

## LAW REVIEW 18017<sup>1</sup>

February 2018

### Mr. President—Please Make Appointments for the MSPB Vacancies

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[Update on Sam Wright](#)

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

For more than a year (since January 2017), the Merit Systems Protection Board (MSPB) has been down to just one member, and it takes at least two members to decide a case. The term of the one remaining member expires soon, on 3/1/2018.<sup>3</sup> It is urgent that President Trump act promptly to make appointments to the MSPB and that the Senate act promptly in confirming the appointees.

Because the MSPB lacks a quorum to decide cases, a considerable backlog has developed, and when the MSPB has at least two members it will take time to work through the backlog before new appeals can be considered. What is worse, federal agencies have no incentive to obey the

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> See [www.mspb.gov](http://www.mspb.gov).

Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws. They know that they can avoid enforcement simply by appealing the decision of the MSPB Administrative Judge (AJ), even if they have no non-frivolous basis for an appeal, knowing that the appeal will make the enforcement action go into deep limbo, perhaps for years.

### **What is the MSPB?**

The MSPB website states:

The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board.

The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel (OSC) which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although originally established as an office of the Board, the OSC now functions independently as a prosecutor of cases before the Board. (In July 1989, the Office of Special Counsel became an independent Executive branch agency.)

For an explanation of your rights as a Federal employee, and for an in-depth review of the Board's jurisdiction and adjudication process, please review the MSPB publication, *An Introduction to the MSPB*.

The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. More about MSPB can be obtained from MSPB's [Strategic Plan](#). MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of

Personnel Management (OPM) to assess the degree to which those actions may affect merit.<sup>4</sup>

### **What kinds of cases is the MSPB responsible for adjudicating?**

The MSPB is responsible for adjudicating “any action which is appealable to the Board under any law, rule, or regulation.”<sup>5</sup> Any federal civil service employee who has completed the initial probationary period (usually one year of federal employment) can appeal to the MSPB if he or she is fired or suspended without pay for 15 days or more.<sup>6</sup> These individual appeals make up the bulk of the work of the MSPB. The MSPB also adjudicates actions brought by the Office of Special Counsel against individual federal employees seeking to discipline them for violating the Hatch Act<sup>7</sup> or for committing Prohibited Personnel Practices (PPPs).

Title 5 of the United States Code sets forth 14 PPPs, as follows:

- (b)** Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
  - (1)** discriminate for or against any employee or applicant for employment--
    - (A)** on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
    - (B)** on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
    - (C)** on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
  - **(D)** on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
  - (E)** on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;
- (2)** solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--
  - (A)** an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
  - (B)** an evaluation of the character, loyalty, or suitability of such individual;
- (3)** coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for

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<sup>4</sup> [www.mspb.gov](http://www.mspb.gov).

<sup>5</sup> 5 U.S.C. 7701(a).

<sup>6</sup> 5 U.S.C. 7501(1).

<sup>7</sup> The Hatch Act makes it unlawful for federal employees to use federal resources, equipment, or paid time to support or oppose candidates in political elections.

employment as a reprisal for the refusal of any person to engage in such political activity;

- (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;
- (5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
- (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
- (7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;
- (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--
  - (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
    - (i) any violation of any law, rule, or regulation, or
    - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
  - (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--
    - (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
    - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
  - (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of--
    - (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation--
      - (i) with regard to remedying a violation of paragraph (8); or
      - (ii) other than with regard to remedying a violation of paragraph (8);
    - (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A) (i) or (ii);
    - (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

- (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;
- (10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;
- (11) (A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or
- (B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;
- (12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;
- (13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling; or
- (14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.<sup>8</sup>

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<sup>8</sup> 5 U.S.C. 2302(b).

OSC investigates indications or allegations that a federal employee has committed a PPP. If OSC believes that a violation has occurred, OSC initiates an enforcement action against the individual employee seeking disciplinary sanctions, up to and including removal from federal office, and OSC also seeks individual relief and corrective action for the employee who was the victim of a PPP. The MSPB determines, after a hearing, whether a PPP has been committed and, if so, whether the appropriate remedy is removal or some lesser sanction, and the MSPB also orders individual relief and corrective action when appropriate.

### **Reprisal for whistle blowing**

In my opinion, the most important and most often violated PPP is number 8, reprisal for whistle blowing. From my own military<sup>9</sup> and civilian<sup>10</sup> experience, I have come to believe that inspectors general and other authorities need insiders (civilian and military) to come forward with information about fraud, waste, and abuse in federal agencies, and that insiders will not come forward unless they are protected from adverse career consequences that all too often result from whistle blowing. I believe that whistle blowers should be honored and protected, not reprimanded against.<sup>11</sup> The MSPB's lack of a quorum to decide cases is seriously detracting from the ability of OSC to protect federal employee whistle blowers.

### **USERRA**

As I have explained in footnote 2 and in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it on 10/13/1994, as a long-overdue rewrite of and improvement upon the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA applied to federal agencies as employers, but the VRRA lacked an enforcement mechanism for federal employees, former federal employees, and unsuccessful applicants for federal employment to enforce their VRRA rights. Correcting that loophole was one of the major improvements brought about by USERRA. Section 4324 of USERRA provides for enforcing this law against federal executive agencies through the MSPB, as follows:

- (a)
  - (1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary [of Labor] refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary

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<sup>9</sup> In 1996-97, I served for 20 months on active duty, as a Navy Reserve Captain, in the Office of the Naval Inspector General, and for 14 of those months I was the Acting Director of the Hotline Investigations Division. I later served two additional six-month active duty tours, in 1999-2000 and 2001, conducting investigations of alleged violations of the Military Whistleblower Protection Act, which provides similar protection to service members who have blown the whistle.

<sup>10</sup> After I retired from the Navy Reserve in 2007, I worked for OSC as an attorney.

<sup>11</sup> Please see Law Reviews 27 (July 2001), 12066 (July 2012), 13040 (March 2013), 13055 (April 2013), 13123 (September 2013), and 17123 (December 2017).

receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

**(2) (A)** If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

**(B)** Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--

- **(i)** make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and
- **(ii)** notify such person in writing of such decision.

**(b)** A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

- (1)** has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2)** has received a notification from the Secretary under section 4322(e);
- (3)** has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- (4)** has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

**(c)**

**(1)** The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

**(2)** If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

**(3)** Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

**(4)** If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

**(d)**

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.<sup>12</sup>

USERRA cases make up a small percentage of all MSPB cases, but it is most important that federal agencies, as employers, respect and obey USERRA.<sup>13</sup> The MSPB's lack of a quorum seriously detracts from the enforcement of USERRA against federal executive agencies as employers.

### **How are MSPB cases adjudicated?**

MSPB cases (including USERRA cases) begin in front of an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law, and orders relief if appropriate. The AJ's decision becomes the decision of the MSPB if neither party files a timely appeal to the MSPB itself. The AJ process is continuing while the MSPB lacks a quorum, but if either party appeals to the MSPB the appeal goes into limbo until the Board has at least two members and can act.

If the individual appellant loses at the MSPB level, he or she can appeal to the United States Court of Appeals for the Federal Circuit.<sup>14</sup> If the federal agency, as appellee, loses at the MSPB level, the agency is not permitted to appeal to the Federal Circuit.<sup>15</sup>

### **Who are the MSPB members and how are they appointed?**

Title 5 of the United States Code provides for the MSPB, as follows:

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the

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<sup>12</sup> 38 U.S.C. 4324. Please see Law Review 17076 (August 2017) for a detailed discussion of the USERRA enforcement mechanism with respect to federal executive agencies as employers.

<sup>13</sup> USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b).

<sup>14</sup> 38 U.S.C. 4324(d)(1).

<sup>15</sup> Id.

Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.<sup>16</sup>

- - (a) The term of office of each member of the Merit Systems Protection Board is 7 years.
  - (b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.
  - (c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.
  - (d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.<sup>17</sup>
- (a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.
- (b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.
- (c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.<sup>18</sup>
- (a) The Merit Systems Protection Board shall--
  - (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38 [USERRA], or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
  - (2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

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<sup>16</sup> 5 U.S.C. 1201.

<sup>17</sup> 5 U.S.C. 1202.

<sup>18</sup> 5 U.S.C. 1203. Ordinarily, the Chairman and Vice Chairman are of the same political party as the incumbent President and the other member is of the other major political party.

**(3)** 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; and

**(4)** review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

**(b)**

**(1)** Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

**(2)** Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual--

- **(A)** issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and
- **(B)** order the taking of depositions from, and responses to written interrogatories by, any such individual.

**(3)** Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

**(c)** In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

**(d)** A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

**(e)(1)(A)** In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

**(B)**

- (i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.
- (ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2).
- (2) (A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.  
**(B)** The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).
- (3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

**(f)** (1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103, the Board shall review any provision of such rule or regulation--

- (A) on its own motion;
- (B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or
- (C) on the filing of a written complaint by requesting such review.

- (2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision--
  - (A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b); or
  - (B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b).

(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

- (4) The Board shall require any agency--
  - (A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and
  - (B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(g) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

(m)

(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

**(2)** If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964.

**(n)** The Board may accept and use gifts and donations of property and services to carry out the duties of the Board.<sup>19</sup>

The MSPB most recently had a full complement of three members in 2015, when Vice Chairman Anne Wagner left office and the vacancy was not filled. MSPB Chairman Susan Tsui Grundmann left in January 2017. The one remaining member is Mark Robbins, and his term expires on 3/1/2018.

### **Conclusion**

It is urgent that President Trump make appointments for the two (soon to be three) MSPB vacancies and that the Senate act quickly to confirm the appointees. Until the MSPB has at least two members, the USERRA rights of federal employees who are National Guard or Reserve service members are not being protected and federal employee whistle blowers are not being protected from reprisal and all the other important functions of the MSPB are not being performed.

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<sup>19</sup> 5 U.S.C. 1204.