

Comment to Proposed Rules of Practice and Procedure

Please see Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 William & Mary Policy Journal 184 (2012). It includes detailed analysis of MSPB rules and practices as they affect whistleblowers and provides recommendations to correct the extreme bias against whistleblowers that results from MSPB's deference to "administrative judges," a deceptively named group of hearing officers who have none of the qualifications or independence of "administrative law judges." The qualifications, selection, independence and professional conduct of the latter group are defined by the Administrative Procedure Act (APA), whereas the former group is a creation of the MSPB, not even mentioned in the APA. Indeed, the MSPB organic statute makes specific references to "administrative law judges" but nowhere speaks of "administrative judges." The MSPB is authorized to assign hearings to itself, to an administrative law judge or to an employee designated by the Board to hear such cases. The Board's regulations coin the term "administrative judge" by defining "judge" to include "[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board." A search of federal employment records indicates there are no "Administrative Law Judges" employed by MSPB. Further, the job title "Administrative Judge" does not officially exist. A search for "General Attorney," however, returns the names of MSPB's administrative judges, all of whom are GS 13 to GS 15 agency lawyers. In addition, the MSPB itself uses the term "Attorney Examiner" for performance evaluations of so-called administrative judges.

MSPB's administrative judges rule in favor of whistleblowers and in less than two percent of appeals under the Whistleblower Protection Act. Other Federal employees facing adverse personnel actions fare no better at the hands of the MSPB administrative judges. The Board itself inappropriately accords these unqualified and obviously biased initial decision-makers far too much deference, based on rules that were originally intended to guide Federal appellate courts' deference to factual findings made by Article III Federal Judges. If MSPB continues to relinquish its fact-finding responsibilities to its administrative judges, then at the very minimum the MSPB rules should recognize that findings by such kangaroo courts are due no deference. More appropriately, however, MSPB rules should afford Federal employees with initial hearings before qualified administrative law judges, a right the Board currently reserves to its members, to other Board employees including administrative judges, to Government managers charged by the Office of Special Counsel in disciplinary action complaints, and to administrative law judges employed by other agencies. My article documents that under statutes comparable to the Whistleblower Protection Act, where hearings are held by administrative law judges as opposed to administrative judges, employees fare far better and agency adverse personnel actions are sustained with far less frequency. This double standard - one system of justice for the Board's favored few, and another separate and unequal system of injustice for the rest, makes a mockery of the phrase engraved on the entrance to the United States Supreme Court: Equal Justice Under Law.

I have made much more detailed recommendations for legislative reforms in my article - but MSPB should immediately reform its administrative rules in at least two respects. First, reform rules that perpetuate biased, incompetent and unethical administrative appeals decisions for the great majority of appellants, by doing away with so-called administrative judges, or at least reigning in their systematic abuses of power. Second, accord all appellants with equal justice under law, for some (e.g. Board employees) are not more equal than others.