110TH CONGRESS
1ST SESSION

H. R. 3551

To reauthorize the Merit Systems Protection Board and the Office of Special Counsel, to modify the procedures of the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 17, 2007

Mr. DAVIS of Illinois introduced the following bill; which was referred to the Committee on Oversight and Government Reform

---

A BILL

To reauthorize the Merit Systems Protection Board and the Office of Special Counsel, to modify the procedures of the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Merit System Reauthorization Act of 2007".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Authorization of appropriations.

Sec. 3. Allegations of wrongdoing against Special Counsel or Deputy Special Counsel.
Sec. 4. Discrimination on the basis of sexual orientation prohibited.
Sec. 5. Procedures of the Merit Systems Protection Board.
Sec. 6. Procedures of the Office of Special Counsel.
Sec. 7. Reporting requirements.

1 **SEC. 2. AUTHORIZATION OF APPROPRIATIONS.**

2 (a) MERIT SYSTEMS PROTECTION BOARD.—Section
3 8(a)(1) of the Whistleblower Protection Act of 1989 (5
4 U.S.C. 5509 note) is amended by striking "2003, 2004,
5 2005, 2006, and 2007" and inserting "2008, 2009, and
6 2010".

7 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)
8 of the Whistleblower Protection Act of 1989 (5 U.S.C.
9 5509 note) is amended by striking "2003, 2004, 2005,
10 2006, and 2007" and inserting "2008, 2009, and 2010".

11 (c) EFFECTIVE DATE.—This section shall take effect
12 as of October 1, 2007.

13 **SEC. 3. ALLEGATIONS OF WRONGDOING AGAINST SPECIAL**
14 **COUNSEL OR DEPUTY SPECIAL COUNSEL.**

15 (a) DEFINITIONS.—In this section—

16 (1) the term "Special Counsel" refers to the
17 Special Counsel appointed under section 1211(b) of
18 title 5, United States Code;

19 (2) the term "Integrity Committee" refers to
20 the Integrity Committee described in Executive
21 Order 12993 (relating to administrative allegations

against inspectors general) or its successor in function (as identified by the President); and

(3) the terms "wrongdoing" and "Inspector General" have the same respective meanings as under the Executive order cited in paragraph (2).

(b) AUTHORITY OF INTEGRITY COMMITTEE.—

(1) IN GENERAL.—An allegation of wrongdoing against the Special Counsel (or the Deputy Special Counsel) may be received, reviewed, and referred for investigation by the Integrity Committee to the same extent and in the same manner as in the case of an allegation against an Inspector General (or a member of the staff of an Office of Inspector General), subject to the requirement that the Special Counsel recuse himself or herself from the consideration of any allegation brought under this subsection.

(2) COORDINATION WITH EXISTING PROVISIONS OF LAW.—This section does not eliminate access to the Merit Systems Protection Board for review under section 7701 of title 5, United States Code. To the extent that an allegation brought under this subsection involves section 2302(b)(8) of such title, a failure to obtain corrective action within 120 days after the date on which that allegation is received by the Integrity Committee shall, for purposes of sec-

1 tion 1221 of such title, be considered to satisfy sec-
2 tion 1214(a)(3)(B) of such title.
3 (c) REGULATIONS.—The Integrity Committee may
4 prescribe any rules or regulations necessary to carry out
5 this section, subject to such consultation or other require-
6 ments as might otherwise apply.

7 **SEC. 4. DISCRIMINATION ON THE BASIS OF SEXUAL ORI-**
8 **ENTATION PROHIBITED.**

9 (a) REPUDIATION.—In order to dispel any public con-
10 fusion, Congress repudiates any assertion that Federal
11 employees are not protected from discrimination on the
12 basis of sexual orientation.
13 (b) AFFIRMATION.—It is the sense of Congress that,
14 in the absence of the amendment made by subsection (c),
15 discrimination against Federal employees and applicants
16 for Federal employment on the basis of sexual orientation
17 is prohibited by section 2302(b)(10) of title 5, United
18 States Code.
19 (c) DISCRIMINATION BASED ON SEXUAL ORIENTA-
20 TION PROHIBITED.—Section 2302(b)(1) of title 5, United
21 States Code, is amended—
22 (1) in subparagraph (D), by striking "or" at
23 the end;
24 (2) in subparagraph (E), by inserting "or" at
25 the end; and

(3) by adding at the end the following:

"(F) on the basis of sexual orientation;".

SEC. 5. PROCEDURES OF THE MERIT SYSTEMS PROTECTION BOARD.

(a) PROOF OF EXHAUSTION FOR INDIVIDUAL RIGHT OF ACTION.—Section 1221(a) of title 5, United States Code, is amended—

(1) by striking "(a)" and inserting "(a)(1)"; and

(2) by adding at the end the following:

"(2) For purposes of paragraph (1), an employee, former employee, or applicant for employment may demonstrate compliance with section 1214(a)(3)(B) by—

"(A) submitting a copy of the complaint or other pleading pursuant to which such employee, former employee, or applicant sought corrective action from the Special Counsel with respect to the personnel action involved; and

"(B) certifying that the Special Counsel did not provide notice of intent to seek such corrective action to such employee, former employee, or applicant within the 120-day period described in such section 1214(a)(3)(B).".

1 (b) INDIVIDUAL REQUESTS FOR STAYS.—Section
2 1221(c) of title 5, United States Code, is amended by
3 striking paragraph (2) and inserting the following:
4 "(2) Any stay requested under paragraph (1) shall
5 be granted within 10 calendar days (excluding Saturdays,
6 Sundays, and legal holidays) after the date the request
7 is made, if the Board determines that the employee,
8 former employee, or applicant has demonstrated that pro-
9 tected activity described under section 2302(b)(8) was a
10 contributing factor to the personnel action involved. If the
11 stay request is denied, the employee, former employee, or
12 applicant may submit an interlocutory appeal for expe-
13 dited review by the Board.".
14 (c) JOINING SUBSEQUENT AND RELATED CLAIMS
15 WITH PENDING LITIGATION.—
16 (1) IN GENERAL.—Section 1221 of title 5,
17 United States Code, is amended—
18 (A) by redesignating subsections (h), (i),
19 and (j) as subsections (i), (j), and (k), respec-
20 tively; and
21 (B) inserting after subsection (g) the fol-
22 lowing:
23 "(h) During a pending proceeding, subsequent per-
24 sonnel actions may be joined if the employee, former em-
25 ployee, or applicant for employment demonstrates that re-

1 taliation for protected activity at issue in the pending pro-
2 ceeding was a contributing factor to subsequent alleged
3 prohibited personnel practices.".

4 (2) CONFORMING AMENDMENT.—Section 1222
5 of title 5, United States Code, is amended by strik-
6 ing "section 1221(i)" and inserting "section
7 1221(j)".

8 (d) PROCEDURAL DUE PROCESS.—Section
9 1204(b)(1) of title 5, United States Code, is amended by
10 inserting "in accordance with regulations consistent with
11 the Federal Rules of Civil Procedure, so far as prac-
12 ticable" before the period.

13 (e) ATTORNEY FEES.—Section 7701(g)(1) of title 5,
14 United States Code, is amended by striking "if the em-
15 ployee or applicant is the prevailing party and" and insert-
16 ing "if the claim or claims raised by the employee or appli-
17 cant were not frivolous, unreasonable, or groundless; the
18 case was a substantial or significant factor in the agency's
19 action providing some relief or benefit to the employee or
20 applicant; and".

21 **SEC. 6. PROCEDURES OF THE OFFICE OF SPECIAL COUN-**
22 **SEL.**

23 (a) INVESTIGATIONS OF ALLEGED PROHIBITED PER-
24 SONNEL PRACTICES.—Section 1212(e) of title 5, United
25 States Code, is amended by striking "may prescribe such

1 regulations as may be necessary to perform the functions"
2 and inserting "shall prescribe such regulations as may be
3 necessary to carry out subsection (a)(2) and may prescribe
4 any regulations necessary to carry out any of the other
5 functions".

6 (b) MANDATORY COMMUNICATIONS WITH COM-
7 PLAINANTS.—

8 (1) CONTACT INFORMATION.—Section
9 1214(a)(1)(B) of title 5, United States Code, is
10 amended by striking clause (ii) and inserting the fol-
11 lowing:

12 "(ii) shall include the name and contact infor-
13 mation of a person at the Office of Special Counsel
14 who—

15 "(I) shall be responsible for interviewing
16 the complainant and making recommendations
17 to the Special Counsel regarding the allegations
18 of the complainant; and

19 "(II) shall be available to respond to rea-
20 sonable questions from the complainant regard-
21 ing the investigation or review conducted by the
22 Special Counsel, the relevant facts ascertained
23 by the Special Counsel, and the law applicable
24 to the allegations of the complainant.".

1 (2) STATEMENT AFTER TERMINATION OF IN-
2 VESTIGATION.—Section 1214(a)(2)(A)(iv) of title 5,
3 United States Code, is amended by striking "a re-
4 sponse" and inserting "specific responses".

5 (c) QUALIFICATIONS OF SPECIAL COUNSEL.—The
6 third sentence of section 1211(b) of title 5, United States
7 Code, is amended by striking "position." and inserting
8 "position and has professional experience that dem-
9 onstrates an understanding of and a commitment to pro-
10 tecting the merit based civil service.".

11 (d) ALTERNATIVE DISPUTE RESOLUTION PROGRAM
12 OF THE OFFICE OF SPECIAL COUNSEL.—Section 1212 of
13 title 5, United States Code, is amended by adding at the
14 end the following:

15 "(h) The Office of Special Counsel shall by regulation
16 provide for one or more alternative methods for settling
17 matters subject to the jurisdiction of the Office which shall
18 be applicable at the election of an employee, former em-
19 ployee, or applicant for employment or at the direction of
20 the Special Counsel with the consent of the employee,
21 former employee, or applicant concerned. In order to carry
22 out this subsection, the Special Counsel shall provide for
23 appropriate offices in the District of Columbia and other
24 appropriate locations.".

1 (e) SUBSTANTIAL LIKELIHOOD DETERMINATIONS.—
2 Section 1213 of title 5, United States Code, is amended—
3 (1) in subsection (b), by striking "15 days" and
4 inserting "45 days"; and
5 (2) in subsection (c)(1), by inserting ", after
6 consulting with the person who made the disclosure
7 on how to characterize the issues," after "appro-
8 priate agency head".
9 (f) DETERMINATION OF STATUTORY REQUIREMENTS
10 MET.—Section 1213(e) of title 5, United States Code, is
11 amended—
12 (1) in paragraph (3), by striking "subsection
13 (e)(1)" and inserting "paragraph (1)";
14 (2) by redesignating paragraphs (3) and (4) as
15 paragraphs (4) and (5), respectively; and
16 (3) by inserting after paragraph (2) the fol-
17 lowing:
18 "(3) Upon receipt of any report of the head of an
19 agency required under subsection (c), if the Special Coun-
20 sel is unable to make a determination under paragraph
21 (2)(A) or (B), the Special Counsel shall require the agency
22 head to submit any additional information necessary for
23 the Special Counsel to make such determinations before
24 any information is transmitted under paragraph (4).".

1 (g) PUBLIC AND INTERNET ACCESS FOR AGENCY IN-
2 VESTIGATIONS.—Section 1219 of title 5, United States
3 Code, is amended by striking subsections (a) and (b) and
4 inserting the following:
5 "(a) The Special Counsel shall maintain and make
6 available to the public (including on the website of the Of-
7 fice of Special Counsel)—
8 "(1) a list of noncriminal matters referred to
9 heads of agencies under subsection (c) of section
10 1213, together with—
11 "(A) reports from heads of agencies under
12 subsection (c)(1)(B) of such section relating to
13 such matters;
14 "(B) comments submitted under sub-
15 section (e)(1) of such section relating to such
16 matters, if the person making the disclosure
17 consents; and
18 "(C) comments or recommendations by the
19 Special Counsel under subsection (e)(4) of such
20 section relating to such matters;
21 "(2) a list of matters referred to heads of agen-
22 cies under section 1215(c)(2);
23 "(3) a list of matters referred to heads of agen-
24 cies under subsection (e) of section 1214, together

with certifications from heads of agencies under such subsection; and

"(4) reports from heads of agencies under section 1213(g)(1).

"(b) The Special Counsel shall take steps to ensure that any list or report made available to the public or placed on the website of the Office of Special Counsel under this section does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.".

SEC. 7. REPORTING REQUIREMENTS.

(a) MERIT SYSTEMS PROTECTION BOARD.—Each annual report submitted by the Merit Systems Protection Board under section 1206 of title 5, United States Code, shall, with respect to the period covered by such report, include—

(1) the number of cases and alleged violations of section 2302 of such title 5 filed with the Board for each agency, itemized for each prohibited personnel practice;

(2) the number of cases and alleged violations of section 2302 of such title 5 that the Board determines for each agency, itemized for each prohibited

1 personnel practice and compared to the total number
2 of cases and allegations filed with the Board for
3 each, both with respect to the initial decisions by ad-
4 ministrative judges and final Board decisions;
5 (3) the number of cases and allegations in
6 which corrective action was provided, compared to
7 the total number of cases and allegations filed with
8 the Board for each, itemized separately for settle-
9 ments and final Board decisions; and
10 (4) with respect to paragraphs (8) and (9) of
11 section 2302 (b) of such title 5, the number of cases
12 in which the Board has ruled in favor of the em-
13 ployee on the merits of the claim compared to the
14 total number of cases and allegations filed with the
15 Board for each, where findings of fact and conclu-
16 sions of law were issued on whether those provisions
17 were violated, independent from cases disposed by
18 procedural determinations, including a separate
19 itemization of both initial decisions by administrative
20 judges and final Board decisions for each category.
21 (b) OFFICE OF SPECIAL COUNSEL.—Each annual re-
22 port submitted under section 1218 of title 5, United
23 States Code, by the Special Counsel or an employee des-
24 ignated by the Special Counsel shall, with respect to the
25 period covered by such report, include—

1 (1) the number of cases and allegations for
2 each prohibited personnel practice, delineated by
3 type of prohibited personnel practice;
4 (2) for each type of prohibited personnel prac-
5 tice, the number of cases and allegations as to which
6 the Office of Special Counsel found reasonable
7 grounds to believe section 2302 of such title 5 had
8 been violated;
9 (3) for each type of prohibited personnel prac-
10 tice, the number of cases and allegations as to which
11 the Office of Special Counsel referred the complaint
12 for full field investigation;
13 (4) for each prohibited personnel practice, the
14 number of cases and allegations as to which the Of-
15 fice of Special Counsel recommended corrective ac-
16 tion;
17 (5) for each prohibited personnel practice, the
18 number of cases and allegations as to which the Of-
19 fice of Special Counsel conducted a mediation or
20 other form of alternative dispute resolution, with
21 statistics and illustrative examples describing the re-
22 sults with particularity;
23 (6) the number of instances in which the Office
24 of Special Counsel referred disclosures submitted
25 under section 1213 of such title 5 to an agency

1 head, without any finding under subsection (c) or
2 (g) of such section;
3 (7) a statistical tabulation of results for each
4 customer satisfaction survey question, both with re-
5 spect to allegations of prohibited personnel practice
6 submitted under section 1214 of such title 5 and
7 disclosures submitted under section 1213 of such
8 title; and
9 (8) for each provision under section 1216(a) (1)
10 through (5) and (c) of such title 5, the number of
11 cases and allegations, the number of field investiga-
12 tions opened, the number of instances in which cor-
13 rective action was sought, and the number of in-
14 stances in which corrective action was obtained.
15 (c) ANNUAL SURVEY.—Section 13(a) of the Act enti-
16 tled "An Act to reauthorize the Office of Special Counsel,
17 and for other purposes", approved October 29, 1994 (5
18 U.S.C. 1212 note; Public Law 103–424) is amended in
19 the first sentence by inserting ", including individuals who
20 disclose information to the Office of Special Counsel under
21 section 1213" before the period.

○