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MERIT SYSTEM PROTECTION ACT OF 1997

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL SECURITY, PROLIFERATION, AND FEDERAL SERVICES

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

FEBRUARY 26, 1998

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MERIT SYSTEM PROTECTION ACT OF 1997

THURSDAY, FEBRUARY 26, 1998

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL SECURITY,
PROLIFERATION AND FEDERAL SERVICES,
OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in SD–342, Dirksen Senate Office Building, Hon. Thad Cochran, Chairman of the Subcommittee, presiding.

Present: Senators Cochran and Levin.

OPENING STATEMENT OF SENATOR COCHRAN

Senator COCHRAN. The Subcommittee will come to order.

Today we welcome our witnesses and others who are attending this hearing on the subject of the Merit System Protection Act of 1997, specifically, S. 1495, which was introduced at the request of the administration by my distinguished friend, Senator Levin from Michigan, the Ranking Member of this Subcommittee.

The bill proposes two changes to the Civil Service Reform Act of 1978 relating to the authority of the Office of Personnel Management to seek and obtain judicial review of Federal personnel management decisions issued by the Merit Systems Protection Board and by arbitrators.

[The prepared statement of Senator Cochran follows:]

PREPARED OPENING STATEMENT OF SENATOR COCHRAN

I would like to welcome our witnesses and others who are attending this hearing on the Merit System Protection Act of 1997, S. 1495, which was introduced by Senator Levin, the ranking Member of this Subcommittee.

The Merit System Protection Act proposes two changes to the Civil Service Reform Act of 1978. The two changes relate to the authority of the Office of Personnel Management (OPM) to seek, judicial review of Federal personnel management decisions issued by the Merit System Protection Board (MSPB) and by arbitrators.

First, the current law (Section 7703 to Title 5, U.S. Code) gives OPM 30 days to file a petition for review of an MSPB final decision to the U.S. Court of Appeals for the Federal Circuit. S. 1495 proposes extending OPM's appeal period to 60 days after receiving a notice of a final order or decision.

Second, the current law gives the Court of Appeals the discretion to decide whether or not to hear OPM petitions for review of MSPB decisions. S. 1495 would strengthen the ability of OPM to obtain judicial review by requiring the Federal circuit to hear every appeal from a final MSPB decision brought by OPM.

We will hear first from Lorraine Lewis, General Counsel of the Office of Personnel Management, and David M. Cohen, Director of the Commercial Litigation Branch of the Civil Division, Department of Justice. Ms. Lewis and Mr. Cohen will be followed by a second panel consisting of Robert M. Tobias, National President of the National Treasury Employees Union (NTEU) and Mark Roth, General Counsel of the American Federation of Government Employees (AFGE). We will also make

statements submitted by R. Scott Fosler, President of the National Academy of Public Administration, and Albert Schmidt, Acting National President of the National Federation of Federal Employees, part of the hearing record, without objection.

Senator COCHRAN. I will leave it to the witnesses to explain the proposal and the practical implications and how it will affect the process of judicial review of these decisions and why the Office of Personnel Management thinks these are changes that ought to be made in the law.

Our first witness will be the General Counsel of the Office of Personnel Management, Lorraine Lewis, who is accompanied by David Cohen, Director of the Commercial Litigation Branch of the Civil Division of the Department of Justice.

There will be a second panel consisting of the President of the National Treasury Employees Union, Robert Tobias, and the General Counsel of the American Federation of Government Employees, Mark Roth.

We have statements that have been submitted to the Subcommittee which will be made a part of the record. They come from the Chairman, Standing Panel on the Public Service, National Academy of Public Administration, Ralph Bledsoe, and the Acting National President, National Federation of Federal Employees, Albert Schmidt.[1]

At this point, before we turn to our witnesses, I am happy to yield to my distinguished friend from Michigan, Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Mr. Chairman, just very briefly, because you have laid out the issues. As you have indicated, this bill was introduced at the request of the administration, and there are many questions that we will be asking of the witnesses, but I just want to thank you for scheduling this hearing. It is an accommodation to the request of the administration, and it is nice of you to take the time to schedule this hearing so we can learn more about the issue and reach a decision as to what we think are the appropriate steps to take, if any.

Senator COCHRAN. Thank you very much.

Ms. Lewis, if you would come forward, and Mr. Cohen. We have copies of statements that you have provided to the Subcommittee. We thank you for those, and they will be made a part of the record in their entirety, so we encourage you to make summary comments and give the Subcommittee whatever information you think will be helpful to us.

You may proceed.

TESTIMONY OF LORRAINE LEWIS, GENERAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT

Ms. LEWIS. Thank you, Mr. Chairman, Mr. Levin.

First, on behalf of the administration, thank you very much, Senator Levin, for introducing the bill at our request, and thank you, Mr. Chairman and Senator Levin, for scheduling this hearing.

Last month, the Supreme Court ruled that a Federal employee has no right to lie when questioned by the agency about alleged

[1] The prepared statements of Messrs. Bledsoe and Schmidt appear in the Appendix on pages 31 and 33 respectively.

misconduct. The Court reversed the Federal Circuit's finding that the Constitution prohibited agencies from disciplining employees for telling certain lies. This case, *Lachance v. Erickson*, was pursued by the Office of Personnel Management under the authority that brings us here today, the authority Congress conferred solely upon the Director of OPM 20 years ago to appeal erroneous final decisions that have a substantial impact on Civil Service law.

At the same time that Congress vested this responsibility in the Director of OPM, it also granted discretion in the Federal Circuit to reject an appeal despite OPM's "substantial impact" determination. It is time to eliminate this unique discretion in the Federal Circuit.

We are aware of no other instance in which a Federal Court of Appeals possesses the discretionary authority to decline to hear appeals by the Executive Branch from final decisions. In fact, when Congress recently provided for Federal Circuit review of appeals by legislative employing offices, Congress did not empower the Federal Circuit with such authority. The House and Senate Employment Offices may appeal as a matter of right, thereby obtaining decisions on the merits of the legal issues presented.

OPM, as the personnel expert for the Executive Branch, should be afforded the same treatment. With all due respect, OPM is in a better position than the Court to judge the impact of erroneous MSPB and arbitration decisions. While the Federal Circuit has much experience adjudicating Civil Service law, OPM deals regularly with the Federal personnel community which puts that law into practice. This front-line position gives OPM better perspective to assess how decisions will be interpreted and knowledge of the problems that arise.

After 20 years in this position, OPM has acquired a broad perspective on the issues facing the Civil Service, both today and tomorrow. A court simply cannot be expected to possess this expertise which is critical to measuring the substantial impact of decisions.

Instead, we want the court's efforts to be focused upon deciding the merits of the cases that the Director of OPM and the Solicitor General have decided warrant appeal. Everyone—agencies, employees and their representatives—benefits from the resolution of important legal issues. There is no reason to believe that the number of appeals by OPM would increase if the Federal Circuit's discretion were eliminated.

Each appeal filed by OPM is subject to extensive review by several offices within the Department of Justice and ultimately must be authorized by the Solicitor General, the government's very selective gatekeeper for all appeals.

As the charts included with my written statement demonstrate, during the last 18 years, OPM has appealed only 57 cases; that is an average of 3 or 4 a year. Clearly, the law's continuing "substantial impact" requirement and this multi-level review process have ensured and will continue to ensure that only the most important Civil Service cases are appealed.

Despite this prudent track record, the Federal Circuit has refused to hear one out of four of these cases. This has prevented the Executive Branch from securing clarity and understanding of the

law. It has also led to inevitable, costly and time-consuming disagreements between OPM, the MSPB and individuals as to what cases are important enough for the Court to hear. This system is rife with inefficiencies.

Our proposal to eliminate the Court's discretion is also fundamentally fair to the Federal worker. An employee's right to appeal to the Federal Circuit remains absolutely unchanged by our proposal. Further, the law provides that the employee and the MSPB may participate in OPM's cases in the Federal Circuit.

Finally, we are also asking that OPM and the Department of Justice be permitted 60 days in which to file a *pro forma* petition for review. This is the same time limit pertaining to government appeals from the Federal Labor Relations Authority, the other adjudicatory body in addition to the MSPB created by the Civil Service Reform Act of 1978.

Moreover, pursuant to recent law, legislative employing offices are permitted 90 days to appeal to the Federal Circuit. This is in stark contrast to the 30-day fire drill that OPM and the Department of Justice now run to obtain the required approvals and prepare a petition equivalent to a full brief on the merits.

S. 1495 will help OPM carry out the leadership role that Congress and the President require. It will give us the tools we need to ensure that cases of the magnitude of *Erickson* will be considered on their merits.

We are particularly pleased that our proposal has gained the support of the Chairman of the Standing Panel on the Public Service of the National Academy of Public Administration.

Thank you for the opportunity to discuss this proposal with you today and to be on this panel with David M. Cohen from the Department of Justice.

Senator COCHRAN. Thank you, Ms. Lewis for your statement.

[The prepared statement of Ms. Lewis follows:]

PREPARED STATEMENT OF LORRAINE LEWIS

Mr. Chairman, Senator Levin, and Members of the Subcommittee: Last month, the Supreme Court ruled that a Federal employee has no right to lie when questioned by the agency about alleged misconduct. The Court reversed the United States Court of Appeals for the Federal Circuit which found that the Constitution prohibited agencies from disciplining employees for telling certain lies. This pivotal case, *Lachance v. Erickson*, was pursued by the Office of Personnel Management (OPM) under the authority that brings us here today—the authority of the OPM director to appeal erroneous decisions that raise substantial issues of Civil Service law.

The *Erickson* decision means that all of us sitting here today—Congress, Executive agencies, and employees—know an important standard in the framework governing Federal employees. When such principles are unsettled, no one in the system is benefited.

This decision illustrates the significance of OPM's central role in our Civil Service—a role Congress assigned to us 20 years ago—to seek judicial review of only the most important Merit Systems Protection Board (MSPB) and arbitration decisions—those that would have a "substantial impact" upon Civil Service law. To that end, Congress specifically assigned OPM the role of the President's "Chief Lieutenant" in matters of personnel administration.

OPM has steadfastly adhered to Congress's directive. By our count, during the past 18 years, OPM has sought to appeal only 57 cases—approximately four cases on average each year—to the appropriate Court of Appeals. (Attachment A is a graph which illustrates the few number of petitions filed by OPM each year).

Through judicious use of its authority to seek judicial review, OPM has established a number of important legal principles affecting the entire government. For

example, cases like *Hillen* and *Frazier* have established the strict legal standards by which allegations of sexual harassment are judged in the Federal workplace.

Fortunately, while the system established 20 years ago worked in *Erickson,* in our experience, it has proven to be defective in two key respects. S. 1495, OPM's Legislative proposal, seeks to correct those defects and, most importantly, the proposed changes are fundamentally fair to Federal employees.

The first problem with the current system is the Federal Circuit's authority to reject a petition for review despite OPM's "substantial impact" determination. This has prevented OPM from performing its core function of obtaining expeditious judicial review of significant final decisions without needless litigation over which cases are important enough for the Court to hear. Second, there is a burdensome set of constraints by which the government must file a petition for review that is the equivalent of a full-blown brief on the merits of the case within 30 days of receipt of the final MSPB or arbitral decision. Our research has revealed that no other governmental appellant at any Court of Appeals is so constrained.

Substantial Impact Determination

The authority of the Federal Circuit to review and substitute its judgment for that of the Director of OPM is unnecessary. Since the creation of the Federal Circuit, the 50 or so appeals that OPM has filed in that Court must be viewed against the backdrop of the Federal Circuit's overall caseload, which exceeds 22,000 filings for that time period. Thus, OPM's petitions have constituted only ⅕ of 1 percent of the Federal Circuit's entire docket. Clearly, we have not exercised our authority in a manner that burdens the Court.

Each appeal filed by OPM is subject to extensive review by several offices within the Justice Department, and ultimately must be authorized by the Solicitor General. While OPM is the President's "Chief Lieutenant" for personnel administration, there is no question who is the President's General for authorizing government appeals—and the Solicitor General is a very selective gatekeeper. We are unaware of any other instance in which a Federal Court of Appeals possesses the discretionary authority to decline to hear appeals from final decisions. No governmental appellant faces these consequences other than OPM.

In fact, recently Congress provided for Judicial review in the Federal Circuit of employment decisions adverse to Legislative employing offices. However, Congress specifically allowed the House and Senate employment offices to appeal such decisions as a matter of right. This enables those offices to obtain decisions on the merits of the legal issues presented. Since 1978, OPM has proven that its performance as the President's "Chief Lieutenant" in selecting those few cases with substantial impact is deserving of the same treatment.

Unfortunately, in exercising its anomalous authority, the Federal Circuit has declined to hear a significant portion of the cases that OPM and the Solicitor General have determined meet the exacting standards of the law.

For example, in *Avalos,* the Bureau of Prisons found that an employee sexually harassed a female inmate. The arbitrator reversed the agency's discipline against him. In doing so, the arbitrator misinterpreted the Constitution in this Civil Service context and relied on his own invidious ethnic generalizations about witnesses who appeared. The Federal Circuit refused to address these issues even though they were of comparable significance to those in *Erickson.*

In all, since the Court's inception, the Federal Circuit has declined to hear the merits of OPM's cases in one of every four that OPM has filed with the Court. (Attachment B is a graph which illustrates that the Court has rejected OPM's petitions more often than OPM has actually lost cases on their merits). This has prevented OPM from securing clarity and understanding of the law and has led to inevitable, costly and time-consuming disagreements between OPM, the MSPB and individuals as to what cases are important enough for the Court to hear.

S. 1495 would eliminate the discretion of the Federal Circuit to decide whether to hear the director's petition for review, thus permitting OPM to discharge fully the responsibility that Congress conferred upon it nearly 20 years ago.

The elimination of that authority would in no way cause a marked increase in the Federal Circuit's docket. As mentioned, 18 years of OPM's and the Solicitor General's demonstrated restraint dispels that fear. The numbers speak for themselves.

This bill is fundamentally fair to the Federal worker. An employee's ability to appeal an adverse decision to the Federal Circuit, as a matter of right, is left absolutely unchanged by this proposal. A decision on the merits from the Federal Circuit on OPM's petition for review will create certainty in legal principles and will establish repose for agencies, managers, employees, and those who represent them.

Extending the 30-Day Time Limit to 60 Days

The Court has also required OPM to file a full-blown substantive appellate brief only 30 calendar days after the receipt of an arbitrator or MSPB decision. No other agency is required to perform under such strict constraints in their appeals to the Federal Circuit. For example, Congress provided that appeals of decisions (filed by either the Senate or House employment offices) issued by the Board of the Office of Compliance may be perfected by merely filing *pro forma* notices of appeal with the Federal Circuit within 90 days. Of course, neither the Senate nor House employment offices must obtain the Solicitor General's approval prior to filing their appeal.

S. 1495 would remove this anomaly, and allow it to file a *pro forma* petition for review 60 days after an adverse decision has been received. This would then be the same as the time limit pertaining to government appeals from the Federal Labor Relations Authority, the other adjudicatory body created by the Civil Service Reform Act in 1978.

This 60-day time frame would ensure that OPM and the Justice Department have the necessary time to draft the required recommendations and to confer, coordinate and prepare the petition.

Conclusion

S. 1495 would ensure that OPM can carry out the leadership role that Congress and the President require of it. It would give us the tools we need to ensure that cases of the magnitude of *Erickson* will be considered on their merits.

Thank you for the opportunity to discuss the bill with you today, and to be on this panel with Mr. David M. Cohen from the Department of Justice.[1]

Senator COCHRAN. Mr. Cohen, you may proceed.

TESTIMONY OF DAVID M. COHEN, DIRECTOR, COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. COHEN. Thank you, Mr. Chairman, Mr. Levin.

The United States is involved in more cases in the Federal courts than any other litigant. If the United States were to appeal every case that it lost, the Courts of Appeal would be overwhelmed. Moreover, it would not be correct for the government to appeal a case simply because it lost a case at the trial level.

Accordingly, an elaborate procedure has been established in order to control the number of cases and the type of cases which the United States may appeal, and that procedure involves centralizing authority to authorize appeals in the Solicitor General.

In order to exercise his authority, the Solicitor has also established an internal Department of Justice procedure, which I have described in my statement, which involves at least seven different levels of review before an appeal is authorized. This is the normal procedure that we follow in every case when the government is considering an appeal from a lower tribunal.

However, unlike the situation we are talking about today, there are two differences. In the normal procedure, we have 60 days in which to make this determination, 60 days in which to prepare the recommendations, to conduct meetings if it is necessary to resolve disputes, and finally, to file the notice of appeal. And that is the second difference—once it is decided by the Solicitor to authorize an appeal, that appeal is initiated by the filing of a notice.

The differences in the current procedure involving OPM are, first, that we only have 30 days to complete this extensive review, and second, instead of filing a notice of appeal upon conclusion of the Solicitor to authorize an appeal, we have to file a substantive petition.

[1] Charts referred to appear in the Appendix on page 36.

The last thing I would mention on this point is that we never know when a decision is going to be issued by the Merit Systems Protection Board or when the Director of OPM, after considering the matter, will recommend to the Department of Justice that an appeal be taken.

Given that fact and given the fact that we only have 30 days, the procedure places an extreme burden upon our resources. When the Director sends over a recommendation, our attorneys have to drop everything that they are doing at the moment in order to review the record, review the decision, prepare a recommendation that will be forwarded up the chain, and at the same time, they have to prepare a substantive petition for review. And the 30-day period is simply not long enough to enable us to thoroughly consider these matters and to do our other work—in other words, our other work has to suffer whenever we have one of these recommendations from the Director that we appeal.

So for these reasons, we support the provision of the bill that would extend the time for OPM, or the government, to appeal a decision for 60 days, the normal period allowed in every other appeal.

The other aspect of this bill also deals with an unusual procedure. In every other appeal, as I have mentioned, we go through exactly the same process in preparing recommendations for the Solicitor General to make a decision as to whether or not an appeal should be authorized. Once the Solicitor makes that decision and we file a notice of appeal, then the appeal proceeds in the normal course of events. However, under the current procedure, once the Solicitor General makes a determination that an appeal should be taken, even though the Solicitor has taken into account and given weight to, although not dispositive weight, to the Director's determination that the case involved will have a substantial impact on the administration of the Civil Service laws, once the Solicitor makes that decision, then the court under this procedure—an unusual procedure—has an opportunity to make a decision itself as to whether or not the decision will have a substantial impact on the administration of the Civil Service laws.

Now, the problem that this causes is that the court, in our view, is not in as good a position as the Solicitor General and OPM to make a determination as to whether or not a particular decision will affect the administration of the laws. Just to give two examples, in one situation, the court declined to permit an appeal because the decision that the government wished to appeal was unpublished, and in another case, the court declined to give the government permission to appeal because the court felt that the decision that the government wished to appeal was so wrong that no one would possibly follow the decision, and therefore, it could not have a substantial effect upon the Civil Service law.

The point here is that those may be reasons that the court believes are reasons to deny the government the right to appeal, but it involves a guess on the part of the court, that is, that personnel specialists will not be influenced by an unpublished decision, or they will not be influenced by a decision that is so clearly wrong.

In fact, OPM and the Solicitor General are much closer to the operations of personnel specialists throughout the government, and we think they are in a much better position to make a determina-

tion as to whether or not in fact a decision, even if it is unpublished, or a decision even if the court thinks is clearly wrong, will affect the ability of personnel specialists to perform their jobs.

For this reason, we support the second provision of this bill which would restore the normal procedure and allow OPM and the Solicitor General to make the determination as to whether or not a decision should be appealed because if left standing, it will have an adverse impact upon the administration of the Civil Service laws.

Thank you, Mr. Chairman.

Senator COCHRAN. Thank you very much.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF DAVID M. COHEN

Mr. Chairman and Members of the Subcommittee, I am pleased to testify today on behalf of the Department of Justice regarding S. 1495, "The Merit System Protection Act of 1997." This bill would make two changes in the process by which the Office of Personnel Management seeks review of adverse decisions of the Merit Systems Protection Board or arbitrators. First, it would lengthen the time for filing a petition for review from 30 days to 60 days. Second, it would eliminate the discretion of the United States Court of Appeals for the Federal Circuit to reject a petition for review once the Director of the Office of Personnel Management has made the requisite statutory determination that a particular case would have a 'substantial impact on a Civil Service law, rule, regulation, or policy directive." The Department of Justice fully supports the bill.

Currently, pursuant to 5 U.S.C. § 7703(d), a petition for review must be filed within 30 days after notice of the final decision of the Merit Systems Protection Board or the arbitrator is received. Moreover, unlike more traditional notices of appeal, the petition for review must contain a full statement regarding the board's alleged error in interpreting relevant Civil Service law and a description of the substantial impact the error will have upon the Civil Service laws. After receiving the petition for review and any responses to it, the Federal Circuit then determines whether it will entertain the appeal.

This bill would lengthen the time for the government to file a petition for review from 30 days to 60 days. This proposal is appropriate and necessary for several reasons. The additional time would provide the Office of Personnel Management and the Department of Justice a more adequate amount of time to assess the appropriateness of a petition for review. Any final decision to file a petition for review is made by the Solicitor General. Before that final decision is reached, however, several extensive reviews and recommendations are made within the Office of Personnel Management and the Department of Justice. First, the Office of Personnel Management must determine whether the alleged error by the board meets the statutory "substantial impact" standard required for a petition for review. If so, the Office of Personnel Management must fully analyze the Board or arbitrator's final decision and transmit an appeal to the Commercial Litigation Branch of the Civil Division of the Department of Justice, which independently evaluates whether a petition for review is appropriate. The Commercial Litigation Branch's recommendation is forwarded to the Civil Division's Appellate Staff which, in turn, reviews the matter and forwards the recommendation to the Assistant Attorney General or his Deputy, who makes a recommendation to the Solicitor General. Once the Civil Division's recommendation is received by the Office of the Solicitor General, additional reviews are conducted by an Assistant to the Solicitor General and a Deputy Solicitor General before a final decision is made by the Solicitor General whether to authorize the petition for review.

This extensive internal review process is similar to the procedures employed for all appeals upon behalf of Federal agencies and it is a necessary process to ensure that these appeals are appropriate and our arguments are sound. The process is highly effective in identifying only the most significant cases for appeal by the government. Indeed, as a result of this process, the Office of Personnel Management has appealed only about four per year of the approximately 2,000 decisions issued by the Merit Systems Protection Board annually.

Pursuant to the Federal Circuit's current procedures, this entire decisionmaking process must be completed within 30 days. Moreover, a substantive document containing our jurisdictional and substantial impact arguments and evidence also must

be prepared and filed within this same time period. Although the current bill would eliminate the Federal Circuit's discretion to entertain a petition for review, hence, eliminating the need for a substantive brief at the time the initial petition for review is filed, the additional time to appeal is still necessary to ensure that both the Office of Personnel Management and the Department of Justice have an adequate amount of time to assess the appropriateness of further review. The present time constraints impose an undue burden upon both the Office of Personnel Management and the Department of Justice and limit the government's ability to seek effective review of board decisions which we believe are erroneous and have a substantial impact upon Civil Service law. In addition, the limited time period in which to petition for review is even more burdensome in those instances when the Office of Personnel Management and the Department of Justice disagree as to whether a petition for review should be filed or what specific arguments should be presented. The extremely short period to seek review of these complex and significant cases simply does not provide sufficient time for adequate consultation and reflection regarding cases of substantial governmentwide importance. The 60-day period for filing a petition for review envisioned by this bill is consistent with the time period for appeal in other cases involving the United States. For instance, in appeals from district courts in which the United States or an officer or agency thereof is a party, the appeal period is 60 days. More directly, in appeals to the Federal Circuit from the Court of International Trade or the Court of Federal Claims, the period for appeal also is 60 days. Indeed, the period for appealing the administrative determination of a board of contract appeals is even longer in that the time within which an appeal must be filed is 120 days from the date the adverse decision is received. The 60-day period allowed by the bill will provide an adequate amount of time for assessment of each case and ensure that petitions for review are filed only when bath the Office of Personnel Management and the Department of Justice have determined that further review is warranted.

The second part of this bill would eliminate the discretion of the Federal Circuit to entertain the petition for review and require the court to entertain all such appeals when the Office of Personnel Management has made the requisite statutory determination and the Solicitor General has concurred with the recommendation to seek further review. Pursuant to the current statutory scheme, even if the Director of the Office of Personnel Management has made the required determination that the Merit Systems Protection Board or the arbitrator has erred in a way that will have a substantial impact upon the Civil Service laws and the Department of Justice has approved the filing of a petition for review, the Federal Circuit still can decide not to entertain the appeal. In essence, this discretion permits the Federal Circuit, instead of the Executive Branch, as is the case with all other appeals involving government agencies, to determine when it is appropriate for the government to obtain judicial review of a final decision of the board or arbitrator.

Although there are other instances where a court may refuse to entertain an appeal, that discretion results from the court's expertise and special ability. For instance, an interlocutory appeal from a non-final order will be allowed only when "it involves a controlling question of law as to which there is substantial ground for difference of opinion" and when "an immediate appeal . . . may materially advance the ultimate termination of the litigation. . . ." This decision is left firmly to the discretion of the courts. The important distinction is that the Merit Systems Protection Board and arbitrators' decisions are final—there are no disruptions in the proceedings below. Likewise, the Supreme Court has the discretion to reject petitions for a writ of certiorari unless "compelling reasons" such as a conflict among the circuit courts or an important Federal question exist. In both of these instances, however, it is appropriate for the court to make the final determination to entertain an appeal because whether an interlocutory appeal will materially advance a case or whether an important conflict needs to be resolved are questions that are firmly within the courts' expertise and are best left to the courts.

Conversely, in the case of a petition for review, the Federal Circuit has no special expertise in the Federal Civil Service or in deciding the specific question of whether a decision of the Merit Systems Protection Board or arbitrator has a "substantial impact" on a Civil Service law, rule or regulation. Instead, it is the Director of the Office of Personnel Management who is statutorily charged with the administration and oversight of the Federal Civil Service. Moreover, as part of this responsibility, the Director has been given the specific authority to determine when to seek review of an adverse decision of the Merit Systems Protection Board or arbitrator. Given this statutory role of the Director and the fact that the decision to appeal is traditionally and appropriately lodged with the Executive Branch, and more specifically with the Solicitor General, we believe it is inappropriate for the Federal Circuit to be able to substitute its judgment regarding the appropriateness of a petition for

review for the judgment of the Executive Branch. Rather, because of the special expertise the Director of the Office of Personnel Management possesses in personnel matters, the decision to petition for review should belong to the Director, with the approval of the Solicitor General.

There is no evidence that the Office of Personnel Management would abuse its authority or pursue unnecessary petition for reviews if the Federal Circuit's discretion were eliminated as proposed by the bill. Indeed, to date, the Director has exercised his or her authority to appeal in a limited and appropriate manner. As noted, we have appealed only about four cases per year from the approximately 2,000 decisions issued by the Merit Systems Protection Board annually. Yet, despite the limited number of petitions for review sought by the government, the Federal Circuit has refused to hear petitions for review in a number of instances in which both the Office of Personnel Management and the Department of Justice have determined that a significant issue of Civil Service law is implicated.

Moreover, as we have described, once the Office of Personnel Management has made its recommendation, a lengthy and detailed review is performed by the Department of Justice. The nature of this review requires a number of individual attorneys and components of the Department to agree with the Director's substantial impact determination. Accordingly, this review process provides substantial additional assurance that petitions for review will be sought in only the most important and significant cases. Because appeals of decisions from the Merit Systems Protection Board will be taken only when both the Office of Personnel Management and the Department of Justice conclude a petition for review is appropriate, any further discretionary review by the Federal Circuit is unnecessary and encroaches upon the traditional prerogative of the Executive Branch.

Through the judicious use of its authority, the Office of Personnel Management has established a number of important legal principles for Civil Service law such as the proper test for establishing sexual harassment in the Federal workplace and the rule that Federal arbitrators in personnel cases must apply the same substantive law as the Board. In other cases, however, the Executive Branch has been frustrated in its efforts to obtain judicial review of what it believes were significant Civil Service issues because the Federal Circuit declined to hear the appeals. This bill would eliminate the unnecessary discretionary review of the Federal Circuit and place the decision to appeal in the appropriate province of the Executive Branch.

For these reasons, the Department of Justice strongly supports enactment of S. 1495, the "Merit Systems Protection Act oF 1997." That concludes my prepared remarks. I would be happy to attempt to answer any questions that you may have.

Senator COCHRAN. Let me ask you this. Is there any way that you can think of that one or the other parties to an appeal would be disadvantaged if the period of time were to be extended, as this bill suggests it should, from 30 days to 60 days in order to file that required appeal?

Mr. COHEN. I do not believe they would be disadvantaged in the sense that, for example, if the government has lost—let me back up. Suppose an employee has been discharged, and then the Merit Systems Protection Board overturns that discharge. The Solicitor General and the Director of OPM have decided that that decision should be appealed. There is no automatic stay simply because the government has decided to appeal, so the employee would be reinstated during the pendency of the appeal, so it is hard to see how the employee would be disadvantaged by that process.

It is true that the government could move for a stay, but it rarely does so; in fact, I do not recall an instance in which we have done so, or certainly, if we have, it is very, very rare. So the employee would be reinstated during the pendency of the appeal.

Ms. LEWIS. There is also the issue of attorneys' fees. At both the MSPB and the court level, the party may move for collection of fees, and there is an "interest of justice" standard that that body reviews to determine if fees are appropriate. So both of our answers are no, we do not see that there is a harm or a cost. Ultimately, we see a great benefit in those cases in being able to expe-

ditiously get to the merits of the legal issues that have been identified in the government's appeal. Currently, there are two different panels of the Federal Circuit that review the matter. There is an initial panel that looks at the brief filed to determine if the case has substantial impact, and then, upon concurring or agreeing to take the case, there is another panel that is established, a panel with three judges, to see another set of briefs that is filed and then to hear the oral argument. Therefore, in three out of four cases over the last 20 years, this system has basically doubled the work of all of the parties and cost resources in order to do that.

Senator COCHRAN. Looking at the statistics that were given to the Subcommittee in preparation for the hearing, I see that there are close to 10,000 decisions made each year by the Merit Systems Protection Board and arbitrators. Is that correct?

Ms. LEWIS. My recollection is that there have been about 10,000 cases appealed to the Federal Circuit from the MSPB; that each year since the MSPB was created, there ranges from 1,000 to 2,500 or so, final MSPB cases, decided each year, and from that number, 10,000 of those cases have been appealed to the Federal Circuit.

Senator COCHRAN. My information here was from the Court of Appeals for the Federal Circuit in the last 5 years, OPM only submitted 17 cases to the court, and the court agreed to hear 10 of them. Is that not right?

Ms. LEWIS. Since 1993, I believe we have submitted 23; from 1993 until to date, we have petitioned 23 times, and we have been rejected 6.

Senator COCHRAN. OK. That does not seem to me to be many appeals.

Ms. LEWIS. Many appeals by OPM?

Senator COCHRAN. Yes, right.

Ms. LEWIS. Yes, that is correct.

Senator COCHRAN. The appeals have come from the other side; is that what you are saying?

Ms. LEWIS. That is correct; that is exactly right. The individuals in those cases have an appeal as of right to the Federal Circuit, and that aspect of the law is untouched by this proposal.

Senator COCHRAN. OK. That will not be affected.

Ms. LEWIS. Correct.

Senator COCHRAN. So the only thing that would be affected would be to give the OPM an opportunity to have appeal as a matter of right rather than discretion. Is that correct?

Ms. LEWIS. With one qualifier, Mr. Chairman. The requirement in the law that, in the discretion of the OPM Director, the cases will have a substantial impact on Civil Service law, will remain.

Senator COCHRAN. Yes. You will still have to make that determination.

Ms. LEWIS. And we will still be required——

Senator COCHRAN. But the court takes your word for it?

Ms. LEWIS. With all due respect to the court, the decision as to whether a case will have substantial impact on administration of the Civil Service laws will lie with the OPM Director, the President's Chief Lieutenant in Personnel Administration, as the Civil Service Reform Act spelled out for the Director of our agency 20

years ago, requiring the approval of the Solicitor General and the checks and balances in the Department of Justice.

So to contrast in cases that are appealed from the Board of Compliance, a board of the Office of Compliance here in the Legislative Branch, there are two fundamental differences. There is no requirement on the employing office here in the Legislative Branch that the matter have a substantial impact on a law, and second, there is no requirement to seek the approval of the Solicitor General. So there will continue to be very few cases.

Senator COCHRAN. OK. In your opinion—and you can both answer this—would there be any appreciable increase in the number of appeals and therefore the work load of the Federal Circuit if this bill is passed?

Mr. COHEN. I do not believe so. The government appeals very few cases to begin with. For example, in my area of responsibility, we represent every Federal agency in the Court of Federal Claims, and last year, we had 36 cases that we lost, and we only appealed 6 of them. In the normal course, we rarely—we do not appeal every case, and we appeal very few cases. I do not believe the number of cases would increase substantially.

Senator COCHRAN. Ms. Lewis, do you agree with that?

Ms. LEWIS. I agree, absolutely.

Senator COCHRAN. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

I would like to get these numbers straight—by the way, welcome back. This is a room with which you are very familiar. You were counsel to Senator Glenn when he was the Chairman here, and you performed admirably then, and you are performing very capably now, representing your agency, so welcome—I will not say "home"; God forbid, this is no one's home—but welcome back.

Ms. LEWIS. Thank you, Senator Levin.

Senator LEVIN. Let me get the numbers straight. The number in your testimony was 57 efforts to appeal since 1978?

Ms. LEWIS. Yes, sir. The first three cases of the 57 were brought before the U.S. Court of Appeals for the District of Columbia. It was not until the last 54 after the Federal Circuit was created that these cases, both from the MSPB and arbitrators standing in the shoes of the MSPB, have been taken to the Federal Circuit.

Senator LEVIN. So that is since roughly 1980, or——

Ms. LEWIS. Nineteen eight-two, I believe, is when the Federal Circuit——

Senator LEVIN. OK. So 54 efforts to appeal since 1982, of which how many have been granted—applications to appeal?

Ms. LEWIS. We have had 14 denials, so we have had——

Senator LEVIN. So 40 of 54. And then, when the Chairman asked you, you said that since 1993, the figure you used was——

Ms. LEWIS. Twenty-three.

Senator LEVIN [continuing]. Twenty-three attempts, of which how many were denied?

Ms. LEWIS. Six were denied.

Senator LEVIN. So you had 17 successful. OK.

Ms. LEWIS. We have had 17 cases taken, and then——

Senator LEVIN. Taken; I meant taken, right.

Ms. LEWIS [continuing]. Right.

Senator LEVIN. And then, of those 17, you won some and you lost some, I assume.

Ms. LEWIS. We win about two-thirds of the cases on the merits.

Senator LEVIN. How many cases a year are decided by the MSPB, approximately?

Ms. LEWIS. The number varies.

Senator LEVIN. Oh, give me a range.

Ms. LEWIS. The range is about 1,100; the high was 5,223 back in 1984. In 1996, the number of final MSPB decisions was 1,329——

Senator LEVIN. OK, that is good enough. So typically, maybe 1,500 cases a year or something like that. And of those, in how many does the government prevail, roughly?

Ms. LEWIS. I have not been able to get that determination. I have sought, but I have not been able to get it.

Senator LEVIN. Would you guess it is somewhere even-steven, or——

Ms. LEWIS. No. The government generally, I think, has a significant win record at the MSPB; but I do not have the exact number.

Senator LEVIN. And then, how many employee appeals were there, say, since 1993, or give me an "apples and apples" figure—or, last year, how many——

Ms. LEWIS. In 1997, there were 545; in 1996, 789; almost 1,000 the year before.

Senator LEVIN. OK. So you have roughly 500 to 1,000 appeals a year by employees from MSPB decisions or arbitrators' decisions.

Ms. LEWIS. Somewhere between 500 to 800 in the last 4 or 5 years.

Senator LEVIN. Now, in answer to the Chairman's question about whether there would be additional appeals if you were given the right to appeal as the employee has, you said you have significant hurdles to jump inside your process, so you did not think there would be a significant additional number. But I assume there would be additional appeals, otherwise you would not be here.

Ms. LEWIS. I respectfully disagree.

Senator LEVIN. You do not think there would be any additional appeals?

Ms. LEWIS. There is no quota.

Senator LEVIN. I am not saying that. Your own testimony says "There is a burdensome set of constraints by which the government must file a petition that is the equivalent of a fullblown brief." That sounds to me like it deters you from appealing cases that you would like to appeal.

Ms. LEWIS. Senator, Congress expects no less of Janice Lachance, the Director of OPM—and I am sure the same is true of the Solicitor General—than to do the job that we have to do within the system that we have. We make sound decisions under the current constraints.

Senator LEVIN. But don't those constraints deter you from filing at least some efforts to appeal?

Ms. LEWIS. The answer is no.

Senator LEVIN. OK.

Ms. LEWIS. When we identify a case that meets the statutory test—and Senator Levin, I can assure you that from the day I

walked in the door of the General Counsel's Office at OPM and saw that this was no way to run a railroad, I have done the absolute best that I can representing our Director and working with the Justice Department, but each of the cases that we have identified and the cases that I have researched among my predecessors indicates that the government had a sound reason and had an issue of law that required judicial review. And unfortunately, we did not have a decision on the merits.

The *Erickson* case that I pointed out in my opening statement——

Senator LEVIN. That is not my question. My question is are there cases where you think you have a sound case where you now do not appeal because of the hoops and constraints where you would appeal if you had a right to? That is really my question.

Ms. LEWIS. I think the answer is there is nothing about the current system that helps the decisionmaking process.

Senator LEVIN. Well, I do not think that is my question, either.

Ms. LEWIS. But we——

Senator LEVIN. Let me try it again. Do those constraints deter you now because you have to go through the extra process of going through this application process? Does that not, as a matter of fact, use up some resources so that as an obvious practical matter, there would be some more appeals where you now are constrained from appealing even though you have a meritorious position just from the fact that resources are used in this two-step process?

Ms. LEWIS. I definitely have sufficient resources in my office to do the job I need to do. I am also assisted very greatly by the officials who work in our program—the employee relations specialists, the labor relations specialists—and day in and day out, it is those employees in addition to the lawyers in my office who receive the phone calls, who receive inquiries from other agencies and bring cases to our attention. And very frequently—and I think it is well-understood in the personnel community—very, very frequently, we say no to those other agencies; their cases do not meet the statutory test.

I basically look to be undeterred in carrying out the job that must be done.

Senator LEVIN. You are saying that every case that now meets the statutory test—every case, you are now applying for an appeal that meets the statutory test. That is what you are saying? That is a straightforward question.

Ms. LEWIS. Yes.

Senator LEVIN. OK. Under the old Civil Service system, was the application process the same to get to a court? Was there an appeal as of right before it was split up in 1978?

Ms. LEWIS. No.

Senator LEVIN. It was the same application process?

Ms. LEWIS. No, I do not believe that there was an appeal.

Senator LEVIN. There was no appeal.

Ms. LEWIS. Yes.

Senator LEVIN. By the employee or by the government?

Ms. LEWIS. Basically, it stopped at the Civil Service Commission is my understanding.

Senator LEVIN. I would be curious about that. Maybe our staff can find that out for us.

My last question—is there an appeal from the Court of Appeals now if they deny you an application to appeal? Is there an appeal to the Supreme Court—like in the *Erickson* case, did you go to the Supreme Court and say, Gee, the Court of Appeals——

Ms. LEWIS. No. In *Erickson*, the Federal Circuit did agree to take the case.

Senator LEVIN. In any case, then, where they refuse to appeal the case—I had the wrong one—can you appeal the refusal of the Court of Appeals to the Supreme Court?

Mr. COHEN. Actually, no. The only——

Senator LEVIN. I think my time ran out. [Laughter.]

We used to have a light system around here. We are a lot more direct now. It is about time; I am all for the change.

Anyway, that is obviously my last question.

Mr. COHEN. We would not take to the Supreme Court, I do not think, the question of whether the Federal Circuit incorrectly denied the government permission to appeal. But there is a quasi-appellate process, and that is if a three-judge panel of the Court of Appeals denies us permission to take an appeal, we can move for re-hearing en banc, and we have done that in one case, and successfully, where the en banc court, the full court, overruled the panel and granted the government's petition for review.

Senator LEVIN. Thank you.

Thank you, Mr. Chairman.

Senator COCHRAN. Thank you very much, Senator Levin.

Thank you, Ms. Lewis and Mr. Cohen. We appreciate your being here and helping us understand this proposal.

Ms. LEWIS. I appreciate it. If I could just add two items to the record, Senator.

Senator COCHRAN. Certainly.

Ms. LEWIS. One is the *Erickson* decision itself, which is now a published decision of the Supreme Court; and the second is a brief that the government filed in the Federal Circuit in a case called *Arsics*, which is in fact mentioned in one of the pieces of testimony.

Senator COCHRAN. Do you want us to read those?

Ms. LEWIS. I would just like to point out that the very issue that was resolved in the *Erickson* case which was first addressed by the Federal Circuit on the merits in 1996 and ultimately resolved by the Supreme Court in 1998, the issue that arose in that case first arose in 1988 in a case called *Grubka*. In 1991, in the *Arsics* case, the Justice Department put in its brief to the Federal Circuit the very arguments that ended up winning the day at the Supreme Court, that fundamentally, there is no right to lie.

The *Erickson* decision ultimately clarified an important aspect of Federal employee law. Unfortunately, because of the system that we have in the statute, that issue did not get resolved in 1991. The system invites litigation over whether these cases are important enough, and ultimately, the Director and the Solicitor General's determination in 1991 that there was a substantial impact on personnel administration was vindicated, and not until 1996, when the Federal Circuit first took up the issue and addressed it squarely on the merits, and then ultimately, in one of our only two cases that

have gone to the Federal Circuit out of these 57. That did not need to be; that was an unnecessary aspect. What we are asking is that as policymakers, we can all sit and argue the nitty-gritty details of any of these individual cases, but we are simply proposing as policymakers that the policy that was established in 1978 by granting the Federal Court the discretion to reject these cases be changed, and we have demonstrated and will continue to demonstrate our ability to pick only the important cases for judicial review.

So I have those documents to offer for the record.[1]

Senator COCHRAN. Thank you. Senator Levin.

Senator LEVIN. I just want to ask one more question. In that original effort to get that decision resolved in 1991, that was a three-judge panel saying no appeal?

Ms. LEWIS. Right.

Senator LEVIN. Was it unanimous?

Ms. LEWIS. Yes.

Senator LEVIN. And was there an en banc——

Ms. LEWIS. An en banc petition was filed and rejected.

Senator LEVIN. Unanimously?

Ms. LEWIS. The indication on the case is the suggestion for en banc was denied.

Senator LEVIN. Oh—you did not get the en banc——

Ms. LEWIS. No; right.

Senator LEVIN. I see. I misheard you. Thank you.

Thank you, Mr. Chairman.

Senator COCHRAN. Thank you very much.

Ms. LEWIS. Thank you.

Senator COCHRAN. Mr. Tobias and Mr. Roth, if you would please come to the witness table.

Mr. Robert M. Tobias is with the National Treasury Employees Union, and Mr. Roth is with the American Federation of Government Employees.

We have your statements, and we thank you for those. We will print them in the record in full, and we encourage you to make whatever comments by way of summary or explanation that you think would be helpful to the Subcommittee.

Mr. Tobias, you may proceed first.

TESTIMONY OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you very much, Mr. Chairman, for inviting NTEU to testify on S. 1495. As you point out, it contains two very important amendments to the existing process for appealing MSPB decisions to the U.S. Court of Appeals for the Federal Circuit.

First, S. 1495 would take away the Federal Circuit's discretion to decline to review decisions of the MSPB. We urge rejection of this proposed amendment.

The primary congressional intent in creating the existing limited judicial review was to create finality in the process. Congress wanted to allow appeals only when the OPM Director believes the MSPB or arbitrator "erred in interpreting a Civil Service law, rule or regulation affecting personnel management" and that the deci-

[1]Documents referred to appears in the Appendix on page 37.

sion "will have a substantial impact on a Civil Service law, rule, regulation or policy direction," and it gave the court the discretion to reject the appeal because it failed to meet the test.

Congress wanted appeals only in exceptional circumstances. The congressional policy was fashioned on the longstanding private sector law providing deference to arbitral decisions. Congress reaffirmed the policy for arbitrators and applied it to the MSPB.

In seeking the elimination of the court's discretion to reject an appeal, MSPB argues that it will create several layers of review to ensure appeals only in exceptional circumstances, and that it has more maturity and experience since the passage of the CSRA.

I do not believe personal assurances can or should be the basis for public policy. Personal assurances cannot survive the person making the assurance.

Further, the court has granted discretion to appeal in, our number is 10 of 17 cases, and attached to our testimony is a document that the clerk of the court certified, that since 1993, 17 cases have been appealed, 10 have been granted, and 7 denied. This, even an administration which states it will exercise discretion only in limited circumstances, has been rebuffed by the court 41 percent of the time.

We believe current language puts a natural brake on the predisposition of management representatives to appeal adverse decisions and provides needed finality to the process.

Second, S. 1495 would allow the OPM Director 60 days to appeal rather than the 30 days given to everybody else. If the MSPB stays its order reinstating an employee, an additional time period adds to the harm and creates even more uncertainty for the adversely impacted employee. We believe 30 days is ample time.

First, the initial OPM brief is limited to 25 pages and must go only to the reason why the court should grant review. This is not a brief on the merits. This is a brief on whether or not the court should exercise its discretion to allow an appeal. It is a brief supporting the OPM proposition of why the case is extraordinarily important, and I believe that the OPM lawyers and the Justice Department lawyers, notwithstanding what was previously testified to, are sufficiently articulate and skilled to provide a rationale that the court can consider. I do not think this knowledge is knowledge that cannot be communicated to the court.

Second, OPM has already been involved in the case before the MSPB as an intervenor or in filing a request for reconsideration. It already knows the case; it has the information, it has the issues.

And third, the proposal is unfair because other parties are left with 30 days to file their appeal.

This proposed legislation is both unwise and unneeded, and we urge its rejection.

Thank you, Mr. Chairman.

Senator COCHRAN. Thank you, Mr. Tobias.

[The prepared statement of Mr. Tobias follows:]

PREPARED STATEMENT OF ROBERT M. TOBIAS

I thank the Committee for this opportunity to testify on a proposed amendment to 5 U.S.C. 7703. I appear here on behalf of the approximately 155,000 Federal employees represented by the National Treasury Employees Union. The interests of

these Federal employees—and Federal sector labor relations generally—would be ill-served by the passage of this proposed amendment.

The bill introduced at the request of the Office of Personnel Management (OPM) is benignly, but obscurely, labeled a measure "to protect the merit system and for other purposes." In fact, S. 1495 would make two important changes in the judicial review provisions of the Civil Service Reform Act of 1978 (CSRA) First, and most significantly, it would eliminate the discretion of the U.S. Court of Appeals for the Federal Circuit to decline to review certain decisions of the Merit Systems Protection Board (MSPB) and arbitral awards. Second, it would double the time allotted for OPM to file a petition for review, without altering the statutory time limits for other parties.

These changes would upset the carefully crafted limitations on the availability of judicial review, contravening Congress' clearly expressed goal of limiting review and assuring finality of decisionmaking. In addition, the introduction of an inequality in time frames would violate the original legislative intent that OPM be treated "like any other petitioner." I urge the Committee to reject this amendment.

I. OPM's Proposed Elimination of Federal Court Discretion To Decline Review

A. *The Design and Purpose of the Current Limitations on Appeals*

The Civil Service Reform Act now provides for very limited judicial review by agencies of adverse decisions of the MSPB. Agencies themselves do not have a right of appeal of adverse decisions; under 5 U.S.C. 7703(d), only the Director of OPM may petition for review of final MSPB decisions, and only then in certain very limited circumstances: The Director must first determine that the Board "erred in interpreting a Civil Service law, rule, or regulation affecting personnel management," and then, that the Board's decision "will have a substantial impact on a Civil Service law, rule, regulation, or policy directive."

These same requirements apply to petitions for review of arbitral awards. Under 5 U.S.C. 7121(f), the procedures set forth in 5 U.S.C. 7703 pertaining to judicial review apply "in the same manner and under the same conditions" to the award of an arbitrator. Thus, here, as with decisions of the MSPB, OPM must demonstrate an error with wide impact on the Civil Service system in general before it may obtain judicial review. Absent such a showing, the award of the arbitrator—like the decision of the MSPB—is final.

These limited review provisions were of considerable importance to the designers of the CSRA. The Senate report accompanying the version of the legislation that was ultimately accepted "emphasize[d]" that OPM was to seek review only in "exceptional" cases. S. Rep. No. 95-969, 95th Cong. 2d Sess. 64, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2786. The goal of avoidance of unnecessary appeals was so important that the drafters crafted an external safeguard: They "specifie[dl" that "judicial review shall be at the discretion of the court." *Id.*

The reviewing court was thus vested with the authority to conduct an *independent* review of the OPM Director's determinations. *See Devine v. Sutermeister,* 724 F.2d 1558, 1562 (Fed. Cir. 1983); *Devine v. White,* 697 F.2d 421, 434 (D.C. Cir. 1983) (reviewing the legislative history and statutory language) The court was not required to accept at face value OPM's assessment of the importance of the issue. Instead, Congress intended that the reviewing court act like the Supreme Court on writ of certiorari; it empowered that court to decline to hear a case if it determined, contrary to the submissions of OPM, that "the issues raised will not have a substantial impact on the administration of Civil Service laws," or if there were other countervailing factors, such as where "a separate review proceeding in the same case has been brought by the employee in a different circuit. . . ." 1978 U.S. Code Cong. & Admin. News at 2786.

This scheme of limited judicial review is consistent with the traditional policy of deference to arbitrators' decisions in the private sector. Arbitration is recognized as "faster, cheaper, less formal, more responsive to industrial needs, and more conducive to the preservation of ongoing employment relations than is litigation." *Devine v. White,* 697 F.2d at 435. To protect these advantages, judicial review of arbitral awards has traditionally been "extremely limited" in the private sector. *Id.* at 436, citing *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). Parallel considerations underlie the policy of limited review in the public sector. *Id.* at 434-440. *See also, Devine v. Sutermeister,* 724 F.2d at 1562; *Devine v. Nutt,* 718 F.2d 1048, 1052 (Fed. Cir. 1983), rev'd on other grounds *sub nom. Cornelius v. Nutt,* 472 U.S. 648 (1985) (also referencing the traditional policy of judicial deference to arbitrators' decisions).

Just as limited review of arbitral awards furthers important goals, so too does limited review of MSPB decisions. As Congress concluded in enacting the CSRA, the public interest is best served by prohibiting routine agency appeals of adverse deci-

sions. In this manner, employees receive the relief mandated by the MSPB more promptly. An employee's interest in faster, surer remedies and an end to the stress of litigation must outweigh minor agency objections to a given decision of local impact only. Only where the MSPB has allegedly made an error with a substantial governmentwide impact is the employee's interest in finality subordinated to the agency's interest in further appeals.

While the private sector policy of deference to arbitral awards is a creation of judicial interpretation, Congress chose to expand and codify the public sector policy within the CSRA. This codification represents the clearest possible expression of congressional intent that there be the most stringent limitations on OPM's ability to seek review of MSPB and arbitral decisions. Only when it can satisfy an external body—the reviewing court—that the adverse decision will have a broad impact on Civil Service laws and regulations may OPM raise a challenge to the finality of that decision.

B. *OPM's Proposed Elimination of the External Safeguard*

S. 1495 proposes a deletion of the last sentence of 5 U.S.C. 7703(d), which states that "[t]he granting of the petition for judicial review shall be at the discretion of the Court of Appeals." By this means, OPM intends to eliminate the external check designed to assure that the Director seeks review only in "exceptional" cases. This amendment would fundamentally alter the careful balance struck by Congress.

It is our understanding that OPM is not seeking a formal change in the underlying policy restricting the right of agency appeals to certain narrow categories. Despite this acquiescence in the concept of limited review, it nevertheless would remove the enforcement mechanism. Based on conversations with OPM officials, we understand that OPM claims an external monitor is no longer necessary for two main reasons: (1) the existence of other administrative layers of review within OPM and the Department of Justice; and (2) OPM's alleged growth in "maturity" and "experience" since the passage of the CSRA. This internal review process and its own added maturity, it contends, are a sufficient guard against wasteful or abusive appeals.

In our considered opinion, however, neither of these conditions provides the necessary *institutional* assurances that review will only be sought in the most "exceptional" cases. Only an independent body—the reviewing court—can exercise the oversight necessary to guarantee that OPM limits its petitions for review to the most important, far-reaching cases.

The statutory requirement for an independent exercise of discretionary review by the court stands as a bulwark against the fluctuating interpretations of succeeding administrations. Even if this Director intends to be selective in her choice of appeals, there is no guarantee that subsequent Directors will exercise similar restraint. There is, after all, an inherent institutional bias in favor of seeking reversal of adverse decisions. Should future Directors pursue a more activist agenda, there would be no effective or enforceable way to curb those Directors if this amendment passed.

The need for caution here is highlighted by statistics provided by the Clerk of the U.S. Court of Appeals for the Federal Sector. As indicated in the attached letter, the court has granted only 10 of the 17 petitions for review filed by OPM in the last 5 years. In other words, in seven cases over the last 5 years, the court disagreed with the Director that the Board or the arbitrator had erred and that the case would have a "substantial impact" on Civil Service law or regulation. Thus, even an administration, such as the present one, which is concerned with exercising restraint in the filing of petitions for review is rebuffed by the court about 41 percent of the time.

Although OPM chafes at this so-called "judicial secondguessing," suggesting that review is denied in significant cases, NTEU's experience is that the court exercises its review function wisely. For example, in *Newman v. Arsics*, Misc. No. 301 (Fed. Cir. Mar. 26, 1991) (attached), OPM sought judicial review of an arbitrator's decision that, on reconsideration, involved nothing more than the proper application of factors relevant to mitigation of penalty. In refusing to hear the case, the court correctly pointed out that the issue of mitigation is "precisely the type of issue which OPM should not petition for review." If the court had not had the discretion to decline to hear the case, an arbitrator's decision on a fact-bound matter of no importance beyond the immediate parties would have become "a Federal case," consuming time and resources. Just as the court has in the past curbed demonstrable overreaching by OPM, so too can it be expected to play such a role in the future.

The price of this oversight is modest, contrary to OPM's claims, and is more than outweighed by the benefits flowing from the avoidance of unnecessary litigation. While OPM may not be successful in obtaining review of a given issue immediately,

that issue—if sufficiently important—will arise again in another, perhaps cleaner context. Moreover, the burden on OPM of preparing a petition for discretionary review cannot be great, given the limited number of such petitions filed a year.

In sum, the current statutory provision for discretionary review is not an anachronistic and unnecessarily onerous procedural hurdle for OPM, as it might argue. Instead, the provision performs an important function of curbing the natural tendency of the management representative to seek to reverse findings favorable to employees and brings finality to the litigation process. The elimination of the discretion of an independent body to decline to hear an appeal would fundamentally alter the balance crafted by Congress, destroy the finality of decisions, and run counter to the broad policy of limited review. I urge the Committee to reject that course.

II. OPM's Proposed Change to the Statutory Time Frames

OPM's proposed change to the statutory time frames of Section 7703, although of less magnitude than the substantive changes proposed, is also significant. Thus, it proposes amending the statute to provide the Director of OPM with 60 days for filing a petition for review, while leaving unchanged the 30-day time frame for other parties.

A. *The Lack of Justification for the Additional Time*

This amendment would double the period of uncertainty for employees. If the MSPB has stayed its order, the employee may be unemployed; even without a stay, the added delay in bringing the matter to a close compounds the harm already incurred. The justification for such added delay is unclear.

As an initial matter, the proscribed 30-day time period is not unprecedented for governmental appeals, as OPM suggests. See 31 U.S.C. 755, requiring petitions for review of final decisions of the General Accounting Office Personnel Appeals Board-including GAO petitions—to be filed within 30 days. NTEU does not believe that OPM has made out a sufficiently strong case to justify a legislative change in this context.

OPM argues that it needs the additional time because local court rules require it to file a "substantive" brief within 30 days, instead of a *pro forma* petition for review.[1] That brief, however, is limited to a maximum of 25 pages and addresses only the issue of the appropriateness of review. Rule 47.9 of the Federal Circuit Rules of Practice.

It is, moreover, significant that OPM is required to file that mini-brief within 30 days of its receipt of notice of the MSPB's decision only if it had intervened in the matter before the MSPB. In that event, it would be thoroughly familiar with the issues and may have already briefed them. When OPM has not intervened below, its time for filing the petition does not begin to run until after it has filed a request for reconsideration with the MSPB, and the MSPB has denied that request. 5 U.S.C. 7703(d). We therefore believe that OPM has ample time to prepare the supporting argument for its petition under the current statutory scheme.

B. *The Inequality of OPM's Proposal*

OPM's proposed language is seriously troubling for another reason, as well: It introduces an inequality in the procedural time frames. Its proposal leaves all other parties with 30 days for filing a petition, which would give OPM a special status and, perhaps, an unfair advantage.

The legislative history shows that Congress affirmatively intended that the Director of OPM be treated "like any other petitioner." 1978 U.S. Code Cong. & Admin. News at 2786. An enlarged time frame applicable only to OPM petitions would breach the fundamental principle of equality. There is no reason why a modified time frame should not apply to all litigants, as it does in other contexts. Indeed, we are aware of no statutory scheme that grants a governmental party more time for filing a petition or appeal than a nongovernmental party in that same matter. *See, e.g.*, Fed. R. App. Proc. 4(a)(1) (granting all parties 60 days for filing a notice of appeal in any case where the United States is a party).

Accordingly, should the Committee agree that OPM has set forth sufficient reasons to justify an enlargement of the statutory time frame for filing petitions for review, NTEU urges it to amend Section 7703(b)(1) to apply that time frame to all

[1] This justification vanishes if the statute were modified to eliminate the court's discretion to decline review, as OPM seeks. If review were nondiscretionary, we assume that OPM would have to file only a *pro forma* petition, a task easily accomplished within the allotted 30 days. As we urged above, however, the Committee should not solve a perceived OPM problem in that fashion. In NTEU's view, it would be far preferable to extend the time limits for filing a petition than to amend the statute to eliminate discretionary review.

parties. Such an action would assure that the Director of OPM is treated "like any other petitioner," as Congress had originally intended.

I thank the Committee for this opportunity to present NTEU's views on the proposed changes to 5 U.S.C. 7703.[1]

Senator COCHRAN. Mr. Roth.

TESTIMONY OF MARK D. ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO

Mr. ROTH. Mr. Chairman, Senator Levin, AFGE represents 600,000 employees who work in virtually every Executive Branch agency and also the District of Columbia, and we appreciate this opportunity to appear before you and explain our vigorous opposition to S. 1495, a bill to remove the current longstanding standards that govern the Office of Personnel Management when it seeks to obtain judicial review of arbitration awards and MSPB decisions.

Our first reading of OPM's proposal prompted us to immediately ask the questions, Why in the world is this being sought? Why is this bill necessary or even helpful to the integrity of the Civil Service system? What problems have arisen during the last two decades that have prompted a request for this unprecedented expansion of OPM's right to seek court intervention into what are essentially personnel decisions, day-to-day cases, from an agency?

After reading OPM's statement citing one adverse arbitration award and a few appeals rejected by the Federal Circuit over 20 years, we still have no answers.

As was pointed out by this Subcommittee's report on the Civil Service Reform Act back in 1978, the statutory scheme intentionally did not give OPM the unfettered right to mandate court intervention into every personnel decision. Rather, the statute sets out sensible standards that protect the integrity of the Civil Service system in limiting the occasions in which OPM can intervene in personnel cases between agency employers and individual employees.

With respect to OPM's right to seek judicial review of arbitrators' awards and MSPB decisions, the report's comments, I think, are particularly noteworthy: "The OPM should seek judicial review only in those exceptional cases where it finds that the Board has erred as a matter of law in interpreting the Civil Service laws and that the erroneous decision will have a substantial impact on how aspects of the Civil Service rules are interpreted in the future."

"Judicial review shall be at the discretion of the court," and "the court may decline the petition for review."

The statute and the accompanying legislative report demonstrate very clearly that a delicate but necessary balance was meant to be struck between obtaining an expeditious end to day-to-day personnel decisions and appeals, while yet preserving OPM's right to outside intervention only in exceptional cases that have a substantial impact on Civil Service laws.

We would submit that this statutory scheme has worked exceptionally well for the agencies, employees, the judiciary and the public. Indeed, nothing has occurred during the last 20 years that would support such a broad expansion and a removal of these standards on OPM and taking away the court's discretion.

[1] Additional information appears in the appendix on page 68.

OPM is provided with an opportunity to challenge those decisions it believes would substantially impact upon the overall interpretation and administration of Civil Service laws. This opportunity is fair, and its fairness is ensured by the statutory provisions which create a system of checks and balances.

Further, rather than tying up what are essentially individual misconduct and performance cases in the courts for years, once a petition is filed and briefed, the court itself must make an early determination that the case is one which would have a substantial impact on the administration of the Civil Service system.

S. 1495 would remove this well-designed system of checks and balances. OPM would then be allowed judicial review as a matter of right of any MSPB decision or decision by an arbitrator.

We just need to tell you that this drastic change is particularly disturbing when you look at the foreseeable adverse effect it would have on the grievance/arbitration system. First of all, it is a 180-degree move away from how most employers are now seeking to resolve personnel litigation—through alternative dispute resolution, ADR. Volumes have been written by human resource management experts on how an informal ADR mechanism that seeks to mediate disputes saves time and money and cuts down on litigation. Rather than coming before you and seeking intelligent reforms of the Civil Service Reform Act that promote ADR, however, OPM, the government's alleged management guru, is asking the Congress to drastically expand its right to mandate court intervention in these personnel cases and thereby add hundreds of thousands of dollars and years of litigation to the process.

Mr. Cohen was flat-out wrong in our view. In the case of an employee who has been put back to work by an arbitrator, there is no scheme in the statute right now to get that employee back before the decision is final, and by filing an appeal, the arbitrator's award is not final. We had that exact case with OPM. They cited it in their brief and in their testimony: *Avalos.* We went to OPM, and we asked, while you are filing this appeal, can the employee be put back? They can do it before the MSPB—it is called "interim relief"—but what about in the arbitration context?

They told us no, and Mr. Avalos was out 7 more months, I believe it was. When he finally came back to work, of course, he got his back pay, and the government had paid 7 months for another employee to do his job, so it was a double payment.

But this would be the case for every appealed arbitration award, because there is no built-in statutory mechanism to get these people back to work while OPM is appealing an arbitrator's award.

Second, OPM's attempt here is in our view truly misleading in the arbitration context. Arbitration decisions are by their nature virtually never precedential—we cannot think of a case where they would be. An arbitrator reviewing a contract provision or a personnel decision cannot bind the next arbitrator, and they are not bound by a previous arbitrator. So, viewed in this context, we think it is very disingenuous for OPM to seek an automatic right to court intervention in these nonprecedential cases.

By removing the current standards, OPM is actually asking the Congress to give them the unfettered right to judicial review of cases it believes a court will not find significant; cases that will ei-

ther have an insubstantial impact on Civil Service laws or cases that the court will find are truly unexceptional. This is an absurd request.

We believe that this is a case where OPM perhaps has more of a self-interest in winning than in having the public's interest in its eyes. OPM will surely argue that it has used its authority to seek judicial review wisely, and I think the facts do bear that out. However, we believe that that is because they do have some sensible standards and cannot run off to court; they know that a court will be reviewing the standards, and in fact, they have lost about 40 percent of the cases where they have not convinced the court that the issues are important. And in the context of arbitration awards, that is because they are not that important, other than to the individual.

So we would say that OPM's limited exercise of its discretion to petition for judicial review shows only that the statute is working well. But once the standards for seeking judicial review are lifted, then who knows—it could be "Katie, bar the door." In any event, OPM has made no showing that it should have this drastically expanded right to court review.

Mr. Chairman, I think that when looked at in its bare essence, this is a plea where OPM is saying "It ain't broke, so why don't you break it?" We do not think the system is "broke," and we would ask you not to break it.

We thank you.

[The prepared statement of Mr. Roth follows:]

PRPEARED STATEMENT OF MARK D. ROTH

Mr. Chairman and Members of the Subcommittee: My name is Mark D. Roth, and I am the General Counsel for the American Federation of Government Employees, AFL–CIO (AFGE). AFGE represents 600,000 employees who work in virtually every agency within the Executive Branch and the District of Columbia. We appreciate this opportunity to appear before you and provide our views on S. 1495, a bill to remove the current longstanding standards that govern the Office of Personnel Management when it seeks to obtain judicial review of arbitration awards and Merit Systems Protection Board (MSPB) decisions.

Our first reading of S. 1495 prompted us to immediately pose the question of why is this being sought? Why is this bill necessary or even helpful to the integrity of the Civil Service system? What problems have arisen during the last two decades that have prompted a request for this unprecedented expansion of OPM's right to seek court intervention into personnel decisions? We have no answers.

Further research led us to review the legislative history of the Civil Service Reform Act to see if that would shed some light on the possible reasons which could be articulated in support of this measure.

The report of this Committee (No. 95-969, July 10, 1978) contains a good explanation of the purpose for creating the Office of Personnel Management at page 5:

> "The (Civil Service Commission) must now simultaneously serve as a management agent for a President elected through a partisan political process as well as the protection of the merit system from partisan abuse. The Commission serves, too, as the provider of services to agency management in implementing personnel programs, while maintaining sufficient neutrality to adjudicate disputes between agency managers and their employees. As a result, the Commission's performance of its conflicting functions has suffered. 'Expected to be all things to all parties—Presidential counsellor, merit "watchdog." employee protector, and agency advisory—the Commission has become progressively less credible in all of its roles.' (Personnel Management Project, Final Staff Report, Vol. I, p. 233.)
>
> "(The Civil Service Reform Act) would abolish the Civil Service Commission. In its place two new agencies would be created: (1) the Office of Personnel Management, charged with personnel management and agency advi-

sory functions, and (2) the Merit Systems Protection Board, charged with insuring adherence to merit system principles and laws."

The report goes on to state that OPM "will have central responsibility for executing, administering, and enforcing Civil Service rules and regulations . . . without *the demands generated by a heavy day-to-day workload of individual personnel actions,* OPM should provide the President, the Civil Service, and the Nation with imaginative public personnel administration." (emphasis supplied).

With this background in mind, it is not at all surprising that the Civil Service Reform Act which created OPM, addressed its right to seek review of decisions in adverse actions. Again, as is pointed out in this Committee's Report on the CSRA, the statutory scheme does not give OPM the unfettered right to mandate court intervention into every personnel decision. Rather the statute sets out sensible standards that protect the integrity of the Civil Service system in limiting the occasions in which OPM can intervene in personnel cases between agency employers and individual employees. In this regard, it can petition the MSPB (or an arbitrator pursuant to 5 U.S.C. 7121), for review of its decisions only in:

> ". . . those instances where the Director of OPM determines that the decision is erroneous and that, if allowed to stand, *the decision would have a substantial impact on the administration of the Civil Service laws* within OPM's jurisdiction. The OPM should limit the cases in which it seeks the review by the Board to those that are *exceptionally important.*" (emphasis supplied).

With respect to OPM's right to seek judicial review of arbitrator's awards and/or MSPB decisions, the same type of limitation is included. The report's comment on this limitation is particularly noteworthy:

> ". . . the OPM should seek judicial review *only in those exceptional cases* where it finds that the Board erred, as a matter of law, in interpreting the Civil Service laws, *and that the erroneous decision will have a substantial impact* on how aspects of the Civil Service rules are interpreted in the future. The Director of OPM should not seek judicial review if the potential effect of the decision will be limited to the facts of that case. In order to avoid unnecessary appeals by the Director, the provision also requires the Director to petition the Board for reconsideration of its decision in those cases where the Director was not involved in the case at the Board level. This will make sure the Board has an opportunity to consider the concerns of OPM before suit is brought. . . . While an employee or applicant . . . is entitled as a matter of right to judicial review, this will not be the case when the Director seeks review . . . judicial review shall be at the discretion of the Court. If it determines, for example, that the issues raised will not have a substantial impact on the administration of Civil Service laws . . . the court may decline to accept the petition for review." (emphasis supplied).

The statute and the accompanying legislative report demonstrate very clearly that a delicate but necessary balance was meant to be struck between obtaining an expeditious end to day-to-day personnel appeals and preserving OPM's right to outside intervention only in exceptional cases that have substantial impact on Civil Service laws.

We would submit that this statutory scheme has worked exceptionally well for the agencies and employees, the judiciary and the public. Indeed, nothing has occurred during the course of the last 20 years that would support a need for removal of these standards. The CSRA designed a statutory scheme where the MSPB and arbitrators undertake the hearing or adjudicatory role previously performed by the Civil Service Commission and OPM undertakes the functions of personnel administration.

Notwithstanding this, OPM is provided with an opportunity to challenge those decisions it believes would adversely impact the overall interpretation and administration of Civil Service laws. This opportunity is fair and its fairness is insured by the statutory provisions which create a system of checks and balances.

First, the administrative forums, either MSPB or an arbitrator, must be afforded an opportunity to reconsider or perhaps, to correct a mistake. In other words, if OPM believes a decision is erroneous, then rather than going directly to Court, it must bring the matter to the attention of the decision maker by way of a motion for reconsideration. Further, rather than tying these individual misconduct and performance cases up in the court for years, once a petition is filed and briefed, the Court itself must make an early determination that the case is one which is of particular import to the administration of the Civil Service system because it must take

action to either grant or deny OPM's petition for review. If not, the court dismisses the petition.

S. 1495 would remove this well-designed system of checks and balances by permitting OPM to seek judicial review as a matter of right of any MSPB decision or decision by an arbitrator. This drastic change is particularly disturbing where you look at the foreseeable adverse affect it would have on the grievance/arbitration process. First of all, it is a 180 degree move away from how most employers are now seeking to resolve personnel litigation—through Alternative Dispute Resolution (ADR). Volumes have been written by human resource management experts on how an informal ADR mechanism that seeks to mediate disputes saves money and cuts down on litigation. Rather than seeking reforms of the CSRA that promote ADR, however, OPM—the government's management guru—is asking the Congress to drastically expand OPM's right to mandate court intervention in these personnel cases and thereby add hundreds of thousands of dollars and years of litigation to the process.

Second, OPM's attempt here is truly misleading. Arbitration decisions are, by their nature, legally not precedential. An arbitrator reviewing a contract provision or a personnel decision is clearly not clearly bound by a previous arbitrator's award. Viewed in its proper context, therefore, it is disingenuous for OPM to seek an automatic right to court intervention in these non-precedential cases. One might well argue that, for OPM, this is a case of self-interest at the expense of the public's interest! By removing the current standards, OPM is, in effect, asking for the unfettered right to judicial review of cases it believes a court will not find significant; cases that will have either: (1) an "insubstantial impact" on Civil Service laws; or (2) are "unexceptional." Truly, this is an absurd request.

OPM will surely argue that it has used its authority to seek judicial review wisely and in a very limited manner. The facts will mostly bear this out, we agree. Our research led us to find that in the past 18 years, OPM has only petitioned for review 57 times or roughly three times per year. OPM would argue that its limited exercise of its 5 U.S.C. 7703 discretion shows it would not abuse an expanded mandate. We would argue, quite to the contrary, that OPM's limited exercise of its discretion to petition for judicial review in these cases shows only that the statute is working well and as intended, but once the standards for seeking judicial review are lifted—"Katy bar the door!" In either event, there simply has been no showing that OPM should have an expanded opportunity to mandate judicial review in these non-precedential personnel decisions.

During the last half decade, both the Executive and the Legislative branches of government have focused attention on streamlining the day-to-day operations of the Federal Government. This includes eliminating duplicative functions and processes. S. 1495 appears to go in the exact opposite direction. It opens the door to even more litigation. Surely a scholar of modern management techniques would not recommend paving the way for court intervention in matters not substantially important to OPM's mission. Why should it? OPM already has the right to petition for review in any case wherein it believes the very heart of the Civil Service system has been compromised. That right is directly related to the performance of OPM's mission and we support it wholeheartedly. And, where the court agrees, OPM's appeal is fully heard and decided.

In sum, Mr. Chairman, OPM has all of the tools to seek review of the decisions which could affect its carrying out its mission of personnel administration. Evidence shows that it has not sought to use those tools very often. Thus, there is simply no basis for removing the existing system of checks and balances. In point of fact, this is a case where OPM's plea, boiled down to its bare essence, amounts to a case of "where it ain't broke, break it." We urge the Committee not to take further action with respect to S. 1495.

Again, we thank you for this opportunity to appear today. That concludes my remarks. I am happy to answer any questions.

APPENDIX

AFGE has no grants or contracts to declare.

Senator COCHRAN. Thank you, Mr. Roth.

Mr. Tobias, in your statement, you made the point that you do not think it is fair to give OPM 60 days to file a brief when everybody else is given 30 days. What if you gave everybody 60 days; what would be wrong with that?

Mr. TOBIAS. Well, you could do that, and we point out in the testimony that that is a possibility. But I think that the focus of Con-

gress in enacting this legislation was to really provide finality to the process.

We often hear OPM and other folks say that the appeal process for these disciplinary actions and other actions is endless. The premium should be on ending these and not taking them to court. That is where the premium should be. So if it is more onerous, if it is difficult, that is what Congress' intent was—keep it out of the courts, put people back to work or not as the case may be, but get it completed.

Senator COCHRAN. I asked the first panel, as you probably heard, whether or not the passage of this bill would result in more appeals and a heavier workload for the Federal Circuit. What is your response to that question, Mr. Roth?

Mr. ROTH. Well, I have the same problem. I do not see why they would be here unless they wanted to bring more appeals and felt constrained under the current system. Again, it is just the totally wrong direction in personnel cases.

In the case of the MSPB, this is one Federal agency suing another Federal agency. This does not make much sense. In the case of arbitration, you have arbitrators' decisions that are not precedential being thrown into the court system for another year or two. And of course, it is all being litigated at taxpayer expense. When the employee wins, all the attorneys' fees are reimbursed, and the attorneys' fees could be, in some of the cases we have handled, $50,000 or more. It really makes no sense.

Mr. TOBIAS. The answer, Mr. Chairman, is that even if nothing else changed, there are 17 cases that were appealed by our numbers and 7 denied, so there would be 7 additional cases that the court would have to consider if nothing else changed.

Senator COCHRAN. Do you think there would be other kinds of cases presented to the Federal Circuit other than those that are being appealed now? Would this open, as the courts sometimes say, a floodgate of new appeals or new kinds of appeals? Do you expect that that will be the result?

Mr. ROTH. We expect that there would be more each year, and that would strain the current system, and of course, it would strain the poor employees who have not yet been put back on the job.

The other point I want to make is that I am not sure that a political appointee who stays an average of 18 months can make a better decision than a Federal judge who has been reviewing these cases for 20 years. The Federal Circuit is the only court that hears these. It is not like you are going to get one appeal in one court and one in another where they are not familiar with the issues. The whole point of putting all the appeals in the Federal Circuit was to give that Court the expertise. And we do not always like their result—they affirm the government 90 percent of the time—we cannot argue that they do not have the expertise. And, we cannot argue that the OPM Director—who comes and goes—has more knowledge and ability to determine the importance of the case than a Federal Circuit Judge.

Senator COCHRAN. I heard in the testimony of the first panel that there were thousands of cases appealed by employees; is that correct? Is that consistent with what you heard, or did I hear that wrong?

Mr. ROTH. That cannot possibly be right. Our union is the largest, and we appeal a handful a year. I cannot imagine thousands a year.

Senator COCHRAN. How many have you appealed?

Mr. ROTH. I am not sure, but I would say that each year, it would be under 10.

Senator COCHRAN. How about your group, Mr. Tobias?

Mr. TOBIAS. We go for many years with no appeals

Senator COCHRAN. OK.

Senator Levin.

Senator LEVIN. That was the 1,500 figure?

Senator COCHRAN. Yes. I still have not gotten that straight.

Senator LEVIN. Well, yes. Either I did not ask the question straight, or he did not hear it straight, because that is a pretty big difference between 10 and 1,500. We might just ask our staff to find that out for us—what took you so long? [Laughter.]

Mr. TOBIAS. Senator, there are lots of individual employees not represented by unions who might appeal to the Federal Circuit.

Mr. ROTH. There are also a lot of employee appeals that involve retirement issues, disability, and things like that, that we do not normally get involved in

Senator COCHRAN. Well, we can find that out.

Are there a lot of situations like this where one party has a right to appeal, and the other party has to seek leave?

Mr. TOBIAS. Everybody seeks leave with the Supreme Court.

Senator LEVIN. That is what I mean.

Mr. TOBIAS. Well, everybody does; both sides do.

Senator LEVIN. Right, but in this case, apparently, the employee has a right to appeal; is that correct?

Mr. TOBIAS. Correct.

Senator LEVIN. But the government does not?

Mr. TOBIAS. That is correct.

Senator LEVIN. And my question is are there other situations where one party of the litigation has a right to appeal, and the other one must seek leave?

Mr. ROTH. I would like to ask if there are many situations where one Federal agency is suing another Federal agency? I think that is what is messed up about this system.

Senator LEVIN. Well, if there were a third panel, we would ask that panel to answer that.

Mr. TOBIAS. I am unaware of any, Senator Levin.

Senator LEVIN. The number of Federal Circuit decision, according to this chart, looks like about 600 a year, roughly.

Mr. TOBIAS. Is that decisions from the MSPB?

Senator LEVIN. This is the first time I have seen it—"Judicial Review of MSPB Decisions fiscal years 1992–1996"—and then the percentage of MSPB decisions unchanged. And it looks like——

Senator COCHRAN. High 90's.

Senator LEVIN. Unchanged is in the 90's, yes, but it looks like——

Mr. ROTH. Well, Senator, I also want to point out that our primary fear is in the area of the arbitration award. If the MSPB issues a decision, that would be precedential, so it is only a question of whether it is important. But opening this up and having the

same standards for arbitration awards, which are never precedential and normally not important beyond that arbitrator and employee for that occasion, I think would be a drastic change.

Senator LEVIN. What percentage of the employee appeals come from arbitrators compared with the MSPB; do you know?

Mr. ROTH. Very few, because I believe the arbitrator's award is normally dealt with through the union context, and in our union, they normally have to come through our office. I do not think there are many, but maybe OPM has that figure.

Senator LEVIN. Is there an agreement that that arbitration is final and unappealable?

Mr. TOBIAS. We do not appeal arbitration awards to the court.

Senator LEVIN. Well, do employees, without you?

Mr. TOBIAS. No, they do not.

Senator LEVIN. So the appeals—whatever the right number of them is—per year, 99 percent of those would be from MSPB decision, not from arbitrators?

Mr. TOBIAS. Yes.

Mr. ROTH. I would think so.

Senator LEVIN. How much finality is there in this process—I think both of you have talked about that—and how much deference is there to the MSPB, and how expeditious is it if we got 600 to 700 appeals a year?

Mr. TOBIAS. Well, if the 600 to 700 appeals are those who are already off the rolls and seeking to get back on the rolls, so it is final as it impacts on them—I mean, they are off the rolls, so there is no impact.

What we are talking about is where the government loses and appeals and keeps them off the rolls. That is the issue that is important.

Senator LEVIN. And you are saying that during the appeal from the MSPB, the employee is off the rolls where the government is doing the appealing—not the arbitrator—where the appeal is from the MSPB, was he wrong?

Mr. ROTH. No. When an employee wins in front of an administrative judge, which is the hearing level, or afterwards at the MSPB level, the employee is put back. The problem is that that is not true with an arbitrator's award.

Senator LEVIN. But you said 99 percent of the appeals to the Court of Appeals are not from arbitrators but are from MSPB, so it would be true 99 percent of the time, the employee is working.

Mr. ROTH. Well, if you take the standards off, we are afraid that there will be——

Senator LEVIN. No—before you get to that argument, right now, if 99 percent of the cases are from MSPB and not from arbitrators that go to the Court of Appeals, then in 99 percent of the cases where the employees are doing the appealing, that would mean that they are working——

Mr. TOBIAS. No; they are off the rolls.

Senator LEVIN [continuing]. Excuse me, that in all the cases where the government is appealing, if all of those cases come from MSPB and not from arbitrators, the employees are all working during the government appeal. Is that correct?

Mr. ROTH. That is correct, I believe, when it is an MSPB case.

Mr. TOBIAS. Unless the government seeks a stay.

Senator LEVIN. Which, apparently, they rarely do.

Mr. TOBIAS. They rarely do, but they can.

Senator LEVIN. On the old Civil Service Commission, what was the process—both of you guys are too young to remember, but if you read the history books——

Mr. ROTH. I nod to my elder, though.

Mr. TOBIAS. They could file appeals. The government could appeal to the courts.

Senator LEVIN. Without——

Mr. TOBIAS. Without leave.

Senator LEVIN. Under the old Civil Service Commission.

Mr. TOBIAS. Yes, which is one of the reasons why the discretion was included in the Act.

Senator LEVIN. The only other question I have, Mr. Chairman, has to do with the House and Senate Employment Offices. Do either of your unions represent House or Senate employees?

Mr. TOBIAS. Not NETU.

Mr. ROTH. No.

Senator LEVIN. Apparently, our offices can appeal as of right. [Laughter.]

This sounds a little bit like that bill we just passed, saying that if that small business person out there has to put in a lift or whatever, we have got to put in a lift, and if he has got to pay overtime, we have got to pay overtime. But apparently, we have a rule here where our appeals are as a matter of right, but that is not true with OPM's appeals.

Mr. TOBIAS. Well, we would suggest that you might make yourself like OPM instead of OPM like you.

Senator LEVIN. I think that is a fair argument, but I do think we have to face that argument, because we are putting ourselves in a different position than other entities of the government. We are in a better position to appeal decisions that go against us that our employees win than other agencies are, and it does smack a bit of putting ourselves in a better position. None of us personally would probably even have any awareness of these cases, but it sure does not look good, I do not think, for Congress to be in a better position. And if we are not going to do this, then maybe we ought to tell ourselves that, OK, then, we ought to seek leave, too.

I am not sure there is a justification for having two different rules, in any event, but you folks do not represent any of the employees, so we cannot press that.

I think that is all I have, Mr. Chairman. Thank you.

Senator COCHRAN. Thank you very much, Senator Levin.

Thank you, Mr. Roth and Mr. Tobias, for being helpful to the Subcommittee.

Mr. TOBIAS. Thank you for asking us

Senator COCHRAN. There are no further witnesses to be called before this hearing. We appreciate the attendance of all witnesses and the receipt of all statements.

The Subcommittee will stand in recess.

[Whereupon, at 3:08 p.m., the Subcommittee was adjourned.]

APPENDIX

PREPARED STATEMENT OF RALPH BLEDSOE, CHAIRMAN, STANDING PANEL ON THE PUBLIC SERVICE, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

Introduction

It is with pleasure that I provide this statement to the Subcommittee in support of S. 1495, "The Merit System Protection Act of 1997." I believe the provisions of this bill would improve the system for resolving disputes between employees and their employers, Federal agencies, by facilitating final determination of the correct interpretation of significant matters of Civil Service law which have a substantial governmentwide impact. Achieving final determinations of disputed interpretations of Civil Service law will promote consistency, clarity and stability regarding employment relationships and discipline which will benefit both the employee and employer.

The Standing Panel on the Public Service, of which I am Chair, is an arm of the National Academy of Public Administration, an independent, nonprofit, nonpartisan membership organization of 400 Fellows, chartered by Congress to identify emerging issues of governance and provide practical assistance to Federal, State, and local governments on how to improve their performance. A major dimension of the Academy's program is that of human resources management, where through its Center for Human Resources Management, the Academy provides assistance to Executive, Legislative, and Judicial agencies on matters related to personnel management and Civil Service issues.

Previous Testimony

Over the past three years, the Academy has provided on several occasions Congressional testimony on workplace issues. Most recently, I provided a statement on April 23, 1996, to the House subcommittee on Treasury, Postal Service and General Government on the subject of resolving workplace disputes. In that testimony I noted that ". . . how the Federal Government might improve the manner in which workplace issues are resolved is one of its most important tasks as a major employer."

The emphasis in that testimony, as with most commentators on the Federal Government's dispute resolution system, was on fully utilizing alternative dispute resolution mechanisms so that a minimum number of disputes required using a formal process. I believe this remains a sound, basic approach. At the same time, it is recognized that certain workplace disputes, especially those involving employee discipline, will come before formal dispute resolution authorities such as arbitrators, the Merit Systems Protection Board (MSPB), and the courts. Some of these cases involve significant interpretations of Civil Service law and regulation. When such cases are decided by the MSPB and the courts, their interpretations of law and regulation affect the entire system for resolving disputes in the Federal Civil Service and the manner and standards by which agencies and employees are held accountable for workforce conduct and performance.

The CSRA Appeals Provisions

In passing the Civil Service Reform Act (CSRA), Congress recognized the need for a system for dealing with the small number of employee discipline cases which involve disputed interpretations of Civil Service law. For the employee, it provided the ability to appeal an MSPB decision or arbitration award to a higher level within MSPB and ultimately to the Federal Circuit Court of Appeals (Federal Circuit), with no restrictions on the grounds for such an appeal. For the government, it provided the employing agency a limited right to request the MSPB to review its initial decision, with no right to appeal an arbitrator's award, and no right to seek judicial re-

view. Rather, the CSRA provided that only OPM, as the Executive Branch's central personnel agency, could seek judicial review of an arbitrator's award or a final MSPB decision. Further, such appeals to the court could only be made if the Director of OPM and the Department of Justice determined that an arbitrator's award or MSPB decision contained an erroneous interpretation of Civil Service law which would have a substantial impact on the continuing interpretation and application of Civil Service laws, rules, regulations and policy directives.

The basic purposes of the provision for judicial review are to (1) ensure that interpretations of Civil Service law that affect the entire Civil Service and its operations are fully considered and weighed by the parties and the dispute resolution authorities, including, if necessary, the U.S. Supreme Court, and (2) achieve a final resolution to disputed interpretations of Civil Service law so there is consistency, clarity and stability with respect to workplace relationships and discipline. For the most part, it has worked well with numerous significant issues resolved—sometimes in favor of the government and sometimes in favor of the employee.

Recent Experience

Although the number of cases reaching the Federal Circuit for review is small, their impact is substantial and extensive. According to data from the Office of Personnel Management (OPM), the government has asked the appropriate appellate court to review an MSPB or arbitration decision only 57 times in the 18 years since the passage of the Civil Service Reform Act (CSRA), during which time there were over 22,000 final MSPB decisions as well as thousands of arbitration awards. The significance of these few cases is best demonstrated by the most recent outcome of the system—the Supreme Court's decision in *Lachance v. Erickson* which held that no Federal employee has a constitutional or statutory right to lie.

Shortcomings of the Current System and How S. 1495 Would Correct Them

In our view, however, there are two serious shortcomings of the current system which are contrary to its objectives: (1) the Federal Circuit's discretion not to accept the OPM Director's determination that the decision was erroneous and would have a substantial impact and thus not address and resolve the contested interpretation of law; and (2) the requirement that OPM must file a petition for review within 30 days of its receipt of the MSPB or arbitration decision that is in the form of a complete brief on the merits. We believe these shortcomings could be successfully addressed by S. 1495 without affecting an employee's right to appeal and without placing additional burdens on the court or the appeals system.

Authority of the Federal Circuit

With respect to the first shortcoming, it is our understanding that the authority of the Federal Circuit to reject the OPM Director's substantial impact determination is perhaps unique in that OPM is unaware of any other instance in which a court of appeals possesses the authority to decline to hear agency appeals from final decisions. More importantly, this authority has prevented OPM from fulfilling its role as the Executive Branch's representative in seeking judicial resolution of disputed interpretations of law. According to OPM, the Federal Circuit has declined to hear 14 of the 54 total cases that OPM, along with the Department of Justice, have determined to be erroneous and substantially impact the Civil Service. Although neither the Academy nor I are in a position to offer an opinion on the specifics of these 14 cases, it seems clear that purposes of the CSRA in this regard would be better served if the Federal Circuit agreed to accept the OPM and Justice Department judgment and considered these infrequent but critical cases on the basis of their merits.

In refusing to fully consider all such cases, the court leaves unsettled differing interpretations of law which will continue to exist and probably emerge again as disputes in new cases. On the other hand, S. 1495 by permitting a full review of these cases would help achieve clarity and uniformity of legal principles affecting Civil Service employees throughout the Executive Branch. It would also ultimately reduce rather than add to the number of cases litigated because employees and employers would have a clearer understanding of the law's meaning and application.

30 Day Limit on Substantive Appellate Brief

The second shortcoming concerns the Federal Circuit's requirement that OPM file a full-blown substantive appellate brief 30 days after the date of an arbitrator or MSPB decision. S. 1495 would allow it to file a *pro forma* petition for review 60 days after a decision has been made which OPM believe is erroneous. I believe this proposed change would also contribute to a more effective use of the judicial review provision. First, it would remove what we understand is a condition which no other Executive Branch agency is required to meet, thereby allowing OPM appeals to be

treated like other agency appeals of an administrative decision are. Second, it would ensure that OPM and the Justice Department have sufficient time to better analyze the case in question, and prepare a petition which frames the issues in ways most helpful to the court. It should also be noted that this change should not affect in any way an employee's present appeal rights. In conclusion, I believe that S. 1495 would significantly perfect an aspect of the Executive Branch's appeals system that is often unnoticed but which has an impact far beyond the number of cases involved. If enacted, the bill would help bring to closure significant disputes over the meaning and application of Civil Service law. By doing so, it would benefit both employees and employers by providing clarity, consistency and stability in employment law and policy. Given the small number of cases which rise to this level of review and the judicious use OPM and the Department of Justice have made of the provision for judicial review, it is unlikely that the changes in S. 1495 will result in an increased judicial workload. Rather, it seems more likely that the issue resolution that should occur will result in less litigation in the future. For these reasons, I recommend favorable consideration of S. 1495, and thank you for requesting our views.

PREPARED STATEMENT OF ALBERT SCHMIDT, ACTING NATIONAL PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Introduction

Mr. Chairman and distinguished Members of the Subcommittee: My name is Albert Schmidt, and I am the Acting National President of the National Federation of Federal Employees (NFFE), the oldest independent Federal union in the United States. On behalf of the 150,000 Federal employees our union represents I appreciate the opportunity to present this position paper to the Subcommittee and offer you the views of NFFE's membership concerning strengthening the ability of the Office of Personnel Management (OPM) to obtain judicial review of decisions of the Merit Systems Protection Board (MSPB or Board).

Discussion

NFFE strongly opposes the legislation proposed to strengthen OPM's ability to obtain judicial review of MSPB decisions (S. 1495 or the bill). S. 1495 centralizes power in OPM by removing the current, important checks on that power. As a result, the bill jeopardizes the finality of Federal employment law decisions to the detriment of Federal employees. The bill also threatens to clog the courts with cases that are not appropriate for court judgment. For these reasons, S. 1495 should not be enacted.

The current statutory check is found in 5 U.S.C. § 7703(d) which gives discretion to the United States Court of Appeals for the Federal Circuit to grant a petition for review by OPM. The intent of the check was to "avoid excessive centralization in a personnel agency of the responsibility for implementing personnel laws." Civil Service Reform Act of 1978, P.L. No. 95–454, 1978 U.S.C.C.A.N. (91 Stat. 1111) 2723, 2768.

Removing the statutory check and centralizing power in OPM would harm Federal employees by inserting bias into the merit system. Currently the courts apply the "substantial impact" standard as a test for review. If instead of the courts OPM had the power to determine what that standard meant, the interpretation would change along with each new OPM director and the political forces to which that person is subject. Standards and interpretations vary from administration to administration. While OPM claims it is trying to establish consistency in Federal employment law, allowing each new administration to determine what that law will be will achieve just the opposite.

In its defense, OPM claims it is a good watchdog of itself. OPM asserts that it thoroughly evaluates each case an agency brings to it, rejects most of those cases, and petitions for review of only those most legally important. OPM's claims are laudable. However, even if OPM can keep itself in check now, that may not always be the case. OPM's leadership may not be so self-controlled in the future. Once OPM loses that self-control, no check whatsoever will exist on its power to take MSPB cases up for review.

Such flux in Federal personnel law harms Federal employees because it corrodes merit system principles. Those merit principles exist to ensure fairness and equity in Federal employment. Under S. 1495, however, just the opposite will occur because the system will be unpredictable. Federal employees will not know from one administration to another how their performance will be judged, for example. or what their rights will be in a disciplinary situation.

Federal employees also will suffer because any relief they obtain through MSPB will be delayed. These employees' livelihoods are at stake. Any delay in obtaining their relief is a delay in backpay and benefits as well as in future earnings. The delay affects the employees' promotion potential, as well, since a tarnished record affects their ability to compete in the merit promotion process. These employees may suffer great hardship if OPM delays their relief. One employee may be the sole or major wage earner in the family. Another may have large medical expenses due to a disability or illness. Yet another may have other large expenses such as college tuition. Obtaining relief as soon as possible is vital to these employees' economic security.

Vesting discretion in the courts over OPM petitions continues to be an appropriate check on the agency. This discretion makes the courts gatekeepers and is akin to the concept of standing to sue. Under that concept, a court decides whether a petitioner has a legal right to have his or her case heard in court. The concept of standing is a tenet of civil procedure that courts automatically apply. In the context of the proposed legislation, the "substantial impact" standard is a test to determine whether OPM has standing to bring MSPB decisions up for review.

OPM claims that in making this determination, courts substitute their judgment for OPM on which cases will have a substantial impact, and that OPM should retain that judgment because the agency is vested with the authority to guide Federal personnel law. This argument does not hold water. Courts make these threshold determinations in every case. As such, they are eminently qualified to do so. The legal community accepts their authority to do so. Again, removing this threshold determination is likely to clog the courts with cases that are not appropriate for review.

Another argument OPM makes is that the courts have not established clear standards for determining whether the substantial impact standard is met. A simple solution to that concern is to define more clearly what the substantial impact standard means. To remove entirely the courts' watchdog role over OPM eliminates what OPM perceives as the problem rather than solves it. In the process, OPM creates problems for Federal employees and the court system as discussed above.

Conclusion

In sum, NFFE opposes S. 1495 because it will centralize power in OPM to the detriment of Federal employees. While OPM claims the legislative change will solidify Federal personnel law, the change will have the exact opposite effect because different OPM administrations will have different standards and interpretations of the substantial impact standard. As such, OPM cannot be an effective watchdog role itself. The courts are best suited for this watchdog role because they are eminently qualified to do so and the legal community accepts them as gatekeepers. Thus, a better solution to the perceived problem is to clarify the substantial impact standard. Thank you, Mr. Chairman and distinguished Members of the Subcommittee, for your attention to NFFE's position on S. 1495.

LETTER FROM LORRAINE LEWIS, GENERAL COUNSEL, OPM

OFFICE OF PERSONNEL MANAGEMENT

March 5, 1998

The Honorable Thad Cochran, *Chairman*
Subcommittee on International Security,
Proliferation, and Federal Services
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

DEAR CHAIRMAN COCHRAN: I am writing to clarify an answer that I gave in reply to a question from Senator Levin at the Subcommittee's hearing entitled "An Overview of the Merit System Protection Act of 1997," which took place on Feb. 26, 1998.

I understood Senator Levin to have asked if the current law had caused OPM not to file appeals in cases OPM otherwise would have filed to the detriment of the government. I am not sure that my answer fully responded to the sense of his question or was as enlightening as it could have been.

The harm that has arisen from the current law is not that it has prevented or deterred OPM from filing either more appeals or appeals on different issues of law. Rather, the harm in the current system is that it has permitted the Federal Circuit to reject petitions that OPM has filed over the years in exceptionally important cases to further the Congressional objective of achieving clarity and understanding of Civil Service law.

These cases, though few in number—14 cases since enactment of the Civil Service Reform Act of 1978, and 5 cases since 1993—have prevented OPM from furthering this important objective.

The benefit to amending the law to eliminate Federal Circuit discretion is that it will require the Federal Circuit to decide on the merits the small number of appeals that OPM files. There is no reason to believe that the number of appeals by OPM would increase if the Federal Circuit's discretion were eliminated.

I hope that this clarification will allay any confusion that might have been created by my response to Senator Levin's question. I respectfully request that this letter be made a part of the hearing record.

I also request to supplement the record with the enclosed chart that shows filings in the MSPB and Federal Circuit as of Feb. 26, 1998, and a paragraph on the system in place prior to enactment of the Civil Service Reform Act.

SINCERELY,
Lorraine Lewis, *General Counsel*

Feb. 26, 1998 Chart follows:

FILINGS IN THE MSPB AND FEDERAL CIRCUIT

YEAR	MERIT SYSTEMS PROTECTION BOARD FINAL DECISIONS ON PETITIONS FOR REVIEW	OPM PETITIONS FOR REVIEW [1]	TOTAL APPEALS FROM MSPB TO FEDERAL CIRCUIT	TOTAL FILINGS IN THE FEDERAL CIRCUIT
1980	893	0	No data	No data
1981	1,153	0	No data	No data
1982	1,192	1	No data	No data
1983	3,881	2	242	694
1984	5,223	8	524	1,126
1987	1,619	6	683	1,351
1988	1,385	0	537	1,296
1989	1,240	6	590	1,417
1990	1,443	1	687	1,466
1991	1,850	6	676	1,484
1992	1,910	1	789	1,702
1993	1,613	3	713	1,708
1994	2,106	6	810	1,705
1995	2,275	6	970	1,847
1996	1,329	7	789	1,338
1997	No Data	1	545	1,462
Totals	32,649	57	10,897	22,231

[1] OPM's 57 petitions for review include appeals from MSPB and arbitrator final decisions. Three of these petitions were filed in and decided by the United States Court of Appeals for the District of Columbia. In total, fourteen (14) of OPM's petitions were rejected by the Federal Circuit. Since 1993, OPM has petitioned for review on 23 occasions. Five (5) of these 23 petitions were rejected by the Federal Circuit.

PRIOR TO THE ENACTMENT OF THE CIVIL SERVICE REFORM ACT OF 1978 (CSRA), EMPLOYEES APPEALED ADVERSE DECISIONS OF THE CIVIL SERVICE COMMISSION TO THE VARIOUS UNITED STATES DISTRICT COURTS AND THE COURT OF CLAIMS. THE GOVERNMENT HAD NO RIGHT TO JUDICIAL REVIEW OF COMMISSION DECISIONS ADVERSE TO THE GOVERNMENT PRIOR TO THE ENACTMENT OF THE CSRA. ARBITRATORS WERE NOT PERMITTED TO HEAR SUBJECTS COVERED BY A STATUTORY PROCEDURE, SUCH AS ADVERSE ACTIONS. THE CSRA PERMITTED EMPLOYEES TO CHOOSE BETWEEN MSPB AND ARBITRATORS, BUT PROVIDED THAT JUDICIAL REVIEW APPLIED TO ARBITRAL AWARDS IN THE SAME MANNER AND UNDER THE SAME CONDITIONS AS IF THE CASE HAD BEEN HEARD BY THE BOARD. THIS WAS TO PROVIDE FOR CONSISTENCY AND TO DISCOURAGE FORUM-SHOPPING. IN *CORNELIUS V. NUTT,* THE SUPREME COURT HELD THAT ARBITRATORS MUST FOLLOW THE SAME SUBSTANTIVE LAW AS THE BOARD.

OPM Filings in Courts of Appeals 1980-1997

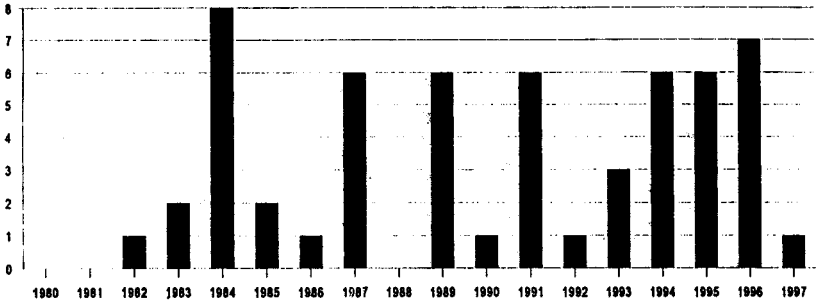
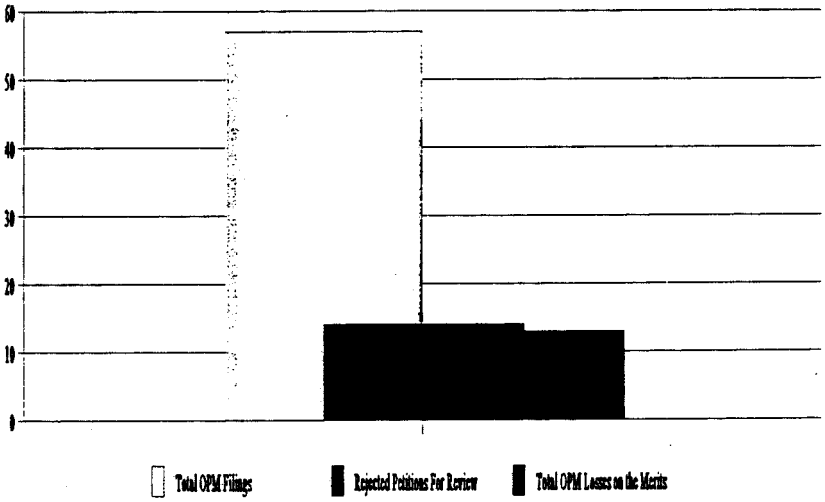


Figure 1

ATTACHMENT A

Rejected OPM Petitions for Review 1980-1997



(57) **(14)** **(13)**

ATTACHMENT B

118 S.Ct. 753
66 USLW 4073, 13 IER Cases 1015, 98 Cal. Daily Op. Serv. 508, 98 Daily Journal D.A.R. 695, 98 CJ C.A.R. 359
(Cite as: 118 S.Ct. 753)

Janice R. LaCHANCE, Acting Director, Office of Personnel Management,
Petitioner,
v.
Lester E. ERICKSON, Jr., et al.

No. 96-1395.

Supreme Court of the United States

Argued Dec. 2, 1997.

Decided Jan. 21, 1998. [FN*]

FN* Together with LaChance, Acting Director, Office of Personnel Management v. McManus et al., also on certiorari to the same court.

Director of the Office of Personnel Management (OPM) petitioned for review of the Merit System Protection Board's final decisions in 62 M.S.P.R. 586, 63 M.S.P.R. 80, 64 M.S.P.R. 570, and 65 M.S.P.R. 186 reversing falsification charges against six employees. In separate opinions, the Court of Appeals for the Federal Circuit, Lourie, Circuit Judge, 89 F.3d 1575, and 92 F.3d 1208 affirmed. OPM sought certiorari. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) neither due process clause or Civil Service Reform Act (CSRA) precludes federal agency from sanctioning employee for making false statements to agency regarding alleged employment-related misconduct; and (2) federal agency may take adverse action against employee for false statements employee made during agency investigation of underlying charge of employee misconduct.

Reversed.

[1] CONSTITUTIONAL LAW ⚷278.4(3)
92k278.4(3)
Neither due process clause nor Civil Service Reform Act (CSRA) precludes federal agency from sanctioning employee for making false statements to agency regarding alleged employment-related misconduct on part of employee. U.S.C.A. Const.Amend. 5; 5 U.S.C.A. § 1101 et seq.

[1] OFFICERS AND PUBLIC EMPLOYEES ⚷69.7
283k69.7
Neither due process clause nor Civil Service Reform Act (CSRA) precludes federal agency from sanctioning employee for making false statements to agency regarding alleged employment-related misconduct on part of employee. U.S.C.A. Const.Amend. 5; 5 U.S.C.A. § 1101 et seq.

[2] OFFICERS AND PUBLIC EMPLOYEES ⚷69.7
283k69.7
Federal agency may take adverse action against employee for false statements employee made during agency investigation of underlying charge of employee misconduct, despite fact that employee was not under oath at time of false statements. U.S.C.A. Const.Amend. 5; 5 U.S.C.A. § 7513(a, b).

[3] CONSTITUTIONAL LAW ⚷251.6
92k251.6
Core of due process is right to notice and meaningful opportunity to be heard. U.S.C.A. Const.Amend. 5.

[4] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
Under due process clause, federal employee's meaningful opportunity to be heard in employee misconduct investigation does not include a right to make false statements with respect to charged misconduct. U.S.C.A. Const.Amend. 5.

[5] WITNESSES ⚷88
410k88
Criminal defendant's right to testify does not include right to commit perjury. U.S.C.A. Const.Amend. 5.

[6] PERJURY ⚷6
297k6
Witnesses appearing before grand jury under oath are required to testify truthfully, on pain of being prosecuted for perjury.

[7] PERJURY ⚷5
297k5
One who files false affidavit required by statute may be fined and imprisoned for perjury.

***753 Syllabus [FN*]**

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FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents, federal employees subject to adverse actions by their agencies, each made false statements to agency investigators with respect to the misconduct with which they were charged. In each case, the agency additionally charged the false statement as a ground for adverse action, and the action taken against the employee was based in part on the added charge. The Merit Systems Protection Board (Board) upheld *754 that portion of each penalty that was based on the underlying charge, but overturned the false statement portion, ruling, inter alia, that the claimed statement could not be considered in setting the appropriate punishment. In separate appeals, the Federal Circuit agreed with the Board that no penalty could be based on a false denial of the underlying claim.

Held: Neither the Fifth Amendment's Due Process Clause nor the Civil Service Reform Act, 5 U.S.C. § 1101 et seq., precludes a federal agency from sanctioning an employee for making false statements to the agency regarding his alleged employment-related misconduct. It is impossible to square the result reached below with the holding in, e.g., Bryson v. United States, 396 U.S. 64, 72, 90 S.Ct. 355, 360, 24 L.Ed.2d 264, that a citizen may decline to answer a Government question, or answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood. There is no hint of a right to falsely deny charged conduct in § 7513(a), which authorizes an agency to impose the sort of penalties involved here "for such cause as will promote the efficiency of the service," and then accords the employee four carefully delineated procedural rights--advance written notice of the charges, a reasonable time to answer, legal representation, and a specific written decision. Nor can such a right be found in due process, the core of which is the right to notice and a meaningful opportunity to be heard. Even assuming that respondents had a protected property interest in their employment, this Court rejects, both on the basis of precedent and principle, the Federal Circuit's view that a "meaningful opportunity to be heard" includes a right to make false statements with respect to the charged conduct. It is well established that a criminal defendant's right to testify does not include the right to commit perjury, e.g., Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997, 89 L.Ed.2d 123, and that punishment may constitutionally be imposed, e.g., United States v. Wong, 431 U.S. 174, 178, 97 S.Ct. 1823, 1825-1826, 52 L.Ed.2d 231, or enhanced, e.g., United States v. Dunnigan, 507 U.S. 87, 97, 113 S.Ct. 1111, 1118, 122 L.Ed.2d 445, because of perjury or the filing of a false affidavit required by statute, e.g., Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973. The fact that respondents were not under oath is irrelevant, since they were not charged with perjury, but with making false statements during an agency investigation, a charge that does not require sworn statements. Moreover, any claim that employees not allowed to make false statements might be coerced into admitting misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal for falsification is entirely frivolous. United States v. Grayson, 438 U.S. 41, 55, 98 S.Ct. 2610, 2618, 57 L.Ed.2d 582. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. See, e.g., Hale v. Henkel, 201 U.S. 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652. An agency, in ascertaining the truth or falsity of the charge, might take that failure to respond into consideration, see Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810, but there is nothing inherently irrational about such an investigative posture, see Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105. Pp. 755-757.

89 F.3d 1575 (C.A.Fed.1996) (first judgment), and 92 F.3d 1208 (C.A.Fed.1996) (second judgment), reversed.

REHNQUIST, C.J., delivered the opinion for a unanimous Court.

Seth P. Waxman, Washington, DC, for petitioner.

Paul E. Marth, Greeensboro, NC, for respondents.

For U.S. Supreme Court Briefs See:

1997 WL 458823 (Pet.Brief)

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1997 WL 564258 (Resp.Brief)

1997 WL 567284 (Resp.Brief)

1997 WL 643344 (Reply.Brief)

1997 WL 523845 (Amicus.Brief)

For Transcript of Oral Argument See:

1997 WL 756652 (U.S.Oral.Arg.)

Chief Justice REHNQUIST delivered the opinion of the Court.

[1] The question presented by this case is whether either the Due Process Clause or the Civil Service Reform Act (CSRA), 5 *755 U.S.C. § 1101 et seq., precludes a federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment-related misconduct on the part of the employee. We hold that they do not.

Respondents Walsh, Erickson, Kye, Barrett, Roberts, and McManus are government employees who were the subject of adverse actions by the various agencies for which they worked. Each employee made false statements to agency investigators with respect to the misconduct with which they were charged. In each case, the agency additionally charged the false statement as a ground for adverse action, and the action taken in each was based in part on the added charge. The employees separately appealed the actions taken against them to the Merit Systems Protection Board (Board). The Board upheld that portion of the penalty based on the underlying charge in each case, but overturned the false statement charge. The Board further held that an employee's false statements could not be used for purposes of impeaching the employee's credibility, nor could they be considered in setting the appropriate punishment for the employee's underlying misconduct. Finally, the Board held that an agency may not charge an employee with failure to report an act of fraud when reporting such fraud would tend to implicate the employee in employment-related misconduct.

The Director of the Office of Personnel Management appealed each of these decisions by the Board to the Court of Appeals for the Federal Circuit. In a consolidated appeal involving the cases of Walsh, Erickson, Kye, Barrett, and Roberts, that court agreed with the Board that no penalty could be based on a false denial of the underlying claim. King v. Erickson, 89 F.3d 1575 (1996). Citing the Fifth Amendment's Due Process Clause, the court held that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," nor may "[d]enials of charges and related facts ... be considered in determining a penalty." Id., at 1585. In a separate unpublished decision, the Court of Appeals affirmed the Board's reversal of the false statement charge against McManus as well as the Board's conclusion that an employee's "false statements ... may not be considered" even for purposes of impeachment. McManus v. Department of Justice, 66 M.S.P.R. 564, 568 (1995).

[2] We granted certiorari in both cases, 521 U.S. ----, 117 S.Ct. 2506, 138 L.Ed.2d 1011 (1997), and now reverse. In Bryson v. United States, 396 U.S. 64, 90 S.Ct. 355, 24 L.Ed.2d 264 (1969), we said: "Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." Id., at 72, 90 S.Ct., at 360 (footnote omitted). We find it impossible to square the result reached by the Court of Appeals in the present case with our holding in Bryson and in other cases of similar import.

Title 5 U.S.C. § 7513(a) provides that an agency may impose the sort of penalties involved here "for such cause as will promote the efficiency of the service." It then sets forth four procedural rights accorded to the employee against whom adverse action is proposed. The agency must:

> (1) give the employee "at least 30 days' advance written notice"; (2) allow the employee "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish ... evidence in support of the answer"; (3) permit the employee to "be represented by an attorney or other representative"; and (4) provide the employee with "a written decision and the specific reasons therefor." 5 U.S.C. § 7513(b).

In these carefully delineated rights there is no hint of any right to "put the government to its proof" by falsely denying the charged conduct. Such a right,

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then, if it exists at all, must come from the Fifth Amendment of the United States Constitution.

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ...." *756 U.S. Const., Amend. V. The Court of Appeals stated that "it is undisputed that the government employees here had a protected property interest in their employment," 89 F.3d, at 1581, and we assume that to be the case for purposes of our decision.

{3][4} The core of due process is the right to notice and a meaningful opportunity to be heard. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). But we reject, on the basis of both precedent and principle, the view expressed by the Court of Appeals in this case that a "meaningful opportunity to be heard" includes a right to make false statements with respect to the charged conduct.

[5] It is well established that a criminal defendant's right to testify does not include the right to commit perjury. Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997, 89 L.Ed.2d 123 (1986); United States v. Havens, 446 U.S. 620, 626, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559 (1980); United States v. Grayson, 438 U.S. 41, 54, 98 S.Ct. 2610, 2617-2618, 57 L.Ed.2d 582 (1978). Indeed, in United States v. Dunnigan, 507 U.S. 87, 97, 113 S.Ct. 1111, 1118, 122 L.Ed.2d 445 (1993), we held that a court could, consistent with the Constitution, enhance a criminal defendant's sentence based on a finding that he perjured himself at trial.

[6][7] Witnesses appearing before a grand jury under oath are likewise required to testify truthfully, on pain of being prosecuted for perjury. United States v. Wong, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). There we said that "the predicament of being forced to choose between incriminatory truth and falsehood ... does not justify perjury." Id., at 178, 97 S.Ct., at 1826. Similarly, one who files a false affidavit required by statute may be fined and imprisoned. Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

The Court of Appeals sought to distinguish these cases on the ground that the defendants in them had been under oath, while here the respondents were not. The fact that respondents were not under oath, of course, negates a charge of perjury, but that is not the charge brought against them. They were charged with making false statements during the course of an agency investigation, a charge that does not require that the statements be made under oath. While the Court of Appeals would apparently permit the imposition of punishment for the former but not the latter, we fail to see how the presence or absence of an oath is material to the due process inquiry.

The Court of Appeals also relied on its fear that if employees were not allowed to make false statements, they might "be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." App. to Pet. for Cert. 16a-17a. But we rejected a similar claim in United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). There a sentencing judge took into consideration his belief that the defendant had testified falsely at his trial. The defendant argued before us that such a practice would inhibit the exercise of the right to testify truthfully in the proceeding. We described that contention as "entirely frivolous." Id., at 55, 98 S.Ct., at 2618.

If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. See Hale v. Henkel, 201 U.S. 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652 (1906); United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). It may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond. See Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) (discussing the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify"). But there is nothing inherently irrational about such an investigative posture. See Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

For these reasons, we hold that a government agency may take adverse action against *757 an employee because the employee made false

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statements in response to an underlying charge of misconduct. The judgments of the Court of Appeals are therefore

Reversed.

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PETITION FOR REVIEW OF PETITIONER,
CONSTANCE B. NEWMAN

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 301

CONSTANCE B. NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

GEORGE F. ARSICS, JR.,

Respondent.

PETITION FOR REVIEW OF ARBITRATOR'S AWARD

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January 22, 1991

PETITION FOR REVIEW OF PETITIONER,
CONSTANCE B. NEWMAN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. _____

CONSTANCE B. NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

GEORGE F. ARSICS, JR.,

Respondent.

PETITION FOR REVIEW OF ARBITRATOR'S AWARD

Constance B. Newman, Director of the Office of Personnel Management ("OPM"), petitions the Court to review the December 18, 1990 decision of Arbitrator Dorothy Cowser Yancy, Pet. App. 1-5,[1] in which the arbitrator denied OPM's request for reconsideration and reaffirmed her earlier holding that the grievant, a Federal employee, had been improperly terminated and must be reinstated in the Matter of Federal Mediation and Conciliation Service Arbitration Case No. 90-09026 between the Federal Communications Commission ("FCC") and the National Treasury Employees Union, Chapter 209 ("NTEU"). The grievant in the arbitration proceedings was George F. Arsics, Jr., the respondent in this appeal.

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[1] "Pet. App. __" is a citation to the appendix to this petition.

STATEMENT OF JURISDICTION

(a) The arbitrator had jurisdiction to entertain the grievance filed by NTEU upon behalf of Mr. Arsics pursuant to 5 U.S.C. § 7121(e)(1).

(b) The statutory basis for the Court's consideration of OPM's petition for review is found in 5 U.S.C. §§ 7121(f) and 7703(d).

(c) This petition for review is timely. OPM received the arbitrator's letter decision on December 21, 1990. As is required by Fed. Cir. Rule 47.11(a), this petition was filed within 30 days after the Director received notice of the final decision of the arbitrator.

STATEMENT OF THE ISSUES

1. Whether the arbitrator erred as a matter of law in originally holding that Mr. Arsics had a due process right to misrepresent deliberately a material fact during an official agency investigation.

2. Whether the arbitrator erred as a matter of law by reaffirming her mitigation of the penalty assessed by the agency without first resolving the issue of whether Mr. Arsics had a due process right to make false representations.

3. Whether the arbitrator erred as a matter of law by ignoring long-settled case law, the proper standard of review, and the agency's burden of proof, in modifying the penalty imposed upon Mr. Arsics by the Federal Communications Commission.

STATEMENT OF THE CASE

I. Statement of Facts

On July 31, 1988, Mr. Arsics was hired by the FCC as an Electronic Technician at the Powder Springs, Georgia, FCC monitoring system. Pet. App. 8. In this position, Mr. Arsics was responsible for monitoring radio communication stations for compliance with FCC regulations, identifying stations that might cause interference with other stations, and acting as "sole watch officer on assigned shifts." He was also responsible for preparing violation notices, investigating unauthorized radio activity and locating interference by using mobile direction findings. Pet. App. 8.

Mr. Arsics is a amateur radio operator (a "HAM"). On October 4, 1989, as a HAM, he broadcast on a frequency that had been bothered by interference in violation of 47 C.F.R. § 97.101, which forbids amateur operators from interfering willfully or maliciously with any radio communication or signal. As a result of a complaint received by the FCC in Washington, D.C., agency officers determined that there was deliberate interference with the frequency, and issued an alert to determine the location of the signal creating the interference. Pet. App. 9.

The alert was received at the Powder Springs FCC facility, and that facility traced the signal to Mr. Arsics's home. It then made tapes of his voice, broadcasting on the suspect frequency. Agency officials visited Mr. Arsics's home and asked him if he had been broadcasting on the frequency. Mr. Arsics responded that "he had been listening to the frequency but that he had not been transmitting." Pet. App. 10.

On October 13, 1989, the FCC proposed the grievant's removal for violating FCC rules, engaging in conduct having an adverse impact on the efficiency of the service, and for deliberately misrepresenting, concealing, and withholding material facts during an official investigation. The agency subsequently sustained the charges, and separated Mr. Arsics effective December 13, 1989. Pet. App. 10.

Pursuant to 5 U.S.C. § 7121(e)(1), Mr. Arsics challenged his removal through the negotiated grievance procedure established by the collective bargaining agreement between the FCC and NTEU. Pet. App. 10. The matter eventually proceeded to arbitration, and a hearing was held before Arbitrator Dorothy Cowser Yancy on September 8, 1990.

II. Course of Proceedings

The arbitrator determined that Mr. Arsics had willfully and maliciously interfered with radio communications of other HAM operators in violation of the FCC rules, and that his actions had an adverse impact on the service.[2] Pet. App. 16, 20. She also found that "there is always the probability that the public might at some point become aware of the incident, and if so, there is always the possibility of lost [sic] of public confidence." Pet. App. 20. Further, the arbitrator determined Mr. Arsics had not

[2] The arbitrator also agreed with NTEU, however, that "engaging in conduct having an adverse impact upon the efficiency of the service" is not a separate charge, but rather constitutes the nexus element which the Government agency must establish as part of its case. Pet. App. 13.

answered truthfully when questioned in the course of the investigation. Pet. App. 13. However, the arbitrator held that, based on Grubka v. Department of the Treasury, 858 F.2d 1570 (Fed. Cir. 1988), Mr. Arsics had a due process right to deny falsely to FCC investigators that he used the frequency, and that the agency could not charge him with the deliberate withholding of material facts from the investigator. Pet. App. 13. In light of that holding, the arbitrator dismissed the charge of withholding material facts, and did not base any part of her penalty determination on the evidence related to that charge.

The arbitrator then conducted her own assessment of the appropriate penalty in this case, based on the factors set forth in Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), and concluded that the penalty of removal "is not supported by the evidence and therefore not appropriate." She therefore reduced the penalty from removal to a 30-day furlough based only upon the charge of violation of FCC rules. Pet. App. 18.

OPM sought reconsideration by the arbitrator pursuant to 5 U.S.C. § 7703(d). OPM argued that the Grubka decision is inapplicable to this case, and that the Merit Systems Protection Board's decision in Greer v. United States Postal Service, 43 M.S.P.R. 180, 184 (1990), was instead controlling. OPM concluded that, based upon Greer, the arbitrator should reinstate the charge of making a false statement, reassess the penalty, and sustain the agency's removal action.

The arbitrator rejected OPM's arguments upon reconsideration, but did not specifically address them. The basis for that decision was her finding that "even if the evidence

indicated that the grievant was guilty of all three charges of misconduct the Agency did not properly apply the Douglas factors." Pet. App. 4. The arbitrator relied upon her analysis of the penalty in her original decision, and concluded that the penalty imposed by the FCC was "excessive" and "unreasonable." She consequently affirmed her initial decision.

ARGUMENT

I. The Arbitrator Erred In Originally Holding That Mr. Arsics Had A Due Process Right To Misrepresent Deliberately A Material Fact During An Official Agency Investigation.

In Grubka, this Court held that an employee's denial of a charge itself cannot become a separate offense if what is denied is proven to be true. This holding should be limited to the peculiar facts faced by the Court in that case. There, this Court stated, without citing any statute or case law, that

> [i]t has always been the rule and practice that **a person charged with an offense can deny the charge and plead not guilty**, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense.

858 F.2d at 1575 (emphasis added). The Court then held that

> [t]he decision of the AJ denied Grubka his due process rights in that **it denied him the right to a trial on the charge without due process of law**. In any event, the denial by Grubka that he kissed Novak in the hotel stairwell after working hours and away from the workplace was a denial of a private relationship between him and Novak and was not a denial of a matter of official interest to the IRS, **because it had nothing to do with the work of that agency**.

Id. (emphasis added).

This case is clearly distinguishable from Grubka because the subject matter of Mr. Arsics's misrepresentation involved a matter of official interest to the FCC, and plainly was not unrelated to the work of the agency.[3] His interference with a radio frequency violated FCC rules, and his false response to questioning could have possibly impeded an official FCC investigation. Therefore, the principal basis for the Court's holding in Grubka that the grievant there could not be charged separately for misrepresentation is significantly absent in this case. Greer, 43 M.S.P.R. at 185.

In Grubka, the Court cited no authority for, or offered no elaboration upon, its singular references to a right to "plead not guilty" or to denial of due process based upon a denial of a

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[3] To the extent that the arbitrator noted this issue as raised in OPM's petition for reconsideration, this case is arguably distinguishable from the case of Newman v. Corrado, 897 F.2d 1579, 1583 (Fed. Cir. 1990), where the Court refused to decide an issue upon which the arbitrator had refused to receive OPM's views upon reconsideration. Therefore, the Court should consider this issue. But see our argument in Section II, below, in which we contend that the arbitrator should have reached a decision on the matter. If this argument prevails, remand to the arbitrator may be appropriate for further "consideration" of the issue. Alternatively, our third argument, regarding the improper mitigation of the penalty, constitutes an independent basis to overturn the arbitrator's decision, regardless of the outcome on the first two arguments presented herein.

"right to a trial." It is not clear upon what basis the statements were made, and they appear to be relevant only to criminal charges.[4]

At any rate, while public employees are entitled to assert the Constitutional privilege against self-incrimination in any proceeding, civil or criminal, that privilege "only protects against 'any disclosures that the witness reasonably believes could be used **in a criminal prosecution** or could lead to other evidence that might be so used.'" Devine v. Goodstein, 680 F.2d 243, 246 (D.C. Cir. 1982), quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (emphasis in original). In this case, there is no evidence whatsoever that Mr. Arsics believed, or had any reason to believe, that his response to the investigators would form the basis for criminal prosecution. Therefore, to the extent that Grubka may have correctly been addressing admissions which could lead to criminal prosecution, it is again inapposite to this case. Greer, 43 M.S.P.R. at 187 (Merit Systems Protection Board correctly distinguished the case before it from Grubka because appellant in Greer provided a false response based not upon fear of criminal prosecution).

The case here is further analogous to Greer because Mr. Arsics, unlike the appellant in Grubka, was not charged with an

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[4] Because kissing a co-worker in a stairwell likely does not constitute grounds for criminal charges, the Court's reasoning in Grubka does not appear to rest upon sound factual grounds. The absence of any citations to supporting legal authorities highlights this fact.

offense by the agency at the time he was questioned. Greer, 43 M.S.P.R. at 185 n.2.

Finally, there is compelling precedent supporting the position that there is no due process right to provide false information. As stated by the United States Supreme Court:

> Our legal system provides methods for challenging the government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

Bryson v. United States, 396 U.S. 64, 72 (1969), cited in Greer, 43 M.S.P.R. at 186; see United States v. White, 887 F.2d 267, 274 (D.C. Cir. 1989).

In light of the above, and as persuasively set forth in OPM's petition for reconsideration, the arbitrator erred as a matter of law in relying upon the Grubka decision in finding that the grievant had a due process right deliberately to provide false information to the FCC during the course of its investigation. As argued to the arbitrator by OPM, Grubka is simply inapplicable to this case, and the arbitrator should have found Greer to be compelling support for sustaining the charge of misrepresentation. Accordingly, the Court should grant this petition challenging the arbitrator's finding that the grievant had a due process right to provide false information.

II. The Arbitrator Erred Upon Reconsideration By Reaffirming Her Mitigation Of The Penalty Without Resolving The Issue Of Whether The Grievant Had A Due Process Right To Provide False Information During The Agency Investigation.

Upon reconsideration, the arbitrator declined to review the issue of whether Mr. Arsics had a due process right falsely to deny that he was using the HAM radio frequency in violation of FCC rules. This failure to decide the legal issue which served as the basis to dismiss a major charge against Mr. Arsics constitutes legal error.

In her original decision, the arbitrator expressly relied upon the fact that she sustained only one of the three charges brought against Mr. Arsics in mitigating the penalty imposed by the FCC. Pet. App. 20. Clearly, an arbitrator is to consider the appropriateness of a penalty in light of the charges that were sustained. Southard v. Veterans Administration, 813 F.2d 1223, 1226 (Fed. Cir. 1987); Douglas, 5 M.S.P.R. at 308. Accordingly, the arbitrator here erred as a matter of law by not postponing a decision on the appropriateness of the penalty until she had reached a final decision on whether the major charge of misrepresentation against Mr. Arsics should be reinstated.

In Newman v. Corrado, 897 F.2d 1579 (Fed. Cir. 1990), the court held that 5 U.S.C. § 7703(d), in conjunction with 5 U.S.C. § 7121(f), requires an arbitrator to "consider **on the merits** an OPM petition for reconsideration." Id. at 1583 (emphasis in original). Here, the arbitrator did not fulfill that requirement, and provided no sustainable basis for her failure. Instead, she merely stated that Mr. Arsics was entitled to the

same penalty regardless of whether he was guilty of one charge or all three of the charges brought by the FCC.

This conclusory assertion is devoid of merit. It has no support in either law or logic. The arbitrator's implied finding that a sustained charge of intentional misrepresentation merits no penalty whatsoever is contrary to controlling precedent. See Southard, 813 F.2d at 1226; Greer, 43 M.S.P.R. at 185, see also Brewer v. United States Postal Service, 227 Ct. Cl. 276, 647 F.2d 1093 (1981), cert. denied, 454 U.S. 1111 (1982) (falsification of documents may warrant the penalty of removal). As a matter of law, that conclusion should not constitute a sustainable legal basis for her failure to consider the issues raised by OPM upon reconsideration. The arbitrator had to determine properly, in accordance with Corrado, whether the charge of misrepresentation should have been reinstated before addressing the correctness of her initial penalty assessment.

The arbitrator's decision does not demonstrate any consideration of the merits of OPM's argument that the Grubka decision is inapplicable.[5] She neither weighed the merits, nor

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[5] Since the purpose of § 7703(d) is to avoid unnecessary appeals by the Director of OPM to the Federal Circuit, the requirement that an arbitrator must "consider" issues on reconsideration obviously means more than the arbitrator merely noting or acknowledging the issues. Rather, "consider" in this light must mean to weigh and reach a decision upon, or adjudicate, those issues. See Carrigan v. Illinois Liquor

(continued...)

reached a conclusion on the issue.[6] As such, the arbitrator has not fulfilled the purpose of § 7703(d), as set forth in Corrado, 897 F.2d at 1582. As recently stated by the Court in Newman v. Lynch, 897 F.2d 1144 (Fed. Cir. 1990):

> [t]he provisions of section 7703(d) requiring a petition for reconsideration where OPM has not previously intervened **provides this court with the benefits of the Board's review of the petition** only if the Board considers the petition on the merits. That portion of section 7703(d) granting OPM the right to seek reconsideration by the Board **would be emasculated if the Board may refuse reconsideration without addressing** the merits of the substantive issues raised by OPM.

897 F.2d at 1147 (emphasis added). The arbitrator's failure here to address the issues raised in OPM's petition for reconsideration, without any legally sound basis for that failure, effectively deprived OPM of court review of significant legal issues. It therefore merits granting this petition for review.

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[5](...continued)

Control Commission, 153 N.E.2d 473, 475 (1958); but see Corrado, 897 F.2d at 1583. If, based upon Corrado, the Court finds that the issue of Grubka's applicability was "considered" by the arbitrator, then it is properly before the Court for review.

[6] Similarly, the arbitrator did not consider OPM's second argument upon reconsideration that because the grievant violated a rule he was hired to uphold, the agency demonstrated an appropriate basis to remove him from his position.

III. The Arbitrator Erred As A Matter Of Law By Ignoring Long-Settled Case Law, The Proper Standard Of Review, And The Agency's Burden Of Proof, In Modifying The Penalty Imposed Upon Mr. Arsics By The Federal Communications Commission.

It is well-settled that an arbitrator must apply the same substantive rules and standards as the Merit Systems Protection Board in reviewing agency disciplinary actions. Cornelius v. Nutt, 472 U.S. 648, 660-662 (1985). This principle applies to the standard of review employed by an arbitrator in reviewing the appropriateness of a penalty imposed upon an employee by the agency. See Horner v. Bell, 825 F.2d 382, 390 (Fed. Cir. 1987); Devine v. Pastore, 732 F.2d 213, 216-217 (D.C. Cir. 1984). In this case, the arbitrator clearly abandoned the proper standard of review,[7] contradicted long-standing precedent which supports the removal of an employee for violating the law he or she is hired to maintain, and placed a legally improper burden upon the agency.

A. The Arbitrator Contradicted Long-Standing Precedent.

Several decisions of the United States Court of Claims establish that an agency's decision to remove an employee for actions contrary to the mission of that agency is a reasonable penalty which should not be disturbed upon review. In Masino v. United States, 218 Ct. Cl. 531, 589 F.2d 1048 (1978), the court

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[7] For a thorough discussion of the proper standard of review which an arbitrator must employ, see Douglas, 5 M.S.P.R. at 302-306.

affirmed the Customs Service's removal of an agent for smoking and transporting marijuana as rational. The court stated that

> we cannot say that the Customs Service has punished an agent too severely when it discharges him for smoking and transporting marijuana, the illegal smuggling of which he is sworn to uncover and prevent. How can we condemn the Customs Service for taking such an action in good faith? We decline so to do.

218 Ct. Cl. at 546-47, 589 F.2d at 1056. See also Giles v. United States, 213 Ct. Cl. 602, 607-609, 553 F.2d 647 (1977) (removal of IRS agent who failed to file returns over three-year period sustained); Hoover, 206 Ct. Cl. 640, 513 F.2d 603 (removal of IRS agent who intentionally claimed tax deductions to which he was not entitled sustained).

These decisions of the Court of Claims are, of course, binding upon this Court. South Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982). Accordingly, this Court has in the past readily looked to Court of Claims precedent in determining the appropriateness of a penalty, or the mitigation of that penalty. Hunt v. Department of Health and Human Services, 758 F.2d 608, 610-11 (Fed. Cir. 1985); Devine v. Nutt, 718 F.2d 1048, 1055 (Fed. Cir. 1983), rev'd on other grounds, Cornelius v. Nutt, 472 U.S. 648 (1985). We ask that it do so again in this case.

In support of our position, we note that the Court of Claims precedent is entirely consistent with the laws of other Federal circuit courts. In Wild v. United States Department of Housing and Urban Development, 692 F.2d 1129 (7th Cir. 1982), the United States Court of Appeals for the Seventh Circuit sustained the

removal of a HUD official who was serving as the manager of slum properties and who had let those properties deteriorate to the point that they came under criminal investigation. The court stressed that

> where an employee's off-duty behavior is blatantly inconsistent with the mission of the employer and is known or likely to become known, most any employer, public or private, however broadminded, would want to fire the employee and would be reasonable in wanting to do so; and we find no evidence that Congress intended to deny this right to federal agencies.

692 F.2d at 1133. See also Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976) (court sustained discharge of employee of the Immigration and Naturalization Service for employing illegal aliens at home).

Likewise, the United States Court of Appeals for the District of Columbia Circuit in Moffer v. Watt, 690 F.2d 1037 (D.C. Cir. 1982) sustained the reversal of a presiding official's mitigation of a removal penalty in a case where an employee of the Bureau of Indian Affairs violated a statutory prohibition against Federal employees' trading with Indians. The court relied upon the well-settled axiom that "[t]he Agency had a legitimate interest in seeking to preserve its credibility and reputation for impartiality by removing an official whose conduct was directly contrary to the public trust he was charged with protecting." Moffer, 690 F.2d at 1040.

Similarly, the MSPB has also long held that removal was an appropriate penalty where an employee's misconduct was related to his employment duties. See e.g., Hickman v. United States Department of Justice, 11 M.S.P.R. 153, 156 (1982); Gibson v.

Department of Justice, 7 M.S.P.R. 561 (1981) (removal warranted based upon correction officer's off-duty criminal flight from apprehension).

In sum, the case law of the Court of Claims, other Federal circuits, and the MSPB, uniformly establish that an agency does not act excessively or unreasonably when it removes an employee for acting contrary to the mission of the agency, or violating a law which he or she is required to uphold. The arbitrator's decision plainly contradicts this overwhelming precedent. It completely contravenes the compelling principle that a Federal agency must be able to preserve its credibility and integrity through the removal of employees whose conduct is directly contrary to the mission of that agency. Accordingly, it must be overturned.

We recognize that in Devine v. Sutermeister, 724 F.2d 1558, 1566 (Fed. Cir. 1983), this Court, in dictum, essentially rejected the position that its decision in Nutt and the D.C. Circuit's decision in Devine v. White, 697 F.2d 421 (D.C. Cir. 1983), compel the conclusion that an arbitrator is bound by MSPB precedent.[8] The Court there reasoned that the legislative history of the CSRA and the decisions in White and Nutt stress adherence to **statutory** provisions, and not MSPB precedents.

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[8] The Court specifically held that "[f]or purposes of this opinion, we need not decide whether an arbitrator is always or never bound by MSPB precedents," since the Court found the arbitrator's actions to be consistent with the MSPB case law. Sutermeister, 724 F.2d at 1565.

However, this reasoning in Sutermeister should not be deemed apposite in this case, for several reasons.

First, it is merely dictum. As observed by the D.C. Circuit in Pastore, "[i]t is not entirely clear whether even the dictum of the opinion means to assert that the arbitrator can ignore so fundamental an element of 'MSPB precedent' as the 'arbitrary or capricious' standard of review." 732 F.2d at 217 n.4. Here, by ignoring relevant precedent and the compelling principles which underly them, and instead inserting her own concepts of reasonableness into her review of the FCC penalty, the arbitrator has clearly overstepped her limited scope of review. See McClaskey v. United States Department of Energy, 720 F.2d 583, 588 n.2 (9th Cir. 1983) (presiding officer's mitigation of penalty overturned where officer acted outside of her discretion by reversing the agency's decision because she considered it unwise and not the only way to accomplish agency's objectives). The dictum in Sutermeister should not be read so broadly so as to condone such a result.

Further, in Cornelius v. Nutt, 472 U.S. 648 (1985), issued after Sutermeister, the United States Supreme Court held that an arbitrator's interpretation of a CSRA provision which is inconsistent with the MSPB's interpretation of the same statutory provision cannot be sustained, based upon the clear congressional intent that an arbitrator apply the same standards as does the Board. In so holding, the Court plainly gleaned the MSPB's interpretation of the statute from its case law, Cornelius, 472 at 658-59, and clearly intended arbitrators to adhere to that

case law. This authority severely undermines the dictum in Gutermeister.

Moreover, in this case, we seek conformance with a long line of Federal case law. As recognized by the Supreme Court in Cornelius,

> Congress made arbitral decisions subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the Board," 5 U.S.C. § 7121(f), expressly "to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board." S.Rep.No. 95-969, p. 111 (1978).

472 U.S. at 661 n.16. Therefore, as the MSPB is bound to follow Federal precedent, see e.g., Bardill v. Department of the Army, 41 M.S.P.R. 599, 602 (1989), so too must an arbitrator. See Bell, 825 F.2d at 390. This position is especially compelling when such a fundamental right is at stake as that of the ability of Federal agencies to ensure their credibility and integrity.

B. The Arbitrator Abandoned The Proper Standard Of Review And Placed A Legally Improper Burden Of Proof Upon The Agency.

Besides contradicting a long line of precedent which she was required to follow, the arbitrator placed an impossible, and legally impermissible burden upon the FCC in rejecting the penalty it meted out. Although the agency showed that it no longer trusts Mr. Arsics and believes the employer-employee relationship has been irreparably damaged, the arbitrator required the agency to provide evidence that "the grievant is more likely to violate FCC Rules or to enforce them with less vigor than any other FCC employee with his responsibilities and duties." Pet. App. 21. There is no legal or logical basis for

placing such an impossible evidentiary burden upon the agency. In fact, the FCC has already proved that Mr. Arsics violated FCC rules where no other employee has; there is no justification for requiring the agency to present evidence comparing the hypothetical probability of continued illegal behavior by Mr. Arsics to the probability of illegal behavior by FCC employees at large. Such a requirement clearly falls outside the arbitrator's settled standard of review, and is clearly contrary to the compelling case law.

In Yacovone v. Bolger, 645 F.2d 1028, 1033 (D.C. Cir. 1981), the court specifically rejected such a "forward-looking analysis" of the employee's future conduct. The court declined to require the agency to show the effect of the employee's future behavior on the efficiency of the service, noting that the employee's position, the effect his conduct may have on other employees and the public, and the relationship of his misconduct with his job duties were sufficient factors to be considered. Id.; see Barnhill v. Department of Justice, 10 M.S.P.R. 378, 381 (1982). There is simply no legal support for the burden placed upon the FCC by the arbitrator in this regard.

Likewise, the arbitrator found removal an excessive penalty based upon her own speculation that "the fact that people who are employed by agencies break the law is no indication that the public will necessarily lose respect for the organization and what it stands for," and because the FCC did not provide evidence in that regard. Pet. App. 22. This rationale (1) ignores the case law set forth above; (2) ignores the fact that Mr. Arsics broke not only the law, but the very law he was hired to uphold;

and (3) places an improper burden on the agency somehow to measure and prove the tide of public opinion.

The arbitrator also rejected evidence that the agency believed that Mr. Arsics' violation of the FCC rules brought into question his "role as an impartial enforcer of FCC rules." She termed this "conjecture," since the public "at this juncture," apparently had no knowledge of his conduct. Pet. App. 21. However, the arbitrator's reasoning contradicts her own factual finding that there is the "probability" that the public will at some point become aware of the incident. Further, it ignores the significant import of the case law, clearly evinced in Giles, 213 Ct. Cl. at 607, 553 F.2d at 650, that the morale and impressions of an employee's fellow workers and others in contact with him at work constitute a compelling factor.

Finally, the arbitrator mitigated the penalty because she was "not convinced that the only method of preventing such an occurrence is to terminate the grievant." Pet. App. 22-23. However, such a judgment is not within the discretion of the arbitrator, based on her limited scope of review. McClaskey, 720 F.2d at 588 n.2. Accordingly, her decision cannot be sustained.

IV. The Arbitrator's Erroneous Holdings Will Have Substantial Impact Upon Civil Service Law.

Section 7703(d) of title 5 limits the right of the Director of OPM to seek review of decisions of arbitrators to exceptional cases in which the arbitrators' decisions "will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d). In this instance, each of the issues set forth above meets this high standard.

The arbitrator's holding that Mr. Arsics had a due process right to misrepresent relevant facts during the course of an agency investigation will have a substantial impact upon civil service law. Such a rule of law would effectively hinder, if not completely undermine, investigations into improper conduct by employees of Government agencies. It would obviously curtail the ability of Federal management to maintain the effectiveness and integrity of the Federal workforce.

In a case addressing very similar facts and issues, the D.C. Circuit granted OPM's petition for review, finding that the arbitrator's error in interpreting the law would have a substantial impact upon civil service law. Goodstein, 680 F.2d at 245-46. This case law constitutes compelling support for the filing of our petition on this issue. Accordingly, we believe that this issue is one which should properly be reviewed by this Court.

In conjunction with that issue, the question of whether an arbitrator can deprive OPM of court review of a significant legal issue by refusing to address the issue upon grounds that are legally incorrect, is clearly another matter that will have a substantial impact upon civil service law. Here, the arbitrator declined to address an important due process issue based upon reasoning which is patently illogical and contrary to established precedent. Such action, if allowed to stand, would certainly "emasculate" OPM's right to seek reconsideration under § 7703(d).

Finally, the mitigation issue in this case will most assuredly have a substantial impact upon civil service law. Admittedly, this Court has held generally that the issue of

mitigation "is essentially a matter of judgment closely to the facts of [each] case, precisely the type of issue OPM should not petition for review." Sutermeister, 724 at 1566; see Devine v. National Treasury Employees Union, F.2d 1031, 1033 (Fed. Cir. 1984).

However, this Court has granted OPM's petition for review addressed the issue of penalty mitigation where the arbitrator's mitigation of a penalty conflicts with "external law." Nutt, 718 F.2d at 1055. This case presents such a situation. In Nutt, this Court acknowledged that it should "exercise jurisdiction here in order to settle a related issue of substantial importance to civil service law -- the proper place of external (e.g., statutory) law in adverse action arbitration." 718 F.2d at 1053. Here, we ask the Court to consider the related, and just as important, issue of the proper place of another type of external law (i.e., Federal case law) in adverse action arbitration.

Although the Court in Nutt cited Federal statutes and regulations as examples of "external law," it is clear that a long line of judicial precedent must similarly constitute an example of "external law." In White, 697 F.2d 421, cited with approval in Nutt, the court examined the requirement of § 7703(d) that the arbitrator's decision must have a "substantial impact" upon a civil service law. In so doing, the White court cited S.Rep. No. 969 95th Cong., 2d Sess. 57-58, reprinted in 1978 U.S. Code Cong. & Admin.News at 2779-80, wherein the Senate discussed the term "substantial impact" as used in discrimination cases. In that report, the Senate described decisions as having a

"substantial impact" -- and thus being appropriate for review -- where they "**propel case law in a new direction**, or [] raise significant conflicts with the policies or interpretations of the [Equal Employment Opportunity] Commission." White, 697 F.2d at 434 (emphasis added). From this relevant analysis, it is apparent that the Court must look not only to see if an arbitrator's decision conflicts with a federal statute or regulation, but also if it conflicts with Federal case law; i.e., if it propels case law in a new direction.[9]

We are not seeking review merely of the arbitrator's factual findings. There is no dispute as to her factual conclusions. The decision sought from this Court would not rest upon the facts of the case. See S.Rep. No. 969 at 64, 1978 U.S. Code Cong. & Admin.News at 2786. Rather, we strenuously contest the arbitrator's failure to apply properly the proper standard of review and binding Federal case law and the legal principle that this case law espouses.

Her decision clearly contradicts, and severely undermines, a well-established line of judicial precedent, discussed above, that sustained an agency's right to remove an employee for behavior which is blatantly inconsistent with the mission of the agency. This is a very important, and most fundamental, right of agencies in the management of their personnel.

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[9] To the extent that the dictum in Sutermeister may caution against requiring arbitrators to adhere to Federal case law, it should be rejected, for the reasons set forth in Section IIIA, above.

One of the major purposes of the Civil Service Reform Act is to "preserve the ability of federal managers to maintain an effective and efficient Government," and the Act was therefore to "allow civil servants to be able to be hired and fired more easily, but for the right reasons." Cornelius, 472 U.S. at 662 (citations omitted). Historically, an employee's violation of a law or regulation which the employee was hired to uphold has unconditionally constituted a "right reason" to remove that employee. The arbitrator's decision is therefore patently exceptional, as contemplated under 5 U.S.C. § 7703(d).

If allowed to stand, it could effectively undermine the right of Federal agencies to remove an employee who violates the very law he or she was hired to uphold. See Wild, 692 F.2d at 1133 ("we do not think it was the purpose of the Civil Service Reform Act to make it impossible as a practical matter to get rid of a civil servant whose off-duty conduct is in direct conflict with the mission of the agency that employs him"). It would unquestionably erode the ability of Federal agencies to ensure their credibility and integrity.[10] Accordingly, the arbitrator's decision warrants the granting of this petition for review.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

DAVID COHEN
Director

OF COUNSEL:

JAIME RAMON
General Counsel

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[10] It is not a defense of the arbitrator's decision to state that the decision has little precedential value. Nutt, 718 F.2d at 1053; White, 697 F.2d at 440.

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January 22, 1991

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
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WASHINGTON, D.C. 20439

JAN HORBALY
CLERK

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May 5, 1997

Barbara A. Atkin
Assistant General Counsel
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Dear Ms. Jewkes:

This will respond to your facsimile of May 1, 1997, regarding your request for statistics concerning the number of OPM petitions filed and granted in the last five years.

The following table will provide the information you have requested.

	SY 93	SY 94	SY 95	SY 96	SY 97
OPM Petitions Filed	0	6	8	2	1
OPM Petitions Granted	0	1	4	3	2

Thank you for your interest in the work of the court.

Sincerely yours,

Jan Horbaly

Jan Horbaly
Clerk

JH:dmw

NOTE: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

RECEIVED MAR 2 8 1991

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 301

FILE

CONSTANCE BERRY NEWMAN, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

GEORGE F. ARSICS, JR. and
NATIONAL TREASURY EMPLOYEES UNION,

Respondents.

ON PETITION FOR REVIEW

Before ARCHER, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

O R D E R

Constance Berry Newman, Director, Office of Personnel Management (OPM) petitions for review of an arbitrator's December 18, 1990 order denying OPM's motion for reconsideration and reaffirming her September 8, 1990 decision that George F. Arsics, Jr. was guilty of misconduct, but that mitigation of his removal penalty to a 30-day suspension was appropriate. Arsics and the National Treasury Employees Union (Arsics) oppose the petition.

Briefly, Arsics was an employee of the Federal Communications Commission (FCC) at Powder Springs, Georgia. One of his responsibilities was to monitor radio communications stations for compliance with FCC regulations. Arsics was also a "HAM" radio operator.

On October 4, 1989, FCC officials at Powder Springs were directed to respond to a complaint about deliberate interference on a certain radio frequency. The officials, who taped the transmissions, tracked the signals to Arsics' home. Arsics allowed the officials into his home and told them that he been listening to that frequency, but that he had not been transmitting on it. The tapes revealed that Arsics had been transmitting on the frequency.

On October 13, 1989, the FCC proposed to remove Arsics based on violation of FCC rules, engaging in conduct having an adverse impact on the efficiency of the service, and deliberately misrepresenting, concealing, and withholding material facts during an official FCC investigation. On December 13, 1989, Arsics was removed and thereafter appealed to the arbitrator.

The arbitrator determined (1) that Arsics was guilty of violating FCC regulations, (2) that the FCC had shown that Arsics' conduct had an adverse impact on the efficiency of the service, (3) that the charge of misrepresenting material facts should be dismissed as inappropriate based on Grubka v. Dept. of Treasury, 858 F.2d 1570 (Fed. Cir. 1988), and (4) that, in light of the "Douglas" factors,[1] the penalty of removal should be mitigated to a 30-day suspension.

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[1]Douglas v. Veterans Administration, 5 MSPB 313 (1981) set forth factors to be considered to determine whether a penalty is appropriate and reasonable.

OPM sought reconsideration of the arbitrator's decision, particularly that part of the decision relating to the dismissal of the misrepresentation charge. On December 18, 1990, the arbitrator sustained her earlier decision determining that, even if the misrepresentation charge were appropriate and Arsics were guilty of the charge, the FCC did not properly apply the Douglas factors. OPM petitioned this court for review.

Under 5 U.S.C. § 7703(d) in conjunction with § 7721(f), OPM may petition for review of an arbitrator's decision if OPM determines, inter alia, that the arbitrator's decision will have a substantial impact on the administration of the civil service. This court will independently decide whether an exercise of our discretionary jurisdiction is warranted. Devine v. Sutermeister, 724 F.2d 1558, 1562 (Fed. Cir. 1983). Moreover, this court will exercise even greater scrutiny of an OPM petition for review where OPM is challenging a decision made pursuant to arbitration rather a decision issued by the MSPB. Id. It is incumbent upon OPM to demonstrate substantial impact. Devine v. Brisco, 733 F.2d 867, 871 (Fed. Cir. 1984).

Here, OPM argues that the arbitrator's determination in the underlying decision dismissing the misrepresentation charge will have a substantial impact on the administration of the civil service. However, on reconsideration, the arbitrator determined that even if the charge were sustained, her decision would remain

the same.[2] Hence, we are unconvinced that the ruling will have a substantial impact and we decline to exercise our discretion on that basis.

OPM also argues that the arbitrator erred in mitigating the penalty. However, an "issue concerning mitigation is essentially a matter of judgment closely tied to the facts of [the] case, precisely the type of issue which OPM should not petition for review." Devine v. Sutermeister, 724 F.2d at 1566. Clearly, we will not exercise our jurisdiction over this petition on that basis.

Accordingly,

IT IS ORDERED THAT:

OPM's petition for review is denied.

FOR THE COURT

MAR 2 6 1991
Date

Randall R. Rader
Randall R. Rader
Circuit Judge

cc: Robert E. Kirschman, Jr., Esq.
Gregory O'Duden, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAR 2 6 1991
FRANCIS X. GINDHART
CLERK

[2]OPM's argument that the arbitrator was required to address the issue of whether her original determination was in error is without foundation in view of the arbitrator's decision on reconsideration.