2015-3066

United States Court of Appeals for the Federal Circuit

JOHN C. PARKINSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition for Review from the Merit Systems Protection Board
Case No. SF-0752-13-0032-I-2

PETITIONER'S RESPONSE OPPOSING RESPONDENT'S PETITION FOR REHEARING *EN BANC*

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June 28, 2016

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

John C. Parkinson **v.** Department of Justice

Case No. 2015-3066

CERTIFICATE OF INTEREST

Counsel for the:
☒ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

John C. Parkinson

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
John C. Parkinson	NA	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Kathleen M. McClellan Jesselyn A. Radack Whistleblower and Source Protection Program (WHISPeR) ExposeFacts
Former Firm: Government Accountability Project

June 27, 2016
Date

/s/Kathleen M. McClellan
Signature of counsel

Please Note: All questions must be answered

Kathleen McClellan
Printed name of counsel

cc:

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INTRODUCTION

Petitioner, LtCol John C. Parkinson, respectfully submits this response opposing Respondent Department of Justice's [hereinafter Agency] Petition for Rehearing *En Banc.* The Panel Decision is based on plain, unambiguous statutory language; is in accordance with congressional intent to grant preference-eligible veterans unique appeal rights; allows only an affirmative defense of whistleblowing reprisal, not a separate cause of action; and does not conflict with existing precedent. The Panel Decision does not risk disclosure of sensitive information nor does it risk conflicting opinions. Therefore, rehearing *en banc* is not appropriate in this matter. *See* Fed. Cir. Rule 35.

FACTUAL BACKGROUND

Mr. Parkinson began his ten-year tenure at the FBI in 1999, and throughout his FBI career also served in the Marine Corps Reserves, including three sets of mobilization orders in support of the global war on terror, two of which involved either combat or hazardous duty deployments. In 2004, Mr. Parkinson was deployed to Iraq, initially to Baghdad and later to Fallujah, where he worked with the Defense Intelligence Agency (DIA) in a classified capacity. After being recalled from Iraq, Mr. Parkinson served as a material witness in two U.S. government investigations into detainee abuse and returned to a position as an FBI Special Agent in the Sacramento Division.

From approximately 2005 to 2008, Mr. Parkinson served as Team Leader for the Special Operations Group (SOG), a surveillance team operating out of an undercover offsite facility. In February 2008, Mr. Parkinson and several members of the SOG squad made protected whistleblowing disclosures to Assistant Special Agent in Charge (ASAC) Gregory Cox that two FBI pilots were engaging in misconduct, including misuse of FBI aircraft to solicit prostitutes, massive time and attendance fraud, using FBI computers to view pornography, and destruction of a security camera at the new SOG undercover facility.

In August 2008, ASAC Cox and Mr. Parkinson's supervisor, Supervisory Special Agent (SSA) Leticia Lucero, involuntarily reassigned Mr. Parkinson away from his SOG Team Leader position and issued him a low-rating performance evaluation. Mr. Parkinson complained that the reassignment and downgraded performance evaluation were retaliatory adverse personnel actions. Pursuant to the FBI's whistleblower regulation, the Department of Justice Office of Inspector General (OIG) opened a whistleblower reprisal investigation. *See* 28 C.F.R. Part 27. The OIG first contacted Mr. Parkinson in January 2009 about his reprisal complaint, and Mr. Parkinson met frequently with the OIG investigators for over a year. The OIG's whistleblower reprisal investigation focused on SSA Lucero, ASAC Cox, and Special Agent in Charge (SAC) Drew Parenti.

Despite the fact that the OIG whistleblowing reprisal investigation was ongoing, the OIG investigators instructed the targets of the reprisal investigation, specifically SAC Parenti, to send their allegations that Mr. Parkinson misused FBI funds to the OIG for investigation. The OIG voluntarily opened a criminal investigation with Mr. Parkinson as the target in August 2009,[1] but did not tell Mr. Parkinson. The same OIG investigators continued to meet with Mr. Parkinson and gather evidence from him for nearly ten months, leading Mr. Parkinson to believe he was only a complainant when, in reality, Mr. Parkinson was the target of an OIG investigation.

When OIG finally told Mr. Parkinson that he was actually the target of an investigation, OIG compelled Mr. Parkinson to a sworn interview. However, OIG instructed Mr. Parkinson not to bring up whistleblowing reprisal during the interview. Upon conclusion of the investigation into the allegations that Mr. Parkinson misused FBI funds, the OIG concluded that "for the most part [Mr. Parkinson] used these funds appropriately." Then, the OIG *sua sponte* raised

[1] The OIG was not required to investigate the allegations against Mr. Parkinson. The vast majority of FBI employee misconduct investigations are handled by the FBI's Inspection Division, and not by the OIG. A report in May 2009 found that OIG investigated only 6% of FBI employee misconduct investigations, while the FBI's Inspection Division investigated 90% of FBI employee misconduct allegations. *See* U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Divisions, Review of the Federal Bureau of Investigation's Disciplinary System, Report Number 1-2009-02 (May 2009), *available at* https://oig.justice.gov/reports/FBI/e0902/final.pdf.

"additional allegations about Parkinson" that Mr. Parkinson had "obstructed the FBI's efforts to reconcile the money spent" on the new offsite facility, removed furniture from the new facility, and created false documents concerning the removal of furniture. Even though OIG forbade Mr. Parkinson from discussing whistleblowing reprisal during the compelled interview, OIG's resulting report included a finding that there was no whistleblower reprisal when the targets of the reprisal investigation (SSA Lucero, ASAC Cox, and SAC Parenti) made unsubstantiated allegations against Mr. Parkinson about misuse of funds.

In October 2010, Mr. Parkinson returned to the Marine Corps. In 2012, the FBI used the OIG investigation targeting Mr. Parkinson as the basis to fire Mr. Parkinson for charges of Theft, Lack of Candor/Lying under Oath, and Unprofessional Conduct – On Duty. The FBI's Office of Professional Responsibility (OPR) also concluded that Mr. Parkinson committed Obstruction of an OPR Matter, but did not impose a separate penalty for that offense.

Mr. Parkinson appealed the removal to the Merit Systems Protection Board (MSPB). Most removal actions taken against FBI employees are excluded from MSPB review, but because Mr. Parkinson is a preference-eligible veteran, the MSPB has undisputed jurisdiction over the removal action in his case. 5 U.S.C. §§ 7513(d), 7511(b)(8) and 7701. Before the MSPB, Mr. Parkinson raised affirmative defenses of whistleblowing reprisal and discrimination based on his military

service under USERRA. The MSPB dismissed both affirmative defenses and restricted discovery accordingly. Vice Chairman Anne Wagner dissented, holding that MSPB precedent and the statutory framework dictated that Mr. Parkinson be afforded full appeal rights before the MSPB, including affirmative defenses. Wagner, Dissenting, *Parkinson v. Dep't of Justice*, 121 M.S.P.R. 703 (2014); *See, also* Wagner, Dissenting, *Van Lancker v. DOJ,* 119 M.S.P.R. 514, at 524 (2013). On the merits, the MSPB ultimately sustained the removal based on two of the four offenses: OPR Matter - Obstruction and Lack of Candor/Lying Under Oath. *Parkinson v. Dep't of Justice*, 121 M.S.P.R. 703 (2014).

This Court reversed, vacated, and remanded the MSPB's decision. *Parkinson v. Dep't of Justice*, 815 F.3d 757 (Fed. Cir. 2016); Addendum, Resp't Pet. for Rehr'g, at 1-35 [hereinafter Addendum]. This Court overturned the Lack of Candor charge and held that the maximum penalty for the one remaining charge of Obstruction is a 30-day suspension, a unanimous ruling that is not the subject of the Agency's request for rehearing. Addendum, at 33. This Court also held that the MSPB erred in dismissing Mr. Parkinson's whistleblowing reprisal affirmative defense. Addendum at 23-26. Judge Taranto dissented in part with respect to the whistleblowing reprisal affirmative defense holding. Taranto, Dissenting, *Parkinson v. Dep't of Justice*, 815 F.3d at 777; Addendum, at 36-40.

The Agency petitioned for rehearing *en banc* on the issue of Mr. Parkinson's whistleblowing reprisal affirmative defense. For the reasons set forth below, Mr. Parkinson respectfully requests that this Court deny the Agency's petition.

ARGUMENT

I. The Panel Decision is in Accordance with the Plain Language of Statute and Congressional Intent

A. The Panel Decision is Based on Clear and Unambiguous Statutory Language.

The Panel Decision correctly held that the plain, unambiguous language of 5 U.S.C. §§ 7513(d) and 7701 provides Mr. Parkinson with a right to appeal his removal to MSPB, including an affirmative defense of whistleblowing reprisal. Addendum, at 23-26. Section 7701(c)(2)(C) specifies that if Mr. Parkinson "shows that the [agency] decision was not in accordance with the law," MSPB cannot sustain the removal. Whistleblower reprisal against FBI employees is unambiguously "not in accordance with the law," as it is expressly prohibited by 5 U.S.C. § 2303. The plain language of the statutory scheme is clear and unambiguous. There is no reason for this Court to review *en banc* a Panel Decision that relies on the unambiguous statutory language and does not contradict any prior precedent. *See* Fed. Cir. Rule 35.

B. The Panel Decision Does Not Undermine Congressional Intent.

The Agency argues that because FBI employees are exempted from the Whistleblower Protection Act (WPA), specifically 5 U.S.C. §§ 2302(b) and 7701 (c)(2)(B) (specifying an affirmative defense based on violations of section 2302(b)), an affirmative defense of whistleblowing reprisal is unavailable to Mr. Parkinson. Regardless of whether the Agency's characterization is correct, it is not pertinent in this case because the Panel Decision did not hold that Mr. Parkinson could obtain judicial review of a whistleblower "claim." The Panel Decision did not hold that Mr. Parkinson had a right to an investigation and corrective action from the Office of Special Counsel under 5 U.S.C. § 1214. Nor did the Panel Decision hold that Mr. Parkinson could bring an Individual Right of Action appeal before the MSPB under 5 U.S.C. § 1221. Rather, the Panel Decision held that Mr. Parkinson could assert an *affirmative defense* to a removal action *the Agency* took against him. The MSPB's authority over Mr. Parkinson's removal stems not from the Whistleblower Protection Act, but from Congress' unambiguous grant of judicial review, including affirmative defenses, over removal actions that the FBI takes against preference-eligible veterans. Mr. Parkinson's affirmative defense of whistleblowing reprisal, as allowed by the Panel Decision, is not based on section 2302(b) or on section 7701(c)(2)(B). In fact, the Panel specifically did not decide that question: "Even assuming without deciding that the reference in §

7701(c)(2)(B) to 'prohibited personnel practice described in section 2302(b)'" necessarily excludes Parkinson's *affirmative defenses*, such a determination does not undermine Parkinson's argument under § 7701(c)(2)(C) that his removal was not in accordance with the whistleblower law directly applicable to FBI personnel, i.e. § 2303." Addendum, at 24.

The Agency argues that allowing Mr. Parkinson to bring an affirmative defense of whistleblowing reprisal would allow a general "catchall" provision (§ 7701c)(2)(C), which provides for an affirmative defense for decisions "not in accordance with the law"), to "swallow" the more specific provision (§ 7701(c)(2)(B), which provides for an affirmative defense based on prohibited personnel practices in section 2302(b)). Resp't Pet for Rehr'g, at 11-12. The Agency's argument would only be viable if sections 2302(b) and 7701(c)(2)(B) applied to FBI employees (the Agency steadfastly maintains that they do not), and if there were no other laws prohibiting retaliation against FBI employees and providing for affirmative defenses. But, there are such a laws: 5 U.S.C. § 2303 prohibits retaliation and 5 U.S.C. § 7701(c)(2)(C) provides for an affirmative defense. As the Panel Decision explained, "If it is true, as the Government argues, that the FBI is incapable of taking a prohibited personnel action under § 2302(b), then § 7701(c)(2)(B) says nothing about affirmative defenses available to FBI

employees, and there can be no conflict between the 'specific' provision of § 7701(c)(2)(B) and the 'general' provision of § 7701(c)(2)(C)." Addendum, at 25.

Similarly, the Agency argues that allowing a whistleblowing reprisal affirmative defense under section 7701 (c)(2)(C) would render "subsection(c)(2)(B) entirely superfluous." Resp't Pet for Rehr'g, at 13. Again, the Agency's argument fails because the Panel Decision has no impact whatsoever on subsection (c)(2)(B) since, in the Agency's view, subsection (c)(2)(B) and section 2302(b) do not apply to the FBI. For example, the Panel Decision has no impact on most non-FBI federal employees, who can indisputably bring whistleblowing reprisal affirmative defenses under subsection (c)(2)(B) or Individual Right of Action claims under 5 U.S.C. § 1221. The Panel Decision allows Mr. Parkinson to assert an affirmative defense of whistleblower retaliation as "not in accordance with the law" under subsection (c)(2)(C) because there is an unambiguous law prohibiting whistleblower retaliation (5 U.S.C. § 2303), and that law applies to FBI employees. Addendum, at 23-24. There is no danger that a non-FBI employee covered by the WPA would use subsection (c)(2)(C) to bring an affirmative defense of whistleblowing reprisal as "not in accordance with the law" using section 2303 instead of the more specific provision in subsection(c)(2)(B), because the two statutes do not overlap: section 2303 applies only to FBI employees, and,

according to the Agency, 2302(b) and, consequently 7701(c)(2)(B), excludes FBI employees.

The Agency also claims that *Chevron v. NRDC*, 467 U.S. 837 (1984), mandates the Panel Decision should have deferred to the Agency's interpretation of section 2303. However, "[o]f course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms." *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 479 (1992) (citations omitted). Congress unambiguously expressed an intent to afford preference-eligible veterans at the FBI full appeal rights before the MSPB in sections 7511, 7513, and 7701.

The Agency argues Congress specifically intended to exclude all whistleblower claims from judicial review on the basis that congressional intent to preclude judicial review can be "gleaned from the statutory scheme as a whole" where "a statute does not include a particular class of employees within its judicial review provisions." Resp't Pet. for Rehr'g, at 13 (citation omitted). However, as the Panel Decision articulated, "[t]his is ***not*** a situation where the statutory scheme evidences a clear Congressional intent to exclude whistleblower ***affirmative defenses*** from judicial review." Addendum, at 27 (emphasis added). Rather than finding availability of judicial review where a statute is silent, the Panel Decision

recognized that the sections 7511, 7513 and 7701 expressly ***included*** preference-eligible veterans at the FBI in the "judicial review provisions."

In addition to the plain language granting them MSPB appeal rights, there is no statutory language that limits affirmative defenses for preference-eligible veteran FBI employees. As the Panel Decision articulated, in excluding most FBI employees from MSPB, there is "nothing in the text or legislative history with respect to §§ 2302, 2303, 7511, 7513, or 7701 [that] suggests that Congress intended to *curtail* rights already extant – such as those available to preference eligible veterans." Addendum, at 29 (emphasis added). Moreover, "Congress maintained this right despite a clear recognition of the security concerns of doing so . . . in contrast to employees of 'some agencies, such as the Central Intelligence Agency . . . [where] even veterans do not have appeal rights.'" Addendum, at 29-30 (citations omitted). The Agency offers no explanation of how the internal whistleblowing procedures available to all FBI employees, including Mr. Parkinson, could undermine an expressly-granted statutory right to judicial review by the MSPB for certain adverse personnel actions taken against preference-eligible veteran FBI employees. Congress intended for FBI agents who qualify as preference-eligible veterans to have full appeal rights before the MSPB, and expressly, unambiguously granted them those rights in sections 7511, 7513 and

7701. And, there is no evidence Congress intended to curtail those already-existing rights in excluding FBI employees from the WPA.

II. The MSPB Can Adequately Protect Private or Sensitive Information

The Agency makes the vague assertion that allowing the MSPB to consider affirmative defenses of whistleblowing reprisal would risk "unintended disclosures of sensitive of classified national security information." Resp't Pet. for Rehr'g, at 10. The Agency's nebulous argument that inclusion of whistleblowing issues in a removal case before the MSPB risks disclosure of sensitive information rings especially hollow in Mr. Parkinson's case given that the OIG Report that led to Mr. Parkinson's removal – surely to be at issue in an MSPB case challenging the removal – itself made a finding that there was no whistleblowing retaliation.

The Agency presents no specifics regarding what possible sensitive or classified information is involved in Mr. Parkinson's, or any other case, or how the MSPB's existing procedures for handling private and classified information are somehow inadequate. *See, e.g.* Judge's Handbook, Merit Systems Protection Board, at 74-77 (2012), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT (discussing sealed cases, including national security and classified information); *Social Security Administration v. Doyle*, 45 M.S.P.R. 258, 261-62 (MSPB disclosure rules are governed by the Freedom of

Information Act 5 U.S.C. §552). Nor does the Agency offer any explanation as to why there is somehow more sensitive information in discovery on a whistleblowing reprisal affirmative defense than on the merits of a removal case. Given that classifying information to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment to a person, organization, or agency" is prohibited by Executive Order, there is no reason a whistleblowing reprisal affirmative defense would risk more classified information than the merits of a removal appeal brought by a preference-eligible veteran at the FBI. Exec. Order No. 13526 § 1.7(a)(1), (a)(2). The Agency may not want the substance of whistleblowers' disclosures evidencing illegality, mismanagement, fraud, waste of funds, abuse of authority, or dangers to health and public safety to be seen outside the Agency, but such a desire cannot contravene clear statutory language allowing preference-eligible veterans full appeal rights before the MSPB. Finally, the only whistleblowing reprisal issues allowable under the Panel Decision are *defenses* to Agency adverse actions, over which the MSPB *already has jurisdiction*. The Panel Decision does not allow MSPB to consider whistleblowing reprisal without the Agency first taking an adverse action against a preference-eligible veteran who has undisputed MSPB appeal rights. If the Agency is concerned about potential disclosure of information in discovery, the Agency can simply refrain from taking

adverse actions against preference-eligible veteran FBI employees whose whistleblowing defenses are too sensitive.

III. The Panel Decision Leaves No Danger for Conflicting Opinions

The Agency argues that a "significant, and perhaps unintended, consequence of the majority's ruling" is that if the Office of Attorney Recruitment and Management (OARM) (which adjudicates FBI whistleblower reprisal claims internally) and the MSPB make opposite findings, "it is unclear which ruling would prevail or have preclusive effect" thereby placing "the FBI in the untenable position of determining whether, and how, to comply with conflicting orders." Reps't Pet. for Rehr'g, at 15. The Agency's argument reflects a misunderstanding of the Panel Decision and of the MSPB's, and this Court's, appellate authority.

It is undisputed that DOJ is subject to MSPB's appellate authority when the FBI takes certain adverse personnel actions against preference-eligible veteran FBI employees. 5 U.S.C. §§ 7513(d), 7511(b)(8) and 7701. Once given jurisdiction over an Agency action, the MSPB "shall order any Federal agency or employee to comply with any order or decision issued by the Board" 5 U.S.C. § 1204(a)(2). The FBI is part of DOJ. DOJ is the parent federal agency, and MSPB can order DOJ to comply with its rulings where MSPB has jurisdiction. The MSPB's rulings are then appealable to this Court. 5 U.S.C. § 7703. The MSPB has undisputed jurisdiction over the removal action, regardless of whether the FBI, OARM, or the Attorney

General herself disagrees with the MSPB's ruling or, ultimately, this Court's ruling. If the MSPB or this Court overturns the removal action, DOJ must comply, regardless of whether an internal process, such as OARM, reached a different conclusion as to the removal.

CONCLUSION

For the reasons set forth above, Petitioner LtCol John C. Parkinson respectfully requests that the Court deny Respondent's Petition for Rehearing *En Banc.*

Respectfully submitted,

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United States Court of Appeals
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CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by WHISTLEBLOWER AND SOURCE PROTECTION PROGRAM (WHISPER), attorneys for Petitioner to print this document. I am an employee of Counsel Press.

On **June 28, 2016** counsel has authorized me to electronically file the foregoing **PETITIONER'S RESPONSE OPPOSING RESPONDENT'S PETITION FOR REHEARING EN BANC** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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Paper copies will also be mailed to the above principal counsel at the time paper copies are sent to the Court.

Also on this date, eighteen paper copies will be filed with the Court via Express Mail.

June 28, 2016 /s/ Robyn Cocho
Counsel Press