by Robert J. McCarthy

Why MSPB Judges Reject 98 Percent of Whistleblower Appeals

Federal law requires government employees to report fraud, waste and abuse, and promises to protect them from retaliation. The Civil Service Reform Act of 1978 created the U.S. Merit Systems Protection Board (MSPB) to adjudicate appeals by employees from prohibited personnel practices, including whistleblower reprisal. Frustrated at the failure of the MSPB to remedy retaliation under existing law, Congress adopted the Whistleblower Protection Act of 1989 (WPA). Lawmakers again sought to improve MSPB compliance with additional WPA amendments in 1994. My analysis of MSPB decisions in recent years suggests that these legislative reforms have had little to no effect.

The MSPB is governed by a three-member, bipartisan board appointed by the president. The board in turn employs a large cadre of "administrative judges," who hold hearings in whistleblower and other personnel appeals, and who issue "initial decisions."

These initial decisions favor the agencies involved in a shocking 95 percent of all cases and up to 98 percent of whistleblower appeals. On further appeal, the full board routinely affirms 97 percent of the initial whistleblower decisions and a similarly overwhelming proportion of other personnel decisions. Upon final review by the U.S. Court of Appeals for the Federal Circuit, 98 percent of the Board's whistleblower decisions are left undisturbed. Such a rubber stamp approach to agency personnel decisions raises serious questions concerning bias, and even puts in doubt the merits of the MSPB and its $44 million annual budget.

MSPB recently revised its adjudicatory Whistleblower Protection Act, ostensibly to strengthen protections against retaliation. President Obama recently signed into law the Whistleblower Protection Enhancement Act of 2012, which again seeks to strengthen protections against retaliation, mainly by closing some judicially-created loopholes in the WPA. Unfortunately, the law fails to address the primary reason for the MSPB's historic hostility toward whistleblowers and federal employees in general.

Despite the deceptive similarity in titles, MSPB administrative judges are not "administrative law judges" (commonly referred to as "ALJs")—an entirely separate classification of independent, highly skilled, and carefully screened judicial officers defined by the Administrative Procedure Act (APA). The APA and the MSPB organic statute make no reference to "administrative judges," but the MSPB statute does refer to "administrative law judges." Although the APA generally mandates adjudication by ALJs, cases involving "the selection or tenure of an employee" are exempt from the hearing provisions of the APA. Similarly, MSPB's governing law permits the Board to delegate authority to ALJs or "other employees."

MSPB regulations coined the term "administrative judge" by defining "judge" to include "[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board."[1] MSPB's administrative judges actually are the agency's own lawyers. MSPB itself uses the term "attorney-examiner" for performance evaluations of its so-called administrative judges.

Why does the board use its lawyers in place of ALJs, and why does it matter? Actually, the board does make limited use of ALJs, for example, in appeals by board employees and in appeals by government officials who are accused of violating personnel laws, such as by retaliating against whistleblowers. Whistleblowers themselves, however, like other employees appealing such adverse personnel actions, are denied access to ALJs.

Presumably, the board opted to replace ALJs with "attorney-examiners" at least partly to save money, since the more highly qualified ALJs make higher salaries than do the board's attorneys. The board's decision to use ALJs for its own staff and in appeals by officials accused of violating personnel laws—but not for those who are the victims of such violations—suggests a second, more sinister motive.

The selective use of cut-rate, less qualified judicial officers is significant because ALJs are far more likely than MSPB lawyers to dispense justice fairly and with a modicum of due process.

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where the principle at stake demands a trial. A trial is not a failure of the system. After all, we are trial judges with courtrooms equipped with advanced technology and a jury box inviting use as envisioned by the Declaration of Independence and the U.S. Constitution.

9. Be Prepared

For me, the courtroom bench is my desk. One of my major disappointments has been the decline of the jury trial. As a consequence, when a case goes to trial, lawyers do not know what to do (e.g., how to effectively communicate with and persuade a jury). To provide lawyers with courtroom experience, especially young lawyers, and to keep the docket moving, I utilize hearings and oral arguments on certain dispositive motions. This allows lawyers the opportunity to appear in the courtroom and speak. It allows me an opportunity to resolve some sticky issues by pressing counsel at argument. I almost always send a list of questions to counsel before the hearing, and usually these questions help to focus the discussion. We do not use an appellate court format, but rather a point/counterpoint format that allows lawyers to reply directly and immediately to their opponent's comments. This also allows me to test the facts or law.

10. First Impressions

During trial, we come in contact with the public yet again, either as parties or as jurors. We reach out to jurors in questionnaires before they come to the courthouse for the trial. By striving for a court system that provides a favorable jury experience, we can help to educate potential jurors, while helping to combat the negative impressions that are often felt by jurors. Also, conversations between the court and counsel *before* a trial begins help to minimize down time *during* trial, which in turn helps me devote my full attention to the trial. This procedure reflects a basic respect for the jurors' time, as well as for the time and expense of the parties.

Conclusion

For those familiar with raising children, you know that each child is different, and treating them fairly does not mean you treat them each the same way. What works with one child may not work with another. The same can be said for cases on our docket. Each case is unique in some way, and may require different handling. And just as parents cannot take all the blame or credit for successful, well-adjusted children (whatever that means), neither can we as judges take all the blame or credit for successful case management. Trial lawyers and courthouse staff are an integral part of the team that must work together. Justice Stephen Breyer remarked recently that cases do not belong to the trial lawyer—they belong to the justice system. And the best perspective I have been given is that my courtroom is not mine—I am merely a placeholder until I hand the gavel to my successor.

We are, after all, a service industry, not unlike the family grocery store where I worked growing up. If we don't "sell well," customers will take their disputes elsewhere—outside the court system. This is exactly what happened over the past two decades with the rise of private mediation. But private mediation should be a supplement, not a substitute. Our court system, long admired and envied the world over, must be responsive to our "customers." The courthouse doors deserve a welcome mat, which is why we try to rule on pretrial motions and deposition objections before trial, why we try to have a draft of the jury instructions on counsels' table the first day of trial, and why I say to litigants at the last conference before trial begins: "My staff and I look forward to hosting you." ⊙

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Under laws comparable to the Whistleblower Protection Act that mandate hearings before ALJs, appellants routinely prevail in far greater numbers than do those whose hearings are held by MSPB attorney examiners. For example, under an array of whistleblower statutes administered by the U.S. Department of Labor, ALJs routinely decide in favor of appellants in one-third of appeals. ALJs acting under other types of statutes and in other agencies have similar records.

ALJs are far from perfect, and in fact are frequently accused of pro-agency bias. The primary motive for such alleged bias is that despite their statutory independence and professionalism, the ALJs are likely to identify with their employer, the government. Lacking such protections and qualifications, MSPB lawyers are far more likely to indulge such inclinations, in addition to other inherent biases they may share with ALJs, such as class and race.

Does the fact that the board and the court of appeals routinely affirm the administrative judges suggest that their initial decisions, biased or not, are correct? No, because MSPB administrative judges have broad discretion to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, to rule on objections—in essence, to create the record that is before the reviewing tribunal. Further, their factual findings are upheld if there is "substantial evidence" in the record to support them.

Finally, and perhaps most significantly, findings concerning the credibility of witnesses are deemed "virtually unreviewable." Ironically, these highly deferential standards are taken directly from the APA standards of review as applied to hearings conducted by ALJs, and from appellate court rules regarding findings by U.S. district court judges.

Any reform that does not mandate hearings before qualified ALJs rather than agency lawyers, or at least eliminate appellate deference to the latter, will leave whistleblowers and other federal employees searching for due process and equal justice under the law.

Endnote

[1]5 C.F.R. § 1201.4(a) (2012).