provisions, generally.

If Congress were to address this issue, it might respond in a number of ways. It could, for example, commission a group of public administration experts, such as the National Academy of Public Administration (NAPA), to study the issues raised above. Alternatively, a committee of Congress could conduct oversight hearings to assess the act's functioning and weigh its benefits and drawbacks as presented by representatives of affected government agencies, administrative procedure experts, and advocates of government openness.[137] In addition to, or instead of, these options, legislation amending the Sunshine Act might be developed and considered.

OSC Background

History and Purpose of OSC

The United States Office of Special Counsel (OSC) is an independent investigative and prosecutorial agency within the executive branch which litigates before the Merit Systems Protection Board (MSPB). It is headquartered in Washington, DC, and has field offices in Dallas, Texas; Oakland, California; Detroit, Michigan; and Washington, DC. Prior to obtaining this independent status through the enactment of the Whistleblower Protection Act of 1989, P.L. 101-12, as amended, on April 10, 1989,[138] the OSC was part of MSPB. Reorganization Plan No. 2 of 1978, effective January 1, 1979, created MSPB, as one of three agencies, to replace the United States Civil Service Commission. P.L. 95-454, the Civil Service Reform Act (CSRA) of 1978, as amended, codified the Reorganization Plan in statute.[139] P.L. 107-304 reauthorized OSC through FY2007.[140]

As stated earlier, the Senate Committee on Governmental Affairs report that accompanied the CSRA noted the need for a "vigorous protector of the merit system." The report also stated that "The Special Counsel will have power to initiate disciplinary action against those who knowingly and willfully violate the merit principles by engaging in prohibited personnel practices" and listed such actions as simple reprimand, removal, suspension, demotion, exclusion from Federal employment for up to 5 years, and fines up to $1,000." According to the report, "For the first time, and by statute, the Federal Government is given the mandate — through the Special Counsel of the Merit Systems Protection Board — to protect whisteblowers from improper reprisals." These protections included "petition[ing] the Merit Board to suspend

---

[137] The most recent congressional hearing concerning, in part, the implementation of the Sunshine Act was in 1996. (See U.S. Congress, House Committee on Government Reform and Oversight, Subcommittee on Government Management, Information, and Technology, *Federal Information Policy Oversight*, hearings, 104th Cong., 2nd sess., June 13, 1996 (Washington: GPO, 1996).

[138] 103 Stat. 16; 5 U.S.C. §1201 et seq.

[139] P.L. 95-454, Title II, §202(a), Oct. 13, 1978, 92 Stat. 1111, at 1121-1122, 1131; 5 U.S.C. §§1201-1206.

[140] P.L. 107-304, §2, Nov. 27, 2002, 116 Stat. 2364; 5 U.S.C. §5509 note.

retaliatory actions against whistle blowers" and initiating "[d]isciplinary action against violators of whistle blowers' rights."[141]

An analysis of the Whistleblower Protection Act of 1989, which established OSC as an independent agency, stated that the "primary responsiblities" of the OSC "have remained essentially the same as set forth in the CSRA" and quoted a portion of the debate in the House of Representatives on the legislative intent of the Act:

> Individuals should be able to go to the Special Counsel to make a disclosure ... to complain about a prohibited personnel practice ... or to allege a violation of another law within the jurisdiction of the Special Counsel, ... without any fear that the information they provide or the investigation they set off will be used against them. Simply put, the Special Counsel must never act to the detriment of employees who seek the help of the Special Counsel.[142]

Agency Management

OSC is headed by the Special Counsel, who is appointed by the President, by and with the advice and consent of the Senate, for a five-year term. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed. He or she may not continue to serve for more than one year after the term would have expired. The Special Counsel must be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a predecessor's term of office serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. He or she may not hold another government office or position, except as otherwise provided by law or at the direction of the President.[143]

The current Special Counsel is Scott J. Bloch, who was confirmed on December 9, 2003, and whose term expires January 5, 2009.[144]

Powers and Functions of OSC

OSC's statutory authority is codified at 5 U.S.C. §§1212 through 1219. The agency states that its "primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing." Other aspects of the mission are to "facilitate disclosures of wrongdoing in the federal government," "enforce restrictions on political activity by government employees," and "participate in enforcement of the Uniformed Services Employment and Reemployment Rights Act." According to the OSC, it carries out this mission by:

---

[141] U.S. Congress, Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978*, report to accompany S. 2640, S. Rept. 95-969, 95th Cong., 2nd sess. (Washington: GPO, 1978), pp. 7-8.

[142] CRS Report 97-787A, *Whistleblower Protections for Federal Employees*, by L. Paige Whitaker and Michael Schmerling, pp. 15-16. (Available from author.)

[143] 5 U.S.C. §1211.

[144] Mr. Bloch was sworn in on January 5, 2004.

Investigating allegations of prohibited personnel practices and other improper employment practices within its jurisdiction, and seeking any appropriate corrective or disciplinary action;

Providing an independent, secure channel for disclosure and resolution of wrongdoing in federal agencies;

Interpreting and enforcing Hatch Act provisions on permissible and impermissible political activity;

Promoting greater understanding of the rights and responsibilities of government employees; and

Enforcing the law that protects service members reemployment rights[145]

A CRS Report, entitled *The Whistleblower Protection Act: An Overview*, analyzes the 5 U.S.C. §§1212-1215 provisions.[146] The remaining statutory provisions are discussed below.

Other matters within the jurisdiction of the Office of Special Counsel. In addition to the authority otherwise provided in chapter 12 of Title 5, United States Code, the Special Counsel must conduct an investigation of any allegation concerning:

1. political activity prohibited under 5 U.S.C. chapter 73, subchapter III, relating to political activities by federal employees;

2. political activity prohibited under 5 U.S.C. chapter 15, relating to political activities by certain state and local officers and employees;

3. arbitrary or capricious withholding of information prohibited under 5 U.S.C. §552. The Special Counsel cannot investigate any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by executive order;

4. activities prohibited by any civil service law, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

5. involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action. The Special Counsel cannot investigate if he or she determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

If the Special Counsel receives an allegation concerning a matter under items 1, 3, 4, or 5, immediately above, he or she may investigate and seek corrective action under section 1214 of

---

[145] U.S. Office of Special Counsel, *The Role of the U.S. Office of Special Counsel*, Jan. 2006. Available on the Internet at: [http://www.osc.gov/documents/pubs/oscrole.pdf].

[146] CRS Report RL33918, *The Whistleblower Protection Act: An Overview*, by L. Paige Whitaker.

Title 5, United States Code and disciplinary action under section 1215 of Title 5, United States Code in the same way as if a prohibited personnel practice were involved.[147]

Transmittal of information to Congress. The Special Counsel or any employee designated by him or her must transmit to Congress, on the request of any committee or subcommittee, information and the Special Counsel's views on functions, responsibilities, or other matters relating to the OSC. The information can be transmitted by report, testimony, or otherwise, and must be transmitted concurrently to the President and any other appropriate executive branch agency.[148]

Annual report. The Special Counsel must submit an annual report to Congress on its activities, including the number, types, and disposition of allegations of prohibited personnel practices filed with it; investigations conducted by it; cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, currently exists, or will occur within the 240-day period specified in 5 U.S.C. §1214(b)(2)(A)(I); and actions initiated by it before the Merit Systems Protection Board. The report must also include a description of the recommendations and reports made by the OSC to other agencies pursuant to 5 U.S.C. chapter 12, subchapter II, and the actions taken by the agencies as a result of the reports or recommendations. Recommendations for legislation or other congressional action the Special Counsel considers appropriate are included in the report as well.[149]

Public information. The Special Counsel must maintain and make available to the public:

- A list of noncriminal matters referred to agency heads under 5 U.S.C. §1213(c), together with reports from agency heads under 5 U.S.C. §1213(c)(1)(B) relating to such matters. Section 1213 covers provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters.

- A list of matters referred to agency heads under 5 U.S.C. §1215(c)(2). Section 1215 covers disciplinary action.

- A list of matters referred to agency heads under 5 U.S.C. §1214(e), together with certifications from agency heads. Section 1214 covers investigation of prohibited personnel practices and corrective action.

- Reports from agency heads under 5 U.S.C. §1213(g)(1).

The Special Counsel must take steps to ensure that any lists or reports referred to above that are made available to the public do not contain any information that must be kept secret in the interest of national defense or the conduct of foreign affairs.[150]

---

[147] 5 U.S.C. §1216.

[148] 5 U.S.C. §1217.

[149] 5 U.S.C. §1218.

[150] 5 U.S.C. §1219.

Representing veterans or reservists. OSC has an enforcement role under P.L. 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.[151] USERRA "protects the reemployment rights of persons who are absent from their respective civilian employment due to the performance of military duties ... and makes it illegal for an employer to deny any benefit of employment on the basis of past, current, or future performance of military service." Under the law, "OSC is authorized to act as the attorney for an aggrieved person ("claimant") and initiate legal action against the involved federal employer." The OSC serves as special prosecutor of USERRA cases having merit, and as such, "seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before MSPB." The "OSC objectively reviews the facts and laws applicable to each complaint" and where "satisfied that claimant is entitled to relief, then it may exercise its prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit."[152]

Under a demonstration project authorized by P.L. 108-454, the Veterans Benefits Improvement Act of 2004,[153] OSC "has the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit" and "also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number." The demonstration project ends on September 30, 2007.[154]

OSC Organization and Functions

As stated earlier, OSC is headquartered in Washington, DC, and has field offices in Dallas, Oakland, Detroit, and Washington, DC. As of December 2006, OSC had 107 employees on-board.[155] In terms of organization and functions, the Immediate Office of the Special Counsel is "responsible for policymaking and overall management of OSC," including congressional liaison and public affairs activities. The agency has five operating units/divisions and five supporting offices, and are described in OSC's annual report to Congress as follows:

- The Complaints Examining Unit receives "all complaints alleging prohibited personnel practices and other violations of civil service law, rule, or regulation within OSC's jurisdiction." Claims that are potentially valid are referred to the Investigation and Prosecution Division to be investigated further.

- The Disclosure Unit receives and reviews disclosures from whistleblowers and "advises the Special Counsel on the appropriate disposition of the information disclosed." The unit determines whether agency reports of investigation "appear to be reasonable and in compliance with statutory requirements."

---

[151] P.L. 103-353, 108 Stat. §3166; 38 U.S.C. §4301.

[152] U.S. Office of Special Counsel, *Fiscal Year 2008 Congressional Budget Justification and Performance Budget Goals*, [Feb. 2007], p. 41. (Hereafter referred to as OSC Budget Justification.)

[153] P.L. 108-454, §204, Dec. 10, 2004, 118 Stat. 3606-3608; 38 U.S.C. §4301 note.

[154] OSC Budget Justification, p. 41.

[155] U.S. Office of Personnel Management, FedScope database, Dec. 2006.

- The Investigation and Prosecution Division "conducts field investigations of matters referred after preliminary inquiry by the Complaints Examining Unit." The attorneys in the division "conduct a legal analysis after investigations are completed to determine whether the evidence is sufficient to establish that a prohibited personnel practice (or other violation within OSC's jurisdiction) has occurred" and work with investigators "in evaluating whether a matter warrants corrective action, disciplinary action, or both." Cases that are not resolved through negotiation with the agency involved are presented before MSPB. Investigators and attorneys also "investigate alleged violations of the Hatch Act" and USERRA.

- The Hatch Act Unit enforces the Hatch Act and "issues advisory opinions to individuals seeking information about Hatch Act restrictions on political activity by federal, and certain state and local, government employees." The unit "reviews complaints alleging a Hatch Act violation and, when warranted, investigates and prosecutes the matter (or refers the matter to the Investigation and Prosecution Division for further action)."

- The USERRA Unit is located at the OSC's headquarters and is "designated to receive, investigate, analyze, and resolve ... all USERRA and related veteran-employment claims. Claims are resolved by voluntary agreement or prosecution before MSPB. The unit "educates federal agencies on their USERRA obligations."

- The Alternative Dispute Resolution Program receives the referral of selected cases from the Complaints Examining Unit for further investigation. OSC "contacts the complainant and the agency involved and invites them to participate in [its] voluntary Mediation Program." If a complaint is resolved, "the parties execute a written and binding settlement agreement," otherwise, it is referred "for further investigation."

- The Legal Counsel and Policy Division "provides general counsel and policy services to OSC, including legal advice and support on management and administrative matters; legal defense of OSC in litigation filed against the agency; policy planning and development; and management of the agency ethics program."

- The Management and Budget Division "provides administrative and management support services to OSC" to inform decisions related to program, human capital, and budget.

- The Training Office "train[s] all new employees, cross train[s] existing employees, and develop[s] specialized training in areas such as litigation skills."

- The Special Projects Unit "uses senior trial lawyers to work cases of high priority, ... conduct[s] internal research on the processes and procedures of the operational units at OSC, ... and is responsible for the project "that requires

OSC to investigate the re-employment rights of military service members under USERRA."[156]

Analysis of Draft Legislation

OSC has submitted for this reauthorization hearing seven "suggested legislative adjustments" for Subcommittee consideration, accompanied by justifications and, in some instances, draft statutory language. The suggested adjustments would (1) modify (or eliminate) OSC's potential liability for attorneys fees after an unsuccessful disciplinary action against an employee in a prohibited personnel action case instituted at the MSPB; (2) grant permission to relocate OSC outside the District of Columbia; (3) combine disciplinary penalties; (4)permit OSC to appear as amicus curiae in cases that reach the federal court system; (5) amend USERRA to grant OSC the authority to investigate all federal sector claims; (6) allow OSC to receive, investigate, analyze and prosecute veterans' preference claims for corrective action purposes; and (7) amend the statute to allow OSC's Disclosure Unit 45 days, instead of the current 15 days, to make the determination whether a whistleblower has presented information indicating that a "substantial likelihood of wrongdoing has taken place." This section of the testimony briefly addresses the justifications presented by each proposal.

Attorneys Fees

OSC advises that under current court interpretation of Section 1204(m)(1) of the MSPB statute, it may be held liable for attorneys fees after it brings an unsuccessful disciplinary action against an agency employee in a prohibited personnel practice (PPP) case at the MSPB. OSC believes this to be an improper reading of the provision which has had "a detrimental effect on legitimate OSC enforcement efforts." OSC argues that the disciplinary actions, which are initiated against agency employees only after independent investigation and determination of a law violation, are taken to enforce the law. "As such they are more akin to the prosecution by the Justice Department, after which defendants are not permitted to seek attorneys fees after an unsuccessful prosecution."

OSC's reliance on a purported analogy to criminal prosecution appears unfounded. Public Law 105-119, section 617, codified at 18 U.S.C. § 3006A note, provides in pertinent part:

> The [federal] court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of the title 28, United States Code. . ..

---

[156] The descriptions are summarized from U.S. Office of Special Counsel, *Report to Congress, Fiscal Year 2006*, (Washington: OSC, [2007], pp. 20-21.

The referenced section 2412 of title 28 is the Equal Access to Justice Act, and the procedures and limitation referred to have been held to be those mentioned in section 2412(d).[157] Awards of attorneys fees by federal courts and agencies generally, and to prevailing criminal defendants in particular, are discussed in CRS Report No. 94-970A, "Awards of Attorneys Fees by Federal Courts and Federal Agencies," by Henry Cohen.

The OSC justification also does not detail or particularize the "detrimental effect" on its law enforcement efforts or how it differs from the impact such ubiquitous attorneys fees provisions have had on other agencies.

Agency Relocation

Under 2 U.S.C. 72 "All offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law." Because its current lease will expire before its next reauthorization OSC would like the option of relocating elsewhere in the D. C. Metropolitan area. The Committee may require more immediate, specific compelling reasons before granting that option.

Disciplinary Action

Under current law MSPB is authorized to impose a variety of disciplinary penalties against an employee: removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand *or* a civil penalty not in excess of $1000.[158] But there can be no imposition of a combination of these penalties. OSC requests that MSPB be given the discretion to combine penalties, giving as an example the circumvention of a Board order to an agency to remove an employee who was then rehired then next day because he had not been debarred. OSC provides legislative language that would effect this purpose. Thus, under the first subsection of revised Section 1215 (a) (3) the MSPB could impose any combination of the above-described disciplinary actions, thereby allowing for increased penalties against employees who retaliate against whistleblowers.

However, it appears that the second part of the proposed legislation would *lower* the standard that the government must meet in its affirmative defense by demonstrating that it would have taken the personnel action in question even if the employee had not engaged in whistleblowing. Under current law, once the complainant has made a prima facie case, the government is required to demonstrate by "clear and convincing" evidence that it would have taken the same personnel action even in the absence of the whistleblowing disclosure. The proposed language appears to lower the standard of the government's affirmative defense to simply a "preponderance of the evidence." Prior to the enactment of the Whistleblower Protection Act of 1989 (WPA), the standard was "preponderance of the evidence." In an effort to make the statute more whistleblower protective, the standard was raised to "clear and convincing."

---

[157] See , U.S. v. Knott, 256 F. 3d. 20 (1st Cir. 2001); U.S. v. Ranger Elections Communications, Inc., 210 F. 3d., 632-33 (6th Cir. 2000)

[158] 5 U.S.C. 1215 (a) (3) (emphasis supplied).

Also of significance, the proposed language appears to make it *more difficult* for the complainant to prove retaliation for whistleblowing. Under current law, the Special Counsel need only show that the whistleblowing disclosure was a "contributing factor" in the government taking the personnel action in question. The proposed language appears to increase that burden to a "significant motivating factor." It may be noted that the WPA made it easier for a complainant to prove retaliation for whistleblowing by changing the earlier standard that the Special Counsel had to meet from "significant factor" to "contributing factor;" the proposed language appears to revert the standard back to what it was prior enactment of the WPA.

Finally, the proposed language would amend section 1215 of title 5, "Disciplinary action," whereas the current statute provides for the government's affirmative defense standard and the complainant's burden of proof in section 1214, "Investigation of prohibited personnel practices; corrective action." The significance or rationale behind amending section 1215 instead of section 1214 is not clear. The OSC's justification does not address these issues.

Special Counsel Amicus Appearances

OSC requests that it be given authority to make amicus curiae appearances in cases that go beyond MSPB to the federal court system. Such appearances need to be authorized by law. [159] As a matter of policy, the Justice Department consistently objects to according independent litigating authority of any sort outside of its control on the grounds that the executive should speak with one voice before the courts. Congress, however, has frequently authorized independent litigating authority in civil matters where it has determined that particular agencies have the knowledge, expertise and interest in particular matters or programs that make agency presentations to courts more appropriate and effective. In what might be viewed as an analogous situations, the Chief Counsel for Advocacy of the Small Business Administration " is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule [that impacts on small business interests]. In any such action the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities."[160]

Disciplinary Action Under USERRA

OSC advises the Committee that USERRA contains no disciplinary action provisions for federal sector cases. Since a violation of USERRA is not a prohibited personnel practice, OSC does not have jurisdiction to seek such disciplinary action for USERRA. To close this "loophole," OSC has submitted a bill that would give it jurisdiction to seek disciplinary actions and also grant it authority to investigate all federal sector USERRA claims. The proposal is submitted to the Committee only to inform it since the Committee on Veterans' Affairs has primary jurisdiction under USERRA. The proposal may be briefly described.

The bill would amend 38 U.S.C. § 4324 to authorize the OSC to request from MSPB disciplinary action against any federal employee who "knowingly takes, recommends, or approves (or fails to take, recommend, or approve) any action that violates USERRA provisions.

---

[159] See 28 U.S.C. 516, 518, 519 vesting control of all federal litigation in the Attorney General unless otherwise authorized by law.

[160] 5 U.S.C 312 (2000).

The remedies for a USERRA violation under current law in 38 U.S.C.§ 4324 are an MSPB order requiring an agency to comply with the statute and to compensate the complainant for any loss of wages or benefits suffered by reason of lack of compliance. Unlike PPP, there is currently no authority to discipline the perpetrator for a USERRA violation.

The authority that OSC seeks with respect to USERRA violations is analogous to the authority it has under 5 U.S.C. § 1215 to request that the Board discipline an employee who has "committed a prohibited personnel practice; violated the provisions of any law, rule or regulations; or has engaged in any other conduct within the jurisdiction of the Special Counsel as described in 5 U.S.C. § 1216 (including Hatch Act violations), or knowingly and willfully refused or failed to comply with an order of the MSPB."

This recommendation also expressly would deny to the MSPB authority to award attorneys fees in cases to discipline federal employees for violating USERRA provisions, "so that the Special Counsel will not be impeded in its effort to seek disciplinary action. . . ."

Time Frame for Processing Whistleblower Disclosures

OSC proposes that the statutory deadline of 15 days be extended to 45 days to make a determination whether there is a "substantial likelihood that information presented by a whistleblower discloses a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." Such claims are evaluated by OSC's Disclosure Unit which does not have authority to investigate the allegations. The agency states that it must present a case that under the current statutory time frame, and in light of its vastly increased case load and limited resources, does not allow sufficient time to review and manage the cases and respond to whistleblower in the manner Congress intended. The proposal and justification appear to merit further Committee review and verification.