UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TIMOTHY MOHLER,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
CH-1221-18-0119-W-2

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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 employees, and applicants for federal employment from "prohibited personnel practices," as defined in section 2302(b) of title 5 of the *United States Code* as amended. 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)(8)-(9).

This case concerns the scope of whistleblower protection afforded by a new amendment to 5 U.S.C. § 2302(b)(9)(C). The amendment extends protection to covered individuals who cooperate with or provide information to any agency "component responsible for internal investigation or review," rather than limiting that protection only to the agency's Inspector General and OSC. *See* National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), Pub. L. No. 115-91, § 1097(c), 131 Stat. 1283, 1618 (2017).[1] As the agency charged with reviewing and investigating

[1] The 2018 NDAA incorporated and codified the OSC Reauthorization Act of 2017.

alleged violations of section 2302(b)(9)(C), OSC has a substantial interest in the scope of this new amendment, including the appropriate identification of agency components with investigation or review responsibilities. Indeed, OSC must be able to accurately and reliably identify these components to assess whether an employee engaged in protected activities as defined by the statute. Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB or Board) on this issue.[2]

STATEMENT OF THE ISSUE

Under the recent amendment to 5 U.S.C. § 2302(b)(9)(C), what qualifies as "any other [agency] component responsible for internal investigation or review?"

RELEVANT BACKGROUND

The appellant, Timothy Mohler, reported a possible security violation to the agency's Computer Security Incident Response Center (CSIRC) at the Customs and Border Patrol (CBP), U.S. Department of Homeland Security (DHS).[3] *See Mohler v. Dep't of Homeland Sec.*, No. CH-1221-18-0119-W-2, 2019 WL 1242609, *2 (Mar. 13, 2019) (Initial Decision). Specifically, the appellant disclosed to CSIRC that a coworker had left his personal identity verification (PIV) card unattended at a workstation. *See id.* at *3. CSIRC reviewed the information, opened an investigation, and assigned a case number (Case No. 201510362-201509212). *See id.* CSIRC later transferred the matter back to management, which referred the allegations to CBP's Internal Affairs to finish the investigation and prepare an Administrative Inquiry Report. *See id.* at *4.

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[2] The Whistleblower Protection Enhancement Act of 2012 (WPEA) 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). Congress's clear intent to allow OSC the opportunity to present its views on these issues applies with equal force in MSPB proceedings. The appellant consents to the filing of this brief, and its filing will not unduly burden the proceedings.

[3] The Federal Information Security Management Act of 2002 (FISMA), as amended, required agencies to implement formal policies and procedures regarding information security. *See* 44 U.S.C. § 3541 *et seq.* As required by FISMA, CSIRC is the agency component at DHS responsible for detecting, reviewing, investigating, reporting, and responding to information security incidents. *See id.* §§ 3553-54. In fulfilling this role, CSIRC seeks to address deficiencies and mitigate risks associated with such incidents. *See id.*

In an initial decision, an MSPB administrative judge held, *inter alia*, that the appellant did not engage in activity protected by section 2302(b)(9)(C) when he made the disclosure to CSIRC. *Id.* at *9. Although the administrative judge found that CSIRC reviewed the appellant's report and began an internal investigation into the appellant's disclosure regarding the PIV card incident and related issues, he reasoned that the new amendment to section 2302(b)(9)(C) was not applicable because "CSIRC does not investigate the agency; it investigates internal complaints and issues." *Id.* at *8-9. The appellant filed this petition for review with the Board.

ARGUMENT

I. THE MSPB ADMINISTRATIVE JUDGE'S UNDULY RESTRICTIVE INTERPRETATION OF THE AMENDMENT TO SECTION 2302(b)(9)(C) IS CONTRARY TO BOTH THE STATUTE AND CONGRESSIONAL INTENT.

The MSPB administrative judge misinterpreted the new amendment to section 2302(b)(9)(C) by creating an unwarranted distinction between agency components that investigate or review "the agency" and those that investigate or review "internal complaints and issues." A plain and more natural reading of the amendment shows that Congress intended to expand this provision to include *any* agency component responsible for conducting internal investigations or reviews similar in kind to the investigations or reviews of potential misconduct, deficiencies, or risks that an Inspector General or OSC—the two other entities identified in section 2302(b)(9)(C)—are authorized to conduct. To assist the Board in adjudicating these types of cases, OSC proposes a fair and workable standard for identifying components of an agency with such investigation or review responsibilities. *See infra* Section II.

A. The plain language of the amendment to section 2302(b)(9)(C) mandates a broad and straightforward reading of what constitutes an agency component with internal investigation or review responsibilities.

The Board has long held that "the interpretation of a statute begins with the language of the statute itself." *Bostwick v. Dep't of Agric.*, 122 M.S.P.R. 269, ¶ 8 (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, ¶ 9 (2006).

As amended by the 2018 NDAA, section 2302(b)(9)(C) prohibits agency officials from threatening, taking, or failing to take personnel actions against covered individuals because such individuals are "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." At issue in this case is the intended meaning of the newly-added parenthetical phrase—"or any other component responsible for internal investigation or review"—and how that phrase should be understood in relation to the original language of the statute.

Rules of grammar prescribe that a parenthetical statement "enclose[s] explanatory material that is *independent* of the main thought of the sentence." William A. Sabin, *The Gregg Reference Manual*, ¶ 218 (7th ed. 1993) (emphasis added).[4] Because a parenthetical is independent of the main sentence, it does not change the meaning of the original clause to which Congress added it. Accordingly, to find out how the parenthetical should interact with the original language in the Whistleblower Protection Act of 1989 (WPA), the analysis should start with an understanding of the meaning of that original statutory text. Section 2302(b)(9)(C) originally protected employees for "cooperating with or disclosing information to the Inspector General *of an agency*." Pub. L. No. 101-12, § 4, 103 Stat. 16, 32 (emphasis added). The phrase "of an agency" simply modified the investigatory entity (*i.e.*, the Inspector General), essentially answering the question "which Inspector General?"

[4] "Rules of grammar, which indicate proper usages of punctuation, are among the rules considered by a reviewing court when interpreting statutory language." Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 21:15 (7th ed. 2007 & Supp. 2019) [hereinafter *Sutherland Statutory Construction*].

Turning to the amended language, the parenthetical expanded on the term before it (Inspector General)—adding other components of an agency beyond the Inspector General with which an employee may cooperate, or disclose information to, while enjoying statutory protection. Under the rules of grammar, the parenthetical did not change the meaning of the phrase that follows it—"of an agency." Rather, that phrase modifies the new investigatory entities in the same way that it modified the original one—to answer a similar question "which components?" The logical, plain meaning understanding follows: Employees are protected for cooperating with or disclosing information to the Inspector General of an agency (or any other component *of an agency* responsible for internal investigation or review).

Perhaps more intuitively, the specific use of the term "any" in the amendment to section 2302(b)(9)(C)—"any other component responsible for internal investigation or review"—should be given full effect. *See United States 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. "Any" means "one or some indiscriminately of whatever kind." *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976)). Thus, giving effect to the term "any," it is clear that the statute intended to protect cooperation with or disclosures to *any* other agency component that conducts internal investigation or review, such as CSIRC in this case.

It is axiomatic that an agency component that reviews or investigates computer security incidents, by definition, reviews or investigates the agency from which those incidents arise. The administrative judge correctly found that CSIRC reviewed the appellant's internal complaint, assigned it a case number, and began an investigation. Despite these investigative steps, the initial decision concluded without elaboration that CSIRC "does not investigate the agency; it investigates

internal complaints and issues." It is difficult, if not impossible, to see a meaningful distinction between investigating an agency's internal complaints and issues and investigating an agency itself, particularly because an agency's Inspector General also investigates the "internal complaints and issues" of an agency.

Because the meaning of the amendment to section 2302(b)(9)(C) is unambiguous, every other MSPB initial decision has adopted a broad and straightforward interpretation of this provision. *See Mottas v. Dep't of Veterans Affairs*, No. DE-1221-19-0011-W-1, 2019 WL 1047622 (Feb. 25, 2019) (concluding that the Compliance and Business Integrity Office at the Department of Veterans Affairs (VA) is a component responsible for internal investigation or review); *Wilkerson v. Dep't of the Army*, No. DA-0752-18-0217-W-1, 2019 WL 5300551 (Oct. 18, 2019) (finding that the Army's Criminal Investigation Command is a component responsible for internal investigation or review); *Turke v. Dep't of Justice*, No. DA-1221-19-0258-W-1, 2019 WL 5693901 (Oct. 29, 2019) (concluding over the objection of the Department of Justice (DOJ) that its Office of Professional Responsibility is a component responsible for internal investigation or review); *Cadena v. Dep't of Homeland Sec.*, No. DE-0432-19-0321-I-1, 2019 WL 6683383 (Dec. 4, 2019) (finding that the Joint Intake Center is a component of the agency involved with investigations).

B. Legislative context supports that the amendment to section 2302(b)(9)(C) is meant to be construed broadly.

Even if the plain language of section 2302(b)(9)(C) did not provide the clear answer to interpreting the new amendment at issue in this case, historical context shows that when Congress has previously amended whistleblower protection laws (specifically, 5 U.S.C. § 2302), it has consistently signaled that it intends whistleblower protections to be read broadly. Given that the legislative history of the 2018 NDAA is silent on the rationale behind the amendment, the new statutory language should be read in a similar light to Congress's past injection of the term "any" in several sections of the statute.

Since 1989, Congress has added the term "any" to various whistleblower protection provisions on multiple occasions. Each time, it has done so to overrule case law that adopted overly restrictive interpretations of the intended protections. For example, in *Fiorello v. Department of Justice*, the Federal Circuit withheld protection from a whistleblower because the court determined that the employee's disclosure was motivated by personal reasons and not intended to serve the public good. 795 F.2d 1544, 1550 (Fed. Cir. 1986). In passing the WPA, Congress rejected the court's attempt to limit protection under section 2302. *See* S. Rep. No. 100-413, at 12-13 (1988) (lamenting that the "court reached this conclusion despite the lack of any indication in the [statute] that an employee's motives are supposed to be considered in determining whether a disclosure is protected"). To correct the misapplication, Congress changed the statutory language to clarify that "a disclosure" meant "*any* disclosure." Pub. L. No. 101-12, § 4, 103 Stat. 16, 32 (1989) (emphasis added); *see also* H.R. Rep. 103-769 at 18 (1994) (emphasizing that "[p]erhaps the most troubling precedents involve the Board's inability to understand that 'any' means 'any'" when advancing OSC Reauthorization Act of 1994).

In subsequent cases, MSPB has recognized the significance of that change. For example, in *Ganski v. Department of the Interior*, the Board acknowledged that replacement of "*a* disclosure of … a violation of law, rule, or regulation" with the term "*any* disclosure" showed Congress's intent to expand protections to any violations of law regardless of whether the law indicated "fraud, waste or abuse." 86 M.S.P.R. 32, ¶ 12 (2000).

Similarly, in 2012, Congress passed the WPEA and again amended section 2302 to include the term "any" in two places in order to expand whistleblower protections. The congressional record reflects that the "statute is intended to encourage disclosure of wrongdoing," and therefore "section 101 of the bill underscores the breadth of the WPA's protections by changing the term 'a violation' to the term 'any violation' in two places in the WPA." S. Rep. No. 112-155, at 8 (2012)

(amending 5 U.S.C. § 2302(b)(8)(A)(i) and (B)(i)). Given this history, the most reasonable conclusion is that Congress intended the use of the word "any" in the phrase "any other component responsible for internal investigation or review" in the amendment to section 2302(b)(9)(C) to be read just as broadly to cover CSIRC in this case.

Finally, the new amendment at issue here should be analyzed consistently with the common statutory interpretation canon that remedial statutes, like the WPA, are to be liberally construed 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). In passing the WPA, Congress found that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." 5 U.S.C. § 1201 note (1989). Internal investigations and reviews are integral to exposing and remedying such violations and wrongdoing. Failing to generously interpret the amendment to section 2302(b)(9)(C) will likely discourage employees from making such reports to agency components for fear that they will not be protected from retaliation. And if we are to make meaningful progress toward a more effective civil service, agencies must be able to depend on employees' cooperation with their investigatory components to understand and remedy reports of violations and wrongdoing.

II. OSC'S PROFFERED APPROACH FOR ANALYZING THE AMENDMENT TO SECTION 2302(b)(9)(C) IS CONSISTENT WITH BOTH THE STATUTE AND MSPB CASE LAW, FAIR IN OPERATION, AND WORKABLE IN PRACTICE.

To assist MSPB with adjudicating whistleblower retaliation cases, OSC proffers a fair and workable standard for identifying agency components that would qualify under section 2302(b)(9)(C) as a "component with responsibility for internal investigation or review." Specifically, OSC proposes that to be covered under section 2302(b)(9)(C), an agency component must have formalized procedures for reviewing or investigating potential misconduct, deficiencies, or risks.

The formality of the procedures may vary between or within agencies depending on the purposes of the component. Some components may be permanent offices with dedicated staff, while others may be convened as temporary boards comprised of agency officials selected for a specific inquiry.[5] The touchstone for determining statutory protection is that the agency component, however established or initiated, has formalized procedures for internal investigation or review.

As discussed above, this proposed standard is consistent with both the plain language of the statute and congressional intent. A straightforward reading of the amendment shows that coverage is expanded to include *any* other agency component responsible for conducting internal investigations or reviews similar in kind to the investigations or reviews of potential misconduct, deficiencies, or risks that an Inspector General or OSC—the two other entities identified in section 2302(b)(9)(C)—are authorized to conduct. *See Sutherland Statutory Construction* § 47:16 ("The commonsense canon [] counsels that a word is given more precise content by the neighboring words with which it is associated ... and means practically that a word may be defined by an accompanying word, and that, ordinarily, the coupling of words denotes an intention that they should be understood in the same general sense."). More generally, OSC's proffered approach is consistent with the broad and remedial purpose of the WPA "to strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." 5 U.S.C. § 1201 note.

By requiring that a covered agency component use formalized investigative or review procedures, OSC grounds its proffered approach in analogous Board precedent. In *Owen v.*

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[5] For example, MSPB already has found that section 2302(b)(9)(C) covers VA's Compliance and Business Integrity Office, Army's Criminal Investigation Command, DOJ's Office of Professional Responsibility, and DHS's Joint Intake Center. Moreover, many agencies—such as CBP, the Bureau of Prisons, and the Bureau of Indian Affairs—contain a permanent investigatory component entitled Office of Internal Affairs. Still other agencies have created formalized procedures for temporary management directed investigations, such as VA's Directive 0700 for Administrative Investigations, Army Regulation 15-6, Navy and Marine Corps Manual of the Judge Advocate General, Air Force Instruction 90-301, and Coast Guard Administrative Investigations Manual.

Department of the Air Force, MSPB considered whether an employee's reports to the agency safety office and the Occupational Health and Safety Administration were protected activities under section 2302(b)(9)(A), which safeguards an employee's exercise of any appeal, complaint, or grievance rights.[6] 63 M.S.P.R. 621, 624-25 (1994). In a carefully crafted opinion that articulated a fair framework for analyzing the various whistleblower protections under the WPA, the Board found that such activities are not protected under section 2302(b)(9)(A) unless they involve "formalized adjudicative proceedings." *Id.* at 627. Building on this holding, OSC argues that just as employees are protected for engaging in activities that involve *formalized* adjudicative proceedings, they too should be protected for engaging in activities that involve *formalized* investigative or review procedures. Thus, the approaches to whistleblower retaliation claims under sections 2302(b)(9)(A) and (C) are consistent with each other as well as with the existing framework that the Board has used "to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act." *Fishbein v. Dep't of Health and Human Servs.*, 102 M.S.P.R. 4, ¶ 8 (2006).

Finally, OSC believes that a simple and fair benchmark like our proffered approach would ensure that employees understand the specific circumstances under which their activities will be protected and thus feel more comfortable participating in formalized internal investigations or reviews. It also would serve as clear guidance to agencies that an employee's disclosure to, or cooperation with, an internal investigation or review conducted pursuant to formalized procedures is just as protected as the same interactions with an Inspector General or OSC. This formality requirement serves as a fair and meaningful safety valve to ensure that an agency's informal inquiries are not extended the same protection.

In the instant case, the appellant used a formalized procedure to disclose a possible computer security violation to CSIRC. *See Mohler*, 2019 WL 1242609, *3; 44 U.S.C. §§ 3553-54. The

[6] The Board separately found that the employee's disclosures were protected under section 2302(b)(8).

undisputed record evidence shows that CSIRC reviewed the information, opened an investigation, and assigned a case number. *See id.* Perhaps most significant, CBP concedes, and the administrative judge found, that "CSIRC … investigates internal complaints and issues." *Id.* at *9. Given these uncontroverted facts, it belies logic to conclude that CSIRC is not a "component responsible for internal investigation or review" under section 2302(b)(9)(C).

CONCLUSION

Based on the foregoing, OSC respectfully urges the Board to clarify in its final decision the appropriate standard for determining what qualifies as "any other [agency] component responsible for internal investigation or review" under the new amendment to section 2302(b)(9)(C). For the above reasons, OSC also respectfully requests that the Board consider adopting OSC's proposed standard as articulated in this amicus curiae brief.

Respectfully submitted,

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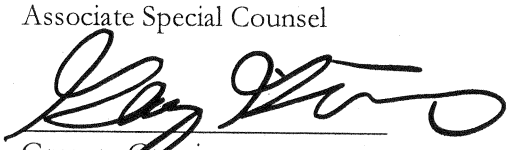

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CERTIFICATE OF SERVICE

I, Gregory Giaccio, an employee with the U.S. Office of Special Counsel, hereby certify that on this 29 day of January 2020, that I caused OSC's Brief as Amicus Curiae and supporting Declaration to be served to the following in the manner indicated:

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