U.S. MERIT SYSTEMS PROTECTION BOARD

Office of General Counsel
1615 M Street, NW
Washington, DC 20419-0002

May 13, 2015

The Honorable Johnny Isakson
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

You have asked the United States Merit Systems Protection Board ("MSPB") to provide written testimony in connection with a hearing the Senate Committee on Veterans' Affairs ("Committee") is holding on May 13, 2015, addressing pending benefits legislation. Specifically, you have asked MSPB to provide input on S. 627, which was introduced by Senator Ayotte and cosponsored by Senators McCaskill, Moran, Flake, Klobuchar, Shaheen, Thune, and Crapo.

MSPB appreciates the opportunity to provide input on S. 627, which generally would require the Secretary of the Department of Veterans Affairs ("Secretary") to revoke bonuses paid to employees and supervisors of the Department of Veterans Affairs who "contributed to the purposeful omission of the name of one or more veterans waiting for health care from an electronic wait list for a medical facility of the Department ..." MSPB notes that it currently does not have jurisdiction over appeals filed by federal employees solely in connection with the revocation of a performance bonus. Thus, this legislation, if enacted into law, would provide MSPB with jurisdiction over a personnel action which neither the three-member Board at MSPB Headquarters in Washington, D.C. ("Board"), nor an MSPB administrative judge, has previously reviewed and adjudicated.

MSPB is an independent quasi-judicial agency and part of the executive branch. It serves as the guardian of merit principles in the federal government and, under statute, is responsible for adjudicating appeals filed by federal employees in connection with certain adverse personnel actions. The Board issues decisions in accordance with statutory law, MSPB precedent, and precedent from United States federal courts, including the United States Court of Appeals for the Federal Circuit, which is MSPB's primary reviewing

court. MSPB is not involved in the taking of any adverse personnel action by any federal agency official. It becomes involved only after an agency takes an adverse personnel action against an employee and the affected employee chooses to appeal to MSPB, per his or her statutory right to do so.

I would like to emphasize that MSPB is prohibited by statute from providing advisory opinions in any matter. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions.") As such, in response to your request, we are providing only technical views, some of which are reflected in MSPB decisions or statute. This response should not be construed as an indication of how the Board or any MSPB administrative judge would rule in any future case brought under this legislation, once enacted into law.

Technical Views on S. 627

1. Liability Under Section 1(a)(1) of the Bill

Section 1(a) of the bill establishes the liability requirements for covered employees at the Department of Veterans Affairs. It provides that the following employees are covered:

> (1) Those who, during any of fiscal years 2011 through 2014 –
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> (A) Contributed to the purposeful omission of the name of one or more veterans waiting for health care from an electronic wait list for a medical facility of the Department identified by the Inspector General [in a report identified in Section 1(a) of the bill]; or
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> (B) [Were] the supervisor of an employee of the Department, or the supervisor of that supervisor, at any level, who contributed to a purposeful omission [as described above] and knew, or reasonably should have known, that the employee contributed to such purposeful omission; and
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> (2) Received a bonus in part because of such omission.

As a technical matter, it would appear Section 1(a)(1) of the bill covers four sets of Department of Veterans Affairs employees: 1) employees who purposefully omitted the names of one or more veterans waiting for health care from an electronic wait list[1]; 2)

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[1] Although Section 1(a)(1)(A) of the bill refers only to employees who "contributed to the purposeful omission of one or more veterans waiting for health care from an electronic wait list," it is logical to conclude that this language would similarly cover employees of

employees who contributed to the purposeful omission of one or more veterans waiting for health care from an electronic wait list; 3) supervisors of employees who purposefully omitted, or who contributed to the purposeful omission of, one or more veterans waiting for health care from an electronic wait list; and 4) supervisors of the supervisors of the employees who purposefully omitted, or who contributed to the purposeful omission of, one or more veterans waiting for health care from an electronic wait list.

The United States Court of Appeals for the Federal Circuit has mandated that, when charging an employee with misconduct, an agency must prove all of the elements of the substantive offense with which an individual is charged. *King v. Nazlerod*, 43 F.3d 663, 667 (Fed. Cir. 1994). *See also Phillips v. General Servs. Admin.*, 878 F.2d 370, 372 (Fed.Cir.1989); *Naekel v. Department of Transp.*, 782 F.2d 975, 977 (Fed.Cir.1986); *Downes v. Federal Aviation Admin.*, 775 F.2d 288, 292 (Fed.Cir.1985). *See also Green v. Department of Army,* 25 M.S.P.R. 342, 345 (1984), *aff'd mem.*, 785 F.2d 326). Traditionally, it is the burden of the agency to prove the requisite intent if intent is an element of the offense charged. *King*, 43 F.3d at 667.

With respect to supervisors and managers, the Board has held that, generally, to the extent an agency wishes to hold such employees responsible for any failures of their subordinates, *i.e.*, those that occur on his or her watch, it may do so. *See Miller v. Department of Navy,* 11 M.S.P.R. 518, 521 (1982) ("A supervisor, by his very position, may be held accountable for improprieties stemming from the actions of his subordinates"). However, according to the Board, in order to do so, an agency must identify the subordinates, show what the subordinates' failures were, show why the manager should have known about them and show that he or she failed to take action to correct the identified failures. *Id.* at 519-21. *See also Mauro v. Department of Navy*, 35 M.S.P.R. 86, 91-93 (1987) (same). To phrase it more colloquially, "an agency must connect the dots of fault from the identified failure by the subordinates back up the line to the manager." *Helman v. Department of Veterans Affairs*, MSPB Docket No. DE-0707-15-0091-J-1 (Dec. 22, 2014).

Also, it would appear that Section 1(a)(1) of the bill requires knowledge of the conduct at issue for only two sets of covered employees at the Department of Veterans Affairs: 1) supervisors of employees who purposefully omitted or contributed to the purposeful omission of one or more veterans waiting for health care from an electronic wait list; and 2) supervisors of the supervisors of the employees who purposefully omitted or contributed to the purposeful omission of one or more veterans waiting for health care from an electronic wait list. Consequently, in order to revoke a bonus received by these employees, the Department of Veterans Affairs would likely need to

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the Department of Veterans Affairs who actually purposefully omitted one or more veterans from an electronic wait list, along with those who contributed to such omissions.

show that these supervisors knew or reasonably should have known of their subordinates' improper conduct, or in other words, "connect the dots of fault … back up the line to the manager. *Helman v. Department of Veterans Affairs*, MSPB Docket No. DE-0707-15-0091-J-1 (Dec. 22, 2014).

MSPB notes that, as drafted, S. 627 does not appear to provide a similar knowledge requirement for: 1) employees who purposefully omitted the names of one or more veterans waiting for health care from an electronic wait list; or 2) employees who contributed to the purposeful omission of one or more veterans waiting for health care from an electronic wait list.[2] MSPB takes no position on this issue, but notes that if the Committee wishes to make the knowledge requirement uniform for all covered employees, it should consider amending section 1(a)(1)(A) of the bill to reflect such a requirement.

2. Internal Hearing Within The Department of Veterans Affairs

Section 1(d)(1) of the bill establishes that employees who have been identified by the Secretary as having received a bonus "in part" because of omissions described above, shall be entitled to notice and an opportunity for a hearing, after which the Secretary "shall issue an order directing the employee to repay the amount of such bonus." Section 1(d)(2) of the bill provides that:

> A hearing [as provided for in subsection 1(d)(1) of the bill] shall be conducted in accordance with regulations relating to hearings promulgated by the Secretary under chapter 75 of title 5, United States code.

MSPB presumes that Section 1(d)(2) is referring to the authority of the Department of Veterans Affairs under 5 U.S.C. § 7513(c), which states that:

> An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under [5 U.S.C. § 7513(b)(2)].

MSPB notes that, under the current language contained in Section 1(d)(1), the Secretary's order "directing the employee to repay" the bonus could be construed to be automatic, once notice and an opportunity for a hearing is

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[2] This is reflected in Section 1(c) of the bill, which requires the Secretary of the Department of Veterans Affairs to identify employees contributing to an omission described in subsection (a)(1) "without regard to whether the employee knowingly contributed to such omission or contributed to such omission for the purpose of receiving a bonus."

provided to the affected employee. There is no language in the Section that would indicate the Secretary's order will be issued only after consideration of the information contained in the Inspector General's report *and* the information provided by the employee during the hearing referenced in Section 1(d)(1), should the employee choose to participate in such a hearing.

The United States Supreme Court has consistently held that some form of hearing is required *before* an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) (emphasis added). *See, e. g. Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1931). *See also Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). Moreover, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time *and in a meaningful manner*." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added). *See also Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

3. Appeals to the Merit Systems Protection Board

a. Employee Appeals "Under section 7701 of title 5, United States Code."

Section (d)(3)(A) of the bill establishes that an employee subject to an order of the Secretary may appeal the Secretary's determination to the Merit Systems Protection Board "under section 7701 of title 5, United States Code."

Section 7701 of title 5 establishes MSPB's appellate procedures. Specifically, 5 U.S.C. § 7701 provides rights to appellants who file appeals with MSPB and articulates the obligations of federal agencies in those appeals. Among the pertinent provisions of 5 U.S.C. § 7701 are:

- **The Right to a Hearing at MSPB**: An employee who files an appeal with MSPB based on any action which is appealable under any law, rule, or regulation shall have the right "to a hearing for which a transcript will be kept" and the ability to conduct discovery. 5 U.S.C. §§ 7701(a)(1) and (k), 5 C.F.R. § 1201.71-75.

- **An Agency's Burden of Proof**: The decision of an agency shall be sustained in an appeal filed at MSPB under 5 U.S.C. § 7701 "if the agency's decision is supported by a preponderance of the evidence." 5 U.S.C. § 7701(c)(1)(B).

- **Affirmative Defenses Available to Appellants**: Section 7701 of title 5 provides that "an agency's decision may not be sustained ... if the employee ... shows that the [agency's] decision was based on any prohibited personnel practice described in section 2302(b) [of title 5, United States Code]." 5 U.S.C. § 7701(c)(2)(B).

Among the "prohibited personnel practices" described in section 2302(b) are illegal discrimination, 5 U.S.C. § 2302(b)(1)(A)-(E), coercion of political activity or reprisal for refusal to engage in political activity, 5 U.S.C. § 2302(b)(3), and reprisal for lawful "whistleblowing," 5 U.S.C. § 2302(b)(8).

b. Scope of MSPB Review

Section 1(d)(3)(B) of the bill states that review of an appeal by MSPB "shall be based on the record established through the appellant's hearing ..." The plain language of this section would require MSPB to review the Secretary's determination solely on the record of the above-referenced internal hearing established in Sections 1(d)(1) and (2) of the bill.

MSPB believes that the language of Section 1(d)(3)(B) of the bill could conflict with the language of Section 1(d)(3)(A) of the bill because "under 5 U.S.C. § 7701," an appellant is entitled to a hearing at MSPB and the right to conduct discovery. In other words, it could be argued that 5 U.S.C. § 7701 provides for the right to more than purely appellate review by the Board. Additionally, as noted above, 5 U.S.C. § 7701(c)(2)(B) allows appellants at MSPB to raise certain affirmative defenses in their appeals, including illegal discrimination and reprisal for unlawful whistleblowing. Thus, it could be argued that appellants have the right to raise certain defenses at MSPB that were not raised during their internal hearing, and be entitled to discovery regarding those defenses.

c. Standard of MSPB Review

Section 1(d)(3)(C) of the bill states that MSPB "shall set aside an order[of the Secretary] if the issuing of the order was clearly erroneous or the result of a denial of procedural due process."

As noted above, in appeals filed "under 5 U.S.C. § 7701," an agency's decision must be supported by a "preponderance of the evidence." 5 U.S.C. § 7701(c)(1)(B). "Preponderance of the evidence" is defined as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R § 1201.4(q). Under this bill, it is unclear what standard the Department of Veterans Affairs will apply during internal hearings to review a decision of the Secretary to revoke a bonus. Regardless, the Board's review of the record from that hearing would be based on the "clearly erroneous" standard. A finding is "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Massachusetts Mut. Life Ins. Co. v. U.S.*, 782 F.3d 1354 (Fed. Cir. 2015) (*citing United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

MSPB is grateful for the opportunity to provide input on this bill. We understand that federal personnel law can be complicated. Should you or your staff have any questions, please do not hesitate to contact me at your convenience.

Sincerely,

Bryan Polisuk
General Counsel
United States Merit Systems Protection Board

C.C.:

The Honorable Richard Blumenthal
Ranking Member
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510