STATEMENT FOR THE HEARING RECORD

SUBMITTED BY

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TO THE

U.S. SENATE COMMITTEE ON VETERANS' AFFAIRS

COMMITTEE HEARING TO CONSIDER

PENDING LEGISLATION

WEDNESDAY, NOVEMBER 18, 2015

Chairman Isakson, Ranking Member Blumenthal and distinguished Members of the United States Senate Veterans' Affairs Committee ("Committee"). Thank you for the opportunity to present written testimony to the Committee on behalf of the United States Merit Systems Protection Board ("MSPB"), an independent, quasi-judicial agency in the executive branch of the federal government. As the Chairman of MSPB, I am pleased to present written testimony for the record for this Committee hearing on pending legislation. Chairman Isakson has asked that MSPB present testimony on a draft bill, S. __, the "Veterans Affairs Retaliation Act of 2015," which we understand may be introduced by Senator Kirk. A similar version of this legislation, H.R. 571, is pending in the United States House of Representatives.

As an initial matter, as I have stated in previous written testimony for the record to this Committee, under statute, MSPB is prohibited from providing advisory opinions on any hypothetical or future personnel action in the executive branch of the federal government. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions."). Accordingly, this testimony should not be construed as an indication of how I, any other presidentially-appointed, Senate confirmed Member of the three-Member Board at MSPB Headquarters in Washington, D.C. ("Board"), or an MSPB administrative judge would rule in any pending or future matter before MSPB. Instead, I would respectfully request that the Committee consider this testimony technical in nature.

A. The MSPB's Interest in the Veterans Affairs Retaliation Prevention Act of 2015

MSPB's interest in the draft "Veterans Affairs Retaliation Prevention Act of 2015," derives from its statutory responsibility to adjudicate appeals filed by federal employees in connection with certain adverse employment actions. As I have previously explained to the Committee, generally, after a federal agency

imposes an adverse personnel action upon a federal employee, such as removal or demotion, and the federal employee chooses to exercise his or her statutory right to file an appeal with MSPB, MSPB will begin the adjudication process. In the case of a federal employee who is removed from his or her position, that individual is no longer employed by the federal government, and is not receiving pay, at the time he or she files an appeal with MSPB or at any point during the subsequent MSPB adjudication process.

B. Pertinent Provisions of the Draft Veterans Affairs Retaliation Prevention Act of 2015

In pertinent part, the draft "Veterans Affairs Retaliation Prevention Act of 2015," if enacted, would establish the following:

1. A process within the Department of Veterans Affairs ("Department") whereby Department employees may file a "whistleblower complaint," as that term is defined in the legislation, with certain Department officials, who will review and act on the complaint;

2. A "Central Whistleblowing Office" within the Department, which shall be responsible for investigating all whistleblower complaints made "by or against" Department employees;

3. A new 38 U.S.C. § 733(a)(1), under which Department supervisory employees who are found to have engaged in a "prohibited personnel practice," as that term is defined in the legislation, by certain individuals or entities, including MSPB, shall be subject to an automatic proposal of specified disciplinary action by the Secretary of the Department of Veterans Affairs ("Secretary");

4. A new 38 U.S.C. § 733(a)(2), under which the above-referenced Department supervisory employees subject to the above-referenced disciplinary action shall be entitled to "not … more than five days following … notification" of the proposed disciplinary action to provide evidence to dispute the proposed action; and then may appeal to the MSPB pursuant to 38 U.S.C. § 713(d) and (e);

5. That certain criteria be considered in the evaluation of Department supervisory employees, including the manner in which those employees

"treat[] whistleblower complaints" and whether those employees have been found to have engaged in a prohibited personnel practice by certain entities, including MSPB;

6. Training requirements in connection with the requirements of the draft legislation; and

7. Reporting requirements for the Department on whistleblower complaints filed.

As stated above, under the new 38 U.S.C. § 733, the Secretary would be required to propose discipline[1] upon Department supervisory employees who are found to have committed a prohibited personnel practice[2], as determined by any of the following: the Secretary, an administrative judge, MSPB, the Office of Special Counsel, an adjudicating body under a union contract, a Federal judge, or the Inspector General of the Department. Prior to the imposition of such discipline, the Department supervisory employees in question "may not be given more than

[1] The new 38 U.S.C. § 733(a)(1)(A) would provide that, with respect to a first offense, the Secretary propose that Department supervisory employees receive "not less than a 12-day suspension and not more than removal," and that with respect to a second offense, Department supervisory employees be removed.

[2] The legislation defines a prohibited personal practice as taking or failing to take a personnel action in violation of section 2302 of title 5 against an employee relating to the employee: A) filing a whistleblower complaint; B) filing a whistleblower complaint with the Inspector General of the Department, the Special Counsel, or Congress; C) providing information or participating as a witness in an investigation of a whistleblower complaint in accordance with section 732 or with the Inspector General of the Department, the Special Counsel or Congress; D) participating in an audit or investigation by the Comptroller General of the United States; E) refusing to perform an action that is unlawful or prohibited by the Department; or F) engaging in communications that are related to the duties of the position or are otherwise protected.

The legislation further defines a prohibited personnel practice to include "preventing or restricting an employee from making an action described in any of" the above referenced sections and "requesting a contractor to carry out an action that is prohibited by section 4705(b) or section 4712(a)(1) of title 41, as the case may be."

five days following such notification to provide evidence to dispute the Secretary's "proposed adverse action." Once the disciplinary action is imposed, the Department supervisory employee would be permitted to appeal to MSPB pursuant to "subsections (d) and (e) of section 713 of title 38."

C. Appeals to MSPB Under Subsections (d) and (e) of Section 713 of Title 38, United States Code

Section 713 of title 38, United States Code, codifies provisions of the Veterans Access, Choice, and Accountability Act of 2014 ("the 2014 Act"), Public Law 113-146. Under the 2014 Act, upon either removal or transfer, a covered employee at the Department may appeal to MSPB "under section 7701 of title 5" not later than seven days after the date of such removal or transfer. Once an appeal is filed at MSPB by a covered Department employee, MSPB shall refer the appeal to an MSPB administrative judge "pursuant to section 7701(b)(1) of title 5." The MSPB administrative judge shall "expedite" such appeal and issue a decision "not later than 21 days after the date of the appeal." If an MSPB administrative judge fails to issue a decision within 21 days, the Secretary's decision to either remove or transfer the employee becomes final.

Significantly, the decision of the MSPB administrative judge in any such appeal shall be final and shall not be subject to further appeal, either to the three-member Board at MSPB Headquarters in Washington, D.C., or to any federal court.

D. Possible Constitutional Defects with the Draft Veterans Affairs Retaliation Prevention Act of 2015

As stated above, the draft Veterans Affairs Retaliation Prevention Act of 2015 allows covered Department supervisory employees to appeal disciplinary action to the MSPB pursuant to procedures established by the 2014 Act. The MSPB has addressed the possible constitutional defects with certain provisions of

the 2014 in prior testimony to this Committee. Ranking Member Blumenthal has articulated similar constitutional concerns in connection with other legislation the Committee has considered that incorporates the same provisions of the 2014 Act.

I encourage members of the Committee and their staff to review the MSPB report entitled *What is Due Process in Federal Civil Service Employment?* [3] This report provides an overview of current civil service laws applicable to adverse actions and, perhaps more importantly, the history and considerations behind the formation of those laws. It also explains why, according to the Supreme Court of the United States, the Constitution requires that any system which provides that a public employee may only be removed for specified causes must also include a meaningful opportunity for the employee – prior to his or her termination – to be made aware of the charges the employer will make, present a defense to those charges, and appeal the removal decision to an impartial adjudicator.

In the landmark decision of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) the Supreme Court held that while Congress (through statutes) or the president (through executive orders) may decide *whether to grant protections* to employees, they lack the authority to decide whether they will grant due process rights *once those protections are granted*. Stated differently, when Congress establishes the circumstances under which employees may be removed from positions (such as for misconduct or malfeasance), employees have a property interest in those positions. *Loudermill*, 470 U.S. at 538-39[4]. Specifically, the *Loudermill* Court stated:

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[3] This report can be found at: http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT

[4] The *Loudermill* case involved a state employee, not a federal employee. Nevertheless, while the Federal Government is covered by the Fifth Amendment and the states by the Fourteenth Amendment, the effect is the same. *See Lachance v. Erickson*, 522 U.S. 262, 266 (1998); *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1375-76 (Fed. Cir. 1999).

> Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without the appropriate procedural safeguards.

Id. at 541.

The Court explained that the "root requirement" of the Due Process Clause is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest," and that "this principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Id*. at 542.

According to the Court, one reason for this due process right is the possibility that "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id*. at 542. The Court further held that "the right to a hearing does not depend on a demonstration of certain success." *Id*. at 544.

I further note that the requirements of the Constitution have shaped the rules under which federal agencies may take adverse actions against federal employees, as explained by the Supreme Court, U.S. Courts of Appeal, and U.S. District Courts. Accordingly, should Congress consider modifications to these rules, many of which have been in place for more than one hundred years, MSPB respectfully submits that the discussion be an informed one, and that all Constitutional requirements be considered.

Finally, I note that the constitutionality of certain provisions of the 2014 Act is currently the subject of litigation at the United States Court of Appeals for the Federal Circuit. *Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed.

Cir. 2015). The plaintiff in that litigation is alleging that Section 707 of the 2014 Act is unconstitutional primarily on two grounds:

- By permitting the Department to remove a tenured federal employee without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee's right to constitutional due process as articulated by the Supreme Court; and

- By removing the three-member Board from the MSPB appellate review process and permitting MSPB administrative judges to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

This concludes my written testimony. I am happy to address any follow up questions the Committee may have.