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 SUPPLEMENTAL EN BANC BRIEF

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September 26, 2016

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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)

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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	N/A	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.

September 26, 2016
Date

/s/ Kathleen M. McClellan
Signature of counsel

Please Note: All questions must be answered

Kathleen M. McClellan
Printed name of counsel

cc:

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STATEMENT OF RELATED CASES

This case has not previously been before this Court. Counsel is unaware of any appeal in or from the same agency decision that was before this or any other appellate court. Counsel is also unaware of any cases pending in this or any other court that will be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

Pursuant to 5 U.S.C. §§ 7511(b)(8) and 7513(d), the Merit Systems Protection Board ("MSPB") has jurisdiction to review the decision to remove Petitioner John C. Parkinson, a preference-eligible veteran, from the Federal Bureau of Investigation (FBI). This Court has jurisdiction to review the MSPB's final decision pursuant to 5 U.S.C. § 7703. The MSPB decision appealed from is a final decision resolving all issues in the case, dated October 10, 2014. This appeal was timely filed on December 8, 2014.

STATEMENT OF THE ISSUE

Pursuant to this Court's Rehearing Order, the sole issue addressed herein is: Whether a preference eligible employee of the FBI challenging an adverse employment action before the MSPB under 5 U.S.C. § 7513(d) may raise whistleblower reprisal in violation of 5 U.S.C. § 2303 as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). *See* Rehearing Order, *Parkinson v. Dep't of Justice*, No. 2015-3066 (Fed. Cir. Aug. 8, 2016)

FACTUAL BACKGROUND

LtCol John C. 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. Joint Appendix

("JA") 784-785. 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. JA 786. 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. JA 211.

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. *See* JA 236.

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. JA 365-366. Mr. Parkinson complained that the reassignment and downgraded performance evaluation were retaliatory adverse personnel actions. *See* JA 794-96. Pursuant to the FBI's whistleblower regulation, the Department of

Justice Office of Inspector General (OIG) opened a whistleblower retaliation investigation. JA 387, 794-796; *See also* 28 C.F.R. Part 27. The OIG first contacted Mr. Parkinson in January 2009 about his retaliation complaint. JA 794. At the request of OIG investigators, Mr. Parkinson met frequently with the OIG for over a year. JA 794-798.

The OIG's whistleblower retaliation investigation focused on SSA Lucero, ASAC Cox, and Special Agent in Charge (SAC) Drew Parenti. *Id.* While the OIG was interviewing SSA Lucero, ASAC Cox, and SAC Parenti as subjects of the whistleblower retaliation investigation, the three officials falsely accused Mr. Parkinson of misusing $77,000. JA 164-165. Despite the fact that the retaliation investigation was ongoing, the OIG investigators instructed the targets of the retaliation investigation to send their allegations against the complainant (Mr. Parkinson) to the OIG for investigation. JA 165, 724. Based on the (now disproven) allegations from the subjects of its own retaliation investigation, the OIG voluntarily opened a criminal investigation[1] with Mr. Parkinson as the target in August 2009. JA 521. The OIG was not required to open an investigation with Mr. Parkinson as the target, and, in fact, the vast majority of FBI employee misconduct investigations are conducted by the FBI, not the OIG. *See* U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Divisions,

[1] The U.S. attorney declined to pursue a criminal case against Mr. Parkinson. JA 394.

Review of the Federal Bureau of Investigation's Disciplinary System, Rep. No. 1-2009-02, at iii fn. 6, (May 2009), *available at* https://oig.justice.gov/reports/FBI/e0902/final.pdf (Noting that OIG investigated only 6% of FBI employee misconduct allegations, and the FBI investigated 90% of FBI employee misconduct allegations).

The OIG did not tell Mr. Parkinson he was now a target, rather than the complainant. 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, he was a target. JA 797-798. After a witness contacted Mr. Parkinson and told Mr. Parkinson he may actually be the target, Mr. Parkinson confronted the OIG investigators. His un-rebutted hearing testimony described the interaction:

> I went to the OIG office in San Bruno at [the OIG investigator's] invitation with the understanding that I was continuing to provide statements in the Whistleblower Protection Act investigation. I confronted both [the investigator] and his [ASAC] with the question, "Do you have an investigation open on me?"
>
> They both – and we were in their conference room. They shifted in their chairs, looked at each other, looked back at me, and kind of mumbled, "Yes."
>
> And I said, "Is this a criminal investigation?"
>
> And again, "Yes." Very uncomfortable body language.
>
> And I said, "Well, it would have been I think professional of you to notify me of this because I have been speaking to you in a

> specific capacity with the understanding that everything I'm telling you was within my protected disclosures," so.
>
> JA 797-798

When OIG finally told Mr. Parkinson that he was the target of an investigation, OIG compelled Mr. Parkinson to a sworn interview. JA 619-621. However, OIG instructed Mr. Parkinson not to bring up whistleblower retaliation during the interview. JA 624-625, 721-22, 811.

Upon conclusion of the investigation into the allegations that Mr. Parkinson misused $77,000, the OIG concluded that "for the most part [Mr. Parkinson] used these funds appropriately." JA 522. Then, the OIG *sua sponte* raised "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. JA 521. Even though OIG forbade Mr. Parkinson from discussing whistleblower retaliation during the compelled interview, the OIG Report included a finding that there was no whistleblower retaliation when the targets of the retaliation investigation (SSA Lucero, ASAC Cox, and SAC Parenti) made the unsubstantiated allegations against Mr. Parkinson. JA 525-528.

In October 2010, Mr. Parkinson returned to the Marines Corps, where he received positive performance evaluations, was recommended for promotion, and received a Joint Service Achievement Medal and a Joint Service Commendation

Medal. *See* JA 241, 273-292. Meanwhile, the FBI's Office of Professional Responsibility (OPR) used the OIG Report as the basis to dismiss Mr. Parkinson from the FBI.[2] JA 141.

STATEMENT OF THE CASE

In October 2011, based on the OIG Report, the FBI proposed removing Mr. Parkinson from the FBI for four charges of misconduct. JA 141. On April 26, 2012, OPR sustained all of the charges, and terminated Mr. Parkinson for three of four offenses. Mr. Parkinson appealed his removal to the MSPB. *See* 5 U.S.C. §§ 7511(b)(8) and 7513(d) (allowing preference-eligible veterans to appeal certain adverse personnel actions).

At the MSPB, Mr. Parkinson raised affirmative defenses of violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and whistleblower retaliation. The Administrative Judge dismissed the affirmative defenses and restricted discovery in accordance with that ruling. JA 200-202. On the merits, the Administrative Judge dismissed two charges, sustained two charges (Lack of Candor/Lying Under Oath and OPR Matter-Obstruction), and

[2] OPR's Report incorrectly states that the OIG inquiry was predicated on an allegation that Mr. Parkinson "removed furniture from an offsite, in violation of FBI Offense Code 4.5 (Fraud/Theft)," leaving out the primary predicate for the OIG investigation: the completely false accusation that Mr. Parkinson misused $77,000. JA 141; *See* JA 159-163 (OIG Report identifying predicate). The Theft charge was not sustained by the MSPB, and has been abandoned by the FBI. *Parkinson v. Dep't of Justice*, 815 F.3d 757, 762 fn. 2 (Fed. Cir. 2016).

sustained the removal penalty. The full MSPB sustained the Administrative Judge's ruling. *Parkinson v. Dep't of Justice,* No. SF-0752-13-0032-I-2 (M.S.P.B. Oct. 24, 2013). Vice Chairman Wagner dissented as to the affirmative defenses, holding that she would have allowed Mr. Parkinson to assert the USERRA and whistleblower retaliation affirmative defenses. Wagner, Dissenting, *Parkinson v. Dep't of Justice,* No. SF-0752-13-0032-I-2 (M.S.P.B. Oct. 24, 2013).

Before this Court, Mr. Parkinson appealed the sustained charges, removal penalty, and dismissal of his affirmative defenses.[3] On February 29, 2016, this Court reversed-in-part, vacated-in-part, and remanded the case. *Parkinson v. Dep't of Justice,* 815 F.3d 757 (Fed. Cir. 2016). The panel held unanimously (1) that the Lack of Candor/Lying under Oath charge could not be sustained; (2) that the Obstruction – OPR Matter charge was properly sustained; (3) that the MSPB properly dismissed the USERRA affirmative defense; and (4) that, on remand, the maximum remaining penalty for the remaining charge (Obstruction – OPR Matter) was a 30-day suspension. *Id.,* at 757-777. The panel majority also held that the MSPB erred by dismissing Mr. Parkinson's whistleblower retaliation affirmative defense. *Id.,* at 770-774. Judge Taranto dissented as to the whistleblower retaliation

[3] The Justice Department did not appeal the two charges that were not sustained. (Theft and Unprofessional Conduct – On Duty). DOJ Docketing Statement, *Parkinson v. Dep't of Justice,* 2015-3066 (Fed. Cir. Feb. 10, 2015).

ruling, writing that the MSPB properly dismissed the whistleblower retaliation defense. *Id.*, at 777-780.

On June 13, 2016, the Justice Department petitioned for rehearing *en banc* on the grounds that the panel decision erred in holding that Mr. Parkinson could assert a whistleblower retaliation affirmative defense. Petition for Rehearing *En Banc*, 2015-3066, *Parkinson v. Dep't of Justice* (Fed. Cir. Jun. 13, 2016). Mr. Parkinson opposed the petition, arguing that the Panel Decision properly allowed the whistleblower retaliation affirmative defense. Petitioner's Response Opposing Respondent's Petition for Rehearing *En Banc,* 2015-3066 (Fed. Circ. Jun. 28, 2016). On August 8, 2016, this Court granted the petition for rehearing, vacated the panel decision, and reinstated the appeal. Rehearing Order, *Parkinson v. Dep't of Justice*, No. 2015-3066 (Fed. Cir. Aug. 8, 2016); *See also* Errata, *Parkinson v. Dep't of Justice,* No. 2015-3066 (Fed. Cir. Aug. 11, 2016). Supplemental briefing for *en banc* rehearing is limited to the issue of whether a preference eligible employee of the FBI challenging an adverse employment action before the MSPB under 5 U.S.C. § 7513(d) may raise whistleblower reprisal in violation of 5 U.S.C. § 2303 as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). Rehearing Order, *Parkinson v. Dep't of Justice*, No. 2015-3066, at 2 (Fed. Cir. Aug. 8, 2016)

SUMMARY OF ARGUMENT

The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 et seq., provides preference eligible veterans at the FBI with a right to appeal certain adverse actions to the MSPB. 5 U.S.C. §§ 7511(b)(8), 7512, 7513(d). The CSRA specifies that employees can assert affirmative defenses. 5 U.S.C. § 7701(c)(2). Because there is no express or implicit congressional intent to revoke or repeal affirmative defenses for preference eligible veterans at the FBI, this Court should not preclude Mr. Parkinson from raising whistleblower retaliation in violation of 5 U.S.C. § 2303 as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). An affirmative defense is consistent with the statutory scheme governing whistleblower retaliation complaints – both for employees at the FBI and employees at other government agencies – because the scheme is expressly intended to preserve employees' rights to bring adverse action appeals to the MSPB under section 7513. The MSPB is authorized to interpret section 2303 when the MSPB assumes jurisdiction under section 7513. The MSPB and this Court can adequately handle sensitive or classified information associated with appeals brought under section 7513(d), including information pertaining to affirmative defenses. Finally, a separate remedial scheme for FBI employees' whistleblower retaliation complaints does not trump the CSRA's clear grant of appeal rights, including affirmative defenses, to preference eligible veterans.

ARGUMENT

I. The CSRA Unambiguously Allows a Whistleblower Retaliation Affirmative Defense

A. FBI Preference Eligible Veterans Have MSPB Appeal Rights, Including Affirmative Defenses

The plain, unambiguous language of the CSRA provides preference-eligible veterans at the FBI with appeal rights at the MSPB. 5 U.S.C. §7511(b)(8) (preference eligible veterans at the FBI are covered employees); 5 U.S.C. § 7512 (removals are a covered action). When the MSPB assumes jurisdiction over a personnel action, the process is governed by section 7701. *See* 5 U.S.C. 7513(d) ("An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.").

Section 7701 unambiguously provides for affirmative defenses, mandating that the MSPB cannot sustain an agency's decision "if the employee . . . (A) shows harmful error in the application of the agency's procedures in arriving at such a decision; (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or (C) shows that the decision was not in accordance with law." 5 U.S.C. § 7701(c)(2). Section 7701 does not contain a limit on the affirmative defense of "not in accordance with the law." Given that the affirmative defense of showing that an agency decision is "not in accordance with law" is expressly granted by section 7701(c)(2)(C), this Court

should not repeal section 7701(c)(2)(C) for a certain segment of employees without clear congressional intent. *See Rodriguez v. U.S.* 480 U.S. 522, 524 (1987) (repeals by implication are not favored); *United States v. Fausto,* 484 U.S. 439, 452 (1988) (excepted service employees excluded from CSRA only with a clear congressional intent), *superseded by statute,* Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990).

The legislative history of the CSRA indicates Congress clearly intended (1) for preference eligible veterans at the FBI to have appeal rights that other FBI employees do not have; and (2) for preference eligible veterans at the FBI to have appeal rights that veterans working at other national security agencies do not have. FBI employees who are not preference eligible veterans cannot appeal adverse actions to the MSPB. 5 U.S.C. § 7511(b)(8) (excluding non-preference eligible veterans from MSPB's jurisdiction). Congress recognized as much in enacting the CSRA and amendments, and made clear the intent to maintain unique appeal rights for preference eligible veterans at the FBI. H.R. Rep. No. 101-328, as reprinted in 1990 U.S.C.C.A.N. 695, 699 ("The bill limits the procedural protections for employees of . . . the [FBI] solely to preference eligible, ***thereby preserving the status quo.***") (emphasis added). While FBI preference eligible veterans have appeal rights, those rights do not extend to all national security employees. *See* 5 U.S.C. § 7511(b)(7) (excluding all CIA employees, including veterans, from

MSPB jurisdiction). Congress also recognized this distinction in enacting the CSRA. *See* H.R. Rep. No. 101-328, as reprinted in 1990 U.S.C.C.A.N. 695, 697 ("[at] some agencies, such as the [CIA] . . . even veterans do not have appeal rights."). The legislative history does not indicate an intent to revoke or limit any affirmative defenses for FBI preference eligible veterans bringing appeals to the MSPB under section 7513(d). Rather, the legislative history exhibits a clear congressional intent to preserve MSPB appeal rights for FBI preference eligible veterans. This Court should not infer an intent to revoke affirmative defenses when Congress explicitly stated an intent to preserve extant rights for FBI preference eligible veterans. *See, e.g., Rodriguez*, 480 U.S. at 424.

The Justice Department has argued that Congress intended to preclude an affirmative defense of whistleblower retaliation because Congress excluded FBI employees from the Whistleblower Protection Act (WPA), specifically 5 U.S.C. § 2302. Petition for Rehearing *En Banc*, *Parkinson v. Dep't of Justice*, 2015-3066, at 8 (Fed. Cir. Jun. 13, 2016); *See also* 5 U.S.C. 2302(a)(2)(C)(ii) (excluding FBI employees from section 2302). This argument is unpersuasive because the exclusion of FBI employees from the WPA cannot undermine the express grant of MSPB appeal rights to preference eligible veterans at the FBI. The Justice Department's argument also contradicts the MSPB's longstanding interpretation of appeal rights as inclusive of affirmative defenses, including whistleblower

retaliation. *See, e.g.*, *Butler v. U.S. Postal Service,* 10 M.S.P.R. 45, 48 (1982) (holding that all federal employees who have appeal rights have the same rights); *Mack v. U.S. Postal Service,* 48 M.S.P.R. 617, 621 (1991) (holding that Postal Services employees can raise a whistleblower retaliation affirmative defense even though they are excluded from the WPA); Wagner, Dissenting, *Van Lancker v. DOJ* 119 M.S.P.R. 514, 520-525 (2013) ("[M]uch like FBI employees, Postal Service employees are provided a separate administrative procedure, set forth in regulations, from which they may received protection from making whistleblower protected disclosures."). Moreover, the Justice Department's argument based on the FBI's exclusion from WPA is only relevant to whether Mr. Parkinson could assert an affirmative defense under section 7701 (c)(2)(B), which provides for an affirmative defense for actions "based on any prohibited personnel practice described in section 2302(b)."[4] The exclusion of FBI employees from the WPA has no bearing on the affirmative defenses of harmful error under section 7701(c)(2)(A) or of "not in accordance with the law" under 7701(c)(2)(C).

The implementing regulation for section 2303, 5 C.F.R. Part 27, lays out an administrative process for FBI whistleblowers, which applies to Mr. Parkinson.

[4] Mr. Parkinson does not concede that he is precluded from bringing an affirmative defense under section 7701(c)(2)(B), but, in accordance with this Court's Rehearing Order, does not address the question of whether he can assert a defense under 7701(c)(2)(B) in supplemental briefing. Rehearing Order, *Parkinson v. Dep't of Justice,* No. 2015-3066, at 2 (Fed. Cir. Aug. 8, 2016).

However, this is not a situation where Congress created a separate remedial scheme aimed at limiting what Mr. Parkinson could raise at the MSPB in an appeal under section 7513. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (specific statutory provisions govern the general). Sections 1214, 1221 and 2302 provide a system for some federal employees (but not FBI employees) to bring whistleblower retaliation appeals to the Office of Special Counsel (OSC) and MSPB. Section 2303 and 28 C.F.R. Part 27 provide a separate system for FBI employees to adjudicate whistleblower retaliation complaints. Regardless of whether an appeal includes a whistleblower retaliation claim or defense, sections 7511, 7513, and 7701 provide MSPB appeal rights for some employees (including preference eligible veterans at the FBI) for certain adverse personnel actions, and section 7701(c)(2) unambiguously includes affirmative defenses. Moreover, as described *infra*, the statutory scheme is consistent with allowing a whistleblower retaliation affirmative defense based on section 2303.

It is a longstanding principle that the MSPB regularly interprets laws, regulations and Collective Bargain Agreements relevant to its jurisdiction. *Adakai, et. al. v. Dep't of Interior*, 20 M.S.P.R. 196, 202 (1984) (MSPB has authority to review "relevant provisions of law, regulations or negotiation procedure as circumstances warrant."); *See also Cornelius v. Nutt*, 472 US 648 (1985) (MSPB interprets Collective Bargaining Agreements). There is no provision in section

2303, nor any other statute, that bars MSPB from interpreting the statute where MSPB assumes jurisdiction under section 7513. Nowhere in the statutory scheme or legislative history is a preference eligible veteran at the FBI precluded from asserting an affirmative defense of "not in accordance with the law," based on section 2303 or any other law the agency may violate in taking a personnel action.

B. A Whistleblower Retaliation Affirmative Defense is Consistent with the Whistleblower Protection Act and Section 2303

When read together, the WPA and 5 U.S.C. § 2303 favor allowing Mr. Parkinson to assert an affirmative defense of whistleblower retaliation before the MSPB. The WPA prohibits retaliation against most federal employees. 5 U.S.C. § 2302. 5 U.S.C. § 1221(a) allows covered federal employees who are subjected to whistleblower retaliation to seek corrective action before the MSPB in an Individual Right of Action (IRA). 5 U.S.C. § 1213(a)(3) requires employees to first bring whistleblower retaliation complaints to the OSC before bringing an IRA case before the MSPB.

Sections 1221 and 1214 specifically delineate that nothing in the statute is intended to interfere with MSPB's jurisdiction over adverse actions in section 7513. 5 U.S.C. § 1221(b) provides:

> This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee,

> or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

Similarly, 5 U.S.C. § 1214(a)(1)(D)(3) provides:

> Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board . . .

Therefore, an employee covered by section 2302 who is subjected to an adverse action covered by section 7513 can bring a whistleblower affirmative defense before the MSPB without first going through the OSC. *See* 5 C.F.R. § 1209.2. For example, an employee who is terminated can appeal the removal action to the MSPB and is not required to take a claim that the removal was whistleblower retaliation through the OSC process first – the claim is treated as an affirmative defense under section 7701(c). An appeal under section 7513 effectively allows an employee to bypass the OSC in raising a whistleblower claim before the MSPB.

Many national security employees, including FBI employees, are excluded from bringing an IRA to the MSPB. 5 U.S.C. 2302(a)(2)(C)(ii). With respect to the FBI, however, whistleblower retaliation is prohibited by 5 U.S.C. § 2303. Section 2303 instructs the Justice Department to implement regulations to enforce the section, and instructs the President to provide for enforcement of the section. 5

U.S.C. § 2303(b) and (c); *See also* 5 C.F.R. Part 27 (FBI whistleblower regulation).

When section 2303 is read in conjunction with sections 1214, 1221, and 2302, the statutory scheme supports allowing a whistleblower retaliation affirmative defense for preference eligible veterans at the FBI, who have undisputed appeal rights to the MSPB. Section 2303(c) incorporates sections 1221 and 1214: "The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221." To prohibit affirmative defenses afforded by section 7701 is not consistent with 1214 and 1221. The Justice Department has argued that section 2303 gives the President exclusive authority over all FBI whistleblower claims, when in fact the President's authority is limited by statute to enforcement ***consistent with sections 1221 and 1214.*** No enforcement of section 2303 can be consistent with sections 1221 and 1214 while curtailing rights afforded under sections 7513 and 7701, because both section 1221 and section 1214 specify that they are not to be construed to limit direct MSPB appeal rights. 5 U.S.C. §§ 1214(a)(1)(D)(3) and 1221(b).

Just as an employee covered by WPA and bringing an MSPB appeal under section 7513 is not required to first bring the whistleblower retaliation portion of her case through OSC, Mr. Parkinson can appeal his termination directly to the MSPB and bring up whatever affirmative defenses are authorized by section 7701

(c)(2). The statutory scheme requiring that section 2303 be consistent with 1221 and 1214 and the express requirement that 1221 and 1214 ***not*** be construed to limit direct MSPB appeal rights allows Mr. Parkinson to assert an affirmative defense of "not in accordance with the law" based on section 2303.

C. Section 7701(c)(2)(C) provides a separate affirmative defense from 7701(c)(2)(A) and 7701(c)(2)(B)

5 U.S.C. section 7701(c)(2)(C) prohibits the MSPB from upholding actions if an employee "shows that the decision was not in accordance with law." Whistleblower retaliation at the FBI is clearly not in accordance with the law. 5 U.S.C. § 2303. Section 7701(c)(2)(C) does not specify which law, but this Court has made clear it provides an affirmative defense separate from harmful error as provided by section 7701(c)(2)(A). *Handy v. U.S. Postal Service*, 754 F.2d 335, 337 (Fed. Cir. 1985). In order to prove "not in accordance with law," this Court has recognized that an employee need not also prove a separate affirmative defense. *McCollum v. NCUA*, 417 F.3d 1332, 1339 (Fed. Cir. 2005). As applicable here, if Mr. Parkinson shows the agency's removal decision was not in accordance with the law, it is not required that he prove affirmative defenses under 7701(c)(2)(A) and 7701(c)(2)(B). The panel decision assumed without deciding that Section 7701(c)(2)(B) did not apply to Mr. Parkinson. *Parkinson,* 815 F.3d, at 771. In that case, then, if Mr. Parkinson is disqualified from asserting a defense under 7701(c)(2)(B) (which Mr. Parkinson does not concede), there is no preclusion in

sections 7701 or any other statute form Mr. Parkinson asserting other separate affirmative defenses under sections 7701(c)(2)(A) and 7701(c)(2)(C).

II. The MSPB and This Court Can Adequately Protect Private or Sensitive Information

The Justice Department has made the vague assertion that allowing the MSPB to consider an affirmative defense of whistleblower retaliation would risk "unintended disclosures of sensitive or classified national security information." Petition for Rehearing *En Banc*, 2015-3066, at 10, *Parkinson v. Dep't of Justice* (Fed. Cir. Jun. 13, 2016). This is inaccurate. The MSPB regularly handles sensitive information, and has existing procedures for handling private and classified information. *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). MSPB's discovery procedures also allow for protective orders. *See* 5 C.F.R. § 1201.147. Moreover, for decades, the courts have regularly and successfully handled Equal Employment Opportunity cases brought by FBI employees, with no disclosure of sensitive or classified information. *See, e.g., Perez v. FBI*, 707 F. Supp. 891, 897 (W.D. Tex. 1988) ("The Court exercised

control over the discovery process attempting to balance the Plaintiff's class-member's need for access to proof in support of their claims against the significant needs of the FBI and Justice Department for confidentiality and the protection of its methods, sources, and mission.").

The argument that an inclusion of whistleblowing issues in a removal case before the MSPB risks disclosure of sensitive or classified 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 whistleblower retaliation. JA 525-528. In Mr. Parkinson's case, the FBI based an appealable personnel action on an OIG Report that made findings on whistleblower retaliation, with no mention of "risk of unintended disclosure of sensitive or classified national security information." But, now that it is the employee (rather than the FBI) who seeks to raise whistleblower retaliation, a generalized risk of "unintended disclosure of sensitive of classified national security information" has materialized.

Regardless of whether Mr. Parkinson asserts a whistleblower retaliation affirmative defense, he is entitled to discovery in an MSPB appeal challenging the removal. *See* 5 C.F.R. § 1201.72. 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 whistleblower retaliation affirmative defense would risk disclosure of any more sensitive or classified information than the merits of a removal appeal brought by a preference-eligible veteran at the FBI. *See* Exec. Order No. 13526 § 1.7(a)(1), (a)(2). The FBI 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 FBI, but such a desire cannot contravene clear statutory language allowing preference-eligible veterans full appeal rights before the MSPB.

Allowing an affirmative defense of whistleblowing retaliation is not equivalent to allowing an independent cause of action. An FBI preference eligible veteran can only bring up whistleblower retaliation at the MSPB if he or she is subjected to an adverse action over which the MSPB already has undisputed jurisdiction under section 7513. In other words, MSPB's jurisdiction in Mr. Parkinson's case is entirely dependent upon the FBI first taking an adverse action, and with full knowledge of the potential appeals that could result from that adverse action.

III. The FBI Whistleblower Regulation Cannot Trump the CSRA

Congress intended for some FBI employees (preference eligible veterans) to bring employment cases outside the FBI to the MSPB and this Court. 5 U.S.C. § 7511(b)(8); 5 U.S.C. § 7513(d). 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 Justice Department has argued that the existence of a whistleblower retaliation investigation process under the FBI's whistleblower regulation (28 C.F.R. Part 27) has supremacy over an affirmative defense expressly authorized by section 7701. *See* Petition for Rehearing *En Banc*, 2015-3066, at 8-10, *Parkinson v. Dep't of Justice* (Fed. Cir. Jun. 13, 2016). Should the Court accept the Justice Department's argument, the result would be an inefficient and inherently unjust system wherein preference eligible veterans' rights are prejudiced as they are forced to challenge adverse personnel actions partly at MSPB and partly at the Justice Department's Office of Attorney Recruitment and Management (OARM) (which adjudicates FBI whistleblower retaliation claims internally). For example, in Mr. Parkinson's case, Mr. Parkinson would be required to parse out the whistleblower retaliation in his removal case, and start (again) the process of making a retaliation complaint under 5 C.F.R. 27.3 that the removal was whistleblower retaliation. Mr. Parkinson would be forced to simultaneously litigate the same removal issue before the MSPB and OARM, with MSPB unable to consider a critical aspect of the case despite having jurisdiction to review the removal action. Such a result materially interferes with Mr. Parkinson's appeal rights under 7513(d). It is particularly unjust in Mr. Parkinson's case because it is

Mr. Parkinson's reporting whistleblower retaliation under the FBI's whistleblower regulation (for the downgraded performance appraisal and involuntary transfer) that directly led to the OIG investigation targeting him and the removal action at issue. *See* JA 794-798. Also, requiring preference eligible veterans to simultaneously litigate removal at the MSPB and a claim that the removal was whistleblower retaliation at OARM will almost certainly require years of additional costly litigation at OARM. *See* U.S. Government Accountability Office, Report to the Chairman, Committee on the Judiciary, U.S. Senate, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints, No. GAO-15-112 (January 2015), *available at* http://www.gao.gov/assets/670/668055.pdf. ("DOJ took from 2 to 10.6 years to resolve the 4 complaints we reviewed that DOJ adjudicated, and DOJ did not provide complainants with estimates of when to expect DOJ decisions throughout the complaint process.").

The Justice Department has argued that if OARM and 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." *See* Petition for Rehearing *En Banc*, 2015-3066, at 15, *Parkinson v. Dep't of Justice* (Fed. Cir. Jun. 13, 2016). The Justice Department's argument reflects a misunderstanding of the CSRA's grant of

appellate authority to the MSPB and this Court. The FBI is part of the Justice Department. The Justice Department is the parent federal agency, and MSPB can order the Justice Department 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 reached a different conclusion as to the removal. For example, the FBI provides an internal disciplinary appeals process for FBI employees (both preference eligible veterans and non-veterans),[5] but the FBI must comply with an MSPB order for appeals brought under section 7513(d), even if the MSPB's decision conflicts with the findings of FBI's internal process. In affording FBI preference-eligible veterans MSPB appeal rights, Congress clearly intended for their cases to be handled outside of the Justice Department, regardless of whatever internal processes the FBI puts in place.

Precluding an affirmative defense of whistleblower retaliation in an MSPB action properly brought under section 7513(d) and requiring preference eligible

[5] *See* U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Divisions, Review of the Federal Bureau of Investigation's Disciplinary System, Rep. No. 1-2009-02, (May 2009), *available at* https://oig.justice.gov/reports/FBI/e0902/final.pdf.

veterans to take whistleblower retaliation affirmative defenses through OARM would create a perverse dual system wherein the Justice Department is serving as the defendant in an MSPB challenge to an FBI personnel action and the adjudicator in a simultaneous OARM challenge that the exact same FBI personnel action constituted whistleblower retaliation. An inefficient, unjust dual system cannot comport with Congress' intent to give preference eligible veterans at the FBI MSPB appeal rights under 7513(d).

CONCLUSION

For the reasons set forth above, Petitioner LtCol John C. Parkinson respectfully requests that this Court affirm the panel decision and allow the affirmative defense of whistleblower retaliation.

Respectfully submitted,

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United States Court of Appeals
for the Federal Circuit
Parkinson v DOJ, 2015-3066

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 **September 26, 2016** counsel has authorized me to electronically file the foregoing **PETITIONER'S SUPPLEMENTAL EN BANC BRIEF** 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 on this date.

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

September 26, 2016 /s/ Robyn Cocho
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