

**REAUTHORIZING THE OFFICE OF SPECIAL COUNSEL (House of Representatives -
October 07, 1994)**

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Mr. McCLOSKEY. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 2970) to reauthorize the Office of Special Counsel, and for other purposes, with a Senate Counsel, and for other purposes, with a Senate amendment thereto, and concur in the Senate amendment.

The Clerk read the title of the bill.

The Clerk read the Senate amendment, as follows:

Senate amendment: Strike out all after the enacting clause and insert:

SECTION 1. AUTHORIZATION OF APPROPRIATIONS.

(a) **Merit Systems Protection Board:** Section 8(a)(1) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note: Public Law 101-12: 103 Stat. 34) is amended by striking out `1989, 1990, 1991, 1992, 1993, and 1994' and inserting in lieu thereof `1993, 1994, 1995, 1996, and 1997.'

(b) **Office of Special Counsel:** Section 8(a)(2) of the Whistleblower Protection Act of 1989 (5 U.S.C. 5509 note: Public Law 101-12; 103 Stat. 34) is amended by striking out `1989, 1990, 1991, and 1992' and inserting in lieu thereof `1993, 1994, 1995, 1996, and 1997'.

SEC. 2. REASONABLE ATTORNEY FEES IN CERTAIN CASES.

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

`(m)(l) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

`(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).'.

SEC. 3. OFFICE OF SPECIAL COUNSEL.

(a) **Succession:** Section 1211(b) of title 5, United States Code, is amended by inserting after the first sentence: `The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection.'

(b) **Limitations on Disclosures:** Section 1212(g) of title 5, United States Code, is amended--

(1) in paragraph (1), by striking out `provide information concerning' and inserting in lieu thereof `disclose any information from or about'; and

(2) in paragraph (2), by striking out `a matter described in subparagraph (A) or (B) of section 2302(b)(2) in connection with a' and inserting in lieu thereof `an evaluation of the work performance, ability, aptitude, general qualifications, character, loyalty, or suitability for any personnel action of any'.

(c) **Status Report Before Termination of Investigation:** Section 1214(a) of title 5, United States Code, is amended--

(1) in paragraph (1) by adding at the end thereof the following new subparagraph:

`(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.'; and

(2) in paragraph (2)(A)--

(A) in clause (ii) by striking out `and' after the semicolon;

(B) in clause (iii) by striking out the period and inserting in lieu thereof a semicolon and `and'; and

(C) by adding at the end thereof the following new clause:

`(iv) a response to any comments submitted under paragraph (1)(D).'

(d) **Determinations.**--Section 1214(b)(2) of title 5, United States Code, is amended--

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

(2) by inserting before subparagraph (B) (as redesignated by paragraph (1) of this subsection) the following:

`(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

`(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.'; and

(3) by inserting after subparagraph (D) (as redesignated by paragraph (1) of this subsection) the following new subparagraph:

`(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.'

(e) **Reports.**--Section 1218 of title 5, United States Code, is amended by inserting `cases in which it did not make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken within the 240-day period specified in section 1214(b)(2)(A)(i),' after `investigations conducted by it,'.

SEC. 4. INDEPENDENT RIGHT OF ACTION.

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

`(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.'

(b) **Corrective Actions.**--Section 1221(e)(1) is amended by adding after the last sentence: `The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--

`(A) the official taking the personnel action knew of the disclosure; and

`(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.'

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

`(3) If, based on evidence presented to it under this section, the Merit Systems Protection Board determines that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215.'

SEC. 5. PROHIBITED PERSONNEL PRACTICES.

(a) **Personnel Actions.**--Section 2302(a)(2)(A) of title 5, United States Code, is amended--

(1) in clause (ix) by striking out `and' after the semicolon:

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

`(x) a decision to order psychiatric testing or examination; and

`(xi) any other significant change in duties, responsibilities, or working conditions'; and

(3) in the matter following designated clause (xi) (as added by paragraph (2) of this subsection) by inserting before the semicolon the following: `, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31'.

(b) **Covered Positions.**--Section 2302(a)(2)(B) of title 5, United States Code, is amended to read as follows:

`(B) `covered position' means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action--

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

`(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and'.

(c) **Agencies.**--Section 2302(a)(2)(C) of title 5, United States Code, is amended in clause (i) by inserting before the semicolon: `, except in the case of an alleged prohibited personnel practice described under subsection (b)(8)'.

(d) **Informational Program.**--Section 2302(c) of title 5, United States Code, is amended in the first sentence by inserting before the period `, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title'.

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SEC. 6. PERFORMANCE APPRAISALS.

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

`(5) meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with the merit systems principles set forth under section 2301 of this title.'

SEC. 7. MERIT SYSTEMS APPLICATION TO CERTAIN VETERANS AFFAIRS PERSONNEL.

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

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

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

(a) **In General.**--Section 1214 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

`(g) If the board orders corrective action under this section, such corrective action may include--

`(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

`(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.'.

(b) **Certain Reprisal Cases.**--Section 1221(g) of title 5, United States Code (as amended by section 4(d) of this Act) is further amended--

(1) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and
(2) by inserting before paragraph (2) (as redesignated by paragraph (1) of this subsection) the following new paragraph:

`(1)(A) If the Board orders corrective action under this section, such corrective action may include--

`(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

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

`(B) Corrective action shall include attorney's fees and costs as provided for under paragraph (2) and (3).'

SEC. 9. AUTHORITIES RELATING TO ARBITRATORS AND CHOICE OF REMEDIES NOT INVOLVING JUDICIAL REVIEW.

(a) **Authorities Which May be Extended to Arbitrators.**--Section 7121(b) of title 5, United States Code, is amended--

(1) by redesignating subparagraphs (A) through (C) of paragraph (3) as clauses (i) through (iii), respectively;

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

(3) by striking `(b)' and inserting `(b)(1)'; and

(4) by adding at the end the following:

`(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

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

`(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

`(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.'

(b) **Choice of Remedies Provision Not Involving Judicial Review.**--Section 7121 of title 5, United States Code, is amended by adding at the end the following:

`(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

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

`(3) The remedies described in this paragraph are as follows:

`(A) An appeal to the Merit Systems Protection Board under section 7701.

`(B) A negotiated grievance procedure under this section.

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

`(4) For the purpose of this subsection, a person shall be considered to have elected--

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

`(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

`(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).'

(c) **Technical and Conforming Amendments.**--Section 7121(a)(1) of title 5, United States Code, is amended--

(1) by striking `(d) and (e)' and inserting `(d), (e), and (g)'; and

(2) by inserting `administrative' after `exclusive'.

SEC. 10. EXPENSES RELATED TO FEDERAL RETIREMENT APPEALS.

Section 8348(a) of title 5, United States Code, is amended--

(1) in paragraph (1)(B) by striking out `and' at the end thereof:

(2) in paragraph (2) by striking out the period and inserting in lieu thereof a semicolon and `and'; and

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

`(3) is made available, subject to such annual limitation as the Congress may prescribe, for any expenses incurred by the Merit Systems Protection Board in the administration of appeals authorized under sections 8347(d) and 8461(e) of this title.'

SEC. 11. ELECTION OF APPLICATION OF LAWS BY EMPLOYEES OF THE RESOLUTION TRUST CORPORATION AND THRIFT DEPOSITOR PROTECTION OVERSIGHT BOARD.

(a) **Election of Provisions of Title 5, United States Code:** If an individual who believes he has been discharged or discriminated against in violation of section 21a(q)(1) of the Federal Home Loan Bank Act (12 U.S.C. 144a(g)(1)) seeks an administrative corrective action or judicial remedy for such violation under the provisions of chapters 12 and 23 of title 5, United States Code, the provisions of section 21a(q) of such Act shall not apply to such alleged violation.

(b) **Election of Provisions of Federal Home Loan Bank Act:** If an individual files a civil action under section 21a(q)(2) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(q)(2)), the provisions of chapters 12 and 23 of title 5, United States Code, shall not apply to any alleged violation of section 21a(q)(1) of such Act.

SEC. 12. IMPLEMENTATION.

(a) **Policy Statement:** No later than 6 months after the date of enactment of this Act, the Special Counsel shall issue a policy statement regarding the implementation of the Whistleblower Protection Act of 1989. Such policy statement shall be made available to each person alleging a prohibited personnel practice described under section 2302(b)(8) of title 5, United States Code, and shall include detailed guidelines identifying specific categories of information that may (or may not) be communicated to agency officials for an investigative purpose, or for the purpose of obtaining corrective action under section 1214 of title 5, United States Code, or disciplinary action under section 1215 of such title, the circumstances under which such information is likely to be disclosed, and whether or not the consent of any person is required in advance of any such communication.

(b) **Termination Statement:** The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations.

SEC. 13. ANNUAL SURVEY OF INDIVIDUALS SEEKING ASSISTANCE.

(a) **In General:** The Office of Special Counsel shall, after consulting with the Office of Policy and Evaluation of the Merit Systems Protection Board, conduct an annual survey of all individuals who contact the Office of Special Counsel for assistance. The survey shall--

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

(2) determine whether the individual was successful either at the Office of Special Counsel or the Merit Systems Protection Board; and

(3) determine if the individual, whether successful or not, was satisfied with the treatment received from the Office of Special Counsel.

(b) **Report:** The results of the survey conducted under subsection (a) shall be published in the annual report of the Office of Special Counsel.

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SEC. 14. EFFECTIVE DATE.

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

Mr. **McCLOSKEY** (during the reading). Mr. Speaker, I ask unanimous consent that the Senate amendment be considered as read and printed in the Record.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Indiana?

There was no objection.

The SPEAKER pro tempore. Is there objection to the initial request of the gentleman from Indiana?

Mr. MYERS of Indiana. Mr. Speaker, reserving the right to object, I do so to yield to my friend, my longtime friend from Indiana, Mr. **McCloskey**, and a former constituent of mine, in fact.

I yield to the gentleman.

Mr. **McCLOSKEY**. I thank the gentleman for yielding.

Mr. Speaker, H.R. 2970 reauthorizes and reforms the Office of Special Counsel and the Merit Systems Protection Board. I would note that there was one amendment in the Senate deleting the provision in the House allowing an action de novo in a Federal court in dealing with complaints going through the OSC. Much of our legislation is intact still. Particularly, one of the things I am most concerned about is that there are protections against abusive practices, such as ordering psychiatric examinations arbitrarily, arbitrarily suspending or terminating security clearances. And as I said to the gentleman's esteemed colleague, the gentleman from Wisconsin [Mr. **Sensenbrenner**], earlier, there is nothing in the Senate amendment that affects any of this legislation that is nongermane.

Mr. MYERS of Indiana. I thank my colleague. That is a question that I have. Through the years as we close out these sessions, often things are crowded into a bill that none of us knows what is in there.

I think we all fear when we do not see the legislation.

It is necessary in the closing hours of the session that we do put things in the legislation, but there is nothing that is not germane to the House rules in that compromise. Is that right?

Mr. **McCLOSKEY**. That is correct.

Mr. MYERS of Indiana. And there is nothing substantively changed in the House-passed bill.

Mr. **McCLOSKEY**. Except for the deletion as to a right to a particular form of legal action.

Mr. MYERS of Indiana. Other than that, no substantive changes in the House-passed legislation.

Mr. **McCLOSKEY**. That is correct.

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- Today, the House will consider H.R. 2970 which reauthorizes and reforms the Office of Special Counsel [OSC] and the Merit Systems Protection Board [MSPB].
- Earlier this week, the House approved H.R. 2970 which the Senate has amended. Although this legislation which we are now considering is far less comprehensive than the House's earlier efforts, I urge the House to approve this bill.
- This legislation will reauthorize the OSC and the MSPB through fiscal year 1997.
- The bill allows prevailing parties to require payment of reasonable attorney fees incurred by the employee or applicant in pursuing his or her case.
- The expanded provisions for consequential damages and attorney fees are intended to provide a realistic expectation that employees who prevail will recover their costs, the same as if a merit system reprisal had not occurred. Too many

employees who win their cases find their victories to be pyrrhic. Further, if an employee with a pending case wins substantial relief, the agency's motives for providing it are not relevant grounds to deny fees. There is no requirement for an employee who substantially prevails under this act under any available procedure, including before the Office of Special Counsel, whether formally through negotiated settlement or through unilateral agency action rendering the dispute moot, to demonstrate a nexus between the relief and the proceeding. The special counsel, agency chiefs, and the Board retain the authority to award fees in any case where an employee earns substantial relief through a no-fault settlement.

- This legislation establishes further limitations on the information the OSC may disclose about an individual who comes seeking redress. The special counsel's final status report with proposed findings of fact and legal conclusions may not be admitted into any administrative or judicial forum without the complainant's consent.
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- The bill tightens the language for a key WPA provision that the OSC has obeyed as the exception, rather than the rule--the prohibition on disclosing the evidence on an employee's case to the employer allegedly engaged in retaliation: 59 percent of OSC complainants reported to GAO that the special counsel undercut their rights by leaking information about their cases back to
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- their employers. This can impose a fatal handicap on the employee in a subsequent MSPB appeal or individual right of action. It also flatly violates section 3 of the joint explanatory statement for the WPA that individuals may allege prohibited personnel practices to the OSC 'without any fear that the information they provide or the investigation their disclosure triggers is used against them.' The bill reaffirms this and associated legislative history in the 1989 WPA. Of course, some information must be released in order to obtain further evidence necessary for investigative finding supporting an employee. But the decision on what risks to take is the complainant's alone. The complainant controls the information the same way a client seeking private counsel is the privilege holder under the attorney-client privilege, even if the lawyer chooses not to take the case. The restriction exists as soon as the OSC obtains the information, and lasts as long as it is in the special counsel's possession. Without the complainant's consent, an OSC employee is acting outside the scope of his or her Government authority. The OSC's policy statement in section 12 on disclosures shall implement these instructions.
- New timelines for OSC action are established and the OSC must provide a written status report to the complainant and allow for response 10 days before terminating any investigation.
- During an independent right of action before the MSPB, H.R. 2970 establishes new subpoena authority for the complainant. The Senate amendment also establishes that an employee may demonstrate that a protected disclosure was a contributing factor in the personnel action through more favorable evidentiary standards.
- The bill also overturns the Federal circuit court of appeals decision in Clark versus Department of Army by codifying that among the circumstantial evidence factors to establish a prima facie case of whistleblowing prohibited personnel practice is when a challenged personnel action occurred within a period of time that a reasonable person could conclude a protected disclosure was a contributing factor in the personnel action. A personnel action taken during the pendency of a performance appraisal period meets this standard, which was specified in legislative history for the Whistleblower Protection Act of 1989 but must be codified, because it has not been honored by the Federal circuit or the Board.
- Also contrary to the Federal circuit's decision in Clark, an agency's ability to demonstrate it could have taken the

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- personnel action, that is, that it can sustain its normal personnel burden of proof under section 7701(c) to support a proposed personnel action, is irrelevant. The prohibited personnel practice affirmative defense is legally independent from the merits of an agency action. There is no need to further revise statutory language. That standard already was codified clearly in the Whistleblower Protection Act by sections 1214 and 1221.
- It also is not possible to further clarify the clear statutory language in section 2302(b)(8)(A) that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive, or context. In 1989, Congress explicitly changed the language in section 2302(b)(8) from protecting 'a' disclosure to protecting 'any' disclosure, specifically to prohibit those type exceptions. If information is classified or its release is specifically prohibited by statute, employees must disclose it through specified confidentiality channels to maintain protection. Otherwise there are no exceptions.
- H.R. 2970 expands the definition of prohibited personnel practices to include the decision to order psychiatric examination and any other significant change in duties, responsibilities, or working conditions.
- Consistent with the Whistleblower Protection Act's remedial purpose, the provision adding 'any other significant change in duties, responsibilities, or working conditions' to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis. Examples include denial, revocation, or suspension of a security clearance; issuing, denying, or removing an employee from specific assignments; changes in duty station; removal of support staff; and any analogous actions taken because of protected activity.
- Similarly, the prohibition against threats in sections 2302(b)(8) and (b)(9) should be broadly construed even if not formal changes in duties, responsibilities, or working conditions, the Board should consider whether other common forms of harassment represent prohibited threats, because they are a prelude or precondition to listed forms of personnel actions. The techniques to harass a whistleblower are limited only by the
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- imagination. Illustrative examples, however, include retaliatory investigations, threat of or referral for prosecution, defunding, reductions in force and denial or workers compensation benefits. In evaluating whether harassment constitutes a threatened personnel action, among factors the board should consider is whether the activity is discriminatory, or could have a chilling effect on merit system duties and responsibilities.
- The House Report on H.R. 2970 lists 14 examples of decisions where the Merit Systems Protection Board or the Federal circuit court of appeals have ruled contrary to the clear mandate of the Whistleblower Protection Act of 1989. A new example, *Costin v. Department of Health and Human Services* (No. AT-12000-00-0670-W-1), may be the most significant, by requiring whistleblowers to identify the precise personnel actions at issue in their initial complaint to the Office of Special Counsel.
- First this burden forces employees without counsel to fashion their complaints in legally technical language. Second, it is unrealistic, because often the full scope of reprisals is not exposed until the complaint is investigated or otherwise pursued. Third, OSC closeout letters do not always list all the reprisals alleged by

whistleblowers. This burden would eliminate the guaranteed right of all whistleblowers to a due process hearing before the board.

- There should not be any confusion. To exhaust the OSC administrative remedy and qualify for an individual right of action, an employee or applicant only must allege a violation of section 2302(b)(8). The examples of alleged reprisals listed in the OSC complaint, and the scope of the evidence that a whistleblower presents to the OSC, are completely irrelevant to establish jurisdiction for an IRA.
- Today, the House expands the number of Federal employees covered by whistleblower protections and includes employees in the Department of Veterans Affairs, Federal Deposit Insurance Corporation, and the Resolution Trust Corporation.
- In response to concerns first raised by the Banking Committee, the bill also provides that employees of the FDIC and the RTC who have separate whistleblower protection provisions as a result of the savings and loan bailout legislation must choose to either follow those procedures in title 39 or the ones established in title 5.
- H.R. 2970, as amended by the Senate, includes provisions in the House-passed bill to expand the authority of arbitrators to order a stay of any personnel action and any disciplinary action
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- allowable under section 1215. Judicial review shall be allowed in any disciplinary action case in the same manner as it could be obtained if the order had been issued by the employee's agency. The legal burdens of proof for whistleblower cases in arbitration shall be the same as with cases before the MSPB.
- Consistent with the WPA's intent that whistleblower reprisal may not play any factor in a personnel action, the provision requiring Board referrals for OSC disciplinary investigation is triggered by a prima facie case that section 2302(b)(8) is violated. A final determination of prohibited personnel practice creates an inference that disciplinary sanctions are warranted and that the critical element for the relevant agency manager(s) to comply with merit system and equal opportunity laws has not been met.
- As detailed in the House report on H.R. 2970, Congress is dissatisfied with the OSC's recent non-track record on referring for agency investigation and aggressively evaluating subsequent agency reports on whistleblowing disclosures under section 1213. It is the legislative intent that when in doubt, the OSC should refer whistleblower charges for investigation. Most significant, the OSC should reevaluate agency reports with a 'strict scrutiny' or 'clear and convincing evidence' standard.
- Finally, the legislation provides for reporting and survey requirements for the OSC.
- I urge all of my colleagues to support this measure.

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Mr. MYERS of Indiana. Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER pro tempore. Is there objection to the initial request of the gentleman from Indiana?

There was no objection.

A motion to reconsider was laid on the table.

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