

LEXSEE 103 H. RPT. 769

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REAUTHORIZATION OF THE OFFICE OF SPECIAL COUNSEL

DATE: September 30, 1994. Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

SPONSOR: Mr. Clay, from the Committee on Post Office and Civil Service, submitted the following

REPORT

(To accompany H.R. 2970)

(Including cost estimate of the Congressional Budget Office)

TEXT:

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 2970) to reauthorize the Office of Special Counsel, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. REAUTHORIZATIONS.

Section 8(a) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note) is amended by striking "fiscal years" through "such sums" each place it appears and inserting "fiscal years 1993-1997, such sums".

SEC. 2. OFFICE OF SPECIAL COUNSEL.

(a) Authority to Continue Serving Pending the Appointment of a Successor. Section 1211(b) of title 5, United States Code, is amended by inserting after the third sentence the following: "The Special Counsel may continue to serve after the expiration of the Special Counsels term until a successor has qualified, but for not longer than 1 year."

(b) Limitations on Disclosures. Section 1212(g) of title 5, United States Code, is amended to read as follows:

"(g)(1) The Special Counsel may not respond to any inquiry or provide information concerning either any person making an allegation under section 1214(a) or any allegation so made, except in accordance with the provisions of section 552a or as required by any other applicable law.

"(2) If, or to the extent that, the allegation involves a prohibited personnel practice described in paragraph (2), (8), or (9) of section 2302(b), no disclosure described in paragraph (1) may be made unless

"(A) either of the exceptions permitting disclosure under paragraph (1) is met; and

"(B)(i) the consent of the person who made such allegation is obtained in advance; or

"(ii) the information is being sought by an agency which requires such information in order to make a determination concerning access, for the person referred to in paragraph (1), to information the unauthorized disclosure of which could be expected to cause exceptionally grave damage to national security."

(c) Standard Applicable With Respect to Certain Agency Findings. Section 1213(e)(2)(A) of title 5, United States Code, is amended to read as follows:

"(A) the findings of the agency head are supported by clear and convincing evidence; and"

(d) Technical Clarification. The first sentence of section 1213(g)(1) of title 5, United States Code, is amended to read as follows: "If the Special Counsel receives information from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2) which, if such individual were an individual described in either of such subparagraphs, would be considered information of a type described in subsection (a), the Special Counsel may transmit the information to the head of the agency which the information concerns."

(e) Investigations. Section 1214(a)(1) of title 5, United States Code, is amended

(1) in subparagraph (B) by striking "practice under paragraph (1)," and inserting "practice,"; and

(2) by striking subparagraph (C) and inserting the following:

"(C) Unless an investigation under this section is terminated, the Special Counsel shall, within 60 days after notice is provided under subparagraph (B) with respect to a particular allegation, and at least every 60 days thereafter, notify the person who made such allegation as to the status of the investigation and any action which has been taken by the Office of Special Counsel since notice was last given under this subsection.

"(D)(i) Except as provided in clause (ii), no later than 120 days after the date of receiving an allegation of a prohibited personnel practice, the Special Counsel shall determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

"(ii) The deadline under clause (i) may be extended by written agreement between the Special Counsel and the person who made the allegation involved.

"(E) A determination by the Special Counsel under this paragraph shall not be admissible in any judicial or administrative proceeding except in the same circumstances as would apply under paragraph (2)(B) with respect to a written statement under paragraph (2)(A)."

(f) Clarification Relating to Burden of Proof. Sections 1214(b)(4)(B)(i) and 1221(e)(1) (as amended by section 3(b)) are further amended by striking the period at the end and inserting ", notwithstanding the provisions of section 7701(c)(1)."

(g) Additional Information To Be Included in Annual Reports. Section 1218 of title 5, United States Code, is amended by inserting "the number of instances in which it did not make a timely determination under section 1214(a)(1)," after "investigations conducted by it,".

(h) Effective Date. The amendments made by subsection (e) shall apply with respect to any allegation first received by the Office of Special Counsel on or after the effective date of this Act.

SEC. 3. INDIVIDUAL RIGHT OF ACTION RELATING TO THE MERIT SYSTEMS PROTECTION BOARD.

(a) Subpoenas. Section 1221(d)(1) of title 5, United States Code, is amended to read as follows:

"(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the matter requested

"(A) is not unduly burdensome;

"(B) is not privileged or otherwise protected from disclosure by law, rule, or regulation; and

"(C) is relevant to the subject matter involved in the pending action or appears reasonably calculated to lead to the discovery of admissible evidence."

(b) Burden of Proof. (1) In general. Section 1221(e) of title 5, United States Code, is amended to read as follows:

"(e)(1) Subject to paragraph (2), in any case involving an alleged prohibited personnel practice as described in paragraph (8) or (9) of section 2302(b), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that protected conduct under such paragraph (8) or (9) (as defined in paragraph (3)(A) or (B), as applicable) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

"(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected conduct involved.

"(3) For the purpose of this subsection, the term protected conduct means

"(A) with respect to paragraph (8) of section 2302(b), any disclosure described in subparagraph (A) or (B) of such paragraph; and

"(B) with respect to paragraph (9) of section 2302(b), any conduct described in subparagraph (A), (B), (C), or (D) of such paragraph."

(2) Same standard if relief is sought through office of special counsel.

(A) In general. Subparagraph (B) of section 1214(b)(4) of title 5, United States Code, is amended to read as follows:

"(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described in paragraph (8) or (9) of section 2302(b), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that protected conduct under such paragraph (8) or (9) (as defined in clause (iii)(I) or (II), as applicable) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

"(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected conduct involved.

"(iii) For the purpose of this subparagraph, the term protected conduct means

"(I) with respect to paragraph (8) of section 2302(b), any disclosure described in subparagraph (A) or (B) of such paragraph; and

"(II) with respect to paragraph (9) of section 2302(b), any conduct described in subparagraph (A), (B), (C), or (D) of such paragraph."

(B) Conforming amendment. Section 1214(b)(4)(A) is amended by striking "section 2302(b)(8)," and inserting "paragraph (8) or (9) of section 2302(b),".

(3) Same standard if relief is sought through binding arbitration. Section 7121(b) of title 5, United States Code, as amended by section 5(e), is further amended by adding at the end the following:

"(3) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice described in paragraph (8) or (9) of section 2302(b) is involved, require that the arbitrator apply the same standard as would apply under section 1221(e)."

(4) Same standard if relief is sought by an appeal under section 7701. Section 7701(c) of title 5, United States Code, is amended

(A) in paragraph (1) by striking "Subject to paragraph (2)" and inserting "Subject to paragraphs (2) and (3)"; and

(B) by adding at the end the following:

"(3) To the extent that an appeal involves an alleged prohibited personnel practice described in paragraph (8) or (9) of section 2302(b), the standard under section 1221(e) shall be applied."

(c) Referrals for Possible Disciplinary Action. Section 1221(f) of title 5, United States Code, is amended by adding after paragraph (2) the following:

"(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel for investigation and appropriate action under section 1215."

SEC. 4. PROHIBITED PERSONNEL PRACTICES. (a) Personnel Actions.

(1) In general. Section 2302(a)(2)(A) of title 5, United States Code, is amended

(A) in clause (ix) by striking "and" after the semicolon; and

(B) by redesignating clause (x) as clause (xii) and inserting before such clause the following:

"(x) a decision to require psychiatric testing or examination;

"(xi) a denial, revocation, or other determination relating to a security clearance; and".

(2) Conforming amendment. Section 2303(a) of title 5, United States Code, is amended by striking "clauses (i) through (x)" and inserting "clauses (i) through (xii)".

(b) Covered Positions. Section 2302(a)(2)(B) of title 5, United States Code, is amended to read as follows:

"(B) covered position, as used with respect to an employee or applicant for employment, means any position in the competitive service, a career appointee position in the Senior Executive Service, a position in the excepted service, or a position covered by chapter 74 of title 38, but does not include any position which, as of the date on which the employee began serving in the position or the applicant applied for such position (as the case may be), was

"(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

"(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration."

(c) Agencies. Section 2302(a)(2)(C) of title 5, United States Code, is amended

(1) by striking clause (i); and

(2) by redesignating clauses (ii) and (iii) as clauses (i) and (ii), respectively.

(d) Information. Section 2302(c) of title 5, United States Code, is amended in the first sentence by striking "management." and inserting "management, and for ensuring (in consultation with the Office of Special Counsel) that employees of such agency are informed of the rights and remedies available to them under this chapter and chapter 12."

(e) Sense of Congress. It is the sense of the Congress that a Federal employee or applicant for Federal employment who makes a disclosure described in section 2302(b) of title 5, United States Code, should not be prosecuted, or threatened with prosecution, under section 205 of title 18, United States Code, for such disclosure.

SEC. 5. ADDITIONAL AMENDMENTS RELATING TO PROCEDURES UNDER WHICH INDIVIDUALS MAY SEEK RELIEF FROM PROHIBITED PERSONNEL PRACTICES. (a) Individual Right of Action Before MSPB Available for Prohibited Personnel Practices Generally.

(1) In general. Section 1221(a) of title 5, United States Code, is amended by striking "practice described in section 2302(b)(8)," and inserting "practice,".

(2) Exception. Subsection (b) of section 1221 of title 5, United States Code, is amended by redesignating such subsection as subsection (b)(1), and by adding at the end the following:

"(2) Nothing in this subchapter shall be considered to create any right to seek corrective action with respect to a prohibited personnel practice described in section 2302(b)(1).

"(3) For purposes of subsection (a), the term personnel action, if taken or proposed to be taken as a result of a prohibited personnel practice other than one described in paragraph (1) or (8) of section 2302(b), means

"(A) an action under subchapter II of chapter 75;

"(B) a detail, transfer, or reassignment; and

"(C) a reduction in grade or removal under section 4303."

(3) Technical correction. Section 1221(a) is amended by striking "subsection 1214(a)(3)" and inserting "section 1214(a)(3)".

(b) Appeals. (1) In general. Section 7703 of title 5, United States Code, is amended

(A) in subsection (b)(1) by striking "Circuit." and inserting "Circuit or the United States court of appeals for the circuit in which the petitioner resides.";

(B) in subsection (c)

(i) by striking "In any case filed in the United States Court of Appeals for the Federal Circuit," and inserting "In any case filed under subsection (b)(1),"; and

(ii) by striking "evidence;" at the end of paragraph (3) and inserting "evidence.", and by striking "except that in" and inserting "In"; and

(C) by adding at the end of subsection (d) the following: "If a proceeding under this subsection is transferred to another court of appeals, the Director shall have the right to appear in the proceeding before such other court."

(2) Conforming amendment. Paragraph (9) of section 1295(a) of title 28, United States Code, is repealed.

(3) Applicability. The amendments made by this subsection shall apply to petitions filed on or after the effective date of this Act.

(c) Amendments Relating to the "Pass-Through" Requirement. Section 1214(a)(3) of title 5, United States Code, is amended

(1) by adding at the end the following:

"This paragraph shall not apply with respect to a prohibited personnel practice described in section 2302(b)(8).";

(2) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively; and

(3) by striking the matter before subparagraph (B) (as so redesignated by paragraph (2)) and inserting the following:

"(3) Except as provided in the last sentence of this paragraph, an employee, former employee, or applicant for employment may not seek corrective action from the Board under section 1221 unless

"(A) such employee, former employee, or applicant has sought corrective action from the Special Counsel under this subchapter;"

(d) Choice of Remedies Provision Involving Judicial Review.

(1) In general. Chapter 12 of title 5, United States Code, is amended by adding at the end the following: "SUBCHAPTER IV JUDICIAL REVIEW

" 1231. Judicial review

"(a) Subject to subsection (c) and section 1232, an employee, former employee, or applicant for employment may, with respect to a personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), bring a civil action in the appropriate district court of the United States for relief. For purposes of the preceding sentence, the term personnel action means

"(1) an action under subchapter II of chapter 75;

"(2) a detail, transfer, or reassignment; and

"(3) a reduction in grade or removal under section 4303.

"(b) The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

"(c) An action under this section

"(1) shall be brought in the district court of the United States for the judicial district in which the prohibited personnel practice is alleged to have been committed, in which the employment records relevant to such practice are maintained and administered, or in which the aggrieved person works or would have worked but for the alleged prohibited personnel practice; and

"(2) shall be brought within 120 days after the prohibited personnel practice is alleged to have occurred.

"(d) Review. In any action brought under this section, the court

"(1) shall review the matter de novo; and

"(2) shall apply the same standard as would the Merit Systems Protection Board under section 1214(b)(4)(B) or 1221(e).

" 1232. Choice of remedies

"(a) An action under section 1231

"(1) if brought, shall be in lieu of any remedy described in subsection (b); but

"(2) may not be brought if the aggrieved person has elected to raise the same matter under any of the remedies described in subsection (b).

"(b) The remedies described in this subsection are as follows:

"(1) An appeal to the Merit Systems Protection Board under section 7701.

"(2) A negotiated grievance procedure under section 7121.

"(3) Procedures for seeking corrective action under subchapters II and III.

"(c) For the purpose of this section, a person shall be considered to have elected

"(1) the remedy described in subsection (b)(1) if such person has timely filed a notice of appeal under the applicable appellate procedures;

"(2) the remedy described in subsection (b)(2) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties negotiated procedure; or

"(3) the remedy described in subsection (b)(3) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

"(d) For purposes of subsection (a)(1), a person shall be considered to have elected the remedy under section 1231 if such person has timely commenced an action in an appropriate court, in accordance with applicable procedures."

(2) Chapter analysis. The analysis for chapter 12 of title 5, United States Code, is amended by striking "Sec." each place it appears, by inserting "Sec." as a flush left item after the item relating to subchapter I, and by adding at the end the following:

"SUBCHAPTER IV JUDICIAL REVIEW

"1231. Judicial review.

"1232. Choice of remedies."

(e) Authorities Which May Be Extended to Arbitrators. Section 7121(b) of title 5, United States Code, is amended

(1) by redesignating subparagraphs (A) through (C) of paragraph (3) as clauses (i) through (iii), respectively;

(2) by redesignating paragraphs (1) through (3) as subparagraphs (A) through (C), respectively;

(3) by striking "(b)" and inserting "(b)(1)"; and

(4) by adding at the end the following:

"(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order

"(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

"(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

"(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration."

(f) Choice of Remedies Provision Not Involving Judicial Review. Section 7121 of title 5, United States Code, is amended by adding at the end the following:

"(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

"(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made in the same way as set forth in section 1232(c).

"(3) The remedies described in this paragraph are as follows:

"(A) An appeal to the Merit Systems Protection Board under section 7701.

"(B) A negotiated grievance procedure under this section.

"(C) Procedures for seeking corrective action under subchapters II and III of chapter 12."

SEC. 6. PERFORMANCE APPRAISALS.

Paragraph (5) of section 4313 of title 5, United States Code, is amended to read as follows:

"(5) meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth in section 2301."

SEC. 7. IMPLEMENTATION.

(a) Policy Statement. No later than 6 months after the date of the enactment of this Act, the Special Counsel shall issue a policy statement regarding the implementation of the amendments made by the Whistleblower Protection Act of 1989. Such policy statement shall be made available to each person alleging a prohibited personnel practice described in section 2302(b) of title 5, United States Code, and shall include detailed guidelines identifying specific categories of information that may (or may not) be communicated to agency officials for an investigative purpose, or for the purpose of obtaining corrective action under section 1214 of title 5, United States Code, or disciplinary action under section 1215 of such title, the circumstances under which such information is likely to be disclosed, and whether or not the consent of any person is required in advance of any such communication.

(b) Termination Statement. The Special Counsel shall include in any written statement under section 1214(a)(2)(A) of title 5, United States Code, the name and telephone number of an employee of the Office of Special Counsel who shall be available to respond to reasonable questions from the person regarding the investigation involved, the relevant facts ascertained by the Special Counsel, and the law applicable to the persons allegations.

SEC. 8. AMENDMENTS RELATING TO ATTORNEYS FEES.

(a) Chapter 12. Section 1221(g) of title 5, United States Code, is amended by striking "attorneys fees" each place it appears and inserting "fees for legal representation".

(b) Chapter 77. Section 7701(g) of title 5, United States Code, is amended

(1) by striking "attorney fees" each place it appears and inserting "fees for legal representation"; and

(2) in paragraph (1)

(A) by inserting "substantially" before "prevailing"; and

(B) by striking "agency or any case in which the agency's action was clearly without merit." and inserting "agency, in which the agency's action was clearly without merit, or which is settled or otherwise similarly resolved."

SEC. 9. MSPB RETIREMENT APPEALS EXPENSE AUTHORIZATION.

(a) In General. Section 8348(a) of title 5, United States Code, is amended by striking "and" at the end of paragraph (1), by striking the period at the end of paragraph (2) and inserting "; and", and by adding at the end the following:

"(3) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Merit Systems Protection Board in connection with the administration of appeals authorized under section 8347(d) or 8461(e)."

(b) Effective Date. The amendments made by subsection (a) shall take effect on October 1, 1995.

SEC. 10. EFFECTIVE DATE.

(a) In General. Except as provided in section 9, this Act and the amendments made by this Act shall take effect 120 days after the date of the enactment of this Act.

(b) Savings Provision. No provision of this Act shall affect any administrative proceeding pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Explanation of the Amendment

The Committee amendment strikes all after the enacting clause and inserts a substitute text for the text of the introduced bill. The provisions of the substitute text are explained in this report.

Purpose

H.R. 2970, as amended by the Committee, reauthorizes the Office of Special Counsel (OSC) and the Merit Systems Protection Board through Fiscal Year 1997 and expands existing protections established in the 1989 Whistleblower Protection Act (WPA).

The bill requires agencies to educate and inform their employees of their rights and remedies under the WPA; expands coverage to hundreds of thousands of Federal employees who are not currently covered; expands the definition of personnel actions to include several practices that are not currently covered but that can have a debilitating effect on an employee's career; and requires agencies to do a better job of communicating to managers and supervisors that retaliation against whistleblowers is not acceptable and will not be tolerated.

Furthermore, the legislation provides for expanded use of Individual Rights of Action (IRAs) before the MSPB in non-whistleblower cases which involve severe personnel actions such as demotion or dismissal; expanded avenues of appeal so that those who allege a whistleblowing prohibited personnel practice may adjudicate the most severe cases in District Court jury trial; a choice of appellate jurisdiction at the Federal Circuit or the Circuit in which the employee resides; and authority for the arbitrator in a negotiated grievance procedure providing for binding arbitration to order a stay of any personnel action and disciplinary action against supervisors while maintaining appropriate review of the action against the supervisors. Finally, the legislation clarifies the burden of proof faced by an employee who files a prohibited personnel practice action. H.R. 2970 restores Congress original intent with respect to interpreting the WPA burdens of proof, and applies that standard to activity protected by section 2302(b)(9) of title 5, United States Code, covering exercise of appeal rights, witness testimony, and refusal to violate the law.

Committee Action

H.R. 2970 was introduced by Congressman Frank McCloskey, Chairman of the Subcommittee on the Civil Service, on August 6, 1993 and was referred to the Committee on Post Office and Civil Service.

Prior to introduction of H.R. 2970, the Subcommittee on the Civil Service held an oversight hearing on whistleblower protection and the Office of Special Counsel (Serial No. 103-6). Testifying before the Subcommittee were Representative James H. Bilbray; Mr. Thomas Devine, Legal Director, and Mr. Jeff Ruch, Legislative Counsel, Government Accountability Project; Ms. Nancy Kingsbury, Director, Federal Government Division, General Accounting Office, accompanied by Mr. Ronald J. Cormier and Mr. Norman A. Stubenhofer; Ms. Kathleen Day Koch, Special Counsel, U.S. Office of Special Counsel, accompanied by Mr. William Reukauf, Associate Special Counsel for Prosecution; Mr. Jeff van Ee, whistleblower, Environmental Protection Agency; Ms. Maria Ramirez, whistleblower, Department of

the Navy; Mr. Robert Seldon, counsel for Mr. Gordon Hamel, whistleblower, Presidents Commission on Executive Exchange; and Mr. Thomas Day, whistleblower, Department of the Navy.

On August 3, 1993, the Subcommittee on the Civil Service held a hearing (Serial No. 103-19) on the reauthorization of the Merit Systems Protection Board. Testifying before the Subcommittee were Mr. Peter Broida, attorney and author; Mr. Ben Erdreich, Chairman, Merit Systems Protection Board, accompanied by Mr. Llewellyn M. Fischer, General Counsel, and Ms. Mary L. Jennings, Legislative Counsel; Representative George Gekas; Mr. Robert Keener, President, National Federation of Federal Employees; Mr. John Markuns, Vice President, and Ms. Pamela Jackson, Secretary, Merit Systems Protection Board Professional Association; and Mr. Jeff Ruch, Legislative Counsel, Government Accountability Project.

The Subcommittee on Civil Service held a hearing on H.R. 2970 (Serial No. 103-21) on September 14, 1993. Testifying before the Subcommittee were Mr. Tom Devine, Legal Director, Government Accountability Project, accompanied by Mr. Jeff Ruch, Policy Director; Ms. Kathleen Koch, Special Counsel, accompanied by Mr. William E. Reukauf, Senior Legal Advisor; Mr. Mark D. Roth, General Counsel, American Federation of Government Employees; and Mr. Timothy Hannapel, Assistant Counsel, National Treasury Employees Union.

On October 20, 1993, the Subcommittee on the Civil Service, by a record vote of 5 to 0, a quorum being present, approved H.R. 2970, with an amendment in the nature of a substitute, for full committee consideration.

On August 10, 1994, the Committee on Post Office and Civil Service, by a voice vote, ordered H.R. 2970 favorably reported, as amended.

Summary of Major Features

H.R. 2970, as amended, reauthorizes the Office of Special Counsel and the Merit Systems Protection Board, provides Federal employees with greatly expanded whistleblower protections, and enhances remedial procedures to address other prohibited personnel practices (PPPs).

The legislation establishes a 120-day period in which the Office of Special Counsel must determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, after which the Office may not continue to investigate without the complainants consent. The time period by which the Special Counsel must make initial status reports to prohibited personnel practice complainants is shortened from 90 to 60 days.

Burdens of proof and other legal standards and protections are also clarified by H.R. 2970. The burden of proof pertaining to a PPP is standardized to be contributing factor test whether the employee seeks redress before the Office of Special Counsel, the Merit Systems Protection Board, as an Individual Right of Action before the MSPB, through binding arbitration or as a civil court case with the right to jury trial for section 2302(b)(8) whistleblowers.

The legislation further provides a mutually exclusive provision that when an individual chooses one of the possible routes: redress before the Office of Special Counsel; the Merit Systems Protection Board; as an individual right of action before the MSPB; through binding arbitration; or as a civil court case for section 2302(b)(8) whistleblowers; the other options are foreclosed. The exception is that individuals seeking corrective action from the MSPB through an Individual Right of Action first must have sought corrective action from the Office of Special Counsel.

The limitation on OSC disclosure concerning a person who files an allegation of a prohibited personnel practice has been broadened. Under this provision, the OSC has the same duty to protect any information concerning the complainants case as private counsel would have under the attorney-client privilege. The restriction exists as soon as the OSC obtains the information. Release without the complainants consent are made beyond the scope of the Special Counsels authority. Except for specified access determinations, the committees intent is to eliminate all OSC discretion to make unauthorized releases. The decision on what risks to take by releasing information is the complainants alone.

The legislation adds two new prohibited personnel actions in reprisal for protected conduct: a decision to require psychiatric testing or examination; and a denial, revocation, or other determination relating to a security clearance.

H.R. 2970 expands merit system coverage to virtually the entire Federal workforce, including employees of the Department of Veterans Affairs and of Government corporations. In addition to those agencies exempted under sections 2302(c)(ii) and 2302(c)(iii) (the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and upon Presidential determination, any Executive agency or unit thereof the principle function of which is the conduct of foreign intelligence or counterintelligence activities), the only employees not covered are those expected from the competitive service when they applied

or took office; because of positions confidential, policy-determining, policy-making, or policy-advocating character; or those excluded by the President based on the Presidents determination that it is necessary and warranted by conditions of good administration.

Employees, former employees or applicants for Federal employment are authorized Individual Rights of Action before the Merit Systems Protection Board, and the Board must order timely subpoenas to assist the employee in pre-hearing discovery, provided the matter requested is not unduly burdensome, privileged or otherwise protected, is relevant, and appears reasonably calculated to lead to the discovery of admissible evidence.

However, the IRA is not permitted for section 2302(b)(1) discrimination cases, which already are covered by section 7702 of title 5 and well-developed procedures coordinating merit system and Equal Employment Opportunity remedies. In non-whistleblower cases, actions could be brought only for the most significant personnel actions, where the alleged prohibited personnel practice involves an action enumerated in chapter 75 of title 5 (removal, a suspension of more than 14 days, a reduction in pay or grade, or a furlough of 30 days or less); a detail, transfer, or reassignment, or an action under section 4303 of title 5 (removal or demotion based on negative performance appraisal).

In nonwhistleblower cases the "pass-through" requirement, section 1214(a)(3), is amended to provide that an employee, former employee, or applicant for employment may not seek corrective action from the MSPB unless the individual first has sought it from the Office of Special Counsel.

For adjudication under section 2302 (b)(8) or (b)(9), the Board shall order corrective action which it considers appropriate if the individual making the allegation demonstrates that protected conduct was a contributing factor in the personnel action. Corrective action may not be ordered if the agency demonstrates by clear and convincing evidence that the personnel action would have been taken in the absence of the protected conduct. An agency's ability to demonstrate that it "could have" taken the personnel action, i.e., that it can sustain its normal burden of proof under section 7701(c)(1) to support a proposed personnel action, is irrelevant. The prohibited personnel practice affirmative defense is legally independent from the merits of an agency action.

The legislation provides that as an alternative to existing avenues for redress, (i.e. the Office of Special Counsel, the Merit Systems Protection Board, an Individual Right of Action before the MSPB, or through binding arbitration), an individual alleging a section 2302(b)(8) prohibited personnel practice which has resulted an action covered by chapter 75 of title 5 (removal, a suspension of more than 14 days, a reduction in pay or grade, or a furlough of 30 days or less); a detail, transfer, or reassignment, or an action under section 4303 of title 5 (removal or demotion based on negative performance reviews) may bring a civil action for a jury trial in the appropriate United States District Court.

The district courts shall have jurisdiction for a jury trial without regard to the amount in controversy. Appropriate venue is where the prohibited personnel practice is alleged to have occurred, in which the employment records relevant to such practice are maintained and administered, or in which the aggrieved person works or would have worked but for the alleged prohibited personnel practice. These civil actions must be brought within 120 days after the prohibited personnel practice is alleged to have occurred. The court shall review the matter de novo and shall apply the same standard as would the Merit Systems Protection Board under section 1214(b)(4)(B) or 1221(e) (that protected conduct was a contributing factor in the personnel action, and proof by clear and convincing evidence that in the absence of protected activity the agency would have taken the same action for legitimate, independent reasons).

Appeals from decisions issued by the Merit Systems Protection Board currently may be made only to the Federal Circuit Court of Appeals. H.R. 2970 will expand appellate jurisdiction to give petitioners the choice of appealing either to the Federal Circuit or to the United States Court of Appeals for the circuit in which petitioner resides.

H.R. 2970, as amended, gives arbitrators in binding arbitration the authority to order a stay of any personnel action in a manner similar to that described in section 1221(c) for the Merit Systems Protection Board and to order the agency to take any disciplinary action identified under section 1215(a)(3) (removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000) that is otherwise within the authority of the agency to take. An employee so disciplined has the same appeal rights, either within the agency or to the MSPB, as if the agency had taken the disciplinary action itself absent arbitration.

In addition to codifying arbitrators authority to impose discipline, the legislation authorizes MSPB administrative judges to refer cases to the Special Counsel for investigation and possible disciplinary prosecution. Further, H.R. 2970 requires that compliance with affirmative action goals, EEO requirements and merit system principles be part of each Senior Executive Service members performance appraisal.

The legislation requires agency officials to inform their employees of merit system rights and remedies.

Finally, the legislation provides for the recovery of "fees for legal representation," rather than "attorneys fees" (the current statutory provision) when parties prevail before the MSPB. In the event of a settlement, the legislation will allow persons who settle pending MSPB cases to obtain fees for legal representation if they substantially prevail, regardless of the agency's reasons for providing the relief. The Special Counsel and agency heads also have authority to award fees in any case where the employee substantially obtains relief sought in a no-fault settlement.

Statement

mandate for protection and need for change

For more effective whistleblower protection is an essential precondition to achieving the reinventing government goals of the National Performance Review ("NPR"). Until the track record of the Whistleblower Protection Act of 1989 ("WPA" or "Act")

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matches its promise, those objectives cannot be met.

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National Performance Review, "From Red Tape to Results: Creating a Government that Works Better and Costs Less" (1993).

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Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.A.) (West Supp. 1992).

Whistleblowers personify the NPR's principles. The WPA could be called the Taxpayer Protection Act, because whistleblowers "put the customer first." By definition, their disclosures only qualify for legal protection when the information is significant for accountability to the civil services customer the taxpaying public.

The NPR seeks to achieve reform from the bottom up. Whistleblowers are the eyewitnesses in the front lines as public policy is implemented. The WPA's bottom line was making it safe for them to communicate.

The most basic NPR goal is to build on prior successes against fraud, waste and abuse. Whistleblowers are the successful pioneers whose individual courage has forced the repair or conversion of nuclear power plants with systematic safety violations; shutdown or cleanup of nuclear weapons facilities that were regularly leaking radioactive wastes; exposed the world's most expensive coffee pots, nuts, bolts, arm rests and toilet seats, sparking reform of defense procurement practices; exposed the failure of expensive, ineffective defense technologies such as discredited elements of the Star Wars program; forced the repair or shutdown of incinerators emitting illegal levels of poisons such as dioxin; and successfully defended sanitation levels from being reduced for government-inspected meat and poultry and dairy products. Whistleblowers are right too often to ignore. As the agents for accountability and change, they are the human factors who expose bureaucracies that are dishonest and shake up those that are stagnant.

The necessity for significant change to structurally reform current whistleblower protection law is beyond credible debate. The Act's legislative mandate is unsurpassed. Congress seldom passes any significant statute unanimously once, let alone twice in five months. Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them.

Since the last pre-WPA study in 1983, the Board's 1993 survey

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found that the rate of eyewitnesses who challenge fraud, waste and abuse has increased from 30 to 50%. In 1993 the General Accounting Office reported that 60% acted within the chain of command instead of outside the system, but 20% were harassed within 24 hours. Overall, the rate of ensuing retaliation increased from 24% to 37%. Less than 10% exercising legal remedies were helped, and 45% report that acting on their rights got them in more trouble.

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Supra, at n.7.

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Supra, at n.7.

A 1993 Merit Systems Protection Board study

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concluded that would-be whistleblowers are far more concerned about whether their disclosure will make a difference, compared to fear of retaliation. 59% of those who observed but kept silent about illegal or wasteful activities explained that it was because nothing would be done, while 33% cited fear of reprisal. These findings mirrored Board conclusions in reports on 1980

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and 1983

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studies.

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Office of Policy and Evaluation, Merit Systems Protection Board, "Whistleblowing in the Federal Government: An Update" (1993) ("1993 MSPB study").

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Office of Merit Systems Review and Studies, Merit Systems Protection Board, "Whistleblowing and the Federal Employee" (1981).

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Office of Merit Systems Studies and Review, Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Results" (1984).

The MSPB survey found that, by a 60-23 percent margin, employees do not believe their rights will help them, and fear of reprisal remains as strong a reason why would-be whistleblowers remain silent as in 1983.

The cause of the failure is no mystery. The WPAs rights have not met their promise on paper, because the agencies responsible for the Acts implementation have been hostile, or at least unwilling, to enforce its mandate. In response, H.R. 2970 overhauls the responsibilities and structure for whistleblower protection in four areas agency leadership and management accountability; closing coverage gaps in the scope of statutory protection; freeing whistleblowers from vulnerability to abuses of discretion by the Office of Special Counsel; and creating a choice of a system that offers civil service whistleblowers access to the same due process procedures generally available to American citizens to enforce constitutional rights.

AGENCY LEADERSHIP AND MANAGEMENT ACCOUNTABILITY

There is little question that agency leadership is a far stronger factor than statutory provisions to establish a workplace environment of respect for the merit system. The composite lesson to be learned from recent studies and the Committees hearings is that the WPA is not working, because it has not deterred managers from trying to retaliate. That is not surprising when those who violate the merit system have nothing to lose.

The law functionally contains a vacuum of accountability. While in theory the Office of Special Counsel may prosecute, the last two OSC annual reports

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reveal only one case where the Office sought disciplinary sanctions for Whistleblower Protection Act violations.

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U.S. Office of Special Counsel, "A Report From The U.S. Office of Special Counsel Fiscal Year 1992" (1993) ("1992 OSC Annual Report"); U.S. Office of Special Counsel, "A Report From the U.S. Office of Special Counsel Fiscal Year 1993" (1994) ("1993 OSC Annual Report").

The Acts goals will not be reached until managers recognize and accept their responsibilities to the merit system. The study's authors noted that changing management attitudes will stop more retaliation than stronger legal defenses per se. The study observes, "only in a climate in which employees and managers recognize that making and responding to such disclosures is an integral part of their jobs will employees be protected from reprisals."

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That Climate cannot be achieved without accountability.

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1993 MSPB study, *supra* n.5, at 25-6.

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Id., at 26.

Agencies also need to swiftly investigate any reports of supervisors or managers taking reprisal actions against employees who disclose information about illegal or wasteful activities and to take appropriate action against supervisors or managers found to be guilty of such retaliatory actions.

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Id., at 36.

H.R. 2970 strengthens the accountability of agency leaders to the merit system through four mechanisms a duty for agency leaders to establish training and outreach programs for communicating merit system rights; a requirement that performance appraisals for Senior Executive Service managers contain a critical element for compliance with merit system principles, including affirmative action goals and Equal Employment Opportunity requirements; MSPB referrals for the Office of Special Counsel to investigate officials for possible disciplinary sanctions, based on the record from employee prohibited personnel practice litigation; and authority for arbitrators to order disciplinary sanctions against retaliatory managers or supervisors in binding arbitration.

Agency heads and the Special Counsel should foster employee participation through partnerships with unions, employee and management organizations to prepare joint training programs for employees and managers. Training should emphasize the unsurpassed legislative mandate for whistleblower protection and the public policy significance of this merit system principle. Agencies may further discharge responsibilities under this provision through creation of an ombudsman reporting directly to the agency chief, with responsibility to prevent prohibited personnel practices, and to avoid unnecessary litigation through efforts at no-fault mediation in merit system disputes.

GAPS IN COVERAGE

One reason for the WPAs disappointing record is the plethora of coverage gaps that leave many reprisal victims defenseless. Some are due to erroneous statutory interpretations by hostile implementing agencies and fora. Many, however, are because the ten actions listed in 5 U.S.C. 2302(a)(2)(A) reflect the outer boundaries for whistleblower protection. The list has not kept pace with the creativity of effective harassment tactics. Two of the most glaring omissions concern mandatory psychiatric examinations, and security clearance actions. Psychiatric examinations are the ugliest form of retaliation, and perhaps the most effective for blacklisting.

Because security clearances are a precondition for nearly three million Federal and contract workers to hold their jobs, employers can de facto terminate an employee by removing his or her clearance for access to classified information. Unfortunately, Federal workers have no functional due process rights to defend their clearances, leaving them defenseless against back door retaliation when a forthright attempt at firing could not succeed. Due to secrecy and the lack of procedural rights, commentators have analogized the legal system for security clearances to the system of justice in Kafkas "The Trial."

Through six hearings since 1987 jointly held with the House Judiciary Committee, this committee has developed a record detailing how rampant retaliation has filled the due process vacuum. Examples of security clearance abuses against whistleblowers in the Army's Strategic Defense Command (SDC), or Star Wars, program are illustrative.

Section (4)(a)(1)(B) of the bill, which amends 5 U.S.C. 2302(a)(2)(A) is intended to legislatively convert Executive branch security clearance decisions into personnel decisions that an employee can allege constitute prohibited personnel practices. It is important to note, however, that a security clearance decisions does not, in and of itself, constitute a decision to permit or allow access to sensitive information. The committee recognizes that information access determinations are an Executive branch prerogative. Accordingly, the committee wishes to make clear that this section does not cover decisions concerning an individuals access to Sensitive Compartmented Information (SCI). Such information consists of particularly sensitive classified material relating to intelligence sources, methods, or analytical processes which requires handling within formal access control systems established by the Director of Central Intelligence under his authority to protect intelligence sources and methods, which is derived from statute and Presidential delegation. Decisions with respect to controlling access to SCI do not equate to security clearance decisions, and are not subject to review by the Merit Systems Protection Board or the courts under this legislation.

The committee does not intend that jurisdiction be limited to listed personnel actions. Both sections 2302(b)(8) and (b)(9) permit the MSPB to provide relief for "threatened" personnel actions. As the groundwork or warnings for formally recognized merit system violations, many forms of unlisted harassment constitute threats that chill or defeat the exercise of merit system rights. Examples include retaliatory investigations, reorganizations, reductions in force and defunding of positions.

office of special counsel

Despite the opportunity for a fresh start under the Whistleblower Protection Act of 1989, the consensus among Federal workers, unions, and outside commentators is that the OSC remains a barrier to achieving merit system principles in general, and whistleblower protection in particular. Contrary to its rhetoric, the OSC's empirical track record is one of hostility to its stated mission as the rule, rather than the exception. Despite 400-500 cases yearly and the most sympathetic legal standards in history, the Office still has not litigated a single case to restore a whistleblowers job since the Acts 1989 passage, or indeed since 1979.

During the last two fiscal years, the OSC has sought from the MSPB only three stays of prohibited personnel practices, out of some 4,000 complaints. Last year GAO concluded the OSC has not improved on its traditional claim of obtaining relief for 5% of complaints. Significantly, 35% of those whom the OSC turned away got help elsewhere, often through settlements a no-fault, constructive approach the OSC routinely refuses to attempt during MSPB appeals. The Office ordered full agency investigations under 5 U.S.C. 1213(c) into whistleblowers charges of waste, fraud or abuse for only five out of 149 whistleblowing disclosures in FY 1992, and 14 out of 209 new disclosures in FY 1993.

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1992 OSC Annual Report, *supra* note 12, at 16.

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1993 OSC Annual Report, *supra* note 12, at 15.

While whistleblowers consistently report the OSC refuses to work with them, 59% reported to GAO that without permission the Office undercut their rights by leaking information about their cases back to their employers. By serving as a secret vehicle for advance agency pre-hearing discovery, the OSC continues to risk placing employees at a fatal handicap in a subsequent MSPB appeal or Individual Right of Action. In one case the OSC turned over its investigative findings to an agency for comment, and thereby revealed the blueprint of the whistleblowers case.

Leaks also create an opportunity to propose new charges against whistleblowers based on unauthorized disclosures from OSC investigations. The committee received testimony that an agency used information leaked by the OSC to suspend the security clearance of an employee seeking the Special Counsels help against retaliation. Over, 76% told GAO that in practice the Office of Special Counsel acts to serve agency interests, rather than the merit system.

These findings were echoed at the committee March 31 and September 14, 1993, hearings (Serial No. 103-6 and Serial No. 103-21) by leaders of the American Federation of Government Employees, National Treasury Employees Union, National Federation of Federal Employees, the Government Accountability Project and the Whistleblowers Alliance and Relocation network. Their testimony consistently reported an ASC pattern of unauthorized releases and failure to work with complaints, examine suggested evidence, contact proffered witnesses, or provide meaningful status reports, responses to inquiries or explanations in letters closing cases.

H.R. 2970 attempts structural reform to remove the OSC as an inherent threat to merit system principles when the Office acts in bad faith, while maintaining the Special Counsels ability to defend the merit system effectively. The legislation seeks to achieve this balance through two primary means freeing whistleblowers from any requirement to file their cases with the Office of Special Counsel prior to pursuing an Individual Right of Action due process hearing; and unequivocally removing the OSCs discretion to make unauthorized disclosures of information concerning a case without the complainants consent.

merit systems protection board and judicial review

The track record has not been significantly better for WPA litigation options. A due process forum inherently provides increased opportunities for relief through judgement or settlement. However, the statistical record indicates that the MSPB and Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. In the first two years after the Acts passage, whistleblowers won approximately 20% of Merit Systems Protection Board decisions on the merits. Since FY 1991, however, that rate has dropped to 5%, far lower than analogous statutes with tougher burdens of proof administered by the Department of Labor. Instead of restoring balance, the U.S. Court of Appeals for the Federal Circuit has been more hostile than the Board. Since its 1982 creation, in reported decisions employees have prevailed only twice on the merits with the whistleblower defense. The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases. Due to the MSPBs failure to consistently enforce standards in the Federal Rules of Procedure or the Federal Rules of Evidence, the Board has not earned respect as a fair forum even on procedural grounds.

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Sullivan v. Dept. of Navy, 720 F.2d 1266 (Fed. Cir. 1983); Marano v. Dept. of Justice, 2F.3d 1137 (Fed. Cir. 1993).

The body of case law developed by the Board and Federal Circuit has represented a steady attack on achieving the legislative mandate for effective whistleblower protection. Various decisions have held that the WPA (1) does not have to protect employees who disclose violations of "interpretive" rules; (2) does not protect employees who fail to cite the specific law(s) being violated when they blow the whistle; (3) does not protect those whose disclosures evidence violation of laws with enforcement discretion; (4) limits protection in Board proceedings to the record already presented to the OSC; (5) effectively requires employees to plead proposed findings of fact establishing jurisdiction in their initial complaint to the Board, without first permitting pre-hearing discovery; (6) does not require the Board to probe behind agency assertions that provision of interim relief would be disruptive, and does not require return of an employee to his or her original duties; (7) does not have to provide back pay for employees who were suspended during investigations but subsequently cleared and restored to duty; (8) does not offer relief when an agency believed that outside attention due to the employees protected whistleblowing upset co-workers; (9) does not preclude ex parte contacts between the proposing and deciding officials in intra-agency adjudications, or even preclude them from being the same person; (10) does not prohibit an agency from finalizing action against an employee without waiting for completion of the reply period required by agency procedures; (11) does not encompass within the nexus requirement a one month time lag between protected speech and a challenged performance appraisal, because the timing of the appraisal was beyond the supervisors control; (12) does not permit employees to be made whole through payment of consequential expenses incurred as a result of an improper personnel action; (13) does not protect employees who blow the whistle in the context of a grievance; and (14) does not permit an employee pursuing an Individual Right of Action under section 2302(b)(8) to consolidate the case with the same employees related challenges to other alleged prohibited personnel practices violated by the same personnel action. These decisions are illustrative, not exhaustive. They all, however, violate the WPAs clear mandate through statutory provisions or legislative intent.

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Precedents illustrating the above doctrines, respectively, include *Houston v. U.S. Department of Labor*, Docket No. DC-1221-93-0448-W-1 (Sept. 21, 1993); *Padilla v. Department of the Air Force*, 55 M.S.P.R. 540 (1992); *Haley v. Department of Treasury*, 977 F.2d 553 (Fed. Cir. 1992); *Knollenberg v. Department of Navy*, 47 M.S.P.R. 92 (1991), *affd sub nom Knollenberg v. Merit Systems Protection Board*, 953 F.2d 263 (Fed. Cir. 1992); *Fidler v. U.S.P.S.*, 53 M.S.P.R. 440 (1992), *Ginocchi v. Department of Treasury*, 53 M.S.P.R. 62; *Weimers v. Merit Systems Protection Board*, 792 F.2d 1113 (Fed. Cir. 1986); *Nicholas v. Department of Air Force*, No. 92-3472 (Fed. Cir. Feb. 8, 1993); *DeSarno v. Department of Commerce*, 761 F.2d 657 (Fed. Cir. 1985); *Baracco v. Department of Transportation*, 15 M.S.P.R. 112 (1983), *affd* 735 F.2d 488 (Fed. Cir. 1984); *Wagner v. E.P.A.*, 51 M.S.P.R. 337 (1991); *Harris v. Department of Agriculture*, 53 M.S.P.R. 78 (1992); *Fisher v. Department of Defense*, 52 M.S.P.R. 470 (1992), *Marren v. Department of Justice*, 51 M.S.P.R. 532 (1991). For systematic review of hostile precedents undermining the WPA, see Minahan, "The Whistleblower Protection Act; Death of a Statute," 93 Federal Merit Systems Protection Reporter v-93-5 (April 26, 1993).

The Federal Circuits decision in *Clark v. Department of the Army*, 997 F.2d 1466 (Fed. Cir. 1993), cert. denied 114 S. Ct. 920, illustrates the vulnerability of whistleblowers legal rights. In *Clark* the court erased the Acts clear legislative intent that protected whistleblowing may not play any factor in personnel actions, unless the agency demonstrates by clear and convincing evidence that it was an immaterial factor.

Clark effectively canceled the whistleblower defense, by permitting an agency simultaneously to defeat a prima facie case through meeting the same burden of supporting its personnel action that exists under section 7701(c), whether or not the employee raises an affirmative defense.

Perhaps the most troubling precedents involve the Boards inability to understand that "any" means "any." The WPA protects "any" disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit. H.R. 2970 attempts to restore balance to precedents interpreting the Whistleblower Protection Act by creating badly needed competition a choice of fact-finding fora between existing remedies and

civil actions providing for jury trials in U.S. District Court; and (2) elimination of the Federal Circuits monopoly on judicial review of Board decisions by also permitting jurisdiction in the U.S. circuit court of appeals where a petitioner resides. These structural changes will provide whistleblowers with the same access to court enjoyed by citizens generally.

Consistent with the Boards increasing emphasis on expedited litigation through alternative disputes resolution, H.R. 2970 seeks to enhance the role of arbitrators in binding arbitrations. The legislation gives them the authority to order a stay of any personnel action as permitted under section 1221(c) for the Merit Systems Protection Board, and to order the agency to take any disciplinary action identified under section 1215(a)(3) (removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000) that is otherwise within the authority of the agency to take. An employee so disciplined has the right to appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

Section 5, subsection (e) of H.R. 2970 clarifies the arbitrators authority in the wake of *United States Department of Justice v. Federal Labor Relations Authority*, 981 F.2d 1339 (D.C. Cir. 1993). In that case the Department of Justice unsuccessfully sought to prevent the FLRA from upholding an arbitrators determination.

"On January 6, 1989, Lieutenant John Klopff, a supervisor at the federal penitentiary in Lewisburg, Pennsylvania, ordered Samuel L. Miller, a correctional officer, to stay at his post past his regular work shift. Miller sought permission to take a break to attend to a medical condition, but Lieutenant Klopff denied his request. A few hours later, Miller collapsed at this post. The American Federation of Government Employees ("AFGE" of "union") filed a grievance against the Department of Justice ("DOJ" or "agency" on Millers behalf.

In 1990, an arbitrator sustained the grievance and ordered the DOJ to take disciplinary action against Lieutenant Klopff. The DOJ filed exceptions with the Federal Labor Relations Authority ("FLRA" of "Authority", which upheld most of the arbitrators award. The DOJ now petitions this court for review of the FLRAs decision upholding that award.

Section 7122(a) of the Federal Service Labor Management Relations Statute ("FSLMRS" or "Statute") provides for Authority review of labor arbitration awards involving parties covered by the Statute. 5 U.S.C. section 7122(a)(1988). However, section 7123(a) of the Statute precludes judicial review of final orders of the Authority "involving an award by an arbitrator," unless the order involves an unfair labor practice. 5 U.S.C. section 7123(a) (1988). This case falls squarely within the ambit of preclusion under section 7132(a). The DOJ argues that, notwithstanding this preclusion, we should consider its petition for review under the doctrine enunciated in *Leedom v. Kyne*, 358 U.S. 184, 188, 79 S.Ct. 180, 184, 3 L.Ed.2d. 210 (1958) (holding that a district court may have jurisdiction over actions taken by the National Labor Relations Board, despite an express statutory finality provision, when the agency has acted "in excess of its delegate powers and contrary to a specific prohibition in the (National Labor Relations Act)"). Here, the DOJ contends that, in upholding an arbitral award that required the agency to take disciplinary action against a supervisor, the Authority acted in excess of a statutory authority and the action is therefore subject to judicial review. We find no merit in DOJ's position; accordingly, we dismiss the petition for review for want of jurisdiction.

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United States Department of Justice v. Federal Labor Relations Authority, 981 F.2d 1339, 1340 (D.C. Cir. 1993).

The committee concurred with the findings of the Court and believed that additional statutory language was warranted to clearly delineate the arbitrators authority to issue stay orders and to order discipline.

To avoid duplication, the legislation provides that when an individual chooses one of the possible routes redress before the Office of Special Counsel, the Merit Systems Protection Board, an Individual Right of Action before the MSPB, binding arbitration, or in a civil court case for 2302(b)(8) whistleblowers, the other new options are foreclosed. The exception is that individuals seeking corrective action from the MSPB must first have sought corrective action from the Office of Special Counsel.

H.R. 2970 also expands the appellate jurisdiction for whistleblower cases. The U.S. Courts of Appeals have wide expertise in analogous matters including labor law and EEO litigation. By contrast, the committee found the Federal

Circuit to have virtually no other substantive jurisdiction related to whistleblower appeals. The bulk of its caseload is technical Federal matters such as patents, copyrights and international trade law.

In addition, allowing an appellant to have the appeal heard in his or her geographic circuit removes obstacles placed on a Federal employee not in the greater Washington, D.C. area for access to the appellate panel. Although some informal concern was voiced by agencies that broadening the appellate jurisdiction will lead to varying decisions and applications of relevant law, the committee found that this diversity is normal under the Administrative Procedures Act, 5 U.S.C. 706 et seq.

While acknowledging that the new structure established in H.R. 2970 will not be the most administratively convenient, the committee found that there will be expanded access to the appellate courts for the petitioner, the expanded jurisdiction will bring in panels with greater expertise in labor law, and any disparities in appellate holdings will ultimately strengthen the Federal whistleblower protection structure by focusing on disputed legal areas and thereby enabling Congress or the Supreme Court to resolve the matter.

section analysis

Section 1. Reauthorizations

Section 1 reauthorizes the Office of Special Counsel and the Merit Systems Protection Board from 1993 through 1997.

Section 2. Office of Special Counsel

Subsection (a) of section 2 provides that the Special Counsel may continue to serve, for a period not to exceed one year, after the expiration of the Special Counsels term until a successor has qualified.

Subsection (b) of section 2 amends section 1212(g) of title 5 by increasing the scope of the limitation on OSC disclosure of a complainants identity to also include the information concerning the substance of a prohibited personnel practice allegation.

Further, subsection (b) of section 2 expands the current strict prohibition on OSC releases of information for allegations under 5 U.S.C. 2302(b)(2), to also protect information concerning alleged violations of sections 2302(b)(8)(whistleblowing) and (b)(9)(exercise of appeal rights, witness testimony and refusal to violate the law). In addition to the disclosure restrictions in section 1212(g)(1), the OSC may not directly or indirectly release any relevant information unless the complainant first consents. The only exception is for specified national security access determinations.

Subsection (c) of section 2 establishes a review standard of clear and convincing evidence that agencies must meet when submitting written reports to the Office of Special Counsel concerning an allegation of a violation of any law, rule, regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

Subsection (d) of section 2 is a technical clarification that the OSC may forward information to agencies for investigation and report when it receives disclosures made by non-agency employees or others. For example, government contractors, citizen organizations or members of the public may trigger OSC referrals through filing whistleblowing disclosures that evidence a reasonable belief of significant misconduct.

Subsection (e) of section 2 shortens the time period by which the Special Counsel must provide initial status reports to persons making an allegation of a prohibited personnel practice from 90 to 60 days. OSC shall make reports at least every 60 days thereafter to the individual who made the allegation detailing the status of the investigation and any action taken by OSC since notice was last given. The status reports must be case specific, and inform the complainant of the necessary evidence that must be ascertained to merit corrective action. Mere form checklists will not suffice. With the complainants consent, the OSC may fulfill this duty through oral briefings.

This subsection also requires OSC to determine within 120 days whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. The deadline may be extended by written agreement between OSC and complainant.

Subsection (f) of section 2 clarifies that the agencies burden of proof in cases under subsection 2302(b)(8) or 2302(b)(9) is separate and distinct from the burden of proof to support the merits of a personnel action under section 7701. An agencies ability to demonstrate under section 7701 that a performance based action is supported by substantial

evidence or a disciplinary action by a preponderance of evidence is irrelevant to evaluate alleged violations of section 2302(b)(8) or (b)(9).

Subsection (g) of section 2 requires OSC to report the number of cases in which it did not make a determination within 120 days.

Subsection (h) of section 2 provides that the amendments made by subsection (e) shall apply with respect to any allegation first received by the Office of Special Counsel on or after the effective date of this Act. These amendments shall be effective with respect to allegations first received by the OSC on or after the effective date of the Act. The operative date is when a complaint is filed, even if the alleged prohibited practice occurred before the effective date of this Act.

Section 3. Individual right of action relating to the Merit Systems Protection Board

Subsection (a) of section 3 provides that in Individual Right of Action cases, consistent with the Federal Rules of Civil Procedure, the MSPB shall issue subpoenas when the applicant for a subpoena shows that the request is not unduly burdensome; does not involve material that is privileged or otherwise protected from disclosure by law, rule, or regulations; and is relevant or appears reasonably to lead to discovery of admissible evidence.

The committee intends that the MSPB shall liberally construe and strictly enforce this provision. The Board shall permit and enforce discovery prior to jurisdictional pleadings and decisions.

Subsection (b) of section 3 expands the legal burden of proof governing adjudication of whistleblower cases under section 2302(b)(8) to also include allegations of prohibited personnel practices under section 2302(b)(9), and applies those burdens of proof to all available fora.

Subsection (c) of section 3 requires the MSPB to refer cases to the OSC for disciplinary action under 5 U.S.C. 1215, if the Board determines there is reason to believe that a current employee may have committed a prohibited personnel practice. The Board referral creates an inference of a prohibited personnel practice, and the Committee intends that the OSC conduct a full field investigation into any such referral.

Section 4. Prohibited personnel practices

Subsection (a) of section 4 adds two actions to the definition of personnel actions under 5 U.S.C. 2302 a decision to require psychiatric testing or examinations; and a denial, revocation, or other determination relating to a security clearance, such as a suspension.

Subsection (4)(a)(1)(B) of section 4 adds psychiatric evaluations to personnel actions listed in 5 U.S.C. section 2302(a)(2)(A). This provision does not apply to individuals being advised to seek counseling due to marital or similar personal situations, nor does it apply to recommendations for counseling due to a substance problem such as alcohol abuse.

Subsection (4)(a)(1)(B) also establishes that a security clearance action, inaction or threat is a personnel action that an applicant or employee may allege constitutes a prohibited personnel practice. This provision does not cover an individual's access to Sensitive Compartmentalized Information (SCI), consisting of particularly sensitive classified material controlled by the Director of Central Intelligence.

Subsection (b) of section 4 adds Department of Veterans Affairs positions under 38 U.S.C. Chapter 74 to jobs included in the definition of a "covered position" under 5 U.S.C. 2302(a)(2)(B), and prohibits ex post facto decisions to remove an employee's merit system coverage on grounds that a position is exempt based on confidential policy grounds or Presidential determination.

Subsection (c) of section 4 adds government corporations to the definition of covered agencies for purposes of whistleblower and other prohibited personnel practice cases. The Committee intends that this provision not be restricted through technically rigid criteria for an employer's corporate or legal status. For purposes of this Act, "government corporations" should be broadly construed to cover the full range of federally-funded institutions where the merit system may be relevant to defend the taxpayers interest. Examples range from the Legal Services Corporation to the Institute of American Indian Arts.

Subsection (d) of section 4 requires agency heads to ensure that their employees are informed of the rights and remedies available to them under the Whistleblower Protection Act.

Subsection (e) of section 4 expresses the sense of Congress that employees engaging in merit system protected activity, including disclosures as private citizens on behalf of citizen organizations, should not be prosecuted or threatened with criminal prosecution under section 205 of title 18.

Section 5. Additional amendments relating to procedures under which individuals may seek relief from prohibited personnel practices

Subsection (a) of section 5 allows individual right of action cases before the MSPB to be brought in cases involving all classes of alleged prohibited personnel practices except (b)(1) discrimination. For non-whistleblower cases, such actions could only be brought in cases in which the alleged PPP involves an action enumerated in 5 U.S.C. Chapter 75 (removal, a suspension of more than 14 days, a reduction in pay or grade, or a furlough of 30 days or less); a detail, transfer or reassignment; or an action under 5 U.S.C. Chapter 4303 (removal or demotion based on negative performance reviews).

Subsection (b) of section 5 changes appellate jurisdiction for appeals of MSPB decisions to give petitioners the choice of either the U.S. Court of Appeals for the Federal Circuit, or the U.S. Court of Appeals with jurisdiction in the circuit where the petitioner resides. With respect to additional circuits, the Director of the Office of Personnel Management maintains the present right available for appeals to the Federal Circuit under 5 U.S.C. section 7703(d) to petition for review and to appear in any appeal where the case is heard.

Subsection (c) of section 5 provides that, except in 2302(b)(8) cases, an employee, former employee or applicant for employment who is seeking an Individual Right of Action before the MSPB may not do so unless such employee, former employee, or applicant has first sought corrective action from the Special Counsel. An individual alleging a violation of whistleblower protections in section 2302(b)(8) does not have to first file a complaint with the Office of Special Counsel for 120 days.

Subsection (d) of section 5 allows employees, former employees or applicants for employment in cases involving an alleged whistleblower prohibited personnel practice violating section 2302(b)(8) to bring a civil action in the appropriate U.S. district court. Such actions only could be brought in cases in which the alleged PPP involves an action enumerated in 5 U.S.C. 7512 (removal, a suspension of more than 14 days, a reduction in pay or grade, or a furlough of 30 days or less); a detail, transfer, or reassignment, or an action under 5 U.S.C. Chapter 4303 (removal or demotion based on negative performance reviews).

The district courts of the United States shall have jurisdiction of actions brought under this section for a jury trial without regard to the amount in controversy. Appropriate venue is where the prohibited personnel practice is alleged to have been committed, where employment records relevant to such practice are maintained and administered, or where the aggrieved person works or would have worked but for the alleged prohibited personnel practice.

The case must be filed within 120 days after the alleged prohibited personnel practice occurred.

The court shall review the matter de novo in a jury trial if requested, and shall apply the same legal burdens of proof governing Board adjudication of whistleblower complaints under sections 1214(b)(4)(B) or 1221(e).

The civil suit is mutually exclusive of an appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, a negotiated grievance procedure under 5 U.S.C. 7121 or procedures for seeking corrective action under subchapters II and III.

Subsection (e) of section 5 provides that in a negotiated grievance procedure providing for binding arbitration, the arbitrator may order a stay of any personnel action described in 5 U.S.C. 1221(c) and disciplinary action allowable under section 1215(a)(3). Judicial review shall be allowed in any disciplinary action case in the same manner available if the order had been issued by the employees agency.

Subsection (f) of section 5 provides that in non-whistleblower cases (cases in which a civil action is not allowed), the aggrieved employee may only choose one of the following when seeking redress through an administrative procedure: An appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, a negotiated grievance procedure under 5 U.S.C. 7121 or procedures for seeking corrective action under subchapters II and III, which may evolve into a proceeding before the Board in an Individual Right of Action.

Section 6. Performance appraisals

Section 6 provides that the criteria for performance appraisals of Senior Executive Service employees shall include compliance with the merit system principles of section 2301, including affirmative action goals and Equal Employment Opportunity requirements.

Section 7. Implementation

Subsection (a) of section 7 requires OSC to issue a policy statement within 6 months of implementation that shall be made available to each person alleging a prohibited personnel practice, including tangible, detailed guidelines with illustrative examples identifying the type of information that may or may not be communicated to agency officials for investigative purposes, or for the purpose of obtaining corrective or disciplinary action, the circumstances in which information is likely to be disclosed, and whether consent is required in advance or any such communication.

Subsection (b) of section 7 requires OSC to include in a required written termination statement the name and telephone number of an OSC employee who is available to respond to reasonable questions regarding the nature and scope of the investigation (including documents reviewed and non-confidential witnesses contacted), the relevant, material facts for each legal element, and the conclusions of law for each element. This information, which the OSC must disclose in response to questions, also shall be available under the Freedom of Information Act, 5 U.S.C. 552.

Section 8. Amendments relating to attorneys fees

Subsection (a) of section 8 broadens the ability of prevailing parties to obtain fees relating to their case by expanding the current term "attorneys fees" to "fees for legal representation." Fees shall be available to non-attorneys such as pro se litigants or union representatives who serve as an employees advocate.

Subsection (b) of section 8 allows persons with cases pending at the MSPB who settle their cases to obtain fees for legal representation if they substantially prevail. If an employee with a pending case obtains substantial relief, the agency's motives for providing it are not relevant grounds to deny fees.

Section 9. MSPB retirement appeals expense authorization

Subsection (a) of section 9 authorizes the Merit Systems Protection Board (MSPB) to obtain reimbursement from the Civil Service Retirement System Fund and the Federal Employees Retirement System Fund for the administrative expenses of processing retirement appeals.

Subsection (b) of section 9 mandates that this subsection shall take effect October 1, 1995.

Section 10. Effective date

Subsection (a) of section 10 establishes that, except as provided in section 9, this Act shall take effect 120 days after date of enactment.

Subsection (b) of section 10 provides that no provision of this Act shall affect any administrative proceeding pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted. If a proceeding is initiated on or after the effective date of this Act, it shall be governed by the provisions of this Act regardless of when the alleged prohibited personnel practice occurred.

Cost

The cost estimate prepared by the Congressional Budget Office pursuant to sections 308(a) and 403 of the Congressional Budget Act of 1974, as amended, is set forth below.

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 26, 1994.
Hon. William L. Clay,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, DC.

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2970, a bill to reauthorize the Office of Special Counsel, and for other purposes.

Although enactment of H.R. 2970 would increase direct spending by the Postal Service, pay-as-you-go procedures would not apply to the bill because the Postal Service is off-budget.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,
Robert D. Reischauer,
Director.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 2970.

2. Bill title: A bill to reauthorize the Office of Special Counsel, and for other purposes.

3. Bill status: As ordered reported by the House Committee on Post Office and Civil Service on August 10, 1994.

4. Bill purpose: H.R. 2970 would authorize the appropriation of such sums as necessary to fund the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) for fiscal years 1995-1997. The conference report on the Treasury, Postal Service, and General Government Appropriation bill for 1995 provides \$25 million for the MSPB and \$8 million for the OSC.

The bill also would make several changes to the current laws governing the OSC, the MSPB, and the cases that these offices handle.

5. Estimated cost to the Federal Government:

-- (PLEASE REFER TO ORIGINAL SOURCE FOR TABLE) --

The costs of this bill fall primarily within budget function 800, although the bill affects most budget functions.

Basis of estimate: CBO assumes that the necessary funds will be appropriated and estimates that spending will occur at historical rates. The authorization amounts in the above table for the MSPB and OSC are CBOs baseline projections for these programs that is, the 1994 appropriations adjusted for inflation.

One provision of H.R. 2970 could result in additional costs for federal agencies involved in disputes with employees that go before the MSPB. Under current law, agencies are required to pay attorneys fees when the MSPB grants an employees request for such payment. The bill would change the requirement from paying attorneys fees to paying "fees for legal representation," which would include costs of representation by individuals who are not attorneys, such as business agents from employees unions. In addition, an agency would have to pay such costs if the employee "substantially" prevails, even in cases that are settled. It is unclear how the MSPB would make this determination on a case by case basis when it is asked to award fees for legal representation that are not attorneys fees.

According to the MSPB, there are about 2,000 cases per year that are settled or that the employee wins and attorneys fees are not granted. If agencies were to pay fees for legal representation in most of these cases, CBO estimates that agencies costs could increase by about \$5 million annually, which would be paid from appropriated funds. These costs could be more or less depending on the amount of time spent on each case, the rate of compensation, and the number of affected cases.

This provision would affect the Postal Service as well, which would be involved with about 500 such cases annually. Costs of the Postal Service would increase by about \$1 million for each year until 1999, when the Postal Service could recover these costs in the next postal rate increase. These costs would be direct spending, but, because the Postal Service is off-budget, this spending would not count for pay-as-you-go purposes.

Other provisions of the bill would not result in any significant cost to the federal government.

6. Pay-as-you-go considerations: None.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: On July 20, 1994, CBO prepared a cost estimate for S. 622, a similar bill ordered reported by the Senate Committee on Governmental Affairs on April 26, 1994. S. 622 did not include the provision expanding the type of fees that agencies have to pay when they lose or settle cases. Therefore, the estimated cost of H.R. 2970 is higher than that of S. 622.

10. Estimate prepared by: James Hearn.

11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

Oversight

Under the rules of the Committee on Post Office and Civil Service, the Subcommittee on the Civil Service is vested with legislative and oversight jurisdiction over the subject matter of this legislation. As a result of its hearings and deliberations, the subcommittee has concluded that there is ample need and justification for enacting this legislation.

The Committee received no report of oversight findings or recommendations from the Committee on Government Operations pursuant to clause 4(c)(2) of House Rule X.

Inflationary Impact Statement

Pursuant to clause (2)(1)(4) of House Rule XI, the committee has concluded that enactment of H.R. 2970 will have no inflationary impact on the national economy.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

SECTION 8 OF THE WHISTLEBLOWER PROTECTION ACT OF 1989

SEC. 8. AUTHORIZATION OF APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS.

(a) Authorization of Appropriations. There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated

(1) for each of fiscal years 1989, 1990, 1991, 1992, 1993, and 1994, such sums fiscal years 1993-1997, such sums as necessary to carry out subchapter I of chapter 12 of title 5, United States Code (as amended by this Act); and

(2) for each of fiscal years 1989, 1990, 1991, and 1992, such sums fiscal years 1993-1997, such sums as necessary to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

* * * * *

TITLE 5, UNITED STATES CODE

* * * * *

PART II CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

* * * * *

CHAPTER 12 MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

SUBCHAPTER I MERIT SYSTEMS PROTECTION BOARD

Sec.

Sec. 1201. Appointment of members of the Merit Systems Protection Board.

Sec. 1202. Term of office; filling vacancies; removal.

Sec. 1203. Chairman; Vice Chairman.

Sec. 1204. Powers and functions of the Merit Systems Protection Board.

Sec. 1205. Transmittal of information to Congress.

Sec. 1206. Annual report.

SUBCHAPTER II OFFICE OF SPECIAL COUNSEL

Sec. 1211. Establishment.

Sec. 1212. Powers and functions of the Office of Special Counsel.

Sec. 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters.

Sec. 1214. Investigation of prohibited personnel practices; corrective action.

Sec. 1215. Disciplinary action.

Sec. 1216. Other matters within the jurisdiction of the Office of Special Counsel.

Sec. 1217. Transmittal of information to Congress.

Sec. 1218. Annual report.

Sec. 1219. Public information.

SUBCHAPTER III INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

Sec. 1221. Individual right of action in certain reprisal cases.

Sec. 1222. Availability of other remedies.

SUBCHAPTER IV JUDICIAL REVIEW

1231. Judicial review.

1232. Choice of remedies.

* * * * *

SUBCHAPTER II OFFICE OF SPECIAL COUNSEL

1211. Establishment

(a) * * *

(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel shall 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 term of office of the Special Counsels predecessor serves for the remainder of the term. The Special Counsel may continue to serve after the expiration of the Special Counsels term until a successor has qualified, but for not longer than 1 year. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. 1212. Powers and functions of the Office of Special Counsel

(a) * * *

* * * * *

(g)(1) The Special Counsel may not respond to any inquiry or provide information concerning any person making an allegation under section 1214(a), except in accordance with the provisions of section 552a of title 5, United States Code, or as required by any other applicable Federal law.

(2) Notwithstanding the exception under paragraph (1), the Special Counsel may not respond to any inquiry concerning a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a person described in paragraph (1)

(A) unless the consent of the individual as to whom the information pertains is obtained in advance; or

(B) except upon request of an agency which requires such information in order to make a determination concerning an individuals having access to the information unauthorized disclosure of which could be expected to cause exceptionally grave damage to the national security.

(g)(1) The Special Counsel may not respond to any inquiry or provide information concerning either any person making an allegation under section 1214(a) or any allegation so made, except in accordance with the provisions of section 552a or as required by any other applicable law.

(2) If, or to the extent that, the allegation involves a prohibited personnel practice described in paragraph (2), (8), or (9) of section 2302(b), no disclosure described in paragraph (1) may be made unless

(A) either of the exceptions permitting disclosure under paragraph (1) is met; and

(B)(i) the consent of the person who made such allegation is obtained in advance; or

(ii) the information is being sought by an agency which requires such information in order to make a determination concerning access, for the person referred to in paragraph (1), to information the unauthorized disclosure of which could be expected to cause exceptionally grave damage to national security.

1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

(a) * * *

* * * * *

(e)(1) * * *

(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determined whether

(A) the findings of the head of the agency appear reasonable; and

(A) the findings of the agency head are supported by clear and convincing evidence; and

* * * * *

(g)(1) If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. If the Special Counsel receives information from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2) which, if such individual were an individual described in either of such subparagraphs, would be considered information of a type described in subsection (a), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head. If the Special Counsel does not transmit the information to the head of the agency, the Special Counsel shall return any documents and other matter provided by the individual who made the disclosure.

* * * * *

1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) * * *

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), practice, the Special Counsel shall provide written notice to the person who made the allegation that

(i) * * *

* * * * *

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(C) Unless an investigation under this section is terminated, the Special Counsel shall, within 60 days after notice is provided under subparagraph (B) with respect to a particular allegation, and at least every 60 days thereafter, notify the person who made such allegation as to the status of the investigation and any action which has been taken by the Office of Special Counsel since notice was last given under this subsection.

(D)(i) Except as provided in clause (ii), no later than 120 days after the date of receiving an allegation of a prohibited personnel practice, the Special Counsel shall determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) The deadline under clause (i) may be extended by written agreement between the Special Counsel and the person who made the allegation involved.

(E) A determination by the Special Counsel under this paragraph shall not be admissible in any judicial or administrative proceeding except in the same circumstances as would apply under paragraph (2)(B) with respect to a written statement under paragraph (2)(A).

* * * * *

(3) Except in case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and

(3) Except as provided in the last sentence of this paragraph, an employee, former employee, or applicant for employment may not seek corrective action from the Board under section 1221 unless

(A) such employee, former employee, or applicant has sought corrective action from the Special Counsel under this subchapter;

(A) (B)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) (C) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

This paragraph shall not apply with respect to a prohibited personnel practice described in section 2302(b)(8).

* * * * *

(b)(1) * * *

* * * * *

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), paragraph (8) or (9) of section 2302(b), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described in paragraph (8) or (9) of section 2302(b), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that protected conduct under such paragraph (8) or (9) (as defined in clause (iii)(I) or (II), as applicable) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant, notwithstanding the provisions of section 7701(c)(1).

(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected conduct involved.

(iii) For the purpose of this subparagraph, the term "protected conduct" means

(I) with respect to paragraph (8) of section 2302(b), any disclosure described in subparagraph (A) or (B) of such paragraph; and

(II) with respect to paragraph (9) of section 2302(b), any conduct described in subparagraph (A), (B), (C), or (D) of such paragraph.

* * * * *

1218. Annual report

The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, the number of instances in which it did not make a timely determination under section 1214(a)(1), and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

* * * * *

SUBCHAPTER III INDIVIDUAL RIGHT OF ACTION IN CERTAIN REPRISAL CASES

1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3) section 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), practice, seek corrective action from the Merit Systems Protection Board.

(b)(1) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(2) Nothing in this subchapter shall be considered to create any right to seek corrective action with respect to a prohibited personnel practice described in section 2302(b)(1).

(3) For purposes of subsection (a), the term "personnel action", if taken or proposed to be taken as a result of a prohibited personnel practice other than one described in paragraph (1) or (8) of section 2302(b), means

- (A) an action under subchapter II of chapter 75;
- (B) a detail, transfer, or reassignment; and
- (C) a reduction in grade or removal under section 4303.

* * * * *

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board may issue a subpoena for the attendance and testimony of any person or the production of

documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the matter requested

(A) is not unduly burdensome;

(B) is not privileged or otherwise protected from disclosure by law, rule, or regulation; and

(C) is relevant to the subject matter involved in the pending action or appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(e)(1) Subject to paragraph (2), in any case involving an alleged prohibited personnel practice as described in paragraph (8) or (9) of section 2302(b), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that protected conduct under such paragraph (8) or (9) (as defined in paragraph (3) (A) or (B), as applicable) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant, notwithstanding the provisions of section 7701(c)(1).

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected conduct involved.

(3) For the purpose of this subsection, the term "protected conduct" means

(A) with respect to paragraph (8) of section 2302(b), any disclosure described in subparagraph (A) or (B) of such paragraph; and

(B) with respect to paragraph (9) of section 2302(b), any conduct described in subparagraph (A), (B), (C), or (D) of such paragraph.

(f)(1) * * *

* * * * *

(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel for investigation and appropriate action under section 1215.

(g)(1) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorneys fees fees for legal representation and any other reasonable costs incurred.

(2) If an employee, former employee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorneys fees fees for legal representation and any other reasonable costs incurred, regardless of the basis of the decision.

* * * * *

SUBCHAPTER IV JUDICIAL REVIEW

1231. Judicial review

(a) Subject to subsection (c) and section 1232, an employee, former employee, or applicant for employment may, with respect to a personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), bring a civil action in the appropriate district court of the United States for relief. For purposes of the preceding sentence, the term "personnel action" means

- (1) an action under subchapter II of chapter 75;
- (2) a detail, transfer, or reassignment; and
- (3) a reduction in grade or removal under section 4303.

(b) The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(c) An action under this section

(1) shall be brought in the district court of the United States for the judicial district in which the prohibited personnel practice is alleged to have been committed, in which the employment records relevant to such practice are maintained and administered, or in which the aggrieved person works or would have worked but for the alleged prohibited personnel practice; and

(2) shall be brought within 120 days after the prohibited personnel practice is alleged to have occurred.

(d) Review. In any action brought under this section, the court

(1) shall review the matter de novo; and

(2) shall apply the same standard as would the Merit Systems Protection Board under section 1214(b)(4)(B) or 1221(e).

1232. Choice of remedies

(a) An action under section 1231

(1) if brought, shall be in lieu of any remedy described in subsection (b); but

(2) may not be brought if the aggrieved person has elected to raise the same matter under any of the remedies described in subsection (b).

(b) The remedies described in this subsection are as follows:

(1) An appeal to the Merit Systems Protection Board under section 7701.

(2) A negotiated grievance procedure under section 7121.

(3) Procedures for seeking corrective action under subchapters II and III.

(c) For the purpose of this section, a person shall be considered to have elected

(1) the remedy described in subsection (b)(1) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(2) the remedy described in subsection (b)(2) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties negotiated procedure; or

(3) the remedy described in subsection (b)(3) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(d) For purposes of subsection (a)(1), a person shall be considered to have elected the remedy under section 1231 if such person has timely commenced an action in an appropriate court, in accordance with applicable procedures.

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PART III EMPLOYEES

Subpart A General Provisions

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CHAPTER 23 MERIT SYSTEM PRINCIPLES

* * * * *

2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section

(A) "personnel action" means

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) a decision to require psychiatric testing or examination;

(xi) a denial, revocation, or other determination relating to a security clearance; and

(x) (xii) any other significant change in duties or responsibilities which is inconsistent with the employees salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(B) "covered position", as used with respect to an employee or applicant for employment, means any position in the competitive service, a career appointee position in the Senior Executive Service, a position in the excepted service, or a position covered by chapter 74 of title 38, but does not include any position which, as of the date on which the employee began serving in the position or the applicant applied for such position (as the case may be), was

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency and the Government Printing Office, but does not include

(i) a Government corporation;

(ii) (i) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) (ii) the General Accounting Office.

* * * * *

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that employees of such agency are informed of the rights and remedies available to them under this chapter and chapter 12. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

* * * * *

2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences

(1) * * *

* * * * *

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) clauses (i) through (xii) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policy-making, or policy-advocating character).

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CHAPTER 43 PERFORMANCE APPRAISAL

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SUBCHAPTER II PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

* * * * *

4313. Criteria for performance appraisals

Appraisals of performance in the Senior Executive Service shall be based on both individual and organizational performance, taking into account such factors as

(1) * * *

* * * * *

(5) meeting affirmative action goals and achievement of equal employment opportunity requirements.

(5) meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth in section 2301.

* * * * *

Subpart F Labor-Management and Employee Relations

CHAPTER 71 LABOR-MANAGEMENT RELATIONS

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SUBCHAPTER III GRIEVANCES, APPEALS, AND REVIEW

* * * * *

7121. Grievance procedures

(a) * * *

(b) (b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall

(1) (A) be fair and simple,

(2) (B) provide for expeditious processing, and

(3) (C) include procedures that

(A) (i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) (ii) assure such an employee the right to present a grievance on the employees own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) (iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(3) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice described in paragraph (8) or (9) of section 2302(b) is involved, require that the arbitrator apply the same standard as would apply under section 1221(e).

* * * * *

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made in the same way as set forth in section 1232(c).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

* * * * *

CHAPTER 77 APPEALS

* * * * *

7701. Appellate procedures

(a) * * *

* * * * *

(c)(1) Subject to paragraph (2) Subject to paragraphs (2) and (3) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

* * * * *

(3) To the extent that an appeal involves an alleged prohibited personnel practice described in paragraph (8) or (9) of section 2302(b), the standard under section 1221(e) shall be applied.

* * * * *

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees for legal representation incurred by an employee or applicant for employment if the employee or applicant is the substantially prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit, in which the agency's action was clearly without merit, or which is settled or otherwise similarly resolved.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees for legal representation shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

* * * * *

7703. Judicial review of decisions of the Merit Systems Protection Board

(a) * * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit or the United States court of appeals for the circuit in which the petitioner resides. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

* * * * *

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, In any case filed under subsection (b)(1), the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; evidence.

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition

for judicial review shall be at the discretion of the Court of Appeals. If a proceeding under this subsection is transferred to another court of appeals, the Director shall have the right to appear in the proceeding before such other court.

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Subpart G Insurance and Annuities

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CHAPTER 83 RETIREMENT

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SUBCHAPTER III CIVIL SERVICE RETIREMENT

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8348. Civil Service Retirement and Disability Fund

(a) There is a Civil Service Retirement and Disability Fund. The Fund

(1) is appropriated for the payment of

(A) benefits as provided by this subchapter or by the provisions of chapter 84 of this title which relate to benefits payable out of the Fund; and

(B) administrative expenses incurred by the Office of Personnel Management in placing in effect each annuity adjustment granted under section 8340 or 8462 of this title, in administering survivor annuities and elections providing therefor under sections 8339 and 8341 of this title or subchapters II and IV of chapter 84 of this title, in administering alternative forms of annuities under sections 8343a and 8420a (and related provisions of law), and in withholding taxes pursuant to section 3405 of title 26; and

(2) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Office in connection with the administration of this chapter, chapter 84 of this title, and other retirement and annuity statutes.; and

(3) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Merit Systems Protection Board in connection with the administration of appeals authorized under section 8347(d) or 8461(e).

* * * * *

SECTION 1295 OF TITLE 28, UNITED STATES CODE

1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

(1) * * *

* * * * *

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

* * * * *

SUBJECT: LEGISLATION (79%); JUDICIAL REVIEW (59%); APPEALS COURTS (59%); ALTERNATIVE DISPUTE RESOLUTION (59%); INVESTIGATIONS (59%); US FEDERAL GOVERNMENT (59%); BURDENS OF PROOF (59%); HUMAN RESOURCES (59%); LAWYERS (59%); SUBPOENAS (59%);

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