UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, DC

MARCUS MILTON,	)	
Appellant,	)	**DOCKET NUMBER**
	)	**SF-1221-22-0584-W-1**
v.	)	
	)	
DEPARTMENT OF VETERANS AFFAIRS,	)	
Agency.	)	
	)	

BRIEF ON BEHALF OF
THE UNITED STATES OFFICE OF SPECIAL COUNSEL
AS AMICUS CURIAE

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees, and applicants for federal employment from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC investigates and prosecutes whistleblower retaliation complaints, including retaliation for engaging in protected activities. *See* 5 U.S.C. §§ 1214; 2302(b)(8) and 2302(b)(9).

This case concerns whether a federal employee's protection from reprisal for cooperating with an agency-run investigation depends on the content of their testimony before the agency's investigating board. OSC has strong interest in clarifying how the Whistleblower Protection Act of 1989 (WPA)[1] shields participants in agency-run investigations, like the appellant Marcus

[1] This brief uses WPA as shorthand for whistleblower retaliation protections initially adopted in the Civil Service Reform Act of 1978 (CSRA), as amended by subsequent legislation, including but not limited to the Whistleblower Protection Enhancement Act of 2012 (WPEA).

Milton, under section 2302(b)(9)(C) for two reasons. First, as the agency tasked with investigating alleged violations of section 2302(b)(9), OSC has an interest in ensuring the statute is given its full intended effect. Second, as an investigative agency, OSC's ability to obtain candid testimony—and thus, to effectively investigate—depends on broad protection for those who cooperate with those oversight efforts. This case, therefore, impacts OSC's mission to protect whistleblowers from retaliation. Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB or Board) on this issue.[2] OSC does not take a stance on any other issues in this case.

STATEMENT OF THE ISSUE

It was error to consider the substance of Milton's cooperation with an agency investigative component in the analysis of his retaliation claim because section 2302(b)(9)(C) protects cooperation with investigative components regardless of content.

INTRODUCTION AND SUMMARY

On June 20, 2023, an MSPB Administrative Judge (AJ) dismissed Milton's individual right of action (IRA) appeal, finding that while he non-frivolously alleged participation in a protected activity by cooperating with an Administrative Investigation Board (AIB), he did not prove that the activity was protected under 5 U.S.C. § 2302(b)(9)(C). *Milton v. Dep't of Veterans Affairs*, SF-1221-22-0584-W-1, 2023 MSPB LEXIS 3146, *22-23 (M.S.P.B. June 20, 2023). Milton petitioned for review of this decision on July 25, 2023.

[2] The WPA authorizes OSC "to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b)(8) or (9), or as otherwise authorized by law." 5 U.S.C. § 1212(h)(l). OSC also may appear as amicus curiae to present its views in MSPB proceedings. *See* 5 C.F.R. § 1201.34(e). The appellant in this case did not object to OSC filing an amicus curiae brief and the filing will not unduly burden the proceedings.

OSC respectfully submits that the AJ erred in this aspect of the analysis. A key holding of the decision—that an employee loses protection under the WPA if their cooperation with an internal investigative component concerns discrimination—contradicts the plain language of the WPA, Board precedent, and the WPA's purpose and legislative intent. Moreover, there are compelling policy reasons to modify the decision. If upheld, this decision will require AJs to conduct unnecessarily complicated and fact-specific jurisdictional inquiries, inhibit OSC's and other investigators' ability to obtain witness testimony, and lead to inconsistent protection for witnesses. Therefore, we ask the Board to modify the initial decision to affirm that cooperation with an investigative component is activity protected regardless of the content of that cooperation.

RELEVANT BACKGROUND

Since 2015, Milton worked as a Registered Nurse for the Long Beach VA Emergency Department (ED). *Milton*, *at* *2. On March 14, 2022, Milton complained to multiple officials about discrimination and poor working conditions within the ED. The agency convened an AIB to investigate seven claims, four of which did not involve racial discrimination. *Id.* at *2-3, 9. After interviewing multiple witnesses, including Milton twice, the AIB substantiated an unhealthy work environment, but not racial discrimination. *Id*. *11-12. After Milton's second AIB interview, agency officials placed Milton on administrative leave and detailed him out of the ED. *Id.* at *13.

After exhausting his remedies before OSC, Milton appealed the detail to the Board, alleging retaliation. *Id.* at *1-13. At the merits stage, the AJ concluded that Milton failed to prove either protected disclosures or activity. The AJ found that Milton's two disclosures concerning non-discrimination matters lacked a reasonable belief of either an abuse of authority or violation

of law. *Id.* at *19-22. The AJ concluded that Milton's testimony to the AIB was not protected activity under 5 U.S.C. § 2302(b)(9)(C) because the AIB was convened in response to discrimination allegations and Milton's testimony exclusively focused on racism. *Id.* at *23-24 (citing *Graves v. Dep't of Veterans Affairs*, 123 M.S.P.R. 434 (2016)). The AJ found no legal authority or legislative intent to confer section 2302(b)(9)(C) protection to Milton's testimony before the AIB. *Id.* at *24. Having excluded Milton's disclosures and protected activity, the AJ did not analyze the agency's burden of showing clear and convincing evidence for the personnel actions. *Id.* at *24-25.

ARGUMENT

OSC respectfully submits that the Board should grant Milton's Petition for Review. 5 U.S.C. § 1212(c)(2) and 5 C.F.R. § 1201.114(i)(2)(ii). The Board's regulations provide for review if the AJ's initial decision: (a) contains erroneous findings of material fact; (b) is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; or (c) was not consistent with required procedures or involved an abuse of discretion. *See* 5 C.F.R. § 1201.115(a)-(c).

As discussed below, the PFR satisfies the standard for review. First, the AJ mistakenly analyzed the content of Milton's testimony to the AIB instead of focusing on the protected activity of cooperation. This interpretation ignored the plain text of the statute. This also contradicts the Board's case law, including its holding in *Fisher v. Dep't of Interior*, 2023 M.S.P.B. 11, ¶8 (March 16, 2023) (modifying initial decision for failing to analyze disclosures to the OIG and OSC as protected activities). Finally, this misinterpretation raises serious policy concerns, in that it would blur the clear path to protection under section 2302(b)(9)(C) and negatively impact OSC's ability to protect witnesses in OIG, OSC, and other investigations.

I. PARTICIPATION IN AN AGENCY INVESTIGATION IS A PROTECTED ACTIVITY WITHOUT REGARD TO THE CONTENT OF ONE'S TESTIMONY.

A. The Plain Text of the Statute Protects All Cooperation with or Disclosures to a Covered Investigative Entity

The initial decision erred because the plain text of section 2302(b)(9)(C) protects the activity of "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel" without limiting protection based on the content of that cooperation or disclosure. The Board has long held that "the interpretation of a statute begins with the language of the statute itself." *Bostwick v. Dep't of Agric.*, 122 M.S.P.R. 269, ¶ 8 (2015). If the language provides a clear answer, the inquiry ends, and the plain meaning of the statute is regarded as conclusive absent a clearly expressed legislative intent to the contrary. *Id.*; *Hall v. Office of Pers. Mgmt.*, 102 M.S.P.R. 682, ¶ 9 (2006). With the 2018 National Defense Authorization Act (2018 NDAA), Congress expressly extended the protections in section 2302(b)(9)(C) to cooperation with investigative entities, like AIBs, by inserting the parenthetical phrase "(or any other component responsible for internal investigation or review)." Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017). The AJ's own analysis indicates that there was no explanatory legislative intent, suggesting there should be no basis to upend the usual presumption that the text means what it says. Instead, the AJ relied on the very *absence* of legislative history to conclude that Congress could not actually have meant what the language plainly states—that the statute protects all cooperation with or disclosures to an investigative component, without any qualification for its content.

The plain language of section 2302(b)(9)(C) covers Milton's participation in the AIB as a qualifying protected activity. It is not disputed that Milton disclosed information to and

cooperated with an AIB. *Id.* at *8-12. And an "Administrative Investigation Board" is clearly a board—*i.e.*, a component—responsible for investigation of administrative matters—*i.e.*, matters internal to the agency. The AJ acknowledged as much. *Id.* at *16. Nevertheless, the initial decision looked past the plain language and the undeniable fact that Milton cooperated with an AIB to examine the content of what he told the investigators and exclude that activity from protection. This was error.

Section 2302(b)(9)(C) makes no such exception for the content of an employee's cooperation or disclosure to an eligible investigative entity. In this regard, section 2302(b)(9)(C)'s language differs from other sections of the WPA where Congress explicitly qualified the types of disclosures or activities that were eligible for protection. For example, section 2302(b)(8)(A) requires examination of the content of disclosures because, to qualify for protection, the disclosures must be grounded in reasonable belief, show one of five types of misconduct, and not be prohibited by law or certain Executive Orders. Similarly, activities protected under section 2302(b)(9)(A)(i) must be "with regard to remedying a violation" of section 2302(b)(8), requiring an AJ to examine the content of activities alleged under that provision to determine whether they qualify.

By contrast, section 2302(b)(9)(C) protects "cooperating with or disclosing information" to certain entities with no such qualifying language for the type of information disclosed or the nature of the cooperation. The Board has ruled that "[i]t is axiomatic that statutes should be construed to give effect to every provision, and must be construed to be in harmony, if possible." *Ochoa v. Dep't of the Navy*, 65 M.S.P.R. 39, 44 (1994) (citing 2B Singer, *Sutherland Statutory Construction*, § 51.02, (5th ed.)). When Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v.*

Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th rev. ed. 2000)).

Consequently, by considering the content of Milton's testimony to the AIB, the initial decision incorrectly injected a limitation into section 2302(b)(9)(C) which is not found in the statutory text. As a remedial statute, the WPA should be construed liberally to advance the remedy. *See Sutherland Statutory Construction* § 60.01; *see also Costin v. Dep't of Health and Human Servs.*, 72 M.S.P.R. 525, 531 (1996); *Wilcox v. Int'l. Boundary and Water Comm.*, 103 M.S.P.R. 73, 77 (2006). Non-textual barriers to protection undermine the remedial nature of the statute.

B. Case Law Confirms That Participation in an Oversight Investigation is Protected Without Regard to Content

Earlier this year, in *Fisher v. Department of Interior*, the Board held that "[u]nder the broadly worded provision of 5 U.S.C. § 2302(b)(9)(C), any disclosure of information to OIG or OSC is protected *regardless of its content* as long as such disclosure is made in accordance with applicable provisions of law." 2023 M.S.P.B. 11, ¶8 (emphasis added). Thus, the Board modified the initial decision because it failed to analyze the appellant's disclosures to OSC and the OIG under section 2302(b)(9)(C). *Id*. In a footnote, the Board advised that the content of one's disclosures to OSC or the OIG may be relevant at the merits stage of an IRA appeal to discern whether an appellant meets the contributing factor test or whether the agency can meet their rebuttal burden. *Id*. at n.1. Here, as in *Fisher*, the relevant inquiry regarding the content of Milton's cooperation at the merits stage is to determine if it contributed to the personnel action or affects the agency's rebuttal burden. Instead, the AJ concluded that Milton's testimony could not be protected under section 2302(b)(9)(C) because "his statements...are outside the Board's

jurisdiction in the context of an IRA appeal." *Milton*, at *22-24. However, as *Fisher* makes clear, it is the fact of the cooperation, *regardless of its content*, that matters.

While the Board has not yet issued a precedential decision on whether section 2302(b)(9)(C) protects testimony related to discrimination, it has squarely addressed this issue in two non-precedential cases. First, in *Tamayo v. Department of Homeland Security*, the Board concluded that an appellant's disclosures of discrimination and EEO reprisal were not protected under section 2302(b)(8), but nonetheless modified the initial decision to recognize that repeating these unprotected disclosures to OSC did constitute protected activity under section 2302(b)(9)(C). Docket no. AT-1221-17-0449-W-1, 2023 MSPB LEXIS 3821 (2023) (NP). Second, in a case decided after *Milton*, the Board found that email complaints of discrimination to the OIG were not protected under section 2302(b)(8) but were protected by section 2302(b)(9)(C). *Vaz v. Dep't of Housing and Urban Development*, Docket no. DA-1221-15-0132-W-1, 2023 MSPB LEXIS 4487 (2023) (NP). Given the nonfrivolous allegation of protected activity, the Board remanded the case for further findings. *Id.*

To the extent the AJ relied on *Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434 (2016) to support the Board's historical declination to extend IRA protection to AIB testimony, that decision is inapposite. *Graves* was decided two years before Congress extended protection under 2302(b)(9)(C) beyond activities involving OSC and OIG to also include any disclosure of information or cooperation with an agency "component responsible for internal investigation or review," like an AIB. *See* 2018 NDAA, Pub. L. No. 115-91, § 1097(c), 131 Stat.at 1618.

II. NARROWING THE SCOPE OF SECTION 2302(B)(9)(C) MAKES THE PROVISION DIFFICULT TO APPLY AND THREATENS TO UNDERMINE INVESTIGATIONS BY OSC, OIG, AND INVESTIGATIVE COMPONENTS

Beyond the compelling statutory and case law support for OSC's position, there are strong policy reasons for protecting all participation in internal investigative proceedings.

First, the initial decision sets up an analysis that would be confusing and difficult to administer in most cases, presumably in an effort to distinguish between activities protected under the WPA and the EEO process, respectively. *See Edwards v. Dep't of Labor*, 2022 MSPB 9 ¶ 12-14 (2022) (observing that Congress intended to create two distinct processes for retaliation claims covered by the WPA and those covered by Title VII). In the context of section 2302(b)(9)(C), however, the Board need not conduct complicated, fact-specific inquiries about the nature of a particular witness' agency investigation testimony to preserve a distinction between the two processes. AIB inquiries, like those conducted by OSC and OIGs, are readily distinguishable from EEO investigations, where the reasoning of *Edwards* may apply with greater force. Whereas EEO investigations can *only* investigate and resolve matters of discrimination and reprisal for engaging in that process, investigations by OSC, the OIG, and internal investigative components often include both discriminatory and non-discriminatory misconduct. Thus, a rule that requires the MSPB to inquire with particularity into the basis for an internal investigation and the exact content of an employee's testimony would be difficult to apply and is unnecessary given the clear differences between EEO and other types of section 2302(b)(9)(C) investigations.

Second, OSC and other oversight entities need federal employees to have broad protections in order to obtain complete, candid participation in their investigations, especially because cooperation is required, and witnesses may be reluctant. *See Ashford v. Dep't of Justice*, 6 M.S.P.R. 458, 464-465 (1981) (recognizing that under most circumstances, employees must cooperate with administrative investigations, even without the due process right to be

represented by counsel). If instead those protections are ambiguous or appear to vary from one fact-finding to another, witnesses may be hesitant to share all the information at their disposal. In turn, the quality of the investigation suffers, and government oversight becomes less effective.

Third, excluding AIB testimony based on its content would be unfair to individual participants and lead to inconsistent results. Witnesses may not know the scope of the investigation or the significance of the questions they are asked. On its face, the law does not put any employee, but especially an unrepresented witness, on notice that their remedies differ based on the content of the testimony or the subject matter of the investigation. Under those circumstances, a witness' right to pursue a retaliation claim should not depend on whether they know enough to choose the right forum, especially where time limits in the EEO process may lapse before the investigation for which they testified is complete. *See* 29 C.F.R. § 1614.105(a)(1). Moreover, the reasoning of the initial decision would protect an AIB witness who provides no relevant testimony, while a witness who provides damning testimony of discrimination in the same fact-finding would be left wondering where to file a claim. The law should be interpreted to avoid such disparate results.

CONCLUSION

Based on the foregoing, OSC urges the Board to remand this case to the AJ with instructions to reconsider Milton's IRA appeal under the proper standard.

Respectfully submitted,

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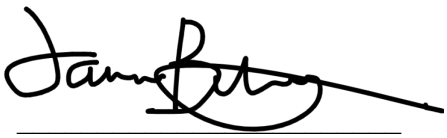

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