JUDICIAL VIEWS ON PROSECUTION OF PROHIBITED PERSONNEL PRACTICES

A REPORT TO THE PRESIDENT AND THE
CONGRESS OF THE UNITED STATES BY
THE U.S. MERIT SYSTEMS PROTECTION BOARD

THE OFFICE OF SPECIAL COUNSEL: Judicial Views on Prosecution of Prohibited Personnel Practices

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C.

A Report to the President and the Congress of the United States

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

September 18, 1987

Sirs:

In accordance with section 202(a) of the Civil Service Reform Act of 1978 [5 U.S.C. §1205(a)(3)], it is my honor to submit the Merit Systems Protection Board monograph titled "The Office of Special Counsel: Judicial Views on Prosecution of Prohibited Personnel Practices." ,

This monograph was prepared by the Board's Office of General Counsel and contains a summary and analysis of judicial views on the role of the Office of Special Counsel in regard to three areas:

1. The authority and role of the Special Counsel in remedying prohibited personnel practices.

2. The role of the Special Counsel in protecting "Whistleblowers" from reprisal actions.

3. The responsibility of the Special Counsel to pursue other types of allegations of fraud, waste and abuse.

I think that this monograph will assist in understanding the role assigned to the Special Counsel and its relationship with the Board as defined in case law.

Respectfully,

Daniel R. Levinson

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The President of the United States
The President of the Senate
The Speaker of the House of Representatives

Washington, DC

Acknowledgements

The following individuals contributed to the preparation of this monograph: Llewellyn M. Fischer, General Counsel, Mary L. Jennings, Deputy General Counsel, Bruce Mayor and Calvin M. Morrow, attorneys.

This report was prepared by the Office of General Counsel and is not intended to reflect the views of the Board, its Members, or the Office of Special Counsel.

A. Introduction

Under the Civil Service Reform Act of 1978 (Reform Act or CSRA),[1] the Merit Systems Protection Board (Board or MSPB) was established as a quasi-judicial body to protect Federal merit systems and decide a wide variety of civil service cases. One important responsibility of the Board is to decide *"whistleblower"* cases brought under a provision of the Reform Act. That legislation for the first time in civil service history provides broad protection for whistleblower employees who report violations of law, waste, fraud, or abuse. Under this part of the Reform Act, the Board adjudicates charges brought against employees and agencies by an independent Special Counsel. The charges may involve engaging in prohibited personnel practices or taking reprisal against whistleblowing. Judicial review of the Board's decision is available in an appropriate United States Circuit Court of Appeals.

The purpose of this monograph is to review MSPB and court decisions issued in the first decade of the Reform Act involving the authority of the Special Counsel to remedy prohibited personnel practices.[2] Primary emphasis will be placed on the five cases in which federal circuit courts of appeals have reviewed decisions of the Board in actions brought by the Special Counsel. These rulings interpret the prohibited personnel practices statute, 5 U.S.C. § 2302, and the provisions governing enforcement actions by the Special Counsel, 5 U.S.C. §§ 1206-1207.

The issues addressed in these cases involve substantive and procedural issues of great significance to the effective implementation of the CSRA, including: the allocation of corrective action authority between the Office of Special Counsel (OSC) and the Board, the Special Counsel's burden of persuasion, the Special Counsel's authority over matters not related to personnel actions, the extent of the Board's authority to prescribe sanctions when requested to impose discipline by the Special Counsel, the elements of proof in a retaliation case, including whether protected activity can be considered in any way in taking an adverse personnel action, and judicial review of the Board's decisions in Special Counsel cases. In addition, a separate section of this monograph will address a series of important cases recently decided by the United States Court of Appeals for the District of Columbia Circuit, concerning Special Counsel jurisdiction over claims not appealable to the Board. These cases, beginning with the 1983 decision in *Carducci v. Regan*,[3] have important implications for the Special Counsel's ability to investigate and seek correction of a wide variety of personnel-related actions considered arbitrary or incorrect.

The cases agree in finding a quasi-prosecutorial role for the Special Counsel, whether in seeking agency correction of prohibited personnel practices or in seeking discipline of the individual supervisors responsible for their commission. The courts have shown a willingness to read the Special Counsel's authority to remedy prohibited personnel practices broadly, while rejecting an expansive interpretation of that authority with respect to other civil service related matters. Perhaps the most interesting developments in the case law have been in actions alleging reprisal for protected activity, where distinguishing retaliatory from legitimate motivation has presented a difficult challenge.

B. Background

The Office of Special Counsel (OSC) was established by Section 202 of the CSRA with the enforcement of the prohibited personnel practices statute, 5 U.S.C. 2302, as its principal responsibility.[4] Section 2302 applies to employees with authority to take or recommend "personnel

[1] Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*

[2] The Board is directed by law to conduct "special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." 5 U.S.C. § 1205(a)(3). The publication of this monograph is in furtherance of that mission. Previous MSPB reports and studies on whistleblower protections provided by the CSRA include: *Whistleblowing and and the Federal Employee: Blowing the Whistle on Fraud, Waste, and Mismanagement—Who Does It and What Happens*, U.S. Merit Systems Protection Board, Washington, DC, 1981 and *Blowing the Whistle In The Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings*, U.S. Merit Systems Protection Board, Washington, DC, 1984.

[3] 714 F.2d 171 (D.C. Cir. 1983).

[4] *See* 5 U.S.C. § 1206(a),(c),(h); S. Rep. No. 95-969, 95th Cong., 2d Sess. 24, 32 (1978), *reprinted in* House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978* (hereinafter *Legislative History*) at 1488, 1496.

actions" and prohibits use of such authority for various illegitimate purposes which are inconsistent with the merit principles enunciated in 5 U.S.C. § 2301. The statute's definition of "personnel action" is broadly inclusive, encompassing many personnel actions which are not directly appealable to the Board by the employee involved.[5]

The CSRA authorizes OSC to bring four kinds of actions for relief from prohibited personnel practices: "stay requests," "corrective actions," "disciplinary actions," and "regulation review requests." Under section 1208, OSC can ask the Board to stay an alleged prohibited personnel action on an interim basis.[6] Under section 1206(c)(1)(B), OSC can bring an action for a final order requiring an agency to correct a prohibited personnel practice. Section 1206(g) authorizes OSC to ask the Board to impose disciplinary sanctions on employees who have committed prohibited personnel practices or certain other violations within OSC's jurisdiction.[7] Section 1205(e)(1) authorizes OSC (as well as other "interested persons") to request review of an Office of Personnel Management (OPM) regulation on the ground that the regulation on its face or as implemented by an agency requires or has resulted in a prohibited personnel practice.

To date, only a handful of MSPB Special Counsel decisions have triggered judicial review.[8] Court decisions have issued only in appeals from corrective action and disciplinary action orders.[9] An employee subjected to disciplinary action is specifically authorized to seek judicial review by 5 U.S.C. § 1207(c), and reported decisions have issued in four such appeals. A fifth case involved a decision in a corrective action. There is no explicit right of judicial review for the employee affected by the personnel action which is the subject of a corrective action request. Indeed, in a corrective action, section 1206(c)(1)(B) does not entitle the employee to participate in the proceeding. However, *Frazier v. MSPB*,[10] held that employees adversely affected by the Board's decision in such a case are entitled to appeal the decision by 5 U.S.C. § 7703(a)(1), which applies to any "final order or decision" of the Board. The employees who filed the appeal in *Frazier* had been permitted to appear as parties in the Board proceeding, but the court's opinion suggests that intervention is not a prerequisite to appeal.[11]

The Director of OPM is authorized by 5 U.S.C. § 7703(d) to petition the United States Court of Appeals for the Federal Circuit for judicial review of any final order or decision of the Board which the Director believes is a misinterpretation of a civil service law, rule, or regulation affecting personnel management and one which will have a substantial adverse impact. *Horner v. MSPB*[12] expressly

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[5] *See* 5 U.S.C. § 2302(a)(2)(A).

[6] Because a stay order under section 1208 provides only temporary or interim relief and does not finally resolve the controversy, it is not a final order for purposes of judicial review under 5 U.S.C. § 7703.

[7] Under 5 U.S.C. § 1206(e), the Special Counsel's jurisdiction also includes violations of the Hatch Act, arbitrary withholding of information sought under the Freedom of Information Act, involvement in prohibited discrimination found by any court or appropriate administrative authority, and "activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking." The scope of OSC's authority in the last named area was the issue in *Horner v. Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987), discussed *infra at 6-7.*

[8] The overwhelming number of OSC investigations are resolved without the initiation of formal proceedings before the Board. See, e.g., *Protecting the Integrity of the Merit System* (OSC 1985) at 125 ("...during 1983-1985, the [OSC] found it unnecessary to take any corrective action matter before the Board since, in each such case, the agency took the action recommended by the Special Counsel (except in one case in which the action became moot"). *See also A Report to Congress from the Office of Special Counsel*, Fiscal Year 1985, 12-13.

[9] The only reported appeal of an OPM regulation review decision was from the Board's ruling in a proceeding initiated by an interested person (an employee union) under section 1205(e) (1) (B), *NTEU v. MSPB*, 743 F.2d 895 (D.C. Cir. 1984). In that case, the court held it had jurisdiction under 5 U.S.C. § 7703(b)(1) to hear an appeal brought by the union on behalf of members aggrieved by the decision, even though an OPM regulation can also be challenged in a district court under the Administrative Procedure Act and can be challenged only in that forum when the Board declines to review it under section 1205(e). *Id.* at 903-08. Under the court's analysis, an aggrieved employee could appeal the decision without regard to whether the proceeding was initiated by himself or another interested person, by OSC under section 1205(e)(1)(C), or by the Board *sua sponte* under section 1205(e)(1)(A). *See id.* at 908-911. The OPM could appeal the decision in a section 1205(e) proceeding pursuant to 5 U.S.C. § 7703(d), *see id.* at 904 & n.10, but the Special Counsel could not, because no statute authorizes the Special Counsel to appeal any Board decision.

[10] 672 F.2d 150, 158-60 (D.C. Cir. 1982).

[11] 672 F.2d at 159 n.30.

[12] 815 F.2d 668 (Fed. Cir. 1987).

recognized the Director's right to seek review of the Board's decision in a Special Counsel case.[13]

C. Corrective Actions

Frazier v. Merit Systems Protection Board

Frazier v. MSPB,[14] was the first court decision to delineate the roles of the Office of Special Counsel and the Board in actions to enforce section 2302(b) and the elements of a reprisal case under that section. The court endorsed the Board's analysis of these issues and affirmed its decision on the merits.

Frazier involved allegations that four Deputy U.S. Marshals in Atlanta were being transferred to other districts in retaliation for protected activities: disclosures protected by the "*whistleblowing*" provisions of section 2302(b)(8) and exercise of appeal rights (filing of discrimination complaints) protected by section 2302(b)(9). The Special Counsel obtained a stay of the transfers from the Board under section 1208 on the basis that there were reasonable grounds to support these claims. After completing an investigation, OSC filed a report with the Board, OPM, and the Department of Justice (of which the Marshals Service is a part), which concluded that reprisal for protected activities may have been the basis for the transfers and recommended that the transfers be rescinded.

The Department declined to carry out OSC's recommendation on the ground that the reassignments were ordered for the sound management purpose of relieving irreconcilable personality conflicts in the Atlanta office. The Special Counsel then petitioned the Board pursuant to section 1206(c)(1)(B)[15] for a corrective action order requiring the Department to rescind the transfers. The Board held an evidentiary hearing on the need for corrective action over the objections of OSC and the deputies, who were permitted to appear as parties. Over further objections of the complaining parties, the Board assigned the burden of proof on the need for corrective action to OSC.

In its decision,[16] the Board found the deputies had made disclosures to Congressmen which were protected under 5 U.S.C. § 2302(b)(8).[17] However, the Board concluded that OSC failed to show the transfers were in reprisal for such protected activities. The Board found that the Director of the Marshals Service, who ordered the transfers, had neither actual nor constructive knowledge of the deputies' protected disclosures but rather that in ordering the transfers the Director relied on the recommendations of a management review team whose members were also unaware of the deputies' whistleblowing.[18] The Board also decided that the transfers of three of the deputies were also not in reprisal for their exercise of appeal rights, finding that neither the Director nor the review team was aware of two of the deputies' EEO activities and concluding that the third deputy's EEO complaints, of which they were aware, had not been considered in the decision to transfer him.[19]

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[13] By virtue of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, the Federal Circuit was designated the exclusive forum for review of all final Board orders and decisions on agency individual personnel actions that do not properly raise issues of employment discrimination. Consequently, the vast majority of appeals from Board decisions are heard by the Federal Circuit.

[14] 672 F.2d 150 (D.C. Cir. 1982).

[15] This provision provides:

If, after a reasonable period, the agency has not taken the corrective action recommended [in the Special Counsel's report under section 1206(c)(1)(A)], the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the [OPM].

[16] *In re Frazier*, 1 M.S.P.R. 163 (1979).

[17] The Board rejected the argument that the disclosures were not protected because not made in the reasonable belief that the matters disclosed constituted mismanagement, gross waste, abuse of authority or threats to public safety within the meaning of section 2302(b) (8) (A). As evidence of the reasonableness of the deputies' beliefs, the Board noted that the report of the management review team (on which the transfers were based) itself found there were serious management deficiencies. The fact that disciplinary action was threatened against two of the deputies at the time did not deprive the disclosures of protection, the Board said, and it declined to find that there can never be an element of self-interest in protected whistleblowing. 1 M.S.P.R. at 186-87. The Board's rulings concerning the protected nature of the disclosures were not at issue on appeal.

[18] 1 M.S.P.R. at 187-90.

[19] *Id.* at 193-94.

However, the Board determined that the EEO activities of a fourth deputy (Frazier) were known to the Director and were impermissibly considered by the review team in recommending his transfer. Therefore, the Board attributed to the Director the retaliatory intent against Frazier that it found in the management of the Atlanta office.[20] Accordingly, finding that Frazier's transfer violated section 2302(b)(9), the Board ordered the agency to rescind the action and to cease its retaliation against Frazier for his EEO activities. The deputies then appealed the Board's decision to the Court of Appeals for the District of Columbia Circuit.

The court, in one of the first major court decisions interpreting the CSRA,[21] resolved two key questions of first impression under the corrective action provisions: 1) the intended roles of the Special Counsel and the Board in corrective action proceedings under section 1206(c)(1)(B) and 2) the elements of a reprisal case. The deputies urged the position both they and OSC had advanced in the MSPB proceeding: that OSC was intended to be both "*public defender*" for employees and the final judge of the prohibited personnel practice claims it investigated. Under this view, the Board's role in a corrective action proceeding would have been limited to determining the appropriate remedy for the violation found by the Special Counsel, and thus the evidentiary hearing held by the Board to resolve factual disputes between OSC and the agency would have been not only inappropriate, but unauthorized.

"(In Frazier V. MSPB) the court * * * resolved two key questions of first impression: * * * 1) the intended roles of the Special Counsel and the Board in corrective action proceedings * * * and 2) the elements of a reprisal case."

The court, however, adopted the Board's interpretation of the Special Counsel's role, deferring to the Board's contemporaneous construction of the new statute, the administration of which was the Board's responsibility. The court also found that both the language and the history of the Act supported the Board's analysis.[22] The court agreed that the Special Counsel's fundamental role was to vindicate the public interest in the integrity of the merit system and that therefore the duties of OSC were not equivalent to that of an employees' advocate. Although the interests of OSC and a particular employee will often converge, the court noted that OSC may refuse to pursue a case or may compromise with the agency or seek corrective action short of that requested by a complainant.[23] Moreover, the court agreed with the Board that the

[20] *Id.* at 194-95.

[21] *Frazier v. MSPB*, 672 F.2d 150 (D.C. Cir. 1982). Before reaching the merits, the Court of Appeals first resolved two threshold issues. As to whether a corrective action order is appealable, the court found that the language of 5 U.S.C. § 7703(a), authorizing "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the [MSPB]" to obtain judicial review, was sufficiently broad to permit appeals by employees adversely affected by a final corrective action order under section 1206(c)(1)(B). *Id. at* 159-60. As to whether the deputies' resignations had rendered the controversy moot, the court acknowledged that the resignations had made their request for rescission of their transfers meaningless. However, it found the decision nonetheless had a continuing effect on them so that their appeal was not moot. The negative characterizations on which their transfers were partly based remained in their records and could affect their future employment prospects, and the decision could also affect potential coerced resignation claims. However, the appeal of deputy *Frazier* whose transfer the Board had ordered rescinded as in reprisal for EEO activities was dismissed as moot. Review of the Board's rejection of *Frazier's* other claim (of retaliation for whistleblowing), the court pointed out, could provide him no further relief even if he prevailed. *Id.* at 160-61.

[22] 672 F.2d at 162.

[23] The court expressed no opinion on whether the complaining employee would have a right to challenge an OSC decision not to bring a corrective action petition or to settle a case with the agency involved. *Id.* at 162 n.41. Subsequently, the court has held that mandamus would lie to compel OSC to perform its ministerial duty under section 1206(a) to investigate employee prohibited personnel practice complaints and that, where OSC determined the complaint did not merit the Board's consideration, limited judicial review would be available to determine whether OSC's investigation constituted an adequate discharge of its responsibilities. *Wren v. Merit Systems Protection Board*, 681 F.2d 867, 875-76 n.9 (D.C. Cir. 1982); *Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); *Barnhart v. Devine*, 771 F.2d 1515, 1526 (D.C. Cir. 1985). *See* discussion in Section E, *infra*. In *Barnhart* the District of Columbia Circuit left open the question of what court would have jurisdiction over a mandamus action against OSC. 771 F.2d at 1524 n.15. One district court has held that exclusive jurisdiction to review the Special Counsel's failure to act is in the Board's primary reviewing court, the Federal Circuit, under the All Writs Act. *Moss v. Arnold*, 654 F. Supp. 19 (S.D. Ohio 1986).

language and history of the Act portray the Special Counsel as a prosecutor rather than a judge, while the same sources assign the adjudicatory role to the Board. Section 1206(c)(1)(B) itself suggests such a prosecutor-judge relationship, the court noted, and it found the Board had authority as the adjudicator to conduct evidentiary hearings in appropriate cases, even though the corrective action provision does not require a hearing.[24]

"The court agreed that the Special Counsel's fundamental role was to vindicate the public interest in the integrity of the merit system * * *"

The court also upheld the Board's decision concerning the burden of proof in a corrective action, requiring the Special Counsel to prove the existence of prohibited personnel practices by the preponderance of the evidence. The court agreed that this result was consistent with section 7701(c)(2)(B), which places the burden of proving prohibited personnel practice allegations on the employee in an appeal, and with the rule concerning proof of reprisal in other employment contexts.[25]

Frazier also discusses the elements of a reprisal case because the deputies contended that the Board's decision required direct, personal knowledge of the protected activities by the final agency decisionmaker as an essential element of a reprisal finding. The court found that, although the Board's opinion could have been clearer, it did not impermissibly limit retaliation findings to such narrow situations. The Board expressly found that Director Hall had neither actual nor constructive knowledge of the deputies' whistleblowing, and it considered whether the management review team, on whose recommendation Hall acted, had knowledge attributable to Hall. The Board found that the team members did not have knowledge, that the agency was not so small that Hall's knowledge could be presumed under the labor law "small plant" doctrine, and that those of Hall's subordinates who did have sufficient knowledge to support an inference of retaliatory intent played no part in the transfers.

Thus the court concluded the Board did not run afoul of the legislative history indicating that constructive knowledge of protected activities by those ultimately responsible for personnel actions could support an inference of retaliation, and it implicitly found substantial evidence supported the Board's conclusion that those who effected the transfers had no knowledge, actual or constructive, while those with knowledge of the protected conduct took no part in the decision.[26] Since OSC did not contend the review team report on which Hall acted was unknowingly infected by biased testimony from individuals aware of the whistleblowing, the court did not decide "to what extent, if any, the Act prohibits personnel actions unwittingly based on evidence tainted by the retaliatory motives of non-decisionmakers."[27]

In sum, *Frazier* accepted the Board's view that in corrective action cases the adjudicatory role is exclusively the Board's, that OSC has the burden of proving the existence of the alleged prohibited personnel practice by the preponderance of the evidence, and that an evidentiary hearing may appropriately be held to resolve factual disputes. The decision also endorses and amplifies the rule adopted by the Board that proof of retaliation for protected activities can be based on the decisionmaker's actual or constructive knowledge of the activities. A finding of reprisal may thus be based on what the decisionmaker should have known or on the retaliatory motives of subordinates' whose recommendations were the basis of the challenged action.[28] No court has subsequently disagreed with these rulings. The Board has continued to follow the principles set forth in *Frazier*, although the case law concerning proof of retaliation has been further developed in subsequent cases, as discussed below.

D. Disciplinary Actions

Frazier is the only reported court decision in an appeal from the Board's decision on a Special Counsel corrective action request. To date, subsequent court decisions reviewing Special Counsel cases

[24] 672 F.2d at 162-64.

[25] *Id.* at 164-65.

[26] *Id.* at 166-68.

[27] *Id.* at 167 n.62.

[28] *Frazier* also reviewed and reversed the related decision of the Board denying a motion for attorney fees on the ground that 5 U.S.C. § 7701(g) had no application outside Chapter 77 appeals. The issues in this related appeal are outside the scope of this monograph.

have all involved disciplinary actions against individual employees brought by the Special Counsel pursuant to 5 U.S.C. § 1206(g) and heard by the Board under 5 U.S.C. § 1207. It is implicit in these decisions that the Board is not bound by the factual assertions in OSC's complaint for disciplinary action and that OSC, as the moving party, has the burden of proof. Consistent with the burden *Frazier* established for corrective actions, *Harvey v. MSPB*[29] expressly held that OSC must prove its charges by a preponderance of the evidence. Like *Frazier*, both *Harvey* and *Starrett v. Special Counsel*,[30] involved charges of reprisal for protected activities, but they address different issues concerning the required elements of proof of reprisal.[31] There was no issue concerning whether the Board appropriately held a hearing in these cases, since the respondent employee in a disciplinary action is entitled to a hearing by 5 U.S.C. § 1207(a)(3). *Horner v. MSPB*,[32] involved an issue concerning the scope of the Special Counsel's authority (and of the Board's derivative jurisdiction) under a particular provision of section 1206, while *Filiberti v. MSPB*,[33] addressed the question of whether the Board's compliance authority permits it to devise new penalties if necessary to prevent circumvention of the section 1207(b) sanction initially imposed.

Horner v. Merit Systems Protection Board

Unlike the other cases discussed in this section, this appeal was brought by the Director of OPM under 5 U.S.C. § 7703(d), the first such appeal from the Board's decision in a Special Counsel case. The basic issue was whether the Special Counsel could bring a disciplinary action (and the Board could impose a sanction) for an employee's alleged violation of a civil service law, rule, or regulation not related to personnel practices, merit systems abuses, or other matters specifically made subject to the Special Counsel's jurisdiction. OPM appealed to challenge the Board's broad interpretation of 5 U.S.C.§ 1206(e)(1)(D), giving OSC jurisdiction to investigate (and, with 5 U.S.C. § 1206(g), to prosecute) "activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking."

In its complaint, OSC asked the Board to discipline an agency official (Williams) for accepting gifts from subordinates in violation of 5 U.S.C. § 7351(3) and for accepting the gift of a weekend trip from a subordinate and from an officer of a union whose contract disputes the agency mediates. This was charged as a violation of the ethical standards of conduct contained in 5 C.F.R. §§ 735.201 & 735.202. The Administrative Law Judge (ALJ) dismissed the complaint, finding that section 1206(e)(1)(D) did not give OSC jurisdiction over the alleged violations.

The Board disagreed, finding that the charged violations were within the plain meaning of the statute and that the ALJ had erred by reading into section 1206(e)(1)(D) a limitation to personnel practices which was in a proposed version of the provision but had been deleted before it was adopted.[34] Although the Board dismissed the first charge (because the statute does not prohibit voluntary gifts of nominal value on a special occasion), it approved the settlement between Williams and OSC with respect to the other charge after it determined that this violation was within OSC's jurisdiction.

On appeal by OPM, the Federal Circuit reversed.[35] The court rejected the plain meaning interpretation of section 1206(e)(1)(D) adopted by the Board, finding other subsections of section 1206 raised significant questions about such a construction and made it necessary to analyze the statute as a whole and to consult the legislative history. In the court's view, a literal

[29] 802 F.2d 537, 544, 547 (D.C. Cir. 1986).

[30] 792 F.2d 1246 (4th Cir. 1986).

[31] In stating the elements of a reprisal claim, *Harvey* follows *Frazier* in stating that constructive knowledge of the protected activity by the acting official suffices to establish a violation. 802 F.2d at 547.

[32] 815 F.2d 668 (Fed. Cir. 1987)

[33] 804 F.2d 1504 (9th Cir. 1986).

[34] 27 M.S.P.R. 97, 100-101 (1985).

[35] 815 F.2d 668 (Fed. Cir. 1987). Before reaching the merits, two preliminary issues had to be resolved. First, the court found that the settlement between OSC and Williams did not moot the appeal because OPM's independent right to seek judicial review under section 7703(d) was sufficient to meet the live controversy requirement of Article III. Second, the court found the issue of OSC's authority to bring a general disciplinary action was of vital interest to OPM given its government-wide responsibility for personnel policy, an interest sufficient to bring OPM's appeal within the scope of its limited appeal right under section 7703(d). 815 F.2d at 670-71.

interpretation would render duplicative other provisions granting more specific authorities to OSC and would override other provisions limiting OSC's authority with respect to violations which were not prohibited personnel practices.[36] The legislative history referred only to specific areas of responsibility, the court said, and it declined to infer, as the Board did, an intent to expand the scope of subsection (e)(1)(D) from deletion of the original limiting language in the absence of an explicit statement of such an intent. The court determined that no substantive change in the provision's meaning was intended and concluded that the limitations in the original version are still in effect. Under its reading, the court said, subsection (e)(1)(D) supplements OSC's authority to enforce section 2302(b) with authority to investigate other prohibited personnel activities.[37]

"The result (of Horner v. Merit Systems Protection Board) is to leave the policing of ethical violations by high level managers, if not committed in the course of personnel administration, to the agency and OPM."

The court's decision does not give examples of personnel activities which are outside the scope of section 2302(b), which applies to a broad range of personnel actions defined in section 2302(a)(2). The Special Counsel's first charge, which the Board dismissed on other grounds, involved accepting gifts from subordinates. Such conduct, which the Board found to be related to personnel administration, 27 M.S.P.R. at 101 n.1, would arguably be a personnel activity not included within the section 2302(a)(2) definition.

The effect of the court's decision is to ensure that OSC will not interfere in agency discipline of ordinary employee misconduct, the concern which prompted OPM's appeal. The result is to leave the policing of ethical violations by high level managers, if not committed in the course of personnel administration, to the agency and OPM.

Starrett v. Special Counsel

In *Starrett*,[38] OSC charged that the Director of the Defense Contract Audit Agency (Starrett) refused to grant an agency auditor (Spanton) a waiver of the agency's rotation policy in reprisal for Spanton's exposure of accounting irregularities in defense contracts in violation of 5 U.S.C. § 2302(b)(8), the whistleblowing provision involved in *Frazier*. Section 2302(b)(8) prohibits reprisal for disclosures of information which the employee "reasonably believes" evidences mismanagement or wrongdoing, *i.e.*, the protection does not depend on whether mismanagement or wrongdoing is found. The Board found that Spanton's disclosures were protected because he had such a reasonable belief, and it concluded that Starrett had retaliated against Spanton based on Starrett's own testimony that in his decision he had considered the truth of Spanton's disclosures and had relied in part on his view that Spanton's disclosures were not true.[39]

On appeal, Starrett challenged the standard of causation used by the Board, *see infra*. The court did not resolve this claim, however, because it concluded that the evidence concerning Starrett's actions did not meet the Board's own standard.[40] Essentially, the court disagreed with the finding that Starrett's admission he considered the truth of Spanton's assertions (about a defense contractor's excess entertainment and labor costs) constituted an admission that Starrett had retaliated against Spanton for making these assertions to the press. In the court's view, a reasonable reading of Starrett's statements was that, if he had believed what Spanton alleged was true, Starrett would have waived the rotation policy and left Spanton in place to address the alleged problems.[41] Since he did not believe Spanton's assertions, Starrett saw no basis for waiving the rotation requirement. The fact that Starrett disbelieved Spanton and acted on his beliefs concerning the inaccuracy of what Spanton claimed does not in itself constitute retaliation against Spanton for making the claims, the court said, especially where Starrett's action was to deny Spanton a benefit to which he would have been entitled, if at all, only if his claims had been true.[42]

[36] 815 F.2d at 673-74.
[37] *Id.* at 674-76.
[38] 792 F.2d 1246 (4th Cir. 1986).
[39] 28 M.S.P.R. 60, 65-66 (1985).
[40] 792 F.2d at 1253.
[41] *Id.* at 1255.
[42] *Id.* at 1254-55.

The court refrained from assessing Starrett's argument that the Board erred in applying the standard of causation for disciplinary action cases announced in *Special Counsel v. Harvey*.[43] Under that test, OSC is required to show that the protected activity was a significant factor in the adverse decision, but (unlike the agency in a corrective action) the employee thus found to have engaged in prohibited conduct cannot escape discipline by showing that an adverse action "would" have been taken even if there had been no protected conduct (the "*Mt. Healthy* defense").[44] Although the court did not address Starrett's arguments, it expressed its reservations about the more relaxed test employed by the Board in section 1207 cases. While not rejecting outright the Board's distinction between cases where correction of the agency action is at issue and those where the issue is discipline of supervisors for prohibited practices, the court observed that the standard of proof must be adequate to protect supervisors responsible for numerous personnel actions, many of which may involve employees who have incidentally engaged in protected activity, from unwarranted discipline. "The standard of proof used must insure that the motivation for the adverse action was an improper one. . . . [The standard] must not be so loose or weak as to punish those not motivated by improper purposes."[45]

Because it reversed, it was also unnecessary for the court to address Starrett's challenge to the imposition of dual sanctions in his case (fine and removal). Without resolving this claim, the court indicated its doubt as to whether more than one of the penalties specified in 5 U.S.C. § 1207(b) can be imposed in the same case since they are linked by "or," a word which "quite possibly means that the various elements in a series are alternatives."[46]

The court rejected Starrett's argument that because 5 U.S.C. § 554(a)(2) exempts proceedings involving the selection or tenure of employees from 5 U.S.C. §§ 556-557, the hearing provisions of the Administrative Procedure Act (APA), the Board is not free to adopt or reject an ALJ's initial decision, as section 557(b) authorizes an agency to do. The court could have ruled that, whether or not section 557 applies, the Board may delegate cases within its jurisdiction for hearing and initial or recommended decisions under 5 U.S.C. § 1205(a)(1), which authorizes the Board to "provide for the hearing or adjudication" of matters within its jurisdiction. Instead, it held that section 557 does apply because of the explicit reference made by section 1207 to the APA when it authorizes the Board to delegate the hearing of disciplinary actions only to ALJ's appointed pursuant to 5 U.S.C. § 3105, in contrast to its less restricted authority to delegate appeals cases under 5 U.S.C. § 7701(b). The explicit reference to section 3105 (part of the APA) was evidently equivalent in the court's mind to an implicit reference to section 556, which also authorizes hearings to be delegated only to ALJ's, and to its companion provision, section 557.[47]

Harvey v. Merit Systems Protection Board

As noted above, *Harvey*,[48] also involved a reprisal issue: whether the Board correctly found the respondent had acted to punish an employee for protected conduct (exercise of his appeal right to the Special Counsel) in violation of 5 U.S.C. § 2302(b)(9). As in *Starrett*, the Board's ruling relied largely on its finding that Harvey had admitted that he retaliated. Harvey testified that he was shown a draft of his subordinate Gorsey's complaint to the Special Counsel and that he knew Gorsey's charges against him

"(In Harvey V. Merit Systems Protection Board) the court disagreed with the Board's ruling that * * * an adverse decision based on a view of the falsity of an appeal's allegations * * * constitutes prohibited retaliation."

[43] 28 M.S.P.R. 595, 609 (1984).

[44] In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the Supreme Court held that even if the employee's constitutionally protected conduct played a substantial part in the employer's adverse decision, there would still be no constitutional violation if the employer were able to show that it would have reached the same decision even in the absence of the protected conduct.

[45] 792 F.2d at 1253 n.12.

[46] *Id.* at 1255.

[47] *Id.* at 1252.

[48] 802 F.2d 537 (D.C. Cir. 1986).

were false. Harvey admitted that, because he believed Gorsey to be untruthful and lacking in integrity, he recommended against Gorsey's selection for a Senior Executive Service vacancy.

The court found that this evidence did not show that Harvey acted to punish or deter Gorsey from exercising his appeal rights. In doing so, the court disagreed with the Board's ruling that, just as good faith whistleblowing is protected whether or not the disclosure is true, an adverse decision based on a view of the falsity of an appeal's allegations and resulting view of the appellant's character constitutes prohibited retaliation.[49] Citing *Starrett*, the court stated:

> *[T]here is some link between Harvey's actions and Gorsey's protected conduct. But it is not the type of prohibited link covered by the Act. . . . Formulating an adverse opinion of an employee, based upon what he has written and thereby not recommending him for certain jobs, is not the same as taking action against an employee in an attempt to thwart his exercise of his protected rights.*[50]

The Board's rule would prevent managers from taking appropriate action based on proper motives, the court added, quoting the warning in *Starrett* against a standard of causation too loose to distinguish between properly and improperly motivated actions.[51] The Board did not find incredible Harvey's testimony that he believed Gorsey's statements to be false, and the court found from this testimony that Harvey's action was based on his resulting evaluation of Gorsey's character. Even if Harvey were incorrect in his assessment of Gorsey, it would not show improper motivation, the court concluded.[52]

The distinctions drawn in *Harvey* and *Starrett* could be seen as facilitating concealment of retaliation for protected conduct, but in fact the courts' rulings may relate to the Board's reliance in large part in the two cases on the alleged retaliator's own testimony. Frequently other evidence is the basis for a finding of reprisal. But even in cases like *Harvey* and *Starrett* where a respondent's admissions are crucial, the facts will often be different. The respondent's asserted reliance on belief in the falsity of the adversely affected employee's protected disclosure may be incredible on its face or unworthy of credence in light of other evidence or the accuracy of the disclosure may have no relevance to the action taken by the respondent. *Starrett* only rejected a per se rule prohibiting any consideration, in taking a personnel action, of the truth about the matter asserted in a protected disclosure where the true state of affairs may have a bearing on a personnel action quite independent of the fact of the disclosure.

Harvey may be more problematical because of the court's approval of Harvey's reliance on his distrust of the employee, which he specifically based on his disbelief of allegations made by the employee in the exercise of a protected appeal right. The court rejected the Board's rule that the truth of the employee's allegations cannot be considered by a supervisor in taking a personnel action and that the supervisor can be disciplined for doing so without regard to his motives or the reasonableness of his beliefs. The court's decision can be read as adopting the opposite rule, that the supervisor cannot be disciplined for such an action, without regard to the reasonableness of the supervisor's belief that an appellant's allegations are false. However, the court's purpose appears to have been to protect the supervisor from discipline for an adverse action based on a reasonable belief that the employee's allegations in his appeal were false. Such a rule may be less protective of the integrity of appeals processes than the Board's rule. However, it ensures that supervisors are not disciplined for good faith conduct, and it would not prevent the employee from obtaining relief from an adverse action based on allegations in an appeal which the employee reasonably believed to be true.

The court also rejected the Board's ruling that Harvey violated 5 U.S.C. § 2302(b)(10) because his unfavorable recommendations and other actions adverse to Gorsey (deliberately idling him) were based in part upon Harvey's belief that Gorsey, contrary to Harvey's orders, had revealed a draft audit report to a GAO investigator. The Board ruled that this conduct had not occurred and that therefore Harvey discriminated against Gorsey on the basis of conduct which did not adversely affect Gorsey's job performance or the performance of others in violation of section

[49] *See* 28 M.S.P.R. 595, 605 n.19 (1984).

[50] 802 F.2d at 548.

[51] *Id.* at 548 n.5.

[52] *Id.* at 550. The court here again cited *Starrett*, where the Fourth Circuit noted that acting on belief in the inaccuracy of the contents of a protected disclosure is not the same as acting to punish the fact of the disclosure.

2302(b)(10). The court said the Board misapprehended the focus of the statute which, the court found, is on the *nature* of the alleged conduct, not on whether or not the conduct *in fact occurred*. The conduct in question—Gorsey's release of a report in violation of Harvey's directive—would have been directly related to the performance of Gorsey's duties had the conduct occurred. However mistaken Harvey's decision, he acted on the basis of conduct he ascribed to Gorsey which was clearly performance-related. The court also added[53] that even if section 2302(b)(10) could be violated by reckless reliance on an unfounded belief that such conduct occurred, Harvey should not be punished because his determination, if mistaken at all, was honestly arrived at.[54]

Filiberti v. Merit Systems Protection Board

In *Filiberti*,[55] the Special Counsel charged, and the Board found, that respondents Filiberti and Dysthe, high-level Navy civilian personnelists, used their authority to influence an applicant for employment to withdraw from competition in order to secure the appointment of another individual in violation of 5 U.S.C. § 2302(b)(5) and OPM regulations. The case involved respondents' actions after OPM discovered there had been an error in computing applicant McCracken's veterans preference so that a lower ranking candidate, Bruno, had mistakenly been appointed to the position of port captain. This was a unique position, and Bruno could be retained only if McCracken declined an offer or a veterans-passover was obtained. The Board found that respondents delayed making a required offer to McCracken and instead influenced him to withdraw his application by providing him negative and misleading information about the job. In furtherance of their purpose to retain Bruno they also provided misleading information to OPM in an attempt to obtain a veterans-passover. The Board's ALJ found not credible respondents' testimony that they did not act for the purpose of dissuading McCracken but merely to provide him information. In affirming the decision on the merits, the court rejected respondents' contention that the decision was unsupported by substantial evidence, noting that it deferred to the Board's credibility findings.[56]

The court rejected respondents' claim of a fatal variance between the complaint, which charged them with acting to *secure* Bruno's appointment, and the evidence which showed they acted to *maintain* it. Administrative pleadings are liberally construed, the court pointed out, and *secure* can mean *make safe*. Read in context, the complaint alleged the violation that was proved. The court also found no merit to respondents' contentions that the statute and regulations should be read in a similarly narrow way so as not to reach conduct designed to assist an already appointed incumbent. The court approved the Board's use of the *Douglas* factors[57] to determine the appropriate disciplinary measure under section 1207(b) and found the Board appropriately balanced the relevant factors in imposing 60-day suspensions on the respondents. The record did not provide support for most of the additional mitigating factors urged by respondents and the other factor would not affect the outcome.[58]

"(In Filiberti v. Merit Systems Protection Board) the court approved the board's use of the Douglas factors to determine the appropriate disciplinary measure (in Prohibited Personnel Practice Cases)."

Respondent Filiberti retired prior to serving his 60-day suspension without pay. In order to counteract this circumvention of its order, the Board, relying on its broad enforcement authority under 5 U.S.C.

[53] 802 F.2d at 550-52.

[54] The court also rejected the Board's finding that Harvey violated 5 U.S.C. § 2302(b)(11) by deliberately idling Gorsey. This ruling was not based on an interpretation of the statute but on the court's view that the record was utterly devoid of any evidence that Harvey knew or should have known that Gorsey had no work. *Id.* at 544-546.

[55] 804 F.2d 1504 (9th Cir. 1986).

[57] The factors relevant to the assessment of the appropriate penalty in an adverse action, which were first set out by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303-306 (1981).

[58] *Id.* 1510-11. On remand, the Board assessed the maximum fine of $1,000. *Special Counsel v. Filiberti*, 33 M.S.P.R. 186 (1987).

§ 1205(a)(2), imposed the alternative penalty of a deduction of 60-days pay from Filiberti's accrued annual leave. The court reversed, finding that the Board's enforcement authority would not permit it to extend its sanctioning authority beyond the penalties specifically listed in section 1207(b).[59]

E. The Effect of Carducci and its Progeny on The Special Counsel's Jurisdiction

A series of cases recently decided by the United States Court of Appeals for the District of Columbia Circuit, *Carducci v. Regan;*[60] *Gray v. Office of Personnel Management;*[61] *Barnhart v. Devine;*[62] *National Treasury Employees Union v. Egger;*[63] and *Harrison v. Bowen*[64] have articulated a broad jurisdictional basis for Special Counsel investigations into allegations of prohibited personnel practices. Together, these cases interpret the merit systems principles contained in 5 U.S.C. § 2301(b), the personnel actions described in 5 U.S.C. § 2302(a), and the prohibited personnel practices defined in 5 U.S.C. § 2302(b) in inclusive and non-restrictive terms. As a result, these cases suggest strongly that the Special Counsel can and should investigate matters as diverse as allegations of incorrect classification or performance decisions—or allegations of arbitrary or unfair grievance or reassignment determinations—since such decisions, if they are arbitrary or incorrect, can constitute prohibited personnel practices.

"* * * (T)hese cases suggest strongly that the Special Counsel can and should investigate matters as diverse as allegations of incorrect classification or performance decisions * * * since such decisions, if they are arbitrary or incorrect, can constitute prohibited personnel practices."

The plaintiffs in these cases were all seeking to have the federal courts exercise jurisdiction over claims regarding personnel actions which were not appealable to the Board. The court declined to entertain these actions because it found that Congress intended, by passing the Civil Service Reform Act, to eliminate, in the personnel area, the judiciary's traditional jurisdiction to review allegations that the government acted arbitrarily or capriciously.

Instead, the court concluded that Congress established an exclusive multi-layer process for the handling of personnel actions which had the effect of eliminating Administrative Procedure Act jurisdiction. At the top of that multi-layer scheme were actions that were appealable to administrative tribunals, like the Board, and then reviewable under traditional appellate standards in the courts. In the middle were more minor actions which could be investigated by the Special Counsel if they were "infected by particularly heinous motivations or disregard of law."[65] The Special Counsel's exercise of that investigatory power was subject to limited judicial scrutiny. And, at the bottom layer there were even more minor actions which were not appealable administratively nor reviewable by the Special Counsel. For these actions, there was to be no judicial scrutiny at all.

In discussing this last category, the *Carducci* court said that "[t]he third category is not fearfully broad, since the specified minor personnel actions [reviewable by the Special Counsel] are extensive. . . and since the infecting basis or motivation includes" violating any law, rule or regulation aimed at protecting "against arbitrary action and [providing]. . . for fair and equitable treatment in all aspects of personnel management."[66]

The court then concluded that Carducci's claims—that his reassignment for reasons of poor performance was arbitrary and that his supervisor played an improper role in the handling of the grievance concerning that reassignment—could be allegations of prohibited personnel practices which the Special Counsel should investigate since (1) the merit principles call for fair (and prohibit arbitrary) treatment and (2) the statute proscribing prohibited practices forbids discriminating against an employee on the basis of conduct which did not adversely affect his performance.

[59] *Id.* at 1511-12.
[60] 714 F.2d 171 (D.C. Cir. 1983).
[61] 771 F.2d 1504 (D.C. Cir. 1985).
[62] 771 F.2d 1515 (D.C. Cir. 1985).
[63] 783 F.2d 1114 (D.C. Cir. 1986).
[64] 815 F.2d 1505 (D.C. Cir. 1987).
[65] 714 F.2d at 175.
[66] *Id.*

The court then went on to conclude that, with such "broad bases" for seeking the assistance of the Special Counsel, it had "little fear that Congress. . . inadvertently created a significant field in which the employing agency itself has the last word." To the contrary, the Court said, only wrongs which were "relatively minor both in their substantive effect and in the malevolence of their motivation" could be "consigned to category (3)."[67]

This portion of the *Carducci* holding stated a more expansive view of the Special Counsel's investigatory powers than the Special Counsel perhaps shared. Carducci had originally filed the claims which he made in court with the Special Counsel, who did not investigate them notwithstanding a statutory obligation to investigate all filed allegations of prohibited personnel practices.[68] Instead, the Special Counsel returned the filing because it contained " 'insufficient information evidencing the occurrence or possible occurrence of any prohibited personnel practice' to warrant consideration by the Board."[69] The Court noted (after concluding that the allegations would, if particularized and true, be prohibited personnel actions) that it would not rule on the propriety of the Special Counsel's actions in handling Mr. Carducci's claims since "[a]ppellant's complaint did not seek review of OSC's compliance with the statutory requirement of conducting an adequate inquiry."[70]

[67] *Id.*
[68] *See* 5 U.S.C. § 1206(a).
[69] 714 F.2d at 172.
[70] *Id.* at 175 n.4.

Had the court reached that issue, it might have concluded that the Special Counsel's rejection of Carducci's claims did not constitute an adequate inquiry under the standards set forth in its decision in *Cutts v. Fowler.*[71]

Two years later in *Barnhart* and *Gray*, the court again addressed the Special Counsel's obligation to adequately investigate minor personnel decisions which, if inaccurate, would amount to prohibited personnel practices and concluded that this obligation extended to classification matters. In *Barnhart*, the plaintiffs were seeking to compel OPM to conduct position-to-position comparisons of allegedly comparable, but differently graded, positions. The D.C. Circuit had previously held in *Haneke v. Secretary of Health, Education, and Welfare*,[72] that courts had jurisdiction to hear such cases and could direct that such comparisons be conducted, in appropriate cases, in order to ensure compliance with the Classification Act's mandate of equal pay for equal work.

The court, however, refused to consider *Haneke* because it found that the plaintiffs' charges of disparate classifications were prohibited personnel practice allegations. The court reasoned that the Classification Act embodied a merit system principle and that, therefore, a violation of that act could also constitute a violation of section 2302(b)(11). The court then found that, under the rationale announced in *Carducci*, the fact that the CSRA made such violations subject to investigation by the Special Counsel now precluded the court from exercising jurisdiction over the matter.

[71] 692 F.2d 138, 140 (D.C. Cir. 1982).
[72] 535 F.2d 1291 (D.C. Cir. 1976).

The court then went on to describe what the Special Counsel should do in exercising its authority to investigate the propriety of classification actions. It said that the Special Counsel would have to accept the court's views that the Classification Act embodied the merit system principle of equal pay for equal work and that position-to-position comparisons were sometimes required by the Act. "Pursuant to its duty to investigate 'prohibited personnel practice' complaints, the Office of Special Counsel would be obliged to take into consideration decisions bearing upon the determination of whether a statute embodying a merit system principle had been violated. . . . [and to understand that] *Haneke's* teaching. . . applies with equal force in the post-CSRA era."[73] In addition, the Special Counsel, in order to determine if a prohibited personnel practice has been committed, might well have to perform as extensive an investigation as OPM would have to perform in order to determine if there had been a Classification Act violation. "Thus, in order properly to evaluate a 'prohibited personnel practice' claim founded upon an allegation of unequal pay for the same work, the OSC might well be required to undertake a position-to-position comparison of the type contemplated by *Haneke* on the part of the old CSC."[74]

[73] *Barnhart*, 771 F.2d at 1526 n.20.
[74] *Id.*

Gray was issued on the same day as *Barnhart*. The plaintiffs in *Gray* were administrative law judges who were also complaining about disparate classifications. They had sought and been denied, on jurisdictional grounds, assistance from the Special Counsel. OSC informed them that " 'matters involving position classification are not within the investigative authority of the Special Counsel absent some evidence of a prohibited personnel practice.' "[75]

In response to the plaintiffs' argument that, because of this refusal, the *Carducci* jurisdictional doctrine should not be applied in their case, the court first found that the plaintiffs may not have sufficiently alleged the existence of disparate classifications to enable the Special Counsel to understand the nature of their prohibited personnel practice allegations. In addition the court went on to note that the Special Counsel might well now reconsider its dismissal because

> *the OSC did not have the benefit of our decision in* Barnhart *when it received the letter from appellant's counsel, and thus there may have been some uncertainty as to the scope of the OSC's authority or, more precisely, as to what could constitute a "prohibited personnel practice."*[76]

The next year, the court in *Egger* expanded on the rationale why it was appropriate for incorrect classification decisions to be considered prohibited personnel practices. In *Egger*, the plaintiffs, who had received higher wages under the Prevailing Rate system than they did after they had been reclassified into the General Schedule, were contending that their reclassifications were unlawful. They argued that the Classification Act excluded the type of work that they performed from being included under the General Schedule. The court found that this alleged violation of the Classification Act constituted an allegation of a prohibited personnel practice under section (b)(11) since the Classification Act implements the

> *merit system principles prohibiting "arbitrary action" (§ 2301(b)(8)(A)), insuring "fair and equitable treatment in all aspects of personnel management" (§ 2301(b)(2)) and providing "equal pay. . .for work of equal value (§ 2301(b)(3)).*[77]

And then, in *Harrison* the court made it clear that, under the *Carducci* rationale, an agency's failure to follow Chapter 43 requirements also constituted a prohibited personnel practice over which the Special Counsel could exercise jurisdiction. Harrison was an excepted service attorney who had been removed for poor performance. She claimed, among other things, that her work was not unsatisfactory and that her supervisor had utilized an incorrect period of time in making his determination.

Harrison unsuccessfully advanced a variety of arguments as to why the court should hear her claims. The court rejected her contentions that there was an implied right of action under the Reform Act; that the Administrative Procedure Act allowed for judicial review of her removal; and/or that prior decisions of the court required it to exercise jurisdiction to compel the agency to follow its own implementing regulations. The court asserted, instead, that, "[a]s a 'covered person' alleging a 'prohibited personnel practice'—here a removal in violation of the dictates of § 4303—Harrison could have presented her claims to OSC."[78]

F. Conclusion

Because of their small number, the corrective and disciplinary action cases do not support many generalizations. The fundamental propositions enunciated in *Frazier* concerning the relationship between the Board and the Special Counsel are explicitly or implicitly accepted by the subsequent cases, including the Special Counsel's burden to prove a violation of the prohibited personnel practices statute by the preponderance of the evidence. *Filiberti* and *dicta* in *Starrett* suggest that an expansive view of the Board's sanctioning authority under section 1207(b) will not meet with approval. In *Horner* the court similarly rejected the expansive view that the Special Counsel's subject matter jurisdiction embraces *any* violation of *any* civil service law, rule, or regulation. In *Filiberti* the court ruled that substantial evidence supported the Board's decision because the court deferred to the Board's negative credibility finding concerning the respondents' testimony as to their motives for the actions they took. Other evidence supported the Board's contrary conclusion as to the employees' motives. In contrast, *Harvey* found that the usual rule that an agency is entitled to reject a

[75] 771 F.2d at 1512 n.12.
[76] *Id.*
[77] 783 F.2d at 1116.
[78] 815 F.2d at 1512.

witness' testimony as incredible did not apply to the Board's treatment of Harvey's testimony that he believed Gorsey would soon be transferred out. The court declined to defer to the Board's negative credibility finding, it said, because there was evidence supporting Harvey's testimony and no contrary evidence.[79]

Unlike *Filiberti*, the Board's conclusions in *Harvey* and *Starrett* concerning the retaliatory purpose of the respondents' actions were largely based on interpretations of the respondents' own testimony. The court reversed in *Starrett*, not because it differed with the Board's credibility determinations, but because it put a different construction on the respondent's alleged admissions. This different interpretation resulted from the court's view of what constitutes prohibited retaliation. *Starrett* rejected a rule that any action adverse to a whistleblower which is based on a contrary view of matters from that asserted in the whistleblower's protected disclosure is necessarily a reprisal. Absent such a rule, the Fourth Circuit concluded that Starrett's alleged admission, fairly read, indicated his disbelief in what Spanton asserted, and it found he acted reasonably in view of his belief.[80]

Harvey similarly took a different view from the Board's of the alleged admission by the respondent employee. The court's reinterpretation of the evidence also resulted in part from its rejection of the Board's implicit rule[81] that false statements in an appeal can never be the basis of an adverse personnel action. Thus it said Harvey's admission that his actions were based in part on his perception of Gorsey as one who makes false allegations in an appeal did not amount to an admission that he acted to punish or deter Gorsey from exercise of his appeal rights. However, the court did not explain what keeps these admissions from being equivalent, given the effect on Gorsey, which is arguably the same as if he were punished for exercising his appeal rights. Nor did the court state what additional evidence the Special Counsel was required to present in order to show reprisal. By stating that even if Harvey's assessment of Gorsey was wrong, Harvey's action would not necessarily be wrongly motivated and prohibited,[82] the court suggests that a supervisor may act adversely to an appellant so long as his perception of the appellant as making false charges in his appeal is reasonable. If this is the rule, the court does not state who should have the burden on the question, although the outcome suggests that the Special Counsel must show that the respondent's asserted belief was not a reasonable one.

Finally, the Special Counsel's and the Board's efforts to fashion rules of law in this area that in a fair and predictable manner maximize protections against prohibited personnel practices may be frustrated by the different treatment accorded these cases in various regional circuit courts of appeals. As a single reviewing court, the Federal Circuit has been an important ingredient in providing uniform rules for all Federal workers in other areas of the Board's jurisprudence,[83] so this area of the law may benefit as well if it is brought within the rules for judicial review governing most other Board cases.

With respect to *Carducci* and its progeny, it is clearly the view of the D.C. Circuit—and of the Fifth Circuit, as well,[84]—that the Reform Act provides the Special Counsel with broad authority to investigate the correctness and fairness of agency personnel decisions. Should the Special Counsel begin to rely upon this *Carducci* rationale in bringing corrective and disciplinary proceedings, and should that reliance receive support from the Board and from its reviewing courts, the role of the Special Counsel will have been enlarged while judicial oversight of executive branch personnel decisions will have been more narrowly, and, presumably, more appropriately circumscribed.

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[79] 802 F.2d at 546. In the court's view, the other, undisputed evidence on which the Board relied did not support the inference that Harvey knew Gorsey had no work and thus "deliberately idled" him. *Id.* at 544-46.

[80] 792 F.2d at 1255. Because of its broad view of what constitutes reprisal and of Starrett's testimony as an admission, the Board did not consider whether his beliefs concerning what Spanton asserted were reasonable or supported his decision. *See* 28 M.S.P.R. at 66 ("Since there was direct proof of that causal connection, there was no need to search for inferences or for evidence that Starrett had an impermissible animus toward Spanton. . . . ").

[81] 28 M.S.P.R. at 605 n.19.

[82] 802 F.2d at 550.

[83] The Board has enjoyed an affirmance rate of over 97% before the Federal Circuit. *Annual Report, Fiscal year 1986.* Merit Systems Protection Board, Washington, DC, 1987, p.2.

[84] *See Towers v. Horner,* 791 F.2d 1244 (5th Cir. 1986).

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