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MSPB CHAIRMAN TESTIFIES ON WHISTLEBLOWER BILL

Proposed legislation to amend the 1989 Whistleblower Protection Act (WPA) would codify a Merit Systems Protection Board ruling on the scope of the WPA's protection for disclosures made by whistleblowers, according to testimony by MSPB Chairman Beth S. Slavet at a congressional subcommittee hearing on July 25. Chairman Slavet's testimony also noted that the proposed legislation would apply the WPA's protection to additional types of disclosures that the United States Court of Appeals for the Federal Circuit has held are not within the scope of the Act.

The MSPB Chairman testified at a hearing called by Senator Daniel K. Akaka, Chairman of the Subcommittee on International Security, Proliferation and Federal Services, United States Senate Committee on Governmental Affairs, to examine S. 995, a bill introduced on June 7, 2001, by Senators Akaka, Levin and Grassley. In addition to amending the WPA's language regarding protected disclosures, the bill would codify an "anti-gag" provision that has been included in annual appropriations bills, grant the Office of Special Counsel the right to seek judicial review of final MSPB decisions, and allow review of final MSPB decisions in either the Federal Circuit or the regional circuit courts of appeals. A companion bill, H.R. 2588, was introduced in the House by Rep. Constance Morella this week.

"S. 995 would codify the Board's holding in *Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000)(*Ganski II*) that any disclosure of a violation of law, rule, or regulation is protected whistleblowing, without regard to the subject matter of the law, rule, or regulation," Chairman Slavet told the subcommittee. She further stated that the bill "would protect an employee's disclosure of alleged violations of law made to his or her supervisor as part of the routine performance of his or her job duties, negating the Federal Circuit's holding in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998)...and an employee's disclosure directed to the alleged wrongdoer, negating the Federal Circuit's holding in *Horton v. Department of the Navy*, 66 F.3d 279 (Fed.Cir. 1995)."

Chairman Slavet advised the subcommittee in her opening remarks that the Board, as a quasi-judicial agency that adjudicates cases under the WPA and other laws, would take no position

on the substantive or procedural provisions of S. 995 in order to avoid any appearance of prejudgment. Instead, Chairman Slavet devoted her testimony to discussing the current state of the Board's and the Federal Circuit's case law interpreting the WPA, the probable impact of the bill on the further development of the case law, the need for clarification of certain language in the bill, and the practical impact of the bill on the Board. Chairman Slavet's complete statement will be available shortly on the MSPB website, www.mspb.gov, under "What's New."

The MSPB is an independent, quasi-judicial agency with responsibility for deciding Federal employee appeals from personnel actions taken against them and for protecting the integrity of the civil service and other Federal merit systems. The Board also conducts studies of the civil service and other merit systems in the Executive Branch. The Board, by law, is a bipartisan body composed of three Presidential appointees. In addition to Chairman Slavet, the other current members of the Board are Vice Chairman Barbara J. Sapin and Member Susanne T. Marshall, both of whom accompanied the Chairman at the subcommittee hearing.