



November 2016

WHISTLEBLOWER PROTECTION

Additional Actions Would Improve Recording and Reporting of Appeals Data

Accessible Text

GAO Highlights

Highlights of [GAO-17-110](#), a report to congressional committees

Why GAO Did This Study

Federal employee whistleblowers—individuals who report violations of law or certain agency mismanagement—may risk reprisals from their agencies. WPEA seeks to strengthen the rights of and protections for federal whistleblowers.

WPEA includes a provision for GAO to report on the law's implementation. This report (1) describes changes in the number of whistleblower reprisal appeals filed with MSPB, as well as the outcome of appeals, since WPEA's effective date; (2) provides subject matter specialists' views about granting MSPB summary judgment authority for whistleblower cases; and (3) provides subject matter specialists' views about granting jurisdiction for a subset of whistleblower appeals to be decided by a district court of the United States.

GAO obtained data from MSPB on whistleblower appeals received and closed from fiscal years 2011 through 2015. This period begins approximately 2 years prior to WPEA's effective date of December 27, 2012, and continues through the end of fiscal year 2015. GAO also conducted six focus groups with subject matter specialists that include whistleblower advocates and agency labor relations officials.

What GAO Recommends

GAO recommends that MSPB help ensure the accuracy of its reporting on whistleblower appeals received and closed by (1) updating its data entry user guide to include additional guidance and procedures, and (2) adding a quality check in its data analysis and reporting process to better identify discrepancies. MSPB

View [GAO-17-110](#). For more information, contact Yvonne D. Jones at (202) 512-2717 or jonesy@gao.gov.

November 2016

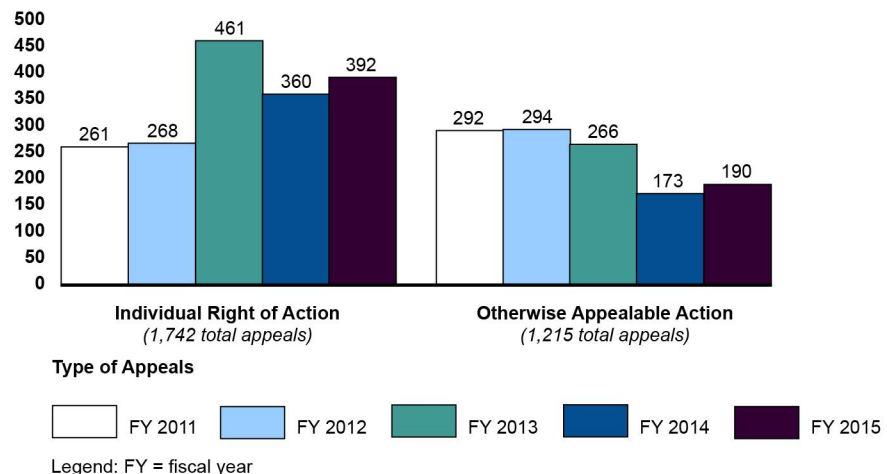
WHISTLEBLOWER PROTECTION

Additional Actions Would Improve Recording and Reporting of Appeals Data

What GAO Found

Of the two types of whistleblower appeals—individual right of action (IRA) and otherwise appealable action (OAA)—Merit Systems Protection Board (MSPB) data show higher numbers of IRA appeals received by MSPB after enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA). In an IRA appeal, an individual has been subject to a personnel action, such as a reassignment, and claims the action was reprisal for whistleblowing. In contrast, the number of OAA appeals decreased after WPEA. In an OAA appeal, an individual has been subject to an action directly appealable to MSPB, such as a demotion, and claims that the action was taken because of whistleblowing. WPEA, among other things, clarified the scope of protected disclosures which may have contributed to a higher number of IRA appeals. WPEA did not alter MSPB's jurisdiction over OAAs.

Annual Numbers of Two Kinds of Whistleblower Appeals Before and After Whistleblower Protection Enhancement Act's Enactment in 2012
Number of appeals



Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

MSPB has taken steps to collect and report whistleblower appeals data. GAO identified a number of weaknesses in MSPB's data collection. Some were due to shortcomings in data coding that resulted in over reporting appeals closed. Further, MSPB has not updated its data entry user guides to reflect new reporting requirements nor has it instituted checks to ensure data accuracy, which are inconsistent with internal control standards.

Subject matter specialists varied in their opinions about the benefits of granting summary judgment authority—a procedural device used when there is no dispute as to the material facts of the case—to MSPB. Benefits cited included a more efficient process; but negatives included the loss of a whistleblower's right to a hearing. Similarly, the specialists provided a mix of opinions about granting jurisdiction for cases to U.S. District Courts. A benefit cited was access to a jury trial, while a negative cited was the increased workload of the courts.

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Abbreviations

CSRA	Civil Service Reform Act of 1978
DHS	Department of Homeland Security
EEOC	Equal Employment Opportunity Commission
IRA	individual right of action
MSPB	Merit Systems Protection Board

OAA	otherwise appealable action
OGC	Office of the General Counsel
OIG	Office of the Inspector General
OSC	Office of Special Counsel
PPP	prohibited personnel practice
TSA	Transportation Security Administration
VA	Department of Veterans Affairs
VHA	Veterans Health Administration
WPEA	Whistleblower Protection Enhancement Act of 2012

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November 28, 2016

The Honorable Ron Johnson Chairman The Honorable Thomas R. Carper Ranking Member Committee on Homeland Security and Governmental Affairs United States Senate

The Honorable Jason Chaffetz Chairman The Honorable Elijah E. Cummings Ranking Member Committee on Oversight and Government Reform House of Representatives

Federal employee whistleblowers—individuals who report violations of law, or certain agency mismanagement or ethical violations—potentially help to safeguard the federal government against waste, fraud, and abuse, and their willingness to come forward may contribute to improvements in government operations. However, these whistleblowers also may risk reprisals from their agencies for their disclosures and may sometimes be demoted, reassigned, or fired as a result. Federal laws are in place to help protect federal employees from workplace reprisal for whistleblowing.¹ Over the years, the courts have narrowly interpreted these laws as to the type and recipient of the disclosure that qualifies for whistleblower protection.

The Whistleblower Protection Enhancement Act of 2012 (WPEA) amends federal personnel law to, among other things, clarify the breadth of disclosures that are afforded protection, expand the right to bring reprisal claims for certain protected activities, and enhance the remedies available to federal whistleblowers who have suffered retaliation.² WPEA also required, for the first time, the Merit Systems Protection Board (MSPB), an independent, quasi-judicial agency that serves as the

¹The whistleblower protections discussed in this report cover federal employees, former employees, and applicants for employment. We refer to all categories as employees for simplicity.

²Pub. L. No. 112-199, 126 Stat. 1465 (Nov. 27, 2012). In general, a “disclosure” means a formal or informal communication or transmission that an employee, former employee, or applicant for employment reasonably believes evidences violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2)(D). Protected activities include filing a complaint, appeal, or grievance for reprisal for whistleblowing; testifying or assisting someone else who files such a complaint, appeal or grievance; cooperating with or disclosing information to an inspector general or the Special Counsel; or refusing to obey an order that requires a violation of law. 5 U.S.C. § 2302(b)(9).

guardian of federal merit systems, to track and report information in its annual performance reports about the number of whistleblower reprisal appeals filed, as well as the outcome of such appeals.³ In addition, WPEA requires us to report on the implementation of the law.

Our objectives were to (1) describe changes in the number of whistleblower reprisal appeals filed with MSPB, as well as the outcome of appeals, since WPEA's effective date, including whether or not MSPB, the United States Court of Appeals for the Federal Circuit, or any other court determined the appeal allegations to be malicious or frivolous; (2) provide subject matter specialists' views about granting MSPB summary judgment authority for whistleblower cases; and (3) provide subject matter specialists' views about granting jurisdiction for some subset of whistleblower appeals, to be decided by a district court of the United States, and its potential impact on MSPB and the federal court system.

To address the first objective, we requested and obtained data from MSPB on all whistleblower reprisal appeals filed and all whistleblower reprisal appeals closed in fiscal years 2013 through 2015. This period includes the effective date of WPEA and continues through the end of fiscal year 2015. We also requested and obtained data from MSPB on whistleblower reprisal appeals filed during fiscal years 2011 and 2012 to identify changes, if any, in the number of whistleblower reprisal appeals filed before and after WPEA.⁴ We reviewed the data provided by MSPB and relevant MSPB documents, including data entry guidelines and annual reports, to help us further understand the data. We did a keyword search using Lexis Nexis to determine if the U.S. Court of Appeals for the Federal Circuit or any other appeals court had concluded that a whistleblower reprisal appeal from MSPB was "malicious" or "frivolous." To supplement the documentary evidence obtained, we interviewed MSPB officials regarding whistleblower reprisal appeals and the potential impact of WPEA. Although MSPB has jurisdiction for other appeals, we

³MSPB's mission is to protect the merit system principles and promote an effective federal workforce free of prohibited personnel practices. MSPB's Board Members, including the Chairman, Vice Chairman, and Board Member, are appointed by the President and confirmed by the Senate. The three Board Members serve overlapping, nonrenewable 7-year terms and they can only be removed for cause. No more than two of the three Board Members can be from the same political party. The Board Members' primary role is to adjudicate the cases brought to the Board.

⁴MSPB was not required to report out on whistleblower appeals data prior to fiscal year 2013.

evaluated only information related to the whistleblower reprisal appeal process.

To assess the reliability of the data on whistleblower reprisal appeals MSPB provided to us, we compared it to the whistleblower data MSPB reported in its annual performance reports. We identified various discrepancies which we discussed with MSPB staff and discuss in this report. We also reviewed related documentation and interviewed MSPB officials. We corrected the data for these discrepancies based on our discussions with MSPB staff before conducting our analysis. After making these adjustments, the whistleblower appeals data from MSPB were sufficiently reliable to provide a general indication of a change in the numbers of appeals received and closed post WPEA.

To address the second and third objectives, in July 2016 we conducted six focus groups made up of whistleblower protection subject matter specialists that included advocates from whistleblower advocacy organizations; representatives of federal agency labor relations, human capital, and legal offices; a national labor union representative; and private sector attorneys to obtain their views for and against granting MSPB summary judgment and for and against granting jurisdiction to U.S. District Courts for whistleblower cases. We then analyzed and summarized responses from focus group participants. To identify and select subject matter specialists, we relied on our own research, as well as suggestions from MSPB, the Office of Special Counsel (OSC), and the Equal Employment Opportunity Commission (EEOC). Additionally, we solicited input from MSPB and the Administrative Office of the U.S. Courts to obtain their opinions on how they might be impacted if Congress granted jurisdiction to the U.S. District Court for whistleblower cases.

We conducted this performance audit from January 2016 to November 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Civil Service Reform Act of 1978 (CSRA) provided the first whistleblower protections for disclosures of, among other things, violations of laws, mismanagement, or gross waste of funds for federal employees, former employees, and applicants for employment.⁵ The act established both MSPB and OSC and placed OSC within MSPB.⁶ OSC was tasked with investigating allegations of prohibited personnel practices (PPP), obtaining corrective actions for employees subjected to PPPs, and initiating disciplinary action against civilian government officials who commit PPPs, among other things.⁷

Thereafter, Congress passed the Whistleblower Protection Act of 1989 to strengthen protections for those who claim whistleblower retaliation.⁸ This act separated OSC from MSPB, making OSC an independent agency. The Whistleblower Protection Act also created the individual right of action (IRA), allowing whistleblowers to bring their appeals to MSPB after exhausting remedies at OSC. Congress further expanded whistleblower protections in 1994 when it made additional personnel actions subject to coverage and extending whistleblower protections to employees of government corporations and to employees in the Veterans Health Administration (VHA).⁹

On November 27, 2012, the President signed WPEA into law. WPEA

⁵Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

⁶CSRA replaced the Civil Service Commission with three new agencies: MSPB as the successor to the Commission; the Office of Personnel Management as the President's agent for federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee federal labor-management relations.

⁷OSC is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system by protecting federal employees and applicants from PPPs, especially reprisal for whistleblowing, and to provide an independent, secure channel for disclosure and resolution of wrongdoing in federal agencies. The "merit system" in federal employment refers to laws and regulations designed to ensure that personnel decisions, including hiring and discipline, are taken based on merit. OSC investigates allegations of reprisal and is authorized to seek corrective action to make a whistleblower whole and to initiate disciplinary action against civilian government officials who commit PPPs.

⁸Pub. L. No. 101-12, 103 Stat. 16 (Apr. 10, 1989).

⁹Pub. L. No. 103-424, 108 Stat. 4361 (Oct. 29, 1994).

- clarified the scope of protected whistleblowing under the Whistleblower Protection Act;
- expanded the ability to bring IRA appeals for certain protected activity;
- provided the authority to award compensatory damages;
- afforded whistleblower protections to all Transportation Security Administration (TSA) employees; and
- mandated broader outreach to inform federal employees of their whistleblower rights.

OSC and MSPB are the two primary agencies in the executive branch to which federal employees, former employees, or applicants for employment in the federal government go with whistleblower reprisal claims. OSC investigates PPP complaints with respect to a broad range of personnel actions, including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, and certain decisions concerning education or training. MSPB is an independent, quasi-judicial agency that serves the interests of prompt, procedurally simple dispute resolution. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies.

MSPB has jurisdiction over claims made by whistleblowers in two types of appeals—an Individual Right of Action (IRA) appeal and an Otherwise Appealable Action (OAA) appeal.¹⁰ A significant difference between the two types is in how they reach MSPB. In the first type of appeal—an IRA—the individual is subject to a personnel action, such as a reassignment with no reduction in pay or grade, and claims that the action was taken because of whistleblowing or other covered protected activity, but the action need not be one that is directly appealable to MSPB.¹¹ Examples of the personnel actions that can be raised in an IRA appeal include an appointment, a reassignment, and a performance appraisal. In

¹⁰MSPB also receives a third type of whistleblower case, an original jurisdiction whistleblower protection case, which occurs when OSC concludes that an agency has likely retaliated against an individual on the basis of the individual's protected disclosure of wrongdoing and OSC seeks to correct the agency's action. These cases are not within the scope of our mandate.

¹¹An employee who suffers an appealable adverse action and believes the action constitutes whistleblower reprisal has the option to file an appeal directly with MSPB, a grievance, or a complaint with OSC. The employee may only elect one of those available remedies. 5 U.S.C. § 7121(g). If the employee elects to file an OSC complaint, he or she may later have the option to file an IRA appeal.

this kind of case, the individual can appeal to MSPB only if he or she files a complaint with OSC first and OSC does not seek corrective action on the individual's behalf.¹² In the second kind of case—an OAA—the individual is subject to a personnel action that is directly appealable to MSPB, such as a removal, demotion, or suspension of more than 14 days, and the individual claims that the action was taken because of whistleblowing.¹³ In this kind of case, the individual may file an appeal directly with MSPB after the action has been taken.¹⁴ In such an appeal, if the employee proves that MSPB has jurisdiction over the appeal, then both the appealable matter and the claim of reprisal for whistleblowing will be reviewed.¹⁵

IRAs and OAAs must be filed with one of MSPB's regional or field offices.¹⁶ Once MSPB receives an appeal, it is then docketed in MSPB's Case Management System and assigned to an administrative judge who issues an acknowledgment that the appeal has been received, orders the agency to file a response to the appeal, and determines whether or not

¹²In an IRA, MSPB's review can only address whether the action was taken in reprisal for whistleblowing.

¹³MSPB reviews OAA appeals whether or not the individual alleges that the reprisal action was taken because of whistleblowing. Employees filing OAA appeals need not file a separate complaint to OSC first if the employee was affected by a personnel action that is directly appealable to MSPB.

¹⁴In an OAA, MSPB can address the merits of the agency's action, including whether the agency proved its charge and whether the agency's chosen penalty is appropriate. In addition, MSPB can address a number of affirmative defenses other than whistleblower reprisal in an OAA, such as discrimination.

¹⁵Many appeals that are processed as OAAs involve actions that are not in fact appealable to MSPB (e.g., the termination of a probationary employee, which is appealable only in very limited circumstances). If the challenged action is not directly appealable or MSPB lacks jurisdiction for some other reason, the appeal will be dismissed and MSPB will not consider any claim of whistleblower reprisal.

¹⁶MSPB's regulations provide for the filing of appeals "by commercial or personal delivery, by facsimile, by mail, or by electronic filing." 5 C.F.R. § 1201.22(d). MSPB's field and regional offices include: (1) Atlanta Regional Office; (2) Central Regional Office; (3) Dallas Regional Office; (4) Denver Field Office; (5) New York Field Office; (6) Northeastern Regional Office; (7) Washington D.C. Regional Office; and (8) Western Regional Office.

MSPB has jurisdiction over the appeal.¹⁷ If the administrative judge determines that MSPB has jurisdiction, the administrative judge will then conduct a hearing (if requested by the employee), consider the evidence, and issue an initial decision. That decision may be appealed to the three-Member Board of MSPB on a petition for review. According to MSPB, the Board members review initial decisions in much the same way that appellate courts review the decisions of trial courts. Thus, petition for review outcomes are the decisions of the Board and it may issue a decision that affirms, reverses, modifies, or vacates, in whole or in part, the initial decision. The Board may also send back the appeal to the administrative judge for further review. An employee also may appeal either the initial decision (which becomes the final decision if neither party files a timely petition for review), or the petition for review decision, to a U.S. Court of Appeals.¹⁸

¹⁷Through its adjudicatory mission, MSPB rules upon cases within its jurisdiction and can order corrective action to undo the effect of a PPP. However, MSPB does not automatically have jurisdiction over all allegations that a PPP has occurred. For IRAs, in order to establish jurisdiction, the employee whistleblower must make nonfrivolous allegations that he or she made a protected disclosure and that the disclosure was a contributing factor in the personnel action at issue. The employee whistleblower must also show that he or she exhausted his or her administrative remedies before OSC.

¹⁸Generally, the U.S. Court of Appeals for the Federal Circuit has jurisdiction over appeals from MSPB decisions. 28 U.S.C. § 1295(a)(9). However, WPEA created a pilot program that allowed appeals from certain MSPB decisions to be filed in the Federal Circuit “or any court of appeals of competent jurisdiction” during the 2-year period following the effective date of the act. Congress subsequently extended that pilot program for an additional 3 years. Pub. L. No. 113-170, 128 Stat. 1894 (Sept. 26, 2014). Thus, the pilot program is currently set to expire in December 2017. 5 U.S.C. § 7703(b)(1)(B).

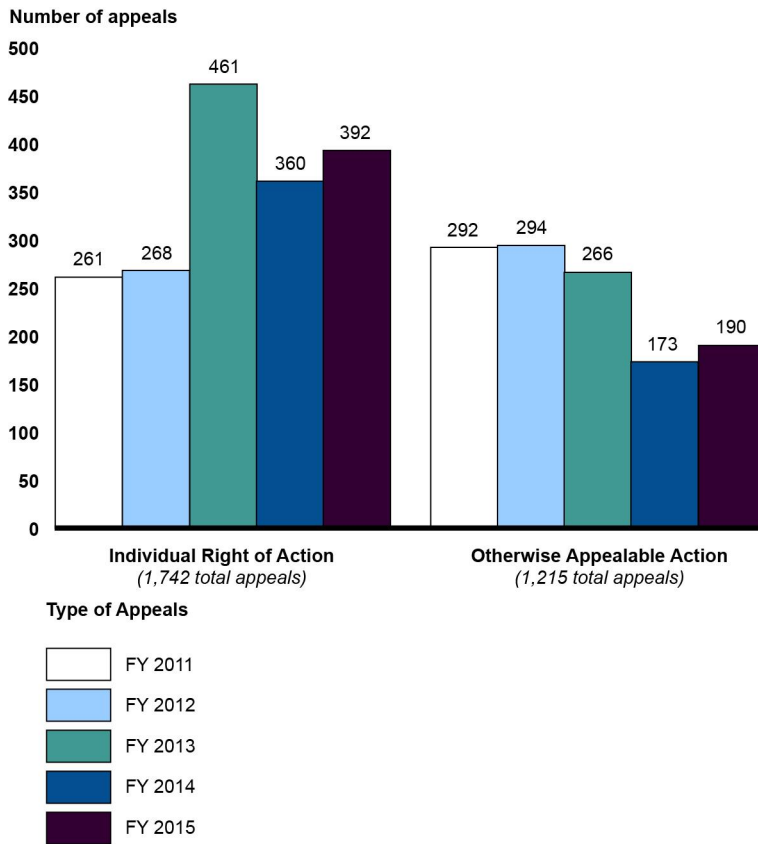
MSPB's Data Show a Higher Annual Number of Whistleblower Appeals Post WPEA; but Weaknesses Exist in MSPB's Recording and Reporting Processes

MSPB Data Show a Higher Annual Number of Post-WPEA IRA Appeals, but a Lower Annual Number of OAA Appeals

MSPB data show the agency received a total of 1,213 IRA appeals for whistleblower reprisal claims for fiscal years 2013 through 2015. As shown in figure 1, our analysis of MSPB data shows the agency received a higher number of IRA appeals in the 3 fiscal years after WPEA was enacted than in the 2 years prior to WPEA. MSPB data show that it received 461 IRA appeals in fiscal year 2013, 360 in fiscal year 2014, and 392 in fiscal year 2015.¹⁹ MSPB data show that it received 261 IRA appeals in fiscal year 2011 and 268 IRA appeals in fiscal year 2012. As discussed earlier, IRA cases often involve personnel actions that are not directly appealable to MSPB, thus employee whistleblowers can only bring an IRA appeal to MSPB if they first filed a complaint with OSC and OSC did not seek corrective action on their behalf.

¹⁹Data for fiscal year 2013 include appeals that MSPB received prior to the effective date of WPEA because the fiscal year started on October 1, 2012, and WPEA became effective for most provisions on December 27, 2012.

Figure 1: Annual Numbers of Two Kinds of Whistleblower Appeals Before and After Enactment of Whistleblower Protection Enhancement Act of 2012



Legend: FY = fiscal year
 Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Conversely, MSPB’s data show that it received lower annual numbers of OAA appeals with whistleblower reprisal claims post WPEA. MSPB data show the agency received a total of 629 OAA appeals for fiscal years 2013 through 2015. While WPEA clarified the scope of protected disclosures and expanded the individual right of action appeal for certain other protected activities, the act did not alter MSPB’s jurisdiction over OAAs. As described earlier, for an OAA, the employee alleges whistleblowing as an affirmative defense to the adverse agency action, but the action was one that could be appealed to MSPB even without whistleblowing. Therefore, WPEA may not have necessarily impacted the number of OAAs filed with MSPB. MSPB’s data show it received 266 OAA appeals in fiscal year 2013, 173 in fiscal year 2014, and 190 in fiscal year 2015, compared to 292 in fiscal year 2011 and 294 in fiscal year 2012.

Several Aspects of WPEA May Account for Changes in the Number of Whistleblower Appeals

As previously described, WPEA, among other things, clarified the scope of protected disclosures, afforded whistleblower protections to all Transportation Security Administration (TSA) employees, expanded IRA appeals rights, and mandated broader outreach to inform federal employees of their whistleblower rights. Each of these may have contributed to a higher number of appeals filed. For example, earlier court decisions had determined that the following disclosures were not protected: disclosures made to the alleged wrongdoer, disclosures made as part of an employee's normal job duties, and disclosures of information already known. WPEA clarified that each of these disclosures does not lose whistleblower protection due to the nature of the disclosure. In addition, WPEA extended whistleblower protections to the approximately 60,000 TSA employees who were not previously afforded whistleblower protection.²⁰ WPEA also expanded the IRA for reprisals for certain other protected activities, including filing a whistleblower appeal, cooperating with an inspector general or OSC investigation, or refusing to obey an order that would require the employee to violate a law.²¹ Another possible factor for the higher number of appeals may be that employees are more knowledgeable post WPEA about the whistleblower protection process because of the requirement under WPEA for each agency to designate a whistleblower protection ombudsman to educate agency employees about prohibitions on retaliation, and rights and remedies against retaliation, for protected disclosures.

²⁰Although WPEA marked the first time TSA employees were granted the right to file an IRA appeal by statute, TSA and MSPB had previously entered into a memorandum of understanding that allowed such appeals to be filed after exhaustion before OSC. See *Aquino v. Department of Homeland Security*, 2014 M.S.P.B. 21, ¶ 12 (Mar. 26, 2014).

²¹WPEA expanded the scope of IRA appeals to include individuals who claimed reprisal for activities such as filing a whistleblower appeal or cooperating with a whistleblower investigation (5 U.S.C. § 2302(b)(9)). However, we were unable to separate out appeals received claiming reprisal for other protected activities (section 2302(b)(9)) from appeals claiming reprisal for whistleblowing (or disclosure of information, section 2302(b)(8)). According to MSPB officials, the vast majority of IRA appeals received since WPEA's enactment claiming a violation of section 2302(b)(9) also included a whistleblower reprisal claim under section 2302(b)(8). As a result, MSPB has not tracked detailed information on claims of section 2302(b)(9). According to MSPB officials, there have been fewer than 10 IRA appeals filed since the start of fiscal year 2013 in which only a section 2302(b)(9) claim is raised.

According to MSPB officials, MSPB is not in a position to know why the number of OAAs filed with MSPB decreased post WPEA; however they provided a number of factors that could have contributed to the lower numbers. They told us that agencies that furloughed large numbers of employees as a consequence of government sequestration in fiscal year 2013 were likely devoting significant resources to defending furlough appeals before MSPB during fiscal year 2014.²² MSPB officials explained that some agencies may have taken fewer adverse actions during fiscal year 2014 in light of the resources devoted to furlough appeals. MSPB officials indicated that the government-wide shutdown in October 2013, and the resulting disruption to agencies' operations, may have also caused some agencies to take fewer adverse actions during fiscal year 2014. The officials said that another possible explanation for the reduction in OAAs is that employees with MSPB appeal rights might have elected to challenge appealable actions in other ways, such as by filing a grievance or an equal employment opportunity or OSC complaint. According to MSPB officials, such matters could still eventually come before MSPB. For example, if the employee files a complaint with OSC, the employee may file with MSPB once OSC has terminated its investigation or 120 days after the complaint was filed with OSC if OSC has not notified the employee that it will seek corrective action.

Ten Agencies Accounted for More than One-Third of the Total Number of IRA and OAA Appeals Filed from Fiscal Years 2013 through 2015

Employees from 10 agencies accounted for more than one-third of the IRA and OAA appeals filed with MSPB during fiscal years 2013 through 2015. As shown in table 1, employees from these 10 agencies filed 636 of the total 1,842 IRA and OAA appeals received by MSPB during this period. Employees in the Department of Veterans Affairs' (VA) Veterans Health Administration (VHA) filed the most whistleblower appeals with MSPB, a total of 290 OAA and IRA appeals combined, followed by employees at: VA (excluding VHA) (54 appeals); the Department of the Army's Army Medical Command (50 appeals); DHS's Bureau of

²²On March 1, 2013, the President ordered a sequestration across federal government accounts. Federal agencies were required to reduce discretionary appropriations and direct spending (also referred to as mandatory spending) by \$80.5 billion. This had a wide range of effects on federal agency operations and on services to the public. According to MSPB officials, the furlough appeals primarily affected DOD, not other large agencies, such as DHS and VA.

Immigration and Customs Enforcement (40 appeals); DHS’s TSA (38 appeals); and the Social Security Administration (38 appeals).

Table 1: Agencies from Which the Merit Systems Protection Board Received the Highest Number of Total Whistleblower Reprisal Appeals for Fiscal Years 2013 through 2015

Department and agency		Total number of appeals received for fiscal years 2013 through 2015
1	Department of Veterans Affairs/Veterans Health Administration (VHA)	290
2	Department of Veterans Affairs (excluding VHA)	54
3	Department of the Army/Army Medical Command	50
4	Department of Homeland Security (DHS)/Bureau of Immigration and Customs Enforcement	40
5	DHS/Transportation Security Administration	38
	Social Security Administration	38
7	DHS/Bureau of Customs and Border Protection	34
8	Department of Justice/Bureau of Prisons/Federal Prison System	33
9	Department of Transportation/Federal Aviation Administration	30
10	Department of Health and Human Services/Indian Health Service	29
Total of 10 agencies		636
All other agencies		1,206
Total number of appeals received		1,842

Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Note: Data in this table reflects appeals received after WPEA’s effective date of Dec. 27, 2012.

More Than Half of All Whistleblower Appeals in Fiscal Year 2013 through Fiscal Year 2015 Were Closed Without Adjudication on the Merits

MSPB data show that the majority of IRA appeals closed from fiscal years 2013 through 2015 were dismissed, settled, or withdrawn and not adjudicated on the merits (see sidebars). As shown in figure 2, nearly half of these appeals—41 percent overall—were dismissed because MSPB determined either the appeal was untimely or the action alleged by the employee whistleblower was outside MSPB’s jurisdiction. For example, an administrative judge would dismiss the appeal if the employee

Dismissals

The Merit Systems Protection Board (MSPB) uses two categories of dismissal for coding purposes in individual right of action (IRA) appeals: (1) dismissal for timeliness/res judicata/jurisdiction and (2) dismissal for failure to exhaust at the Office of Special Counsel (OSC). While failure to exhaust is a jurisdictional requirement, MSPB applies a separate level of coding to distinguish it from other types of jurisdictional dismissals.

The first category includes three separate reasons for dismissal:

- **Timeliness**—An IRA appeal should generally be dismissed on timeliness grounds when the individual files an IRA appeal more than 65 days after OSC issues a letter closing out its investigation into the complaint.
- **Res judicata**—Once an appeal has been decided, the same issues or an issue arising from that appeal cannot be contested again.
- **Jurisdiction**—Generally, to establish jurisdiction over an IRA appeal regarding whistleblowing, an employee whistleblower must prove that he or she exhausted his or her administrative remedies before OSC and make nonfrivolous allegations that (1) he or she engaged in whistleblowing activity by making a protected disclosure and (2) the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action.

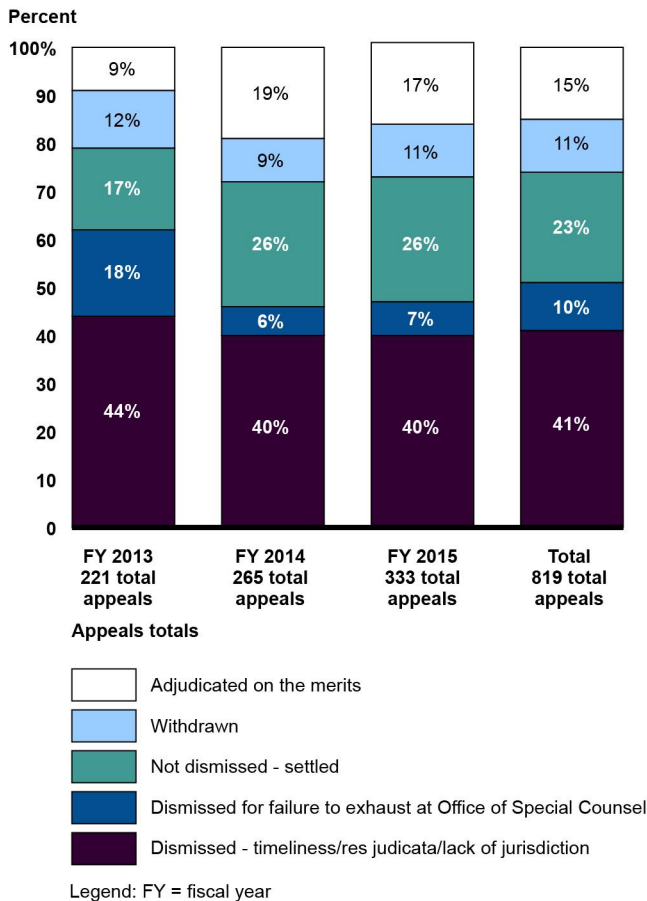
The second category, dismissal for failure to exhaust at OSC, applies when

- the employee whistleblower has not filed a complaint with OSC before filing an MSPB appeal;
- OSC has not terminated the investigation of the complaint; or
- the individual files an appeal before OSC has had 120 days to investigate the complaint.

Source: GAO. | GAO-17-110

whistleblower alleges reprisal because of a disclosure of a violation of agency policy, as this is not a protected disclosure under section 2302. Only a small percentage of IRA appeals—15 percent of the total appeals closed during the 3 fiscal years—advanced further in the appeals process where the cases were adjudicated on the merits, meaning the employee had the opportunity to present his or her case to the administrative judge.

Figure 2: Majority of Individual Right of Action Appeals Were Closed Before Adjudication on the Merits from Fiscal Years 2013 through 2015



Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Note: For purposes of the report, we are grouping the following four categories together as being closed before moving to a hearing: (1) dismissed—timeliness/res judicata/lack of jurisdiction; (2) dismissed for failure to exhaust at OSC; (3) not dismissed—settled; and (4) withdrawn.

Withdrawn

Employee whistleblowers have a right to withdraw their individual right of action (IRA) appeals after they have been received for whatever reason. If, however, the administrative judge dismisses the appeal with prejudice, the employee whistleblower will not be allowed to refile the appeal at a later date.

Settled

According to MSPB officials, the agency encourages employees filing appeals to settle with their respective agencies before the case goes to a hearing. Parties may settle for many different reasons. Generally, officials cannot assess why certain appeals settle and others do not.

MSPB officials also say that the agency has trained and certified mediators as part of its free Mediation Appeals Program (MAP). MAP facilitates a discussion between the employee and his or her respective agency to help identify issues to resolve disputes. Such steps may help settle the appeal quickly, economically, and to the benefit of both parties. However, both parties must agree to its use before the appeal will be accepted for MAP. Also, both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the guidance of the mediator. The mediator plays no role in deciding the appeal should an accord not be reached.

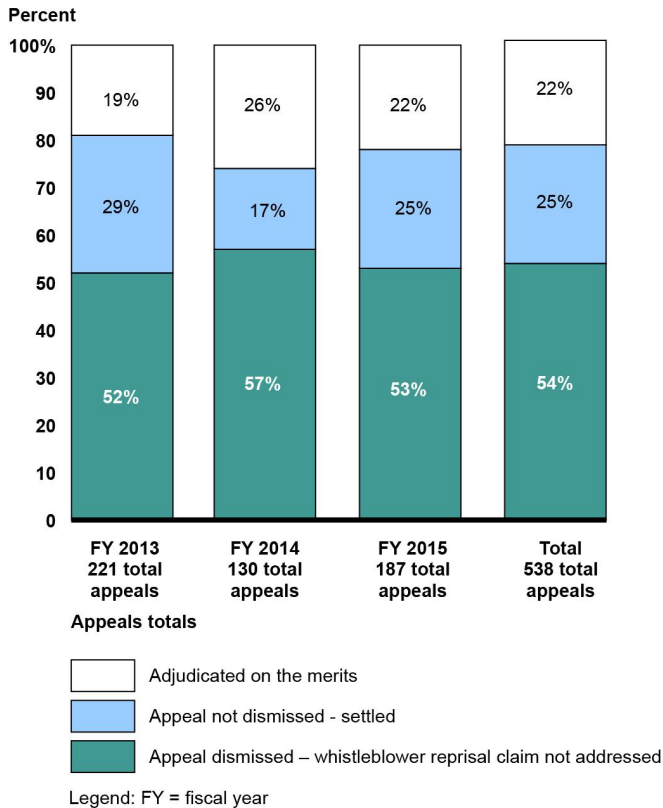
Source: GAO. | GAO-17-110

Of the 221 IRA appeals closed during fiscal year 2013, a total of 137 appeals (or 62 percent) were dismissed.²³ Of the remaining 84 appeals, 26 (or 12 percent) were withdrawn by the employee, and 38 appeals (or 17 percent) were settled between the employee and the agency. The remaining 20 appeals (or 9 percent) were adjudicated by MSPB on the merits of the appeal.

More than half of all OAA appeals received by MSPB during fiscal years 2013 through 2015 were dismissed (see figure 3). According to MSPB officials, OAA appeals are dismissed without addressing the merits of the whistleblower claim for a variety of reasons including the appeal falling outside of MSPB's jurisdiction, timeliness, or because the individual made a binding election to proceed with his or her claim in another manner, such as filing a grievance under a negotiated grievance procedure.

²³In addition, the appeals closed by MSPB each fiscal year do not necessarily include the same universe of appeals received by MSPB in each fiscal year. For example, an IRA appeal may be received by MSPB in fiscal year 2013 but may not be closed until fiscal year 2014. Also, of the 137 appeals dismissed in fiscal year 2013, 40 were dismissed for failure to exhaust. Therefore, the employee could ultimately file a new appeal on the same personnel action after meeting the exhaustion requirement.

Figure 3: Merit Systems Protection Board Dismissed More Than Half of All Otherwise Appealable Action Appeals from Fiscal Years 2013 through 2015



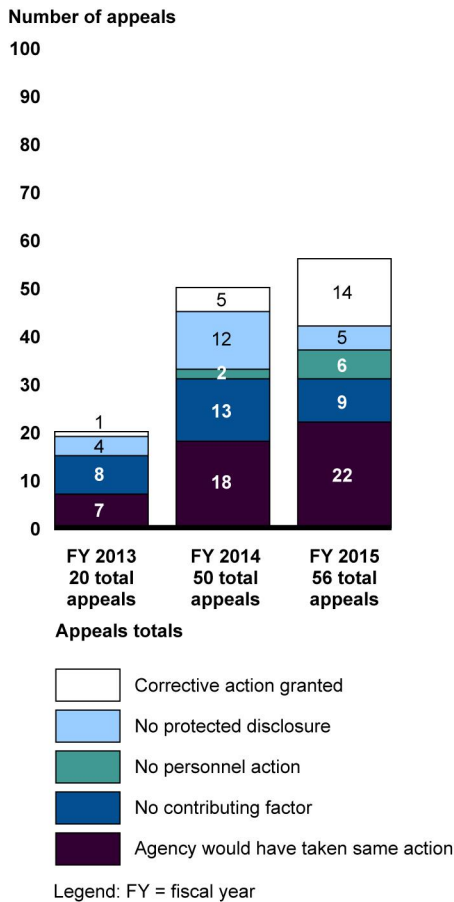
Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Number of IRA Appeals Granted Corrective Action by MSPB Increased from Fiscal Year 2013 through Fiscal Year 2015

MSPB data show that the number of IRA appeals increased that were timely, were within MSPB’s jurisdiction, and were neither withdrawn nor settled by the employee, and were therefore adjudicated on the merits. In fiscal year 2013, 20 IRA appeals were adjudicated on the merits (see figure 4). This number increased to 50 IRA appeals in fiscal year 2014 and 56 IRA appeals in fiscal year 2015. MSPB officials stated that, post WPEA, it is now more likely that an IRA appeal would be adjudicated on the merits because WPEA expanded through clarification the universe of disclosures that were considered protected. Additionally, according to MSPB officials, under the Board’s decision in *Day v. DHS*, 2013 M.S.P.B.

49, appeals pending on the effective date of the act that would have been dismissed prior to WPEA were ruled to be within MSPB's jurisdiction.

Figure 4: Individual Right of Action Appeals Where Merit Systems Protection Board Granted Corrective Actions Increased in Fiscal Years 2013 through 2015



Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Corrective action was granted in 1 IRA appeal in fiscal year 2013. This number increased to 5 IRA appeals in fiscal year 2014, and 14 IRA appeals in fiscal year 2015. MSPB's data do not identify what specific corrective action was granted for each appeal.²⁴ Corrective action is ordered in any appeal if the employee has demonstrated that (1) he or

²⁴MSPB officials stated that although the specific corrective action granted in an IRA appeal is not tracked through MSPB's Case Management System, that information is available in MSPB's written decisions granting such relief.

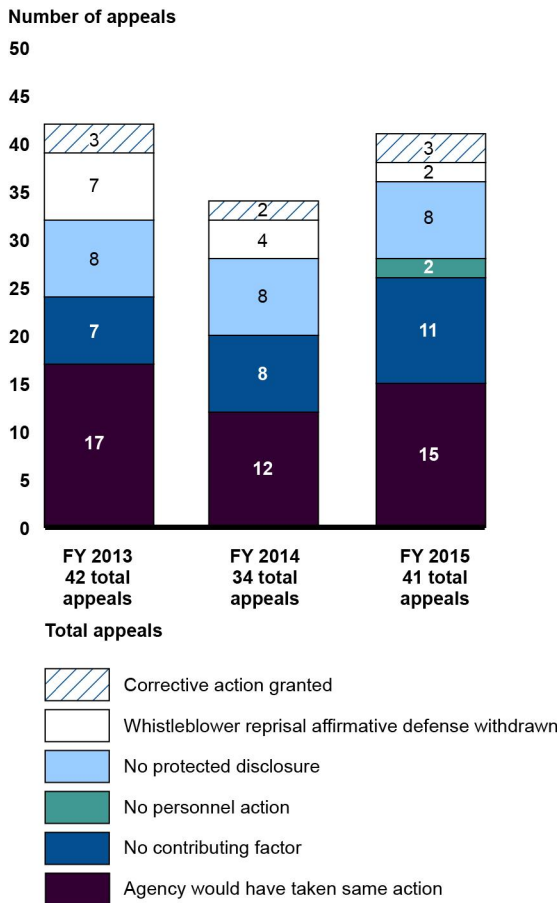
she made a protected disclosure; (2) the agency has taken or threatened to take a personnel action against him or her; and (3) his or her protected disclosure was a contributing factor in the personnel action. All three elements must be present for MSPB to find for corrective action. MSPB will not order corrective action if, after a finding that a protected disclosure was a contributing factor, the agency demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.²⁵ Corrective action for a PPP violation may include reinstatement, back pay (lost wages), medical costs, compensatory damages, any other reasonable and foreseeable consequential damages, and attorneys' fees and costs.²⁶

MSPB granted corrective action to few OAA appeals that were adjudicated on the merits during fiscal years 2013 through 2015 (see figure 5). In approximately one-third of all OAA appeals that were adjudicated on the merits, MSPB determined that the agency would have taken the same action.

²⁵5 U.S.C. § 1221(e)(2).

²⁶Prior to the enactment of WPEA, MSPB was not authorized to award compensatory damages for PPP violations. In *King v. Dep't of Air Force*, MSPB determined the compensatory damages provision in WPEA does not apply retroactively. 2013 M.S.P.B. 62 (Aug. 14, 2013).

Figure 5: Merit Systems Protection Board Granted Corrective Action in Few Otherwise Appealable Action Appeals from Fiscal Years 2013 through 2015



Source: GAO analysis of Merit Systems Protection Board data. | GAO-17-110

Neither MSPB nor Other Courts Specified Whether Whistleblower Reprisal Allegations Were Deemed Malicious or Frivolous

We did not identify any cases where MSPB or any courts determined the allegations of reprisal in the appeals to be malicious or frivolous.²⁷

²⁷For purposes of this report, we are defining “malicious” as the filing of an appeal without just cause or excuse and “frivolous” as an appeal that lacks any legal basis and not reasonably purposeful or serious.

Generally, MSPB, the Federal Circuit, and other courts do not make determinations on the intent, or the reason for, an employee filing a whistleblower claim. MSPB officials told us that because administrative judges do not use the term “malicious,” it would be unlikely that we would find the term used in appeals’ files or outcomes.

Generally, to establish jurisdiction over an IRA appeal regarding whistleblowing, an employee whistleblower must prove that he or she exhausted his or her administrative remedies before OSC and make nonfrivolous allegations that (1) he or she engaged in whistleblowing activity by making a protected disclosure and (2) the disclosure was a contributing factor in the agency’s decision to take or fail to take a personnel action. If a whistleblower appeal were to be dismissed for lack of jurisdiction, one of the potential reasons for dismissal could be because the individual was unable to make a nonfrivolous allegation that he or she made a protected disclosure or that the disclosure was a contributing factor in a personnel action.²⁸ However, MSPB officials stated that dismissing an appeal on this basis cannot be interpreted as an affirmative finding that the claim was determined frivolous. Moreover, according to MSPB officials, MSPB does not track or maintain such information on potentially frivolous appeals.

MSPB Has a Process for Capturing Whistleblower Appeals Data; However, Recording and Reporting Errors Occurred

As previously stated, WPEA required MSPB for the first time to include whistleblower appeals data in its annual performance reports. According to the act, each report should include, among other things, the number of appeals received in the regional and field offices and the outcomes decided. According to MSPB officials, the agency implemented a number of changes in reporting in response to WPEA. For example, MSPB created a standard form for appeals that could be used for data collection throughout its eight regional and field offices. Further, MSPB began collecting more specific information about the outcomes of whistleblower

²⁸MSPB’s regulations define “nonfrivolous allegation” as “an assertion that, if proven, could establish the matter at issue” and explain that an allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that is (1) more than conclusory; (2) plausible on its face; and (3) material to the legal issues in the appeal. 5 C.F.R. § 1201.4(s).

appeals post WPEA. Prior to WPEA, for example, MSPB's Case Management System only captured that a whistleblower reprisal claim was not found in an IRA appeal. So, the appeal was adjudicated on the merits, but without any specific information related to the analysis of the reprisal issue. Post WPEA, MSPB changed its Case Management System and began capturing additional information about why corrective action was not granted in an IRA appeal adjudicated on the merits. This includes "no protected disclosure found," "no contributing factor," or "agency would have taken same action."

We found differences between the reported data in MSPB's annual performance reports and the whistleblower data MSPB provided to us. In some cases, the differences between the two sets of data numbered a few appeals. However, other differences in the numbers were as much as 43 for IRAs received in fiscal year 2013 (MSPB reported 418 in its annual performance reports, compared to 461 in the data it provided to us) and 64 for IRAs dismissed for timeliness/res judicata/lack of jurisdiction in fiscal year 2013 (MSPB reported 161 in its annual performance reports, compared to 97 in the data it reported to us). According to MSPB officials, in some cases appeals were reported under more than one outcome due to human error and limitations in the data coding that resulted in over reporting of appeals closed. In addition, MSPB officials told us the agency did not save its original queries or datasets used to identify appeals data received and closed for fiscal year 2013. MSPB recreated these queries upon our request.²⁹

MSPB officials stated that changes to its Case Management System and new data entry procedures are communicated routinely to appropriate staff, typically through e-mail and in-person and virtual meetings. MSPB officials told us that administrative judges were provided additional guidance on issue coding post WPEA; however, as of September 2016, MSPB had not updated its Case Management System data entry user guide in response to WPEA's reporting requirements and changes in the required elements of data reporting that may affect data entry. The user guide, which outlines how appeals should be added and updated, was

²⁹MSPB officials said the discrepancies were due to changes in a small amount of the data after each annual performance report was published. For example, an appeal that originally contained no whistleblowing reprisal claim when received—and therefore not counted in MSPB's annual performance report totals—may have turned into a whistleblowing reprisal case at a later point in the adjudication and after the close of the fiscal year.

last issued in May 2004. Internal controls dictate that if there is a significant change in an entity's process, management should review this process in a timely manner after the change to determine that the control activities are designed and implemented appropriately.³⁰ Internal control standards also dictate that management should periodically review policies, procedures, and related control activities for continued relevance and effectiveness in achieving the entity's objectives or addressing related risks.³¹ By reviewing and updating its data entry user guide for whistleblower appeals, MSPB may be able to more quickly identify potential coding errors and provide appropriate guidance.

In reviewing the data provided by MSPB, we identified 156 separate whistleblower appeals that were reported under more than one outcome. After reviewing the duplicate entries identified by us, MSPB was able to identify the single correct outcome for 145 of the 156 cases, and those 145 cases were therefore included in the numbers we analyzed.³² MSPB officials indicated that the remaining duplicate entries were the result of either incorrect coding or unusual outcomes that did not fit comfortably within any of the enumerated categories. MSPB officials therefore recommended that those cases not be used for reporting purposes. We also identified a total of 364 cases that MSPB reported as closed but that were not included in any of the reported datasets for cases received. MSPB reviewed each of these cases and found that many of them were not reported as received because they had been received prior to fiscal year 2011, the first year for which we requested data. However, MSPB also found approximately 90 initial appeals that had not been reported. Those cases have now been added to the appropriate dataset. Internal

³⁰GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

³¹[GAO-14-704G](#).

³²Specifically, MSPB identified the following explanations for duplicate entries: (1) IRA appeals that were correctly reported as dismissed for failure to exhaust at OSC, but that were also reported as being dismissed for timeliness/res judicata/lack of jurisdiction (72 cases); (2) IRA appeals that were correctly reported as dismissed as withdrawn, but that were also reported as being dismissed for timeliness/res judicata/lack of jurisdiction (24 cases); (3) OAA appeals that were withdrawn in their entirety and were therefore correctly reported as cases in which the appeal was dismissed and the whistleblower reprisal claim was not addressed, but that were also reported as cases in which the whistleblower reprisal claim itself was withdrawn (40 cases); (4) cases (both IRA and OAA) in which MSPB correctly reported the outcome of the initial appeal before the administrative judge, but also incorrectly reported the outcome of the petition for review before the members of the Board (9 cases).

controls state that management should process data into information and then evaluate the processed information so that it is quality information.³³ By developing a process to identify data discrepancies or other anomalies in its data queries and the resulting datasets, MSPB may be able to quickly identify weaknesses overall in its data entry process allowing the agency to more accurately report the required appeals information. Congress relies on MSPB's annual reports on the number of appeals received and the outcome of appeals alleging violations of whistleblower protection laws to help examine WPEA's effectiveness and to identify unintended consequences of the legislation. MSPB, with improved reporting processes, has an opportunity to better assist Congress.

³³[GAO-14-704G](#).

Subject Matter Specialists Said Granting MSPB Summary Judgment Authority Could Create Efficiencies, but Could Also Deny Employee Whistleblowers' Right to a Hearing

Generally, the subject matter specialists who participated in our focus groups had mixed views as to whether MSPB's authority should be expanded. Some strongly supported expanding MSPB's authority, while others strongly opposed it. Focus group participants said that granting MSPB summary judgment may be advantageous for involved agencies and MSPB because greater efficiencies may be gained (see sidebar). However, in doing so, employee whistleblowers could lose their right to a hearing, which some participants said represents a disadvantage to employee whistleblowers.

Focus group participants in favor of summary judgment for MSPB stated that it would be advantageous for involved agencies and MSPB because it would create greater efficiencies. They said that involved agencies would not have to engage in an exhaustive, extensive process when the facts do not warrant it if MSPB had summary judgment authority. One participant stated that having summary judgment would separate valid complaints from meritless complaints that may not have any facts in dispute, such as employees who are shielding themselves from misconduct they actually committed. Another participant said that involved agencies would delay making settlement decisions until summary judgment rulings were made instead of currently settling cases agencies deemed meritless to save agency resources.

Participants also told us that MSPB could gain greater efficiencies from summary judgment because it could potentially decrease the number of appeals for which administrative judges would conduct hearings, thus allowing administrative judges to issue decisions on additional appeals, reducing potential backlogs, and resolving cases sooner. As a result, MSPB could conserve time and resources in the long term. One participant proposed a 5-year pilot to determine and measure the efficiency of summary judgment on affected parties.

On the other hand, focus group participants opposing summary judgment for MSPB said that a motion for summary judgment may not resolve whistleblower cases any faster because it would require more discovery,

What is summary judgment?

Summary judgment authority is a procedural device used when there is no dispute as to the material facts of the case, and a party is entitled to judgment as a matter of law and the responsibility of the court.

Who has summary judgment authority?

Other federal adjudicatory bodies, such as the Equal Employment Opportunity Commission (EEOC) and the Federal Labor Relations Authority, have summary judgment authority. According to EEOC officials we met with, summary judgment is frequently used at EEOC as a vetting process to determine whether or not a hearing will be held after the record has been developed. They also stated that summary judgment is used as a case management tool and its advantages include eliminating the need for a hearing.

Source: GAO. | GAO-17-110

depositions, and documents to establish the disputed facts thereby creating more prehearing litigation work.³⁴ In addition, they said that while MSPB's current caseload may decrease in the short term, MSPB may spend more time dealing with appeals of unfavorable summary judgment decisions. They explained that this could lead to prolonged litigation, thereby eliminating any potential efficiency gained by MSPB. Participants also discussed MSPB's ability to dismiss cases under its jurisdictional test, noting that this process is like a summary judgment review. However, one participant distinguished MSPB's current jurisdictional test from summary judgment because the jurisdictional test only involves the whistleblower, not the agency, and only reviews whether the whistleblower has exhausted his or her administrative remedies and can establish the jurisdictional requirements for MSPB review. Three participants pointed out the small number of appeals that are currently adjudicated on the merits as an example of MSPB's current efficiency in using its jurisdictional test. Adding summary judgment authority to MSPB, according to another participant, would not only be duplicative but would also create two barriers for a whistleblower's case to move forward.

Focus group participants not in favor of granting summary judgment to MSPB also stated that doing so could unfairly erode employee whistleblowers' right to a hearing. They explained that the procedural nature of responding to a summary judgment motion may include legal technicalities that employee whistleblowers, who choose to represent themselves without legal counsel, may not understand. Specifically, they stated that summary judgment may be too complicated a legal tactic to master for the average employee whistleblower, who may be confused about the burden needed to overcome a summary judgment motion. For example, employee whistleblowers may lack legal expertise to properly complete required paperwork to address the motion for summary judgment. Conversely, agency attorneys who represent the involved agencies' position in whistleblower appeals may be better positioned to draft sophisticated briefs and well-prepared affidavits to which employee whistleblowers would be unable to respond—a scenario that focus group participants believe favors involved agencies.

One participant said that involved agencies already win a majority of the appeals at MSPB, and if summary judgment were granted, the odds of

³⁴Discovery documentation primarily includes depositions of parties and potential witnesses, written interrogatories (questions and answers written under oath), written requests for admissions of fact, and requests for production of documents.

employee whistleblowers prevailing against an agency's motion would be nonexistent. The participant stated that the current process is already an uneven playing field. Another participant explained that proving retaliatory intent by the agency for whistleblowing may be too difficult to achieve where the employee whistleblower must rely on submitting a brief and documents to support the employee's allegations rather than a hearing. In addition, focus group participants cited the additional costs of conducting discovery as another potential disadvantage for employee whistleblowers. Conducting discovery includes gathering documentation and conducting depositions to establish disputed facts in order to draft motions required for summary judgment.

Subject Matter Specialists Said Granting U.S. District Courts Jurisdiction Would Increase Overall Caseload, but Would Also Aid Employee Whistleblowers

Focus group participants generally agreed that it would be beneficial for employee whistleblowers if U.S. District Courts were granted jurisdiction for whistleblower cases. They said that this would give whistleblowers access to a jury trial similar to nonfederal employee whistleblowers.³⁵ One participant pointed out that a double standard already exists because corporate whistleblowers can go to district court while federal employee whistleblowers are unable to do so. Another participant stated that it would be a good idea to get federal employee whistleblower cases into district court because the only option typically available to get into federal court is on appeal to the U.S. Court of Appeals for the Federal Circuit, which this participant said overwhelmingly upholds the Board's decisions.³⁶ This participant also said that it would be more feasible for federal employees to go to district court for a full review of their claims rather than to appeal to the U.S. Court of Appeals for the Federal Circuit,

³⁵Examples of nonfederal employee whistleblowers cited by focus group participants include private sector employees covered under Sarbanes-Oxley, as well as state and local employees who have access to jury trials for First Amendment violations. Specifically, the Sarbanes-Oxley Act of 2002 contains protections for corporate whistleblowers from retaliation for reporting alleged mail, wire, bank, or securities fraud; violations of Security and Exchange Commission rules and regulations; or violations of federal law relating to fraud against shareholders.

³⁶WPEA temporarily permitted whistleblower reprisal appeals at all U.S. Circuit Courts.

which has a limited scope of review.³⁷ Another participant explained that adding additional procedural options for employee whistleblowers, such as district court, could help strengthen the law.

While it may be advantageous for employee whistleblowers, participants also pointed out that allowing U.S. District Courts this jurisdiction could be a disadvantage to those courts because of the increased overall workload that would result from having jurisdiction for whistleblower cases. However, views on the extent to which the court's workload might increase were mixed. Participants in favor of district court jurisdiction stated that there would be a negligible impact because not all employee whistleblowers would exercise their right to court for a number of reasons. For instance, they said the relatively high cost of filing and any kick out provisions that may require employee whistleblowers to wait before filing in district court may keep the burden on courts low.³⁸ Two participants said that the district court would most likely only be used for high-profile or complex, in-depth proceedings involving scientific questions or technical cases, and not for all types of whistleblower reprisals. Another participant said that while district court is slower in resolving cases, employee whistleblowers could get injunctive relief.³⁹ Participants against district court jurisdiction generally concurred that the current MSPB process is sufficient and efficient and provides employee whistleblowers with an opportunity for a hearing. They stated that adding the district court as an option would undermine efficiency because it would create more backlogs for an already overburdened court system.

Another potential disadvantage cited by focus group participants against granting jurisdiction to U.S. District Courts was that involved agencies would have to relinquish control over their cases. Participants told us that the responsibility for appeals cases would shift from the involved

³⁷The U.S. Court of Appeals for the Federal Circuit reviews the record and sets aside MSPB actions, findings or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law; or unsupported by substantial evidence. 5 U.S.C. § 7703(c).

³⁸The whistleblower protections under the Sarbanes-Oxley Act of 2002 require retaliation actions to be filed with the Secretary of Labor. However, the act allows a whistleblower to file a claim in U.S. District Court if the Secretary of Labor has not issued a final decision within 180 days of filing a complaint. This is an example of a kick out provision.

³⁹An injunction is a court order commanding or preventing an action. This order could, for example, prevent the agency from further retaliating against the whistleblower while the case is pending or could require the agency to reinstate the employee to a former position.

agencies to the Department of Justice. As a result, the Assistant U.S. Attorney would be responsible for litigating all whistleblower reprisal appeals that went to district court while agency counsel would assist. This could be a potential advantage or disadvantage because involved agencies would no longer have responsibility for litigating such cases. One participant said that Assistant U.S. Attorneys would push to settle whistleblower cases because many of them are already overburdened. Another participant echoed that Assistant U.S. Attorneys are so busy that they may be unwilling to devote appropriate attention to whistleblower cases, in contrast to counsel for involved agencies.

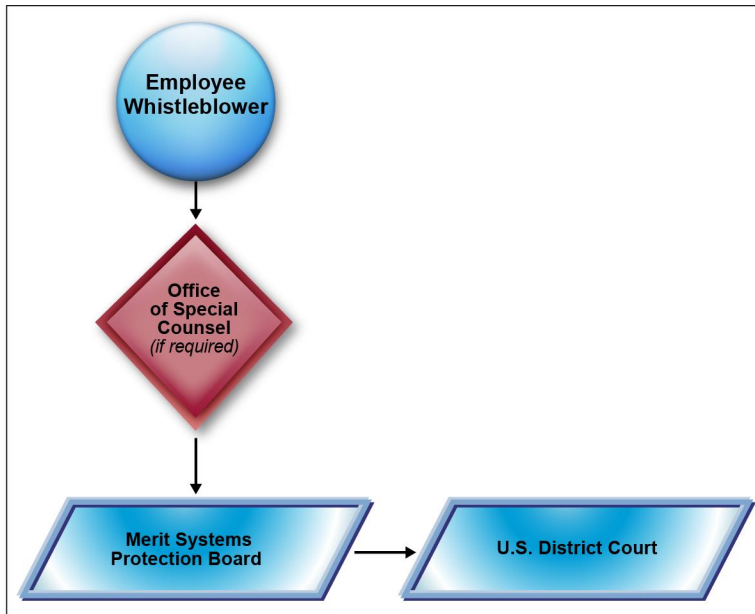
Focus Group Participants Identified Two Potential Scenarios and Eligible Appeal Types for U.S. District Court Review

While focus group participants generally agreed that the U.S. District Courts should be granted jurisdiction for some whistleblower appeals, they stated that not all cases should be eligible for U.S. District Courts. However, they differed on which whistleblower appeal cases should be eligible and at what stage of the process. For instance, participants were divided on whether all or a subset of whistleblower appeals, such as only terminations or demotions, should be eligible to be heard in U.S. District Court.

We asked focus group participants for their input on how the process could work and what types of appeals should be considered if employee whistleblowers had the right to file their whistleblower case at the U.S. District Court. The current process requires employee whistleblowers to file a claim with either OSC or MSPB, depending on the type of agency action alleged. If whistleblowers are dissatisfied with the initial decision at MSPB, they can appeal it to the U.S. Court of Appeals or to MSPB's Board through a petition for review. In fiscal year 2015, employee whistleblowers filed a total of 582 whistleblower reprisal appeals with MSPB and 95 petitions for review with the Board.

For scope of jurisdiction, the focus group participants primarily proposed two options as shown in figures 6 and 7.

Figure 6: First Option Presented by Focus Group Participants for a Whistleblower Remedy through the U.S. District Courts



Source: GAO analysis of focus group information. | GAO-17-110

As shown in figure 6, the first option proposed by focus group participants would require employee whistleblowers to exhaust all administrative remedies before permitting them to proceed to district court. In discussing this option, participants also discussed whether to allow employee whistleblowers to go to district court after a specified amount of time if no action is taken by MSPB. One participant highlighted whistleblower statutes that applied to his agency which included employees’ right of action to go to district court if a decision was not rendered after a certain period. However, participants expressed concern that this process would allow too many “bites of the apple,” or opportunities to appeal, resulting in inefficiencies because employee whistleblowers could prolong the entire process by filing claims at district court for a full, *de novo* review after receiving adverse MSPB decisions.⁴⁰ Using discrimination complaints as an example, participants explained that complainants can go to district court at many different points in the process if they choose to do so. Specifically, complainants have a right to file a civil action in district court after final agency action or after 180 days of filing a complaint if the

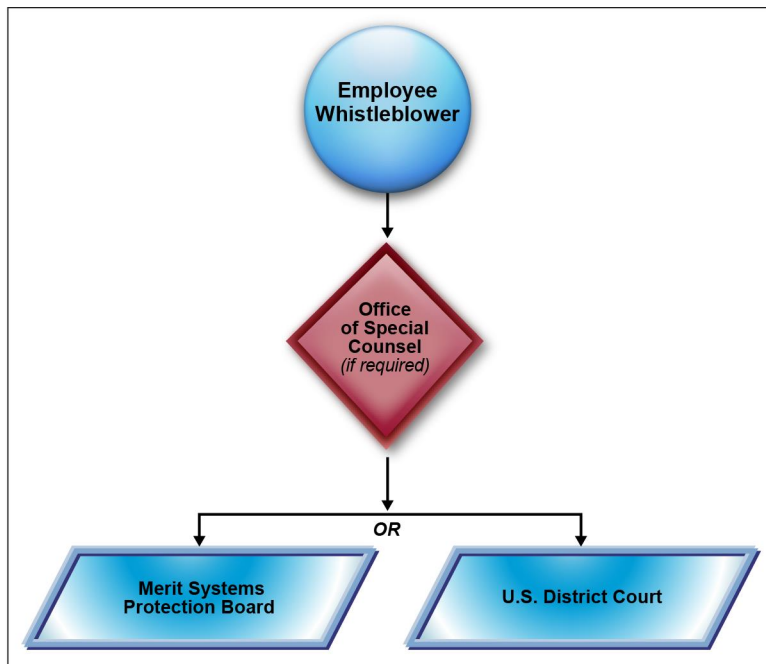
⁴⁰In a *de novo* review, a matter is reviewed anew as if it had not been reviewed before. Both the employee and agency get a full review of their positions.

agency has not taken final action, or, after the complainant appeals to EEOC, after a final EEOC decision or after 180 days from the date of filing an appeal with EEOC if no final decision has been issued.⁴¹ In response to the EEOC example, one participant found that there was a negligible increase of between 0.01 and 0.015 percent of EEOC cases that went to district courts based on a study conducted by his organization. Another participant stated that the option for employee whistleblowers to elect to go to district court was previously proposed in prior legislation, but with a specified time limit if no action was taken by MSPB.⁴²

⁴¹29 C.F.R. § 1614.407.

⁴²Several bills have been proposed in previous Congresses that would have provided federal employees the option to file a case in federal district court if no action was taken by MSPB. See e.g., H.R. 985, 110th Congress, § 9 (2007) and H.R. 1507, 111th Congress, § 9 (2009) (both providing employees with the option to bring an action for *de novo* review in U.S. District Court if no final order is issued by the Board within 180 days of filing an appeal); H.R. 3289, 112th Congress, § 117 (2011) (providing the employee the option to kick out to U.S. District Court if no decision is issued by MSPB within 270 days after filing an appeal).

Figure 7: Second Option Presented by Focus Group Participants for a Whistleblower Remedy through the U.S. District Courts



Source: GAO analysis of focus group information. | GAO-17-110

As shown in figure 7, the second option proposed by focus group participants would allow employee whistleblowers to have “one bite of the apple”—in other words, selecting either MSPB or district court to have their appeal heard. Participants generally agreed that this would be the preferred method if employee whistleblowers were permitted to go to district court. Two participants proposed that the employee whistleblower should choose between MSPB and district court following OSC’s initial review. Participants also said that the election of remedies may be more suitable because employee whistleblowers may choose to go to MSPB because it does not charge a filing fee and therefore is more affordable than the court route. Meanwhile, attorney-represented employee whistleblowers or those with high-profile and complex cases may choose to bypass MSPB and go to district court.

Finally, participants discussed what types of whistleblower retaliation should be eligible for district court review. The two proposals discussed were (1) all whistleblower reprisal appeals, including minor and major offenses; and (2) only a subset of whistleblower reprisal appeals, such as the more serious adverse actions. However, participants disagreed on which whistleblower appeal types should be eligible. One participant

stated that it should not be limited to a subset and that all whistleblower reprisal appeals should go to district court. On the other hand, those in favor of having a subset of whistleblower reprisal appeals eligible for court review stated that only the more severe adverse actions, such as terminations or demotions, should be allowed. If whistleblower appeals could go to district court, the statute would need to clearly define what is eligible for court review. One participant pointed out that none of the corporate whistleblower statutes have a breakdown of which serious adverse actions can go to district court versus administrative adjudication.

We solicited input from MSPB and the Administrative Office of the U.S. Courts to obtain their opinions on how their respective organizations might be impacted if Congress granted U.S. District Court jurisdiction for whistleblower cases. MSPB officials declined to comment. Officials at the Administrative Office of the U.S. Courts told us that forecasting specific impacts would be speculative. They also said that legislation that imposes new workload requirements on the federal judiciary may necessitate additional resources. They added that, should specific legislation be proposed by Congress, the Judicial Conference and its committee(s) and staff would then carefully review the legislation, and consider its effect to determine if a Judicial Conference position on the legislation was warranted.

Conclusions

Lawmakers have recognized that whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement, and threats to public health and safety across the federal government; however, those who come forward may face reprisal from their employers. Courts, over the years, have narrowly interpreted the type and recipient of the disclosure that qualifies for whistleblower protection. The Whistleblower Protection Enhancement Act of 2012 was enacted to further ensure that employees come forward and report violations of law, or certain agency mismanagement or ethical violations, primarily by expanding protected disclosures.

As required by WPEA, MSPB has collected and reported information on the number of whistleblower appeals filed and on the outcomes of cases decided by MSPB. However, we found discrepancies between the data MSPB publicly reported and the data MSPB provided to us. Some of these discrepancies may have been caused by the lack of updated data

entry user guides and the lack of a quality check in its data analysis and reporting process.

Recommendation for Executive Action

To help ensure the accuracy of MSPB's reporting on whistleblower appeals received and closed, the Chairman of MSPB should take the following two actions:

- Update MSPB's data entry user guide to include additional guidance and procedures to help improve the identification of appropriate whistleblower appeal closing codes to use.
- Add a quality check in MSPB's data analysis and reporting process to better identify discrepancies or other anomalies in data queries and the resulting datasets.

Agency Comments and Our Response

We provided a draft of this report to the Chairman of MSPB for review and comment. In its written comments, reproduced in appendix III, MSPB agreed with our recommendations and stated that it is currently incorporating them. MSPB pointed out that it already provides an "impartial adjudication" of all appeals filed there, and takes no policy position on the issue of providing appellants the option for a jury trial in a U.S. District Court. As stated in our report, the documented views for and against granting jurisdiction to U.S. District Courts for whistleblower cases were obtained from focus groups consisting of whistleblower protection subject matter specialists.

MSPB also provided technical comments on the draft report, which we incorporated in the report as appropriate.

We are sending copies of this report to the Chairman of the Merit Systems Protection Board, as well as to the appropriate congressional committees and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2717 or jonesy@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last

page of this report. GAO staff who made key contributions to this report are listed in appendix IV.

A handwritten signature in black ink that reads "Yvonne D. Jones". The signature is written in a cursive, flowing style.

Yvonne D. Jones Director, Strategic Issues

Appendix I: Objectives, Scope, and Methodology

The objectives of this engagement were to describe the Merit Systems Protection Board's (MSPB) implementation of the Whistleblower Protection Enhancement Act of 2012 (WPEA).

Specifically, this report: (1) describes changes in the number of whistleblower reprisal appeals filed with MSPB, as well as the outcome of appeals, since WPEA's effective date, including whether or not MSPB, the United States Court of Appeals for the Federal Circuit, or any other court determined the allegations to be frivolous or malicious;¹ and provides (2) subject matter specialists' views on granting MSPB summary judgment authority for whistleblower cases, and (3) subject matter specialists' views on granting jurisdiction for some subset of whistleblower cases to be decided by a district court of the United States, and the potential impact on MSPB and the federal court system.

To address the first objective, we reviewed the whistleblower reprisal appeal data published by MSPB for fiscal years 2013 through 2015. We requested and obtained from MSPB data on all whistleblower reprisal appeals filed in fiscal years 2013 through 2015, after WPEA's effective date, as well as all whistleblower reprisal appeals closed during the same time frame. We also requested and reviewed MSPB whistleblower reprisal appeals data for 2 fiscal years prior to WPEA's effective date, specifically for fiscal years 2011 and 2012, in order to have 5 years of consecutive data to identify changes in the number of whistleblower reprisal appeals filed after WPEA's effective date. We reviewed relevant MSPB documents, including data entry guidelines and annual performance reports. To supplement the documentary evidence obtained, we interviewed MSPB officials on whistleblower reprisal appeals and WPEA's enactment.

To assess the reliability of the data, we compared data on whistleblower reprisal appeals reported in MSPB's annual performance reports with data that MSPB provided us and we identified discrepancies. We provided MSPB with the results of our data analysis and coding language. We discussed the discrepancies with MSPB staff as discussed in the report. Based on our analysis and our review of related documentation and interviews with MSPB officials, we corrected the data and the resulting data set that we used for analysis was sufficiently reliable to

¹WPEA was signed into law on November 27, 2012, but most provisions were effective 30 days later on December 27, 2012.

provide a general indication of a change in the numbers of appeals received and closed post WPEA. Although MSPB has jurisdiction for other appeals, we evaluated only information related to the whistleblower reprisal appeal process. We did a keyword search using Lexis Nexis to determine if the U.S. Court of Appeals for the Federal Circuit or any other appeals court had concluded that a whistleblower reprisal appeal from MSPB was “malicious” or “frivolous” post WPEA.

To address the second and third objectives, we conducted six focus groups in July 2016 with subject matter specialists knowledgeable about WPEA. Of the six focus groups, four included a mix of whistleblower advocacy and agency representatives (the mixed sessions) while the remaining two were conducted with agency representatives from the Chief Human Capital Officers Council. To select the 28 participants for the six focus groups, we solicited suggestions from MSPB and the Office of Special Counsel based on their direct knowledge of whistleblower cases, as well as the Equal Employment Opportunity Commission, that has summary judgment authority. We also conducted our own research to identify additional participants in the whistleblower community and reached out to the federal inspector general and Chief Human Capital Officers communities. Although these focus group discussions provided rich information, they are nongeneralizable and do not reflect opinions of all in the whistleblower community. The selected participants represent nonprofit organizations, a national union, private law firms, and federal agencies. For a list of organizations represented by the focus group participants, see appendix II.

We asked each focus group to discuss the following issues: (1) WPEA’s impact on various entities, such as the alleged employee whistleblower and the involved agency; (2) reasons for or against granting MSPB summary judgment authority for whistleblower cases; and (3) reasons for or against granting U.S. District Court jurisdiction for whistleblower cases. All six focus groups were recorded and transcribed. We analyzed the results to identify common themes and patterns among the mixed and Chief Human Capital Officers Council focus groups.

Additionally, we solicited input from MSPB and the Administrative Office of the U.S. Courts to obtain their opinions on how they might be impacted if Congress granted U.S. District Court jurisdiction for whistleblower cases.

We conducted this performance audit from January 2016 to November 2016, in accordance with generally accepted government auditing

standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Organizations Represented in GAO's Focus Groups on the Whistleblower Protection Enhancement Act of 2012

Whistleblower Advocacy Organizations

Government Accountability Project
MSPB Watch
National Whistleblowers Center
National Employment Lawyers Association
National Treasury Employees Union
Project on Government Oversight
The Federal Practice Group
The Law Offices of Ronald P. Ackerman
Zuckerman Law
Federal Agencies

Department of Agriculture: Office of the Inspector General (OIG)
Department of Homeland Security: Office of the General Counsel (OGC) and Transportation Security Administration, Office of Chief Counsel
Department of Justice: OIG
Department of Labor: Occupational Safety and Health Administration
Department of State: Office of the Legal Adviser
Department of Veterans Affairs: OGC
Nuclear Regulatory Commission: OGC
Office of Personnel Management: OGC
Office of Special Counsel
Securities and Exchange Commission: OGC

Chief Human Capital Officers Council

Department of Defense: Defense Civilian Personnel Advisory Service
Department of Health and Human Services: Office of Assistant Secretary for Administration
Department of Homeland Security: Human Capital Policy and Programs
Department of Housing and Urban Development: Office of the Chief Human Capital Officer
Department of State: Bureau of Human Resources
Social Security Administration: Office of Labor Management and Employment Relations

Appendix III: Comments from the Merit Systems Protection Board



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Chairman
1615 M Street, NW
Washington, DC 20419-0002

Phone: (202) 653-7101; Fax: (202) 653-7208; E-Mail: chairman@mspb.gov

Chairman

November 10, 2016

Ms. Yvonne Jones
Director, Strategic Issues
U.S. Government Accountability Office
Washington, D.C. 20548

Dear Ms. Jones:

On behalf of the U.S. Merit Systems Protection Board (MSPB), I would like to thank you for the opportunity to review the Government Accountability Office (GAO) draft report "Whistleblower Protection: Additional Actions Would Improve Record and Reporting of Appeals Data" (GAO-17-110).

As you know, MSPB is an independent, quasi-judicial federal agency that, pursuant to statute, is generally responsible for adjudicating personnel appeals filed by federal employees and conducting studies on the federal civil service and issuing reports to our various stakeholders. The Whistleblower Protection Enhancement Act of 2012 (WPEA) required, for the first time, that MSPB annually report the following information: (1) information related to the outcome of cases decided by MSPB in which violations of section 2302(b)(8) or (9)(A)(i), (B)(i), (C), or (D) of title 5, United States Code, were alleged; and (2) the number of such cases filed in MSPB's regional and field offices, and the number of petitions for review filed in such cases at MSPB headquarters in Washington, D.C., and the outcomes of any such cases or petitions for review (irrespective of when filed).

We have reviewed GAO's draft report and have paid particular attention to GAO's recommendations to: (1) update MSPB's data entry user guide to include additional guidance and procedures to help improve the identification of appropriate whistleblower appeal closing codes to use; and (2) add a quality check in MSPB's data analysis and reporting process to better identify discrepancies or other anomalies in data queries and the resulting datasets. After a review of the draft report, we agree with both of GAO's recommendations and are currently in the process of incorporating them.

As a small agency with limited resources – that issued decisions in 61,090 cases between Fiscal Years 2012–2015 – I can assure you that our dedicated staff will continue to work diligently to comply with the WPEA’s statutory requirements and to incorporate GAO’s recommendations. To the extent there have been any shortcomings on MSPB’s part with respect to the recording of this vast amount of data, those shortcomings are the agency’s, and not those of any particular subset of MSPB employees, including the hard-working paralegals in MSPB’s regional, field, and headquarters offices.

Finally, I note that in summarizing the comments of participant groups about the possibility of providing appellants the right to a jury trial in a United States district court, the report states this possibility would provide an “impartial” trial to appellants. As you know, MSPB takes no policy position on the issue of providing appellants the option for a jury trial in a United States district court. Respectfully, I feel it necessary to state that MSPB already provides an “impartial adjudication” of all appeals filed at MSPB. Indeed, there is no duty our administrative judges and/or the Board takes more seriously than to provide an impartial, unbiased review of all appeals filed at MSPB.

We have provided technical comments for your review that we believe will enhance this report and make a complicated topic more easily understood by the report’s readers. If you have any questions regarding any of our comments, or any other questions, please do not hesitate to contact Jim Eisenmann, MSPB Executive Director, at (202) 254-4487.

Sincerely,



Susan Tsui Grundmann

Enclosure

Appendix IV: GAO Contacts and Staff Acknowledgments

GAO Contact

Yvonne D. Jones, (202) 512-2717 or jonesy@gao.gov

Staff Acknowledgments

In addition to the contact named above, Clifton G. Douglas Jr., Assistant Director; Dewi Djunaidy, Analyst-in-Charge; Amy Bowser; Sara Daleski; Karin Fangman; Joshua Garties; Susan Sato; and Cynthia Saunders made major contributions to this report. Also contributing to this report were Ellen Grady; Robert Robinson; Mark Ryan; and Stewart Small.

Appendix V: Accessible Data

Data Tables

Data Table for Highlights figure, Annual Numbers of Two Kinds of Whistleblower Appeals Before and After Whistleblower Protection Enhancement Act's Enactment in 2012

Data Table for Figure 1: Annual Numbers of Two Kinds of Whistleblower Appeals Before and After Enactment of Whistleblower Protection Enhancement Act of 2012

Type of Appeal	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	Total
Individual Right of Action (1,742 total appeals)	261	268	461	360	392	1742
Otherwise Appealable Action (1,215 total appeals)	292	294	266	173	190	1215
Total	553	562	727	533	582	2957

Source: GAO analysis of Merit System Protection Board data.

Data Table for Figure 2: Majority of Individual Right of Action Appeals Were Closed Before Adjudication on the Merits from Fiscal Years 2013 through 2015

Closing Description	FY 2013 221 total appeals	FY 2014 265 total appeals	FY 2015 333 total appeals	Total 819 total appeals
Adjudicated on the merits	9%	19%	17%	15%
Dismissed—timeliness/res judicata/lack of jurisdiction	44%	40%	40%	41%
Dismissed for failure to exhaust at the Office of Special Counsel	18%	6%	7%	10%
Not dismissed—settled	17%	26%	26%	23%
Withdrawn	12%	9%	11%	11%
Total	221	265	333	813

Source: GAO analysis of Merit System Protection Board data.

Data Table for Figure 3: Merit Systems Protection Board Dismissed More Than Half of All Otherwise Appealable Action Appeals from Fiscal Years 2013 through 2015

Closing Description	FY 2013 221 total appeals	FY 2014 130 total appeals	FY 2015 187 total appeals	Total 538 total appeals
Adjudicated on the merits	19%	26%	22%	22%
Appeal dismissed—whistleblower reprisal claim not addressed	52%	57%	53%	54%
Appeal not dismissed—settled	29%	17%	25%	25%
Total	221	130	187	538

Source: GAO analysis of Merit System Protection Board data.

Data Table for Figure 4: Individual Right of Action Appeals Where Merit Systems Protection Board Granted Corrective Actions Increased in Fiscal Years 2013 through 2015

Closing Description	FY 2011	FY 2012	FY 2013 20 total appeals	FY 2014 50 total appeals	FY 2015 56 total appeals	Total
Agency would have taken same action	.	12	7	18	22	59
Corrective action granted	5	5	1	5	14	30
No contributing factor	.	4	8	13	9	34
No personnel action	.	.	0	2	6	8
No protected disclosure	.	2	4	12	5	23
Total	5	23	20	50	56	154

Source: GAO analysis of Merit System Protection Board data.

Data Table for Figure 5: Merit Systems Protection Board Granted Corrective Action in Few Otherwise Appealable Action Appeals from Fiscal Years 2013 through 2015

Closing_Description	FY 2011	FY 2012	FY 2013 42 total appeals	FY 2014 34 total appeals	FY 2015 41 total appeals	Total
Agency would have taken same action	NA	10	17	12	15	54
Corrective action granted	2	1	3	2	3	11
No contributing factor	.	.	7	8	11	26
No personnel action	.	.	0	0	2	2
No protected disclosure	1	9	8	8	8	34
Whistleblower reprisal affirmative defense withdrawn	33	22	7	4	2	68
Total	36	42	42	34	41	195

Source: GAO analysis of Merit System Protection Board data.

Agency Comment Letter

Text of Appendix III: Comments from the Merit Systems Protection Board

Page 1

Ms. Yvonne Jones Director, Strategic Issues
U.S. Government Accountability Office Washington, D.C. 20548

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Page 2

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Sincerely,

Susan Tsui Grundmann

Enclosure

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