



Public Employees for Environmental Responsibility

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U.S. Merit Systems Protection Board
Office of the Chairman
1615 M Street, NW
Washington, D.C. 20419

By U.S. Mail and by email to MSPB.StrategicPlan@MSPB.gov

Re: COMMENTS ON ITS NEW STRATEGIC PLAN FOR FY 2012 – FY 2016

Dear Chairman Grundmann,

Public Employees for Environmental Responsibility (PEER) hereby submits its comments on the MSPB Strategic Plan for 2012-2016. PEER represents whistleblowers before the Board, and has several concerns about the conduct of cases before the Board and the fairness and quality of decisions. These concerns impact upon the Board's mission to "Protect the Merit Principles and promote an effective Federal workforce free of Prohibited Personnel Practices," and the Organizational Values of basing decisions on "statute and legal precedent" and of conducting work in a "fair, unbiased, and objective manner."¹ These laudable goals cannot be achieved unless serious shortcomings in the adjudication of cases before the Board are addressed.

PEER's experience is that MSPB Administrative Judges often deny discovery and disapprove witnesses which are highly relevant to our clients' cases, to the point where we do not have a fair opportunity to develop the record. Permitted discovery into the elements of a whistleblower case -- protected activity, retaliatory motive, treatment of similarly situated non-whistleblowers -- is often extremely limited or even non-existent.

Moreover, the rush to hearing results in the time to conduct discovery and resolve discovery disputes being so truncated that prehearing conferences are scheduled before the deadline for completion of discovery and before resolution of discovery disputes. Timely discovery motions are denied or ignored simply because there is not time before the hearing to resolve them. The strategic plan appears to recognize that this is a problem, listing under "Internal Management Issues and Challenges": "Address external concerns about MSPB time constraints and the potential negative impact such constraints

¹ Draft Strategic Plan at 5.



have on case development and discovery.”² However, the time constraints and unwarranted limitations on the breadth of discovery are more than an internal management issue – they severely undermine the ability of employees to obtain due process and a fair adjudication.

The administrative judges also often issue decisions which rely on a highly selective reading of the record which favors the agency. These concerns are not a matter of simply disagreeing with decisions which do not favor our clients, but of a process and outcomes which are fundamentally unfair.

When an administrative judge makes a decision concerning discovery or witnesses or other matters which compromises the employee’s right to a fair and impartial adjudication, the Board’s regulations provide that an interlocutory appeal must be approved by the judge who made the ruling. 5 C.F.R. 1201.91-93. Our experience is that the judges summarily deny these motions, and thus there is no way to get these matters before the Board before the hearing. Moreover, despite egregious violations of due process and decisions which are biased and legally unsound, the Board too often declines review by means of non-precedential orders which merely recite that no new evidence or legal error has been shown.

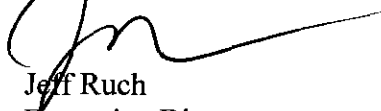
One contributing factor to these problems may be the way administrative law judges are evaluated. Their performance evaluations contain a critical element rating them based on number of decisions issued per year, with fewer than 80 decisions considered unacceptable. While it is understandable that the Board wants to insure that its administrative judges are productive, setting requirements for the number of decisions only incentivizes short-circuiting discovery, improperly limiting witnesses and evidence, and writing superficial decisions. Productivity should instead be measured by whether full due process was afforded and by the quality of decisions in terms of thorough record review and legal analysis. Even in the “Quality of Decisions” performance element, consideration of relevant facts, evidence or authority is put on a par with proper grammar, spelling and punctuation.

According to MSPB statistics as of 2008, in general federal employees win less than 2% of cases before the MSPB. There are administrative judges who have *never* ruled in favor of a whistleblower. It is simply not credible that so few cases brought before the MSPB have merit. Regardless of what other reforms the Board may make, it will not be a forum that actually serves federal employees and contributes to a federal work force free of Prohibited Personnel Practices, unless it can assure procedurally and substantively fair adjudications. The Board must aggressively use all possible tools to achieve this end, including those set out in the Strategic Plan -- “increased legal training and expertise of adjudication staff” and “monitoring adjudication performance and accountability” in order to “improve adjudication customer satisfaction,”³ as well as correcting the errors of its administrative judges on review.

² *Id.*, p. 12.

³ Draft Strategic Plan at 9, Strategic Goal 1, #1.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JR', with a long horizontal flourish extending to the right.

Jeff Ruch
Executive Director,
Public Employees for Environmental Responsibility