

“(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

“(3) in passing the Civil Service Reform Act of 1978 [Pub. L. 95-454, see Tables for classification], Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

“(b) PURPOSE.—The purpose of this Act [see Short Title of 1989 Amendment note above] is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

“(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

“(2) establishing—

“(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

“(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

“(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.”

TERMS OF OFFICE OF MEMBERS

Section 202(b) of Pub. L. 95-454 provided that: “Any term of office of any member of the Merit Systems Protection Board serving on the effective date of this Act [see Effective Date of 1978 Amendment note set out under section 1101 of this title] shall continue in effect until the term would expire under section 1102 of title 5, United States Code, as in effect immediately before the effective date of this Act, and upon expiration of the term, appointments to such office shall be made under sections 1201 and 1202 of title 5, United States Code (as added by this section).”

§ 1202. Term of office; filling vacancies; removal

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(Added Pub. L. 95-454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1122; amended Pub. L. 100-202, §101(m) [title VI, §620], Dec. 22, 1987, 101 Stat. 1329-390, 1329-427; Pub. L. 101-12, §3(a)(2), (3), Apr. 10, 1989, 103 Stat. 17.)

AMENDMENTS

1989—Pub. L. 101-12, §3(a)(2), substituted a semicolon for the comma after “office” in section catchline.

Subsec. (b). Pub. L. 101-12, §3(a)(3), substituted “the member's” for “his” in first sentence and struck out “of this title” after “section 1201” in second sentence.

1987—Subsec. (b). Pub. L. 100-202 inserted provision permitting any new member serving portion of seven-year term to continue serving until successor is appointed and has qualified, with exception limiting duration of such service.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101-12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as a note under section 1201 of this title.

§ 1203. Chairman; Vice Chairman

(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

(Added Pub. L. 95-454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1122; amended Pub. L. 101-12, §3(a)(4), (5), Apr. 10, 1989, 103 Stat. 17.)

AMENDMENTS

1989—Subsec. (a). Pub. L. 101-12, §3(a)(4), struck out the comma after “time” in first sentence.

Subsec. (c). Pub. L. 101-12, §3(a)(5), substituted “the Chairman and the Vice Chairman” for “the Chairman and Vice Chairman” after “both”.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101-12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as a note under section 1201 of this title.

§ 1204. Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service

free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—

(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)(1)(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or

other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.

(ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2).

(2)(A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).

(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

(f)(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103, the Board shall review any provision of such rule or regulation—

(A) on its own motion;

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

(C) on the filing of a written complaint by the Special Counsel requesting such review.

(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision—

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b); or

(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b).

(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

(4) The Board shall require any agency—

(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(g) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

(m)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(Added Pub. L. 95-454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1122, §1205; amended Pub. L. 97-258, §3(a)(2), Sept. 13, 1982, 96 Stat. 1063; renumbered §1204 and amended Pub. L. 101-12, §3(a)(7), Apr. 10, 1989, 103 Stat. 17; Pub. L. 102-568, title V, §506(c)(4), Oct. 29, 1992, 106 Stat. 4341; Pub. L. 103-353, §2(b)(2)(A), Oct. 13, 1994, 108 Stat. 3169; Pub. L. 103-424, §2, Oct. 29, 1994, 108 Stat. 4361; Pub. L. 103-446, title XII, §1203(c)(1), Nov. 2, 1994, 108 Stat. 4690.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

PRIOR PROVISIONS

A prior section 1204 was renumbered section 1211(b) of this title by Pub. L. 101-12, §3(a)(6). Pub. L. 102-378, §2(3), Oct. 2, 1992, 106 Stat. 1346, struck out section catchline of prior section 1204.

AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103-446, which directed the amendment of par. (1) by substituting “section 4303” for “section 4323” could not be executed because the phrase “section 4323” does not appear in text subsequent to the intervening amendment by Pub. L. 103-353 substituting “chapter 43” for “section 4323”. See below. Pub. L. 103-353 substituted “chapter 43” for “section 4323”.

Subsec. (m). Pub. L. 103-424 added subsec. (m).

1992—Subsec. (a)(1). Pub. L. 102-568 substituted “4323” for “2023”.

1989—Pub. L. 101-12, §3(a)(7), renumbered section 1205 of this title as this section.

Pub. L. 101-12, §3(a)(7)(A), struck out “and Special Counsel” after “Board” in section catchline.

Subsec. (a)(4). Pub. L. 101-12, §3(a)(7)(A), (C), substituted “subsection (f)” for “subsection (e) of this section”.

Subsec. (b)(1). Pub. L. 101-12, §3(a)(7)(A), struck out “the Special Counsel,” after “Board.”

Subsec. (b)(2). Pub. L. 101-12, §3(a)(7)(D), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “Any member of the Board, the Special Counsel, and any administrative law judge appointed by the Board under section 3105 of this title may—

“(A) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States or any territory or possession thereof, the Commonwealth of Puerto Rico, or the District of Columbia; and

“(B) order the taking of depositions and order responses to written interrogatories.”

Subsec. (b)(3). Pub. L. 101-12, §3(a)(7)(B), substituted “subpoena” for “subpena” and “subpoenaed” for “subpenaed”.

Subsec. (c). Pub. L. 101-12, §3(a)(7)(B), (E), substituted “subpoena” for “subpena” in two places, “(b)(2)(A) or section 1214(b), upon application by the Board” for “(b)(2) of this section”, and “for the district” for “for the judicial district”.

Subsec. (d). Pub. L. 101-12, §3(a)(7)(F), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101-12, §3(a)(7)(F), redesignated former subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (e)(1). Pub. L. 101-12, §3(a)(7)(A), (G)(i), designated existing provisions as subpar. (A), struck out “of this section” after “subsection (a)(1)”, and added subpar. (B).

Subsec. (e)(2). Pub. L. 101-12, §3(a)(7)(G)(ii), designated existing provisions as subpar. (A), struck out “of this section” after “subsection (a)(2)”, and added subpar. (B).

Subsec. (e)(3). Pub. L. 101-12, §3(a)(7)(A), (G)(iii), struck out “of this section” after “subsection (a)(3)”

and inserted “of Personnel Management” after “Office”.

Subsec. (f). Pub. L. 101–12, §3(a)(7)(F), redesignated former subsec. (e) as (f). Former subsec. (f) redesignated (g).

Subsec. (f)(1). Pub. L. 101–12, §3(a)(7)(H)(i), inserted “of the Office of Personnel Management” after “Director” and struck out “of this title” after “section 1103”.

Subsec. (f)(2). Pub. L. 101–12, §3(a)(7)(H)(ii), inserted comma after “subsection” and in subpars. (A) and (B) struck out “of this title” after “section 2302(b)”.

Subsec. (f)(3), (4). Pub. L. 101–12, §3(a)(7)(H)(iii), struck out “(A)” before “The Director”, struck out subpar. (B) which provided that any review conducted by the Board be limited to determining the validity on its face of the provision under review and whether the provision under review has been validly implemented, and redesignated former subpar. (C) and cls. (i) and (ii) of former subpar. (C) as par. (4) and subpars. (A) and (B), respectively, of par. (4).

Subsecs. (g) to (i). Pub. L. 101–12, §3(a)(7)(F), redesignated former subsecs. (f) to (h) as (g) to (i), respectively. Former subsec. (i) redesignated (j).

Subsec. (j). Pub. L. 101–12, §3(a)(7)(F), (I), redesignated former subsec. (i) as (j) and substituted “chapter 33” for “chapter 33 of this title”. Former subsec. (j) redesignated (k).

Subsecs. (k), (l). Pub. L. 101–12, §3(a)(7)(F), redesignated former subsecs. (j) and (k) as (k) and (l), respectively.

1982—Subsec. (j). Pub. L. 97–258 substituted “section 1105 of title 31” for “section 201 of the Budget and Accounting Act, 1921 (31 U.S.C. 11)”.

EFFECTIVE DATE OF 1994 AMENDMENTS

Section 14 of Pub. L. 103–424 provided that: “The provisions of this Act [amending this section and sections 1211, 1212, 1214, 1218, 1221, 2105, 2302, 4313, 7121, and 8348 of this title, enacting provisions set out as notes under sections 1212 and 1214 of this title and section 1441a of Title 12, Banks and Banking, and amending provisions set out as a note under section 5509 of this title] and the amendments made by this Act shall be effective on and after the date of the enactment of this Act [Oct. 29, 1994].”

Amendment by Pub. L. 103–353 effective with respect to reemployments initiated on or after the first day after the 60-day period beginning Oct. 13, 1994, with transition rules, see section 8 of Pub. L. 103–353, set out as an Effective Date note under section 4301 of Title 38, Veterans’ Benefits.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

§ 1205. Transmittal of information to Congress

Notwithstanding any other provision of law or any rule, regulation or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

(Added Pub. L. 95–454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1131, §1209(a); renumbered §1205 and amended Pub. L. 101–12, §3(a)(9), Apr. 10, 1989, 103 Stat. 18.)

PRIOR PROVISIONS

A prior section 1205 was renumbered section 1204 of this title.

AMENDMENTS

1989—Pub. L. 101–12 renumbered section 1209(a) of this title as this section and inserted section catchline.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

§ 1206. Annual report

The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.

(Added Pub. L. 95–454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1131, §1209(b); renumbered §1206 and amended Pub. L. 101–12, §3(a)(10), Apr. 10, 1989, 103 Stat. 18.)

PRIOR PROVISIONS

A prior section 1206, added Pub. L. 95–454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1125, which related to authority and responsibilities of Special Counsel, was repealed by Pub. L. 101–12, §§3(a)(8), 11, Apr. 10, 1989, 103 Stat. 18, effective 90 days following Apr. 10, 1989. See section 1212 of this title.

AMENDMENTS

1989—Pub. L. 101–12 renumbered section 1209(b) of this title as this section and inserted section catchline.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as a note under section 1201 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in first sentence of this section relating to annual reports to Congress (formerly 5 U.S.C. 1209(b)), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 176 of House Document No. 103–7.

[§§ 1207, 1208. Repealed. Pub. L. 101–12, § 3(a)(8), Apr. 10, 1989, 103 Stat. 18]

Section 1207, added Pub. L. 95–454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1130, provided for hearings and decisions on complaints filed by Special Counsel. See section 1215(a)(2) to (5) of this title.

Section 1208, added Pub. L. 95–454, title II, §202(a), Oct. 13, 1978, 92 Stat. 1130, related to stays of certain personnel actions. See section 1214(b) of this title.

EFFECTIVE DATE OF REPEAL

Repeal of sections effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101–12, set out as an Effective Date of 1989 Amendment note under section 1201 of this title.

[§ 1209. Renumbered §§ 1205 and 1206]

CODIFICATION

Subsecs. (a) and (b) of this section were renumbered as sections 1205 and 1206, respectively, of this title by Pub. L. 101–12, §3(a)(9), (10). Pub. L. 102–378, §2(2), Oct. 2, 1992, 106 Stat. 1346, struck out section catchline of prior section 1209.