NO. 2014-3103

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

COLIN CLARKE,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Petition for Review of the Merit Systems Protection Board
in Consolidated Case Nos. NY–1221–10–0226–W–2 and NY–1221–11–0169–W–2

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

Respectfully submitted,

CAROLYN N. LERNER
Special Counsel

GREGORY GIACCIO
Attorney
U.S. Office of Special Counsel
1730 M Street, NW
Washington, DC 20036-4505
(202) 254-3600

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IDENTITY OF THE *AMICUS CURIAE*

The U.S. Office of Special Counsel (OSC) is an independent federal agency charged with, among other things, protecting federal employees from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC "shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. § 1214(a)(1)(A). 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). OSC respectfully submits this brief to address concerns that upholding the decision of the Merit Systems Protection Board (MSPB or Board) in *Clarke v. Dep't of Veterans Affairs*, 121 M.S.P.R.154 (2014), will impede OSC's ability to effectively enforce sections 2302(b)(8) and (9).

STATEMENT OF THE ISSUE

Did the MSPB err as a matter of law by denying jurisdiction to the appellant for his alleged failure to exhaust administrative remedies before OSC?

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal workers who have experienced certain types of retaliation, including reprisal for whistleblowing, may seek corrective action in appeals to the MSPB. Such an appeal is known as an "Individual Right of Action" (or IRA appeal). By law, an individual must first exhaust administrative remedies by filing a complaint with OSC before pursuing an IRA appeal with the Board. This allows OSC the opportunity to resolve disputes before MSPB involvement.

In finding that appellant failed to exhaust administrative remedies, the MSPB erred in several respects. Because he filed a timely IRA appeal based on the same allegations raised before OSC, appellant met the plain statutory requirements for exhaustion. Rather than finding jurisdiction, however, the Board improperly focused the exhaustion inquiry on OSC's discretionary determination to close appellant's complaint. This approach contradicts established case law, results in prejudice to whistleblowers, and constitutes an unwarranted infringement on OSC's independent authority.

RELEVANT BACKGROUND

Appellant Colin Clarke, a probationary Title 38 physician at a Department of Veterans Affairs (VA) facility in Long Island, New York, was terminated for allegedly failing to maintain an unrestricted medical license in 2009. *Clarke v. Dep't of Veterans Affairs*, 121 M.S.P.R. 154, 156 (2014) (*Clarke*). Appellant filed

a complaint with OSC alleging that he was terminated in reprisal for whistleblowing. After obtaining additional information from appellant, OSC closed the complaint and informed appellant that he could file an IRA appeal with the MSPB. (Initial Appeal File (IAF) III, Tab 9, pp. 68-70.)

Appellant timely filed an IRA appeal alleging the same disclosures, personnel actions, and theory of reprisal that he had raised at OSC.[1] (IAF I, Tab 1, Appellant's Appeal.) The VA stipulated that appellant had exhausted his administrative remedies. *Clarke* at 162. Yet, the Administrative Judge (AJ) found that appellant had failed to meet the exhaustion requirement for six of the eight disclosures made in his IRA appeal. (IAF III, Tab 16, Initial Decision (ID), pp.11-12.)

On appeal, the MSPB upheld the AJ's determination that appellant had failed to exhaust his administrative remedies "because the information that the appellant provided to OSC was insufficient for it to pursue an investigation that might lead to corrective action concerning those alleged disclosures …." *Clarke* at 162. In so finding, the Board specifically relied on two letters to appellant from OSC: a January 2010 letter requesting additional information about appellant's disclosures, and an April 2010 letter notifying appellant that OSC had made a preliminary determination to close his complaint. In supporting its decision, the

[1] Appellant subsequently filed a second IRA appeal, which was joined with his first action. Only the disclosures in his first IRA are at issue in this case.

MSPB stated, "[t]he Board will defer to OSC in its determination that it might need further information in order to pursue an investigation that might lead to corrective action." *Clarke* at 160 n.8.

STANDARD OF REVIEW

The Federal Circuit must affirm final Board decisions unless they are (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without following the procedures required by law; or (3) unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1366 (Fed. Cir. 2012). Because this appeal turns on a question of law – the scope of the MSPB's jurisdiction – this court conducts a *de novo* review. *See Herman v. Dep't of Justice,* 193 F.3d 1375, 1378 (Fed. Cir. 1999). Issues of statutory or regulatory interpretation are also reviewed *de novo*. *See Augustine v. Dep't of Veterans Affairs*, 503 F.3d 1362, 1365 (Fed. Cir. 2007).

ARGUMENT

I. THE MSPB'S DECISION IS LEGALLY INCORRECT BECAUSE IT DISREGARDS THE PLAIN STATUTORY LANGUAGE

The MSPB disregarded the plain text of the Whistleblower Protection Act (WPA) regarding the showing that IRA appellants must make to prove exhaustion of administrative remedies. The statute states simply and unambiguously that an appellant "shall seek corrective action from the Special Counsel before seeking

corrective action from the Board." 5 U.S.C. § 1214(a)(3); *see Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1377 (Fed. Cir. 2001). The purpose of the exhaustion requirement is to give OSC an opportunity to take corrective action before involving the Board. *See Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992). The exhaustion requirement thus provides whistleblowers with an appeal right while also promoting administrative economy by encouraging the resolution of disputes before litigation.

Congress created the IRA appeal in the WPA, in large part, to "assure whistleblowers … an opportunity to argue their case in a hearing – *with or without* the OSC's involvement." S. Rep. No. 100-413, at 17 (1988) (emphasis added).[2] The WPA provides two roadmaps to obtain an IRA hearing: one route where OSC has made a determination on the complaint, and the other path where OSC has not taken any action on the complaint. Under either course, the appellant must "'articulate with reasonable clarity and precision [before OSC] the basis for his request for corrective action.'" *Abou-Hussein v. Merit Sys. Prot. Bd*., 557 Fed. Appx. 979, 981-82 (Fed. Cir. 2014) (*per curiam*) (unpublished) (*quoting Ellison v. Merit Sys. Prot. Bd*., 7 F.3d 1031, 1037 (Fed. Cir. 1993)). This is so because in reviewing an IRA appeal, the MSPB may only consider the allegations that

[2] While portions of this Senate Report contain language that was deleted from the bill that ultimately became the WPA, the sections cited in this brief relate to language in the bill that was enacted into law without substantive changes. *See Clark v. Dep't of the Army*, 997 F.2d 1466, 1471-72 (Fed. Cir. 1993).

appellant raised with OSC. *See Ellison*, 7 F.3d at 1036; *Coufal v. Dep't of Justice*, 98 M.S.P.R. 31, 37 (2004). Once an appellant informs OSC of the basis for his reprisal claims, however, he may add further detail to those claims before the Board. *See Briley*, 236 F.3d at 1378.

Significantly, OSC's discretionary decision to close a complaint should not – and by law, must not – be mistaken for a determination that an appellant has failed to make allegations with the requisite specificity. *See Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, 84 (2008) (finding legal error where AJ considered OSC's decision to close complaint in IRA appeal). Thus, under the first avenue – where OSC investigated but made a decision not to seek corrective action – an appellant who files an IRA appeal within 60 days of receiving OSC's decision has exhausted administrative remedies under the statute. *See* 5 U.S.C. § 1214(a)(3)(A). An appellant filing an IRA appeal under the second track meets the exhaustion requirement and may proceed to the Board if OSC has *not* issued a determination within 120 days of filing a complaint with OSC. *See* 5 U.S.C. § 1214(a)(3)(B). Under either option, the underlying purpose of the exhaustion requirement is met: whistleblowers may file timely appeals to the Board based on clearly articulated allegations that OSC had the opportunity, even if unsuccessful, to resolve.

In the present case, appellant first "[sought] corrective action from the Special Counsel," as required by the statute. 5 U.S.C. § 1214(a)(3). In his

complaint before OSC, appellant provided information regarding each element of his whistleblower reprisal claim, including to whom the disclosures were made, when they were made, and an appropriate description of what he disclosed. *See Swanson v. Gen. Servs. Admin*., 110 M.S.P.R. 278, 284 (2008). As Vice-Chair Wagner noted in her dissent, the MSPB has "consistently found allegations of similar specificity … to be adequate to meet the administrative exhaustion requirements." *Clarke* at 167 (Vice-Chair Wagner, dissenting in part). Ultimately, when OSC declined to pursue his complaint, appellant timely filed his IRA appeal. *Clarke* at 156-57. The IRA appeal was based on the same allegations raised before OSC. *See Heining v. Gen. Servs. Admin.*, 61 M.S.P.R. 539, 547 (1994) (appellant did not characterize allegations differently in IRA appeal, but merely added more detail). These facts alone demonstrate that appellant has properly exhausted his administrative remedies. Indeed, the purpose of the IRA appeal was met because OSC had the opportunity to resolve the claim prior to litigation at the Board. The Board's misplaced reliance on OSC's discretionary determination to close the complaint extended well beyond the limited specificity inquiry contemplated by the WPA. *See* 5 U.S.C. § 1214(a)(3). Thus, applying the plain language of the statute, the MSPB erred in finding that appellant failed to meet the exhaustion requirement.

II. THE MSPB'S DECISION CONTRADICTS ESTABLISHED PRECEDENT PRECLUDING IT FROM RELYING ON OSC'S DETERMINATIONS TO DECIDE THE EXHAUSTION REQUIREMENT

The MSPB erred by focusing its exhaustion of administrative remedies inquiry on OSC's discretionary determination to close appellant's complaint, rather than on whether appellant had filed a timely IRA appeal based on a properly articulated whistleblower reprisal claim. Specifically, the Board found that appellant failed to meet the exhaustion requirement based on OSC's letters indicating that "the information that the appellant provided to OSC was insufficient for it to pursue an investigation that might lead to corrective action." *Clarke* at 161. This approach not only contravenes established precedent, but also seriously prejudices appellants from bringing whistleblower claims to OSC.

Recently, this court summarized the necessary elements to prove exhaustion of administrative remedies: "a petitioner [must] inform[] OSC of the precise ground of his whistleblowing claim and provide[] OSC with a sufficient basis to investigate the claim." *Abou-Hussein*, 557 Fed. Appx. at 981-82 (citations omitted). Consistent with the WPA, appellants may demonstrate exhaustion through evidence contained in their complaints or from correspondence with OSC. *See Baldwin v. Dep't of Veterans Affairs*, 113 M.S.P.R. 469, 473-74 (2010). However, the MSPB considers OSC correspondence only to the extent that it

provides evidence of the allegations first raised to OSC. *See Bloom*, 101 M.S.P.R. at 84 (citing *Yunus v. Dep't of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001)); *Costin v. Dep't of Health & Human Servs.*, 64 M.S.P.R. 517, 531 (1994). In plain terms, the exhaustion inquiry focuses on what an appellant said to OSC, not on what OSC heard.

Consistent with this approach, MSPB precedent has long held that OSC's determinations, including its decisions to close complaints, should not be considered in IRA appeals. *See, e.g., Cassidy v. Dep't of Justice*, 118 M.S.P.R. 74, 82-83 (2012) (remanding case where AJ wrongly relied on OSC's characterization of appellant's allegations); *Smith v. Dep't of Agric.*, 64 M.S.P.R. 46, 55 (1994) (finding legal error for AJ to rely on OSC's letter to make findings adverse to appellant). Thus, the issue of exhaustion before the Board is always reviewed *de novo* and necessarily relies on appellant's representations and evidence, not on OSC's characterizations or determinations of appellant's allegations or evidence.

Here, the MSPB improperly relied on OSC's determinations regarding appellant's complaint. The Board obtained private correspondence between OSC and appellant that revealed OSC's reasons for closing the complaint. *Clarke* at 161. Then, the Board used OSC's reasons for closure to deny jurisdiction, underscoring OSC's statement that it "could not determine that a violation of 5 U.S.C. § 2302(b)(8) occurred." *Clarke* at 161. The Board also highlighted the fact

that OSC told appellant it would close the complaint, "in part, because the appellant had provided insufficient information to demonstrate that he made a protected disclosure." *Id*. To remove any doubt that it was relying on OSC's prior decision, the Board explicitly stated in a footnote that it was deferring to that determination. *Id.* at 160 n.8. This patently misplaced reliance on OSC's discretionary determinations contradicts established precedent and constitutes reversible legal error.

Significantly, the MSPB's decision not only harms appellant in this case, but also critically undermines the Congressional intent to protect all whistleblowers. In enacting the WPA, Congress took pains to ensure that OSC's determinations would not prejudice an appellant's IRA appeal. For example, Congress forbade courts and administrative bodies from considering OSC's reasons for closing a complaint without the appellant's consent. *See* 5 U.S.C. § 1214(a)(2)(B); 5 U.S.C. § 1221(f) ("decision [by OSC] to terminate an investigation … may not be considered in any action or other proceeding"). Indeed, Congress outlawed OSC's determinations from being used to influence any part of the administrative or judicial processes without consent.[3] *See* 5 U.S.C. § 1214(b)(2)(E) ("determination

[3] In addition, Congress barred OSC from participating in an IRA appeal without the appellant's consent. *See* 5 U.S.C. § 1214(a)(4). Congress also provided an umbrella policy to protect individuals seeking OSC's assistance from any harm threatened by the potential release of information from OSC's files without consent. *See* 5 U.S.C. § 1212(d)(2).

by the Special Counsel … shall not be cited or referred to in any proceeding … for any purpose"). The Board's decision undoes these considerable protections. The safeguards surrounding the IRA appeal were intended to "provide employees with assurance that if they come to the OSC for assistance and provide the OSC with information but the OSC declines to pursue their case, OSC will not use such information against those employees." S. Rep. No. 100-413, at 10 (1988). If the Board's decision stands, OSC could not provide its complainants with these valuable assurances.

III. THE MSPB'S DECISION ENCROACHES ON OSC'S INDEPENDENT AUTHORITY AND THREATENS FUTURE WHISTLEBLOWER CLAIMS

The MSPB's improper reliance on OSC's discretionary determinations undermines OSC's investigative authority, creating significant risks to future whistleblower claims. OSC is an independent agency that operates with full investigative and prosecutorial discretion. *See* 5 U.S.C. §§ 1211, 1212(a)(2); S. Rep. No. 100-413, at 18 (1988). The decision whether to conduct an investigation is solely within OSC's authority. *See Special Counsel v. Harvey*, 28 M.S.P.R. 595, 599 (1984), *rev'd on other grounds, Harvey v. Merit Sys. Prot. Bd.*, 802 F.2d 537 (D.C. Cir. 1986). Such decisions are not reviewable by the MSPB or the courts.[4]

[4] The manner in which OSC conducts its investigations is likewise not reviewable by the MSPB. *See Special Counsel v. Dep't of Commerce*, 26 M.S.P.R.

See, e.g., *Weber v. U.S.*, 209 F.3d 756, 759 (D.C. Cir. 2000) ("[T]he MSPB does not review the OSC's decision of whether to investigate; it simply makes its own assessment of the validity of the complaint. When the Federal Circuit reviews the MSPB's action, it is not even indirectly reviewing the OSC.").

In the instant case, the MSPB signaled that in reviewing an appellant's IRA appeal, it will now review the substance of OSC's communications and "defer" to OSC's determination to close a complaint. *Clarke* at 161. This inquiry is untenable for several reasons. First, the law is clear: OSC operates independently from the Board and OSC's analysis and determination to close a complaint has no bearing on the Board's *de novo* review of an appellant's IRA appeal. As such, the MSPB does not – and may not – defer to OSC's factual and legal determinations in reviewing IRA appeals. Indeed, the fact that the Board reviewed OSC's confidential correspondence with appellant in this case, considered it, and then decided to defer to OSC's determination, demonstrates the impermissible intrusion that was neither contemplated by the statute nor permitted under prior case law.

Second, this case demonstrates the inherent difficulty with the MSPB attempting to interpret OSC's communications to determine whether appellants have exhausted administrative remedies. Here, two members of the Board

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415, 419 (1985) (OSC "conducts [] investigations independent of the Board, and the Board lacks authority to direct the manner in which such investigations are conducted.").

construed OSC's correspondence as speaking to the precision of the allegations in appellant's whistleblower claim, whereas the Vice Chair viewed OSC's determinations as addressing the merits of his claim. These conflicting interpretations of OSC's correspondence illustrate the pitfalls and perils of this type of inquiry. The Board and the AJ interpreted OSC's request for information and ultimate decision to close the complaint without the benefit of OSC's internal deliberations. As such, they could not assess all of the relevant factors that OSC considers in marshalling its limited resources.[5] Perhaps most hazardous, however, the Board wrongly used OSC's discretionary handling of the complaint as evidence that appellant failed to meet the exhaustion requirement and then barred him from proceeding with his claim. The finality of this outcome underscores its harm.

Third, the MSPB's decision to defer to OSC's determinations creates serious risks to future whistleblower claims. Here, the Board faulted appellant for allegedly failing to respond fully to OSC's request for more information, even though the Board did not know the purpose for the request.[6] *Clarke* at 161. Any

[5] The most recent publicly available statistics show that OSC received 2,936 prohibited personnel practice complaints in fiscal year 2013. *See* U.S. Office of Special Counsel, Annual Report to Congress, Fiscal Year 2013, at 26, available at http://www.osc.gov/documents/reports/ar-2013.pdf. Based on the volume of individual complaints received, OSC must make difficult choices in the complaints pursued for corrective and disciplinary action.

[6] Like many complainants, appellant was unrepresented during the OSC complaint process. Courts and the MSPB have long held that *pro se* pleadings

number of reasons – unrelated to exhaustion concerns – could have prompted OSC to request more information beyond what was provided on the complaint form.[7] *See* S. Rep. No. 112–155, at 5 (2012) (showing Congress' intent to overturn court decisions which narrowed the scope of protected disclosures). The MSPB's role in determining exhaustion is only to ascertain whether appellant timely presented his claim with reasonable precision, not to look behind the final determination to examine OSC's discretionary handling of the complaint. To hold otherwise could open all IRA appeals to unwarranted jurisdictional attacks and require whistleblowers to defend against employers incentivized to litigate the scope of OSC's complaint handling process for jurisdictional defects.

In sum, any exhaustion-related inquiry by the Board into OSC's determinations is likely to be an unwise encroachment on OSC's independent authority, ill-informed, and prejudicial to whistleblowers.

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regarding jurisdiction must be liberally construed. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding *pro se* complaint to "less stringent standards than formal pleadings drafted by lawyers" when determining whether to dismiss the complaint); *Becker v. Dep't of Veterans Affairs*, 76 M.S.P.R. 292, 298 n.4 (1997) (*pro se* appellants' efforts to meet their jurisdictional burdens should be interpreted liberally). Thus, appellants should not be punished for failing to comply with the stringent standards of an adversarial, court-like process during the informal, preliminary stage of OSC's complaint process.

[7] Indeed, OSC's request for information in this case occurred prior to the passage of the Whistleblower Protection Enhancement Act of 2012, which made the disclosure inquiry far less fact intensive. Pub. L. No. 112-199, 126 Stat. 465 (2012). The unspecified details requested by OSC in 2010 thus would likely be irrelevant to the Board's *de novo* review of appellant's IRA appeal in 2014.

CONCLUSION

For the foregoing reasons, the MSPB's decision that appellant failed to exhaust administrative remedies is not in accordance with law. As such, OSC requests that the court reverse the MSPB's decision in *Clarke v. Dep't of Veterans Affairs*, 121 M.S.P.R. 154 (2014).

Respectfully submitted,

Carolyn N. Lerner
Special Counsel

/s/ Eric Bachman
Eric Bachman
Deputy Special Counsel for Litigation

/s/ Louis Lopez
Louis Lopez
Associate Special Counsel

/s/ Gregory Giaccio
Gregory Giaccio
Attorney
U.S. Office of Special Counsel
1730 M Street, NW
Washington, DC 20036-4505
Fax: (202) 254-3711