NO. 17-2311

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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GEORGE KARL,

*Petitioner*,

v.

MERIT SYSTEMS PROTECTION BOARD,

*Respondent*.

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Petition for Review of the Merit Systems Protection Board
in Case No. SF-1221-17-0269-W-1

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# BRIEF OF *AMICUS CURIAE* U.S. OFFICE OF SPECIAL COUNSEL IN SUPPORT OF PETITIONER AND IN FAVOR OF REVERSING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION

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## IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The United States Office of Special Counsel (OSC) is an independent federal agency charged with safeguarding the merit system by protecting federal employees, former federal employees, and applicants for federal employment from "prohibited personnel practices," as defined by 5 U.S.C. § 2302(b) of the Civil Service Reform Act of 1978 (CSRA), as amended by both the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). In particular, OSC is responsible for investigating and seeking corrective action for federal employee whistleblowers, including those who experience retaliation for engaging in protected activities, such as filing complaints with OSC or an Inspector General (IG). *See* 5 U.S.C. § 2302(b)(8)-(b)(9).

OSC has a substantial interest in two legal issues presented by this case. The first issue concerns the administrative exhaustion requirements for a whistleblower retaliation complaint filed with OSC pursuant to sections 2302(b)(8) and (b)(9). The second issue concerns the protection of activities related to cooperating with or disclosing information to OSC or an IG under section 2302(b)(9)(C). Both issues bear directly on OSC's statutory enforcement authority. Moreover, as the agency responsible for enforcing these laws, OSC has particular expertise interpreting, investigating, and evaluating claims brought pursuant to these statutory provisions.

By statute, OSC is "authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9) … [and is] authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) … and the impact court decisions would have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h); Fed. R. App. P. 29(a). Therefore, OSC respectfully submits this *amicus curiae* brief to address administrative exhaustion, as well as the protection of disclosures to OSC and IGs under section 2302(b)(9)(C), pursuant to its statutory authority under section 1212(h) and as a government entity under Fed. R. App. P. 29(a)(2).[1] OSC takes no stance on any other issues in this case.

## STATEMENT OF THE ISSUES

1. Did the Merit Systems Protection Board (MSPB or Board) err by holding that petitioner George Karl failed to exhaust administrative remedies as to disclosures he provided to OSC because he did not provide "further details" to support the underlying allegations of wrongdoing in the disclosures?

2. Did the MSPB err by concluding that Karl's prior OSC complaint was not protected activity under section 2302(b)(9)(C) because he did not affirmatively demonstrate that his complaint was made in accordance with applicable provisions of law?

[1] OSC informed the parties of its intention to file this brief and no party objected.

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. Federal employee whistleblowers may seek corrective action in *de novo* proceedings before the MSPB through an Individual Right of Action (IRA). By statute, an individual must exhaust administrative remedies with OSC before pursuing an IRA to allow OSC the opportunity to resolve disputes without Board involvement. However, Congress made clear that if OSC does not resolve such a complaint, the individual has the right to bring the claim to the MSPB. Under the Federal Circuit's well-established standard, an individual exhausts administrative remedies by presenting a request for corrective action with reasonable clarity and precision, such that OSC has a sufficient basis to pursue an investigation.

In this case, Karl filed a complaint with OSC alleging that the Navy suspended him in retaliation for his prior complaint and protected whistleblowing, including disclosures made in a letter to Senator Patty Murray. Nevertheless, the Board held that Karl failed to exhaust his administrative remedies because the letter sent to Senator Murray was "vague" and lacked "further details" to support the wrongdoing disclosed in the letter. OSC disagrees. Because Karl provided OSC with a copy of the actual disclosures to Senator Murray, OSC was afforded sufficient information to investigate whether those disclosures were protected and whether they contributed to his suspension. As such, Karl properly exhausted his administrative remedies with OSC. By requiring Karl to provide more specific

details about his disclosures as well as more precise information about the underlying basis for them, the Board improperly conflated the Federal Circuit's administrative exhaustion standard with the subsequent merits determination about whether the statute protects Karl's disclosures.[2]

More broadly, the MSPB's approach to administrative exhaustion contradicts federal whistleblower statutes, as well as Congress's intent to provide broad protection for whistleblower retaliation backed by effective remedies. It also increases the burden on whistleblowers and creates inefficiency by making the OSC administrative process more formal and opaque and by encouraging whistleblowers to refile claims that have been previously considered. Additionally, the Board's approach prejudices whistleblowers who typically are not represented by counsel and who may lack access to agency documents or investigative tools needed to provide details related to their claims.

II. Karl filed a prior OSC complaint, which constitutes protected activity under section 2302(b)(9)(C). The MSPB disagreed, however, and held that Karl failed to prove that he engaged in protected activity because he did not affirmatively

[2] Karl alleged to OSC that additional protected disclosures contributed to his suspension. OSC's administrative exhaustion analysis focuses on Karl's letter to Senator Murray because doing so most clearly illustrates how the errors in the Board's legal analysis of administrative exhaustion affected the outcome of Karl's claim. Because the MSPB erred in its legal analysis, it would be appropriate for the court to remand for the correct analysis of the entire case in the first instance.

demonstrate that his prior complaint to OSC was made "in accordance with applicable provisions of law." In doing so, the Board transformed a general obligation on individuals not to violate the law when providing information to OSC or an IG (for example, by mishandling classified information) into an affirmative legal burden to prove compliance with the law in Board proceedings. This burden of proof is inconsistent with Congress's intent and binding case law. The MSPB's approach also puts a new and substantial burden on whistleblowers—who typically are *pro se*—as well as on OSC, IGs, and the Board itself. Accordingly, this court should remand for the MSPB to properly consider Karl's whistleblower retaliation claim based on his prior protected activity.

## RELEVANT BACKGROUND

George Karl filed a complaint with OSC alleging that the Navy suspended him in retaliation for his prior complaint and protected whistleblowing, including disclosures made in a letter to Senator Murray. *See Karl v. Dep't of the Navy*, SF-1221-17-0269-W-1, 2017 WL 1374881 (April 14, 2017), Appx2. After OSC closed the complaint, Karl filed a timely IRA with the Board alleging the same disclosures, personnel action, and theory of whistleblower retaliation that he raised to OSC. Appx2-3.

On April 14, 2017, the MSPB Administrative Judge (AJ) issued an initial decision, which became the final decision of the Board on May 19, 2017. After

stating that Karl "must inform OSC of the precise ground of his charge of whistleblowing," the Board held, in pertinent part, that Karl failed to exhaust administrative remedies with OSC on his claim that the Navy suspended him in retaliation for his protected disclosures. Appx4. The Board additionally held that Karl's prior OSC complaint was not protected activity under section 2302(b)(9)(C) because he failed to demonstrate that "what he actually communicated to OSC" was "in accordance with applicable provisions of law." Appx11. On July 18, 2017, Karl timely filed an appeal with this court under 5 U.S.C. § 7703(b)(1)(B).

## STANDARD OF REVIEW

Because this appeal turns on questions of law—i.e., the scope of the Board's IRA jurisdiction and the burden of proof for claims under section 2302(b)(9)(C)—this court conducts a *de novo* review. *See Herman v. Dep't of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999).

## ARGUMENT

### I. THE BOARD ERRED IN REQUIRING WHISTLEBLOWERS TO PROVIDE PRECISE DETAILS ABOUT PROTECTED DISCLOSURES TO EXHAUST ADMINISTRATIVE REMEDIES

#### A. The Board's Restrictive Approach to IRA Jurisdiction Contravenes the Plain Language of the Statute

The MSPB's approach to administrative exhaustion is contrary to the statute. *See* 5 U.S.C. § 1214(a)(1)(A); 5 U.S.C. § 1212(a). Individuals may file prohibited

personnel practice complaints with OSC seeking an investigation and corrective action. Section 2302(b) defines 13 prohibited personnel practices, including two related to whistleblower retaliation claims: (1) retaliation for making protected disclosures, in section 2302(b)(8); and (2) retaliation for engaging in protected activities, such as providing information to OSC or an IG, in section 2302(b)(9). Upon receipt of a complaint, OSC investigates the allegation to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. *See* 5 U.S.C. § 1214(a)(1)(A).

Individuals alleging most types of prohibited personnel practices have no further recourse if they do not obtain corrective action through OSC. Individuals alleging whistleblower retaliation claims, however, are treated differently. After filing complaints with OSC, such an individual "may seek corrective action from the Board … if such employee … seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) …." 5 U.S.C. §§ 1214(a)(3), 1221(a).[3] This process, known as an IRA, is not an appeal of OSC's decision on the individual's complaint. Rather, an IRA

[3] Certain types of serious personnel actions, not relevant here, may be appealed directly to the Board without administrative exhaustion before OSC. *See* 5 U.S.C. §§ 1214(a)(3), 7511-13 . If an individual instead brings a claim challenging such a personnel action to OSC, he or she may subsequently pursue an IRA of any whistleblower retaliation claims, subject to the administrative exhaustion requirements.

is a *de novo* review of the validity of the complaint, *see*, *e.g., Weber v. United States*, 209 F.3d 756, 759 (D.C. Cir. 2000), which does not rest on OSC's administrative record.

The statutory provisions regarding administrative exhaustion at OSC and the Board's IRA jurisdiction both reference presenting the "prohibited personnel practice" claim to OSC, but neither references the individual elements of proving that claim, such as the specific disclosures made or whether such disclosures were protected. 5 U.S.C. §§ 1214(a), 1221(a). The statute places only one condition on an individual's right to seek corrective action from the Board in a whistleblower retaliation claim: the individual "shall seek corrective action from the Special Counsel before seeking corrective action from the Board." 5 U.S.C. § 1214(a)(3). After doing so, the individual "may"—without any qualification—file an IRA after at least 120 days have elapsed, or within 60 days of being notified that OSC has terminated its investigation. *Id.*

Here, Karl first sought corrective action from OSC for a suspension that he alleged to be in retaliation for, among other things, making protected disclosures to Senator Murray in a letter he provided to OSC (and the MSPB). Within 60 days of being notified that OSC terminated its investigation, he filed an IRA with the Board. These facts alone demonstrate that Karl properly exhausted his administrative remedies with OSC. The MSPB's additional obligation that Karl

provide "further details" on his individual disclosures to establish administrative exhaustion was improper because it effectively required him to prove the merits of his whistleblower retaliation claim. Thus, applying the plain language of the statute, the Board erred in finding that Karl failed to exhaust administrative remedies with OSC.

### B. The Board's Administrative Exhaustion Standard Ignores Clear Congressional Intent

The MSPB's standards for administrative exhaustion conflict with Congress's intent to provide broad IRA rights. The "WPA is remedial legislation, intended to improve protections for federal employees, and should be construed to effectuate that purpose." *King v. Dep't of Health & Human Servs.*, 71 M.S.P.R. 22, 32 (1996); *see also Hudson v. Dep't of Veterans Affairs*, 104 M.S.P.R. 283, 287 (2006); *Porter v. Dep't of the Treasury*, 80 M.S.P.R. 606, 609 (1999). A central purpose of the WPA was to override restrictive interpretations of federal employee whistleblower protections. *See* S. Rep. No. 100-413 (1988), at 12-16 (discussing various provisions of the WPA crafted to overturn judicial decisions); H.R. Rep. No. 100-274 (1987), at 25-28 (same).

In expanding whistleblower protections, Congress created IRA rights as part of the WPA "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government[.]" Pub. L. No. 101-12 § 2(b), 103 Stat. 16 (1989). Due to the small

percentage of whistleblowers who obtained relief through OSC at that time, Congress created the IRA to "to assure whistleblowers, at the very least, of having an opportunity to argue their case in a hearing—with or without the OSC's involvement." S. Rep. No. 100-413 at 17; H.R. Rep. No. 100-274) at 22-23 (stating that "individuals should have the right to pursue their own cases" before the Board). The Senate Report emphasized that it "is important that whistleblowers who seek the OSC's help not be penalized by any OSC decision *not* to pursue their cases …." S. Rep. No. 100-413, at 17 (emphasis added).

The legislative history of later WPA amendments further weighs against restrictive interpretations of whistleblowers' IRA rights. The House Committee Report accompanying the 1994 Amendments strengthening the WPA explicitly rejected a Board decision limiting an employee's IRA right for failing to exhaust administrative remedies. *See* H.R. Rep. No. 103-769 (1994), at 17 & n.15 (citing *Knollenberg v. Dep't of the Navy*, 47 M.S.P.R. 92 (1991), *aff'd sub nom. Knollenberg v. Merit Sys. Prot. Bd.*, 953 F.2d 623 (Fed. Cir. 1992)). Congress's disapproval of *Knollenberg* is instructive, especially because the employee in that case had not even alleged whistleblower retaliation. *See* 47 M.S.P.R. at 96-97. The House Committee deemed the Board's administrative exhaustion analysis—which was far less restrictive than its current approach—to be part of "a steady attack on achieving the legislative mandate for effective whistleblower protection."

H.R. Rep. No. 103-769, at 17 & n.15. On the day the House passed the final 1994 Amendments, Representative Frank McCloskey, the sponsor of the Amendments, explicitly addressed administrative exhaustion, stating:

> There should not be any confusion. To exhaust the OSC administrative remedy and qualify for an individual right of action, an employee or applicant only must allege a violation of section 2302(b)(8). ***The examples of alleged reprisals listed in the OSC complaint, and the scope of the evidence that a whistleblower presents to the OSC, are completely irrelevant to establish jurisdiction for an IRA***.

140 Cong. Rec. 29, 353 (1994) (emphasis added)).

More recent legislative history likewise underscores congressional intent to afford whistleblowers broad IRA rights. In 2012, Congress passed the WPEA to strengthen whistleblower protections and counter the "evident tendency of adjudicative bodies to scale back" the statute's intended scope. S. Rep. No. 112-155 (2012), at 1-2, 4-6, 9-10. In this legislation, Congress expanded IRA rights to individuals alleging whistleblower retaliation claims for engaging in protected activities, including disclosing information to OSC or an IG under section 2302(b)(9). *See* Pub. L. No. 112-199 § 101(b), 126 Stat. 1465 (2012); S. Rep. No. 112-155, at 57, 59-60.

In short, the entire legislative history of federal employee whistleblower protections reflects Congress's clear intent to encourage whistleblowing to help eliminate fraud, waste, and abuse within the federal government through strong

statutory protections backed by effective remedies. The MSPB's approach—so restrictive that Karl was held not to have exhausted his administrative remedies as to disclosures he provided to OSC—is inconsistent with that intent and creates barriers for whistleblowers to receive protection. As a result, the Board's constrained reading of administrative exhaustion requirements creates a chilling effect on whistleblowing, which undermines the ultimate legislative purpose of eliminating government wrongdoing.

### C. The Board's Circumscribed Approach to Administrative Exhaustion Increases Inefficiency and Unnecessarily Burdens OSC and Whistleblowers

The MSPB's administrative exhaustion standard advances administrative inefficiency and places additional burdens on OSC and whistleblowers. When the Board determines that a whistleblower has not exhausted administrative remedies with OSC prior to filing an IRA, that individual may simply file another complaint, regardless of the amount of time that has passed since the allegations occurred. OSC must then spend its limited resources evaluating that claim. If OSC closes the new complaint or 120 days pass, the individual may file another IRA with the Board. Multiple reviews of the same allegations wastes OSC's, the Board's, and complainants' time and resources, and is contrary to congressional intent.

In particular, the MSPB's holding that Karl failed to exhaust administrative remedies, even though he provided OSC with a letter containing the alleged

protected disclosures, leaves whistleblowers such as Karl in a Catch-22 situation. The face of the letter shows precisely what Karl disclosed and to whom. If he were to refile his claim, OSC likely would determine that it is precluded because OSC has considered his previous complaint based on the same disclosures and personnel action, denying him any right to pursue his IRA. If OSC determined that Karl's claim was not precluded in light of the Board's holding, OSC would have to allow Karl to provide "further details" to support the wrongdoing alleged in the letter to allow him to exhaust his administrative remedies. Such an approach is inefficient because it effectively requires OSC to investigate the merits of a claim that it previously determined it had sufficient information to close.

Congress intended the OSC administrative process to be informal and efficient, but the MSPB's approach makes the administrative exhaustion standard burdensome, legalistic, and inaccessible to many whistleblowers. If complainants must provide "precise" information about every element of their whistleblower retaliation claims to OSC—or worse, if they must provide "further details" to demonstrate the underlying basis for the alleged protected disclosures—they will need more background information about the statutory structure, and may have to do their own investigative work to access those details.

The Board's approach to administrative exhaustion fails to recognize that the large majority of complainants are not represented by counsel before OSC.

Complainants typically do not have the training to present a legal case; they often focus on telling OSC their story, not on the statutory requirements to win their case. Requiring complainants to describe in detail each individual whistleblower disclosure at issue in the case—here taken a step further to require Karl to articulate something more about a letter he provided to OSC—is particularly problematic because complainants frequently do not have a full understanding of the statutory definition and case law defining the scope of protected disclosures. In the analogous context of administrative exhaustion of employment discrimination complaints, the U.S. Supreme Court has emphasized that procedural technicalities are inappropriate because laymen typically initiate the administrative process. *See Love v. Pullman Co*., 404 U.S. 522, 527 (1972); *Zipes v. Trans World Airlines*, *Inc.*, 455 U.S. 385, 397 (1982). This court has embraced that line of reasoning, applying it to claims before the Board arising under the Veterans Employment Opportunities Act (VEOA), in which laymen typically participate without the benefit of counsel. *See Kirkendall v. Dep't of the Army*, 479 F.3d 830, 841-42 (Fed. Cir. 2007) (noting that veterans enforcing their rights under the VEOA often do not have representation making it "particularly inappropriate to foreclose equitable relief") (internal citation omitted).

Additionally, the MSPB's approach ignores that complainants lack access to agency information. The WPA does not provide a complainant with discovery

tools unless and until he or she files an IRA with the Board, and OSC does not share its investigative files with complainants. The statute assigns OSC the responsibility to investigate prohibited personnel practices during the administrative process. *See* 5 U.S.C. § 1214(a)(1)(A). OSC's responsibility is paired with the statutory authority to interview witnesses, take depositions, request documents, and issue interrogatories to agency officials. *See id.* § 1212(a)-(b). This statutory structure does not contemplate that whistleblowers seeking corrective action from OSC would bear the responsibility of collecting and providing the precise factual underpinnings of each element of their claims. By requiring individuals to provide exact details of each element of their claims at the OSC stage—in effect conflating administrative exhaustion with proof on the merits—the Board has elevated the burden on whistleblowers and thereby undercut the statutory scheme protecting them.

The Board's administrative exhaustion standard additionally deprives whistleblowers of the benefits of discovery before the MSPB. If an individual has exhausted administrative remedies before OSC, he or she may add more detail during Board proceedings. *See Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1378 (Fed. Cir. 2001) (holding that petitioner exhausted administrative remedies where she provided the general nature of her disclosures to OSC and added more detail before the Board); *Heining v. Gen. Serv. Admin.*, 61 M.S.P.R.

539, 547 (1994) (petitioner did not characterize allegations differently, but merely added more detail, before the Board). Through discovery, a whistleblower may gain additional evidence that he or she did not have the opportunity to present to OSC, which may directly affect the merits of his or her claim. However, if the Board requires precise details of claims to be presented to OSC, the whistleblower would not get past the administrative exhaustion inquiry.

D. Karl Exhausted Administrative Remedies by Providing a Sufficient Basis for OSC to Investigate

The Federal Circuit has held that in order to satisfy the administrative exhaustion requirement, an individual must articulate to OSC the basis for his or her request for corrective action "with reasonable clarity and precision." *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1037 (Fed. Cir. 1993); *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992). The modifier is highly significant—*reasonably* clear and precise information is required, not *the* precise ground.[4]

[4] In three opinions, the Federal Circuit has articulated in *dictum* the more restrictive "precise ground" formulation, while applying the standard above. *See Briley*, 236 F.3d at 1377 (petitioner exhausted administrative remedies where she provided the general nature of her disclosures to OSC and more detail before the Board); *Ellison*, 7 F.3d at 1037 (petitioner's OSC complaint appeared to raise a personal grievance and did not provide a sufficient basis for OSC to investigate a disclosure to an IG); *Ward*, 981 F.2d at 526 (Fed. Cir. 1992) (disclosure that an official approved unnecessary travel was not "sufficient notice" to OSC of a disclosure that the same official herself traveled unnecessarily). The Court may reject this *dictum* as unnecessary to the cited decisions and inconsistent with the Court's substantive standard, the statute, and congressional intent.

Because the purpose of administrative exhaustion is to give OSC the opportunity to resolve the dispute before involving the Board in the case, the individual must give OSC sufficient basis to pursue an investigation that might lead to corrective action. *See Ward*, 981 F.2d at 526. Thus, the inquiry for exhaustion is not whether the whistleblower has made a *prima facie* case of retaliation, but whether OSC has enough information to investigate whether a *prima facie* case exists. To this end, a whistleblower need not provide OSC with every detail needed to prove a violation, but rather enough information for OSC to understand and investigate what is alleged. If a whistleblower's narrative makes his or her allegations reasonably clear, OSC has the information necessary to investigate.

Under the Federal Circuit's standard, Karl plainly exhausted administrative remedies with OSC. Karl's complaint expressly stated, among other things, that the Navy suspended him in retaliation for making disclosures to Senator Murray. Appx6. He even provided OSC with the letter containing the disclosures to Senator Murray. Yet the Board determined that Karl did not properly exhaust because the disclosures made in the letter were "so vague that they would not have provided OSC with an adequate basis to pursue an investigation." Appx6. The Board further held that Karl "provided no further details" to support or clarify the disclosures made in the letter. *Id*. In its analysis, the Board conflated assessing administrative exhaustion for IRA purposes with determining the merits of Karl's

whistleblower retaliation claim. As the sponsor of successful legislation to strengthen the WPA aptly noted, "the scope of evidence that a whistleblower presents to OSC [is] completely irrelevant to establish jurisdiction for an IRA." 140 Cong. Rec. 29, 353 (1994).

Contrary to the Board's understanding, OSC's investigation and analysis of disclosures that may appear vague on their face can nevertheless provide OSC with a sufficient basis to pursue an investigation that leads to corrective action. As part of its investigation, OSC analyzes whether a whistleblower's disclosure meets the statutory definition in section 2302(b)(8). Here, by filing the complaint and providing OSC with the letter containing the disclosures made to Senator Murray, the allegations in Karl's whistleblower retaliation claim were reasonably clear and precise, and OSC had a sufficient basis to pursue its investigation. Thus, Karl's case should be remanded so the Board can apply the correct administrative exhaustion standard to his case.

## II. THE BOARD ERRED BY REQUIRING INDIVIDUALS TO AFFIRMATIVELY DEMONSTRATE THAT THEIR COOPERATION WITH OR DISCLOSURE OF INFORMATION TO OSC OR AN IG, WAS IN ACCORDANCE WITH APPLICABLE PROVISIONS OF LAW

### A. Congress Did Not Intend to Impose an Added Burden on Individuals Who Cooperate with or Disclose Information to OSC or an IG

In 1978, the CSRA created protections for whistleblower disclosures under section 2302(b)(8). Specifically, section 2302(b)(8)(A) protects non-classified

disclosures, and section 2302(b)(8)(B) protects classified disclosures to OSC, an IG, or another employee designated to receive such disclosures. *See* H.R. Rep. No. 95-1403 (1978), at 146. Under the original CSRA, section 2302(b)(9) protected against "reprisal for the exercise of any right of appeal granted by law, rule, or regulation." In 1989, the WPA expanded section 2302(b)(9), as relevant here, to ensure that cooperating with or disclosing information to OSC and IGs were also protected activities. *See* 5 U.S.C. § 2302(b)(9)(C); H.R. Rep. No. 100-274 (1987), at 15, 16, 28, 39. The statute provided that these protected activities—including those dealing with disclosures of classified information under section 2302(b)(8)(B)—were to be done "in accordance with applicable provisions of law." 5 U.S.C. § 2302(b)(9)(C); H.R. Rep. No. 100-274 (1987), at 69. Indeed, this proviso was likely intended to reinforce the existing legal obligation of OSC and IGs to handle classified information appropriately.

Notably, this legislative history frames the protection for cooperating with or disclosing information to OSC or an IG broadly. Neither Committee report indicates any intention to limit those protections or to create an affirmative burden of proof with the "in accordance with applicable provisions of law" language.[5] *See*

[5] Although the statute does not require Karl to present any information about the substance of his previous OSC complaint, we note for the record that none of Karl's disclosures involved classified information. Thus, any concern Congress

H.R. Rep. No. 100-274 (1987), at 15, 16, 28, 39; S. Rep. No. 100-413 (1988), at 16, 34-35.

B. The New Obligation to Affirmatively Demonstrate Compliance with Applicable Provisions of Law is Inconsistent with Board Precedent

The MSPB routinely protects cooperation with and disclosures of information to OSC and IGs, without imposing a new affirmative burden on complainants to prove that they acted in accordance with law. For example, in *Salerno v. Department of the Interior*, 123 M.S.P.R. 230, 237 (2016), the Board held that Salerno's disclosures to OSC were protected under section 2302(b)(9)(C) without requiring that Salerno demonstrate that he made his complaint to OSC in accordance with law, or making any finding that he did so. The Board did so after quoting section 2302(b)(9)(C), including the "in accordance with applicable provisions of law" clause, so its omission of any analysis of that clause indicates that no analysis is required. *See id*.; *see also Dean v. Dep't of the Army*, 57 M.S.P.R. 296, 302 (1993) (affirming AJ's finding that appellant's complaints to OSC are protected activity under section 2302(b)(9)(C)); *English v. Small Bus. Admin.*, DE-1221-16-0484-W-1, 2017 WL 950631 (Mar. 7, 2017) ("An OSC complaint is automatically protected under 5 U.S.C. § 2302(b)(9)(C)[.]")

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may have had regarding the appropriate handling of classified information is simply not present in this case.

(nonprecedential); *Guarino v. Dep't of Homeland Sec.*, SF-1221-16-0374-W-1, 2016 WL 4088291 (July 26, 2016) (concluding that appellant engaged in protected activity under section 2302(b)(9)(C) even when he "did not include copies or otherwise describe his complaints to OIG and OSC") (nonprecedential); *Nuri v. Dep't of the Army*, SF-1221-16-0293-W-1, 2016 WL 3522912 (June 22, 2016) (same) (nonprecedential).

The MSPB's reasoning in *Corthell v. Department of Homeland Security*, 123 M.S.P.R. 417, 422-23 (2016), is instructive as well. There, the Board held that individuals need not even show that they provided information to OSC or an IG, as long as the employing agency perceived them to have done so. That is so because "the statute speaks to the motivation of the agency, forbidding the agency to" retaliate against individuals for cooperating with or disclosing information to OSC or an IG. *Corthell*, 123 M.S.P.R. at 423. If the agency acts for that reason, the statute prohibits it, even if the agency was mistaken. *See id*. The Board elaborated that "a broad reading of section 2302(b)(9)(C)'s protection is necessary to avoid creating "a chilling effect [that] would contravene the purpose of the statute." *Id.* The same reasoning applies in this case. Here, the appropriate focus is whether Karl demonstrated that the Navy acted in retaliation for his prior OSC complaint. Imposing an affirmative obligation of demonstrating that he provided information

to OSC in accordance with applicable provisions of law would surely have a chilling effect that is inconsistent with congressional intent.

### C. The Board's Interpretation of Section 2302(b)(9)(C) Substantially Burdens Whistleblowers, OSC, and the Board

The MSPB's analysis and application of section 2302(b)(9)(C) prejudices whistleblowers by requiring them to meet additional burdens not contemplated by the statute. Many of the same arguments articulated earlier in Section I.C. apply with equal force to this issue. The Board fails to recognize that the vast majority of whistleblowers—and related witnesses who cooperate in investigations—do not have counsel or a full understanding of the law to assist them in meeting the burden to prove that they provided information to OSC or an IG in accordance with applicable law. This may push more complainants to feel they must hire an attorney before they file a whistleblower retaliation complaint—or even worse, before individuals feel comfortable cooperating with or providing information to OSC or an IG at all.

The Board's interpretation would additionally place substantial new burdens on OSC, IGs, and the Board itself. Currently, assessing whether an individual engaged in protected activity under section 2302(b)(9)(C) is a straightforward inquiry, the investigation or adjudication of which requires relatively little commitment of resources by OSC and the Board respectively. However, under the

Board's approach here, OSC staff investigating claims arising under section 2302(b)(9)(C) would be required to investigate whether past OSC or IG cooperation or disclosures were in accordance with applicable provisions of law. To do so would require them to dig deeply into the substance of separate OSC and IG cases—for example, reviewing the relevant OSC case files, document requests to IGs, and witness interviews of those who handled the past disclosures. This burdensome process would be required in every single case arising under section 2302(b)(9)(C), even though only a small percentage of such cases (*i.e.*, those involving classified information) would actually warrant such heightened review.[6]

D. Karl Engaged in Protected Activity under Section 2302(b)(9)(C) by Filing his Previous OSC Complaint

It is undisputed that Karl filed a prior complaint with OSC and asserted his protected activity under section 2302(b)(9)(C) in the instant proceedings. The underlying substance of Karl's previous OSC filing is immaterial to whether he engaged in protected activity under section 2302(b)(9)(C). *See, e.g.*, *Special*

[6] For decades OSC and IGs have had trained staff with security clearances in place to ensure that classified information is handled in accordance with applicable law. The Board should rely on these existing processes for safeguarding classified information rather than imposing new and onerous burdens on all whistleblowers. To the extent the proviso in section 2302(b)(9)(C) covers other "applicable provisions of law," OSC is better equipped than complainants to monitor compliance. For example, if OSC determines that an individual has elected a different remedy under section 7121(g)(2), OSC will close the complaint due to a lack of jurisdiction and will not issue an IRA letter.

*Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991) (section 2302(b)(9)(C) covers employee disclosures to OSC that do not meet the terms of section 2302(b)(8)), *recons. denied*, 52 M.S.P.R. 375, *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992).[7] Thus, Karl's claim of whistleblower retaliation based on prior protected activity should be remanded for consideration on the merits.

## CONCLUSION

For the foregoing reasons, the MSPB's holdings that Karl failed to exhaust administrative remedies and that his previous OSC complaint does not constitute protected activity are not in accordance with law. Therefore, the Special Counsel requests that the court reverse the Board's decision below.

Respectfully submitted,

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[7] Section 2302(b)(9)—unlike section 2302(b)(8)—does not impose a "reasonable belief" standard on whistleblowers; the act of filing with OSC, in and of itself, is protected activity under section 2302(b)(9)(C).

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