



September 4, 2013

**VIA e-mail to MSPBStrategicPlan@mspb.gov**

William D. Spencer  
Clerk of the Board  
Merit Systems Protection Board  
1615 M Street NW  
Washington, DC 20419

**Re: Comments Regarding Draft MSPB Strategic Plan for FY 2014-18**

Dear Mr. Spencer:

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Merit Systems Protection Board's August 5, 2013, news release.<sup>1</sup> NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, as well as undertaking other advocacy actions on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees and/or represent federal employees in employment law matters, and thus we have an interest in the modifications to MSPB's draft Strategic Plan.

NELA appreciates the opportunity to comment on the proposed revisions to the MSPB's draft Strategic Plan. NELA generally supports the Board's overall goal of continuing reevaluation of internal processes and strategy in the interest of improving operations. NELA, however, has a few concerns about specific proposals appearing in the draft Strategic Plan, and would like to make sure that the Board's focus on improved operational efficiency does not inadvertently detract from the Board's fundamental programmatic goals.

Pages 11 (section S1A-3), 15 (Strategic Goal 1, item 5) and 20 of the draft Strategic Plan identify concerns with case processing efficiency, in particular expressed in metrics of days to case closeout at various adjudicative phases. NELA is concerned that an undue focus on this simplified metric may mask practices deleterious to the Board's long-stated policy of giving appellants their fair "day in court" by ensuring that cases go to a hearing whenever possible for a

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<sup>1</sup> See

<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=871363&version=874859&application=ACROBAT>.

decision on the merits. NELA suspects, for instance, that the 93 day processing statistic for initial appeals in FY 2012 noted at Page 11, section S1A-3a, reflects in no small part the statistical impact of case dismissals for alleged lack of jurisdiction in matters such as whistleblower reprisal claims in the pre-Whistleblower Protection Enhancement Act (WPEA) period. These dismissals were in no small part facilitated by accumulated years of earlier Board and Federal Circuit precedent which extremely narrowly construed the scope of protection under the WPA—an approach rejected by Congress in Section 101 of the WPEA. Further, this initial decision metric is presumably also in part the result of truncated hearings and abbreviated initial decisions which glossed over the underlying evidence of retaliatory animus in whistleblower cases in favor of solely focusing on the agency’s clear and convincing evidence that they would have taken the same action notwithstanding the protected whistleblowing—an approach rejected by Congress in Section 114 of the WPEA. As demonstrated by the Board’s case suspension regulations, the Board has long recognized that the balance favors justice over expedience especially at the administrative judge level. NELA encourages the Board to continue to uphold this wise policy decision, and not let a concern over mere statistics of number of days to case closure get in the way of substantive justice.

Page 21 of the draft Strategic Plan discusses the Board’s desire to expand its mechanisms for assessing both the quantitative and qualitative performance of the Board’s various programs. NELA endorses this idea, and believes that this mechanism may provide a solution for concerns stated in pages 11 (section S1A-1 and S1A-4), 15 (Strategic Goal 5, items 4, 5 and 8) and 20 concerning quality control and accountability issues for proceedings at the administrative judge level. It has long been the practice in most federal sector mediation programs (including the Board’s own Mediation Appeals Program) to solicit anonymous qualitative feedback from mediation participants post-mediation. NELA believes that a similar feedback mechanism—one directly tied into the administrative judges’ annual performance evaluations—would be a highly effective means for ensuring that adjudication receives the same qualitative oversight as the mediation process. Such a feedback mechanism would also have the salutary effect of counterbalancing any incentives administrative judges might have to cut corners or truncate hearing-level proceedings in the interest of maximizing any applicable “number of days to initial decision” case closure metric.

Finally, NELA strongly supports the Board’s focus on ensuring transparency and efficacy in the enforcement process, as noted at pages 15 (Strategic Goal 1, item 8) and 20 of the draft Strategic Plan. This emphasis continues the Board’s efforts in its October 2012 revisions to 5 C.F.R. Part 1201 to strengthen the Board’s procedures for enforcement of remedial orders and settlement agreements. As demonstrated by the existence of 5 U.S.C. § 1204(e)(2)(A), Congress clearly favors strong enforcement by the Board to ensure prompt agency compliance with remedial orders, even if strident measures are required to force agency compliance. Some NELA members have observed that—even after the 2012 regulatory revisions—a certain degree of lassitude has remained in these enforcement mechanisms, especially as applied at the administrative judge level. Vigilance and stridency are needed in the enforcement of these remedial orders and settlements, as to do otherwise is to invite agencies to tarry in their obligations to implement remedies and settlement (or to not comply outright with impunity).

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Again, NELA appreciates the opportunity to comment on the draft Strategic Plan, and wishes to thank the Board for its attention and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terisa E. Chaw". The signature is fluid and cursive, with the first name "Terisa" and last name "Chaw" clearly distinguishable.

Terisa E. Chaw  
Executive Director

TEC/ajp