

This is a comment in response to the proposed changes to 5 C.F.R. 1209.2, *Jurisdiction*. MSPB proposes to change this rule such that employees who choose to pursue a whistleblowing reprisal action with the Office of Special Counsel will sacrifice the ability to challenge the personnel action on the merits when filing an Individual Right of Action with MSPB. This is a significant limitation of whistleblowers' legal rights, but since it is one that Congress enacted in 1994, the MSPB has no choice but to reconcile its regulations with 5 U.S.C. 7121(g).

I am concerned, however, that tribunals adjudicating future IRA cases might apply this rule to conduct taking place before the rule's enactment. This is contrary to Supreme Court and Federal Circuit precedent. *See Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994) ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.") (internal citations omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.") (citations omitted); *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362-62 (Fed. Cir.2005) (restating and applying the *Bowen* and *Landgraf* holdings).

In cases where a federal employee who makes a protected disclosure suffers a causal personnel action before the proposed rule is enacted, but files a complaint with the Office of Special Counsel after (or files with OSC before but does not file the IRA until after the rule takes effect), the above analysis applies and the current version of 5 C.F.R. 1209.2 should govern. In order to minimize confusion and reduce litigation, the Board should state in the final rule preamble that the revised Section 1209.2 applies only to conduct that takes place after the rule takes effect.

Sincerely,

David Pardo
MSPB Watch