

103RD CONGRESS
2^D SESSION

H. R. 2970

AMENDMENT

In the Senate of the United States,

October 7 (legislative day, September 12), 1994.

Resolved, That the bill from the House of Representatives (H.R. 2970) entitled “An Act to reauthorize the Office of Special Counsel, and for other purposes”, do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

1 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

2 (a) *MERIT SYSTEMS PROTECTION BOARD.*—Section
3 *8(a)(1) of the Whistleblower Protection Act of 1989 (5*
4 *U.S.C. 5509 note; Public Law 101–12; 103 Stat. 34) is*
5 *amended by striking out “1989, 1990, 1991, 1992, 1993,*
6 *and 1994” and inserting in lieu thereof “1993, 1994, 1995,*
7 *1996, and 1997”.*

8 (b) *OFFICE OF SPECIAL COUNSEL.*—Section *8(a)(2) of*
9 *the Whistleblower Protection Act of 1989 (5 U.S.C. 5509*
10 *note; Public Law 101–12; 103 Stat. 34) is amended by*
11 *striking out “1989, 1990, 1991, and 1992” and inserting*
12 *in lieu thereof “1993, 1994, 1995, 1996, and 1997”.*

13 **SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.**

14 *Section 1204 of title 5, United States Code, is amended*
15 *by adding at the end thereof the following new subsection:*

1 “(m)(1) Except as provided in paragraph (2) of this
2 subsection, the Board, or an administrative law judge or
3 other employee of the Board designated to hear a case arising
4 under section 1215, may require payment by the agency
5 involved of reasonable attorney fees incurred by an employee
6 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
7 personnel practice was engaged in by the agency or any
8 case in which the agency’s action was clearly without merit.
9
10

11 “(2) If an employee or applicant for employment is
12 the prevailing party of a case arising under section 1215
13 and the decision is based on a finding of discrimination
14 prohibited under section 2302(b)(1) of this title, the payment
15 of attorney fees shall be in accordance with the standards
16 prescribed under section 706(k) of the Civil Rights Act
17 of 1964 (42 U.S.C. 2000e–5(k)).”
18
19

20 **SEC. 3. OFFICE OF SPECIAL COUNSEL.**

21 (a) *SUCCESSION.*—Section 1211(b) of title 5, United
22 States Code, is amended by inserting after the first sentence:
23 “The Special Counsel may continue to serve beyond the expiration
24 of the term until a successor is appointed and has
25 qualified, except that the Special Counsel may not continue

1 *to serve for more than one year after the date on which*
2 *the term of the Special Counsel would otherwise expire*
3 *under this subsection.”.*

4 (b) *LIMITATIONS ON DISCLOSURES.—Section 1212(g)*
5 *of title 5, United States Code, is amended—*

6 (1) *in paragraph (1), by striking out “provide*
7 *information concerning” and inserting in lieu thereof*
8 *“disclose any information from or about”; and*

9 (2) *in paragraph (2), by striking out “a matter*
10 *described in subparagraph (A) or (B) of section*
11 *2302(b)(2) in connection with a” and inserting in*
12 *lieu thereof “an evaluation of the work performance,*
13 *ability, aptitude, general qualifications, character,*
14 *loyalty, or suitability for any personnel action of*
15 *any”.*

16 (c) *STATUS REPORT BEFORE TERMINATION OF INVES-*
17 *TIGATION.—Section 1214(a) of title 5, United States Code,*
18 *is amended—*

19 (1) *in paragraph (1) by adding at the end there-*
20 *of the following new subparagraph:*

21 “(D) *No later than 10 days before the Special Counsel*
22 *terminates any investigation of a prohibited personnel*
23 *practice, the Special Counsel shall provide a written status*
24 *report to the person who made the allegation of the proposed*
25 *findings of fact and legal conclusions. The person may sub-*

1 *mit written comments about the report to the Special Coun-*
2 *sel. The Special Counsel shall not be required to provide*
3 *a subsequent written status report under this subparagraph*
4 *after the submission of such written comments.”; and*

5 *(2) in paragraph (2)(A)—*

6 *(A) in clause (ii) by striking out “and”*
7 *after the semicolon;*

8 *(B) in clause (iii) by striking out the period*
9 *and inserting in lieu thereof a semicolon and*
10 *“and”; and*

11 *(C) by adding at the end thereof the follow-*
12 *ing new clause:*

13 *“(iv) a response to any comments submitted*
14 *under paragraph (1)(D).”.*

15 *(d) DETERMINATIONS.—Section 1214(b)(2) of title 5,*
16 *United States Code, is amended—*

17 *(1) by redesignating subparagraphs (A), (B) and*
18 *(C) as subparagraphs (B), (C) and (D), respectively;*

19 *(2) by inserting before subparagraph (B) (as re-*
20 *designated by paragraph (1) of this subsection) the*
21 *following:*

22 *“(A)(i) Except as provided under clause*
23 *(ii), no later than 240 days after the date of re-*
24 *ceiving an allegation of a prohibited personnel*
25 *practice under paragraph (1), the Special Coun-*

1 *sel shall make a determination whether there are*
2 *reasonable grounds to believe that a prohibited*
3 *personnel practice has occurred, exists, or is to*
4 *be taken.*

5 “(ii) *If the Special Counsel is unable to*
6 *make the required determination within the 240-*
7 *day period specified under clause (i) and the*
8 *person submitting the allegation of a prohibited*
9 *personnel practice agrees to an extension of time,*
10 *the determination shall be made within such ad-*
11 *ditional period of time as shall be agreed upon*
12 *between the Special Counsel and the person sub-*
13 *mitting the allegation.”; and*

14 (3) *by inserting after subparagraph (D) (as re-*
15 *designated by paragraph (1) of this subsection) the*
16 *following new subparagraph:*

17 “(E) *A determination by the Special Coun-*
18 *sel under this paragraph shall not be cited or re-*
19 *ferred to in any proceeding under this para-*
20 *graph or any other administrative or judicial*
21 *proceeding for any purpose, without the consent*
22 *of the person submitting the allegation of a pro-*
23 *hibited personnel practice.”.*

24 (e) *REPORTS.—Section 1218 of title 5, United States*
25 *Code, is amended by inserting “cases in which it did not*

1 *make a determination whether there are reasonable grounds*
2 *to believe that a prohibited personnel practice has occurred,*
3 *exists, or is to be taken within the 240-day period specified*
4 *in section 1214(b)(2)(A)(i),” after “investigations con-*
5 *ducted by it.”*

6 **SEC. 4. INDEPENDENT RIGHT OF ACTION.**

7 (a) *SUBPOENAS.*—Section 1221(d) of title 5, United
8 States Code, is amended by striking out paragraph (1) and
9 inserting in lieu thereof the following:

10 “(1) *At the request of an employee, former em-*
11 *ployee, or applicant for employment seeking corrective*
12 *action under subsection (a), the Board shall issue a*
13 *subpoena for the attendance and testimony of any*
14 *person or the production of documentary or other evi-*
15 *dence from any person if the Board finds that the tes-*
16 *timony or production requested is not unduly burden-*
17 *some and appears reasonably calculated to lead to the*
18 *discovery of admissible evidence.”*

19 (b) *CORRECTIVE ACTIONS.*—Section 1221(e)(1) is
20 amended by adding after the last sentence: “The employee
21 may demonstrate that the disclosure was a contributing fac-
22 tor in the personnel action through circumstantial evidence,
23 such as evidence that—

24 “(A) *the official taking the personnel action*
25 *knew of the disclosure; and*

1 “(B) the personnel action occurred within a pe-
2 riod of time such that a reasonable person could con-
3 clude that the disclosure was a contributing factor in
4 the personnel action.”.

5 (c) *REFERRALS.*—Section 1221(f) of title 5, United
6 States Code, is amended by adding after paragraph (2) the
7 following new paragraph:

8 “(3) If, based on evidence presented to it under
9 this section, the Merit Systems Protection Board de-
10 termines that there is reason to believe that a current
11 employee may have committed a prohibited personnel
12 practice, the Board shall refer the matter to the Spe-
13 cial Counsel to investigate and take appropriate ac-
14 tion under section 1215.”.

15 **SEC. 5. PROHIBITED PERSONNEL PRACTICES.**

16 (a) *PERSONNEL ACTIONS.*—Section 2302(a)(2)(A) of
17 title 5, United States Code, is amended—

18 (1) in clause (ix) by striking out “and” after the
19 semicolon;

20 (2) by striking out clause (x) and inserting in
21 lieu thereof the following:

22 “(x) a decision to order psychiatric
23 testing or examination; and

1 “(xi) any other significant change in
2 duties, responsibilities, or working condi-
3 tions;”; and

4 (3) in the matter following designated clause (xi)
5 (as added by paragraph (2) of this subsection) by in-
6 serting before the semicolon the following: “; and in
7 the case of an alleged prohibited personnel practice
8 described in subsection (b)(8), an employee or appli-
9 cant for employment in a Government corporation as
10 defined in section 9101 of title 31”.

11 (b) COVERED POSITIONS.—Section 2302(a)(2)(B) of
12 title 5, United States Code, is amended to read as follows:

13 “(B) ‘covered position’ means, with respect to
14 any personnel action, any position in the competitive
15 service, a career appointee position in the Senior Ex-
16 ecutive Service, or a position in the excepted service,
17 but does not include any position which is, prior to
18 the personnel action—

19 “(i) excepted from the competitive service
20 because of its confidential, policy-determining,
21 policy-making, or policy-advocating character; or

22 “(ii) excluded from the coverage of this sec-
23 tion by the President based on a determination
24 by the President that it is necessary and war-

1 *ranted by conditions of good administration;*
2 *and”.*

3 (c) *AGENCIES.*—Section 2302(a)(2)(C) of title 5, *Unit-*
4 *ed States Code, is amended in clause (i) by inserting before*
5 *the semicolon: “, except in the case of an alleged prohibited*
6 *personnel practice described under subsection (b)(8)”.*

7 (d) *INFORMATIONAL PROGRAM.*—Section 2302(c) of
8 *title 5, United States Code, is amended in the first sentence*
9 *by inserting before the period “, and for ensuring (in con-*
10 *sultation with the Office of Special Counsel) that agency*
11 *employees are informed of the rights and remedies available*
12 *to them under this chapter and chapter 12 of this title”.*

13 ***SEC. 6. PERFORMANCE APPRAISALS.***

14 Section 4313(5) of title 5, *United States Code, is*
15 *amended to read as follows:*

16 “(5) *meeting affirmative action goals, achieve-*
17 *ment of equal employment opportunity requirements,*
18 *and compliance with the merit systems principles set*
19 *forth under section 2301 of this title.”.*

20 ***SEC. 7. MERIT SYSTEMS APPLICATION TO CERTAIN VETER-***
21 ***ANS AFFAIRS PERSONNEL.***

22 Section 2105 of title 5, *United States Code, is amended*
23 *by adding at the end thereof the following new subsection:*

1 “(f) For purposes of sections 1212, 1213, 1214, 1215,
2 1216, 1221, 1222, 2302, and 7701, employees appointed
3 under chapter 73 or 74 of title 38 shall be employees.”.

4 **SEC. 8. CORRECTIVE ACTIONS ORDERED BY THE MERIT**
5 **SYSTEMS PROTECTION BOARD.**

6 (a) *IN GENERAL.*—Section 1214 of title 5, United
7 States Code, is amended by adding at the end thereof the
8 following new subsection:

9 “(g) If the Board orders corrective action under this
10 section, such corrective action may include—

11 “(1) that the individual be placed, as nearly as
12 possible, in the position the individual would have
13 been in had the prohibited personnel practice not oc-
14 curred; and

15 “(2) reimbursement for attorney’s fees, back pay
16 and related benefits, medical costs incurred, travel ex-
17 penses, and any other reasonable and foreseeable con-
18 sequential damages.”.

19 (b) *CERTAIN REPRISAL CASES.*—Section 1221(g) of
20 title 5, United States Code (as amended by section 4(d) of
21 this Act) is further amended—

22 (1) by redesignating paragraphs (1) and (2) as
23 paragraphs (2) and (3), respectively; and

1 (2) by inserting before paragraph (2) (as redesignig-
2 nated by paragraph (1) of this subsection) the follow-
3 ing new paragraph:

4 “(1)(A) If the Board orders corrective action
5 under this section, such corrective action may in-
6 clude—

7 “(i) that the individual be placed, as nearly
8 as possible, in the position the individual would
9 have been in had the prohibited personnel prac-
10 tice not occurred; and

11 “(ii) back pay and related benefits, medical
12 costs incurred, travel expenses, and any other
13 reasonable and foreseeable consequential changes.

14 “(B) Corrective action shall include attorney’s
15 fees and costs as provided for under paragraphs (2)
16 and (3).”.

17 **SEC. 9. AUTHORITIES RELATING TO ARBITRATORS AND**
18 **CHOICE OF REMEDIES NOT INVOLVING JUDI-**
19 **CIAL REVIEW.**

20 (a) *AUTHORITIES WHICH MAY BE EXTENDED TO AR-*
21 *BITRATORS.*—Section 7121(b) of title 5, United States Code,
22 *is amended—*

23 (1) by redesignating subparagraphs (A) through
24 (C) of paragraph (3) as clauses (i) through (iii), re-
25 spectively;

1 (2) by redesignating paragraphs (1) through (3)
2 as subparagraphs (A) through (C), respectively;

3 (3) by striking “(b)” and inserting “(b)(1)”; and

4 (4) by adding at the end the following:

5 “(2)(A) The provisions of a negotiated grievance proce-
6 dure providing for binding arbitration in accordance with
7 paragraph (1)(C)(iii) shall, if or to the extent that an al-
8 leged prohibited personnel practice is involved, allow the ar-
9 bitrator to order—

10 “(i) a stay of any personnel action in a manner
11 similar to the manner described in section 1221(c)
12 with respect to the Merit Systems Protection Board;
13 and

14 “(ii) the taking, by an agency, of any discipli-
15 nary action identified under section 1215(a)(3) that
16 is otherwise within the authority of such agency to
17 take.

18 “(B) Any employee who is the subject of any discipli-
19 nary action ordered under subparagraph (A)(ii) may ap-
20 peal such action to the same extent and in the same manner
21 as if the agency had taken the disciplinary action absent
22 arbitration.”.

23 (b) CHOICE OF REMEDIES PROVISION NOT INVOLVING
24 JUDICIAL REVIEW.—Section 7121 of title 5, United States
25 Code, is amended by adding at the end the following:

1 “(g)(1) This subsection applies with respect to a pro-
2 hibited personnel practice other than a prohibited personnel
3 practice to which subsection (d) applies.

4 “(2) An aggrieved employee affected by a prohibited
5 personnel practice described in paragraph (1) may elect not
6 more than one of the remedies described in paragraph (3)
7 with respect thereto. For purposes of the preceding sentence,
8 a determination as to whether a particular remedy has been
9 elected shall be made as set forth under paragraph (4).

10 “(3) The remedies described in this paragraph are as
11 follows:

12 “(A) An appeal to the Merit Systems Protection
13 Board under section 7701.

14 “(B) A negotiated grievance procedure under this
15 section.

16 “(C) Procedures for seeking corrective action
17 under subchapters II and III of chapter 12.

18 “(4) For the purpose of this subsection, a person shall
19 be considered to have elected—

20 “(A) the remedy described in paragraph (3)(A)
21 if such person has timely filed a notice of appeal
22 under the applicable appellate procedures;

23 “(B) the remedy described in paragraph (3)(B)
24 if such person has timely filed a grievance in writing,

1 *in accordance with the provisions of the parties' nego-*
2 *tiated procedure; or*

3 *“(C) the remedy described in paragraph (3)(C)*
4 *if such person has sought corrective action from the*
5 *Office of Special Counsel by making an allegation*
6 *under section 1214(a)(1).”.*

7 *(c) TECHNICAL AND CONFORMING AMENDMENTS.—*
8 *Section 7121(a)(1) of title 5, United States Code, is amend-*
9 *ed—*

10 *(1) by striking “(d) and (e)” and inserting “(d),*
11 *(e), and (g)”;* and

12 *(2) by inserting “administrative” after “exclu-*
13 *sive”.*

14 **SEC. 10. EXPENSES RELATED TO FEDERAL RETIREMENT AP-**
15 **PEALS.**

16 *Section 8348(a) of title 5, United States Code, is*
17 *amended—*

18 *(1) in paragraph (1)(B) by striking out “and”*
19 *at the end thereof;*

20 *(2) in paragraph (2) by striking out the period*
21 *and inserting in lieu thereof a semicolon and “and”;*
22 *and*

23 *(3) by adding at the end thereof the following*
24 *new paragraph:*

1 “(3) is made available, subject to such annual
2 limitation as the Congress may prescribe, for any ex-
3 penses incurred by the Merit Systems Protection
4 Board in the administration of appeals authorized
5 under sections 8347(d) and 8461(e) of this title.”.

6 **SEC. 11. ELECTION OF APPLICATION OF LAWS BY EMPLOY-**
7 **EES OF THE RESOLUTION TRUST CORPORA-**
8 **TION AND THRIFT DEPOSITOR PROTECTION**
9 **OVERSIGHT BOARD.**

10 (a) *ELECTION OF PROVISIONS OF TITLE 5, UNITED*
11 *STATES CODE.*—If an individual who believes he has been
12 discharged or discriminated against in violation of section
13 21a(q)(1) of the Federal Home Loan Bank Act (12 U.S.C.
14 1441a(q)(1)) seeks an administrative corrective action or
15 judicial remedy for such violation under the provisions of
16 chapters 12 and 23 of title 5, United States Code, the provi-
17 sions of section 21a(q) of such Act shall not apply to such
18 alleged violation.

19 (b) *ELECTION OF PROVISIONS OF FEDERAL HOME*
20 *LOAN BANK ACT.*—If an individual files a civil action
21 under section 21a(q)(2) of the Federal Home Loan Bank
22 Act (12 U.S.C. 1441a(q)(2)), the provisions of chapters 12
23 and 23 of title 5, United States Code, shall not apply to
24 any alleged violation of section 21a(q)(1) of such Act.

1 **SEC. 12. IMPLEMENTATION.**

2 (a) *POLICY STATEMENT.*—No later than 6 months
3 after the date of enactment of this Act, the Special Counsel
4 shall issue a policy statement regarding the implementation
5 of the Whistleblower Protection Act of 1989. Such policy
6 statement shall be made available to each person alleging
7 a prohibited personnel practice described under section
8 2302(b)(8) of title 5, United States Code, and shall include
9 detailed guidelines identifying specific categories of infor-
10 mation that may (or may not) be communicated to agency
11 officials for an investigative purpose, or for the purpose of
12 obtaining corrective action under section 1214 of title 5,
13 United States Code, or disciplinary action under section
14 1215 of such title, the circumstances under which such in-
15 formation is likely to be disclosed, and whether or not the
16 consent of any person is required in advance of any such
17 communication.

18 (b) *TERMINATION STATEMENT.*—The Special Counsel
19 shall include in any letter terminating an investigation
20 under section 1214(a)(2) of title 5, United States Code, the
21 name and telephone number of an employee of the Special
22 Counsel who is available to respond to reasonable questions
23 from the person regarding the investigation or review con-
24 ducted by the Special Counsel, the relevant facts ascertained
25 by the Special Counsel, and the law applicable to the per-
26 son's allegations.

1 **SEC. 13. ANNUAL SURVEY OF INDIVIDUALS SEEKING AS-**
2 **SISTANCE.**

3 (a) *IN GENERAL.*—The Office of Special Counsel shall,
4 after consulting with the Office of Policy and Evaluation
5 of the Merit Systems Protection Board, conduct an annual
6 survey of all individuals who contact the Office of Special
7 Counsel for assistance. The survey shall—

8 (1) determine if the individual seeking assistance
9 was fully apprised of their rights;

10 (2) determine whether the individual was suc-
11 cessful either at the Office of Special Counsel or the
12 Merit Systems Protection Board; and

13 (3) determine if the individual, whether success-
14 ful or not, was satisfied with the treatment received
15 from the Office of Special Counsel.

16 (b) *REPORT.*—The results of the survey conducted
17 under subsection (a) shall be published in the annual report
18 of the Office of Special Counsel.

19 **SEC. 14. EFFECTIVE DATE.**

20 The provisions of this Act and the amendments made
21 by this Act shall be effective on and after the date of the
22 enactment of this Act.

Attest:

Secretary.

HR 2970 EAS—2

HR 2970 EAS—3