S. Hrg. 108–590

NOMINATIONS OF NEIL McPHIE AND BARBARA J. SAPIN

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON THE

NOMINATIONS OF NEIL McPHIE, TO BE CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, AND BARBARA J. SAPIN, TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD

JULY 19, 2004

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

95–502 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON GOVERNMENTAL AFFAIRS

SUSAN M. COLLINS, Maine, *Chairman*

TED STEVENS, Alaska
GEORGE V. VOINOVICH, Ohio
NORM COLEMAN, Minnesota
ARLEN SPECTER, Pennsylvania
ROBERT F. BENNETT, Utah
PETER G. FITZGERALD, Illinois
JOHN E. SUNUNU, New Hampshire
RICHARD C. SHELBY, Alabama

JOSEPH I. LIEBERMAN, Connecticut
CARL LEVIN, Michigan
DANIEL K. AKAKA, Hawaii
RICHARD J. DURBIN, Illinois
THOMAS R. CARPER, Deleware
MARK DAYTON, Minnesota
FRANK LAUTENBERG, New Jersey
MARK PRYOR, Arkansas

MICHAEL D. BOPP, *Staff Director and Chief Counsel*
JOHANNA L. HARDY, *Senior Counsel*
MICHAEL J. RUSSELL, *Staff Director, Financial Management, the Budget, and International Security Subcommittee*
JOYCE A. RECHTSCHAFFEN, *Minority Staff Director and Counsel*
NANCI E. LANGLEY, *Minority Deputy Staff Director, Financial Management, the Budget, and International Security Subcommittee*
JENNIFER E. HAMILTON, *Minority Research Assistant*
AMY B. NEWHOUSE, *Chief Clerk*

CONTENTS

	Page
Opening statements:	
Senator Fitzgerald	1

WITNESSES

MONDAY, JULY 19, 2004

Neil McPhie, to be Chairman, Merit Systems Protection Board	3
Barbara J. Sapin, to be a Member, Merit Systems Protection Board	4

ALPHABETICAL LIST OF WITNESSES

McPhie, Neil:	
Testimony	3
Prepared statement	11
Biographical and professional information requested of nominees	13
Pre-hearing questionnaire and responses submitted for the Record for the nomination hearing held May 15, 2003 of Mr. McPhie to be a Member	23
Pre-hearing questionnaire and responses submitted for the Record from Senator Akaka for the nomination hearing held May 15, 2003 for the nomination of Mr. McPhie to be a Member	37
Pre-hearing questionnaire and responses submitted for the Record for the nomination of Mr. McPhie to be Chairman	41
Sapin, Barbara J.:	
Testimony	4
Prepared statement	78
Biographical and professional information requested of nominees	79
Pre-hearing questionnaire and responses for the Record	86

NOMINATIONS OF NEIL McPHIE AND BARBARA J. SAPIN

MONDAY, JULY 19, 2004

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:34 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Peter G. Fitzgerald, presiding.

Present: Senator Fitzgerald.

OPENING STATEMENT OF SENATOR FITZGERALD

Senator FITZGERALD. This Committee will come to order. Today, the Governmental Affairs Committee will consider the nominations of Neil McPhie to be Chairman of the Merit Systems Protection Board and Barbara J. Sapin to be a member of the Merit Systems Protection Board.

I would like to welcome Mr. McPhie back before this Committee. I was just recollecting his last appearance before this Committee was in May 2003, I believe, and it was over in the Capitol Building, and I was in between stacked votes. I remember that distinctly. And welcome, Ms. Sapin, before this Committee for the first time. The President has selected you for important positions in our government, and I congratulate you both of your nominations.

Mr. McPhie and Ms. Sapin have filed responses to the Committee's biographical and financial questionnaire, answered prehearing questions submitted by the Committee, and had their financial statements reviewed by the Office of Government Ethics. Without objection, this information will be made part of the hearing record, with the exception of the financial data, which are on file and available for public inspection in the Committee offices.

In addition, I have personally reviewed the FBI background investigation reports on each of the nominees.

Neil McPhie was nominated by President Bush to be a member of the Merit Systems Protection Board on July 9, 2002, and was renominated on January 7, 2003, when he began serving as senior attorney to the Board. The President appointed Mr. McPhie as a member of the Board on April 23, 2003. Prior to joining the Board, Mr. McPhie served as a trial and appellate attorney for the Equal Employment Opportunity Commission, as an Assistant Attorney General for the Commonwealth of Virginia, and as the Executive Director of the Virginia Department of Employment Dispute Resolution. Mr. McPhie earned his J.D. degree from the Georgetown

University Law Center and a B.A. degree in economics from Howard University.

Barbara Sapin currently serves as general counsel to the National Abortion Federation in Washington, DC, a position she has held since April 2002. Ms. Sapin previously served on the Merit Systems Protection Board as its Vice Chairman from January to December 2001. She also served as general counsel and labor counsel for the American Nurses Association and as an attorney with the National Labor Relations Board. Ms. Sapin earned her J.D. from Catholic University School of Law and her B.A. in psychology from Boston University.

The Merit Systems Protection Board serves as the guardian of Federal merit systems principles. The Board was created in 1978 as part of a comprehensive reform of the civil service, including statutory protections for Federal employees to encourage disclosure of waste, fraud, abuse, and illegal activity. In this area, the Board plays a critical role in protecting the rights of whistleblowers.

Over the years, whistleblowers have presented some of the most compelling evidence of government abuse and fiscal mismanagement, saving the taxpayers hundreds of millions of dollars. I am pleased to be an original cosponsor of S. 2628, the Federal Employee Protection of Disclosures Act, that Senator Akaka and Chairman Collins introduced earlier this month. This bill would strengthen the current whistleblower laws and provide added protection to those Federal employees who expose waste, fraud, and abuse. I look forward to working with Senator Akaka and our Committee colleagues on this important legislative initiative.

At this point, I would like to swear in the nominees. Our Committee rules require that all witnesses at nomination hearings give their testimony under oath, and so at this time, I would ask both of you to please stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MCPHIE. I do.

Ms. SAPIN. I do.

Senator FITZGERALD. Thank you. You may be seated.

Before we begin with opening statements, I would ask whether either of you would like to introduce any special guests who are here today. Mr. McPhie?

Mr. MCPHIE. If I may defer to Ms. Sapin?

Senator FITZGERALD. OK. Ms. Sapin, do you have some special guests you would like to introduce?

Ms. SAPIN. I would like to introduce my family: My father, George Sapin, who flew in from Cleveland today; my sister, Linda Sapin; and my nephew, Sean Peacock. I would also like to recognize my mother, Shirley Sapin, who was unable to make the trip to Washington.

Senator FITZGERALD. Well, that is wonderful.

Ms. SAPIN. And I also want to thank all my friends who came today. They are sitting behind me.

Senator FITZGERALD. Well, that is terrific. It is great to have some supporters here, and to the family, congratulations.

How old is your nephew?

Ms. SAPIN. He is 12.

Senator FITZGERALD. That is my son's age. Are you going into the seventh grade?

Ms. SAPIN. Yes, he is.

Senator FITZGERALD. Oh, that is great. Good to see you here.

Mr. McPhie.

Mr. MCPHIE. Yes, sir. I want to introduce my wife, Regina, she is right here, and my two kids who were here the last time but could not be here this time.

Senator FITZGERALD. Yes.

Mr. MCPHIE. But I told them I would tell them everything that happens.

Senator FITZGERALD. Oh, that is great, yes.

Mr. MCPHIE. That is Abigail and Sidney. And there are folks from the agency, MSPB, that I appreciate took the time out, and let me, if I may, introduce them, please.

Senator FITZGERALD. Absolutely.

Mr. MCPHIE. There is Bill Atkinson. He is my Chief of Staff. Tracey Watkins, she is my senior Adviser. And there is Rosalyn Wilcots, who is the Legislative Counsel at MSPB. And then there is our General Counsel, Marty Schneider. They helped prepare me so I can look good in front of this——

Senator FITZGERALD. And answer my tough questions.

Mr. MCPHIE. Yes, sir. And then there is Rachel Leonard, who is an attorney at the MSPB. Oh, yes, and there is my good friend, Will Cardoza, who is also an attorney at the MSPB. Will volunteered to be my photographer today.

Senator FITZGERALD. Where is Will? There is Will. OK. That is terrific. Anybody else?

Mr. MCPHIE. I think I have covered them all.

Senator FITZGERALD. Well, that is great. It is good to see that you both have some family and supporters here.

At this point, I would like you to go ahead and give your introductory statements, and, Mr. McPhie, we would begin with you. In the interest of time, we ask that you limit your statements to no more than 10 minutes, and we will include your full statement in the hearing record.

So, Mr. McPhie, you may proceed.

TESTIMONY OF NEIL McPHIE,[1] TO BE CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Mr. MCPHIE. I will not read the statement, which is already in the record, but I will just simply highlight some important points.

I thank you and I thank the Committee, and the staff, for making this hearing possible. I want to thank the President for appointing me to this important position. And I want to thank MSPB for being the decent agency that it is.

---

[1] The prepared statement of Mr. McPhie appears in the Appendix on page 11.

Biographical and professional information appears in the Appendix on page 13.

Pre-hearing questionnaire and responses submitted for the Record for the nomination hearing held May 15, 2003 of Mr. McPhie to be a Member appears in the Appendix on page 23.

Pre-hearing questionnaire and responses submitted for the Record from Senator Akaka for the nomination hearing held May 15, 2003 for the nomination of Mr. McPhie to be a Member appears in the Appendix on page 37.

Pre-hearing questionnaire and responses submitted for the Record for the nomination of Mr. McPhie to be Chairman appears in the Appendix on page 41.

The agency has not had a full complement of Board members for a while now, and they deserve a full complement. I do believe that if it is the Senate's wish to confirm Ms. Sapin and myself—and I hope it is—it would provide the agency with two persons who will be there for some time and, therefore, begin the task of long-term planning.

It is important, I believe, because the MSPB and what it does is more important today, I would venture, than when it was created in 1978. Today, we are in the midst of change in the way government operates. We have DOD change; we have Department of Homeland Security changes. Those two agencies account for at least 20 percent of the MSPB case work.

Some have begun to question the role of the MSPB, and I would assure you during my term I will be an ardent defender of the importance of this agency. It is a small agency, but it does a really good job. And it is real important for Federal employees to have such an agency at this point.

So I am grateful to be here. I am happy, but I am more happy that MSPB's interest is finally being taken care of.

There are some other things that I have highlighted, and I will just stand by what I said in the opening statement, and without further ado, I will pass the mike over to my colleague.

Oh, one other thing if I may. I am sorry. I want to tell you that I am delighted to work with Ms. Sapin. When I heard of her nomination, we met. We had a delightful lunch. We talked. We shared views and so on. And I don't know that I could have found a better person to conduct the important work of the Board. I am the Chairman, but I am also inclusive in my management style, and I am looking forward to having Barbara Sapin's views be represented throughout the MSPB. Thank you very much, sir.

Senator FITZGERALD. Thank you. Ms. Sapin.

TESTIMONY OF BARBARA J. SAPIN,[1] TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD

Ms. SAPIN. Thank you very much. That is very nice.

To save the Committee time, I have submitted a prepared statement that I hope can be placed into the record.

Senator FITZGERALD. Absolutely.

Ms. SAPIN. Thank you. I really want to say how honored I am to have been nominated as a member of the Merit Systems Protection Board and to be appearing before this Committee today. As you know, it was my privilege to serve as the Vice Chairman of the MSPB during 2001 and work with the dedicated staff of that agency. If I am confirmed, I will do everything that I can to honor their accomplishments by committing to work with Chairman McPhie and Board Member Marshall to promote the goals of the agency.

I just want to also echo the sentiments of Mr. McPhie about the agency and the experience that I had there. It is one of the finest agencies—I have worked in several agencies in the government, and it is one of the finest that I have ever worked with.

[1] The prepared statement of Ms. Sapin appears in the Appendix on page 78.
Biographical and professional information appears in the Appendix on page 79.
Pre-hearing questionnaire and responses for the Record appears in the Appendix on page 86.

I welcome the opportunity to serve as a member of the Merit Systems Protection Board and look forward to the challenges presented by that position. Thank you very much.

Senator FITZGERALD. Thank you.

We are going to start the first round of questions for the nominees by asking you questions jointly, and if you could both respond, these are standard questions.

Is there anything that you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. MCPHIE. No, sir.

Ms. SAPIN. No, sir, there is not.

Senator FITZGERALD. Do you know of anything, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. MCPHIE. No, sir.

Ms. SAPIN. No, Senator.

Senator FITZGERALD. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress, if you are confirmed?

Mr. MCPHIE. Yes, sir.

Ms. SAPIN. Yes, I do.

Senator FITZGERALD. You are sure about that? Sometimes they change their mind when they get confirmed in the administration. [Laughter.]

Well, that is good. I appreciate that. Those questions are standard, and we ask all witnesses about that.

Mr. McPhie, what is your view of the role of Chairman of the MSPB? And how have your experiences as Acting Chairman and Board member influenced your view?

Mr. MCPHIE. Well, as the chairperson, I, under the statute, am the chief operating officer, the CEO. As I indicated earlier, I have an inclusive style of management. Therefore, I want Member Sapin and Member Marshall, although her term is winding down, to be involved in the operational decisions facing the agency.

Being at the Board, first as a senior attorney, then as a member, then as an Acting Chair, has really informed my view on the importance of the agency and some of the personnel involved. I have had some tough calls to make already. We have had a reorganization. We have brought on board a new computer system that sort of dragged for some time—finally it is operational—and so on.

Senator FITZGERALD. What is the total number of personnel in the MSPB?

Mr. MCPHIE. Two hundred and thirty-seven, thereabouts.

Senator FITZGERALD. Do you know what the total budget is?

Mr. MCPHIE. Between $35 to $37 million, and we have a regional office structure, we closed a couple of offices. I made it a personal decision to go visit those offices and talk to the affected employees. I thought that would be good.

Senator FITZGERALD. I guess we are having some technical difficulties here ourselves.

You closed the office in Boston. And where was the other one that you closed?

Mr. MCPHIE. In Seattle. And we shifted cases accordingly, so it was a seamless changeover from the parties' perspective.

Senator FITZGERALD. And why did you close those offices?

Mr. MCPHIE. To realign staff with where the work was. Over time, the Federal workforce had shifted.

Senator FITZGERALD. Where did you move the employees? Or where did you add more?

Mr. MCPHIE. We gave every employee the option of moving, and most did. I think we had maybe two folks or three folks at most who decided to retire at that point in time. Some folks went from Seattle to San Francisco and so on. We had one person come to headquarters in Washington, DC, where she currently is.

But, obviously, there were some anxious moments from a staff standpoint. We could not keep this thing hanging over folks' heads for too long, so we went out, we talked, we engaged the union, and we came up with decisions that were win-win.

We still have the issue down the road some of what impact, if any, changes with DOD's and DHS' final regulations would affect us, but we are better positioned today to absorb that impact.

Senator FITZGERALD. How many people do you have in Chicago? Do you know off the top of your head?

Mr. MCPHIE. In Chicago? I am told we have about nine administrative judges, but I couldn't tell you the total office.

Senator FITZGERALD. OK.

Mr. MCPHIE. Chicago is a thriving office for us. It is a very good office.

Senator FITZGERALD. You do not plan to close Chicago?

Mr. MCPHIE. No, I don't.

Senator FITZGERALD. That is good. OK.

Mr. MCPHIE. In fact, I am heading out there soon to give a speech at a law school, at Kent.

Senator FITZGERALD. That is great.

Mr. MCPHIE. So back to your original question, those are the kinds of almost baptisms by fire I have undergone since I have been at the Board. And I think I am better informed for it.

Senator FITZGERALD. Ms. Sapin, what is your view of the role of an MSPB Board member? And how has your experience in the past as Vice Chairman of the Board affected your view of that role?

Ms. SAPIN. Well, clearly, the role is to be fair in adjudicating and to do it within the law and to uphold the merit system principles.

I also feel that it is also important to work closely with staff and other Board members, and I think—I have firsthand knowledge from my experience as Vice Chairman. I do have firsthand knowledge of the Board's case law, the jurisdiction and procedures, and a valuable insight into how the MSPB functions as an impartial adjudicatory agency.

Also in my experience there, I gained a keen appreciation of staff and the collegial relationships among Board members that I think are so important in the smooth functioning of the agency.

Senator FITZGERALD. Now, does each Board member have his or her own personal staff?

Ms. SAPIN. Yes. When I was there, I had a chief counsel and two attorneys and a confidential assistant. I don't know what the numbers are at this point.

Senator FITZGERALD. So what is the budget for each Board member? Would either of you know that?

Mr. MCPHIE. Not off the top of my head. But there is a budget. I am aware of that.

Senator FITZGERALD. Do you know what the budget is?

Mr. MCPHIE. Let me correct my statement. The budget for the staff is not kept separately. There is a separate budget which I was alluding to, but that is for travel, that type of thing. Most Board members, including myself, rely a lot on MSPB's regular attorneys who are assigned on detail. In fact, Ms. Leonard, whom I introduced early on, is such a person.

Senator FITZGERALD. OK.

Ms. SAPIN. And one of my attorneys was on detail from the general counsel's office, and we often worked very closely with the attorneys in the Office of Appeals Counsel to help us with the cases as well.

Senator FITZGERALD. So do the individual Board members' staffs just report to that Board member that they are assigned to? Or are they—I mean, does your staff work for you, or are they loyal to the overall agency?

Ms. SAPIN. Well, they worked in my office, and, again, I don't know whether things have changed.

Senator FITZGERALD. OK.

Ms. SAPIN. They worked in my office but were a part of the discussions that went on and the case handling discussions that went on throughout the agency.

Senator FITZGERALD. OK.

Mr. MCPHIE. Well, they are certainly a part of the deliberative process that each Board member goes through in arriving at some sort of a decision.

Senator FITZGERALD. Right.

Mr. MCPHIE. Therefore, you would want and insist, in fact, that that deliberative process be kept confidential.

Senator FITZGERALD. Right.

Mr. MCPHIE. Otherwise, you may, in fact, be accused of being influenced in some fashion in how you vote a particular case. So I rely on these folk to give me their unvarnished view of what the law is and what the outcome should be.

Senator FITZGERALD. In most cases, you are just applying facts and the law, almost in an antiseptic way, almost like a judge would.

Mr. MCPHIE. Yes, sir.

Ms. SAPIN. Yes.

Senator FITZGERALD. Senator Akaka, who is our Ranking Democratic Member of the Subcommittee, unfortunately could not be with us, but he has some questions that he has asked me to ask on his behalf. And if you would be kind enough to respond to this question, Mr. McPhie. The Departments of Defense and Homeland Security are both required to consult with the Board in designing any new appeals system. Could you please describe for us the consultative process you have engaged in with both DOD and DHS? And has this role been helpful in safeguarding the merit system's principles? Or do you believe the role of the MSPB should be

strengthened if similar personnel flexibility is granted in the future?

Mr. MCPHIE. Well, the statute as written contemplates a consultative role for MSPB. The same statute contemplates a much more hands-on design role for OPM and for DOD and for DHS. So there is a difference.

I was always of the personal view that consulting is most effective when you do it early. We got into the consulting business at the tail end of the DHS process. I was not the Chairperson then. And they had submitted a set of draft regulations.

Now, once it began, there clearly was consulting. We had a team of senior people—I think the general counsel was on that team, who is here—and others, very experienced MSPB folks. And we tried then to shape the final product around our views.

Now, quite clearly, we had no veto power. The regulations, there are things in there that we thought were quite good, and there are things, if we had to do it ourselves, we would have done differently. But that is our role.

With DOD now, we formulated a similar group, and by this time I became then the Acting Chairperson, and I sort of became very proactive in seeking out a role for MSPB. And I talked to folks at DOD and at OPM, and there was a role created for MSPB. We had the same kind of team. DOD folks came to meet us rather early. We had working teams, and then there came a point in time when they asked us to sort of suspend what we are doing until they can put their arms around some other issues that frankly were not the appeal issues.

We have clearly tried to make the case that MSPB is a viable organization that should be involved in any employee appeals system, no matter what. And while that decision has not been made, I anticipate having numerous opportunities to make that case myself and at the highest levels of government, if I have to.

Senator FITZGERALD. Ms. Sapin, this is a question that Senator Akaka asked me to ask you. As you know, the Department of Homeland Security issued proposed regulations for its new human resources system, including its appeal system. However, this system would treat DHS employees differently than employees at other Federal agencies in matters regarding time lines for appeals and burdens of proof.

What impact do you believe different procedures and standards among different agencies have on the Federal Government as a whole?

Ms. SAPIN. I think that there is a concern or I have a concern that the same kinds of issues may be treated differently among employees in different agencies. But I believe that the MSPB is very adept at working with the different standards of proof, providing a fair, objective adjudication of the appeals. And its my understanding that they have had experience with different levels, different burdens of proof and also working with different kinds of proofs.

And, so I think that there is also a concern, that without proper resources and because there are some cases with abbreviated statutory time limits, there may be some cases that don't move as quickly because of the prioritization of the DHS cases.

But I am very confident in the ability of the Board to handle that. I have also noted that the Board is working very hard, and has worked, to ease the time that cases sit at the Board and to really work very hard at case processing. So I think that is going to be and I have no doubt that they would be able to handle all of the cases that come in.

Senator FITZGERALD. OK. And this is also another question from Senator Akaka, also for Ms. Sapin. Senator Akaka strongly believes that employees should be fully informed of their rights and protections. While individual agencies and the Office of Special Counsel have statutory responsibility in this area, Senator Akaka is interested in knowing how you believe MSPB could help to educate employees about the steps they can take if they have been retaliated or discriminated against.

Ms. SAPIN. I believe that the MSPB has many opportunities to inform employees and managers of the MSPB's procedures. I know that there are videos that are available. I am aware of the brochures.

I also believe that in the offices, in the regional offices, there are some, where there is some sort of coordination to provide employees with additional assistance if it is needed under certain circumstances.

I think that there are ways, again, given the resources of the organization, as I had recommended or suggested that there may be an ombudsman or an information person in the offices in the regions, and that, of course, will depend upon the resources. But I think that could go a long way in working with the Federal population to understand their rights under the MSPB.

Senator FITZGERALD. Mr. McPhie, I would like to go into case processing. Could you please provide the Committee with a status report of the Board's current caseload and any backlog you may have? Do you have any of that information available with you today?

Mr. MCPHIE. I don't have the statistics that would give you a total spread, but let me tell you what I have. This is our crunch period. This is our time when it is tough at the MSPB. Why? Because we are trying to meet our GPRA performance goals. Those are cases, we call them target cases. Those are cases that are at least 300 days or will be 300 days old by the end of the fiscal year. And the entire agency's focus at this point in time is getting those cases out of the door.

That tends to be a challenge for the MSPB year-in and year-out. I have talked to department heads trying to understand, and we have initiated some investigation to figure out where are the bottlenecks. And if so, what can we do about them?

You talk to some folks, they tell you, well, it is just simply a resource issue. You get more people, you get things done quicker. I don't know that resource just totally explains it. There are some other issues, too, that the MSPB has to deal with.

Senator FITZGERALD. Do you know how many cases you handle annually, on average?

Mr. MCPHIE. About 8,000, isn't it?

It is 8,416, on average.

Senator FITZGERALD. Has that been going up in recent years?

Mr. MCPHIE. No. In recent years, they have kept constant.

Senator FITZGERALD. OK.

Mr. MCPHIE. It is about 7,000 in the field offices and about 1,000 at headquarters, give or take.

Senator FITZGERALD. And do you know at any one time how many cases over 300 days old you have?

Mr. MCPHIE. Cases over 300 days old? Right now, it is about 250 cases that must leave the MSPB between now and the end of the fiscal year.

Senator FITZGERALD. The vast majority of that 8,000 cases that you get in a year are dealt with within 300 days.

Are you aware of any trends in terms of whether the Federal circuit court is overturning Board decisions more often than they used to?

Mr. MCPHIE. No. I can tell you with a certain amount of pride that we are maintaining a very high affirmance rate. I will also tell you—and I had this conversation with Federal circuit judges recently——

Senator FITZGERALD. When you say a very high affirmance rate, would you—how high——

Mr. MCPHIE. Yes, sir, that is 96, 97 percent, or 94 percent.

Senator FITZGERALD. OK. And has that remained pretty constant or has that——

Mr. MCPHIE. That has remained pretty constant.

Senator FITZGERALD. OK.

Mr. MCPHIE. When we get the product in front of them, we are obviously doing a good job. That is not the issue for us. The number of cases that they are seeing from MSPB has declined. It is now 20 percent of the court's docket.

But the way these cases—these time frames are created, cases come into a judge out in the field, and they are usually in and out of those field offices within about 90 days. I mean, it is real quick. These guys are really good. They are the real heroes at MSPB, as far as I am concerned.

Then the case is appealed up to Washington, DC. That is where we have to do better. Cases, frankly, spend too long a time at headquarters.

Senator FITZGERALD. Now, both of you are committed, I presume, to trying to work down any backlogs at all times and keep everything and everybody moving at the MSPB?

Ms. SAPIN. Absolutely.

Mr. MCPHIE. Yes, sir.

Senator FITZGERALD. Well, I think that about does it for the Committee's questions today. I would like to keep the hearing record open for any individual Senators or additional statements or questions from Senators through the close of business today. And that is pretty much it.

Thank you both for being here, and thank you and congratulations to your families and friends.

Ms. SAPIN. Thank you.

Mr. MCPHIE. Thank you, sir.

If there is no further business to come before the Committee, this hearing is adjourned.

[Whereupon, at 3:09 p.m., the Committee was adjourned.]

APPENDIX

U.S. Senate Committee on Governmental Affairs
Confirmation Hearing
Statement for the Record
Submitted by
Neil A. G. McPhie, Nominee
to be
Chairman of the U.S. Merit Systems Protection Board

July 19, 2004

Good afternoon, Mr. Chairman and members of the Committee. It is an honor and a privilege to appear before this panel as I seek confirmation of my nomination to serve as Chairman of the U.S. Merit Systems Protection Board (MSPB). The President's elevation of my nomination from Member to Chairman reflects a level of confidence in me and my contributions to the Federal government that both humbles me and challenges me to be of even greater service. I am pleased to have had the opportunity to serve as a Board Member since April, 2003, and to serve as the Board's Acting Chairman since the President designated me as Vice Chairman on December 11, 2003.

While serving as Acting Chairman, I have had to make sometimes difficult decisions. For example, very shortly after becoming Acting Chairman, I had to decide how best to restructure the MSPB. While the prior Chairman had studied and developed a plan for restructuring the Board, no final decision had been made on that plan before I took office as the Acting Chairman. Deciding to implement the restructuring plan was especially difficult because the original plan called for closing four of the Board's field offices and, thus, had the potential to significantly impact the personnel of those offices. However, after carefully reviewing the supporting data, I decided that it was necessary to close only two of the Board offices, Seattle and Boston, and determined that the Board was able to offer every employee in the affected offices jobs in other remaining Board offices. While the decision to close these two offices was difficult, these changes were in the best interests of the agency and will result in more cost effective and efficient operations.

Additionally, after becoming Acting Chairman, I decided to address the fact that the final implementation of a new agency-wide case management system was years overdue. While the system was implemented successfully, I was concerned with the systemic issues that led to the system being overdue and over budget. Accordingly, I authorized an external review of the Board's computer resources division and of the MSPB's computer systems. The Board is now in the process of implementing some of the recommendations from that review, including hiring a full-time Chief Information Officer. The CIO's responsibilities, which were previously shared by the MSPB Chief of Staff and the computer resources division Director require a CIO's full-time oversight.

The MSPB has recently implemented additional enhancements to its operations. These enhancements include: the implementation of an e-Appeal program where

appellants may file appeals online (the Board anticipates that it will receive more than one thousand appeals filed electronically under this new program before the end of the fiscal year), the continuation of the mediation appeals program, and the redesign and upgrading of the Board's website.

The Board continues to review methods to address its case processing systems. I played a significant role in the agency's work toward the reduction in the backlog of cases that resulted from the period of time when the Board had only one member and was, therefore, unable to issue decisions. But, it is my goal to work toward reducing this backlog further and to process all cases more expeditiously. Toward this end, I plan to initiate a study of the major factors resulting in case processing delays. The Board will use this information to develop creative mechanisms for eliminating barriers to more timely adjudication of cases. Additionally, I will work to ensure that the Board has an effective case docketing and tracking system and will hold Board managers and reviewing attorneys accountable for expediting cases for Board review. Finally, I will encourage the Board to adopt a more stringent case processing time standard for Board members.

There have been several significant developments affecting the Board's adjudicatory responsibilities since I last appeared before this panel. Two related developments resulted from statutes giving the Department of Homeland Security (DHS) and the Department of Defense (DoD) authority to establish their own personnel systems and employee appeals processes. These statutes reflect the new direction of Federal personnel management, which favors enhanced flexibilities for hiring, compensating and promoting high performing employees. Additionally, these innovations permit Federal managers to address more expeditiously the disciplinary issues problem employees raise. I am pleased to report that the Board is fulfilling its responsibilities, as required under these statutes, to consult with DHS and DoD as these agencies develop regulations to govern the employee appeals process in their new personnel systems. The MSPB's mandate is to ensure that any new system affords due process to the employees of these agencies. In fulfilling this role, the MSPB met regularly with DHS, DoD and OPM, reviewed relevant material, provided necessary information, and consulted on the proposed regulations. The Board remains available to DHS and DoD to provide further consultation as these agencies work to finalize their regulations.

If confirmed, I look forward to meeting the challenges facing the Board as Chairman and working with a full complement of Board members. I am particularly pleased to have the opportunity to work with former Board Vice Chairman Barbara J. Sapin. Since her redesignation to the Board, Barbara and I have had the opportunity to meet with one another and talk about our experience as Board members. I look forward to working with Barbara on a full Board and have complete confidence that we can work together to advance the interests of the Federal Government and its employees.

Together, the Board and its agency staff will work to continue the Board's tradition of outstanding public service. The Board will not rest on the laurels of past achievements but, as I briefly described, will work diligently to enhance the adjudicatory and studies operations of the agency in light of the changing national priorities.

Again, thank you for the opportunity to be with you and I am happy to answer any questions that the members of the panel may have.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.)
   Neil Anthony Gordon McPhie
2. **Position to which nominated:**
   Member, Merit Systems Protection Board
3. **Date of nomination:**
   July 9, 2002
4. **Address:** (List current place of residence and office addresses.)
   Residence:
   Office: MSPB, 1615 M Street, N.W., Washington, D.C. 20419
5. **Date and place of birth:**
   June 13, 1945, Port of Spain, Trinidad, West Indies
6. **Marital status:** (Include maiden name of wife or husband's name.)
   Married to Regina Chow McPhie whose maiden name is Regina Lee Chow
7. **Names and ages of children:**

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
   Queen's Royal College (Trinidad) 1957 - 1962, Senior Cambridge Certificate 1962
   Howard University 1970 - 1973, B.A., Magna Cum Laude, 5/12/73
   Georgetown University Law Center, Juris Doctor 5/23/76
9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)
   1970 - 1976: Worked at various jobs part-time during the school year and full time during the summer months at Arent, Fox. Kintner, Plotkin and Kahn, 1815 H St., N.W. Wash., D.C. (Xerox Room night supervisor in large law firm); Office of Law, Prince Georges County, Main Street, Upper Marlboro, Md. Law clerk for County Attorney's Office. Duties included legal research, drafting pleadings and briefs for assistant county attorneys; Legal intern, Office of Attorney General, Richmond, Va. Legal research and writing.

   1976 - 1982: Equal Employment Opportunity Commission, 2401 E. St., N.W., Washington, D.C. Attorney in the Appellate and Legal Counsel Divisions. Duties included representing the Commission in employment cases before federal trial and appellate courts and administrative tribunals, amicus curiae participation in employment cases involving private parties, drafting and responding to employment law questions posed by private persons.

   1982 - 1998: Office of the Attorney General of Virginia, 900 East Main Street, Richmond, Va. 23219.
   Assistant Attorney General (1982 - 1990) Tried jury and non-jury cases defending state agencies and officials in state and federal courts. Tried cases under the Virginia Tort Claims Act, defended judges from extraordinary writs of prohibition and mandamus, the state from significant damage awards in breach of contract claims involving building construction projects, and represented the Virginia State Bar in disciplinary cases.
   Senior Assistant Attorney General (1990-1998) As Chief of the Employment Law Section, supervised a team of attorneys, paralegals and secretaries while maintaining an independent case load.

   1998 - 2002: Executive Director, Virginia Department of Employment Dispute Resolution, One Capitol Square, 830 East Main Street, Suite 400, Richmond, Virginia.
   Public Service Management
   Directed implementation of EDR's statewide grievance, mediation, training and consultation programs for

state employees. In the 2000 General Assembly, led a successful effort to obtain General Assembly approval for legislative reform involving employees' grievance rights to include a right of appeal, attorneys' fees and costs, publication of grievance decisions, and utilization of full-time EDR Hearing Officers. Oversaw the internal management of EDR to include the strategic planning process, staffing and budget. Initiated significant improvements to EDR's personnel and operating policies while maintaining employee support and enthusiasm. Improved EDR's organizational infrastructure and realigned resources to achieve planning goals. Developed and implemented effective budget tracking processes. Maintained employee morale and programs focus in the face of declining state revenues and budget cuts. Developed and implemented two new self-funded programs.

Administrative Adjudicator

Issued letter rulings in grievance cases. Supervised the work of hearing officers who hear grievance cases and render written opinions. Grievance cases cover a broad range of issues from compensation, performance, workplace harassment, discrimination, retaliation and compliance with statewide personnel policies.

April 2002 - November 2002: Senior Assistant Attorney General. As Chief of the Finance and Government Section, I supervised a team of lawyers and support personnel who represented personnel, financial, gaming and other agency clients.

January 2003 - Present: Senior Attorney, Merit Systems Protection Board. Review proposed case decisions and other tasks as directed by the Chairman.

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

As stated above

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

None

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Bar Admissions

Virginia, District of Columbia, ~~New York, Iowa, United States Supreme Court~~

United States Court of Appeals for the 4th, 7th, 8th, 9th and 10th Circuits

United States District Court for the District of Columbia, and the Eastern and Western Districts of Virginia.

Bar Committees

Public Liaison, Virginia Bar Association, Labor and Employment Section (1998 to 2001)

Member, E.D. Va. Advisory Group, Civil Justice Reform Act of 1990 (1991-1995)

Chair, Virginia State Bar Special Committee to Reduce Litigation Costs and Delays (1989-1991)

Vice Chair, ABA Government Lawyers Committee, and General Practice Section (1990-1991)

Vice Chair, ABA Minority Lawyers Committee, General Practice Section (1990-1991)

Vice Chair, ABA Litigation Committee, General Practice Section (1989-1990)

Member, ABA Steering Committee, Construction Management, Design/Build (1988-1990)

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

None

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years.

2003	None	
2002	Republican National Committee (RNC)	50
	Black Republican Summit	25
	RNC	100
	Cantor for Congress	100
2001	Republican Party of Virginia	150
	Virginians for Blacks in Government(VBIG)	100
	Richmond Republican Committee	35
	Virginians for Jerry Kilgore	50
	Virginians for Jerry Kilgore	25
	VBIG	25
	Friends of Jerry Kilgore	150
2000	Republican Party of Virginia	165
	Cantor for Congress	50
	Steve Martin for Congress	50
	Hedgepeth for Council	25
1999	Republican Party of Virginia	55
	Richmond Republican Committee	35
1998	None	

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.
Academic Scholarship Howard University
Phi Beta Kappa Howard University
International Honor Society in Economics
Special Achievement Award at EEOC
Distinguished Service Award Office of the Attorney General of Virginia
Meritorious Service Award Office of the Attorney General of Virginia

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.
Speeches and Publications
Speaker/Moderator, "Summary of Recent Federal and State Cases Involving Employment and Labor Law Issues," Virginia Bar Association Annual Conference on Labor Relations and Employment Law (1996, 1997, 1998, 1999, 2000, 2001)
Speaker, "Due Process Update: Conducting A Liability-Free Public Sector Discipline Process," Council on Education in Management (2000)
Speaker, "Advising the State Government Employee," Old Dominion Bar Association (1999)
Speaker, "Sexual Harassment In the Workplace," Old Dominion Bar Association (1996)
Speaker on various employment law topics and general litigation before state government audiences

16. **Speeches:** Provide the Committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.
None

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?
I believe I was chosen for this position because of my knowledge and expertise in employment law and strong management skills.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

I bring to this position, years of experience as an employment law litigator and administrative adjudicator. I have represented the interests of management and employees. As an administrative adjudicator, I have taken positions guided by principles of objectivity, fairness and an unbiased interpretation and application of the law and personnel policies. I have also demonstrated the ability to lead an organization through change and tough economic conditions.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
   Yes
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.
   No
3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?
   No
4. Has anybody made a commitment to employ your services in any capacity after you leave government service?
   No
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?
   Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.
   None
2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.
   In my capacity as Executive Director of the Virginia Department of Employment Dispute Resolution, I had the responsibility to monitor and where necessary to influence the passage or defeat of legislation affecting the grievance procedure for state employees. In that capacity I drafted and worked for the passage of legislation reforming the grievance process for state employees.
3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?
   Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.
   McPhie v. McPhie, no fault divorce (Alleghany County, PA., Court of Common Pleas 12/79)
   Marie Assa'ad Faltas v. Commonwealth of Virginia et al. Record No. 930435 (Sup. Ct. of Va. 1993)

Disgruntled former state employee brought suit against her agency employer, supervisors, co-workers, and defense counsel alleging violations of federal law in the termination of her employment. Dismissed.
Kennedy v. McPhie, Civil Action No. 3:99CV358(E.D. Va. 1999)
Denial of due process claim brought by hearing officer who was removed for cause from hearing grievance cases brought by state employees. Case dismissed.

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.
No
3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.
No
4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.
I have enclosed a copy of my resume, and a letter of recommendation from United States District Judge James R. Spencer.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

NEIL A. G. McPhie being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this 6th day of February, 2003

Notary Public

My Commission Expires 09/14/05

NEIL ANTHONY GORDON MCPHIE

Education

J.D., Georgetown University Law Center, 1976

B.A., Economics, Howard University, 1973
Magna Cum Laude, Phi Beta Kappa, Dean's List, Academic Scholarship, International Honor Society in Economics

Experience

Public Service Management

As Executive Director of the Virginia Department of Employment Dispute Resolution (EDR) directed implementation of EDR's statewide grievance, mediation, training and consultation programs. Maintained effective working relationships with officials and subordinates in all branches of government, while simultaneously managing significant changes to policies affecting state agencies. In the 2000 General Assembly, led a successful effort to obtain General Assembly approval for legislative reform involving employees' grievance rights, to include a right of appeal, attorneys' fees and costs, publication of grievance decisions, and utilization of full-time EDR Hearing Officers.

Oversaw the internal management of EDR to include the strategic planning process, staffing and budget. Initiated significant improvements to EDR's personnel and operating policies while maintaining employee support and enthusiasm. Improved EDR's organizational infrastructure and realigned resources to achieve planning goals. Developed and implemented effective budget tracking processes. Implemented technology upgrades. Maintained employee morale and programs focus in the face of declining state revenues and budget cuts. Developed and implemented two new self-funded programs, and in the process effected positive change to the culture of Virginia state goverment.

Leadership style includes active listening, involving stakeholders in decisionmaking, creative thinking and planning and embracing policies that are grounded in common sense.

Co-managed outreach efforts by Virginia's Governor to state employees through town hall meetings, which helped, establish Virginia as one of the best-managed states in the country according to Governing Magazine.

Administrative Adjudicator

As Executive Director of EDR, issued letter rulings regarding qualification of grievance cases for administrative hearings. These rulings may be appealed to a state Circuit Court. Issued letter rulings on compliance issues that are final and binding. Rulings are investigated, researched and drafted by EDR Consultants, and contain a recitation of relevant facts and analysis of case law and policies. Generally, approved and signed rulings after careful review and deliberation. Supervised the work of hearing officers who hear grievance cases and render written opinions that are binding on the parties. Hearing Officer decisions may be appealed by either party to a Circuit Court and the Court of Appeals. EDR adjudicates grievance disputes that cover a broad range of issues from compensation, performance, workplace harassment, discrimination, retaliation and compliance with statewide personnel policies.

Legal Counsel

As an Assistant Attorney General with the Virginia Attorney General's Office, tried jury and non-jury cases defending state agencies and officials in state and federal courts. Tried cases under the Virginia Tort Claims Act. Successfully defended Virginia judges from extraordinary writs of prohibition and mandamus, the state from significant damage awards in breach of contract claims involving building construction projects, and represented the Virginia State Bar in disciplinary cases before the Virginia Supreme Court and prosecuted individuals for the unlawful practice of law.

As the Senior Assistant Attorney General and Chief of the Employment Law Section, supervised a team of attorneys, paralegals and secretaries while maintaining an independent caseload. Defended employment discrimination claims brought under the United States Constitution, and a variety of Civil Rights Statutes to include Title VII, The Americans with Disabilities Act, The Equal Pay Act, The Age Discrimination in Employment Act, The Family and Medical Leave Act and wrongful discharge state law claims. Represented state officials in administrative due process grievance hearings. As Senior Assistant Attorney General and Chief of the Finance and Government Section, I supervised a team of lawyers and support personnel who represent personnel, financial, gaming and other agency clients. Also consulted with OAG leadership regarding internal management policies and decisions.

Provided legal advice to the Governor's Office, Cabinet Secretaries, the Attorney General and state agencies.

As a trial and appellate attorney with the Equal Employment Opportunity Commission, tried employment cases in federal trial and appellate courts and administrative proceedings.

Bar Admissions

Virginia, District of Columbia, New York, Iowa, United States Supreme Court

United States Court of Appeals for the 4th, 7th, 8th, 9th and 10th Circuits

United States District Court for the District of Columbia, and the Eastern and Western Districts of Virginia

Bar Committees

Public Liaison, Virginia Bar Association, Labor and Employment Section (1/98 to 2001)

Member, E.D. Va. Advisory Group, Civil Justice Reform Act of 1990 (1991-1995)

Chair, Virginia State Bar Special Committee to Reduce Litigation Costs and Delays (1989-1991)

Vice Chair, ABA Government Lawyers Committee, and General Practice Section (1990-1991)

Vice Chair, ABA Minority Lawyers Committee, General Practice Section (1990-1991)

Vice Chair, ABA Litigation Committee, General Practice Section (1989-1990)

Member, ABA Steering Committee, Construction Management, Design/Build (1988-1990)

Speeches and Publications

Speaker/Moderator, "Summary of Recent Federal and State Cases Involving Employment and Labor Law Issues," Virginia Bar Association Annual Conference on Labor Relations and Employment Law (1996, 1997, 1998, 1999, 2000, 2001)

Speaker, "Due Process Update: Conducting A Liability-Free Public Sector Discipline Process," Council on Education in Management (2000)

Speaker, "Advising the State Government Employee," Old Dominion Bar Association (1999)

Speaker, "Sexual Harassment In the Workplace," Old Dominion Bar Association (1996)

Speaker on various employment law topics and general litigation before state government audiences

Employment History

2002:	Merit Systems Protection Board 1615 M street, N.W. Washington, D.C. Senior Attorney
2002:	Office of the Attorney General of Virginia 900 East Main Street, Richmond, Va. Senior Assistant Attorney General
1998 to 2002:	Director, Virginia Department of Employment Dispute Resolution 830 East Main Street, Richmond, Va.
1982-1998	Office of the Attorney General of Virginia 900 East Main Street, Richmond, Va. Senior Assistant Attorney General (1990 – 1998) Assistant Attorney General (1982-1990)
1976 to 1982:	Trial and Appellate Attorney United States Equal Employment Opportunity Commission Office of the General Counsel, Washington, D.C.

Personal Information

Married to Regina Chow McPhie. We have two children, Abigail, age 12, and Sydney, age 9. I am the primary caregiver for my 82-year old mother who lives with me. I enjoy working on home and garden projects and spending quality time with my family.

I enjoy the law, helping organizations and people solve disputes, and learning new areas.

References

Available on request

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
LEWIS F. POWELL, JR. COURTHOUSE BUILDING
SUITE 307
1000 EAST MAIN STREET
RICHMOND, VIRGINIA 23219-3525

CHAMBERS OF
JAMES R. SPENCER
DISTRICT JUDGE

TELEPHONE
(804) 916-2250

December 8, 2000

TO WHOM IT MAY CONCERN:

I have been asked to comment on the legal abilities of Neil McPhie, Esquire. I hereby gladly and enthusiastically respond to that request.

Mr. McPhie is an excellent lawyer who is blessed with many fine qualities and talents. Over the course of fourteen (14) years on the bench, I have had numerous opportunities to observe Mr. McPhie at work in the courtroom. He is, in my estimation, a top performer. His preparation for trial is always complete and consistent. Likewise, his grasp of the law is thorough and impressive. I have also found his written work product to be clear, concise and persuasive.

While always a passionate advocate for his client's cause, he is unfailingly professional and courteous to both the Court and opposing counsel. His technical legal skills become even more effective when combined with his good judgment, even temperament and common sense. Mr. McPhie has earned the respect of this Court and I offer my unqualified and positive assessment of his lawyering skills.

Thank you for your kind attention.

Sincerely,

/s/

James R. Spencer
United States District Judge

JRS/jf

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Neil McPhie to be
a Member of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as a Member of the Merit Systems Protection Board (MSPB)?

Answer: I believe that the President nominated me to serve on the MSPB because I am qualified to perform the duties of the position. I believe that my selection was based on my demonstrated expertise in employment law, my experience in government, and my education.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

Answer: No.

3 What specific background and experience affirmatively qualifies you to be a Member of the MSPB?

Answer: I bring to this position approximately 27 years experience as an employment lawyer. I have represented the interests of management and employees. Through this experience, I have become intimately familiar with the myriad of issues that give rise to workplace disputes and counseled clients on effective measures to resolve such disputes. For four years, (1998-2002) I ran a state agency that handled grievance cases. As an administrative adjudicator, I have taken positions guided by principles of objectivity, fairness and an unbiased interpretation and application of the law and personnel policies. I successfully led that organization through significant organizational change and tough economic conditions.

4 Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member of the MSPB? If so, what are they and to whom have the commitments been made?

Answer: I have made no such commitments.

5 If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

Answer: I cannot think of any issue that would create a conflict of interest. However, should any issue arise during my tenure that might raise any ethical questions relating to my participation, I would consult with the appropriate ethics officers, and, if it were appropriate, recuse myself.

II. Role and Responsibilities of a Member of the MSPB

6 What is your view of the role of a member of MSPB?

Answer: As a Member of the MSPB, my basic role would be to adjudicate cases in a fair and objective manner, consistent with the governing statutes, regulations, case law and policies. My role with respect to my fellow Board Members would be to work towards a common effort of handling cases in a fair and expeditious fashion. I look forward to a collegial and professional relationship with Chairman Marshall and the third Member, upon his/her nomination by the President and confirmation by this Body. I will work to ensure that the Board fulfills its adjudicatory, studies, and regulatory oversight functions. In addition, my role would be to assist the Chair with any administrative responsibilities affecting the operations and mission of the Agency.

7. In your view, what are the major challenges facing MSPB? What do you plan to do, specifically, to address these challenges?

Answer: I do not profess to know the major challenges facing the MSPB. I expect that a major challenge facing the MSPB is to continue to adjudicate and process cases carefully, fairly, judiciously, and expeditiously. I believe also that the Board should continue to assess its case management processes to identify additional improvements that would further the more efficient adjudication of cases without compromising due process and the quality of its decisions. I intend to work diligently with all Board members to successfully address any challenges that arise during my tenure on the Board.

8. How do you plan to communicate to the MSPB staff on efforts to address relevant issues?

Answer: I believe in open communication. It has been my experience that this communication style fosters the open exchange of ideas. I therefore intend to have an open door policy at the MSPB. I intend to work through the Office of the Chairman on administrative matters. On matters involving case review and advice, I intend to deal directly with MSPB attorneys and supervisors through memoranda, e-mails, oral discussions and other available means of communication.

III. Policy Questions

9. What lessons learned, if any, can you bring to the federal employee redress system based on your experience as the Director of the Virginia Department of Employment Dispute Resolution or other relevant experience in the positions you have held?

Answer: I believe that the federal employee redress system will benefit significantly from the many lessons I learned from previous positions I have held and as Director of the Virginia Department of Employment Dispute Resolution (EDR). My long and intimate exposure to real life employment disputes has sensitized me to the need to ferret out and effectively address the underlying reasons for workplace disputes. As an advocate, I worked painstakingly to develop the relevant facts and to mold persuasive legal argument around clear themes. I bring that skill and thoroughness to the Board. At EDR I honed those skills necessary to be an effective impartial adjudicator. I learned the importance of not taking or giving the appearance of taking sides in a dispute. I also came to understand more clearly the importance of fostering meaningful relationships with the legislative branch of government based on candor and openness. I developed more fully a leadership style based on active listening, encouraging involvement on the part of stakeholders, and creative thinking and planning. I learned the importance of developing common sense policies. I believe, for example, that the Board should constantly reevaluate its internal systems to ensure that all Board members participate fully in significant management decisions.

10. Do you believe that it would be beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that if acted upon by Congress, agencies, and employees would improve the federal government's civil service system and personnel practices, and reduce the need for and costs of litigation? If so,

- How might MSPB go about identifying such systemic and recurring issues?
- How might Congress, agencies, and employees be made aware of these issues?

- Please explain whether you have any concerns that such activities might be inappropriate in light of the Board's quasi-judicial mission.

Answer: I believe that agency management and employees would benefit greatly from the adoption of measures that improve the civil service system and personnel practices and reduce the need for and costs of litigation. For that reason, I believe that MSPB should continue to play a role in identifying and reporting on areas in need of such improvement. However, because MSPB's mission is quasi-judicial, these efforts must be carefully managed.

I am not familiar with MSPB data collection efforts. In connection with its studies function, it seems to me that in order to identify problem areas in the civil service system as a whole, MSPB must have access to meaningful data. MSPB should develop mechanisms to work collaboratively with universities and private think tanks. Thus, I would begin by reviewing the scope of the data collected by, or available to MSPB. For example, MSPB cases may suggest certain recurring problems in the frequency and type of discipline administered by agencies. In the state system, and probably in the federal system, most disciplinary actions are uncontested. MSPB should therefore have access to all disciplinary actions taken whether or not they are grieved.

MSPB cannot make its observations in cases. It has to confine its observations and recommendations to reports to the President, Congress and other interested parties.

The Board's quasi-judicial mission should not be compromised. Therefore I believe that the Board must continue to carefully monitor its reporting activities so as not to give the appearance of having predetermined its rulings on certain issues based on conclusions published in its studies reports. MSPB has the statutory obligation to conduct periodic studies of the civil service and other merit systems. This obligation is important and must be carried out. However, in selecting studies, the civil service system may benefit from the Board's inclusion of topics that are linked to the Board's adjudicatory functions.

11. The appeals process administered by MSPB has been characterized as being legally complex, with court-like features.

    The process has been described as not always being user friendly. Do you believe that MSPB, as an administrative agency rather than a court, must achieve a balance between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? If so, how can that balance be achieved?

    The appeals process can be daunting for appellants, particularly those not represented by an attorney. Should MSPB assist *pro se* appellants in exercising their rights to due

process? If so, what assistance should MSPB provide? What else can and should MSPB do to reduce the burden on appellants?

Some survey data show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. Do you believe that this is a valid concern, and, if so, what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Answer: Accessibility is a fundamental tenet of Anglo-American jurisprudence. Therefore it is imperative that judicial courts and administrative forums be perceived as accessible, be accessible in fact, and by extension, user-friendly to all parties. I believe that it is a difficult challenge for an administrative tribunal (and a court) to strike the appropriate balance between assisting either party and maintaining impartiality. I do not believe that a blanket rule can be established for all cases. I believe that the degree of MSPB assistance to either party, should vary from case to case depending on a variety of factors such as the nature of the issues, the sophistication of the parties, and whether or not the parties are represented by counsel. The guiding principle for MSPB must continue to be impartiality. MSPB cannot be viewed as an advocate for either party, otherwise its decisions would lack credibility.

MSPB can do (and probably is already doing) a number of things systemically to assist appellants. MSPB should continually reexamine its procedures to ensure that they are easily understandable, not cumbersome, and not a trap for the unwary. MSPB should continue to develop and disseminate free of charge, brochures, FAQ's, and other informational materials on how to take a case through its process. MSPB judges should issue comprehensive pretrial orders. MSPB should ensure that its judges receive training in recent developments in the law, docket and case management, and possess appropriate judicial temperament. The Board should continue to build a culture around the maxim that "win or lose, a party must feel that he/she has been heard."

I do not know whether a burdensome MSPB appeals process deters managers from taking appropriate personnel actions. If the appeals process does that then it should be streamlined. I suspect however, based on my state agency experience, that that perception is more myth than reality. EDR discovered that the majority of disciplinary actions are not grieved. And the majority of disciplinary actions grieved are decided in favor of management. I anticipate that the statistics are similar in the federal system. I believe that the misperception exists for a number of reasons. Some managers do not understand personnel rules and procedures. Others don't understand how and when to discipline and terminate employees. Still others avoid taking discipline because they do not want to be perceived as a 'bad guy." Agencies have a continuing obligation to ensure

that their managers are properly trained. I believe that MSPB should collect and share case data to dispel such myths. In addition, I believe that MSPB should educate the users of the system to the understanding that consistent decisions are fostered through the application of legal standards, some of which are unavoidably complex

12. Some cases require lengthy and complex decisions. What will you do to help ensure that the Board's decisions are written in such a manner that they can be easily understood and implemented by both agencies and employees?

Answer: The Board has already taken steps to improve the quality of its opinions. It has, for example developed a uniform decision format, developed and maintain templates on recurring issues that are easily accessible to MSPB attorneys and judges. I believe that the Board has to continue to look for ways to further improve quality. I would recommend that the Board clearly communicate to MSPB attorneys, its expectations for writing opinions. I believe that opinions must be written in plain English, use fewer acronyms and footnotes with substantive text, and organized around clearly defined issues.

13. The time taken by MSPB administrative judges to process initial appeals has remained fairly stable since FY 1995, averaging about 100 days. However, according to MSPB's 2001 Performance Report, the average time the Board has taken to review initial appeals stood at 214 days in FY 2001, up from 176 days in FY 2000. What would you propose to expedite Board review?

Answer: In 1989-91 I chaired the Virginia State Bar's (VSB) Special Committee to reduce Litigation Costs and Delays. As a result of my committee's recommendation, the VSB adopted for the first time, time standards for civil cases. I was also a member of the Eastern District Virginia Advisory Group (1991-95) that conducted a similar review under the Civil Justice Reform Act for the federal district court. Having practiced for 16 years in the "rocket docket," as the Fourth Circuit is commonly described, I believe that cases can be decided quickly without sacrificing quality or fairness.

I believe that the majority of MSPB cases can and should be decided expeditiously. I would recommend that the Board establish, based on historical and realistic numbers, the time it should take to decide an MSPB case. I know that a number of factors may influence the time it takes to decide a particular case, as for example. complexity, volume, case tracking and management systems, quality and quantity of reviewing personnel, agency culture etc. I would propose that the Board conduct a study to determine which factors are contributing to delay and work creatively to eliminate any systemic cause for the delay. I would also create a strike force to address the current backlog. I would ensure that the Board has an effective case docketing and tracking system, and require that managers and reviewing attorneys be held accountable for

expediting cases for Board review. Finally, in order that the Board itself may be held accountable for expediting decisions, I would propose the adoption of a performance time standard for Board members.

14. The average processing time takes into account cases that are dismissed or settled. However, cases that are heard by an administrative judge and fully reviewed by the Board take longer, on average. The last time MSPB published its Report on Cases Decided, data showed that in fiscal year 1999, the average time for a decision from a hearing of an initial appeal was 171 days, and the average time for the Board to decide cases in which a petition for review was granted was 390 days, for a total of about 560 days. In addition to attempting settlement, what other options would you suggest to reduce the length of time to decide such cases?

Answer: In addition to the strategies discussed in my answer to Question 13, I would suggest that MSPB judges be properly trained in case management techniques, and have the ability and resources necessary to produce timely, well reasoned and well written opinions. I would streamline the Board's internal procedures to avoid duplication of responsibilities. I would examine the Board's rules to seek to streamline and speed up the case procedures. For example, I would recommend that the Board consider adopting a rule that continuances are rarely granted and only in extreme circumstances such as the death of a party etc.

15. MSPB's performance plan for fiscal years 2002 and 2003 contains processing time goals for issuing decisions and also contains goals for quality (e.g., maintaining or lowering the percentage of cases remanded or reversed). What are your thoughts about linking case review timeliness goals and quality goals to MSPB's performance standards for administrative judges and attorneys? What do you consider to be the advantages and disadvantages of such a linkage?

Answer: At EDR, (and other state agencies) the goals expressed in the agency's strategic plan are major factors in performance plans for individual employees, as appropriate to that employee's position. That linkage has worked well. I believe that it would work as well at MSPB. Advantages include educating individual staff on their role in fulfilling the overall mission, promoting a shared responsibility for fulfilling the mission and goals of the agency, building an esprit de corps through all levels of employment, and fostering a culture of accountability.

Some cautions must be considered. Since the full scope of the individual's performance must be considered, timeliness goals and quality should be major factors, never the sole factors. The goals must be realistic and feasible. Managers must have the flexibility to take into account the ebb and flow of cases and resources and other setbacks that could not be anticipated. Also, it takes time and resources to develop and implement

good performance measures. The success of such a plan would depend on the ability of MSPB officials to persuade staff to accept the merits of the plan. Such acceptance would require good communication and knowledgeable managers.

16 Timeliness is one measure of performance. Quality of decisions is another measure. What are appropriate indicators that could be used to measure the quality of MSPB decisions? How can the competing goals of timeliness and quality be balanced?

Answer: As I intimated in my response to Question 13, I do not view the goals of timeliness and quality necessarily to be mutually exclusive. Nevertheless MSPB managers and Board members must be vigilant in ensuring that one is not sacrificed in favor of the other for no compelling reason. For example, an administrative judge may issue excellent decisions but he or she may not be good at managing their docket. The challenge in such a situation may be to help the judge manage his docket rather than extending the timeline. It seems to me the Board has to work hard to nurture a culture wherein the twin goals of timeliness and quality are not only compatible but desirable and attainable. And as I observed in Question 15, the goals must be realistic and feasible. Managers must have the flexibility to take into account the ebb and flow of cases and resources and other setbacks that could not be anticipated.

A variety of indicators may measure the quality of MSPB decisions. Reversal rates can measure the Board's ability to issue legally correct opinions. But there are other quality issues embedded in opinions that reversal rates will not measure. The Board should conduct periodic surveys of a statistically viable sample of parties to determine such things as professional demeanor, conduct of hearings, timeliness of hearing and written decision, knowledge, familiarity with relevant procedures and policies, and the readability and understandability of the written decision.

17. One factor that helps reduce average case processing time is that MSPB settles more than half of the initial appeals it receives that have not been dismissed. This percentage is even higher in adverse action cases—72 percent in fiscal year 2001. There are concerns that there is an undue emphasis and pressure to settle cases. What are your views on settling a case without a hearing on the merits? In this regard, what guidelines do you think should be followed to help ensure that parties are not being forced into settlements that might be unfair, unwise, or prevent due process from being served?

Answer: As a trial lawyer, I have been strong-armed into settling cases. It has left me with misgivings. I have sometimes felt that the judge had predetermined the outcome and that my client would not get a fair trial if settlement were rejected. The decision to settle a case has to be voluntary and works best when the parties are fully informed. Otherwise, a party may feel cheated and would complain of being forced or duped into settlement through misrepresentation, coercion or duress. However, properly

administered settlement processes can be effective tools for resolving disputes. I believe that MSPB can help parties reach informed decisions to settle cases through such processes as mediation, early neutral evaluation, and settlement conferences by non-MSPB third parties. In this way, MSPB can maintain its neutrality and at the same time help the redress system.

18. According to the MSPB's Fiscal Year 2001 Annual Report, MSPB's Alternative Dispute Resolution (ADR) Working Group (established by the former Chairman in fiscal year 2000) continued its work in FY 2001. The Group has a twofold purpose—to explore ways in which the Board can expand its existing ADR program with respect to appeals *after* they are filed with MSPB, and to prepare for the possible enactment of legislation (H.R 1965) authorizing the Board to conduct a voluntary early intervention ADR pilot program to try to resolve certain personnel disputes *before* they result in a formal appeal to MSPB. In fact, at the end of FY 2001, the Board entered into a contract with two ADR experts to develop a proposal for expanding the Board's use of ADR techniques and to conduct mediation training. However, several other entities also are involved in resolving disputes (e.g., the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the Office of Special Counsel) or encouraging the use of ADR (e.g., OPM, the Interagency ADR Task Force, the Federal Mediation and Conciliation Service). Given these circumstances:

•Do you believe that MSPB should play a role in promoting the use of ADR and training federal staff in ADR techniques?

•If so, how should that role be exercised?

•How should MSPB's role be coordinated with, or differentiated from, the role of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

Answer: First I want to state clearly that I am a proponent of ADR. At EDR I ran a mediation program that relied on volunteer mediators that were trained by EDR. I believe that MSPB should play a role in promoting the use of ADR in MSPB cases. I am less certain that MSPB should play a role in training federal employees in the use of ADR techniques for situations that are not linked to grievance rights, e.g., an allegation that "I cannot get along with my coworker." In my view MSPB should avoid duplicating the resources currently available for ADR training generally. Rather MSPB should develop strategies to promote collaboration with existing resources.

19. Legislation[1] creating the Department of Homeland Security, which will assimilate some 170,000 federal employees from 22 agencies, allows the Secretary of Homeland Security

[1] P.L. 107-296.

flexibility in establishing the department's personnel system. The enabling legislation authorizes the Secretary of Homeland Security, in regulations prescribed jointly with the Director of the Office of Personnel Management, to establish a human resources management system for the Department that may waive, modify, or otherwise affect certain employee appeal rights to MSPB.[2] But the legislation establishes specific requirements for any such regulations, and requires the Secretary to consult with the MSPB before issuing such regulations. The legislation also specifically provides that any such regulations may modify procedures under chapter 77 of title 5, United States Code (dealing with employee appeals to the MSPB) only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department. Given these requirements, what are your views with regard to –

- what role the MSPB should play in assisting the Department of Homeland Security in developing regulations for employee appeals, and
- the nature of the modification to the procedures under 5 U.S.C. chapter 77 that may be considered as furthering the fair, efficient, and expeditious resolution of matters involving the Department employees.

Answer: As the statute recognizes, the MSPB has an important role to play in the development of an appeals process that adequately protects the due process rights of DHS employees. MSPB can provide meaningful advice with respect to the promulgation of regulations to provide for the fair, efficient and expeditious resolution of workplace disputes. I would recommend that the Board proactively consult with OPM and DHS to determine whether the Secretary intends to establish a separate Human Resources Management System for DHS and, if so, to advise them on best practice provisions and procedures. That consultation should begin early in the process so that OPM and DHS could get the full benefit of MSPB's expertise before regulations are finalized.

20. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues. What is your understanding of the differences Congress intended in how each agency should perform this role? What is your understanding of the differences in how each agency currently performs these roles? Is it desirable and possible to consolidate these roles and if so, how would you recommend doing so? Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

[2] Section 841.

Answer: I do not have sufficient information or knowledge to answer this question fully. Rather I would offer some observations based on my prior experience at EDR. Consolidation can promote efficiencies but not if core functions are different. OPM creates the fabric of personnel rules. MSPB resolves disputes when those rules are breached, and through its studies function, examines the implementation of those rules. With such fundamentally different core functions, it may be difficult or impossible to consolidate functions. Then there is the perception issue that could be exacerbated by consolidation. Because OPM creates the fabric of rules, it may be viewed by employees as an organ of management. Because MSPB adjudicates cases initiated by employee appeals, it may be seen by management as an organ of employees. It may be that the review process is best served by having both agencies continue to evaluate the merit system through their respective lenses.

21. On May 9, 2000, the MSPB held that the Office of Special Counsel (OSC) could be held liable to pay attorney fees in disciplinary action cases if the accused agency officials were ultimately found "substantially innocent" of the charges brought against them.[3] It has been argued that sanctioning an award of fees in such cases, even where the decision to prosecute was a reasonable one, has a chilling effect on OSC's ability to bring charges due to budget constraints and is against the public interest and contrary to congressional intent of the Whistleblower Protection Act. In order to address these concerns, on November 19, 2002,[4] the Senate Committee on Governmental Affairs favorably reported S. 3070 which contained a provision requiring the employing agency, not OSC, to reimburse the prevailing party for attorney fees in a disciplinary proceeding brought by OSC.

OSC has expressed serious concern about the impact that the May 9, 2002, decision could have on OSC's ability to seek the discipline of agency officials who violate the Whistleblower Protection Act. What is your view of OSC's concern? Do you agree with the provisions of S. 3070 that address this issue?

Answer: As the Federal agency with the lead responsibility for enforcing the Whistleblower Protection Act, I can understand OSC's concern about any decision that might impair its ability to protect the rights afforded by the statute. On the other hand, I firmly believe that the effective administration of justice requires that a balance be achieved between the protection of such rights and the discouragement of frivolous

[3] *Santella v. Office of Special Counsel*, 86 MSPR 48 (2000).

[4] S. Rep. No. 107-349 (2002).

claims. If an action is frivolous when filed, and the filing attorney knows or should have known that the claim lacks merit, the attorney is required to voluntarily dismiss the case. Sanctions may be appropriate where an attorney filed or failed to dismiss a non-meritorious action. However, because I am not familiar with the circumstances of the case cited, I respectfully decline to speculate regarding the bona fides of OSC's concern or the responsiveness of legislation to address that concern.

22. In 2000, the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing.[5] The Court held that the MSPB may neither review a security clearance determination nor require the grant or reinstatement of a clearance, and that the denial or revocation of a clearance is not a personnel action. As a result of this decision, an employee's security clearance may be suspended or revoked in retaliation for making protected disclosures, the employee with a suspended or revoked clearance can be terminated from his or her federal government job, and MSPB may not review the revocation. According to the OSC, revocation of a security clearance is a way to camouflage retaliation.

To address this situation, the Senate Committee on Governmental Affairs favorably reported S. 3070 on November 19, 2002,[6] which contained a provision making it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle. The bill further stated that the MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance.
What would be the impact on the MSPB if such a proposal were to become law? How would MSPB handle the expedited process?

Answer: I do not know MSPB's operations well enough to respond adequately to this question. As a general proposition, whistleblowers ought to be protected from retaliatory discipline or termination. On the other hand, the President ought to have the ultimate authority to determine whether the security clearance of a particular individual must be restored. The legislation strikes the balance by authorizing declaratory and other appropriate relief, but does not mandate the restoration of the security clearance. Thus to the employee, the remedy may be inadequate.

I imagine that the legislation would have an impact on MSPB's resources in that it would give the Board jurisdiction over a new category of cases. Again, because I am not

[5] *Hesse v. State*, 217 F. 3d 1372 (Fed. Cir. 2000).

[6] S. Rep. No. 107-349 (2002).

sufficiently familiar with the Board's operations, I cannot speculate as to how MSPB would handle the expedited process should the bill become law. I can say, however, that if the bill is enacted, and I am confirmed as a Member of the Board, I would work to ensure that appellants receive full and fair consideration of their claims.

IV. Relations with Congress

23. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Answer: Yes.

24. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

Answer: Yes.

V Assistance

25. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

Answer: These are my answers. I consulted with MSPB staff with respect to some questions in Section III.

AFFIDAVIT

I, Neil A. G. McPhie, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 20th day of March, 2003.

Notary Public

Venessa M. Gray
Notary Public, District of Columbia
My Commission Expires 04-14-2007

Neil A.G. McPhie
3021 Archdale Road
Richmond, Virginia 23235-2507

February 20, 2003

The Honorable Susan Collins
Chairman
Committee on Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Collins:

It has been brought to my attention that I did not provide an answer to question number 7, section E, Financial Data of the Committee's Biographical and Financial Information Questionnaire. I apologize for the oversight and respond to the question as follows:

Question: "Have your taxes always been paid on time including taxes paid on behalf of any employees? If not, please explain".
Answer: Yes

Please let me know if I can be of further assistance.

Yours truly,

Neil A. G. McPhie
Nominee

Questions Submitted for the Record by
Senator Daniel K. Akaka
for the Nomination of Neil McPhie
to be a Member of the Merit Systems Protection Board (MSPB)

May 16, 2003

Question:

1. The Department of Homeland Security (DHS) has been granted flexibility to waive chapter 77 of Title 5 relating to federal employee appeals. As you know, the Federal Aviation Administration (FAA) was granted similar authority in 1996. However, Congress reinstated MSPB appeal rights in 2000 after FAA employees and managers expressed concern that the internal process was unfair and biased. Employees were also concerned over how the new system would interpret civil service laws since there was no requirement to follow MSPB case law.

Based on your knowledge and experience in employee rights and appeals, what are some best practices that should be included in <u>any</u> appeals system?

Answer:

Based on my knowledge and experience as an employment trial and appellate lawyer, any appeals system must provide both parties with the opportunity to be heard by a neutral, independent adjudicatory body in order to ensure that both parties are treated fairly. Any appeals system should provide the parties with the right to a hearing if jurisdiction is established and there are material facts in dispute. In order for the appeals process to be meaningful, the parties must be notified of their respective burdens and degrees of proof. The appellant must have the right choose a representative of his or her choice during that process. Any appeals system must also provide the appellant with due process. In the employment law context, this includes ensuring that a tenured public employee receives oral or written notice of the charges against him or her, an explanation of the employer's evidence, and a pre-termination opportunity to present the employee's side of the story. Finally, any appeals system should provide an effective mechanism for enforcing its decisions.

More specifically, if the Secretary of Homeland Security intends to establish a separate human resources system for DHS, I recommend that DHS and the Office of Personnel Management (OPM) confer closely with the Merit Systems Protection Board (MSPB) during the developmental phase of this system. Given the MSPB's extensive experience with adjudicating federal employment matters, the MSPB can provide invaluable advice and insights into how to resolve workplace disputes fairly and efficiently while protecting the due process rights of DHS employees. The MSPB has an important role to play in the development of a fair and effective appeals process for DHS. I recommend that these agencies begin consulting with one another as quickly as possible so that OPM and DHS can receive the full benefit of the MSPB's expertise before DHS finalizes its regulations.

Question:

2. One of the main reasons agencies give for seeking a waiver from chapter 77 of Title 5 is the length of time it takes to remove or discipline poor performers or those employees who engage in actionable misconduct.

- What factors contribute to the length of time it takes to discipline or remove these employees?
- Do you believe that the average time it takes for a matter to be resolved by the MSPB is reasonable?
- Has your time working at the MSPB generated any ideas, in addition to those expressed in the pre-hearing questionnaire, regarding suggestions for streamlining the appeals process without reducing employees' trust and confidence in the Board?

Answer:

With regard to first question, the MSPB and other organizations have conducted a number of studies on the factors that contribute to the length of time it takes to discipline and remove employees who are poor performers or who engage in misconduct. These studies indicate that that many managers lack the necessary knowledge, skills, and agency support necessary to timely discipline problem employees.

These studies are in line with my own experience working with state agencies. As the Director of the Virginia Department of Employment Dispute Resolution (EDR), I found that some managers lack basic management and communications training. Some mangers do not understand personnel rules and procedures or do not understand how and when to terminate or discipline employees. Others are hesitant to come off as "the Bad Guy" or are fearful that their decision will be grieved.

To reduce the length of time it takes to discipline problem employees, agencies must equip managers with effective management tools. Agencies should develop performance standards that are clearer and more measurable, and encourage managers to identify poor performers. Managers must ensure that employees are aware of the standards against which they will be measured and notify employees about agency disciplinary policies. Managers need training in performance management techniques and should give employees regular feedback on their performance. Agencies should design more effective approaches for helping poor performers improve their performance, even if poor performers are given less time in which to improve their performance. Ensuring that managers have the skills and organizational support they need to take appropriate disciplinary action is a major step toward reducing the length of time it takes to discipline and remove problem employees.

With regard to the second question, I believe that the MSPB does resolve the matters before it within a reasonable time. About 80 percent of all appeals filed with the MSPB are resolved at the MSPB regional or field office level when an initial decision issued by an administrative judge becomes final. Currently, these cases are completed in an average of 96 days. The remaining 20 percent of appeals filed with the MSPB typically are cases in which one or both of the parties petition the full Board for review of an initial decision. Of this 20 percent, the Board resolves one quarter within about 60 days. Although the average processing time for all petitions for review during Fiscal Year 2002 was 205 days, the MSPB's case processing time at both the regional/field office and Board level is still substantially better than the processing times of other agencies which deal with employment disputes. Thus, I believe that the MSPB resolves the matters before it within a reasonable time.

Nevertheless, based on approximately 27 years of experience as an employment lawyer and on my time working with the MSPB, I believe that there are opportunities for streamlining the appeals process at the Board without reducing the trust and confidence that federal managers, employees, and practitioners have in the Board. If confirmed, I would work with the Chairman to create a strike force to address the Board's current case backlog. Concurrently, I would propose that the Board periodically reevaluate its system to determine which factors contribute to case processing delays and help the Board think creatively about how to speed up resolving cases. Among other things, I would like to clarify whether the Board should make changes to its case tracking and docketing system and whether the administrative judges have the ability, training, and resources they need for effective case management. I am also a proponent of using alternative dispute resolution methods, such as mediation, to resolve cases more expeditiously. Additionally, I would consider proposing the adoption of a performance time standard for Board members. Through these and other means, I will actively work to streamline our appeals process.

Moreover, I believe we can reduce the Board's processing time while maintaining the trust and confidence of the parties before us. We cannot sacrifice fairness in our quest for timely resolutions. To this end, we must ensure that Board opinions remain of the quality that our reviewing court continues to leave the vast majority of Board decisions unchanged on appeal. Additionally, the Board should conduct periodic quality checks of how parties to Board appeals view their experiences with the Board. These surveys would help us determine whether the parties understood the proceeding and the outcome, and whether they were fairly treated during that process. By considering the Board's reversal rate and these "experiential" quality issues while working to streamline the appeals process, we can keep the Board's dual goals of timeliness and quality in balance.

Question:

3. A number of Federal Circuit Court interpretations of the Whistleblower Protection Act are inconsistent with congressional intent. A primary example is the meaning of the term 'any disclosure.' In 1994, the Committee on Governmental Affairs reaffirmed language from the 1988 Senate Committee report and explicitly stated that 'any' means 'any.'

> OSC, the Board and the Courts should not erect barriers to disclosure that will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures only to be protected if made for certain purposes, to certain employees or only if the employee is the first to raise the issue....The plain language of the WPA extends to retaliation for 'any' disclosure, regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made. (S. Rept. No. 100-413, at 13 and S. Rept. No. 103-358, at 18.)

Nonetheless, the Federal Circuit has erected nearly every barrier listed in the Committee report.[1] As a member of the MSPB, how do you reconcile this contradiction?

Answer:

This is an important issue. I recognize Congress's commitment to ensuring that federal employee whistleblowers are protected from retaliation. I also understand that it has been a longstanding matter of congressional concern that the Federal Circuit reads the Whistleblower Protection Act (WPA) too narrowly and in a manner contrary to congressional intent.

As a general proposition, the Board is bound to follow the Federal Circuit's precedent. Given my limited experience with the WPA, I respectfully decline to speculate as to whether or why the Federal Circuit may have misinterpreted Congress's intent regarding the WPA. However, to the extent that there is a conflict between Congress's intent regarding the WPA and the Federal Circuit's interpretation of that Act, I will work hard, within existing parameters, to resolve this conflict as a Board member. I will seriously and conscientiously consider each and every appeal, including whistleblower appeals, which comes before me. Be assured that I will be vigilant to ensure that my decisions are consistent with the purposes of the WPA and will remain receptive to congressional guidance if Congress enacts legislation to amend the statute.

---

[1] See *Horton v. Dept. of Navy*, 66 F. 3d 279 (Fed. Cir. 1995) (stating that disclosures to co-workers, the wrong-doer, or to a supervisor are not protected), *Willis v. Dept. of Agriculture*, 141 F. 3d 1139 (Fed. Cir. 1998) (stating that disclosures made in course of normal job duties are not protected), and *Meuwissen v. Dept. of Interior*, 234 F. 3d 9 (Fed. Cir. 2000) (stating that disclosures of information previously known are not protected).

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Neil McPhie to be
Chairman of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as Chairman of the Merit Systems Protection Board (MSPB)?

I believe that the President nominated me to serve on the Merit Systems Protection Board because I am qualified to perform the duties of the position. I believe that my selection was based on my demonstrated expertise in employment law, my experience in government management, and my educational background.

2. Were any conditions, expressed or implied, attached to your nomination as Chairman? If so, please explain.

No conditions, expressed or implied, are attached to my nomination as Chairman.

3. What specific background and experience affirmatively qualifies you to be Chairman of the MSPB?

I bring to this position approximately 27 years of experience as an employment lawyer, at different times representing the interests of both management and employees. Through this experience, I have become intimately familiar with the myriad of issues that give rise to workplace disputes and I have counseled clients on effective measures to resolve such disputes. For four years (1998-2002), I was the Executive Director for the Virginia state agency that handles state employee grievance cases. That agency is very similar to the Merit Systems Protection Board. As the Executive Director for that state agency, I made decisions and took positions guided by principles of objectivity, fairness and an unbiased interpretation and application of the law and personnel policies. In that position, I led the organization through significant change and tough economic conditions, similar issues to those currently facing the Merit Systems Protection Board.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as Chairman of the MSPB? If so, what are they and to whom have the commitments been made?

I have made no such commitments.

5. If confirmed as Chairman of the MSPB, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

I foresee no issues which might come before me as Chairman of the Merit Systems Protection Board that would create a conflict of interest. However, should any issue arise which poses an ethical question as to my participation, I would consult with the proper ethics officers, and, if appropriate, recuse myself.

II. Role and Responsibilities of Chairman of the MSPB

6. What is your view of the role of Chairman of MSPB? How has your experience as member and Acting Chairman of the Board informed your view?

By statute, the Chairman is the chief executive officer of the agency. As such, the primary role of the chairman is to set the direction for the agency and to oversee the management of its day to day operations to ensure fulfillment of its statutory responsibilities.

As a Member of the Merit Systems Protection Board, my basic role was to adjudicate cases in a fair and objective manner, consistent with governing statutes, regulations, case law and policies. My role with respect to other Board Members was to work towards a common goal of handling cases in a fair and expeditious fashion.

My experience as Acting Chairman has served to affirm my perception of the Board's vital role in maintaining the efficiency and integrity of the Federal employment system. I have enjoyed the opportunity to direct the operations of the agency within the parameters of its statutory authority and to work more closely with its staff.

7. In your view, what are the major challenges facing MSPB? What, specifically do you plan to do as Chairman to address each of these challenges?

As with any longstanding organization, the Board is facing a number of major challenges. However, with challenges come possibilities.

First and foremost is the question of whether the Board will remain in existence and, if so, in what form and with what functions. Currently, the Board has been tasked with protecting merit principles and promoting the concept of fairness in federal employment through its adjudicative and studies functions. However, various agencies are considering changing the civil service system to provide more flexibility in handling personnel actions. As agencies develop these new personnel systems, including separate processes for appealing employee adverse actions, they may not retain the Board's independent review of such challenges or may limit employee access to Board review. In light of the Board's mission and "consultative" role in new system

development, if I am confirmed as Chairman of the Board, the Board will encourage agencies to consider and protect against potential hazards as they develop new personnel systems. The Board will advise the parties developing the new systems to ensure that flexibility is balanced with fairness by, among other things, providing an external, unbiased and just appeals structure for processing and hearing employment actions. In my view, the Board could effectively provide that appeals structure.

The second major challenge at the Board is a lack of consistent, long-term leadership. The Board was intended to be a bipartisan panel made up of three members holding 7-year terms. However, for several years now the Board has had fewer than three members, some of whom were unconfirmed or were acting in holdover terms. In fact, for a significant portion of 2003, the Board had only one Board member, making it impossible for the Board to issue decisions during that period. This lack of continuity in leadership makes it difficult for the Board to complete its assigned responsibilities, much less strategically plan for the future. It also directly affects employee morale and the Board's ability to hire and retain good employees. Without effective leadership at the helm, a ship in troubled waters is lost. I am pleased to have this opportunity to come before you now because it is my hope that, as Chairman, I will be able to provide the Board with much needed long-term leadership. I would encourage you to act on Board nominations as quickly as possible to ensure that the Board can continue to provide necessary services to the federal community and the American public.

Finally, a third major challenge facing the Board is to actively address "customer" complaints about the Board. Specifically, agencies and appellants have argued that the Board should decide appeals more quickly and should provide the parties with clearer and more understandable decisions. The Board must respond to these concerns. As Chairman, I will work with each Board office to ensure that they are appropriately staffed and managed. I will ask managers and employees alike to obtain or enhance the skills necessary to quickly and efficiently issue Board decisions. I will work with employees to protect against the potential loss of knowledge capital, as many of the Board's employees near retirement age. I will encourage a free flow of information and ideas between offices through technology that enables open communication, inter-office committees, and pilot programs. And, as I discuss in my answers to Questions 11 and 12, I will recommend that the Board develop target timeframes to issue decisions.

However, to take these steps and respond to these challenges, the Board must be fully staffed and adequately funded. We must have the necessary resources to participate effectively in new personnel systems. As Chairman, I will do my part in addressing these challenges. But, we need your help in making this possible.

8. How do you, as Chairman, plan to communicate to the MSPB staff on efforts to address relevant issues?

I believe in open communication. It has been my experience that this communication style fosters the open exchange of ideas. I therefore intend to maintain an open door policy at the

MSPB. I will communicate directly with MSPB staff through memoranda, e-mails, oral discussions, and discussions with the MSPB Professional Association as appropriate, and other available means of communication.

9. What lessons learned, if any, could you bring to service as Chairman of the MSPB based on your experience as a Member and Acting Chairman and, before that, as the Director of the Virginia Department of Employment Dispute Resolution or other relevant experience in the positions you have held?

I believe that the federal employee appeals system will benefit significantly from the many lessons I learned as Executive Director of the Virginia Department of Employment Dispute Resolution (EDR) and from other positions I have held. My long-term and in-depth experience with resolving employment issues has sensitized me to the need to search out and effectively address the underlying reasons for workplace disputes. As an advocate, I worked painstakingly to develop the relevant facts and to mold persuasive legal arguments around clear themes. I bring that skill and thoroughness to the Board. At EDR I honed those skills necessary to be an effective impartial adjudicator. I learned the importance of not taking sides (or giving the appearance of taking sides) in a dispute. I also came to understand more clearly the importance of fostering meaningful relationships with the legislative branch of government based on candor and openness. I developed more fully a leadership style based on active listening, encouraging involvement on the part of stakeholders, and creative thinking and planning. I learned the importance of developing common sense policies. I believe, for example, that the Board should constantly reevaluate its internal systems to ensure that all Board members participate fully in significant management decisions.

III. Policy Questions

MSPB Case Management and Procedures

10. The appeals process administered by MSPB has been characterized as being legally complex, with court-like features.

The process has been described by some as not always being user friendly. What is your opinion about the balance MSPB should strive for between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? How can that balance be achieved?

The appeals process can be daunting for appellants, particularly those not represented by an attorney. Should MSPB assist pro se appellants in exercising their rights to due process? If so, what assistance should MSPB provide? Are there any other things that you believe MSPB can and should do to reduce the burden on appellants?

Some survey data, including MSPB surveys, show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. However, then-Acting Chairman Marshall stated to this Committee in March 2003 that MSPB research "clearly shows that there are reasons for this reluctance other than the Board's appeal process itself. These reasons include insufficient training and knowledge, a belief that higher-level managers will not support taking action, and agency-imposed procedures and documentation," S. Hrg. 108-185 (June 4, 2003), at page 55. What is your opinion on this matter, and what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Accessibility is a fundamental tenet of Anglo-American jurisprudence. Therefore it is imperative that judicial courts and administrative forums be perceived as accessible, be accessible in fact, and by extension, be user-friendly to all parties. I believe that it is a difficult challenge for an administrative tribunal (and a court) to strike the appropriate balance between assisting either party and maintaining impartiality. I do not believe that a blanket rule can be established for all cases. I believe that the degree of the MSPB assistance to either party should vary from case to case depending on a variety of factors such as the nature of the issues, the sophistication of the parties, and whether or not they are represented by counsel. The guiding principles for the MSPB must continue to be impartiality, fairness and efficiency. The MSPB cannot be viewed as an advocate for either party. Moreover, its administrative judges and Members must carry out their adjudicatory responsibilities in a manner that is fair to all parties and operates to efficiently accomplish the MSPB's mission.

The MSPB does a number of things systemically to assist appellants. The MSPB continues to develop and disseminate, free of charge, brochures and a training video which provide guidance for adjudicating a case before the Board. The MSPB administrative judges are expected to issue comprehensive, understandable pretrial orders. The MSPB should continue to ensure that its administrative judges receive training in recent developments in the law, docket and case management, and that they display appropriate judicial temperament. The Board should continue to build a culture around the maxim that "win or lose, a party must feel that he/she has been heard." The MSPB should continue to reexamine its procedures to ensure that they are easily understandable and workable, not cumbersome or seen as a trap for the unwary.

Based on my state agency experience, I suspect that the perception that the appeals process is burdensome is more myth than reality. The staff at Virginia's Department of Employment Dispute Resolution discovered that the majority of disciplinary actions are not grieved. And, the majority of disciplinary actions that are grieved are decided in favor of management. The statistics are similar in the federal system. The misperception that the Board's appeals process is burdensome exists for a number of reasons. Some managers do not understand personnel rules and procedures. Others do not understand how and when to discipline and terminate employees. Still others avoid taking discipline because they do not want to be perceived in an unfavorable light. Agencies have a continuing obligation to ensure that their managers are properly trained.

The MSPB will continue its outreach activities to assist agencies in training their managers. The MSPB should, through its studies function, collect and share case data to dispel such myths.

11. The time taken by MSPB administrative judges to process initial appeals has remained fairly stable since FY 1995, averaging about 100 days. However, according to MSPB's Fiscal Year 2003 Performance and Accountability Report, the average time the Board itself has taken to review initial appeals stood at 295 days in FY 2003, up from 176 days in FY 2000. In your view, what are some options, if any, for timelier decision making? Specifically, what do you believe that you, as Chairman, could and should do to expedite Board review?

I believe that MSPB cases can be decided quickly without sacrificing quality or fairness. Currently, Board administrative judges are generally required to issue an initial decision within 120 days of the regional office's receipt of the appeal. To expedite the Board's review of those initial decisions, I believe that the Board should have shorter target timeframes for issuing decisions at the Board level.

MSPB cases can and should be decided expeditiously. I recognize that a number of factors may influence the time it takes to decide a particular case, such as the complexity of the issues, the Board's existing workload and staffing resources, and the limitations of available information technology resources. Additionally, external factors impact the ability of the Board to timely issue decisions. For example, for a portion of 2003, the Board lacked a quorum (the Board had only a single Board member) and, therefore, could not issue any decisions. As Acting Chairman, I am already planning for the Board to conduct a study to determine which of these factors are contributing to case processing delays. The Board must then work creatively to eliminate any systemic causes for such delays. As has been done in the past, I also plan to create a strike force to address the current backlog of cases awaiting Board review of initial decisions issued by administrative judges. As Chairman, I will ensure that the Board has an effective case docketing and tracking system, and I will require that managers and reviewing attorneys be held accountable for expediting cases for Board review. Finally, in order that the Board itself may be held accountable for expediting decisions, I will propose that the Board adopt a more stringent case processing time standard for Board members.

I have the experience necessary to develop and implement reasonable but expeditious timeframes for decision making at the Board level. From 1989-91, I chaired the Virginia State Bar's (VSB) Special Committee to reduce Litigation Costs and Delays. As a result of my committee's recommendations, the VSB adopted time standards for civil cases. From 1991-95, I was a member of the Advisory Group for the U.S. District Court for the Eastern District of Virginia. This group conducted a review under the Civil Justice Reform Act for this federal district court that was similar in nature to the review of state courts conducted by the VSB committee, which I chaired. Furthermore, I practiced for 16 years before the U.S. District Court for the Eastern District of Virginia, or "rocket docket" as it is commonly described. Experience before that court

has shown me that cases can be adjudicated with efficiency and speed without sacrificing quality or fairness.

12. The average processing time takes into account cases that are dismissed or settled. However, cases that are heard by an administrative judge and fully reviewed by the Board take longer, on average. The last time MSPB published its Report on Cases Decided, data showed that in fiscal year 1999, the average time for a decision from a hearing of an initial appeal of an adverse action was 171 days, and the average time for the Board to decide cases in which a petition for review was granted was 390 days, for a total of about 560 days. What options do you suggest be considered to reduce the length of time to decide such cases?

Initially, I should point out that current case processing statistics are tracked differently from those discussed in this question. According to the Board's May 2004, caseload statistics, during fiscal year 2004, the Board field and regional offices have processed appeals in an average of 89 days. At the Board level during fiscal year 2004, the Board has processed appeals in an average of 282 days. While these statistics include dismissal and settlement, each case must be reviewed and considered on its own merits; thus, dismissals and settlements are appropriately considered in the average time that it takes to decide Board appeals.

As I discussed in my answer to the previous question, as Chairman, I plan to create a strike force to consider the Board's backlog and decide how best to reduce it. However, having worked at the Board as a Member and Acting Chairman, I see several means of reducing the length of time it takes to issue decisions at the administrative judge and Board level.

When a party files an appeal with the Board's regional or field office, the administrative judge assigned to the case generally has 120 days to resolve the appeal (whether through settling the case, dismissing the case, holding a hearing and issuing a decision on the merits, etc.). The Board's administrative judges do an excellent job of timely resolving these cases. However, there is always room for improvement. As Chairman, I would examine the Board's rules and regulations with an eye toward streamlining and speeding up case review and processing. To reduce case processing time, the Board must become fully and appropriately staffed at the field and regional level. To address this concern, the Board has recently advertised for two additional administrative judges in the Western Regional Office and, during the recent reorganization, administrative judges were reassigned to understaffed regional and field offices. As Chairman, I will continue to work with the field and regional offices to determine whether additional staffing, training, or support is required to reduce the time it takes to decide appeals.

When a party files a petition for review of an administrative judge's initial decision with the Board, several offices at the Board may review and/or process the case. To reduce the processing time at the Board level, as Chairman, I will work with each office to determine how best to increase that office's efficiency in handling these petitions for review.

For example, currently, the Board's Office of Appeals Counsel (OAC) has a significant backlog of cases due, in part, to earlier position vacancies. However, since becoming Acting Chairman, OAC has hired a number of new attorneys and is currently in the process of hiring more attorneys and a paralegal to address this backlog. Nevertheless, the Board may be required to hire additional staff to ensure that it meets the shorter decision making time limits described in the proposed DHS regulations, discussed in the answer to Question 31. Additionally, given that many of OAC's recent hires may be newer to Board law, additional training in employment and Board law may be required to ensure that these attorneys are able to quickly and efficiently advise the Board on the appeals before it. As Chairman, I will continue working with OAC management to monitor the staffing levels and case receipts and ensure that the Board is appropriately staffed and trained.

As Chairman, I will also monitor the Board's technology needs and will upgrade hardware and software, as needed. The Board recently implemented a new e-filing system. E-filing is the first in a series of technology upgrades that should reduce the time that it takes to process an appeal. Eventually, the Board hopes to use electronic case management, under which all files will processed electronically. Electronic case management would reduce the potential for mishandling appeal files and would reduce or eliminate the time it takes to handle and send documents and files between offices. As Board Chairman, I will encourage the Board's information technology staff to continue to explore and upgrade hardware and software, as needed, and recommend new technologies that will assist the Board in fulfilling its statutory mission. Further, I will ensure that Board employees receive in-house technology training so that they can effectively and efficiently use the resources provided.

Finally, as I previously discussed, I think that the Board, itself, should set stricter time limits for the Board members to review cases. I would encourage Board members to manage their dockets so as to identify those cases that can be voted quickly, allowing more time to review cases that are complex, sensitive, or otherwise more difficult to resolve. When each office in the chain of review reduces its time to consider and process an appeal, the Board will reduce its overall processing time.

13. MSPB's strategic and performance plans call for the development and implementation of an integrated automated agency-wide case management system to assist in effective case processing, management, and program evaluation. MSPB's fiscal year 2001 performance report indicated some problems and delays in developing and deploying the system (called Law Manager), and the fiscal year 2002 performance report said that work continued on the development of the case management system. The fiscal year

2003/2004 performance plan had goals of implementing components of the system and the fiscal year 2005 performance plan indicated that MSPB had discussions with the contractor about its failure to meet the contract deadline for completion.

What is the status of the system's implementation?

The system was implemented in February, 2004.

What, in your opinion, was the cause of the contractor's failure to meet the contract deadline, has the matter been resolved and how, and what has been the impact of the delay on completing the system?

The contractor did not fully understand the Board's requirements and underestimated the amount of time needed to implement features in the existing case management system and requested enhancements. The matter was resolved when the MSPB stopped payments to the contractor and required the contractor to submit a firm-fixed price contract to complete the system. Furthermore, the MSPB withheld payment for 4 months of work performed under the old contract and all payments on the firm-fixed price contract until the system was implemented, resulting in the contractor receiving no payments for 18 months. After acceptance of the system, the Board paid for the 4 months of work and the amount of the firm-fixed price contract.

The delay in implementing the case management system resulted in the delay of some other projects in the Board's strategic plan, but did not significantly impact the end-users who continued to use the old system. The old system worked well but it needed to be replaced because the manufacturer no longer supported the operational hardware and it was difficult to interface the old system with the new components of the electronic case processing system.

For system components deployed, has MSPB evaluated the extent to which the system is meeting MSPB's and the user communities' expectations? What are the results of the evaluation?

The MSPB has not yet completed a comprehensive evaluation of the case management system as the system is too new and the Board's technology group is still resolving minor code problems. However, since implementation, the MSPB has been tracking user feedback and resolving issues raised by the users. The Board plans to conduct a more comprehensive evaluation after the system has been operational for six months. Additionally, the Board solicited an external review of this system and the project by the Information Technology Review Board. The ITRB has completed its investigation and is expected to issue a comprehensive report in the very near future.

With regard to the electronic filing system that was implemented in September 2003, the Board has received feedback from users that is overwhelmingly positive.

14. Timeliness is one measure of performance. Quality of decisions is another measure. How can the competing goals of quality and timeliness be balanced? What are appropriate indicators that could be used to measure the quality of MSPB decisions?

As I indicated in my response to Question 11, I believe that the goals of timeliness and quality are concurrently achievable. The MSPB administrative judges, attorneys, managers, and Board members must work together to ensure that one goal is not sacrificed at the expense of the other. Managers must have the flexibility to take into account the ebb and flow of cases and resources, as well as unanticipated setbacks. At the same time, if an administrative judge issues excellent decisions but is having difficulty managing his docket, he should be assisted in managing his docket rather than being granted a timeline extension. The Board must encourage and effectuate a culture wherein the twin goals of timeliness and quality are not only compatible but also desirable and attainable.

The rate at which Board decisions are upheld on appeal is one measure of the quality of the Board's decisions. Such rates indicate the Board's ability to issue legally correct opinions. But, there are other quality issues that reversal rates cannot measure. I believe that the Board should periodically survey a statistically viable sample of parties to determine whether hearings are conducted in a fair, impartial, professional, and timely manner; whether decisions are clear, concise, and understandable; and, whether the Board's employees, including administrative judges, litigation and settlement attorneys, mediators, etc., are professional, responsive and courteous.

15. MSPB's fiscal year 2005 performance plan contains goals for quality (e.g., maintaining or lowering the percentage of cases remanded or reversed) and for maintaining or reducing average case processing time. Do you believe it is desirable that the performance management system for administrative judges and attorneys be aligned to the MSPB's performance goals? What do you consider to be the advantages and disadvantages of such a linkage, and what changes, if any, would you make as Chairman?

I believe that the performance management system for administrative judges and attorneys should be aligned with the MSPB's performance goals. It is only through the work of its employees that the Board is able to achieve its own performance goals.

In fact, the performance standards that apply to the Board's administrative judges and other attorneys are now, and have been for some time, closely linked with the goals that the Board is expected to achieve. For example, the Board's performance plan requires Board attorneys to produce a certain number of high quality decisions within a limited timeframe. Consistent with these goals, each attorney is individually responsible for tasks such as identifying the issues in an appeal, considering relevant evidence, conducting appropriate research and analysis, and preparing legal documents that effectively convey the results of this work. In turn, Board attorneys are evaluated on the quality of their legal research, analysis, and writing, and Board managers ensure that each employee's performance augments the Board's other efforts to meet

its overall goals, to the extent possible within the constraints of their differing programs and purposes. Board attorneys' compliance with their performance standards is critical to the Board's ability to meet its goals. Board attorneys who competently perform their assigned tasks enable the Board to achieve its goals of timely issuing high quality decisions, reducing the number of appeals the Board must remand for further adjudication, and maintaining the high affirmance rate of the Board's reviewing court. Thus, in my view, individual Board employees' performance standards are consistent with the Board's broader goals.

However, there are certain limitations on the extent to which individual attorneys' performance evaluations can be aligned with the Board's success in achieving the specific goals in its annual performance plan. For example, the Board's ability to meet its timeliness goals may be affected from time to time by changes in the Board's leadership. A little over a year ago, the Board had only one member and consequently was unable to issue decisions at all for a significant period of time. The resulting backlog could not, of course, have the effect of lowering individual attorneys' performance ratings. Moreover, the Board's ability to minimize the number of remands and reversals also may be influenced by developments unrelated to the quality of the decisions drafted by the Board's attorneys. Some remands and reversals by the Board's reviewing court, as well as some remands and reversals by the Board itself, result from changes in statutory or case law, or from the issuance of precedent that settles matters on which there had previously been disagreement. In addition, some draft opinions prepared for the Board are returned to the drafting attorneys because the Board members cannot agree and have called for the drafting of separate opinions.

In light of the considerations described above, a perfect alignment between the Board's performance plan and the system for evaluating and managing administrative judges' and other Board attorneys' performance would be impractical. To the extent possible, though, as Board Chairman, I would attempt to maintain a close correlation between the two.

16. One factor that helps reduce average case processing time is that more than half of the initial appeals received by the MSPB and not dismissed are settled. This percentage is even higher in adverse action cases and performance cases, 67 percent and 74 percent, respectively, in fiscal year 2003. What role, if any, do you believe the MSPB should exercise to help ensure that parties do not feel compelled to enter into settlements that might be unfair, unwise, or without due process? In this regard, what are your views on the MSPB's current procedures and policies relevant to the settlement of cases, and what changes, if any, do you believe should be made in those procedures and policies?

The Board has long held that its administrative judges may not advocate for one side or another. The Board has a duty to ensure that parties to appeals receive even-handed, fair treatment, and that the parties are aware of their rights and responsibilities on appeal.

At the same time, administrative judges may offer a fair assessment of the merits of each party's case during the development of the record. When doing so, administrative judges must notify the

parties that any assessment of the merits is just that – a discussion of Board law to help the parties gauge their own likelihood of success against similar Board cases. Administrative judges are careful to explain that parties are not required to settle their case or agree to any specific settlement terms. Further, administrative judges notify the parties that, if they decide not to settle an appeal, they will receive a full and fair adjudication of their claims. The Board's administrative judges do a very good job in this regard.

Typically, the same administrative judge who worked with the parties in an attempt to settle an appeal is assigned to decide the appeal if a settlement was not reached. To avoid any appearance of bias, I believe that a new administrative judge should be assigned to hear the appeal after a failed settlement attempt. Currently, a new administrative judge is assigned only at the request of a party.

17. According to the MSPB's Fiscal Year 2005 performance plan, MSPB has initiatives underway to foster mediation and other forms of alternative dispute resolution (ADR).

Do you believe the MSPB should play a role in promoting the use of ADR at other federal agencies and in training federal staff in ADR techniques? If so, how should that role be exercised?

How should MSPB's role be coordinated with, or differentiated from, the respective roles of other federal entities with similar responsibilities or interests to help ensure efficiency and consistency in federal workplace ADR policy and practice?

First, I want to state clearly that I am a proponent of ADR. I believe that regional offices should identify early in the process those cases that could benefit from mediation and, with approval of the parties, submit those cases for handling by the Board's mediators. At the Virginia Department of Employment Dispute Resolution, I ran a mediation program that relied on volunteer mediators from other state agencies who were trained by my agency. I believe that the MSPB should also play a role in promoting the use of ADR. I am less certain that the MSPB should play a role in training federal employees of other agencies in the use of ADR techniques. The Board does not have the statutory authority or the funds for such activities.

Limited opportunities for coordination with agencies such as the Equal Employment Opportunity Commission and the Office of Special Counsel may be presented in mixed cases, whistleblower cases or Hatch Act cases. Where such opportunities arise, the Board should work with those agencies to ensure efficiency and consistency in federal workplace ADR policy and practice.

Whistleblower Protection

18. In 2000, the United States Court of Appeals for the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing. *Hesse v. Department of State*, 217 F.3d 1397 (Fed. Cir.

2000). The Court held that, even if the employee's security clearance was suspended or revoked in retaliation for making protected disclosures, the employee cannot obtain a remedy from the MSPB, because civil service law does not authorize the Board to either review a security clearance determination or require the grant or reinstatement of a clearance. To respond to the holding in *Hesse*, S. 1358, which is pending before the Governmental Affairs Committee, contains a provision that would make it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle.

What, if any, significant impact on MSPB would you anticipate from the creation of this additional prohibited personnel practice if S. 1358 were enacted? In 1992 the Board established an Information Security Manual that sets forth a policy for handling classified information and, since then, has considered cases involving classified information. In addition to the need to ensure that classified information is handled in accordance with established MSPB policies, would the consideration of cases alleging retaliation in the form of suspension or revocation of a security clearance differ in any significant way from the consideration of cases alleging other forms of retaliation? Moreover, what, if any, impact would you anticipate on MSPB's workload from this provision?

In addition to establishing a new prohibited personnel practice, the legislation would also state that MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance. Absent restoration of the security clearance, what are some examples of relief that you think might be appropriate in these cases? Would you anticipate that the expedited review process for these cases would have a significant impact on MSPB's other workload?

The creation of an additional prohibited personnel practice is likely to increase the Board's caseload because employees and former employees will have another basis for challenging an agency personnel action. The Board cannot provide a realistic estimate of the extent to which the caseload might increase because of the new prohibited personnel practice at this time, although the only employees who could bring such a claim would be those who possessed a security clearance, and those employees represent a relatively small percentage of all federal employees.

Whether the consideration of cases alleging retaliation in the form of suspension or revocation of a security clearance would differ in any significant way from the consideration of cases alleging other forms of retaliation depends on the nature of the underlying employee conduct that resulted in the agency action. If an examination of the circumstances leading to the suspension or revocation of a security clearance does not require access to classified information, the Board's adjudication of the case would proceed along normal channels. If access to classified information were necessary during the adjudication, the Board would limit such access to those Board employees with appropriate clearances.

Some examples of relief that might be appropriate where the Board determines that an employee's security clearance has been suspended or revoked as a result of unlawful retaliation for whistleblowing include back pay, attorneys fees, and consequential damages.

19. In *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit appeared to impose an erroneous standard for determining when an employee makes a protected disclosure under the Whistleblower Protection Act. Whereas the Act clearly provides that an employee need only have "a reasonable belief" that he or she is providing evidence of fraud, waste, or abuse before making a protected disclosure, 5 U.S.C. § 2302(b)(8)(A), (b)(1)(B), the Federal Circuit in *Lachance* required "irrefragable" proof.

Last September, the MSPB concluded in its decision on remand that the "irrefragable proof" language in *Lachance* was dictum that was neither supported by the legislative language of the Whistleblower Protection Act nor thereafter imposed by the Federal Circuit itself. *White v. Air Force*, MSPB (Docket DE-1221-92-0491-M-4, Sept. 11, 2003). However, OPM argued to the MSPB in *White* that "irrefragable proof" is the correct standard, and OPM has the authority to reassert this position to the Federal Circuit by appealing any future MSPB decision that applies a lesser standard.

To assure that the misinterpretation in *Lachance* is not repeated, S. 1358 contains a provision to provide assure that the misinterpretation in White is not repeated by providing that any presumption relating to a federal government employee taking a personnel action for the purposes of a disclosure under 5 U.S.C. §2302(b)(8) may be rebutted by substantial evidence. In light of the Board's remand decision, but also considering OPM's authority to appeal future cases on this subject to the Federal Circuit, do you believe that the provision in S. 1358 is necessary or desirable?

While the language in *Lachance* is dictum, and while the court has not subsequently required a whistleblower to submit "irrefragable proof," neither has the court criticized or repudiated that language in its later decisions. I therefore support the proposed amendment to overrule the language in *Lachance v. White* requiring "irrefragable proof" to counter the presumption of administrative regularity. Substantial evidence supporting a whistleblower's disclosure is sufficient to rebut any presumption.

20. Under current law, the Office of Special Counsel has no authority to request MSPB reconsideration of final decisions or to seek appellate review of an MSPB decision. S. 1358 would authorize the Office of Special Counsel to appear in any civil action brought in connection with the Whistleblower Protection Act and to request appellate review of any

MSPB order where OSC determines MSPB erred and the case would have a substantial impact on enforcement of the Whistleblower Protection Act. Do you believe that this provision would be helpful and appropriate to ensure proper enforcement of the Whistleblower Protection Act?

I agree with the provisions of S. 1358 which give OSC the authority to appear in any civil action brought in connection with the Whistleblower Protection Act and to request appellate review of MSPB orders. Allowing OSC to seek such review will help ensure proper enforcement of the Whistleblower Protections Act.

21. Under current law, appeals of most MSPB decisions are appealed to the United States Court of Appeals for the Federal Circuit. Subject to a five-year sunset, S. 1358 would allow petitions for review of these MSPB decisions to be filed with the Federal Circuit or any other federal circuit court of competent jurisdiction. The rationale for this provision, including a list of several existing statutes that allow federal employee cases (including certain MSPB decisions) to be appealed to Courts of Appeals across the country, is stated in the Governmental Affairs Committee report on a similar bill last Congress, Report on S. 3070, S. Rep. No. 107-349 (Nov. 19, 2002), pages 16-18. What do you believe would be the impact of this provision on federal personnel law?

Allowing petitions for review of most MSPB decisions to be filed with any federal circuit of competent jurisdiction would allow MSPB case law to grow and develop more broadly. Ultimately, I see that as a benefit. The lack of uniformity that would result, however, could lead to "regional" justice, complicating the way in which agencies develop standards for disciplining their employees. It would also impose a hardship on litigants, both agencies and appellants, who previously have been able to rely on a substantial body of established precedent. I believe, though, that having the Federal Circuit as the court of exclusive jurisdiction for appeals of most MSPB decisions can stifle the development of federal civil service law, unfairly impeding the growth of that body of law at a time when the federal civil service is facing significant challenges. In sum, there are advantages and disadvantages to either approach.

22. Currently, when OSC pursues disciplinary action against managers who retaliate against whistleblowers, OSC must demonstrate that an adverse personnel action would not have occurred "but for" the whistleblower's protected activity. S. 1358 would require OSC to demonstrate that a whistleblower's protected disclosure was a significant motivating factor in the decision by the manager to take the adverse action, even if other factors also motivated the decision. This standard is similar to that created by the Supreme Court in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), *see* S. Rep. No. 107-349 (Nov. 19, 2002), pages 20-21. Do you believe that this is an appropriate standard? Would you anticipate that such a

provision would have a significant impact on MSPB if it were to become law? Do you believe such a provision would be helpful and appropriate to ensure adequate due process for federal employees?

Prior to the Whistleblower Protection Act of 1989 (WPA), when the Special Counsel pursued disciplinary action against managers who retaliated against whistleblowers, the Board ordered disciplinary action when OSC showed that the whistleblower's conduct was a "significant factor" in the prohibited personnel practice. *Special Counsel v. Brown*, 28 M.S.P.R. 133, 137 (1985); *In re Frazier*, 1 M.S.P.R. 163, 196 (1979), *aff'd, Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982). After the WPA, in several cases, the Board applied what was essentially a "but for" test whereby, upon a showing that a protected disclosure was a contributing factor in the action at issue, the Board ordered disciplinary action unless the agency presented clear and convincing evidence that it would have taken the action in the absence of the disclosure. In *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400, 1405 (Fed. Cir. 1992), however, the Court of Appeals for the Federal Circuit held that that test did not apply in disciplinary action cases and that the "significant factor" case remained applicable.

The Board then resumed its application of the "significant factor" test to such cases, but it considered the issue of whether disciplinary action should be ordered if the charged manager would have taken the allegedly improper action even in the absence of the protected conduct. In *Special Counsel v. Santella*, 65 M.S.P.R. 452, 458-59 (1994), the Board held that a factor could not be regarded as "significant" unless it played an important role in the allegedly improper action; that the "significant factor" test was not met in a disciplinary action case unless the motivation for the action was improper; and that the test was not met if the charged manager would have taken the allegedly improper action in the absence of the protected conduct. *Id.* The Board thus requires OSC to demonstrate that protected conduct was a significant motivating factor in the decision to take the allegedly improper action. This standard is similar to that created by the Supreme Court in *Mt. Healthy*, and requires OSC to show that the charged manager would not have taken the same action in the absence of the protected conduct.

S. 1358 would amend 5 U.S.C. § 1215 to provide that the manager charged in a disciplinary action case must demonstrate, by preponderant evidence, that he would have taken the allegedly retaliatory action in the absence of the protected conduct. Although I have some reservations about placing on employees the burden to prove that they should not be disciplined for their actions, I believe, overall, that the proposed amendment of 5 U.S.C. § 1215 would be beneficial because it would codify an approach very similar to the one the Board has taken. It would also avoid the injustice, perceived by some appellate courts, of punishing those who are forced to make personnel decisions that may incidentally involve situations where employees have engaged in protected activity.

Merit System Oversight

23. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues. What is your understanding of the differences Congress intended in how each agency should perform this role? What is your understanding of the differences in how each agency currently performs these roles? Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

What is your understanding of the differences Congress intended in how each agency should perform this role?

The legislative history of the Civil Service Reform Act (CSRA) makes it clear that Congress intended MSPB and OPM to have different but complementary roles in managing and overseeing Federal merit systems. MSPB and OPM were created to separate the conflicting roles of promulgating policy and overseeing policy. Prior to the passage of CSRA, the Civil Service Commission had become increasingly and necessarily more involved in creating policy. Congress concluded that the Commission had not effectively performed—and could not effectively perform—both of these important roles. While creating policy was critical to effective management in a changing world, Congress recognized the need for independent, bipartisan oversight of the merit system to ensure that the civil service did not suffer the real problems or public distrust that had occurred under the spoils system.

Congress created the MSPB to provide independent oversight of the civil service and other merit systems. This oversight was to assure the public that workforce policies and programs promulgated to adapt to a changing work environment also conformed to the concepts of fairness, efficiency and effectiveness embodied in the merit principles. The MSPB's ability to provide this type of oversight and independent viewpoint was designed into its structure. The MSPB's bipartisan composition ensures that the MSPB approaches its work without regard to political or administrative agendas. The MSPB is neither an advocate of particular programs nor an advocate of particular constituencies. The staggered seven-year terms of the Board's members enable the MSPB to take a long-term view of civil service issues. Further, I believe that Congress gave the MSPB both an adjudicative and a studies function so that each of these functions might inform the other. In providing oversight of the civil service system, the Board has a duty to analyze whether the Board, itself, promotes the concepts of fairness, efficiency and effectiveness in adjudicating its cases, and should conduct comparison studies between the Board and similar agencies at the state and local level.

OPM has an oversight role different from the MSPB's. OPM was created to serve as the President's agent for human resources management. Concentrating this role in a single, politically responsive agency contributes to the President's ability to manage the Federal workforce. While also concerned with merit, OPM's oversight authority was intended to ensure that agencies comply with civil service laws and regulations and to ensure that agencies correctly

exercise the authorities that OPM has specifically delegated to them. These roles are important, but distinct from the oversight provided by the MSPB.

What is your understanding of the differences in how each agency currently performs these roles?

In addition to its role in adjudicating employee appeals, the Board carries out its oversight function by conducting studies of the civil service and merit systems. The Board's merit systems studies review civil service and other merit system laws, regulations and procedures, including how these systems are developed and implemented. The Board's oversight responsibility concerns the long-term effects of OPM management policies, that is, whether OPM policies and regulations result in management practices that conform with the merit principles and whether the American public is being well served. The bipartisan nature of the Board creates an environment conducive to objectivity and allows an independent perspective on results of OPM policies and regulations. The Board's independence enables it to report even controversial findings to Congress and the President.

OPM has developed oversight programs to assess the degree to which agencies comply with laws and properly exercise delegated authorities. OPM has also recently succeeded in helping agencies improve their overall human capital management in support of the President's Management Agenda. However, OPM's advocacy role and involvement in designing and implementing HR policies, rules and regulations makes it critical that there be an independent, bipartisan review of the impact of its actions on merit so that there is no conflict of interest. We believe MSPB and OPM's roles are designed to complement one another and that this has generally worked well. For example, recommendations from an MSPB report on the Presidential Management Intern program are reflected in OPM's recent revision of that program.

The MSPB and OPM use similar tools to conduct their oversight activities and, as you note, the topics which the MSPB and OPM review sometimes overlap. This is not surprising given the importance of ensuring effective management within the merit systems. Yet, even when the subject matter and activities overlap, the viewpoints of MSPB and OPM differ. There is no—nor should there be a single guardian of merit. To have only one entity responsible for ensuring merit risks the development of a limited definition of what constitutes merit. The MSPB's independence and bipartisan composition allow it to provide a balanced perspective on the management of the Federal workforce. We believe this is something that makes the Board's research particularly useful to policy makers.

Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

No. At this time the distinct oversight roles and perspectives that OPM and the MSPB provide are probably more critical than at any time since the passage of the Civil Service Reform Act. As a result of legislation that permits the Department of Homeland Security and the Department of

Defense to develop their own personnel systems, more than half of the Federal workforce may soon be managed under systems that contain significant exemptions from traditional civil service laws. OPM's role in oversight is important to assessing compliance with laws and the effectiveness of current Administration policies. The MSPB's unique and independent oversight role is necessary to assure the public that the Federal workforce is managed in accordance with the merit principles and free from prohibited personnel practices.

24. Do you believe that it is beneficial and appropriate for the MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if acted upon by Congress, agencies, and employees, would improve the federal government's civil service system and personnel practices and reduce the need for and costs of litigation? If so,

How should MSPB go about identifying such systemic and recurring issues?

How should Congress, agencies, and employees be made aware of these issues?

Yes, I believe it is beneficial and appropriate. The MSPB has already done some work in this area. Several of the Board's studies have examined the issues of poor performers, sexual harassment, and fair and equitable treatment in Federal employment. These are issues that often result in the filing of appeals. The report concerning poor performers in particular compiled two decades of Board research regarding how supervisors respond to unacceptable performance and offered agencies suggestions on how to better address and prevent unsatisfactory employee performance. The Board also publishes information about decisions on significant cases.

To more directly identify specific systemic and recurring issues, the Board is exploring several internal management study options including:

Examining the factors that lead to adverse actions and that contribute to agency decisions whether or not to initiate an action. This study could also identify specific challenges agencies encounter in dealing with misconduct, poor performance, and an employees' inability or unwillingness to perform; and

Exploring how settlement agreements affect the Government's ability to effectively manage its workforce and what the Government can do to mitigate any negative effects of settlements. Currently, more than half of all MSPB appeals that are not dismissed are resolved through settlement agreements. Little data has been collected about the nature of the Board's settlements, such as whether attorney's fees are awarded, whether the employee resigns or is reinstated, and whether there are any long-term consequences of these settlements.

Additionally, I think that the Board should evaluate how it can best promote the merit system principles in its adjudicative function. It should conduct a comparison analysis between its approach to adjudicating personnel issues and the approach that similar state and local agencies

take in resolving employment disputes. The Board should survey whether it is effectively adjudicating appeals by, for example, evaluating how long it should reasonably take to resolve the average appeal and by considering whether the parties to appeals understand the hearing process and the Board's decisions. Currently, the Board is conducting a customer survey of agency representatives to determine their views regarding the adjudicatory process and to identify potential improvement areas. By understanding the flaws in the Board's current approach to adjudicating cases, the Board can zero in on the changes it must make in its own practices to better promote the merit principles in the Federal government.

The Board informs Congress, agencies, and employees of the results of the MSPB's research by publishing and distributing reports on the Board's research, summarizing findings in the Board's newsletter, *Issues of Merit,* and presenting findings at conferences, seminars, and Federal Executive Board meetings.

25. Based on MSPB's surveys of the federal workforce and other research and studies, what do you believe are the major challenges facing federal managers and other federal employees in today's and tomorrow's federal workplace, and what do you believe needs to be done to meet those challenges?

There are three general areas in which agencies face significant challenges to create and maintain a high-quality workforce.

The first challenge area is leadership. The Board's survey research indicates that slightly less than half of Federal employees believe their supervisors have adequate management skills. Supervisors and managers are often promoted for technical competence, longevity, or other factors unrelated to their ability to lead. Recent and proposed changes to Federal personnel systems will demand more of these managers than ever before.

The Federal Government can meet this challenge by evaluating and improving key aspects of leader selection and development. The MSPB can help address these issues by conducting program evaluation studies of leadership and sharing the resulting data and recommendations with agencies responsible for implementing these programs. The MSPB plans to continue this evaluative role and work closely with agencies to strengthen the selection and development of leadership talent through independent evaluation and feedback.

The second challenge is attracting and hiring well-qualified employees. The MSPB is currently conducting studies of the hiring process to help agencies identify the best practices and ensure that hiring procedures are legal, sound, and in the best interests of the American public. Recent and in-progress MSPB studies address the effective use of structured interviews and reference checks by hiring officials, the appropriate use of automated hiring systems and special hiring authorities by agencies, and the use of intern programs and probationary periods as effective components of the hiring process. The MSPB is also studying compensation strategies to clarify their role in attracting and retaining the best applicants to Federal service.

A third challenge is effectively managing the Federal workforce. To do that, the Federal Government must more accurately understand its employees' motivations and needs. The MSPB's Merit Principles Surveys have identified a set of pervasive dissatisfactions, including high stress, high workload, insufficient training and lack of recognition. A strengthened link between pay and performance is part of the answer. To achieve effective personnel policy, there must be a greater understanding of the factors that affect employees' commitment to the mission and culture of their agencies, their relationships with their coworkers and supervisors, and their ongoing needs for professional development.

26. According to some, the redress system for federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel as well as MSPB) is lengthy, time consuming, costly, and sometimes misused, and offers the opportunity to "forum shop" in some situations. These are among the arguments that the Department of Homeland Security and the Department of Defense have apparently considered in developing proposed employee appeals options. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the federal workplace against political favoritism, retaliation, discrimination, and managerial abuse. What is your view about the current framework of the redress system for federal employees? Please explain the extent to which, if at all, you have concerns about the current process. Can you offer recommendations that could help improve the process? Please explain.

I believe that the current system provides an effective and, for the most part, efficient means of protecting the federal workforce against the abuses you have mentioned. Not only does it provide a means for redressing abuses that harm individual employees, but it promotes public confidence in the integrity of federal institutions and it deters managers from taking actions that they might be reluctant to have aired in a public proceeding. The impartial roles played by the various agencies, and the fact that each of those agencies has its own special expertise in its area of responsibility, adds to the public's confidence in the system. These positive features outweigh the fact that, in certain situations, the current system may occasionally lengthen the time, and increase the costs, associated with resolving a particular case.

I also note that the areas in which the different agencies' responsibilities overlap are in fact limited. The FLRA, for example, does not review individual actions that are appealable to the Board, and the Board does not decide whether agency actions that are the subject of union complaints constitute unfair labor practices.

There is an area, however, in which EEOC's and the Board's functions could be said to overlap unnecessarily. Until 1979, the Board's predecessor was responsible for final administrative resolution of discrimination claims by federal employees, including claims raised in connection with otherwise appealable actions. Under the system established by the Civil Service Reform

Act of 1978, an appellant who raises an allegation of discrimination in an appeal over which the Board has jurisdiction may obtain review by EEOC of the same claim of discrimination that a Board administrative judge has already fully adjudicated by means of a formal evidentiary hearing. Moreover, when EEOC and the Board reach different conclusions on the matter, a special panel may need to be convened to resolve the conflict, even though the appellant is entitled to seek subsequent judicial review of his claims. Arguably, the Board's decision in such a case should become the final administrative decision, subject only to judicial review at the appellant's (or possibly OPM's) request under 5 U.S.C. § 7703.

27. Based on MSPB's surveys and other research and studies of the federal workforce, and your prior Board experience, what do you believe are the major challenges facing federal managers and other federal employees in managing today's and tomorrow's federal workforce, and what do you believe needs to be done to meet these challenges?

This is the same question as No. 25 above. Please refer to the response for that question.

Personnel Flexibility at the Departments of Homeland Security and Defense

28. The Department of Homeland Security (DHS) and the Department of Defense (DOD) have been granted statutory authority to alter the process by which employee appeals are handled, but only after consultation with MSPB. Please describe the consultative process that was undertaken with DHS and that is anticipated with DOD. Do you believe that the consultative role assigned to MSPB is appropriately defined by the applicable statutes? As the agency charged with safeguarding the merit system principles, how do you believe the role of MSPB in helping design modifications to appeals processes should be defined in future personnel flexibility legislation?

The statutes do not define the consultative role of the Board. Nonetheless, in order for the Board to fulfill its statutory responsibility to consult with the Department of Homeland Security on the development of regulations governing its employee appeals process, the Board established a working group comprised of senior managers and senior attorneys who met regularly with DHS officials and representatives. The Board's working group entered the DHS process after draft regulations were proposed, reviewing drafts and offering recommendations regarding the proposed procedures, where appropriate.

In an effort to be more proactive, the Board began consulting with DOD before regulations were developed. I believe that this earlier interaction between high level working groups from MSPB and DOD will prove to be beneficial to the development of a fair appeals system. This consultation has been temporarily suspended while DOD consults with stakeholders on the feasibility of different systems under consideration. The Board intends to continue consultation when DOD focuses on a specific appeals procedure.

29. The FY2004 National Defense Authorization Act authorizes the Secretary of Defense and the Director of the Office of Personnel Management to establish a new human resources management system for DOD's civilian employees, and to jointly prescribe regulations for the system. Regulations applicable to employee appeals of adverse actions related to conduct or performance may not be prescribed without consultation with the MSPB. If confirmed, the Committee expects that you will be fully engaged in such consultation. What do you believe are the minimum requirements the appeals process for DOD employees needs in order to be fair and perceived as fair?

At a minimum, an appeals process for DOD employees must incorporate the basic and well-recognized elements of due process: notice of the reasons for an action and an opportunity to respond before an action is taken. Beyond minimal due process, however, a DOD appeals system must be fair and must be perceived as fair. Fairness is a broader concept that often includes other rights granted by statute and/or regulation. For example, the system must be one that, at the outset, is easily accessed by the parties. It must not be a system in which managers are afraid to participate, or of which employees are suspicious. Justice is served when the parties believe that they can achieve meaningful relief, where appropriate. The litigants must recognize and perceive the system as transparent, with clear rules as to practice and procedure. In my view, fairness requires an appeals system that is external and independent. Without this key feature, the credibility of the system will always be at issue. The hearing portion of the appeals system must meet certain requirements in order to be fair. The employee must have the right to be represented by counsel or some other individual, if he or she chooses. An adequate record must be developed so as to allow review on appeal. There must be a fair opportunity for the parties to explore alternate dispute resolution at the beginning of the process, and a further opportunity for them to pursue voluntary settlement negotiations during the appeal process. In short, the system must balance flexibility with fairness. With increased flexibility comes increased responsibility to ensure fairness. And a fair system is a system that is viewed as credible by agencies and employees alike.

30. The proposed DHS personnel regulations have a number of provisions having operational implications for MSPB. Among these is the requirement that an initial MSPB decision be made no later than 90 days after an appeal is filed. In fiscal year 2003, according to its Performance and Accountability Report, average processing time for an initial decision was 94 days (as noted in an earlier question, this average reflects cases that are dismissed or settled in short fashion as well as cases that go to hearing and take longer). In other words, it is proposed that MSPB be required to process DHS cases more quickly than cases have been processed on average. In your view, what approach should MSPB take in meeting the proposed requirements in DHS cases? In what way, if at all, would this approach differ from the handling of non-DHS cases? If there is a difference in approach, what are the implications for non-DHS appellants?

Under 5 U.S.C. § 9701, the Department of Homeland Security (DHS) must ensure that its procedures are consistent with the requirements of due process, and that any modifications it

makes to the procedures set in 5 U.S.C. Chapter 77 be "designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department." Section 9701 also requires that the Board consult with DHS on matters within the purview of Chapter 77. The Board's staff has done so, and continues to take this role seriously as they write the Board's regulations to effectuate those written by DHS. Beyond consulting with DHS, the MSPB is bound by the law which gives DHS authority to establish its own human resources management system "[n]otwithstanding any other provision of this part." The continued participation of the Board in the DHS appellate process, at both the level of its administrative judges and at the Board member level will assure DHS's employees a neutral review of their appeals, albeit under rules set by DHS within the confines of section 9701.

Practically, the Board recognizes that it will be held to tighter time limits than those that are now applied to other agencies. There is no doubt that this will set a challenging standard. However, for the reason set forth below, I believe that we will generally be able to satisfy the DHS requirements and at the same time, expeditiously decide the appeals from all other agencies.

First, the proposed regulations provide that only certain appeals that arise from DHS will be subject to the new system and its more stringent time limit.. For example, retirement appeals, whistleblower appeals, and appeals arising under the Uniformed Services Employment and Reemployment Rights Act of 1994 and the Veterans Employment Opportunities Act of 1998 will be adjudicated as they would be if they came from other agencies. Additionally, mixed cases are not subject to change. Accordingly, none of these appeals will be subject to the 90-day time limit.

Second, certain features of DHS's proposed regulations will render it easier for the Board to timely decide those appeals that will be subject to the stricter time limit. For example, as you have noted, the Board will not require the parties to engage in settlement efforts unless both agree to do so; parties must jointly submit requests that an appeal be suspended for purposes of discovery or settlement; discovery is more stringently limited; administrative judges may not hold hearings where there are no material facts in dispute; the Board has limited authority to examine the effect of the wording of a charge; the standard of proof will be lowered to substantial evidence; and, the Board may not review the reasonableness of the penalty imposed by DHS. In addition, the Board will work with DHS and OPM, pursuant to DHS's proposed regulations, to develop and issue voluntary expedited appeals procedures that will help speed the adjudication of these cases. Finally, if necessary, the Board may request funding for additional personnel to timely adjudicate DHS appeals without significantly delaying decisions in appeals from other agencies.

31. Similarly, if a party files a petition for review of an initial decision by the MSPB, the proposed DHS regulations would require the MSPB to render its decision within 90 days. In your view, what approach should MSPB take in meeting the proposed requirements in

DHS cases? In what way, if at all, would this approach differ from the handling of non-DHS cases? If there is a difference in approach, what are the implications of this requirement for non-DHS appellants?

The Board is sensitive to the interests that both agencies and appellants have in the timely adjudication of appeals, and it is working diligently to issue decisions as promptly as it can. Progress in this area was hampered in 2003 by the fact that the Board had only one member for a period of time and was therefore unable to issue any decisions at all. Since then, however, the number of cases pending before the Board has been substantially reduced, and the timeliness of adjudication has improved. The fact that the proposed regulations set a lower standard of review on petitions for review in DHS cases will allow these cases to be adjudicated even more quickly at the Board level.

To the extent the adjudication of DHS appeals is subject to stricter time limits than those applicable to other agencies' appeals, the Board will have to give priority to DHS appeals. I will of course ensure that the Board provides any such priority that is required. Nonetheless, the Board will, if necessary, request funding for additional staff to avoid significant delays in the adjudication of appeals involving other agencies. I believe that the Board can continue to adjudicate petitions for review more efficiently and expeditiously to the point that, ultimately, all appeals can be decided in a more timely manner.

32. The proposed DHS regulations would prohibit MSPB from requiring alternative dispute resolution (ADR) or settlement in appeals, in that once either party decided that settlement is not desirable, a matter would proceed to adjudication. As noted above, MSPB settled 67 percent of adverse action and 74 percent of performance-based appeals in fiscal year 2003. In your view, what are the operational implications of the proposed DHS rule on settlements (e.g., what do you believe will be the effect on the portion of cases settled and processing time)?

The success of the settlement process at the Board over the years has been instrumental in the Board's ability to timely adjudicate cases that do not settle. While the Board may not require the parties to appeals in DHS cases to attempt settlement, I must assume that the parties to such cases will approach settlement with a fair and open mind, and will not reject it as a matter of course. Nonetheless, the Board may not be able to maintain as high a settlement rate for DHS appeals.

For those cases that do settle, I do not envision that there will be any major changes. For those DHS cases that do not settle, the Board will provide administrative judges who were not involved in the settlement attempts to adjudicate the appeal. This reliance on two administrative judges, however, may slow down the process of deciding the appeal because it will require the second administrative judge to familiarize himself with the record.

Nevertheless, as I stated earlier, the new procedures should streamline the decision-making process and allow the Board's administrative judges to timely decide most cases. Additionally,

the Board and its administrative judges will do their best to eliminate any dilatory impact that the new DHS system may have on appeals from other agencies.

33. The proposed DHS personnel regulations would also affect how MSPB decides cases. For example, adverse action cases involving DHS employees would be decided on a substantial evidence standard. In addition, MSPB would not be able to mitigate penalties in DHS cases. Also, the proposed regulations would not permit MSPB to reverse a charge in DHS cases based on the way in which the charge is labeled or the conduct is characterized, as long as the employee is on fair notice of the facts sufficient to respond to the allegations of a charge. In short, MSPB will be applying different standards for DHS and non-DHS cases. What approach do you believe MSPB might use to consistently apply different legal standards for DHS cases than for non-DHS cases? What are the implications of a dual-track adjudication system on the federal civil service?

The Board is accustomed to applying different standards of proof, burdens of proof, procedures, and rules to cases that arise under different authorities. For example, in Chapter 43 performance appeals, the Board reviews the record under a substantial evidence standard and does not consider issues relative to mitigation. On the other hand, in Chapter 75 adverse action appeals, the Board applies the preponderance of the evidence standard and reviews the reasonableness of the penalty. The Board also applies different rules and standards to appeals arising under the Whistleblower Protection Act, the Uniformed Services Employment and Reemployment Rights Act, and the Veterans Employment Opportunities Act. The Board and its administrative judges will become familiar with differing DHS requirements. I believe that decisions in DHS appeals will remain of the same high quality as other MSPB decisions. I do not believe that there will be any significant implications for appeals from other agencies as a result of this new dual-track adjudication system on the federal civil service.

34. With the personnel flexibilities recently granted to DHS and DOD, a large share of the federal workforce is removed from the traditional civil service personnel system. What are the implications of having different agencies subject to different civilian personnel systems? Do you believe the effect of such changes should be examined? If so, what should be MSPB's role and how should that role be exercised? How does that compare to OPM's oversight responsibilities?

I believe that, with appropriate safeguards, different agencies can benefit from different systems. Agencies have different missions, different cultures, and different workforce requirements. Flexibility is needed to accommodate those differences. However, that flexibility does not and should not include exemption from merit principles, the freedom to commit prohibited personnel practices, or freedom from oversight and accountability. Congress recognized this when it authorized the creation of the DHS and DOD personnel systems.

Nevertheless, the proliferation of different personnel systems does pose challenges. First, change brings risk. Agencies may make mistakes when creating new personnel systems. Inequities may

arise because the managers who exercise personnel authorities are ill-equipped or ill-trained. Second, the emergence of multiple personnel systems may make it more difficult for the Federal Government to act as a "single employer" when needed to ensure equity or uniformity across agency lines, and agencies with less flexibility or fewer resources may be at a disadvantage when attempting to recruit and retain high-quality employees. Finally, the existence of different rules, procedures, and practices – even when they reflect the same fundamental values – may confuse employees and complicate the tasks of assuring that agencies comply with law and regulation and adhere to merit system principles. These challenges are manageable, but they must indeed be managed.

Do you believe the effect of such changes should be examined? If so, what should be MSPB's role and how should that role be exercised?

Yes, I believe that these different civilian personnel systems must be examined to ensure adherence to merit principles and to assure the public that these systems are free of prohibited personnel practices. The Merit Systems Protection Board should have a role in this examination and Congress and the President should be informed of the results of this examination.

MSPB's role must be consistent with its Congressional mandates. Congress created the MSPB to ensure, at both the systemic and individual levels, that the civil service is managed in a manner consistent with merit principles and that it is free of prohibited personnel practices. That role continues, and applies to existing personnel systems at other agencies as well as to the new personnel systems at DHS and DOD.

The MSPB can carry out its role in several ways. First, the MSPB should participate in the establishment of new appeals systems to adjudicate or enforce federal employee rights. Currently, the Board is actively participating in this manner with both DHS and DOD.

Second, the MSPB should evaluate the DHS and DOD systems to assure that the design, implementation, and operation of these systems protects the public's interest in a civil service system that adheres to merit principles and is free of prohibited personnel practices. This evaluation should be systemic, focusing on broad merit system issues rather than individual personnel decisions. Along these lines, the MSPB must collect baseline information that can be used to evaluate the operation and effects of the DHS and DOD systems.

Finally, the MSPB should continue to report on the significant actions of the Office of Personnel Management. This mandate, established by the Civil Service Reform Act, is more important than ever because OPM has a central role in the design of both the DHS and DOD personnel systems.

How does that compare to OPM's oversight responsibilities?

Congress created OPM to execute, administer, and enforce personnel management rules and regulations. As the President's agent for human resources management, OPM strives to establish policies that support effective management of the Federal workforce, advocates for the Administration's human resources management initiatives, and reviews agencies' use of delegated authorities. OPM oversees the development of human resources policy, reviews agencies' compliance with laws and regulations, and assesses Federal and agency human capital practices.

The MSPB, in contrast, is responsible for reviewing how OPM's regulations, policies, and actions affect the civil service as a whole. The MSPB provides independent oversight of the Federal Government's adherence to merit principles and ensures freedom from prohibited personnel practices. In this capacity, the Board reports to Congress and the President and provides OPM with constructive commentary on the effects of its policies and activities. The MSPB, whose Board members serve staggered, nonrenewable 7-year terms and can be removed only for cause, has the independence needed to perform these functions.

35. Much has been said about the graying of the federal workforce and the proportion of the workforce at or near retirement eligibility. What role does succession planning play in this regard and how do you see such planning as applicable to MSPB?

The MSPB has long emphasized the importance of workforce and succession planning. MSPB research suggests that Federal agencies can improve significantly in these areas. For example, in the Board's 2000 Merit Principles Survey, substantial percentages of Federal employees reported that they needed more training to do their jobs, that their work units needed more staff, or that downsizing had eroded institutional memory.

To address these issues, workforce and succession planning are now receiving much-needed attention throughout the Federal Government. The Administration has made strategic management of human capital one of five government-wide goals in the President's Management Agenda. The Office of Personnel Management has issued human capital standards which require agencies to identify their workforce needs and to develop plans to meet those needs.

The MSPB, like other agencies, must engage in succession planning. The MSPB's workforce is highly competent and dedicated, but it is also aging. The average age of Board employees is nearly 50, and approximately 21% of MSPB employees are currently eligible for voluntary retirement, well above the Government-wide figure of 15%.

The MSPB has taken tangible actions to prepare for the future. For example:

> The MSPB has recruited and hired new employees in mission-critical areas (administrative judges, appeals, policy and evaluation, and information technology) to maintain continuity of knowledge and operations.
>
> The MSPB invests in its employees to ensure that they have the skills needed to perform effectively. For example, the Board holds a biennial conference for its legal staff, it supports continuing professional education – including conference attendance and distance learning – for all of its employees, and provides its leadership cadre with opportunities to participate in management development programs.

The MSPB has reorganized its field structure to reduce administrative overhead, allowing the MSPB to devote more resources to human capital and infrastructure improvements, such as electronic filing of appeals.

Management of the MSPB Workforce

36. What are the major personnel-management challenges facing MSPB in the coming years, and what are your plans, as Chairman, in addressing those challenges?

The MSPB's most challenging personnel management issues revolve around the personnel systems being created for the Department of Homeland Security (DHS) and the Department of Defense (DOD). These systems pose three challenges that the MSPB must address:

> Maintaining an appropriate level of staffing. Changes in appeals processes and standards will likely affect workload. The Board is participating in the development of the new appeals processes and should be able anticipate and respond to any resulting changes in workload.
>
> Adjudicating and reviewing appeals under differing processes, procedures, and case law. The Board and its staff must be flexible and learn new methods and requirements, such as new standards of proof and new case law, while operating under shorter deadlines. As a result, effective management, training, and sufficient staffing will be critical.
>
> Overseeing merit systems in a decentralized civil service. With the implementation of new personnel systems in DHS and DOD, over 50 percent of the Federal workforce will be managed under alternative HR systems with significant differences from the traditional title 5 civil service. The MSPB must assess the health of these new systems and ensure they are free from prohibited personnel practices.

Other agencies may request flexibilities and waivers similar to those given to DHS and DOD. If so, the challenges described above will be magnified. In addition, Congress may ask the MSPB for its perspective on the implications of, or parameters for, granting such flexibility.

Two other trends may create personnel management challenges for the MSPB. First, the aging of the Board's workforce suggests that the MSPB could face a wave of retirements, particularly among administrative judges who are on the front lines, addressing the challenges of new appeals procedures and processes. Second, transforming the MSPB's work through technology creates challenges. The Board's long-term goal is to transition to an electronic case management system, under which all appeal files are processed electronically. To achieve this goal, the Board's information technology staff will have to think creatively and train the rest of the Board's staff to use the new technology. The Board has taken the first step toward a purely electronic file system by implementing an internet based system that allows appeals to be filed electronically.

37. A performance goal that MSPB stated in its performance plan for fiscal year 2005 calls for the development of agency-wide recruitment strategies to ensure a diverse, highly qualified workforce. How would you view MSPB's performance in meeting this performance goal? What challenges, if any, does MSPB face in ensuring a diverse, highly qualified workforce? How is MSPB dealing with these challenges, and how would you as Chairman intend to deal with them?

MSPB has a history of attracting diverse, highly qualified applicants for key positions. Even so, the Board has implemented a number of initiatives to ensure that the Board maintains a diverse, highly qualified workforce. For example, the Board developed and implemented a structured interview process for the selection of Administrative Judges and Senior Research Analysts. The Board is also automating aspects of the application process for Board positions. These efforts will help streamline and improve how the Board fills Board employee vacancies.

To ensure that the Board recruits from a diverse population, the MSPB has broadened its outreach. While each position's series, grade and area of consideration determine which sources are most appropriate, distribution sites for vacancy announcements have included:

- OPM's USAJOBS web site;
- OPM's user group of employee and labor relations professionals;
- Minority employee associations in other Federal agencies;
- Minority professional organizations, such as the Hispanic National Professional Law Association;
- Historically Black Colleges and Universities;
- Hispanic Association of Colleges and Universities;
- Recruitment agencies with a primarily minority clientele;

National and local employment offices;

Federal Circuit Bar Association.

Within the Board, the Office of Equal Employment Opportunity and human resources staff meet with managers and supervisors to inform them about recruitment strategies available to ensure a diverse, highly qualified workforce. In addition, the Board's Office of Policy and Evaluation conducts research into human resource flexibilities and best practices in the area of recruiting so that managers are aware of all recruiting tools at their disposal.

As a result, the MSPB has a diverse workforce. MSPB's employment of African-Americans, Asian Pacific Americans, Native Americans, and women is at or above the Civilian Labor Force rates of representation. Hispanics are slightly underrepresented. However, because attorneys account for over 55% of MSPB's workforce, it is also important to compare this component of the Board's workforce to the Relevant Civilian Labor Force (RCLF). This comparison reveals that Hispanic employees are well-represented at MSPB relative to attorneys in the RCLF. Since Hispanics are slightly underrepresented among the non-attorney workforce, the Board will continue outreach activities and consider expanding its efforts, such as using media advertisements, to target this audience.

Hiring during FY 2003 also served to increase diversity as the Board experienced a net gain of female, Asian Pacific American, and African American employees. Thus, the MSPB is on target to meet the objectives in its performance plan. The Board will continue to develop and refine strategies to recruit a diverse, highly qualified workforce.

38. What is your view of the MSPB's past efforts and accomplishments in assuring fairness and equity within the Board's own workplace, and what are your plans as Chairman in this area?

I have a great deal of respect for the Board's past and current efforts and accomplishments regarding workplace fairness and equity. I am very fortunate to have inherited members of the senior executive service who make these matters a top priority. As Chairman, I will emphasize and publicize my support of employee rights and my intolerance of discrimination of any kind. I will continue the MSPB's annual, mandatory diversity training and will continue to schedule other EEO training. I will also ensure that any EEO complaints are investigated and resolved in a timely and fair manner.

39. Has MSPB developed and implemented a process for gathering information on its employees' attitudes about the MSPB work environment, and, if so, what has been learned? How would you describe the views the MSPB workforce currently holds regarding fairness and equity in their workplace?

The Board remains concerned about how its employees view their work environment. One of the MSPB's strategic goals is to develop and manage an efficient and effective workforce.

Continually monitoring the attitudes of its employees is an important aspect of this goal. Because the MSPB is such a small agency, there are many informal opportunities for employees to express their views, and the MSPB managers meet regularly to address any employee concerns that require their attention. Based on these informal feedback mechanisms, as well as the Board's EEO program and formal communications from the MSPB Professional Association, it appears that MSPB employees hold fairly positive views about the fairness and equity in their workplace. To formalize the assessment practice, the MSPB's senior staff last year began discussing plans to formally assess and document employee views and to compare current views with the results of a 1995 survey.

The MSPB believes that it has a responsibility to provide workplace policies and programs that will enable employees to succeed. To this end, the MSPB allocates a significant portion of its budget to training and professional development, including training at the Federal Executive Institute, OPM's Management Development Centers, and professional conferences, staff details to other MSPB offices, and a biennial legal conference for MSPB's administrative judges and attorneys. Additionally, the MSPB attempts to ensure that the workplace is secure and attractive, and that employees have the necessary technology and resources to accomplish their mission. To provide a family-friendly workplace, almost all employees are allowed to work on alternative work schedules, and, in fiscal year 2001, 52 of the MSPB's 222 employees had flexible work arrangements.

40. What is MSPB's policy for holding supervisors and managers accountable for helping to ensure that the workplace remains free from discrimination and retaliation?

All supervisors and managers at the MSPB are held accountable for helping to ensure that the workplace remains free from discrimination and retaliation. All employees, including managers and supervisors, receive an annual performance rating based on a diversity element in their performance appraisals.

41. What is MSPB's policy with respect to maintaining a workplace free from discrimination on the basis of sexual orientation? What processes and procedures are in place to communicate that policy to the workforce, to afford avenues of redress, and to hold supervisors and managers accountable? What are your intentions and plans, as Chairman, to foster a workplace free from such discrimination?

The Board strongly supports the protection of its employees from all types of unlawful discrimination, including discrimination on the basis of sexual orientation. The Board's Civil Rights Policy Statement, as issued to all employees on April 30, 2002, encourages all Board employees to embrace and value diversity. The policy states further that all office and regional directors, supervisors and chief administrative judges are held responsible for the protection of employees' civil rights at the Board. This accountability policy is reflected in the performance standards for all employees. That is, all employees are rated on the extent to which they respect and value diversity in the workplace.

The Board, as an employer, deems discrimination on the basis of sexual orientation to constitute a prohibited personnel practice. Currently, the Board directs its employees to file complaints of discrimination based on sexual orientation with the Office of Special Counsel, the agency with primary statutory authority for protecting Federal employees from prohibited personnel practices.

42. In June 2003, the MSPB requested legislation granting personnel flexibilities for buyouts and early retirements for MSPB employees, due to anticipated possible reduction in MSPB's workload arising from legislation granting flexibility in appeals for DOD.[1] Subsequently, however, MSPB sought and was granted authority by OPM to offer buyouts and early retirement. Please explain why MSPB decided to seek approval from OPM to offer this flexibility rather than seeking separate legislation. Do you believe any conflict of interest or appearance of conflict of interest may arise from MSPB applying to OPM for such personnel authority?

The Board decided to seek approval from OPM to offer buyouts and early retirement rather than seeking separate legislation because the Board thought that it was more efficient to do so. Since the Board did not need permanent buyout or early retirement authority at the time of the restructuring efforts, the Board determined that the temporary authority available through OPM was sufficient to meet the Board's needs. No, I do not believe that any conflict of interest will arise from having sought such personnel authority from OPM.

Reorganization of MSPB Field Offices

43. MSPB recently closed its Boston and Seattle offices. The closures were based on a plan drafted as a means of consolidating resources to allow for the most efficient case processing management.

How does MSPB plan to serve federal employees who would have been served by the Seattle and Boston offices? Will services to these employees be evaluated? How?

Please explain the factors you considered and how you applied them in deciding what resources MSPB needed and where they should be located, and, specifically, which offices should be closed.

When I became Acting Chairman of the Board, I inherited a plan to close four of the Board's offices. This plan was initiated by prior Board management. I want to assure you that closing Board offices was not a paper exercise for me. I was very concerned about the impact of all of these office closures on Board employees, especially the administrative staff. I personally

[1] S. Hrg. 108-185 (June 4, 2003), at page 138.

traveled to each of the affected offices and spoke with the employees face-to-face. Additionally, my management team and I were in regular contact with the union (the MSPB Professional Association) to work on the concerns of affected professional employees.

To ensure that these closures were required, I insisted on the collection and careful analysis of additional information. Among other data, my management team and I evaluated data spanning several years regarding the number of appeals received, the locations from which the appeals were filed (down to the level of the city of the appellant), the offices at which they were filed, the administrative judges' workloads in each office, and the costs associated with appeals decided in each office. This data indicated the locations where there was greater or lesser demand for the Board's services at the initial appeal level.

Based on this data, my management team and I determined that the Board should close only two of the four offices that had previously been considered for closure, the Boston and Seattle offices. These two offices were closed solely due to business considerations, including workload shifts, costs, economies of scale, changes in the locations of the federal workforce, and the flexibility needed to adjust civil service reform.

To ensure that the Board's services continue to be readily available to federal employees and agencies despite these closures, the Board's Office of Regional Operations continually monitors staffing levels and case receipts. During the reorganization, one of the judges from Seattle was reassigned to the Dallas Field office, which was understaffed, one administrative judge from Boston was reassigned to the New York Field Office, and four administrative judges from Seattle chose to work at the Western Regional Office in San Francisco. Further, the Board recently advertised for two additional administrative judges in the Western Regional Office and an administrative judge from an overstaffed office was reassigned to headquarters. Finally, prior to closing the Boston and Seattle offices, the Board notified the public through a Federal Register publication and the Board's website that appeals that previously would have gone to the Boston Field Office should be directed to the Northeastern Regional Office in Philadelphia, Pennsylvania, and that appeals that would have gone to the Seattle Field Office should instead be directed to the Western Regional Office in San Francisco, California. Thus, the transition should have been "seamless" for the Board's customers. From time to time, however, the Board's Office of Policy and Evaluation conducts customer satisfaction surveys of the Board's customers. The Board anticipates that the next study of customer satisfaction will evaluate how the Board office closures have effected federal employees.

44. Do you foresee the closing of additional offices, or other changes in staffing and assignments at MSPB, as a result of possible changes to the appeals process for DHS and DOD employees?

With the recent closing of field offices in Seattle and Boston, and the perception that additional changes at MSPB may result from the personnel flexibilities granted to DHS and DOD, what have you done, and what do you plan to do as Chairman, to communicate with

employees about proposed office closings and other possible changes in the deployment of personnel?

No, I do not foresee any additional office closings. When the Board announced that the Boston and Seattle Field Offices would be closing, we stated that the Board has no current plans to close any other Board office and that no Board office is under heightened scrutiny for possible closure in the future. This statement remains true today. Because of the cooperative efforts of the regional and field offices, which I mentioned earlier, I believe that the Board can serve its customers well, even with an ebb and flow of case receipts over time.

When the Board decided to close the Seattle and Boston offices, the Board notified employees of these closures through officers of the union (the MSPB Professional Association), meetings with employees, e-mail messages, the intra-office web site, and letters to individuals directly affected by the closures, as appropriate. To minimize the adverse impact of the closures on affected employees, the Board offered all employees in the Seattle and Boston offices, from senior administrative judges to paralegals, a reassignment to an equivalent position in another Board office and offered to pay their relocation expenses. The Board also offered Voluntary Early Retirement or Voluntary Separation Incentive Payments, as appropriate, to employees who chose not to accept reassignment. Working with the MSPB Professional Association, the Board also reduced the impact of these closures by, for example, implementing additional flexibility in the Board's telecommuting program for former Boston and Seattle administrative judges.

Because the future is unsure, I cannot say that the Board will never restructure again. However, the Board will continue to monitor the situation and suggest changes, as needed, in regional and field office jurisdiction, the number of administrative judges assigned to each office, and similar modifications, with an eye toward avoiding the need for another major reorganization.

IV. Relations with Congress

45. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed as Chairman?

Yes.

46. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed as Chairman?

Yes.

V. Assistance

47. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

I consulted with MSPB staff with respect to these answers. However, I was personally involved with every response in this document and these responses are my own.

AFFIDAVIT

I, NEIL A.G. McPhie, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Subscribed and sworn before me this 18th day of June, 2004.

Notary Public

My commission expires April 14, 2007.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

July 11, 2002

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Neil A. McPhie, who has been nominated by President Bush for the position of Member of the Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the Merit Systems Protection Board concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe that Mr. McPhie is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Amy L. Comstock
Director

Enclosure

U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
STATEMENT OF
BARBARA J. SAPIN
ON THE
NOMINATION AS MEMBER OF THE
U.S. MERIT SYSTEMS PROTECTION BOARD

I want to thank the Chairman and Committee Members for giving me the opportunity to come before you today. It is a great honor to be nominated as a Member of the Merit Systems Protection Board. During 2001, I had the privilege of serving as the Vice Chairman of the MSPB and of working with a dedicated staff who were committed to upholding merit system principles. I greatly respect the work of the Board and if confirmed, I will do all that I can to honor that work by objectively deciding every case that comes before the Board, on its merits and in accordance with the law.

Since its creation, the MSPB has protected the rights of Federal employees and ensured the efficacy of the Federal service. Its importance as an impartial arbiter and its central role in ensuring that Executive Branch agencies make employment decisions in accordance with merit system principles are widely recognized. In a period that has seen and will, no doubt, continue to see many changes to the Federal government's personnel systems, I believe that the MSPB's mission is more important than ever. It must fulfill its traditional role by continuing to provide appellants with access to a mechanism for the impartial and timely adjudication of their employment disputes and Federal managers with clear guidance for meeting their personnel management responsibilities while adhering to Federal merit principles. At the same time, the Board must be flexible enough to adapt to these modifications. As a member of the Board, I will work closely with all of the Board members and staff to ensure that the MSPB remains true to its mission while accommodating change.

My experience as Vice Chairman has provided me with valuable insight into how the Board functions as an independent, impartial adjudicatory agency. My experience with the National Labor Relations Board and my experience as a Labor Counsel and General Counsel have given me a keen appreciation of the importance of systems that promote fairness in the workplace. My experience as a Federal employee has allowed me to understand more fully the needs of those served by the MSPB. It is with this background and my personal commitment to promote the equity and efficacy of government operations that I approach the role as a Member of the Merit Systems Protection Board. I welcome both the challenges that such a position presents and the opportunity to serve that it provides.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** Barbara Joan Sapin

2. **Position to which nominated:** Member, Merit Systems Protection Board

3. **Date of nomination:** April 8, 2004

4. **Address:** (List current place of residence and office addresses.)
Residence:
Office Address: 1755 Massachusetts Ave., Suite 600, Washington, DC 20036

5. **Date and place of birth:** June 13, 1950; New York (Brooklyn), New York

6. **Marital status:** (Include maiden name of wife or husband's name.) Divorced; Former husband: Robert P. Chenoweth

7. **Names and ages of children:** None

8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.

Columbus School of Law, Catholic University, Washington, D.C.
Dates attended: August 1979 to May 1982
J.D. May 1982

Case Western Reserve University, Cleveland, OH
~~Dates attended: September 1973 – May 1974~~

Boston University, Boston MA
Dates attended: September 1968 – May 1972
B.A. May 1972

Syracuse University, Syracuse, NY
Dates attended: February 1971 – June 1971

Shaker Heights High School, Shaker Heights, OH
Dates attended: September 1965 – June 1968
Graduated: June 1968

9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment. (Please use separate attachment, if necessary.)

National Abortion Federation, Washington, D.C.
General Counsel
(April 2002 – Current)

Merit Systems Protection Board, Washington, D.C.
Vice Chairman (Member)
(January 2001 – December 2001)

American Nurses Association, Washington, D.C.
General Counsel, Labor Counsel
(October 1990 – January 2001)

National Labor Relations Board:
Washington, D.C. - Trial Attorney (December 1988 – October 1990)
Chicago, IL - Attorney (February 1987 – December 1988)
Washington, D.C. - Senior Counsel to Board Member (May 1981 – February 1987)

Occupational Safety and Health Review Commission, Washington, D.C.
Law Clerk
(November 1980 – May 1981)

Environmental Protection Agency, Washington, D.C.
Legal Intern
(May 1980 – November 1980)

Prince George's General Hospital, Cheverly, MD
Cardiovascular Technician
(October 1976 – June 1979)

University Hospitals of Cleveland, Cleveland, OH
Cardiovascular Technician (May 1972 – July 1976)
EKG Technician (part time) (1973 – 1974)
Cardiovascular Technician (May 1972 – September 1973)

10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with federal, State, or local governments, other than those listed above.

Other than the positions listed above, I have not served in a paid government position. I served on an advisory panel to the Chairman of the National Labor Relations Board from 1996 to 1998.

11. **Business relationships:** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

I am currently the General Counsel of the National Abortion Federation. Prior to that, I was General Counsel and Labor Counsel at the American Nurses Association. As indicated above, I served as counsel in various offices of the National Labor Relations Board. I have not held any other position as an officer, director, trustee, partner, proprietor, agent, representative, or consultant.

12. **Memberships:** List all memberships and offices currently or formerly held in professional, business, fraternal, scholarly, civic, public, charitable and other organizations.

Member: District of Columbia Bar Association
Member: Maryland State Bar Association
Member: The American Bar Association (membership expired)
Member: AARP (membership expired)
Member: Smithsonian Resident Associate
Member: American Automobile Club
Member: National Association of Female Executives (membership expired)
Admitted to practice: District of Columbia; Maryland; U.S. Courts of Appeals for the: Second, Third, Fifth, Seventh, Ninth, Eleventh, District of Columbia Circuits; and U.S. Supreme Court.

13. **Political affiliations and activities:**

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

None.

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

I am a registered Democrat. I have not held an office in or rendered services to any political party or election committee during the last 10 years.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $50 or more for the past 5 years.

American Nurses Association – PAC
June 1999 - $250
June 1998 - $250
June 1997- $85

Gore/Lieberman Campaign
October 2000 - $250

14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

I graduated cum laude from Boston University. I received the American Jurisprudence and Corpus Juris Secundum Book Awards while attending Catholic University, Columbus School of Law. In 2001, I received recognition by the United American Nurses and the American Nurses Association House of Delegates for my work as Labor Counsel and General Counsel with ANA.

15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.

I published, edited and wrote for *Legal Developments*, an American Nurses Association Newsletter. I also wrote an article for The American Nurse in 1993: *Supreme Court to Hear Labor Cases*. In 1997, I co-wrote and edited an article for Nursing Trends & Issues: *Are You Protected under the NLRA?* I have attached copies of these articles. In addition to these articles, I have written briefs and signed off on agency decisions.

16. **Speeches:** Provide the Committee with four copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

In 2001, I gave a presentation to the Public Administration Forum in which I discussed cases decided by the Merit Systems Protection Board related to disability retirement and disability discrimination. There was no formal speech drafted.

17. **Selection:**

(a) Do you know why you were chosen for this nomination by the President?

I believe that I was chosen for this nomination because of my background and experience as discussed more fully below.

(b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

During 2001, I served as Vice Chairman of the Merit Systems Protection Board. That experience provided me with first hand knowledge of the Board's case law, jurisdiction and procedures. During that time, I reviewed and decided numerous cases. This was invaluable in giving me insight on how the MSPB functioned as an impartial adjudicatory agency. My experience as Labor Counsel and General Counsel with the American Nurses Association, as well as my experience at the National Labor Relations Board has made me keenly aware of the importance of systems that maintain the integrity of the workplace. Having served on the MSPB and after over twenty years of labor and employment law experience in both the private and public sector, I believe that I am well qualified for appointment to the MSPB and that I will be able to continue to contribute my knowledge and expertise in promoting the goals of the agency.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

   Yes.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

   No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

   No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

   No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

   Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

To my knowledge, I have not had any relationship, dealing or transaction that could constitute or result in a conflict of interest in the position to which I have been nominated. However, in the interest of full disclosure, I would like to note that the United American Nurses, a labor organization that separated from the American Nurses Association after I left ANA represents nurses in the VA system. While I was employed by the American Nurses Association, it had as its constituent members various state nurses associations, some which represented nurses in the VA. However, I did not directly represent these nurses, as my representation was limited to the national organization rather than its constituent members or individual nurses.

2. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy other than while in a federal government capacity.

I am currently the General Counsel of the National Abortion Federation (NAF). NAF does engage in limited lobbying on issues related to abortion and reproductive rights. In addition NAF is a plaintiff in federal litigation challenging the Partial-Birth Abortion Ban Act of 2003. I am not counsel of record in this case. Prior to my employment at NAF, I represented the American Nurses Association (ANA). While I was employed by ANA, they engaged in lobbying activities related to funding for nursing education, health care access and other public health issues, as well as various employment and labor issues. Except for providing counsel to NAF and ANA staff on some of the issues mentioned above, I have not, in my capacity as counsel or as an individual engaged in any lobbying activity.

3. Do you agree to have written opinions provided to the Committee by the designated agency ethics officer of the agency to which you are nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes.

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No, I have never been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee or other professional group. However, in the interest of full disclosure, I would like to note that in November 1999, a co-worker at the American Nurses Association complained to the employer that a remark I had made was racially motivated. After a thorough and complete investigation by the law firm retained by ANA, no racial animus was found.

2. To your knowledge, have you ever been investigated, arrested, charged or convicted (including pleas of

guilty or nolo contendere) by any federal, State, or other law enforcement authority for violation of any federal, State, county or municipal law, other than a minor traffic offense? If so, provide details.

No.

3. Have you or any business of which you are or were an officer, director or owner ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

Other than my divorce in 1983, I have not personally been involved as a party in interest in any administrative agency proceeding or civil litigation.

I have not been an officer, director or owner of any business. However I have served as General Counsel for two organizations. I am aware of those cases in which these organizations were parties in interest that occurred during my employment.

My current employer, the National Abortion Federation (NAF) is a plaintiff in a case in the Southern District of New York, challenging the Partial-Birth Abortion Ban Act of 2003. I am not the counsel of record in that case. The case is pending. NAF was also the subject of a Citizen's Petition filed with the Food and Drug Administration relating to NAF's public service material about the drug, mifepristone. The petition was denied by the FDA. NAF was the complainant in a case of cybersquating before the National Arbitration Forum. The panel in that case granted NAF the relief that was requested.

While I was employed at the American Nurses Association, ANA was the subject of a disability discrimination charge filed with the Equal Employment Opportunity Commission. This claim was settled. In addition, the ANA in-house labor union filed two separate unfair labor practice charges, both of which were withdrawn. ANA was also named in a duty of fair representation claim filed against one of its members in federal district court. This claim was withdrawn. ANA intervened in support of the National Labor Relations Board in an unfair labor practice case filed in the U.S. Court of Appeals for the Ninth Circuit and in support of the Occupational Safety and Health Administration in a case filed in the U.S. Court of Appeals for the Eleventh Circuit. Both cases had positive outcomes for ANA. ANA was also the subject of two separate breach of contract claims. These claims were settled.

4. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

AFFIDAVIT

Barbara Joan Sapin being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Barbara Joan Sapin

Subscribed and sworn before me this 23 day of April, 20 04

Mildred Ortas.

Notary Public

MILDRED ORTAS
Notary Public, State of Maryland
My Commission Expires May 31, 2004

U.S. Senate Committee on Governmental Affairs
Pre-hearing Questionnaire for the
Nomination of Barbara J. Sapin to be
a Member of the Merit Systems Protection Board

I. Nomination Process and Conflicts of Interest

1. Why do you believe the President nominated you to serve as a Member of the Merit Systems Protection Board (MSPB)?

   Answer:
   I believe that the President nominated me to serve as a Member of the Merit Systems Protection Board because of my prior experience on the Board and my background and expertise as a labor and employment lawyer.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

   Answer:
   There were no conditions attached to my nomination.

3. What specific background and experience affirmatively qualifies you to be a Member of the MSPB?

   Answer:
   I served as Vice Chairman of the Merit Systems Protection Board in 2001, an experience that provided me with first hand knowledge of the Board's case law, jurisdiction and procedures. During my tenure as Vice Chairman, I reviewed and adjudicated numerous cases, giving me valuable insight into how the MSPB functions as an impartial adjudicatory agency. My experience as Labor Counsel and General Counsel of the American Nurses Association and with the National Labor Relations Board, gave me a keen appreciation of the importance of systems that promote fairness in the workplace. My service on the MSPB together with my twenty years of labor and employment law experience in both the private and public sector makes me well qualified for appointment to the MSPB.

4. Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member of the MSPB? If so, what are they and to whom have the commitments been made?

   Answer:
   I have not made any such commitments.

5. If confirmed, are there any issues from which you may have to recuse or disqualify yourself because of a conflict of interest or the appearance of a conflict of interest? If so, please explain what procedures you will use to carry out such a recusal or disqualification.

Answer:
I do not believe that there are any such issues. However, should a case present a conflict of interest or the appearance of a conflict, I would consult with the appropriate ethics officers and, if appropriate, would recuse myself.

II. Role and Responsibilities of a Member of the MSPB

6. What is your view of the role of an MSPB Board member? How have your experiences as Vice Chairman informed your view?

Answer:
As a Member of the MSPB, my job would be to objectively review and adjudicate cases in accordance with the law. While serving on the Board, I saw that it was not only important to be knowledgeable about the appropriate case law, statutes and regulations, but also to understand the impact that the Board's decisions had on employees and government agencies. During my 11 months as Vice Chairman, I was able to observe this first hand through visits to a number of MSPB regional offices, where staff shared their views about critical issues and the implications of Board decisions in the field. As part of the adjudicatory role, a Board Member must also work closely with staff in order to benefit from full discussion and critical legal analysis. As Vice Chairman, I encouraged not only my own staff but also MSPB staff in other departments to engage regularly in discussions about cases and complex issues. It is also important that Board members maintain collegial relationships with each other and give genuine consideration to one another's views. I tried to do this as Vice Chairman and would make the same effort at collegiality as a Member of the Board. I believe that a respectful relationship among Board members is critical to the smooth running of the agency and to the timely processing of cases.

7. In your view, what are the major challenges facing MSPB? What do you plan to do, specifically, to address these challenges?

Answer:
One of the major challenges facing the MSPB today concerns its role in the various personnel systems currently under consideration, especially those at the Department of Defense and the Department of Homeland Security. I believe that the MSPB has an important role to play in the development and implementation of such systems. In light of its history, the MSPB can serve a role in educating other agencies as to what it takes to

create a credible, objective system that strikes the proper balance between due process protections for employees and the needs of agencies to manage their workforces effectively. As a Board member, I would encourage the MSPB to participate fully in the development of any new systems and to work closely with OPM and other agencies to effectuate a smooth transition to these systems. I would move quickly to understand what would be required by the MSPB once any new personnel system is implemented. Another significant challenge facing the MSPB is ensuring that the necessary resources will be available to provide ongoing training opportunities to MSPB personnel and for redeployment of MSPB staff to where they are most needed. In my role as Board Member, I will work with the Chairman and staff to ensure that during the transition to and implementation of any new system, the MSPB continues to protect Federal merit systems and employees against abuses.

8. How do you plan to communicate to the MSPB staff on efforts to address relevant issues?

Answer:
As Vice Chairman, I met regularly with my staff to discuss not only the cases pending before the Board but also emerging issues and policy concerns. I also encouraged my staff to meet routinely with the staffs of the other Board members to discuss pending cases and our proposed disposition of such cases. Staff from the General Counsel's office, the Office of Appeals Counsel, and the Clerk's office were encouraged to discuss relevant issues with my staff. I would continue to promote such an "open door" policy and to support regular case management meetings. I welcome the opportunity to work with the Chairman and Chief of Staff on various administrative issues.

9. What lessons learned, if any, can you bring to based on your experiences, including your prior service on the Board and your time as General Counsel and Labor Counsel at the American Nurses Association and with the National Labor Relations Board?

Answer:
A key lesson that I have learned in my 20 years as a practicing labor and employment attorney is the importance of ensuring that the rights of employees are balanced with the needs of employers to manage their workforces. I believe that a neutral, objective adjudicatory body ensures that such a balance is achieved and maintained. Also, one of the most important experiences that I bring to the MSPB is my history of collaborating effectively with staff. My experiences at the American Nurses Association, the National Labor Relations Board, and as Vice Chairman of the MSPB, taught me the value of establishing efficient and open channels of communication. In addition, my experience in the regional office of the NLRB and the opportunities I had to meet with MSPB regional staff provided me with a clear appreciation of the expertise and dedication of personnel throughout the government. The encouragement of regular communication among and between staff on cases and emerging issues is, I believe, critical to the MSPB's adjudicatory functions.

III. Policy Questions

10. Do you believe that it would be beneficial for MSPB to identify systemic and recurring issues in the cases that the Board reviews that, if acted upon by Congress, agencies, and employees, would improve the Federal government's civil service system and personnel practices, and reduce the need for and costs of litigation? If so,
- How should MSPB go about identifying such systemic and recurring issues?
- How should Congress, agencies, and employees be made aware of these issues?

Answer:
I believe it would be beneficial for the MSPB to identify systemic and recurring issues that could lead to improvement in the Federal civil service system. However, because of the MSPB's role as a quasi-judicial agency, and in order to preserve is objectivity, the Board's ability to initiate or provide input into substantive or legal legislation may be limited. The MSPB already addresses substantive and procedural issues in the areas over which it has jurisdiction and provides that information to various stakeholders. For example, the Office of Appeals Counsel regularly distributes to the Board a list of significant issues that identify systemic and recurring issues. This list is used to inform Congress about those areas in need of legislative solutions. In addition, the MSPB identifies systemic and recurring problems as part of its data gathering and reporting function. As a Board member, I would be interested in seeing this continue, as reports from the MSPB's Office of Policy and Evaluation are widely read and provide valuable information to Congress, Federal agencies and their employees. Through these reports, the MSPB has made recommendations for procedural changes designed to improve systems affecting the Federal workforce. The MSPB also maintains a legislative liaison whose responsibilities include keeping the Board's Congressional and appropriations committees apprised of significant agency programs and accomplishments, as well as issues affecting Federal employment generally. The MSPB provides testimony on the impact of various legislative initiatives affecting the Federal workforce and publishes a newsletter that provides regular analyses on numerous topics. As part of its efforts to reach interested parties on various technical and procedural issues, the Board maintains an updated website and periodically issues informational pamphlets which are available to the members of the public. Over the years, the Board has initiated pilot programs to respond to recurring procedural issues. Examples of these programs include the Expedited Petition for Review program and the ADR program. These are an important part of the MSPB's role and I would like to see outreach programs like these expanded.

11. The appeals process administered by MSPB has been characterized as being legally complex, with court-like features.

o The process has been described by some as not always being user friendly. What

is your opinion about the balance MSPB should strive for between making its processes "user friendly" to appellants and yet appropriate to deal fairly and consistently with the complex issues presented to it? How can that balance be achieved?

Answer:
It is crucial for the MSPB to maintain the balance between providing appellants with access to the system and being able to fairly and credibly uphold merit system principles. Both employees and managers must perceive that they have access to the process and feel that the system provides them with a fair opportunity to present their respective positions in a dispute. MSPB proceedings must also follow the tenets of due process and the agency must objectively handle the complex issues that come before it. The Board should be seen as a neutral and credible arbiter of disputes, relying on a fully developed record as the basis for carefully reasoned decisions. I do not think that the MSPB needs to be court-like to appropriately deal with complex issues. However, there must be established procedures and rules in place so as to provide the required due process. I believe that the Board continues to effectively balance these ideals of ensuring access to the system by providing stakeholders with enough information and training about the mission, objectives and procedures of the agency. I support the work that is being done in the MSPB regional offices to ensure access by providing appellants with assistance where it is needed and through the use of such practices as video-conferencing and hearings.

- The appeals process can be daunting for appellants, particularly those not represented by an attorney. Should MSPB assist pro se appellants in exercising their rights to due process? If so, what assistance should MSPB provide? Are there any other things that you believe MSPB can and should do to reduce the burden on appellants?

Answer:
I believe that an important part of providing Federal employees with due process in the appeal system is to make sure that pro se appellants are given assistance with their appeals. The MSPB currently has many procedures in place to assist such appellants that I believe are necessary. For example, MSPB regulations require judges to set out all the necessary steps and elements of an appeal. Pro se appellants are often given some degree of leeway in the application of certain procedural rules. Currently, under specific circumstances, regional offices will assist pro se appellants in obtaining representation. In addition, the MSPB has produced videotapes explaining appeals procedures, which can be used by pro se appellants. These tapes are available free to the public and can be shown upon request in the regional field office or requested from the MSPB website. The MSPB currently publishes pamphlets that provide information for use by employees and agency management. I believe that an expansion by MSPB regional offices of pre-hearing conferences will benefit pro se appellants in clarifying the issues and

understanding the procedures. With sufficient resources, regional offices could provide an information officer or an ombudsman specifically to provide pro se appellants with assistance.

- Some survey data, including MSPB surveys, show that some managers avoid taking appropriate personnel actions against employees because of what they perceive to be a burdensome appeals process. However, then-Acting Chairman Marshall stated to this Committee in March 2003 that MSPB research "clearly shows that there are reasons for this reluctance other than the Board's appeal process itself. These reasons include insufficient training and knowledge, a belief that higher-level managers will not support taking action, and agency-imposed procedures and documentation," S. Hrg. 108-185 (June 4, 2003), at page 55. What is your opinion on this matter, and what, if anything, do you believe MSPB can and should do to reduce the burden on managers who take appropriate personnel actions?

Answer:
I believe that the key to assisting managers is to provide them with adequate training on both the appropriate agency personnel procedures and the role of the MSPB. This training should include guidance on specific agency-imposed rules and the need for complete and proper documentation. The MSPB could play a role by using its studies function to ascertain whether adequate management training is being provided and review various management training options. The MSPB could also provide effective training to Federal agency managers on merit systems principles. In my view, it is important that the MSPB reach out to agency managers and employees to help them fully understand the Federal employment system and their roles and obligations within it.

12. The redress system for Federal employees as a whole (involving the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Special Counsel as well as MSPB) as lengthy, time consuming, costly, sometimes misused, and offering the opportunity to "forum shop" in some situations. These are among the arguments that the Department of Homeland Security and the Department of Defense have apparently considered in developing proposed employee appeals options. Others have argued that the current arrangements for redress include necessary and appropriate mechanisms to perform the essential functions of protecting the Federal workplace against political favoritism, retaliation, discrimination, and managerial abuse. What is your view about the current framework of the redress system for Federal employees? Please explain the extent to which, if at all, you have concerns about the current process. Can you offer recommendations that could help improve the process? Please explain.

Answer:
There is no question that the current system can be lengthy, time consuming and costly. There have been occasions where the system has been misused and the possibility for

"forum shopping" does exist. On balance, however, I believe that the current redress system for Federal employees, although complicated, does work. Each adjudicating agency has developed its own expertise in handling the complex issues that come before it. And, each agency plays an independent and objective role in protecting Federal employees against retaliation, discrimination and managerial abuse. While the current system may contain duplicate routes for employee appeals, checks and balances have been built into its structure. Overall, the current system, although not perfect, does provide the opportunity for Federal employees to have their redresses heard. My experience at the MSPB taught me that a key component of the current system is the neutral and objective role that the EEOC, FLRA, MSPB, and OSC play in resolving employment disputes. With this in mind, I am concerned that unless the system being developed by the DOD incorporates third party review, DOD employees could be deprived of their right to due process, and, at a minimum, DOD's personnel policies could appear to be biased. In response to DOD's legitimate concerns about timely review and employee abuse, the MSPB can implement a number of initiatives that streamline its processes to make them more readily accessible to Federal employees. For example, the Board could establish specialized teams to handle DOD cases and, as more fully explained below, could set up procedures that would allow all Board members to review cases simultaneously. As was done in the DHS regulations, various deadlines and time frames could be established. Finally, outreach and education programs aimed at agency employees and agency managers, as well as, regular discussions and conferences among representatives of the EEOC, FLRA, OSC, and the MSPB could make the process more transparent, efficient and effective.

13. The time taken by MSPB administrative judges to process initial appeals has remained fairly stable since FY 1995, averaging about 100 days. However, according to MSPB's Fiscal Year 2003 Performance and Accountability Report, the average time the Board has taken to review initial appeals stood at 295 days in FY 2003, up from 176 days in FY 2000. In your view, what are some options, if any, for timelier decision making?

Answer:
Complex cases often require additional time to process. However, there are a number of options that would allow the MSPB to process cases in a timelier manner. The MSPB has already implemented many of these. Once the Board is at full complement, I believe that cases will be handled more expeditiously. In connection with this, full staffing at headquarters could also help in the timelier issuance of decisions. I would support regular consultations between staff of the Office of Appeals Counsel, the General Counsel, and Member offices on cases that present more difficult or controversial issues. The agency would also benefit from something as simple as regular and timely meetings between Board staff and the Office of Appeals Counsel to discuss Board initiated rewrites. I would also recommend that Board members meet more frequently to discuss cases among themselves. Under the Sunshine Act, Board members cannot discuss cases with each other unless appropriate notice is given to the public. As a result, Board

members often resort to time consuming written exchanges. If Sunshine Act meetings were held regularly, Board members could talk directly with one another and the length of time for case processing might be shortened considerably. During my tenure as Vice Chairman, the Board took aggressive steps to target over age cases for issuance. Additionally, the Board has evaluated several programs aimed at expedited case handling, such as a pilot program for expediting petitions for review of cases that did not appear to have complex or controversial issues. I would encourage the Board to reinstate such a program.

14. The average processing time takes into account cases that are dismissed or settled. However, cases that are heard by an administrative judge and fully reviewed by the Board take longer, on average. The last time MSPB published its Report on Cases Decided, data showed that in fiscal year 1999, the average time for a decision from a hearing of an initial appeal was 171 days, and the average time for the Board to decide cases in which a petition for review was granted was 390 days, for a total of about 560 days. What options do you suggest be considered to reduce the length of time to decide such cases?

Answer:
Those cases in which a hearing is held and are fully reviewed by the Board take longer to process, often requiring more research, analysis, and review and are far more likely to present novel or complex issues. Nevertheless, as I indicated in question 13, there are a number of steps that the MSPB can take to reduce the processing time of such cases. In addition to the suggestions set forth above, there are other options that have been evaluated by the MSPB. These include a "Mediation Appeals Project" in which regional and headquarters staff are trained in mediating appeals and a settlement program that has been implemented at the petition for review level. I would encourage the implementation of a more comprehensive settlement program and the expansion of the mediation/ADR program as mechanisms for reducing case processing times. Currently, Board members review cases sequentially. Perhaps if critical documents in a case were forwarded to all Board staffs and a central location was available for staff to review the full case record, it would be possible for Board members to review cases at the same time. Another way to reduce the time of decision making would be to hold Sunshine Act meetings where Board members would be asked to decide non-controversial cases based on draft decisions presented at the meeting.

15. MSPB's fiscal year 2005 performance plan contains goals for quality (e.g., maintaining or lowering the percentage of cases remanded or reversed) and for maintaining or reducing average case processing time. Do you believe it is desirable that the performance management system for administrative judges and attorneys be aligned to the MSPB's performance goals? What are the advantages and disadvantages? Please explain.

Answer:
I believe that there are some advantages in aligning the performance management system for administrative judges and attorneys with the performance goals of the MSPB. However, there are other, separate indicators that should also be considered in evaluating the performance of judges and attorneys. Clearly, some of the goals are identical and appropriate for both. Therefore, one of the advantages of aligning the performance criteria of judges/attorneys and the agency is that such a program would enable staff to share the responsibility for successfully achieving agency goals, as well as providing consistency throughout the agency. However, lowering the percentage of cases remanded or reversed and maintaining or reducing the average case processing time, although quantifiable, should not be the only criteria by which performance is judged. Because changes in the composition of the Board often result in delays while Board members become familiar with the applicable law and case handling procedures, it would not be appropriate to place the entire burden for case processing time on staff. I believe that the manner in which Board members and their staffs manage their caseloads should be the responsibility of Board member's offices and not be a reflection on the performance of staff in other offices. Evaluation of the time it takes to process a case or whether the case is remanded or reversed, is not always an accurate measure of performance.

16. Timeliness is one measure of performance. Quality of decisions is another. How can the competing goals of quality and timeliness be balanced? What are appropriate indicators that could be used to measure the quality of MSPB decisions?

Answer:
One way in which the Board can balance quality and timeliness is by establishing realistic time lines and targets based on the complexity of each case. Another way of attaining balance between these goals is, as noted above, through the establishment of a procedure that allows Board members to review cases at the same time rather than sequentially. This could expedite the handling of simpler cases and provide more time to consider more complex issues. The quality of decisions can be measured in a number of ways. One indicator, as noted above, is whether the case is remanded or reversed, but I do not believe that this is a reliable indicator of quality. Other indicators include the clarity of the decision, the conciseness of analysis, and the simplicity of expression. Ultimately, the quality of a decision will be determined by how well the stakeholders understand it and are guided by it, as decisions of poor quality are likely to give rise to more cases that raise the same issues.

17. One factor that helps reduce average case processing time is that more than half of the initial appeals that are received by MSPB and not dismissed are settled. This percentage is even higher in adverse action cases and performance cases, 67 percent and 74 percent, respectively, in fiscal year 2003. What role, if any, do you believe MSPB should exercise to help ensure that parties do not feel compelled to enter into settlements that might be

unfair, unwise, or without due process?

Answer:
As the foregoing statistics demonstrate, the settlement of cases clearly helps promote the mission of the MSPB . Many of these agreements are negotiated between agency representatives and appellants who have retained legal counsel. In these cases, there is little concern that appellants have not been fully informed of their legal rights, or apprised of the terms and effects of their agreements.

With regard to settlement agreements entered into between agency representatives and appellants who are not represented by legal counsel, there are a number of things the MSPB can do, and is currently doing, to ensure that the agreements are fair and are not tantamount to a denial of due process. For example, several MSPB regional offices have initiated a Settlement Judge Program for cases adjudicated in that particular region. A settlement judge is an administrative judge, other than the one assigned to adjudicate the case who is made available to the parties for the sole purpose of discussing settlement. If, after initial settlement discussions between the parties and the assigned administrative judge, a party believes the assignment of a settlement judge would be appropriate, a request may be made to the assigned administrative judge. If the assigned administrative judge concurs, a settlement judge will be assigned by the Regional Director. This procedure helps ensure that the parties fully understand the legal and practical ramifications of any potential settlement and, consequently, deters any settlements that are unfair, unwise or constitute a denial of due process. In addition, the MSPB has initiated a program that permits the parties to suspend the processing of a case for a period of up to 30 days if they jointly conclude that they need more time than is routinely provided for discovery or settlement discussions. This program helps to ensure that the parties have fully explored their respective positions and do not feel unduly rushed to execute an agreement that would not be in their best interests. All staff involved in settlement discussions with parties should be required to take the time necessary to make sure the parties have not been forced into settlements. Regional management should also oversee settlement efforts to ensure that undue pressure to settle is not being brought to bear on the parties. In some cases, the region can and should help pro se appellants obtain representation, even for settlement discussions.

The MSPB has other programs that can educate the parties about its procedures. This information helps parties feel more confident about the process and thus less likely to be coerced. MSPB regional offices currently conduct informal programs to educate the parties about processing an appeal before the MSPB. These programs utilize a video presentation followed by a question and answer period with an administrative judge. Finally, the MSPB's PFR procedure permits appellants to raise issues of coercion and duress in connection with settlement agreements.

18. The proposed DHS personnel regulations have a number of provisions having operational

implications for MSPB. Among these is the requirement that an initial MSPB decision be made no later than 90 days after an appeal is filed. In fiscal year 2003, according to its Performance and Accountability Report, average processing time for an initial decision was 94 days (as noted in an earlier question, this average reflects cases that are dismissed or settled in short fashion as well as cases that go to hearing and take longer). In other words, it is proposed that MSPB be required to process DHS cases more quickly than cases have been processed on average. In your view, what approach should MSPB take in meeting the proposed requirements in DHS cases? In what way, if at all, would this approach differ from the handling of non-DHS cases? If there is a difference in approach, what are the implications for non-DHS appellants?

Answer:
I believe that the MSPB should continue to process all cases as expeditiously as possible and that, whenever feasible, DHS and non-DHS cases should be handled in the same manner. As I have indicated in question 13, there are several ways in which the MSPB can and does expedite its case handling. While new DHS regulations may not permit the MSPB to require settlement in appeals, it is my hope that settlement of cases will still be encouraged. If so, the use of mediation and settlement judges could help shorten case processing time. However, once implemented, DHS regulations will require the MSPB to process DHS cases on an expedited basis. This could have the effect of delaying even further the case processing time of non-DHS cases to accommodate the timelines under DHS regulations. Unless sufficient resources are made available to the MSPB to enable it to process all cases on a timely basis, the DHS regulations could have serious implications for the handling of non-DHS cases as DHS cases could take precedence over non-DHS cases.

19. Similarly, if a party files a petition for review of an initial decision by the MSPB, the proposed DHS regulations would require the MSPB to render its decision within 90 days. In your view, what approach should MSPB take in meeting the proposed requirements in DHS cases? In what way, if at all, would this approach differ from the handling of non-DHS cases? If there is a difference in approach, what are the implications for non-DHS appellants?

Answer:
This question presents issues similar to those noted in question 18. Under the proposed DHS regulations, the burden on the Board could be increased. This is particularly true with cases that present novel, complex, or controversial issues. As I have stated above, the Board is continually looking at ways to shorten case processing time without sacrificing the quality of its decisions and it should continue to do so. Regular case management meetings and discussions of DHS cases would also be useful. In addition, I believe it would be beneficial for the Office of Appeals Counsel to set up teams that work exclusively on DHS cases. This would be similar to the National Labor Relations Board's use of specialized teams to handle injunction cases. However, as the MSPB

prioritizes DHS cases, there is a risk that the time for processing of non-DHS cases could be adversely affected. As a Board member, I look forward to the opportunity of working with the Chairman to explore other ways of reducing case processing time while continuing to issue high quality decisions.

20. The proposed DHS regulations would prohibit MSPB from requiring alternative dispute resolution (ADR) or settlement in appeals, in that once either party decided that settlement is not desirable, a matter would proceed to adjudication. As noted above, MSPB settled 67 percent of adverse action and 74 percent of performance-based appeals in fiscal year 2003. In your view, what are the operational implications of the proposed DHS rule on settlements (e.g., what do you believe will be the effect on the portion of cases settled and processing time)?

Answer:
Although the MSPB has been very successful in settling cases, it is ultimately left to the parties to enter into those settlement agreements. As discussed in question 17, however, the agency has initiated a number of programs that encourage parties to settle, including mediation and ADR. These programs help create a culture where settlement and ADR are promoted. Under proposed DHS regulations, it remains to be seen if this culture will extend to DHS cases. I believe that under the proposed DHS regulations, there is a risk that fewer cases will go to mediation or ADR and that the percentage of cases settled will decrease, which could have an adverse effect on overall case processing time.

21. The proposed DHS personnel regulations would also affect how MSBP decides cases. For example, adverse action cases involving DHS employees would be decided on a substantial evidence standard. In addition, MSPB would not be able to mitigate penalties in DHS cases. Also, the proposed regulations would not permit MSPB to reverse a charge in DHS cases based on the way in which the charge is labeled or the conduct is characterized, as long as the employee is on fair notice of the facts sufficient to respond to the allegations of a charge. In short, MSPB will be applying different standards for DHS and non-DHS cases. What approach do you believe MSPB might use to consistently apply different legal standards for DHS cases than for non-DHS cases? What are the implications of a dual-track adjudication system on the Federal civil service?

Answer:
The MSPB has significant experience in applying different rules to employees in different agencies and under different statutes. I believe that the MSPB can successfully apply differing standards to DHS and to non-DHS cases. One approach to dealing with a dual-track adjudication system would be to have teams on staff who are exclusively responsible for DHS and non-DHS cases. Additional training and case management meetings would help in dealing with emerging issues. I would be interested in exploring how other agencies have handled similar questions. I believe that it will take some time

before we know what impact a dual-track adjudication system will have on the Federal service. I look forward to the opportunity of working with the MSPB in ensuring that Federal employees, regardless of the employing agency, will be afforded due process in their appeals.

22. According to the fiscal year 2005 performance plan, MSPB has alternative initiatives underway to foster mediation and other forms of alternative dispute resolution (ADR).
    - Do you believe that MSPB should play a role in promoting the use of ADR and training Federal staff in ADR techniques?
    - If so, how should that role be exercised?
    - How should MSPB's role be coordinated with, or differentiated from, the role of other Federal entities with similar responsibilities or interests to help ensure efficiency and consistency in Federal workplace ADR policy and practice?

Answer:
I support the use of ADR in MSPB cases and believe that there is a role for the MSPB in promoting the use of ADR by Federal agencies. For example, based its experience with ADR, the MSPB could promote its use by other Federal agencies. In addition, MSPB data and information gathering would be useful in determining the utilization and efficacy of ADR. It is my opinion that the MSPB should be looking at ways to expand the use of ADR in its own cases. The Board is currently involved in a project to train staff to use mediation in appeals cases. This could be expanded to provide training to other agencies. There may also be opportunities for the MSPB to assist other Federal agencies by providing information for their employee and supervisor training programs. While I believe that the MSPB can assist other agencies in moving to a culture that supports ADR, I do not believe that it is the responsibility of the MSPB to implement or conduct other agencies' ADR/mediation programs.

23. A performance goal that MSPB stated in its performance plan for fiscal year 2005 calls for the development of agency wide recruitment strategies to ensure a diverse, highly qualified workforce. Do you have a perspective of MSPB's performance in meeting this performance goal? What challenges, if any, do you believe that MSPB faces in ensuring a diverse, highly qualified workforce? To the extent there may be challenges, how do you believe that MSPB should deal with them?

Answer:
In my 11 months as Vice Chairman, I was pleased to have worked with highly qualified and dedicated staff at the MSPB. I believe that the challenges facing the MSPB in maintaining a diverse highly qualified work force are the same challenges facing many Federal agencies especially given the competition for highly skilled employees from the private sector. While I was General Counsel for the American Nurses Association, I worked with the Federal Salary Council in examining the disparity in pay between private sector and Federal employees. I am therefore very familiar with the problem of

maintaining a diverse, highly qualified work force. There are many things that the MSPB is currently doing, including strengthening employee and management development programs and increasing opportunities for MSPB employees through the implementation of core and advanced training and other development programs for key MSPB positions. The MSPB is also working to develop agency-wide recruitment strategies to recruit from a number of different sources. I believe that this can be done in conjunction with outreach to law schools and through mentoring programs. In addition, as Vice Chairman, I worked with a staff member from the General Counsel's office who was detailed to my office. I believe that this sort of movement of personnel between offices will increase opportunities for staff and help the MSPB to meet this goal.

24. MSPB recently closed its Boston and Seattle offices. The closures were based on a plan drafted as a means of consolidating resources to allow for the most efficient case processing management.
    - What factors do you believe should be taken into account in deciding what resources MSPB needs and where they should be located?
    - What are some options, in your view, to ensure quality service to Federal employees who would have been served by closed offices? Should service to these employees be evaluated? If so, how?

Answer:
In deciding what resources MSPB needs and how those resources should be allocated, I believe that the Board should look at the number of personnel in each office, the caseload, proximity of regional offices to areas of high concentration of Federal employees, and which offices can serve the areas that are slated to be closed. The MSPB should survey stakeholders and use that information to inform its decisions on which offices, if any, should be closed. There are steps that the MSPB can take to ensure continuing quality service to Federal employees in those areas that were served by closed offices. Additional staffing could be provided to those offices that will stay open. Regional offices could increase the practice of video-conferencing. However resource allocations are made, I believe that the agency should continually check with stakeholders to assure that all Federal employees have full access to MSPB resources.

25. Much has been said about the graying of the Federal workforce and the proportion of the workforce at or near retirement eligibility. What role does succession planning play in this regard and how do you see such planning as applicable to MSPB?

Answer:
The MSPB is already planning for the future, as evidenced by its stated goal to recruit and maintain a qualified work force. The MSPB, like other Federal agencies will be facing the retirement of many of its managers and supervisors. I support the MSPB's continuing work in this area, such as its evaluation of ways to train and promote staff to take on supervisory and managerial positions. One of the MSPB's ongoing goals is to

continue the development of core and advanced training programs and to provide management training and mentoring programs. The MSPB plays a role through its data and information gathering function in conducting surveys and preparing reports on where the shortages could be particularly acute and what individual Federal agencies are doing to address the problems. While I served as Vice Chairman, the MSPB's Office of Policy and Evaluation conducted several studies on government programs aimed at recruiting and training future management employees. MSPB reports such as: "Growing Leaders: The Presidential Management Intern Program" and "The Federal Merit Promotion Program: Process vs. Outcome" can assist the government in its response to the changing demographics of its workforce. It would be helpful to exchange ideas and information with other agencies who deal successfully with the problems of recruitment, promotion, and the maintenance of a stable workforce.

26. MSPB and OPM both have responsibility for oversight of the merit system and both agencies have issued reports on the merit system that identify similar issues. What is your understanding of the differences Congress intended in how each agency should go about performing these roles? What is your understanding of the difference in how each agency currently goes about performing these roles? Should any other changes be considered in the respective responsibilities of MSPB and OPM for merit system oversight?

Answer:
The Office of Personnel Management has the dual role of enforcing civil service rules to ensure that Federal agencies comply with merit system principles and advocating for administration policies on Federal personnel matters. The role of the MSPB has been to serve as a bipartisan, independent protector of Federal merit systems, ensuring that Federal employees are protected against abuses by agency management and that Executive Branch agencies make employment decisions in accordance with merit systems principles. In addition, the MSPB is responsible for providing oversight of the significant actions and regulations of OPM to determine whether they are in accord with the merit systems. I believe that the perspective of each agency does differ in that OPM, in balancing its dual role, executes and enforces civil service rules and regulations while at the same it is required to be responsive to the administration's personnel management goals. On the other hand, the MSPB provides independent review of the personnel actions of executive branch agencies. I believe that for the most part, the respective roles of OPM and the MSPB are balanced. I would not consider recommending changes in the relationship between the agencies without giving careful thought to the long-term effects such changes might engender.

27. The FY2004 National Defense Authorization Act authorizes the Secretary of Defense and the Director of the Office of Personnel Management to establish a new human resources management system for DOD's civilian employees, and to jointly prescribe regulations for the system. Regulations applicable to employee appeals of adverse actions related to

conduct or performance may not be prescribed without consultation with the MSPB. If confirmed, the Committee expects that you will be fully engaged in such consultation. What do you believe are the minimum requirements the appeals process for DOD employees needs in order to be fair and perceived as fair? Are there lessons learned from your prior experience at the Board that you feel should be born in mind in considering the new system?

Answer:
It is important that all Board members be fully engaged in consultation with the DOD, as it would greatly benefit from the MSPB's experience and expertise in dealing with human resources management. Any system developed by the DOD would need to afford employees the protection of due process. I believe that in order to be fair and maintain the appearance of fairness, the DOD system should include an appellate review by an independent and neutral third party. In order to comply with due process requirements, the appeals procedure should also include full notice of the specific charges and a meaningful opportunity to respond to them, the opportunity for a hearing, and the chance to choose a representative. In addition, a fair and meaningful appeals procedure should include information about the process itself and the elements required in presenting a case. Based on my prior experience of reviewing cases before the Board, I believe that any new system must be viewed as credible by the parties using it so that employees and agency management will have confidence that the issues are being objectively considered.

28. With the personnel flexibilities recently granted to DHS and DOD, a large share of the Federal workforce is removed from the traditional civil service personnel system. What are the implications of having different agencies subject to different civilian personnel systems? Do you believe the effect of such changes should be examined? If so, what should be MSPB's role and how should that role be exercised? How does that compare to OPM's oversight responsibilities?

Answer:
I believe that there are significant implications in having different agencies subject to different personnel systems. There could be problems of fairness and reliability if different personnel systems treat employees from separate agencies differently. Therefore it will be critical that all these systems contain the same basic elements for due process that I noted above. If most of these systems eventually use the appeals process of the MSPB to deal with differing rules and regulations, the MSPB's resources could be strained. However, as I have indicated above, the MSPB does have a long history of successfully handling diverse rules and regulations and should serve as a resource for agencies that are developing new systems. The MSPB could also play a role in examining the effect of such changes through its data and information collection. As an impartial agency whose mission it is to ensure that merit system principles are upheld, the MSPB has extensive expertise in Federal personnel management systems and in

objectively reviewing and analyzing information on those systems. I believe that it is the impartiality of the MSPB that would distinguish its role in this process from that of OPM, which could be seen as having interests that are aligned with agency management.

29. Both MSPB (Merit Principles Survey) and OPM (Human Capital Survey) have conducted surveys of the Federal workforce. What are the pros and cons of each agency to continue doing separate surveys and what would be the pros and cons of MSPB and OPM having a unified survey?

Answer:
I am concerned that a unified MSPB/OPM study would tend to compromise the Board's statutory responsibility to provide impartial oversight and evaluation of Federal merit systems. As I understand it, OPM was created to speak for the administration on Federal personnel matters and much of its current research is done on behalf of Federal agencies, while the MSPB serves as an independent, bi-partisan protector of Federal merit systems. As each agency has a different perspective on many personnel management issues, OPM and the MSPB should continue to do separate surveys. The MSPB Office of Policy and Evaluation should work with OPM to ensure that there is no unnecessary duplication of information gathering while at the same time making certain that the specific focus of each agency is addressed.

30. Based on MSPB's surveys and other research and studies of the Federal workforce, and your prior Board experience, what do you believe are the major challenges facing Federal managers and other Federal employees in managing today's and tomorrow's Federal workforce, and what do you believe needs to be done to meet these challenges?

Answer:
Based on my experiences at the Board, I believe that one of the major challenges facing the Federal workforce is the agencies' ability to attract and keep highly motivated and trained employees. In view of the fact that many of the most experienced employees are nearing retirement age, this problem is becoming critical. Another challenge facing the Federal workforce is how the needs of management to supervise the workforce are balanced with the needs of employees to be ensured that they will be afforded all the necessary protections against abuse, regardless of the personnel system covering them. Federal agencies should develop programs for recruiting and mentoring employees while Federal employees should be provided with sufficient training and room for growth and promotion within each agency. I also believe that Federal employees should have a meaningful stake in the goals of the agency and should be included in promoting those goals. A balance between the needs of management and rights of employees can be struck by providing adequate training for managers in personnel and employment issues and by making human resource systems accessible to all employees. I am pleased to be considered for nomination to the MSPB because I believe that the MSPB has the expertise and the capability to effectuate many of these changes.

31. In 2000, the United States Court of Appeals for the Federal Circuit held that the MSPB lacked jurisdiction over an employee's claim that his security clearance was revoked in retaliation for whistleblowing. *Hesse v. Department of State*, 217 F.3d 1397 (Fed. Cir. 2000). The Court held that, even if the employee's security clearance was suspended or revoked in retaliation for making protected disclosures, the employee cannot obtain a remedy from the MSPB, because civil service law does not authorize the Board to either review a security clearance determination or require the grant or reinstatement of a clearance. To respond to the holding in *Hesse*, S. 1358, which is pending before the Governmental Affairs Committee, contains a provision that would make it a prohibited personnel practice for a manager to suspend, revoke or take other action with respect to an employee's security clearance in retaliation for the employee blowing the whistle.

- What, if any, significant impact on MSPB would you anticipate from the creation of this additional prohibited personnel practice if S. 1358 were enacted? In 1992 the Board established an Information Security Manual that sets forth a policy for handling classified information and, since then, has considered cases involving classified information. In addition to the need to ensure that classified information is handled in accordance with established MSPB policies, would the consideration of cases alleging retaliation in the form of suspension or revocation of a security clearance differ in any significant way from the consideration of cases alleging other forms of retaliation? Moreover, what, if any, impact would you anticipate on MSPB's workload from this provision?

- In addition to establishing a new prohibited personnel practice, the legislation would also state that MSPB or a reviewing court could, under an expedited review process, issue declaratory and other appropriate relief, but may not direct the President to restore a security clearance. Absent restoration of the security clearance, what are some examples of relief that you think might be appropriate in these cases? Would you anticipate that the expedited review process for these cases would have a significant impact on MSPB's other workload?

Answer:
I would expect that if S. 1358 were enacted, the addition of another prohibited personnel practice could increase the workload of the MSPB and the handling of such cases would require additional training for staff. Based on other considerations mentioned in this question, some of the elements of S. 1358 that could have an impact on the MSPB might include limitations on a make-whole remedy and making sure that any classified information that was received by the MSPB was properly protected. At this point, I do not have the information necessary to ascertain if there are other differences in the consideration of cases alleging retaliation in the form of suspension or revocation of a security clearance and cases alleging other forms of retaliation.

In the situation where a security clearance was required for a particular job, the MSPB or a reviewing court would not be able to order reinstatement. However, relief that would be appropriate could include back pay, placement in a position that does not require a security clearance, attorney fees, and consequential damages. Again, as in the case of other regulations that require deadlines for case processing and review, cases handled under expedited review requirements could take precedence over other cases, conceivably delaying the processing of those cases.

32. In *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit appeared to impose an erroneous standard for determining when an employee makes a protected disclosure under the Whistleblower Protection Act. Whereas the Act clearly provides that an employee need only have "a reasonable belief" that he or she is providing evidence of fraud, waste, or abuse before making a protected disclosure, 5 U.S.C. § 2302(b)(8)(A), (b)(1)(B), the Federal Circuit in *Lachance* required "irrefragable" proof.

Last September, the MSPB concluded in its decision on remand that the "irrefragable proof" language in *Lachance* was dictum that was neither supported by the legislative language of the Whistleblower Protection Act nor thereafter imposed by the Federal Circuit itself. *White v. Air Force*, MSPB (Docket DE-1221-92-0491-M-4, Sept. 11, 2003). However, OPM argued to the MSPB in *White* that "irrefragable proof" is the correct standard, and OPM has the authority to reassert this position to the Federal Circuit by appealing any future MSPB decision that applies a lesser standard.

To assure that the misinterpretation in *Lachance* is not repeated, S. 1358 contains a provision to provide assure that the misinterpretation in White is not repeated by providing that any presumption relating to a Federal government employee taking a personnel action for the purposes of a disclosure under 5 U.S.C. §2302(b)(8) may be rebutted by substantial evidence. In light of the Board's remand decision, but also considering OPM's authority to appeal future cases on this subject to the Federal Circuit, do you believe that the provision in S. 1358 is necessary or desirable?

Answer:
As a Board member I would be obligated to follow the precedential decisions of the Federal Circuit and could take no position on the substantive provisions of legislation before Congress in order to avoid any appearance of partiality. However, I understand that, on several occasions, this Committee has spoken on the importance of protecting whistleblowers and about its concern with the Federal Circuit's interpretation of the Whistleblower Protection Act. If Congress deems that the legislative intent is not being followed in the enforcement of a statute, I believe that it should clarify that intent. In view of OPM's continuing argument that "irrefragable proof" is the correct standard and to the extent that this provision in S. 1358 clarifies Congressional intent and will have the effect of holding the Federal Circuit to that standard, I believe that the provision in

S.1358 that any presumption relating to a Federal government employee taking a personnel action for the purposes of a disclosure under the Whistleblower Protection Act is necessary and appropriate.

33. Under current law, the Office of Special Counsel has no authority to request MSPB reconsideration of final decisions or to seek appellate review of an MSPB decision. S. 1358 would authorize the Office of Special Counsel to appear in any civil action brought in connection with the Whistleblower Protection Act and to request appellate review of any MSPB order where OSC determines MSPB erred and the case would have a substantial impact on enforcement of the Whistleblower Protection Act. Do you believe that this provision would be helpful and appropriate to ensure proper enforcement of the Whistleblower Protection Act?

Answer:
If it is Congress' intent that the Office of Special Counsel take an active and comprehensive role in protecting whistleblowers, then this provision is both helpful and appropriate to ensure proper enforcement of the Whistleblower Protection Act. It has been pointed out by the Office of Special Counsel that without the ability to request appellate review, it is difficult for the Special Counsel to participate fully in the arena where that law is interpreted. While this provision would limit the Special Counsel's authority to those situations where the case would have a substantial impact on enforcement of the Whistleblower Protection Act, allowing the OSC to appeal a MSPB decision will provide the courts with the benefit of the Special Counsel's perspective on relevant issues. There is precedent for independent agencies to have their own litigating authority and it is up to Congress to determine, on balance, whether granting the OSC this authority is justified. A large part of my employment and labor background has been with the National Labor Relations Board, an agency with just such authority. Based on that experience I do not believe that this authority is inappropriate. In view of the expressed Congressional intent to strengthen enforcement of the Whistleblower Protection Act, giving the Office of Special Counsel the authority to seek appellate review of an MSPB decision is consistent with this objective.

34. Under current law, appeals of most MSPB decisions are appealed to the United States Court of Appeals for the Federal Circuit. Subject to a five-year sunset, S. 1358 would allow petitions for review of these MSPB decisions to be filed with the Federal Circuit or any other Federal circuit court of competent jurisdiction. The rationale for this provision, including a list of several existing statutes that allow Federal employee cases (including certain MSPB decisions) to be appealed to Courts of Appeals across the country, is stated in the Governmental Affairs Committee report on a similar bill last Congress, Report on S. 3070, S. Rep. No. 107-349 (Nov. 19, 2002), pages 16-18. What do you believe would be the impact of this provision on Federal personnel law?

Answer:
I am aware of the view that multi-court judicial review of MSPB decisions may complicate the enforcement of civil service laws and the opinion that the interpretation these laws by different courts would not promote uniform treatment of Federal employees. However, my experience at National Labor Relations Board leads me to believe that that is not always the case. As the report from the Governmental Affairs Committee points out, there are several current statutes that provide for multi-court review. Based on the work that I did in the NLRB's Appellate Court Division, I have a appreciation of the benefits that different interpretations can bring to legal analysis. In many cases, where several courts have weighed in on an issue, the quality of the decisions is enriched by the debate. I believe that decisions from different courts also help parties frame and develop the arguments in a case. As an attorney with the NLRB also saw that in many cases, the interpretation of law by various courts was remarkably consistent. I don't know whether this provision would have an impact on the MSPB's caseload, but I believe that it could increase its litigation costs. However, on balance, a choice of forum could offer convenience and cost advantages to appellants.

35. Currently, when OSC pursues disciplinary action against managers who retaliate agains whistleblowers, OSC must demonstrate that an adverse personnel action would not hav occurred "but for" the whistleblower's protected activity. S. 1358 would require OSC t demonstrate that a whistleblower's protected disclosure was a significant motivating factor in the decision by the manager to take the adverse action, even of other factors al motivated the decision. This standard is similar to that created by the Supreme Court i *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977), *see* S. Rep. No. 107-349 (Nov. 19, 2002), pages 20-21. Do you believe that this is an appropriate standard? Would you anticipate that such a provision would have a significant impact on MSPB if it were to become la Do you believe such a provision would be helpful and appropriate to ensure adequate d process for Federal employees?

Answer:
If Congress is concerned that the burden of proof placed on the Office of Special Couns in disciplinary actions under the Whistleblower Protection Act is not consistent with th intent of the Act, the standard articulated in S. 1358 modifying that burden is appropria If S. 1358 does become law, requiring the MSPB to adopt this standard, it is likely that there would be an increase in Board rulings adopting OSC recommendations to impose discipline. However, I am not sure what, if any impact it would have on the MSPB's caseload. The standard created by the Supreme Court in *Mt. Healthy v. Doyle* is simila to, and was heavily relied on in the NLRB's *Wright Line* test. (*Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)) Th is the burden of proof standard with which I am most familiar and has served the NLRB well in its role of protecting the rights of employees, unions and employers against unfa labor practices. As this Committee has noted, the "but for" standard is a heavy one to

meet and Congress did lower the burden of proof for whistleblowers to win corrective action if they were subjected to retaliation. The standard set out in S. 1358 would bring both aspects of the Whistleblower Protection Act into alignment. As the Supreme Court pointed out in approving of the test in *Wright Line*, the wrongdoer has "acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)

IV. Relations with Congress

36. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Answer:
Yes, I do.

37. Do you agree without reservation to reply to any reasonable request for information from any duly constituted committee of the Congress if you are confirmed?

Answer:
Yes, I do.

V. Assistance

38. Are these answers your own? Have you consulted with the MSPB or any interested parties? If so, please indicate which entities.

Answer:
These are my answers. I consulted with MSPB personnel about resource material for some of the policy questions in Section III.

AFFIDAVIT

I, Barbara J Sapin, being duly sworn, hereby state that I have read and signed the foregoing Statement on Pre-hearing Questions and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Barbara J Sapin

Subscribed and sworn before me this 24 day of May, 2004.

Jennifer Blasdell
Notary Public

Jennifer Blasdell
Notary Public, District of Columbia
My Commission Expires 06-14-2007

April 19, 2004

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Barbara J. Sapin, who has been nominated by President Bush for the position of Member, Merit Systems Protection Board.

We have reviewed the report and have also obtained advice from the Merit Systems Protection Board concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is a letter dated April 9, 2004, from Ms. Sapin to the Board's ethics official, outlining the steps she will take to avoid conflicts of interest.

Based thereon, we believe that Ms. Sapin is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Marilyn L. Glynn
Acting Director

Enclosures