

## **Two Types of Whistleblower Claims**

An Otherwise Appealable Action (OAA) is one of the major adverse personnel actions (termination, demotion, etc.) which could be brought at the MSPB even without a whistleblower claim.

An Individual Right of Action (IRA) is a claim that must be brought to Office of Special Counsel (OSC) first and may be brought to MSPB if OSC declines to provide corrective action or does nothing for 120 days. IRAs can apply to almost any personnel action or change in conditions of employment and can include proposed and threatened actions

IRAs but not OAAs can be brought by probationary employees

### **IRA v. OAA Proceedings**

In an OAA, the agency must first

- Prove the validity of the charges by a preponderance of the evidence;
- Demonstrate the nexus to the efficiency of the service; and
- Show the reasonableness of the penalty.

In an OAA, whistleblowing is affirmative defense which can be raised among others, such as discrimination under Title VII.

By contrast, in an IRA, only the whistleblower defense is at issue. The agency does not need to prove its charges, etc. And the employee may not raise other defenses or procedural violations, such as harmful procedural error or discrimination.

If you go to OSC on an OAA, the appeal to MSPB is treated as an IRA limited to the whistleblower defense.

### **Why go to OSC even if you qualify for OAA?**

OSC can be a more favorable forum; MSPB judges rule for employees only 3 to 4% of the time

There is no statute of limitations to file at OSC but MSPB requires filing 30 days from effective date of the personnel action.

Only requirement for IRA is to file at MSPB 65 days after OSC dismisses or any time after 120 days after filing with no action by OSC