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TESTIMONY
of

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Before the

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

On

S. 1358, The Federal Employee Protection of Disclosures Act

November 12, 2003

The Senior Executives Association (SEA) is appreciative of the opportunity to present testimony before the Committee on its views related to S. 1358, the Federal Employee Protection of Disclosure Act. SEA is also grateful to the Chairman and the members of the Committee for their interest in improving the laws protecting whistleblowers from reprisal, and of improving administration of the process by which it is determined whether a protected whistleblower has been subjected to prohibited reprisal.

In general, SEA is supportive of the legislation, but in several instances, we believe the bill has gone too far. As explained below in greater detail, we believe the bill should be amended to provide defenses to agencies and to managers accused of reprisal that would allow a defense related to: (1) the bad faith motivation of an employee and (2) disclosures that are only policy disagreements with agency management. SEA also proposes that the new procedure related to security clearances be limited only to whistleblower reprisal cases in violation of 5 U.S.C. § 2302(b)(8). Finally, SEA opposes those portions of the bill that would allow the Office of Special Counsel or an employee to appeal a determination related to section 2302(b)(8) to any Circuit Court of Appeals, as opposed to current law, which limits such appeals to the U.S. Court of Appeals for the Federal Circuit.

The first sections of the bill greatly expand the definition of what constitutes a protected disclosure. These provisions seem designed to overturn precedent from the Federal Circuit that (1) limits protected disclosures to statements made to someone other than the immediate supervisor (by requiring that the disclosure be made to someone who is in a position to correct the illegality or mismanagement that is being disclosed), and (2) excludes from protection a

federal employee who discloses illegalities or mismanagement in the course of his or her job. While SEA is generally supportive of these changes and believes that the precedent from the Federal Circuit should be clarified, we do have concerns related to the current Whistleblower Protection Act and what we think will be an over-reaction to the changes in S. 1358 if the following concerns are not also addressed.

SEA's primary concern is that the bill's amendments to the 1989 Whistleblower Protection Act do not protect the right of a manager or supervisor to continue to manage an employee who has made either a protected disclosure (a whistleblower) or a bad-faith disclosure (a "bad-faith" whistleblower). As a result, managers potentially face a claim of whistleblower reprisal for making virtually any adverse personnel decision that touches upon the whistleblower, no matter how justified the action may be.

A bad-faith whistleblower might make a claim because of an unpopular decision by the manager. Under these circumstances, the employee gains the protection of the Act, potentially insulating that employee from any sort of negative personnel action during the pendency of the case or even beyond. Although the agencies charged with investigating WPA claims may be able to weed out these bad-faith charges during the administrative process, that process is long and drawn out. In the meantime, the manager's hands are tied from making personnel decisions against the bad-faith whistleblower, without regard to whether such action is warranted. At the same time, the manager could be unfairly branded as a retaliator and also must bear the burden of being the subject of an investigation. SEA believes that a provision in the Act providing for some sort of penalty for filing bad-faith whistleblower claims would serve to discourage non-

legitimate whistleblower claims, lessen the agencies' workload by eliminating most bad-faith claims, and also serve the interest of genuine whistleblowers whose disclosures deserve the protection of the Act. In the alternative, the bill should be changed to deny protection for disclosures made by an employee solely to avoid accountability for the employee's misconduct or poor performance.

Additionally, SEA is concerned that S. 1358 could be interpreted to expand the scope of protected disclosures to cover the policy decisions of a supervisor or manager, particularly if the policy disagreement is made only to the supervisor, but is couched in terms of legality. S. 1358 might protect such statements when they are only policy disagreements that should not be protected, particularly if the employee making the statement also exhibits conduct showing a refusal or reluctance to carry out the supervisor's policy decisions. This becomes critical when viewed from the perspective that executives and managers have a duty to carry out the policy direction of the Administration they serve. We believe it is not the intent of S. 1358 or the original intent of the WPA to protect the disclosures of employees whose disagreement with the Administration's policy objectives being carried out by their supervisor is made only to the supervisor and then is followed by a recalcitrant attitude by the employee. We suggest changes that allow the MSPB to deny protection for disclosures that relate only to agency policy decisions which a reasonable employee should follow.

SEA supports the new fourteenth prohibited personnel practice, which prohibits referring a matter for investigation because of any activity protected under 5 U.S.C. § 2302. This is a reform that we believe is necessary to prevent unreasonable and retaliatory investigations.

However, we are concerned that managers have adequate protection if they refer a matter for investigation for other legitimate reasons, especially since investigations often occur when an employee is reasonably suspected of wrongdoing; indeed, the result of the investigation may clear the employee. To correct this, we propose that the language in section 1(h) of the bill, which allows a supervisor or manager to avoid liability for reprisal by proving the personnel action at issue would have occurred anyway, also be made applicable to any new prohibitions of retaliatory investigations.

Section 1(e) of the bill establishes a new section 7702a in Title 5 setting forth a new process if a security clearance decision appears motivated by whistleblower reprisal. In our opinion, the bill appears to be consistent with the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), because it does not require or allow the MSPB or a court to actually grant a security clearance. But we do think the bill may go too far by requiring this new procedure for agency review of security clearances for any violation of section 2302. We propose that this new process be limited to whistleblower reprisal in violation of 5 U.S.C. §2302(b)(8).

SEA supports the provisions in section 1(g) of S. 1358 concerning attorney fees. Current law allowing such fees has been interpreted to require that fees for managers who successfully defend reprisal charges be paid by the Office of Special Counsel. SEA believes that the appropriate policy determination in awarding fees to managers who are found to be substantially innocent of whistleblower reprisal is one of employer indemnification for expenses to an employee who is found to have been doing his or her job. Often, this job includes continuing to

manage a whistleblower after a disclosure is made. A manager who does so risks a charge of reprisal. A manager who successfully defends against a reprisal charge should not be required to pay fees him or herself, and we submit that the employing agency should indemnify its employees in these circumstances. Such a change in the law will also allow the Office of Special Counsel to make prosecutorial decisions without concern for the impact of the decision on the Office's budget.

SEA supports section 1(h) of S. 1358 allowing combinations of disciplinary action to be imposed (as opposed to current precedent that allows only one of the actions) and to clarify that a manager accused of reprisal can avoid liability by proving that the personnel action in question would have happened in the absence of protected activity. Clarification of this latter point is especially significant since a manager or supervisor should be able to avoid liability if the evidence of whistleblowing reprisal was of no consequence to the personnel action in question.

SEA supports the grant of independent litigating authority to the Office of Special Counsel. SEA believes that OSC has acted responsibly and should have this authority. Under current law OSC may only appeal to Federal Circuit if OPM agrees and must accept representation from the Department of Justice. OPM's reasons for seeking review and DOJ's broader government-wide litigating viewpoint should not control appellate decisions under the WPA. Instead this should be entrusted to the Special Counsel who will appeal based on reasons that promote protection of whistleblowers and the legislative intent of the whistleblower protection laws.

SEA does oppose the granting of an appeal right to other Circuit Courts of Appeal other than the Federal Circuit. The reason for our opposition is grounded in strong congressional criticism of the MSPB in the Homeland Security Act and 2004 DoD Authorization Act. Both of these statutes have provisions allowing their respective secretaries to set up their own appeals boards. SEA has consistently supported a federal employee's right to appeal to the MSPB; when we assert that position, one of the criticisms of the MSPB that we are given in response is that the MSPB appeal process is too complex. By allowing appeals to multiple circuits, the level of complexity will only increase because circuit court opinions will differ from each other. Also, it appears that the only reason to allow appeals to multiple circuits is dissatisfaction with the Federal Circuit's decisions. If this is the case, Congress can always legislatively overrule the Federal Circuit as it did in 1994 and as it appears ready to do in S. 1358. SEA contends that this is preferable to the confusing complexity that will be caused by the varying decisions that will be issued by different Courts of Appeal.

On behalf of the Senior Executives Association, we thank you for your willingness to introduce the amendments to the Whistleblower Protection Act, and ask that you consider additional revisions to S. 1358 that would make the Act better serve the needs of all federal employees. We look forward to further discussion of these issues.