

Dear Chairman Grundmann:

The Merit Systems Protection Board is without authority to implement via its regulatory power summary judgment proceedings (i.e. Option C). See Committee on Homeland Security and Governmental Affairs, S. Rep. 112-155 at 28 (Apr. 19, 2012) ("Currently, the Board does not have the authority to grant summary judgment in a whistleblower case."). Further, Congress considered--but declined--to give the Board summary judgment authority, and it even tasked the Comptroller General to recommend "whether Congress should grant the Merit Systems Protection Board summary judgment authority" for cases alleging violations of 5 U.S.C. 2302(b)(8) or (9). See Section 116 of Pub. L. 112-199 and Section 118 of S. 743RS (2012).

As noted by the Congressional Research Service, "[w]hile courts are naturally reluctant to attribute significance to the failure of Congress to act, that reluctance may be overcome if it can be shown that Congress considered and rejected bill language that would have adopted the very position being urged upon the court." See *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, Order Code 97-859, p. CRS-42 (Aug. 31, 2008) (citing *Doe v. Chao*, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages")) (available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>) (last visited Dec. 6, 2013). Here, Congress considered--but rejected--the very position being offered as a regulatory option.

Finally, the basis offered in support for Option C--that it is entitled to *Chevron* deference because "relevant statutes and regulations that provide for Board jurisdiction are silent or ambiguous with respect to the identity of jurisdictional elements and the applicable burden of proof," and because "Congress and OPM did not unambiguously and with precision identify jurisdictional elements or specify applicable burdens of proof for establishing jurisdiction"--is erroneous. Under *Chevron v. NRDC*, 467 U.S. 837, the question is "whether Congress has directly spoken to the precise question at issue," and if Congress' intent is clear, "that is the end of the matter." Here, the precise question is the Board's authority to grant a motion for summary judgment. This is far more specific than "identity of jurisdictional elements and the applicable burden of proof." And Congress' intent vis-à-vis authority to grant motions for summary judgment is indeed clear: the Board does not have it, and it therefore may not grant itself this power via regulation.

Thank you for the opportunity to comment.

Sincerely,

David Pardo, Publisher
MSPB Watch