



2000 P Street, NW · Suite 240 · Washington, D.C. 20036 · 202-265-PEER (7337) ·

fax: 202-265-4192

e-mail: info@peer.org · website: www.peer.org

September 9, 2013

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

Via e-mail to MSPBStrategicPlan@mspb.gov

Re: COMMENTS ON DRAFT MSPB STRATEGIC PLAN FOR FY 2014-18

Dear Chairman Grundman,

Public Employees for Environmental Responsibility (PEER) hereby submits its comments on the MSPB Strategic Plan for FY 2014-2018. PEER represents whistleblowers before the Board.

PEER submitted comments in 2011 on the MSPB Strategic Plan for FY 2012-2016. At that time, PEER expressed concerns about the fairness of proceedings before administrative judges and the quality of their decisions. Specifically, PEER was concerned about administrative judges truncating discovery and improperly limiting the presentation of witnesses and evidence.

PEER believed that these practices were being promoted by the imposition of time limits for resolving appeals and the evaluation of administrative judges based on the number of decisions they issued per year, rather than based upon whether full due process was afforded and upon the quality of decisions in terms of thorough record review and legal analysis. Moreover, because the administrative judges themselves decide whether or not to certify an issue for interlocutory appeal, their errors which compromise the employee's right to a fair and impartial adjudication usually go uncorrected, at least until post-decision appeal to the Board or Federal Circuit, which many litigants cannot afford to pursue.

We were also concerned about the prevalence of administrative judges making decisions in favor of agencies based on a highly selective and biased review of the record, and rarely if ever ruling in favor of whistleblowers. It is simply not credible that less than 4% of whistleblower and other employee appeals are meritorious.

There were several elements of the prior strategic plan which could have helped to address these issues, such as “Address external concerns about MSPB time constraints and the potential negative impact such constraints have on case development and discovery,” “increased legal training and expertise of adjudication staff,” and “monitoring adjudication performance and accountability” in order to “improve adjudication customer satisfaction.”¹ However, our experience is that little has changed.

We have been involved in two cases where either the Board or the Federal Circuit has needed to correct numerous errors by an administrative judge which were recognized to have resulted in highly inadequate and unfair proceedings. In other cases, equally procedurally and substantively unfair proceedings were unfortunately not rectified upon further review.

To our knowledge, the standards for evaluating MSPB administrative judges that emphasize speed over quality have not been changed. Moreover, the current draft strategic plan continues to set a goal for a number of days (120) for initial case processing that is generally incompatible with affording a full opportunity for case development. Draft Strategic Plan at 11, S1A-3a. Focusing on speed rather than quality of adjudication at the initial appeal stage seriously undermines the ability of employees to obtain a fair adjudication of their claims.

On the other hand, PEER applauds the Board’s goal to decrease the time for deciding Petitions for Review, Sec. S1A-3b (from an average of 245 days to 150 days), as it does not compromise the employee’s opportunity to conduct discovery and present his or her case. Our experience is that PFR decisions often take a year or close to a year, and that most of this time involves awaiting decision after all briefing is complete. This delay compromises the employee’s right to timely adjudication of claims.

The current draft strategic plan contains elements that could begin to address the problems noted above, but they are often vague and general, and must be fleshed out and vigorously implemented to achieve results. For example, a goal is stated to increase the percentage of adjudication participants and stakeholders who agree that MSPB decisions are “thorough, understandable, thoughtful, and legally sound (though they may not agree with the outcome of the decisions).” S1A-1. Means to achieve this goal include: “Ensure continuity of legal expertise, increase legal training and expertise of adjudication staff and monitor adjudication performance and accountability,” and “Appropriately balance quality of adjudication decisions, timeliness of case processing, and customer satisfaction with the appeals process, within available resources.” Draft at 15, Means and Strategies for Strategic Goal 1, #s 4 and 5.

¹ All of these elements are repeated in the current draft Strategic Plan.

However, while stating laudable goals, the plan does not detail how these measures will be implemented, e.g., what training will take place and how adjudication performance and accountability will be monitored. Likewise, a goal is stated to “Ensure a sufficient number of adjudication staff who have the necessary competencies, knowledge, and training to perform their work,” Draft at 20, but it is not revealed how MSPB plans to improve upon the competencies, knowledge and training of adjudication staff.

The draft plan does make a specific proposal to improve oversight of performance through internal/external customer satisfaction surveys, draft at 21, a measure which PEER supports. Anonymous feedback concerning adjudications which would be taken into account in the performance evaluations of administrative judges would also be helpful.

Finally, given the overwhelming track record of MSPB administrative judges of deciding against whistleblowers in particular and employees in general, Board review of initial decisions should be thorough and probing, and the deference generally accorded those decisions should be tempered.

Respectfully submitted,

Jeff Ruch
Executive Director