

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

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<b>MIZIEL REMOLONA,</b>	)	
<b>Appellant,</b>	)	<b>Docket Number</b>
	)	<b>NY-1221-21-0127-W-2</b>
	)	
<b>v.</b>	)	<b>Date: August 29, 2024</b>
	)	
<b>DEPARTMENT OF</b>	)	
<b>VETERANS AFFAIRS,</b>	)	
<b>Respondent.</b>	)	
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**BRIEF ON BEHALF OF THE U.S. OFFICE OF SPECIAL COUNSEL  
AS AMICUS CURIAE**

**IDENTITY OF THE 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). 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 protections afforded to federal employees under an amendment to the Whistleblower Protection Act of 1989 (WPA)<sup>1</sup> that explicitly prohibited retaliation for participation in internal agency investigations. See National Defense

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<sup>1</sup> 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).

Authorization Act for Fiscal Year 2018 (2018 NDAA), Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017). As the agency responsible for investigating claims of retaliation under the amended provision, 5 U.S.C. § 2302(b)(9)(C), OSC has a substantial interest in the scope of its protection. In recent years, OSC has filed several *amicus curiae* briefs in cases that implicate the amended provision.

Moreover, OSC is an investigative agency and often reliant on testimony from federal employees. Strong and clear protections for those who cooperate with investigators allow OSC and other oversight entities to obtain candid testimony from federal employees confident that they will be protected from unlawful retaliation. Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB) on this issue.<sup>2</sup> OSC does not take a stance on any other issues in this case.

### **STATEMENT OF THE ISSUE**

Whether the Administrative Judge (AJ) erred by failing to consider whether an employee's testimony to an Administrative Investigatory Board (AIB) qualifies as a protected activity under 5 U.S.C. § 2302(b)(9)(C).<sup>3</sup>

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<sup>2</sup> 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)(1). 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.

<sup>3</sup> Section 2302(b)(9) prohibits personnel actions taken, not taken, or threatened because of:

- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—(i) with regard to remedying a violation of paragraph (8); or (ii) other than with regard to remedying a violation of paragraph (8);
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- (C) 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, in accordance with applicable provisions of law; or
- (D) refusing to obey an order that would require the individual to violate a law, rule, or regulation.

## **RELEVANT BACKGROUND**

Miziel Remolona, a registered nurse employed by the Department of Veterans Affairs (VA), filed an Individual Right of Action (IRA) appeal with the MSPB alleging that the VA retaliated against her for engaging in multiple forms of protected whistleblowing. Most relevant here, Ms. Remolona alleged that one reason the VA retaliated against her was because she testified to a VA AIB in December 2019.

In the Board's initial decision, the AJ found the MSPB lacked jurisdiction and dismissed Ms. Remolona's appeal. In discussing her testimony to the AIB, the AJ cited *Graves v. Dep't of Veterans Affairs* to find that Ms. Remolona's participation in an AIB was not an activity protected by section 2302(b)(9)(B). *See Remolona v. Dep't of Veterans Affairs*, NY-1221-21-0127-W-2 2024 LEXIS 2663 (initial decision) *citing Graves*, 123 M.S.P.R. 434 (2016).

After *Graves* was decided, and before the facts in this case, Congress expanded the protections afforded by section 2302(b)(9) by amending section 2302(b)(9)(C) to protect employees' cooperation with or disclosure of information to "any... component responsible for internal investigation or review" of an agency. *See* 2018 NDAA, § 1097(c). The initial decision, however, did not consider whether Ms. Remolona's activity was protected by section 2302(b)(9)(C).

Ms. Remolona timely filed a Petition for Review.

## **ARGUMENT**

The PFR should be granted because the plain language of the statute, case law, and policy demonstrate that it was legal error not to consider Ms. Remolona's allegations under section 2302(b)(9)(C).

**I. Cooperation with an AIB is Protected Under 5 U.S.C. § 2302(b)(9)(C)**

The initial decision mistakenly confined its analysis of Ms. Remolona’s participation in an AIB to section 2302(b)(9)(B). It did not consider whether her cooperation with the AIB was a protected activity under section 2302(b)(9)(C), which expressly protects cooperation with or providing information to “any other component responsible for internal investigation or review.” As discussed below, an AIB qualifies as an internal investigative component under 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). The definition of “component” is broad, meaning a “constituent part.” See “Component” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/component> (last visited on August 16, 2024). The WPA goes a step further, coupling “component” with an even more expansive term—“any”—which should be given full effect. See *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997) (finding that when “[r]ead naturally, the word ‘any’ has an expansive meaning”). “It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” 2A *Sutherland Statutory Construction*, § 46:6.

Thus, AIBs qualify as components because they are constituent parts of the VA—they are boards, comprised of members convened by qualifying VA officials, empowered with broad investigative authorities. See generally VA Handbook 0700 (Aug. 17, 2021). Moreover, they are specifically convened to conduct internal investigations. See, e.g., *id.* at Ch. 1. P. 2. Indeed,

the VA Handbook provides extensive and formalized guidance on the topic, stating that AIBs are conducted “within VA,” *Id.* at P. 1, and that they are tasked with “collecting and analyzing evidence, ascertaining facts and documenting complete and accurate information.” *Id.* at P. 2. To ensure that they can meet their investigative aims, AIB members are given access to internal VA information and the authority to obtain sworn testimony from VA employees, such as Ms. Remolona. *Id.* at P. 32.

The fact that each AIB may be investigation-specific and finite in duration does not exclude them from being a qualifying investigative component. The definition of component contains no permanency requirement, and the statute explicitly and expansively applies to *any* component. And, like OSC and OIGs—the two entities specifically identified in section 2302(b)(9)(C)—AIBs have formalized procedures for reviewing or investigating potential misconduct, deficiencies, or risks. *See, e.g.*, VA Directive 0700 for Administrative Investigations. Indeed, several other agencies have created formalized procedures to empower such temporary management directed investigations, such as Army Regulation 15-6 (AR 15-6), Navy and Marine Corps Manual of the Judge Advocate General, Air Force Instruction 90-301, and Coast Guard Administrative Investigations Manual.

Accordingly, a plain reading of the statute would find Ms. Remolona’s testimony to the AIB protected under section 2302(b)(9)(C). The initial decision erred in its failure to consider that subsection.

## **II. Case Law Supports a Conclusion that AIB Participation Is Protected**

Although the Board has not considered the application of the current form of section 2302(b)(9)(C) to an AIB specifically, it has described section 2302(b)(9)(C) as “broadly

worded” and it has cautioned against efforts to narrow those protections. *Fisher v. Department of Interior*, 2023 M.S.P.B. 11, ¶8 (admonishing that section 2302(b)(9)(C) protects disclosures to qualifying investigative components regardless of content); *see also Morales v. Veterans Affairs*, Docket No. CH-1221-21-0420-W-12024, 2024 MSPB LEXIS 1817 (reversing initial decision that incorrectly required voluntary participation and protected disclosures for an employee’s cooperation with agency investigators to be protected under 2302(b)(9)(C)); *see also Tao v. MSPB*, 855 Fed. Appx. 716, 718 (Fed. Cir. 2021) (Board requested remand based in part on an AJ’s mistaken application of section 2302(b)(9)(C)).

Prior to *Fisher*, the Federal Circuit overturned the Board’s dismissal of an appellant’s claim that his testimony to a command-directed investigation under Army Regulation 15-6 entitled him to an IRA right. *Smolinski v. Merit Sys. Prot. Bd.*, 23 F.4th 1345, 1352-1353 (Fed. Cir. 2022) An AR 15-6 investigation is similar in nature to an AIB, in that both are qualifying components convened for a specific investigation. Thus, finding AIB testimony to be protected is consistent with the weight of precedent since the amendment of section 2302(b)(9)(C).

The initial decision’s reliance on *Graves* is inapposite. At the time that Graves testified before an AIB, [(C)] only applied to information provided to, or cooperation with, OSC or an OIG, so the appellant could only be protected if his activity fit within the language of section 2302(b)(9)(B). However, shortly after *Graves* was decided, Congress extended protection under section 2302(b)(9)(C) to employees who provide information to or cooperate with any agency “component responsible for internal investigation or review.” As a result, the Board’s reliance on *Graves* to dismiss Ms. Remolona’s claim was error.

**III. Excluding AIBs from Section 2302(b)(9)(C) Protection Would Hinder Investigations and Create Confusion for Witnesses**

Finally, failing to find an AIB testimony protected would have a detrimental effect in testimony in all investigations. Whistleblower protections allow and encourage full candor from federal employees when they provide testimony to an investigative entity, whether it is OSC, an OIG, or any other investigative component. A piecemeal approach, especially based on characteristics of the investigative entity unknown to most witnesses, invites confusion where certainty is needed. Witnesses, including Ms. Remolona, should be confident that when they provide testimony to an investigative component, they will be protected from retaliation.<sup>4</sup>

**CONCLUSION**

The AJ's reliance on *Graves* to deny protections for participation in an AIB was error, because it ignores the subsequent amendment to section 2302(b)(9)(C) that protects such cooperation. Accordingly, OSC requests that the Board clarify that providing information to an AIB is protected under section 2302(b)(9) and remand this case for consideration on the merits.

Respectfully submitted,

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<sup>4</sup> In the absence of clear direction that AIBs qualify as investigative components, inconsistent initial decisions create uncertainty for witnesses who are called to testify for AIBs. *Compare Kolevski v. Dep't of Veterans Affairs*, SF-1221-20-0113-W-1, 2020 MSPB LEXIS 3632, \*37 (M.S.P.B. September 3, 2020) (finding that an AIB is a component responsible for internal investigation or review) *with Thomas v. Dep't of Veterans Affairs*, 2023 MSPB LEXIS 4727, \*10 n.6 (M.S.P.B. November 3, 2023) (making a nonessential conclusion in footnote that an AIB is not protected under section 2302(b)(9)(C) while also holding that the AIB testimony in question was otherwise protected and the agency would have taken the same actions absent the protected disclosures).

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