NO. 16-73427

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. JOHNEN,

Petitioner,

v.

U.S. MERIT SYSTEMS PROTECTION BOARD AND
U.S. DEPARTMENT OF THE ARMY,

Respondents.

Petition for Review of the Merit Systems Protection Board
Case No. SF-1221-14-0338-W-1 and 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,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the United States Office of Special Counsel (OSC), is an independent federal agency whose mission is to safeguard the merit system by protecting federal employees and applicants 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 whistleblower retaliation claims. *See* 5 U.S.C. §§ 1214, 2302(b)(8)-(b)(9).

Because this case concerns the administrative exhaustion requirements under section 1214 for a whistleblower retaliation complaint filed with OSC pursuant to sections 2302(b)(8) and (b)(9), it bears directly on OSC's statutory enforcement authority. Moreover, as the agency responsible for enforcing these statutory provisions, OSC has particular expertise interpreting, investigating, and evaluating whistleblower retaliation claims. Therefore, OSC respectfully submits this brief to address administrative exhaustion, pursuant to its statutory authority under 5 U.S.C. § 1212(h) and as a government entity under Fed. R. App. P. 29(a).[1] OSC takes no stance on any other issues in this case.

[1] Because OSC was unable to comply with the time for filing set forth in Fed. R. App. P. 29(a)(6), OSC seeks the Court's leave to file this brief, as set forth in the accompanying Motion. All parties consent to the filing of this brief.

STATEMENT OF THE ISSUE

Did the Merit Systems Protection Board (MSPB or Board) err as a matter of law by requiring petitioner to provide the precise details of each specific whistleblower disclosure in order to exhaust OSC administrative remedies as to claimed retaliation for those disclosures?

INTRODUCTION AND SUMMARY OF ARGUMENT

Administrative exhaustion of federal employee whistleblower retaliation complaints allows OSC the opportunity to resolve disputes before MSPB involvement. Nonetheless, Congress has made clear that when OSC does not resolve such a complaint, the WPA provides the employee the right to bring his or her claim to the MSPB.

Here, petitioner filed a complaint with OSC alleging retaliation for making protected whistleblower disclosures. The Board held that petitioner had exhausted his administrative remedies as to a disclosure to the Department of Defense Inspector General (IG) described in his OSC complaint, but that he failed to exhaust as to a later disclosure to named agency officials because he did not provide OSC "precise" information about it.

The MSPB's requirement that a federal employee whistleblower provide OSC the precise details of each element of his or her retaliation claim to adequately exhaust administrative remedies is inconsistent with the statute, and it

conflicts with Congress's intent to provide broad protection from whistleblower retaliation backed by effective remedies. Additionally, the Board's approach to administrative exhaustion results in prejudice to whistleblowers who typically are not represented by attorneys, and who lack access to agency documents or investigative tools needed to provide precise details about their claims. It also undermines efficiency by making the administrative process more formal and opaque, and by inducing whistleblowers to refile claims that OSC has previously considered.

The interpretation of OSC administrative exhaustion requirements appears to be a question of first impression in the Ninth Circuit. Under the standard articulated by the Federal Circuit, an individual exhausts OSC 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. Under that standard, petitioner plainly exhausted his administrative remedies before OSC.

RELEVANT BACKGROUND

Petitioner Michael Johnen was terminated from his civilian employment with the U.S. Department of the Army (Army) in August 2013. *See Johnen v. Dep't of the Army*, SF-1221-14-0338-W-2, 2016 WL 4586252, ¶ 2 (Sept. 2, 2016). Petitioner filed a complaint with OSC on September 20, 2013, alleging that the Army terminated his employment and barred him from the Army base on which he

worked in retaliation for making protected whistleblower disclosures. Excerpts of Record (ER) 862, 867. Although petitioner attributed these retaliatory personnel actions to an October 26, 2012 complaint he filed with the IG regarding nepotism, his OSC complaint also expressly states that he "repeatedly complained" of nepotism to three named agency officials. ER 866. Petitioner filed an Individual Right of Action (IRA) with the MSPB on February 12, 2014, after more than 120 days had elapsed from filing his OSC complaint. *See Johnen*, ¶ 3; 5 U.S.C. § 1214(a)(3). Petitioner notified OSC of his IRA, and OSC closed its investigation.

An MSPB Administrative Judge (AJ) hears an IRA in the first instance, after which the individual may file a petition for review with the full Board. On September 17, 2015, the AJ issued an initial decision denying petitioner's request for corrective action. The AJ analyzed administrative exhaustion with respect to each of petitioner's whistleblower disclosures rather than as to petitioner's request for corrective action for the retaliatory personnel actions. In doing so, the AJ held that petitioner exhausted his administrative remedies before OSC on his October 26, 2012 nepotism disclosure to the IG; the AJ rejected petitioner's retaliation claim as to that disclosure on the merits. ER 437-46. However, the AJ held that petitioner had failed to meet the administrative exhaustion requirement for his July 25, 2013 nepotism disclosure to one of the individuals that petitioner named in his

OSC complaint as a recipient of his repeated complaints about nepotism, along with another individual not named in his OSC complaint. ER 438, 866.

Petitioner filed a petition for review of this decision with the Board, arguing that the statement in his OSC complaint that he repeatedly complained about nepotism to three named agency officials was sufficiently specific to exhaust the administrative process for this disclosure. *See Johnen*, ¶ 9. The Board upheld the AJ's decision. After first stating that to "satisfy the exhaustion requirement, an appellant must articulate to OSC the basis for his request for corrective action with reasonable clarity and precision," and "an appellant may add further details to his claims before the Board," *id.* ¶ 7 (citations and quotations omitted), the Board held that petitioner did not exhaust his administrative remedies as to the July 25, 2013 disclosure because he did not "inform OSC of the precise ground of his protected activity." *Id.* ¶ 10.

STANDARD OF REVIEW

The MSPB's jurisdictional ruling in an IRA is a legal determination subject to *de novo* review. *See Daniels v. Merit Sys. Prot. Bd.*, 832 F.3d 1049, 1051 (9th Cir. 2016).

ARGUMENT

I. REQUIRING WHISTLEBLOWERS TO PROVIDE OSC THE PRECISE DETAILS OF EACH PROTECTED DISCLOSURE DISREGARDS PLAIN STATUTORY LANGUAGE AND CONGRESSIONAL INTENT

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

The MSPB's approach to administrative exhaustion ignores the plain statutory text governing IRA jurisdiction. Under the CSRA, as amended, a federal employee who believes he or she has experienced an unlawful personnel action, referred to as "prohibited personnel practice," may file a complaint with OSC seeking an investigation and corrective action. 5 U.S.C. §§ 1212(a), 1214(a)(1)(A). Section 2302(b) defines 13 prohibited personnel practices, including two specifically related to whistleblower retaliation claims: (1) retaliation for making protected whistleblower disclosures, in section 2302(b)(8); and (2) retaliation for engaging in protected whistleblower activities, such as providing information to an IG or OSC, in section 2302(b)(9).

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. Under the statute, "[a]n employee … 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) …."

Id. §§ 1214(a)(3), 1221(a). This process, an IRA, is commonly referred to as an appeal, but that terminology refers to an appeal of the relevant personnel action, not to an appeal of OSC's decision on the individual's complaint. An IRA 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. To the contrary, the statute expressly bars use of OSC's analysis in an IRA without the individual's consent. *See* 5 U.S.C. § 1214(a)(2).

The sole condition placed on an individual's right to seek corrective action from the MSPB in a whistleblower retaliation claim is that the individual "shall seek corrective action from the Special Counsel before seeking corrective action from the Board." *Id.* § 1214(a)(3). After doing so, the individual "may"—without 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.* The statutory provisions providing for the OSC administrative exhaustion requirement and the Board's IRA jurisdiction both reference presenting the "prohibited personnel practice" claim to OSC, but neither references the whistleblower disclosures that are one element of proving such a claim. *See id.* §§ 1214(a), 1221(a). In short, there is simply no statutory basis for the MSPB's additional requirement that an individual specify for OSC the exact details of each and every disclosure claimed to result in retaliation to meet the statutory administrative exhaustion requirement.

In the present case, petitioner first "[sought] corrective action from the Special Counsel," as required by the statute. *Id.* § 1214(a)(3). After 120 days of filing his complaint with OSC, petitioner filed an IRA. Petitioner's IRA was based on the same allegations he raised before OSC, *i.e.*, retaliation for his whistleblower disclosures regarding nepotism. These facts alone demonstrate that petitioner has properly exhausted his administrative remedies. Thus, applying the plain language of the statute, the MSPB erred in finding that petitioner failed to meet the administrative exhaustion requirement.

B. The MSPB's Restrictive Interpretation of IRA Jurisdiction is at Odds with Congressional Intent

Legislative history reinforces the conclusion that the Board's interpretation of IRA jurisdiction conflicts with Congress's intent. The IRA was created in 1989 as part of the WPA, "the purpose of [which was] 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).

Prior to the WPA, OSC was the only avenue for most federal employee whistleblowers to seek relief. Both the Senate and the House Committee Reports accompanying the WPA detailed at length the small percentage of whistleblower complainants who obtained relief through OSC. *See* S. Rep. No. 100-413 (1988),

at 8-10, 16-17; H.R. Rep. No. 100-274 (1987), at 18-23.[2] Congress created the IRA "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); *see also* 5 U.S.C. § 1214(a)(2)(B) (forbidding OSC's analysis of cases from being introduced in IRA proceedings without the consent of the individual pursuing the IRA); *id.* § 1214(a)(4) (barring OSC from participating in an IRA without the individual's consent). Congress's clear intent that OSC's decisions must not penalize whistleblowers clearly encompasses cases in which OSC did not act.

The legislative history of later WPA amendments further militate against the Board's restrictive approach to IRA jurisdiction. The House Committee Report accompanying the 1994 Amendments strengthening the WPA expressly rejected an

[2] Prior to the WPA's enactment, the time period after which a complainant could seek corrective action if OSC did not act was lengthened from 90 to 120 days. *See* S. Rep. No. 100-413, at 17; Pub. L. 101-12 § 3. Notably, the House bill would have permitted IRAs without first requiring OSC proceedings. *See* H.R. Rep. No. 100-274, at 16, 22-23.

MSPB case "limit[ing] protection in Board [IRA] proceedings to the record already presented to the OSC." 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).[3] In *Knollenberg*, the Board held that the petitioner had not exhausted his administrative remedies before OSC because he had failed to specify that his non-selection was in retaliation for whistleblowing, but alleged only that it contravened his right to merit-based competition for employment. 47 M.S.P.R. at 96-97. According to the House Committee, this decision was 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 this issue, stating:

> 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).

[3] Notwithstanding the House Committee's disagreement with *Knollenberg*, it does not appear that any provision of the 1994 Amendments directly addresses the decision.

More broadly, since the passage of the CSRA in 1978, which first created federal employee whistleblower protections, Congress has repeatedly amended the law to strengthen those protections and foster a favorable environment for whistleblowers. A central purpose of the WPA was to override restrictive interpretations of federal employee whistleblower protections. *See* S. Rep. No. 100-413, at 12-16 (discussing various provisions of the WPA crafted to overturn judicial decisions); H.R. Rep. No. 100-274, at 25-28 (same). Likewise, Congress enacted the 1994 Amendments discussed above to strengthen and expand whistleblower protections and to address "destructive precedents" by the Board and Federal Circuit. H.R. Rep. No. 103-769, at 7, 12, 18. The House Committee Report accompanying that legislation specifically rejected 15 MSPB and Federal Circuit decisions that undermined effective whistleblower protections. *See* H.R. Rep. No. 103-769, at 17-18 & n.15-16.

Again 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 from claims of retaliation for making protected whistleblower disclosures under section 2302(b)(8) to claims of retaliation for engaging in certain protected whistleblower activities, such as

disclosing information to an IG or OSC, under section 2302(b)(9). *See* Pub. L. No. 112-199 § 101(b), 126 Stat. 1465; 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 is inconsistent with that intent and creates barriers for whistleblowers to receive protection. As a result, the Board's restrictive reading of administrative exhaustion requirements creates a chilling effect on whistleblowing, which undermines the ultimate legislative purpose of eliminating government wrongdoing.

II. THE BOARD'S APPROACH TO OSC ADMINISTRATIVE EXHAUSTION UNDERMINES THE COMPREHENSIVE STATUTORY SCHEME BY PREJUDICING WHISTLEBLOWERS AND INCREASING ADMINISTRATIVE INEFFICIENCY

A. The MSPB's Approach to Administrative Exhaustion Fails to Recognize that Most OSC Complainants are Unrepresented

Petitioner, like the vast majority of individuals who file whistleblower retaliation complaints with OSC, did not have counsel during the OSC administrative process. Indeed, according to OSC data, only 10 percent of

whistleblower complainants have the assistance of an attorney in presenting their complaint to OSC.[4]

OSC's *pro se* complainants generally do not have the training to present a legal case; they typically focus on telling their story, not on the statutory requirements to win their case. The MSPB's requirement that they provide the precise details of each protected disclosure 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. For example, the WPA protects "any disclosure" of certain types of government wrongdoing, whether the disclosure was formal or informal, oral or in writing, regardless of when or to whom it was made. 5 U.S.C. § 2302(b)(8), (f)(1). If a whistleblower disclosure is unproven, or even inaccurate, the statute still protects it if a disinterested observer with knowledge of the essential facts could reasonably conclude it to be true. *Id*. § 2302(b). If a complainant believes that only formal disclosures—such as petitioner's complaint to the IG here—are protected, he or she may not provide specific information about informal disclosures in an OSC complaint.

[4] This includes whistleblower retaliation complaints under section 2302(b)(8) since 1998, as well as complaints under section 2302(b)(9) after the effective date of the WPEA. *See supra* Section II.B. This statistic may slightly overestimate attorney representation because complainants assisted by non-attorney representatives, such as a union official, may be coded as represented in OSC's system.

Significantly, the Board has not always taken such a restrictive approach to OSC administrative exhaustion in cases involving *pro se* petitioners. For example, in *Tuten v. Department of Justice*, the Board overturned an AJ decision dismissing an IRA for failure to exhaust administrative remedies. 104 M.S.P.R. 271 (2006), *aff'd sub nom. Tuten v. Merit Sys. Prot. Bd.*, No. 2007-3145, 2007 WL 2914787 (Fed. Cir. Oct. 5, 2007). Tuten's OSC complaint stated broadly that she had reported government wrongdoing including "gross mismanagement, abuse of office [sic], waste of funds, falsification of medical records, [and] illegal transfer of sick inmates[.]" *Id.* at 275. The Board held that the AJ did not read the petitioner's *pro se* OSC complaint sufficiently broadly and erred in dismissing the IRA for failure to exhaust administrative remedies. *Id.* *Tuten* is indistinguishable from the present case; indeed, by identifying the recipients of potentially protected disclosures, petitioner provided more specific detail here.

The MSPB's failure to account for petitioner's *pro se* status for OSC administrative exhaustion is also at odds with its approach to individuals who are unrepresented before the Board. In that context, the "Board has held that administrative judges should provide more guidance to *pro se* appellants and interpret their arguments in the most favorable light." *Miles v. Dep't of Veterans Affairs*, 84 M.S.P.R. 418, 421 (1999). Individuals before the Board, "particularly those without the benefit of legal counsel, are not required to plead the issues with

the precision required of an attorney in a judicial proceeding." *Melnick v. Dep't of Hous. & Urban Dev.*, 42 M.S.P.R. 93, 97 (1989), *aff'd* 899 F.2d 1228 (Fed. Cir. 1990); *see also Becker v. Dep't of Veterans Affairs*, 76 M.S.P.R. 292, 298 n.4 (1997) (admonishing the AJ on remand to "bear in mind the appellant's *pro se* status" and "read his pleadings liberally"). Likewise, the Federal Circuit reversed an MSPB decision that it lacked jurisdiction where the petitioner's *pro se* argument was sufficient to "put the board on notice of the reason" for jurisdiction. *Roche v. U.S. Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987). It is inconsistent, and indeed, unfair to accommodate *pro se* petitioners before the Board while holding them to hyper-technical standards during the previous administrative process.

In the analogous context of administrative exhaustion of employment discrimination complaints, the U.S. Supreme Court has emphasized that procedural "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). In line with that reasoning, this Court has held that employment discrimination charges are construed with "utmost liberality" and "should not be held to the higher standard of legal pleading" because they are generally filed by laypersons. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100, 1103 (9th Cir. 2002), *as amended* (Feb. 20, 2002); *see also Lyons v. England*, 307

F.3d 1092, 1104 (9th Cir. 2002); *Greenlaw v. Garrett*, 59 F.3d 994, 999 (9th Cir. 1995); *McConnell v. Gen. Tel. Co. of Cal.*, 814 F.2d 1311, 1316 (9th Cir. 1987).

B. The MSPB's Approach to Administrative Exhaustion Ignores that OSC Complainants Lack Access to Agency Information

The WPA does not provide a whistleblower complainant with discovery tools to seek information from an employing agency unless and until he or she files an IRA, reinforcing the conclusion that Congress did not intend to require OSC complainants to provide exhaustive details in their OSC complaints. 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 investigative 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). The statute does not grant such authority to OSC complainants, and OSC does not share its investigative files with complainants. Accordingly, this statutory structure does not contemplate that individuals seeking corrective action from OSC would bear the responsibility of collecting and providing the precise factual underpinnings of each element of their claims.

The Board's requirement that OSC complainants must provide precise information about each whistleblower disclosure is especially problematic because, as noted above, the WPA provides broad protection to formal and informal disclosures of government wrongdoing. *See* 5 U.S.C. § 2302(b)(8), (f)(1), *supra*

Part II.A. Although an OSC complainant may be more likely to have details or records of formal complaints, such as petitioner's disclosure to the IG, they may not recollect or have access to the precise details of all disclosures that may be protected under the statute. When a complainant has raised potential government wrongdoing repeatedly and informally within an agency, he or she may be particularly unlikely to be able to provide OSC with precise details of each potentially protected disclosure.[5] Even when a complainant retains counsel before OSC, he or she may not have kept meticulous records of repeated informal disclosures such that the attorney can provide precise details to OSC. In some situations, complainants may know or suspect that the agency has documents showing their disclosures or documents suggesting retaliation, but they may not have access to those documents. While OSC complainants may supplement their complaints during the administrative process, without access to agency information and documents the OSC investigation is unlikely to enable them to provide precise details about each potentially protected disclosure.

In the present case, the MSPB faulted petitioner for failing to identify the specific date of his whistleblower disclosure and the name of the second agency

[5] The Board has previously rejected applying such specificity standards for protected disclosures. *See Keefer v. Dep't of Agric.*, 82 M.S.P.R. 687, 693 (1999) (holding that the WPA does not require "that a disclosure be made with such specificity as to enable the recipient of the disclosure to conduct an investigation without having to return to the employee for additional information").

official to whom he made it. It would undercut the statutory scheme to require lay complainants without access to agency information to provide the precise dates and each recipient of protected disclosures.

C. The MSPB's Approach to Administrative Exhaustion of OSC Remedies Undermines Administrative Efficiency

Congress intended the OSC administrative process to be informal and efficient—one in which disputes can be resolved without engaging the more formal MSPB adjudicative process. The Board's technical reading of the administrative exhaustion requirement formalizes this process, and makes it more obscure and intimidating for complainants. If whistleblower complainants must provide the "precise" details of each element of their legal claims to OSC, they need more background information about the statutory structure and protections, and may have to do their own investigative work to access those details. As noted above, complainants do not have investigative authority during the administrative process, and they generally do not have legal training and experience. *See supra* Parts II.A-B. By attempting to do their own investigative work, complainants may inadvertently and unknowingly engage in actions that violate agency policies or privacy laws, leaving them vulnerable to possible adverse or disciplinary actions. Alternatively, they may feel they must hire attorneys to file a complaint with OSC. Placing such burdens on complainants undermines the purpose of providing an administrative investigative process in the first place.

Moreover, due to the absence of a statute of limitations for bringing whistleblower retaliation complaints to OSC, the Board's approach to administrative exhaustion increases procedural inefficiencies and creates perverse outcomes. When the Board determines that a whistleblower has not exhausted his or her administrative remedies with OSC prior to filing an IRA, that individual may simply file another OSC complaint, regardless of the amount of time that has passed since the allegations occurred. 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, MSPB's, and complainants' time and resources, and is not what Congress intended.[6]

III. PETITIONER EXHAUSTED ADMINISTRATIVE REMEDIES BY PROVIDING A SUFFICIENT BASIS FOR OSC TO INVESTIGATE

A. Whistleblower Complainants Must Provide OSC a Sufficient Basis to Investigate

It does not appear that the Ninth Circuit has interpreted the standard for exhausting OSC administrative remedies prior to filing an IRA with the Board. The Federal Circuit and the MSPB have articulated a general standard that the

[6] To the extent MSBP seeks to eliminate weak claims through its restrictive approach to administrative exhaustion, Congress expressly precluded such methods by making the IRA a *de novo* proceeding not based on OSC's administrative record, and by allowing multiple complaints based on the same allegations. The Board does not have the authority to restrict the scope of IRA jurisdiction that Congress enacted.

Court may adopt to maintain consistency among Courts of Appeal.[7] 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* precise information is required, not *the* precise details.[8] Because the purpose of the administrative exhaustion requirement is to give OSC the opportunity to investigate and seek corrective action 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. If an individual has informed OSC of the grounds for his or her whistleblower retaliation complaint, he

[7] The Tenth Circuit has adopted this standard. *See Acha v. Dep't of Agric.*, 841 F.3d 878, 883-84 (10th Cir. 2016).

[8] In three opinions, the Federal Circuit has articulated in *dicta* the more restrictive "precise ground" formulation that the Board used here, while applying the standard above. *See Briley v. Nat'l Archives & Records Admin.*, 236 F.3d 1373, 1377 (Fed. Cir. 2001) (petitioner exhausted administrative remedies where she provided the general nature of her disclosures to OSC and more detail before the Board); *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1037 (Fed. Cir. 1993) (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 v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 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 *dicta* while adopting the Federal Circuit's substantive standard.

or she may add more detail during Board proceedings. *See Briley*, 236 F.3d at 1378 (holding that Briley's OSC complaint "contain[ed] the core" of her claim and gave "OSC sufficient basis to pursue an investigation"); *Heining v. Gen. Servs. Admin.*, 61 M.S.P.R. 539, 547 (1994) (petitioner did not characterize allegations differently, but merely added more detail, before the Board).

This Court should interpret and apply that standard consistent with the Ninth Circuit's approach to administrative exhaustion in the analogous context of employment discrimination claims. This Court has followed an analytically similar framework in those cases, focusing in part on whether the discrimination charge provided the information needed to conduct an administrative investigation. Employment discrimination claims are exhausted before the Equal Employment Opportunity Commission (EEOC) if the claims could "reasonably be expected to grow out of the charge of discrimination" because they are "like or reasonably related to the allegations contained in the EEOC charge." *Lyons*, 307 F.3d at 1104 (overturning an "excessively narrow and over-technical" interpretation of the petitioner's administrative complaint) (internal quotations and citations omitted); *see also B.K.B*, 276 F.3d at 1100-03; *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). This standard is met "to the extent that [later] claims are consistent with the plaintiff's original theory of the case." *Arizona ex rel. Horne v. Geo Grp., Inc.*,

816 F.3d 1189, 1205 (9th Cir. 2016), *cert. denied sub nom. Geo Grp., Inc. v. EEOC*, 137 S. Ct. 623 (2017). This Court has observed that requiring additional investigative and conciliative efforts for related incidents not listed in the EEOC charge would be redundant and serve no purpose other than creating a procedural technicality. *See Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729-30 (9th Cir. 1984).

In addition, two Circuit Courts have applied the same administrative exhaustion standard to whistleblower retaliation claims under the Sarbanes-Oxley Act of 2002 (SOX).[9] In *Wallace v. Tesoro Corporation*, the Fifth Circuit Court of Appeals held that for SOX whistleblower retaliation claims, "[t]he scope of a judicial complaint is limited to the sweep of the [Occupational Safety and Health Administration] investigation that can reasonably be expected to ensue from the administrative complaint." 796 F.3d 468, 476 (5th Cir. 2015). The Fifth Circuit joined the Fourth Circuit, which applied the same standard in *Jones v. Southpeak Interactive Corporation*, 777 F.3d 658 (4th Cir. 2015). Similar to the procedures under the WPA, the SOX requires that a whistleblower must first file an administrative complaint with OSHA, and must then wait 180 days for OSHA to investigate the allegation and issue a decision. *See* 18 U.S.C. § 1514(a)(b)(1). If

[9] To OSC's knowledge, the Fourth and Fifth Circuit Courts are the only circuit courts to address the administrative exhaustion issue in SOX whistleblower retaliation claims directly.

after 180 days OSHA has not issued a final decision, the whistleblower may file a claim in the appropriate district court. *Id.*

Finally, this Court's approach to administrative exhaustion should take into account that 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).

B. Petitioner Exhausted OSC Administrative Remedies as to his Disclosure of Nepotism to Agency Officials

Applying these principles to the present case, petitioner plainly exhausted his OSC administrative remedies as to his allegation that he was terminated and barred from the Army base in retaliation for his whistleblower disclosures regarding nepotism to agency officials. Petitioner's OSC complaint expressly stated that he repeatedly complained of nepotism to three named agency officials who refused to address it, and that his employment was terminated and he was barred from the base in retaliation for his whistleblower disclosures. ER 866-67. On its face, this is reasonably clear and precise and provides OSC more than sufficient basis to investigate.

That petitioner's OSC complaint attributed the allegedly retaliatory personnel actions to the October 26, 2012 disclosure to the IG and not the July 25,

2013 disclosure to agency officials is immaterial because OSC whistleblower retaliation investigations always analyze whether there is a causal connection between a protected disclosure and a challenged personnel action.[10] OSC investigators have the legal training, background, and investigative tools to analyze the factual underpinnings of a whistleblower retaliation claim and how they may or may not fit together to meet the statutory definition of a prohibited personnel practice. In short, petitioner properly provided the "core" of his whistleblower retaliation claim to OSC and then correctly sought to provide additional details during the Board proceedings. *See Briley*, 236 F.3d at 1378; *Heining*, 61 M.S.P.R. at 547.

[10] To the extent that the MSPB considered OSC's closure letter's reference to petitioner's disclosure to the IG, the statute and established case law preclude the Board from relying on OSC's characterization of petitioner's allegations. *See supra* Parts I.A-B.; *Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, 84 (2006); *Costin v. Dep't of Health & Human Servs.*, 64 M.S.P.R. 517, 533 (1994) (Chairman Erdreich, dissenting in part) ("An OSC letter notifying a complainant that it has terminated its investigation is typically general in nature, and should not be the basis of a determination that the appellant has failed to exhaust his OSC remedy.").

CONCLUSION

For the foregoing reasons, the MSPB's decision that petitioner failed to exhaust OSC administrative remedies is contrary to the governing statute. Accordingly, OSC requests that the Court reverse the MSPB's decision below.

Respectfully submitted,

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