

103^D CONGRESS
1ST SESSION

S. 622

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 19 (legislative day, MARCH 3), 1993

Mr. LEVIN (for himself, Mr. COHEN, and Mr. PRYOR) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To authorize appropriations for the United States Office of Special Counsel, the Merit Systems Protection Board, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. AUTHORIZATION OF APPROPRIATIONS.**

4 (a) MERIT SYSTEMS PROTECTION BOARD.—Section
5 8(a)(1) of the Whistleblower Protection Act of 1989 (5
6 U.S.C. 5509 note; Public Law 101–12; 103 Stat. 34) is
7 amended by striking out “1989, 1990, 1991, 1992, 1993,
8 and 1994” and inserting in lieu thereof “1993, 1994, and
9 1995”.

1 (b) OFFICE OF SPECIAL COUNSEL.—Section 8(a)(2)
2 of the Whistleblower Protection Act of 1989 (5 U.S.C.
3 5509 note; Public Law 101–12; 103 Stat. 34) is amended
4 by striking out “1989, 1990, 1991, and 1992” and insert-
5 ing in lieu thereof “1993, 1994, and 1995”.

6 **SEC. 2. OFFICE OF SPECIAL COUNSEL.**

7 (a) SUCCESSION.—Section 1211(b) of title 5, United
8 States Code, is amended by inserting after the first sen-
9 tence: “The Special Counsel may continue to serve beyond
10 the expiration of the term until a successor is appointed
11 and has qualified, except that the Special Counsel may not
12 continue to serve for more than one year after the date
13 on which the term of the Special Counsel would otherwise
14 expire under this subsection.”.

15 (b) LIMITATIONS ON DISCLOSURES.—Section
16 1212(g) of title 5, United States Code, is amended—

17 (1) in paragraph (1), by striking out “provide
18 information concerning” and inserting in lieu thereof
19 “disclose any information from or about”; and

20 (2) in paragraph (2), by striking out “a matter
21 described in subparagraph (A) or (B) of section
22 2302(b)(2) in connection with a” and inserting in
23 lieu thereof “an evaluation of the work performance,
24 ability, aptitude, general qualifications, character,

1 loyalty, or suitability for any personnel action of
2 any”.

3 (c) DETERMINATIONS.—Section 1214(b)(2) of title 5,
4 United States Code, is amended—

5 (1) by redesignating subparagraphs (A), (B)
6 and (C) as subparagraphs (B), (C) and (D), respec-
7 tively;

8 (2) by inserting before subparagraph (B) (as
9 redesignated by paragraph (1) of this subsection)
10 the following:

11 “(A)(i) Except as provided under clause
12 (ii), no later than 240 days after the date of re-
13 ceiving an allegation of a prohibited personnel
14 practice under paragraph (1), the Special Coun-
15 sel shall make a determination whether there
16 are reasonable grounds to believe that a prohib-
17 ited personnel practice has occurred, exists, or
18 is to be taken.

19 “(ii) If the Special Counsel is unable to
20 make the required determination within the
21 240-day period specified under clause (i) and
22 the person submitting the allegation of a pro-
23 hibited personnel practice agrees to an exten-
24 sion of time, the determination shall be made
25 within such additional period of time as shall be

1 agreed upon between the Special Counsel and
2 the person submitting the allegation.”; and

3 (3) by inserting after subparagraph (D) (as re-
4 designated by paragraph (1) of this subsection) the
5 following new subparagraph:

6 “(E) A determination by the Special Coun-
7 sel under this paragraph may not be admissible
8 as evidence in any judicial or administrative
9 proceeding, without the consent of the person
10 submitting the allegation of a prohibited per-
11 sonnel practice.”.

12 (d) REPORTS.—Section 1218 of title 5, United States
13 Code, is amended by inserting “cases in which it did not
14 make a determination whether there are reasonable
15 grounds to believe that a prohibited personnel practice has
16 occurred, exists, or is to be taken within the 240-day pe-
17 riod specified in section 1214(b)(2)(A)(i),” after “inves-
18 tigations conducted by it,”.

19 **SEC. 3. INDEPENDENT RIGHT OF ACTION.**

20 (a) SUBPOENAS.—Section 1221(d) of title 5, United
21 States Code, is amended by striking out paragraph (1)
22 and inserting in lieu thereof the following:

23 “(1) At the request of an employee, former em-
24 ployee, or applicant for employment seeking correc-
25 tive action under subsection (a), the Board shall

1 issue a subpoena for the attendance and testimony
2 of any person or the production of documentary or
3 other evidence from any person if the Board finds
4 that the testimony or production requested is not
5 unduly burdensome and appears reasonably cal-
6 culated to lead to the discovery of admissible evi-
7 dence.”.

8 (b) REFERRALS.—Section 1221(f) of title 5, United
9 States Code, is amended by adding after paragraph (2)
10 the following new paragraph:

11 “(3) If, based on evidence presented to it under
12 this section, the Merit Systems Protection Board de-
13 termines that there is reason to believe that a cur-
14 rent employee may have committed a prohibited per-
15 sonnel practice, the Board shall refer the matter to
16 the Special Counsel to investigate and take appro-
17 priate action under section 1215.”.

18 (c) ATTORNEYS’ FEES.—Section 1221(g) of title 5,
19 United States Code, is amended—

20 (1) in paragraph (1), by striking out “and any
21 other reasonable costs incurred” and inserting in
22 lieu thereof “and any other reasonable costs in-
23 curred directly or indirectly by the employee, former
24 employee, or applicant.”; and

1 (2) in paragraph (2), by striking out “and any
2 other reasonable costs incurred,” and inserting in
3 lieu thereof “and any other reasonable costs in-
4 curred directly or indirectly by the employee, former
5 employee, or applicant.”.

6 **SEC. 4. PROHIBITED PERSONNEL PRACTICES.**

7 (a) **PERSONNEL ACTIONS.**—Section 2302(a)(2)(A) of
8 title 5, United States Code, is amended—

9 (1) in clause (ix) by striking out “and” after
10 the semicolon;

11 (2) by redesignating clause (x) as clause (xi)
12 and inserting before such clause the following:

13 “(x) a decision to order psychiatric testing or
14 examination; and”;

15 (3) in the matter following designated clause
16 (xi) (as redesignated by paragraph (2) of this sub-
17 section) by inserting before the semicolon the follow-
18 ing: “, and in the case of an alleged prohibited per-
19 sonnel practice described in subsection (b)(8), an
20 employee or applicant for employment in a Govern-
21 ment corporation as defined in section 9101 of title
22 31, United States Code”.

23 (b) **COVERED POSITIONS.**—Section 2302(a)(2)(B) of
24 title 5, United States Code, is amended to read as follows:

1 “(B) ‘covered position’ means, with respect to
2 any personnel action, any position in the competitive
3 service, a career appointee position in the Senior Ex-
4 ecutive Service, or a position in the excepted service,
5 but does not include any position which is, prior to
6 the personnel action—

7 “(i) excepted from the competitive service
8 because of its confidential, policy-determining,
9 policy-making, or policy-advocating character;
10 or

11 “(ii) excluded from the coverage of this
12 section by the President based on a determina-
13 tion by the President that it is necessary and
14 warranted by conditions of good administra-
15 tion.”.

16 (c) AGENCIES.—Section 2302(a)(2)(C) of title 5,
17 United States Code, is amended in clause (i) by inserting
18 before the semicolon: “, except in the case of an alleged
19 prohibited personnel practice described in subsection
20 (b)(8)”.

21 (d) INFORMATIONAL PROGRAM.—Section 2302(c) of
22 title 5, United States Code, is amended in the first sen-
23 tence by inserting before the period “, and for ensuring
24 (in consultation with the Office of Special Counsel) that
25 agency employees are informed of the rights and remedies

1 available to them under this chapter and chapter 12 of
2 this title”.

3 **SEC. 5. PERFORMANCE APPRAISALS.**

4 Section 4313(5) of title 5, United States Code, is
5 amended to read as follows:

6 “(5) meeting affirmative action goals, achieve-
7 ment of equal employment opportunity requirements,
8 and compliance with the merit systems principles set
9 forth in section 2301 of this title.”.

10 **SEC. 6. IMPLEMENTATION.**

11 (a) **POLICY STATEMENT.**—No later than 6 months
12 after the date of enactment of this Act, the Special Coun-
13 sel shall issue a policy statement regarding the implemen-
14 tation of the Whistleblower Protection Act of 1989. Such
15 policy statement shall be made available to each person
16 alleging a prohibited personnel practice described under
17 section 2302(b)(8) of title 5, United States Code, and
18 shall include detailed guidelines identifying specific cat-
19 egories of information that may (or may not) be commu-
20 nicated to agency officials for an investigative purpose, or
21 for the purpose of obtaining corrective action under sec-
22 tion 1214 of title 5, United States Code, or disciplinary
23 action under section 1215 of such title, the circumstances
24 under which such information is likely to be disclosed, and

1 whether or not the consent of any person is required in
2 advance of any such communication.

3 (b) TERMINATION STATEMENT.—The Special Coun-
4 sel shall include in any letter terminating an investigation
5 under section 1214(a)(2) of title 5, United States Code,
6 the name and telephone number of an employee of the
7 Special Counsel who is available to respond to reasonable
8 questions from the person regarding the investigation or
9 review conducted by the Special Counsel, the relevant facts
10 ascertained by the Special Counsel, and the law applicable
11 to the person's allegations.

12 **SEC. 7. EFFECTIVE DATE.**

13 The provisions of this Act and the amendments made
14 by this Act shall be effective on and after the date of the
15 enactment of this Act.

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