

Statement of
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Before the
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
of the
Committee on Homeland Security and Governmental Affairs
United States Senate
*A Review of the Office of Special Counsel
and Merit Systems Protection Board*

The Honorable Daniel K. Akaka
Chairman

The Honorable Ron Johnson
Ranking Member

March 20, 2012

Good Afternoon Chairman Akaka, Ranking Member Johnson, and Subcommittee Members. It is an honor to come before this panel to discuss the steps that the Merit Systems Protection Board (“MSPB”) has taken during my tenure as Chairman to ensure that the agency fulfills its statutory responsibility to protect Federal merit systems.

Mr. Chairman, before I begin this discussion, I would like to take this opportunity to congratulate and thank you for the leadership you have demonstrated during your successful tenure as Chairman or Ranking Member of this subcommittee and its predecessors. You have served with distinction in those roles continuously since 1999. You have been a champion for effectiveness and efficiency in the operations of the Federal Government. You articulated the need for designing and implementing systems for recruiting and retaining the best and brightest for Federal service and demanding accountability of Federal employees, managers, and officials. You were an early advocate of greater workforce flexibilities, including teleworking. You have also been a consistent voice for fair treatment of Federal employees. Your efforts to protect the rights of whistleblowers are renowned and your ability to work on a bipartisan basis to bring important legislation to the Senate is noteworthy.

As you know, MSPB safeguards, protects, and promotes the merit principles through our three statutory functions: (1) adjudicating cases within our jurisdiction; (2) conducting studies and issuing reports to the President, Congress, and our community on the health and well-being of the Federal civil service; and (3) reviewing significant actions of the Office of Personnel Management (“OPM”) and reviewing OPM regulations to determine whether they would, on their face or in implementation, require an employee to violate 5 U.S.C. § 2302(b).

TRANSPARENCY, COLLABORATION, AND PARTICIPATION AS GUIDING PRINCIPLES

During the course of my tenure as Chairman of the MSPB, I am proud to report to this Committee that the principles of transparency, collaboration, and participation¹ have served as the overarching tenets for how my Board colleagues and I have carried

¹ See President Obama’s Memorandum on Transparency and Open Government, January 21, 2009 and the OMB Open Government Directive, December 8, 2009.

out these statutory responsibilities. With respect to the adjudicatory function, the Board has exemplified these principles by hearing oral arguments on petitions for review to the Board. In a period of 15 months, the Board held three separate oral arguments on cases having significance to the civil service. These proceedings were the first oral arguments that have been held by the Board in 24 years. In addition to the oral arguments, the Board issued calls for amicus briefs in eight cases. Additionally, the Board has changed the format of its decisions by issuing nonprecedential final orders², which include more information about how the Board arrived at its decision in a particular case. The adoption of nonprecedential final orders has been applauded by the judges from our reviewing court—the U.S. Court of Appeals for the Federal Circuit. The Board is also currently in the process of overhauling its adjudication regulations with early and significant input from its stakeholders.

These principles were also reflected in our studies function when the agency held its first ever Government in the Sunshine Act meeting to develop the Board's national research agenda. During that meeting, stakeholders suggested topics for future studies which resulted in new areas for examination relating to the merit system principles. Also, as I will discuss, prior to the Sunshine Act meeting the Board solicited input from the public as to what studies the Board should consider. I am happy to report that we received over 900 suggestions.

The Board is currently developing its operational strategy for reviewing significant OPM actions. I can assure you that we will work in partnership with OPM, applying the principles of collaboration and participation, to fulfill this important responsibility.

MSPB ADJUDICATION

In FY 2011, MSPB headquarters and the regional offices adjudicated over 8,100 cases. The average case processing time for adjudication of cases in our regional and field offices was 94 days. The average case processing time for matters brought before the Board was 213 days. Though our average processing times are expeditious, we have

² Nonprecedential orders replaced the final orders which provided no information as to how or why the Board reached its decision on petition for review.

continued to focus on issuing quality decisions. Accordingly, only 7% of the decisions issued by the administrative judges in the regional offices were remanded back to the administrative judge by the full Board. Moreover, only 2% of the decisions that were issued by the full Board were reversed or otherwise changed by our reviewing court, the U.S. Court of Appeals for the Federal Circuit.

We have continued to explore ways to improve and expedite the adjudication process. In the first quarter of FY 2012, over 50% of appeals were filed online using the agency's e-Appeal system, compared to 29% in 2007. The use of e-filing for pleadings has increased from 28% in FY 2009 to 48% in the first quarter of FY 2012. In fact, we are piloting a paperless filing system in our Washington Regional and Denver Field offices. Under the pilot program, e-filing is mandatory for agencies and appellants represented by attorneys. Pro se appellants are not required to comply with the e-filing requirement. We have also increased the use of video-teleconferencing for hearings, thereby reducing time and expenses associated with in-person hearings.

I am also happy to report that the Board has improved the effectiveness of its adjudicatory function by issuing nonprecedential orders rather than short-form decisions. We have determined that nonprecedential orders are appropriate when the decision does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but the Board and administrative judges are not required to follow or distinguish them in any future decisions. Like our precedential opinions and orders, nonprecedential decisions are accessible and searchable on the MSPB website.

The MSPB also is currently in the process of a comprehensive review of our adjudication regulations, the first thorough examination and potential revision since our inception in 1978. We are undertaking this endeavor with the support and interactive engagement of stakeholders, sister agencies, and users in our MSPB community.

MSPB STUDIES

The Merit Systems Protection Board was established to serve as a guardian of Federal merit systems, assuring that the Federal workforce is managed in accordance with merit system principles and free from prohibited personnel practices (PPPs). To that end, the Civil Service Reform Act of 1978 (CSRA) authorized MSPB to "conduct, from time to time, 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 [.]”³ Clearly, the framers of the CSRA took an expansive view of what those “studies” might encompass. For example, when introducing the bill that was ultimately enacted as the CSRA.

Senator Abraham Ribicoff stated that the legislation “requires the Board to report to Congress annually on whether OPM policies and decisions are in accord with the merit system principles including the prohibitions against political abuses, and authorizes the Board to conduct any additional, special studies it wants on such matters.” [Emphasis added]⁴ Consistent with that intent, CSRA has given MSPB broad scope to obtain—or demand, if needed—information in support of those studies:

In conducting any studies on the merit system or on the protections against prohibited personnel practices, the Board will determine which inquiries are

³ 5 U.S.C. § 1204(a)(3) (emphasis added).

⁴ Committee on Post Office and Civil Service, House of Representatives, 96th Cong., Legislative History of the Civil Service Reform Act of 1978, (Comm. Print No. 96-2), p. 1609. See also, “What was behind the 1978 Civil Service Reform?” by Dwight Ink, Pfiffner, James P. and Brook, Douglas A., eds., *The Future of Merit: Twenty Years after the Civil Service Reform Act*, Woodrow Wilson Press, Washington, DC, The John Hopkins University Press, Baltimore and London, 2000, p. 49. “A critical part of the reform was the establishment of an independent bipartisan Merit Systems Protection Board . . . to . . . perform special studies concerning the overall performance under the CSRA. Special emphasis was to be given to emerging system problems that threatened to violate the merit principles and undermine the integrity of the career services . . . Congress would never have enacted the CSRA without the promise of a strong a vigorous MSPB that Congress believed could discover and correct abuse on a timely basis.” [Mr. Ink served as executive director of President Carter’s Personnel Management Project, which was responsible for designing the reform.] Additionally: While we have not been able to yet locate the transcripts of some hearings related to the CSRA (these may have been lost when the Board abolished its library function), our records indicate that we previously identified the following testimony on the subject of the Board’s ability to select what issues it should study.

Alan Campbell, who was the architect of the plan for the CSRA, described the studies authorities as “powerful tools for keeping agencies and Office of Personnel Management in line with merit principles.” The Board was to be the “watchdog” and “be free to focus public attention on any policy matter it regards as contrary to merit principles.” The express purpose of this was to keep OPM from holding “imperial sway over the policy field.”

Bernie Rosen said that without the Board’s independent studies function, “the Board would be left with using reports of inspections made by a White House controlled Office of Personnel Management and the protection of merit principles would range from quite modest to superficial. The watchdog would have a patch over one eye.”

It is also notable that in their testimony regarding the CSRA, GAO officials recognized that MSPB would have the authority to conduct studies even when it overlaps with GAO’s ability to conduct studies, and that GAO expressly wanted the Board’s study findings made public.

necessary and shall have full access, unless otherwise prohibited by law, to the personnel records, or information collected by the Office of Personnel Management. In addition, the Board may require whatever additional reports from Executive Branch agencies it determines are needed.⁵

Moreover, the studies function is critical to MSPB's fulfilling its role as guardian of Federal merit systems because it has distinctive elements that complement or transcend MSPB's other statutory functions. Those elements include—

- The ability to focus on adherence to *merit system principles*. The merit system principles are critical to efficient and effective Government, but they are aspirational rather than legally actionable. The studies function enables MSPB to reach issues that cannot be reached under the adjudication or OPM oversight functions and to take a perspective that is both broader (Government-wide and policy-oriented) and more focused (for example, looking at agency implementation of policies and their effects on employees and stakeholders) than is possible through adjudication of individual appeals or review of an individual OPM action or regulation.
- The ability to focus on the incidence and prevention of *PPPs*. The vision of a Federal service “free from prohibited personnel practices” cannot be achieved solely through adjudication or review of OPM actions and regulations.
- Timeliness and relevance. The studies function enables MSPB to examine issues when they are most timely and relevant to the public, policymakers, and other stakeholders. In contrast, the adjudication function can only consider issues if and when they are raised in an appeal, and the OPM oversight functions (significant actions and regulatory review) are necessarily driven by OPM initiatives.
- An independent, objective, and long-term perspective on merit system issues. This element was expressly provided for in MSPB's structure. In contrast to most agencies, including OPM, Board Members' terms do not coincide with those of the President, and the statute requires diversity of political allegiance among the three Members. While OPM was intended to serve as an arm of the Administration, MSPB was intended to provide policy-makers with an independent perspective on the effect of OPM policy initiatives. In this way, the CSRA intended MSPB to serve as a part of a checks and balance system on the greater control the President was given over the civil service.

To carry out this function in a focused and efficient manner, MSPB periodically reviews and develops a formal research agenda. As I mentioned earlier, the most recent

⁵ S. Rep. No. 95-969 at 31 (1978 U.S.C.C.A.N. 2723, 2753).

review, which included formal solicitation of input from stakeholders and open discussion under the Sunshine Act, was completed in 2011 and will be discussed later in this statement.

Role and Impact of the MSPB Studies Function

The prospective nature of the studies function, in conjunction with MSPB's adjudication of individual appeals and the authority to review OPM significant actions regulations, enables MSPB to fulfill its role as guardian of Federal merit systems and to ensure that the Federal workforce is managed in a manner that is consistent with merit system principles and free from PPPs. Particularly in recent years, MSPB's studies have had significant impact on how the Federal workforce is being managed through recommendations concerning policy and practice to both OPM and the various Federal agencies that have day-to-day responsibility for recruiting, managing, and retaining Federal employees. Illustrations of that impact include—

- **Improving Management of the Federal Workforce**

Employee Engagement. In 2008, MSPB demonstrated the importance of an engaged workforce to improving Federal agency results and other desirable agency outcomes (such as sick leave use) and outlined ways that agencies could improve the level of engagement in their workforces. Subsequent MSPB research identified the supervisory behaviors that are important for fully engaging Federal employees, and recommended ways that Federal supervision could be improved toward this end.

Impact. OMB planning guidance for the FY 2011 budget and performance plans, which was based on MSPB research, stated that employee engagement is directly linked to achievement of agency missions, and, for the first time, required that agencies submit reports detailing how they promote employee satisfaction and wellness as a means to improving employee engagement. In addition, agencies were able to use MSPB's engagement scale to determine how engaged their employees are in lieu of much costlier alternatives.

As a result of MSPB's research, agencies are also determining whether current supervisors or applicants for supervisory positions can demonstrate the supervisory behaviors that foster employee engagement as a basis for selection and development decisions. For example, MSPB consulted with the Department of Defense in their effort to incorporate these concepts into the supervisory regimen of their post-NSPS human resources system.

Probationary Period. In 2005, MSPB reported that OPM's regulations regarding the appeal rights of individuals serving in probationary or trial periods were

misleading. Federal agency misuse of the probationary and trial periods was also discussed, and recommendations were offered to ensure these management tools were used as intended—as the final hurdle in the hiring process.

Impact. In 2008, OPM finalized regulations clarifying the appeal rights of individuals serving on a probationary or trial period.

- **Improving Federal Hiring—Openness, Transparency, and Reform**

MSPB Research. In research taking place over a number of years, MSPB has demonstrated that the hiring process is too long, too complicated, and not applicant-friendly. These problems create barriers to attracting and hiring a high-quality workforce. MSPB has issued a number of reports calling for reform of this process and its component parts

Impact. Many MSPB recommendations have been included first in OPM’s End-to-End hiring process improvement effort, and more recently in the Administration’s hiring reform initiative. Additionally, MSPB has on issues in Federal hiring in hearings held by both the House of Representatives and the Senate in 2007 and 2008.⁶

- **Improving Federal Hiring—Merit-Based Selection**

Category Rating. In 1995, MSPB recommended eliminating the rule of three in favor of category rating—a more flexible requirement for merit-based hiring that allows selection from among an adequate number of well-qualified candidates.

Impact. Category rating was enacted into law in 2002 and agencies were specifically directed to adopt category rating by the Administration’s hiring reform initiative.

Outstanding Scholar Hiring Authority. In 2000, MSPB brought attention to the non-merit aspects of the Outstanding Scholar hiring authority, including: its grade point average eligibility criterion, which was a highly questionable predictor of future job performance; its denial of consideration to individuals who otherwise met basic job qualification requirements, contrary to the merit principle of openness and selection based on ability; and its function as a primary hiring tool, contrary to the intent that the authority merely supplement competitive hiring.

Impact. OPM advised agencies against further use of the Outstanding Scholar authority in 2007.

Federal Career Intern Program (FCIP). In 2005, MSPB noted several shortcomings with how some agencies were implementing FCIP, including:

⁶ These hearings are listed in MSPB’s Annual Reports for fiscal years 2007 and 2008.

recruiting strategies that limited FCIP applicant pools; reliance on weak assessment tools to make distinctions between applicants; failure to use the trial period as an intended final hurdle of the hiring process; and failure to provide required training to career interns once selected.

Impact. In 2010, the Board ruled that FCIP violates veterans' preference rules and unfairly blocks veterans from being considered for some Federal jobs. OPM is developing a successor to the FCIP program.

- **Improving the Management of Federal Contracts**

MSPB Research. In 2005, MSPB advocated for agencies to better manage their Contracting Officer Technical Representatives—the experts who help ensure that contractors are meeting a contract's technical requirements. Our research showed that better daily management of these employees was empirically related to more positive contract outcomes in terms of the quality, completeness, timeliness, and cost of deliverables.

Impact. In 2007, OMB issued guidelines for the selection, training, and management of Contracting Officer Technical Representatives referencing MSPB's research on managing these employees.

Development of MSPB's Research Agenda—2010

Studies conducted by MSPB are typically Government-wide in scope and take a long-term perspective on merit systems and effective management of the Federal workforce. To use resources most effectively and to respond to changes in policy and practice in the Federal Government, MSPB undertook a review of its research agenda in 2010.

To assure that the research agenda focused on those merit system issues that are most timely and important, and consistent with the Administration's initiatives to increase transparency in government, MSPB took an inclusive and open approach to developing the agenda that included—(1) solicitation of ideas from Federal employees, the general public, and institutional stakeholders; (2) staff review to consider the ideas received and reduce them to a manageable number, considering factors such as centrality to MSPB's mission and availability of resources; (3) a public meeting⁷ to formally present the draft research agenda to MSPB's three Board Members and hear

⁷ This public meeting was held on December 8, 2010, pursuant to the Government in the Sunshine Act (5 U.S.C. §552(b)) and in accordance with MSPB's regulations at 5 CFR §§ 1206.1-12.

comments from key stakeholders; and (4) an invitation to the stakeholders and the public to make further post-meeting comments.

The outcome was a published research agenda⁸ that lists 6 issues and 29 associated research topics of particular importance to the viability and effective implementation of Federal merit systems. MSPB uses that agenda to guide its current and planned research, including the studies I will discuss today.

Recently Completed Merit System Studies

Since my appointment as Chairman in November 2009, MSPB has issued eight studies on important issues affecting the Federal service. These include three studies related to PPPs, including retaliation for whistleblowing, issues that are central to maintaining the public's confidence in government, and protecting the public's interest in a civil service that is free of PPPs, for which MSPB has special responsibility.

Whistleblowing Protections for Federal Employees

Blowing the Whistle: Barriers to Federal Employees Making Disclosures

Prohibited Personnel Practices: Employee Perceptions

Telework: Weighing the Information, Determining an Appropriate Approach

Women in the Federal Government: Ambitions and Achievements

Making the Right Connections: Targeting the Best Competencies for Training

A Call To Action: Improving First-Level Supervision of Federal Employees

Prohibited Personnel Practices: A Study Retrospective

Merit System Studies Currently in Progress

You requested that I address studies in progress and how they will contribute to an efficient and effective Federal Government. Here, I will limit my testimony to those studies for which research is fully or nearly complete, with plans to issue a report in fiscal year 2012 or 2013.⁹

⁸ U.S. Merit Systems Protection Board, 2011-2013 Research Agenda, March 2011, available at www.mspb.gov/studies.

⁹ We show these draft studies with working titles, which are subject to review and approval by MSPB's Board Members. *See* Appendix for detailed summary of each study listed.

Violence in the Federal Workplace

Fair and Open Competition for Federal Government Jobs

Performance Motivation in the Federal Government: Potentials, Linkages, and Performance

Preserving the Integrity of Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism

Using Training and Experience Measures to Assess Applicants

Managing Public Employees in the Public Interest

REVIEWING SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT (OPM)

MSPB has devoted increased attention to this role, as reflected in MSPB's revised 2012-2013 Annual Performance Plan (which includes a commitment to conduct an after-action review of MSPB's actions on a major OPM rule or regulation) and our forthcoming 2011 Annual Report, which will provide a more comprehensive review of OPM's significant actions than previous annual reports. For example, in addition to describing specific actions that OPM has taken in support of hiring reform, the report also discusses systemic challenges facing OPM in this initiative. Also, the report outlines trends and issues that may affect OPM's ability to exercise policy leadership for Federal merit systems.

Looking ahead, further use of MSPB oversight of OPM's significant actions (under 5 U.S.C. §1206) and regulations (under 5 U.S.C. §1204(f)) will depend on both the scope and substance of OPM's actions and the resources that MSPB can devote to this function without compromising performance in adjudication and merit system studies.

AGENCY CHALLENGES

MSPB is a small agency, but it provides tremendous value to the Federal workforce, Federal agencies, and the American taxpayer in terms of a more effective and efficient merit-based civil service that ensures high quality service to the public. Fulfilling our responsibilities to protect merit, improve adherence to merit system

principles, and prevent PPPs requires a fully-funded and staffed MSPB. MSPB's greatest challenge is ensuring we have the resources and staff needed to accomplish our statutory functions now and in the future. To ensure the continued success of the agency, this year we implemented new agency strategic and performance plans that encompass our full mission and better track our performance. We have also implemented management initiatives that promote the best use of resources to facilitate the achievement of annual administrative goals, such as program evaluation and cost-saving measures as a regular part of business.

However, even with these tremendous improvements to our internal operations, challenges remain as annual budgets shrink while operating requirements remain the same or increase. Despite our best efforts to cut operating costs, we are still forced to delay or freeze hiring each year. As of today, we have more than 18 critical vacancies that we are not able to fill this year. In addition, one-third of our employees and 47% of our administrative judges (AJs) will be retirement eligible in the next two and one-half years. Bearing in mind that the typical AJ receives two years of training and oversight before becoming a fully independent judge, the agency may suffer dramatic increases in case processing times if judges retire in significant numbers.

We must also be prepared to manage the effects of several Government-wide factors that will likely increase our adjudication and enforcement workload, and increase the importance of our studies and OPM review functions. These factors include—(1) an increase in cases involving veterans due to the increase in employees and applicants with veterans' employment rights; (2) an increase in Government-wide retirements which may increase retirement cases; and (3) an increase in Reduction-in-Force and other cases related to structural changes in the workforce driven by budget constraints.

CONCLUSION

In closing, Mr. Chairman and members of this panel, I want to assure you that the Merit Systems Protection Board is committed to “walking the talk.” MSPB is committed to implementing efficient and sound management policies and practices. We recognize that we have a heightened responsibility to be a model Federal employer and to implement the operational efficiencies that we identify in our studies and reports that impact the Federal merit system. To that end, we have restructured agency leadership to improve the ability of all managers to address agency-level issues. We have earned clean financial audits for the past 5 years. We have designed and implemented mechanisms to increase employee involvement and their awareness of the critical role they each play in fulfilling the agency’s missions. We are developing creative ways to recognize employees’ contributions and enhance their engagement.

Thank you for the opportunity to talk about the important work that MSPB does and the significant contributions it makes to the operations of the Federal Government, and by extension, the American public. Again, Mr. Chairman, thank you for the positive example and high standard you have set for those who will assume the reigns of leadership for this important subcommittee.

I am happy to answer any questions that you might have.