UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON, DC

MARCOS A. MORALES, **Appellant,**	)	
v.	)	**DOCKET NUMBER** **CH-1221-21-0420-W-1**
U.S. 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 is responsible for reviewing, investigating, and prosecuting whistleblower retaliation complaints, including claims of retaliation for engaging in protected activities. *See* 5 U.S.C. §§ 1214, 2302(b)(9).

This case concerns the scope of protection afforded under the Whistleblower Protection Act of 1989 (WPA)[1] to a federal employee who cooperated in agency investigations—which is protected activity under section 2302(b)(9)(C). It directly affects OSC's ability to perform its investigative functions, specifically, to obtain credible witness testimony. As such, this case has

[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).

wide-reaching impact on OSC's mission to protect federal employee 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

Did the MSPB Administrative Judge (AJ) err in holding that an employee's cooperation with agency investigative components is unprotected under section 2302(b)(9)(C) because he did not initiate his compulsory participation and because the information he conveyed would not qualify as a disclosure under section 2302(b)(8)?

RELEVANT BACKGROUND

Marcos A. Morales, an Imaging Supervisor with the U.S. Department of Veterans Affairs (VA) Illiana Healthcare System in Danville, Illinois, filed an OSC complaint alleging that the VA took personnel actions against him in retaliation for engaging in protected activities under section 2302(b)(9)(C), including cooperating with three VA investigations led by the Office of the Medical Inspector (OMI), Office of Inspector General (OIG), and Veterans Health Administration (VHA). *See Morales v. Dep't of Veterans Affairs*, CH-1221-21-0420-W-1, 2021 MSPB LEXIS 3401, 1, 4 (M.S.P.B. Oct. 4, 2021). Investigators approached Mr. Morales for information about the alleged wrongdoing of the Health Systems Specialist Director (Director). *See id.* at 4. Mr. Morales informed investigators that he was not personally aware of any wrongdoing on the part of the Director. *Id.* at 9. Investigators also asked Mr. Morales about the

[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.

Director's relationship with other individuals and how he would feel if the VA were to discipline the Director. *Id.*

On August 12, 2021, more than 120 days after filing his OSC complaint, Mr. Morales filed an Individual Right of Action (IRA) appeal with the MSPB, alleging the same theories of retaliation.[3] *See id.* at 1, 5. Mr. Morales notified OSC of his appeal, which resulted in OSC closing its file. *See id.* at 1. An MSPB AJ issued an initial decision on October 4, 2021, finding that Mr. Morales had exhausted his administrative remedies, but failed to nonfrivolously allege that he had engaged in protected activity under section 2302(b)(9)(C). *Id.* at 5, 12. In doing so, the AJ found that Mr. Morales's cooperation with investigators is unprotected because his participation was involuntary and the information that he conveyed was not protected under section 2302(b)(8). *Id*. at 8-12. On November 8, 2021, the initial decision became final. *See id.* at 14. Mr. Morales timely filed a petition for review of the decision with the Board.

The MSPB may grant a petition for review if the initial decision was based on an erroneous interpretation of a statute. *See* 5 C.F.R. § 1201.115(b). OSC respectfully submits that the AJ erred in interpreting section 2302(b)(9)(C) and therefore asks the Board to grant Mr. Morales's petition for review.

ARGUMENT

The AJ erred in excluding Mr. Morales's cooperation with agency investigative components from section 2302(b)(9)(C) protection because Mr. Morales did not initiate his compulsory participation and because the information he conveyed would not qualify as a disclosure under section 2302(b)(8). First, the AJ's analysis disregards the plain language of the statute. Second, it contravenes Congress's purpose and intent to provide IRA appeal rights for

[3] Under 5 U.S.C. § 1214(a)(3)(B), if OSC does not seek corrective action on a complainant's behalf within 120 days after the complaint is filed, the complainant may seek corrective action from the Board.

employees engaging in protected activities under section 2302(b)(9)(C). Lastly, because federal personnel regulations require employees to cooperate in OSC investigations, the AJ's holding would leave federal employees vulnerable to retaliation expressly prohibited by the statute and would hinder OSC's investigative efforts. For these reasons, OSC urges the Board to remand this case for consideration on the merits.

I. The AJ's Analysis Disregards the Plain Language of the Statute.

The Board has long held that "[t]he interpretation of a statute begins with the language of the statute itself." *Bostwick v. Dep't of Agric.*, 122 M.S.P.R. 269, 272 (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, 686 (2006). Judges should not "read an absent [provision] into the statute." *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *see also Harbison v. Bell*, 556 U.S. 180, 199 (2009) (holding that court may not read a limitation into "statute's silence").

In this case, the AJ disregarded the plain language of section 2302(b)(9)(C) and injected non-textual requirements for cooperation in an agency investigation to qualify for protection. Section 2302(b)(9)(C) protects against retaliation for "cooperating with or disclosing information to" an agency's Inspector General, other agency investigative components, or OSC. The definition of "cooperate" includes "to act together *or in compliance*." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/cooperate (accessed Jan. 28, 2022) (emphasis added). And indeed, the AJ acknowledged, more than once, that Mr. Morales *cooperated* with VA investigators. *See Morales*, at 10 ("[T]he appellant had no choice but to cooperate."); *Id.* at 11 ("[T]he appellant seeks protected status for participating in an investigation in which he was

required to cooperate. . . .").[4]

Yet, instead of crediting Mr. Morales's cooperation as protected activity, the AJ added two unstated elements into section 2302(b)(9)(C)—the nature and substance of participation. In analyzing the *nature* of participation, the AJ found that, because VA directives require employees to assist administrative investigators, Mr. Morales "had no choice but to cooperate." *Id.* at 10. Since his participation was not "volitional," the AJ held that it was therefore not protected. *Id.* But section 2302(b)(9)(C) imposes no such constraint on the nature of participation. Any language indicating that participation must be willful, or unprompted by law, regulation, or policy, is absent from the statute. Section 2302(b)(9)(C) protects, by itself, the act of cooperating with investigators—even if that cooperation is just answering their questions—irrespective of whether an agency forced the cooperation. And the AJ disregards the fact that Mr. Morales did have a choice in this case. He could have refused to cooperate with investigators and faced potential discipline, but instead chose to cooperate and risk retaliatory personnel actions.

To justify reading a volitional requirement into the statute, the AJ incorrectly relied on *Graves v. Dep't of Veterans Affairs*, 123 M.S.P.R. 434 (2016). In *Graves*, the Board held that providing testimony in a non-OIG administrative investigation is not protected because furnishing such assistance is not exercising "the right to complain." 123 M.S.P.R. 434, at 441-443. In *Morales*, the AJ construed *Graves* to mean that the statute protects the right to *initiate* a complaint, but not the compulsory participation in a resulting investigation.

[4] In addition to cooperating with investigators, Mr. Morales disclosed information to investigators. "Disclose" means to "make known or public" and "information" includes "knowledge obtained from investigation, study, or instruction." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/disclose (accessed Feb. 1, 2022); Merriam-Webster.com, https://www.merriam-webster.com/dictionary/information (accessed Feb. 1, 2022). Investigators asked Mr. Morales about the Director's relationship with other individuals and how he would feel if the VA were to discipline the Director. *Morales*, at 9. Mr. Morales also disclosed that he lacked personal knowledge of the wrongdoing under investigation. *Id.* This act of "disclosing information to" investigators is also protected under section 2302(b)(9)(C). Thus, Mr. Morales is, in fact, protected by the *entirety* of section 2302(b)(9)(C).

The AJ's reliance on *Graves*, though, is misplaced. *Graves* involved the interpretation of a different statutory provision, section 2302(b)(9)(A), because section 2302(b)(9)(C) did not yet protect an employee's cooperation with a non-OIG agency investigation. Consequently, in *Graves*, the appellant—who cooperated in a non-OIG agency investigation—could only be protected if his activity fit within the language of section 2302(b)(9)(A).[5] However, two years after *Graves*, Congress extended protection under section 2302(b)(9)(C) to employees—like Mr. Morales and Mr. Graves—who provide information to or cooperate with any agency "component responsible for internal investigation or review."[6] Unlike section 2302(b)(9)(A), section 2302(b)(9)(C) does *not* require an employee to initiate a complaint to enjoy protection.

Regarding the *substance* of participation, the AJ opined that to be protected, Board authority requires Mr. Morales "to have done more than meet with agency investigators only to inform them that he knew nothing about the matter being investigated." *Morales*, at 9-10. Because Mr. Morales offered no information that would constitute a disclosure under section 2302(b)(8), the AJ held that his cooperation is unprotected. *Id.* at 11.

Not so. Section 2302(b)(9)(C) does not limit its protection to employees who make protected disclosures. *See Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1352-1353 (Fed. Cir. 2022) (rejecting Board decision that "[e]ngaging in protected activity under section 2302(b)(9) is not sufficient alone" to establish jurisdiction, unless the activity is also protected under section 2302(b)(8)). Unlike section 2302(b)(8), which stipulates that an employee must make a

[5] 5 U.S.C. § 2302(b)(9)(A) protects against retaliation based on the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.

[6] In OSC's 2018 Reauthorization Act, enacted as part of the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), Congress amended section 2302(b)(9)(C) to protect cooperation with any component responsible for internal investigation or review.

"disclosure" as defined in section 2302(a)(2)(D), there is no corresponding limitation under section 2302(b)(9)(C).

The AJ's analysis does not uphold the statutory distinction between retaliation based on whistleblowing and retaliation based on engaging in protected activity. It is indisputable that a statute should not be interpreted to render one part superfluous. *See Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *recons. denied*, 52 M.S.P.R. 375 *and aff'd*, 981 F.2d 1237 (Fed. Cir. 1992); *see, e.g.*, *Horner v. Merit Sys. Prot. Bd.*, 815 F.2d 668, 674 (Fed. Cir. 1987). Yet by holding that section 2302(b)(9)(C) requires a protected disclosure—i.e., a disclosure that would already be protected by section 2302(b)(8)—the AJ does just that.

Further, the AJ's approach is inconsistent with Board decisions confirming that even if a communication with investigators does not meet the requirements of a disclosure, it may still be protected under section 2302(b)(9)(C). *See, e.g.*, *Lowrance v. Dep't of Veterans Affairs*, 2018 MSPB LEXIS 1659, 13 (M.S.P.B. May 7, 2018); *Miller v. Dep't of Com.*, 2021 MSPB LEXIS 2670, 171 (M.S.P.B. Aug. 3, 2021); *Wolfe v. Dep't of Interior*, 2017 MSPB LEXIS 4900, 11 (M.S.P.B. Nov. 20, 2017). In fact, the Board frequently asserts in its decisions that "[p]ursuant to 5 U.S.C. § 2302(b)(9)(C), cooperating with or disclosing information to the Inspector General of an agency is protected activity, *without limitation as to the content of the cooperation or disclosure*." *See, e.g.*, *Lodge v. Dep't of Air Force*, 2017 MSPB LEXIS 399, 34 (M.S.P.B. Jan. 26, 2017) (emphasis added). By creating nonstatutory hurdles for Mr. Morales's cooperation to qualify for protection, the AJ incorrectly denied Mr. Morales a hearing on the merits.

II. The AJ's Approach Contravenes Congressional Purpose and Intent.

Even if the plain language of section 2302(b)(9)(C) did not provide a clear answer, the AJ's approach contravenes legislative purpose and intent. Section 2302(b)(9)(C) should be

analyzed consistently with the common statutory interpretation canon that remedial statutes—like the WPA—are to 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). The remedial purpose of the WPA is undermined if the Board creates a loophole under section 2302(b)(9)(C), excluding otherwise protected activities from coverage based on the nature and substance of participation in investigations. In passing the WPA, the Senate affirmed that it was intended to "strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government." S. Rep. 112-115 (April 19, 2012). Moreover, Congress has reaffirmed that section 2302(b)(9) in particular, is intended to provide robust protection against retaliation for federal employees who engage in covered activities—including cooperating with investigative components. This is evidenced through the continued statutory expansion of those activities.[7] In the 40-year legislative history since the passage of the CSRA, there is no indication that Congress meant to limit the WPA's efficacy by excluding employees who engage in otherwise protected activities, simply because they are required to do so, or they do not make a protected disclosure as part of their activity.

The AJ's requirement that cooperation must be volitional is plainly out-of-step with congressional intent. Under the Inspector General Act of 1978, Congress clearly intended to give OIG broad authority to obtain relevant evidence—including employee testimony—in the performance of its oversight functions. Pub. L. 95-452, § 6, Oct. 12, 1978, 92 Stat. 1101. Many

[7] Since passing the CSRA in 1978, Congress has protected federal employees from retaliation for engaging in certain protected activities. Congress further supplemented the statutory protections in section 2302(b)(9), provided IRA appeal rights for many section 2302(b)(9) claims, and again increased the types of activities covered under section 2302(b)(9) in OSC's 2018 Reauthorization Act. *See* Pub. L. No. 95-454 (1978) § 101(a); Pub. L. No. 101-12, 103 Stat. 16 (1989) § 4(b); Pub. L. No. 112-199, 126 Stat. 1475 (2012) § 101(b); Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017).

federal agencies have reinforced this intention by requiring their employees to cooperate with IG and administrative investigations or risk discipline, including removal.[8] *See, e.g., Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 949 (Fed. Cir. 1983); *Sher v. Dep't of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007); *Shelton v. Dep't of Homeland Sec.*, 2005 MSPB LEXIS 218, 22-25 (M.S.P.B. Jan. 13, 2005). If Congress had intended a volitional requirement, then section 2302(b)(9)(C)'s protection for cooperating with OIG investigations—which is a requirement for nearly all federal employees—would be illusory. The AJ's finding undercuts congressional purpose and intent, depriving Mr. Morales of his statutory rights.

III. The AJ's Finding Leaves Federal Employees Vulnerable to Retaliation and Hinders OSC's Investigative Efforts.

OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices. To achieve this mission, OSC regularly investigates allegations of whistleblower retaliation. The success of OSC investigations depends largely on its ability to obtain credible witness testimony.[9] Witnesses, though, are reluctant to testify without protection from retaliation. Consequently, OSC relies on section 2302(b)(9)(C) to assure witnesses that they are safe to cooperate with OSC.

The AJ's holding that to be protected, participation in agency investigations must be voluntary, leaves federal employees vulnerable to reprisal because they are, in fact, required by regulation to cooperate with OSC. *See* 5 C.F.R. § 5.4. Without assured protection from

[8] Indeed, many federal agencies, including the VA, require employees to cooperate in IG, OSC, and administrative investigations. *See, e.g.*, 38 U.S.C. § .0735-12(b) (requiring VA employees to "furnish information and testify freely and honestly in cases respecting employment and disciplinary matters" and noting that "[r]efusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action."); VA Directive 0700, Part 3.d(1) (requiring all VA employees to "cooperate with administrative investigations. . . ."); 28 C.F.R. § 45.13 (requiring all U.S. Department of Justice employees to "cooperate fully with the Office of Inspector General" and noting that "[r]efusal to cooperate could lead to disciplinary action."); U.S. Department of Agriculture Personnel Manual, Chapter 751-3-10 (noting that "[f]ailure to cooperate with an investigation may constitute the basis for disciplinary action.").

[9] OSC is authorized to examine witnesses under 5 U.S.C. § 1212(b)(1).

retaliation, witnesses will be disinclined to cooperate with OSC, which will, in turn, significantly hinder OSC's investigative efforts.

The AJ's requirement that information provided to investigators must constitute a whistleblower disclosure is blind to the reality of an investigative process and the value of fact testimony. Like Mr. Morales's testimony, the information that OSC witnesses provide often does not constitute a disclosure. Still, the testimony can be essential. Fact witnesses may observe relevant interactions and relationships, participate in key decisions and events, and understand organizational culture and structure, all of which assist OSC in obtaining a complete understanding of the allegations.[10] Furthermore, the AJ did not account for the practical implications that excluding non-disclosure testimony would have. Employees—such as Mr. Morales—may face reprisal for cooperating in an investigation by virtue of *disclaiming* any knowledge of wrongdoing, if their testimony does not provide the information that management hoped to elicit. Such cooperation is plainly protected. It is therefore crucial that the Board remand this case so OSC is not impeded in its mission.

CONCLUSION

For the foregoing reasons, the AJ's holding that the Board lacks IRA appeal jurisdiction over Mr. Morales's case—by finding that his cooperation with agency investigative components is unprotected under section 2302(b)(9)(C) due to the nature and substance of his participation—is not in accordance with law. OSC therefore requests that the Board remand this case for consideration on the merits.

Respectfully submitted,

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[10] In the same way, although Mr. Morales did not make a disclosure, VA investigators undoubtedly found value in his account of the Director's relationships and his view on discipline. *Morales*, at 9.

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