UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES THOMAS RYAN, **Appellant,**	)	**DOCKET NUMBER** **DC-1221-16-0264-W-1**
v.	)	
DEPARTMENT OF DEFENSE, **Agency.**	)	

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

IDENTITY OF THE AMICUS CURIAE

Amicus curiae, the United States 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) of the Whistleblower Protection Act of 1989 (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA). In particular, OSC protects individuals who suffer personnel actions by federal agencies because they disclose any information that they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. *See* 5 U.S.C. § 2302(b)(8). As the agency charged with investigating and prosecuting violations of the WPA, including claims of whistleblower retaliation, OSC respectfully requests the opportunity to

offer its views to the Merit Systems Protection Board (MSPB or Board) on a legal issue raised in this case.[1]

STATEMENT OF THE ISSUE

Does a whistleblower's motive in making a disclosure affect whether that disclosure is protected by the WPA?

INTRODUCTION AND SUMMARY

On January 10, 2017, an MSPB Administrative Judge (AJ) dismissed the appellant's individual right of action appeal, concluding that he "has not met his *prima facie* burden of proof to establish that his whistleblowing activity motivated the agency to take or not take any personnel action.". *Ryan v. Dep't of Defense*, DC-1221-16-0264-W-1, 2017 WL 134320 (Jan. 10, 2017). The appellant filed a petition for review of this decision on March 15, 2017.

OSC respectfully submits that the AJ erred in at least one aspect of her analysis. A key holding in the AJ's decision—that the appellant's disclosures were not protected because he was motivated by "interpersonal squabbling" with his coworkers—is legally flawed. Specifically, the AJ's ruling contradicts the plain language of the WPEA, runs counter to the WPA's purpose and legislative intent, cannot be reconciled with established Board precedent, and if upheld, would weaken whistleblower protections. For these reasons, we ask the Board to modify the Initial Decision to affirm that a whistleblower's motive does not affect whether his disclosures are protected.

[1] The WPEA explicitly authorized 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). We believe Congress's clear intent to allow OSC the opportunity to present its views on these issues applies with equal force in MSPB proceedings. Although the parties have already submitted their briefs in this case, the Board's current lack of quorum suggests that allowing OSC to file an amicus brief will not unduly burden the proceedings.

RELEVANT BACKGROUND

The appellant is a police officer in the Pentagon Force Protection Agency (PFPA). He alleges that in retaliation for his protected disclosures, PFPA gave him verbal and written counseling statements and kept closed reports of investigation on him as a threat of disciplinary action. Although the appellant has engaged in several whistleblowing activities, only one of his disclosures is relevant for purposes of this brief. After learning from his supervisor, [redacted] that a coworker had accused him of not properly performing his duties, he reported misconduct by two other officers in a December 24, 2014 email. The email read:

> On Monday the 22nd, sometime between 0600 and 0900, I observed [redacted] [sic] asleep at his desk snoring. On the 23rd I again observed the same activity. I also observed Officer [redacted] state "I'm going to stab your eye out with a fucking pen.' He was speaking to [redacted] [sic] in an apparent bout of empty bragging. This probably is connected to the fact that someone mentioned to [redacted] I was not performing my duty.

The appellant alleged that PFPA retaliated against him for this disclosure and others made around the same time. The AJ denied the appellant's request for corrective action, in part because she found that he failed to establish that he made protected disclosures. With respect to the email above, the AJ explained:

> On the basis of this evidence, I find the appellant was motivated to make this report because he wanted to retaliate against [redacted] and [redacted] because he believed they complained to [redacted] about him first. The appellant believed these guys reported him for not doing his job properly, so he reported them back. I find his motive was not genuinely to provide information that evidenced protected significant government wrongdoing, and interpersonal squabbling of this kind does not constitute a protected disclosure under the WPEA. *See Ramos v. Department of Treasury*, 72 M.S.P.R. 235, 241 (1996).

Ryan v. Dep't of Defense, DC-1221-16-0264-W-1, 2017 WL 134320 (Jan. 10, 2017).

ARGUMENT

The MSPB grants petitions for review where: (1) the Initial Decision contains erroneous findings of material fact; (2) the Initial Decision is based upon an erroneous interpretation of statute or regulation, or an erroneous application of the law to the facts of the case; (3) the AJ's rulings were not consistent with required procedure or involved an abuse of discretion; or (4) new and material evidence is available that, despite the appellant's due diligence, was not available when the record closed. *See* 5 C.F.R. § 1201.115.

As discussed below, the Initial Decision in this case was based in part on an erroneous application of the governing statute to the facts. Since the AJ misapplied the law in concluding that the appellant's disclosures were not protected, the Board should modify the Initial Decision to correct that error.

I. The Text, Purpose, and Legislative History of the WPA, as Amended by the WPEA, Demonstrate that a Whistleblower's Motive Cannot Be Used to Exclude Disclosures From Protection Under Section 2302(b)(8)

The plain language of the relevant statutes precludes consideration of a whistleblower's motive in determining whether a disclosure is protected. Specifically, the WPEA clearly states that "[a] disclosure shall not be excluded from subsection (b)(8) because ... of the employee or applicant's motive for making the disclosure." 5 U.S.C. § 2302(f)(1)(C). Section 2302(b)(8), in turn, states that agency officials are prohibited from taking or threatening a personnel action for "***any*** disclosure of information ... which the employee reasonably believes evidences" one of the categories of wrongdoing listed in the statute. 5 U.S.C. § 2302(b)(8) (emphasis added). Notably, it contains no exception for disclosures made for less than altruistic reasons.[2] In fact, the WPEA codified an objective test for assessing a whistleblower's disclosures, concluding that reasonable

[2] Aside from arguing that the appellant's motive is irrelevant generally, OSC makes no representation as to the appellant's motive in making the disclosures at issue in this brief.

belief exists where "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence" one of the types of wrongdoing found in section 2302(b)(8). 5 U.S.C. § 2302(b).

In the present case, the AJ concluded that the appellant's disclosures about his coworkers, [redacted] and [redacted] were not protected under section 2302(b)(8) because he was motivated by "interpersonal squabbling" and not a genuine interest in disclosing wrongdoing.[3] This holding directly conflicts with the statute and therefore cannot stand.

Legislative history reinforces the statute's plain language. Since passage of the WPA, Congress has consistently disapproved judicial attempts to limit the scope of whistleblower protections. In a 1988 report on the statute, it expressed frustration over actions and decisions that restricted whistleblowers' ability to obtain corrective action, emphasizing:

> The Committee intends that disclosures be encouraged. The OSC, the Board, and the courts ***should not erect barriers to disclosures*** which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.

S. Rep. No. 413, at 13 (1988) (emphasis added). And in passing the WPEA in 2012, Congress remained critical of the Federal Circuit's and the Board's propensity to read the whistleblower protections narrowly:

> Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of

[3] The AJ improperly conflated a whistleblower's motive with reasonable belief by citing *Ramos* v. *Department of the Treasury*, 72 M.S.P.R. 235, 241 (1996), for her conclusion that the appellant's motive for making a disclosure excluded it from protection. In *Ramos*, the MSPB only concluded that the appellant's disclosure was not protected "because the appellant failed to make a non-frivolous assertion of fact that he reasonably believed [his disclosure] constituted a violation of law, rule, or regulation, or an abuse of authority." *Id.* The decision did not address the appellant's motive for his whistleblowing and thus cannot support the proposition that motive is significant in determining whether a disclosure is protected under section 2302(b)(8).

> disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect ***"any disclosure"*** of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

S. Rep. No. 112-155, at 4-5 (2012) (emphasis added).[4]

Indeed, the very purpose of the WPEA is undermined if the Board creates a loophole excluding otherwise protected disclosures from coverage based on the whistleblower's motive. In passing the legislation, the Senate affirmed that "the WPEA 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. 112-155 (April 19, 2012). Its focus was on creating a work environment conducive to the identification and correction of wrongdoing. There is no indication that Congress meant to limit the WPEA's efficacy in achieving that objective by excluding whistleblowers who may also have their own agendas from protection.

II. The MSPB Should Reaffirm Its Established Precedent that a Whistleblower's Motive is Irrelevant in Determining Whether a Disclosure is Protected

The MSPB has repeatedly affirmed that a whistleblower's motive does not determine whether the disclosure is protected. *See, e.g., Carter v. Dep't of the Army*, 62 M.S.P.R. 393, 402 (1994) (concluding that where a whistleblower has a reasonable belief, his disclosures are protected regardless of his motivation); *Special Counsel v. Costello*, 75 M.S.P.R. 562, 582 (1997) (reversed on other grounds) (noting that, where reasonable belief test is met, motivation for making disclosures is irrelevant); *Molinar v. Dep't of Veterans Affairs*, 80 M.S.P.R 248, 251

[4] The deliberate use of the modifier "any" here strongly suggests Congress intended to protect a wide array of whistleblowing activity, regardless of what motivated the disclosure. "'Any,' after all, means any." *See Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) (citing *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) and explaining that "any" has "expansive meaning").

(1998) (same); *Parikh v. Dep't of Veterans Affairs*, 116 M.S.P.R. 197, 206 (2011) (stating that "vindictive motive" of whistleblower immaterial to whether disclosure is protected).

Personal bias or self-interest of the whistleblower may affect credibility, but do not affect whether the disclosure is protected. Instead, the key inquiry is whether the whistleblower has a reasonable belief that the information he disclosed evidences a type of wrongdoing described in section 2302(b)(8). *See, e.g., Kinan v. Dep't of Defense*, 87 M.S.P.R. 56, 56-67 (2001) (employee's bias is not dispositive on the issue of reasonable belief); *Fickie v. Dep't of the Army*, 86 M.S.P.R. 525, 530-31 (2000) (same). A whistleblower may reasonably believe that the wrongdoing she observed is of a type covered by the statute, but not disclose it unless and until some other influence motivates her to do so. The Board has long acknowledged that such whistleblowing activity is protected. It should continue to do so now.

III. Whistleblower Protections Would be Weakened if Actual or Perceived Motivations for Making a Disclosure Affect Whether it is Protected

If the MSPB permits a whistleblower's motive to be taken into account in deciding whether a disclosure is protected, the existing statutory framework for claims under section 2302(b)(8) will be unnecessarily complicated and thus less consistent. Appellants will assert that they had the purest of intentions in making their disclosures and agencies will counter that they were merely seeking to "incriminate their enemies." *Ryan v. Dep't of Defense*, DC-1221-16-0264-W-1, 2017 WL 134320 (Jan. 10, 2017). It will fall to judges to make this often impossible assessment. But how can one accurately distinguish between purported revenge-seekers and an altruistic but frustrated employee who has become bitter after witnessing chronic misconduct, especially when motives may often be mixed? There is no reason to undertake such an uncertain analysis. Wrongdoing is no less wrong because it was brought to light by an employee with an axe to grind. In passing the WPA, Congress intended to encourage the reporting of government

waste, fraud, and abuse. That objective is thwarted when we protect only those who can prove their virtuous intentions in sounding the alarm.

CONCLUSION

The plain language, purpose, and history of the relevant statutes clearly demonstrate that a whistleblower's motive does not affect whether his disclosures are protected. Consequently, the Special Counsel urges the Board to modify the Initial Decision as necessary to affirm this important point of law.

Respectfully submitted,

Carolyn Lerner
Special Counsel

Louis Lopez
Associate Special Counsel

Emilee Collier
Attorney

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
Fax: (202) 653-5151
ecollier@osc.gov