**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 REPLY TO RESPONDENT DEPARTMENT OF JUSTICE'S SUPPLEMENTAL EN BANC BRIEF

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November 10, 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)

Kathleen M. McClellan

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 |
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| | | |
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| | | |

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.

November 10, 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 THE CASE

Pursuant to the Court's Rehearing Order, Petitioner LtCol John C. Parkinson respectfully submits this reply to the Justice Department's Supplemental *En Banc* Brief. Rehearing Order, *Parkinson v. Dep't of Justice,* No. 2015-3066 (Fed. Cir. Aug. 8, 2016); *Supplemental En Banc* Brief of Respondent Dep't of Justice, *Parkinson v. Dep't of Justice,* No. 2015-3066 (Fed. Cir. Oct. 26, 2016) [Hereinafter DOJ *En Banc* Brief].

## SUMMARY OF ARGUMENT

The Justice Department's argument is based on the flawed theory that Congress established a separate and exclusive remedial scheme for all FBI whistleblower issues. *See* DOJ *En Banc* Brief, at 10-11. Congress did not establish a separate and exclusive remedial scheme for all FBI employees. As a preference eligible veteran, Mr. Parkinson has the right to appeal the FBI's removal action to the MSPB, and this right includes asserting affirmative defenses under 5 U.S.C. § 7701(c). Despite the fact that many FBI employees cannot appeal adverse actions, Congress made an exception for preference eligible veterans, and nowhere did Congress indicate an intent to preclude an affirmative defense of whistleblower retaliation.

The Justice Department twists the legislative history of the Civil Service Reform Act (CSRA), 5 U.S.C. § 1101, et seq, to imply an exception to the adverse

action appeal rights for FBI preference eligible veterans despite the fact that the legislative history cited by the Justice Department pertains to a provision Congress has since repealed. Finally, the Justice Department argues that it should be afforded deference in interpreting a statute that the Justice Department is not tasked with administering and that was specifically intended to provide outside review of adverse personnel actions taken against FBI preference eligible veterans.

## ARGUMENT

### I. There is No Separate Remedial Scheme for FBI Preference Eligible Veterans that Precludes a Whistleblower Retaliation Affirmative Defense.

The Justice Department grounds its entire argument in the erroneous presumption that Congress provided "a specific and exclusive venue for all FBI whistleblower matters." DOJ *En Banc* Brief, at 13. The Justice Department argues that the CSRA, WPA and Section 2303 create a "comprehensive and separate system" that precludes an affirmative defense of whistleblower retaliation, even though the MSPB has jurisdiction over the removal action. DOJ *En Banc* Brief, at 11. It is a wrong presumption that there is some "exclusive" statutory scheme for "all FBI whistleblower matters." Nowhere in the CSRA, WPA, or Section 2303 does Congress mandate that Section 2303 is the "exclusive venue for all FBI whistleblower matters." Such an interpretation is conjured only in the Justice Department's briefing, not in the CSRA, WPA, or Section 2303.

To the contrary, the statutes expressly grant MSPB appeal rights to FBI preference eligible veterans where other FBI employees do not have appeal rights. With respect to MSPB's jurisdiction over personnel actions at the FBI, the statutes (1) exclude all FBI employees from bringing Individual Right of Action whistleblower retaliation appeals before the MSPB, 5 U.S.C. §§ 1221(a), 2302(a)(2)(C)(ii); (2) exclude most FBI employees from bringing adverse action appeals before the MSPB, 5 U.S.C. § 7511(b)(8); and (3) allow preference-eligible veterans at the FBI to bring adverse action appeals before the MSPB under Section 7701, a section that specifically provides for affirmative defenses. 5 U.S.C. §§ 7511(b)(8), 7701(c)(2). Nowhere do the statutes limit affirmative defenses, exclude FBI preference eligible veterans from affirmative defenses, or state that an affirmative defense of whistleblower retaliation can only be brought internally at the Justice Department.

The Justice Department argues that "a negative inference should be drawn from Congress' decision to list prohibited personnel practices as defined by section 2302(b), but not section 2303(a)." DOJ *En Banc* Brief, at 18. The Justice Department asks this Court to adopt a "negative inference" from 7701(c)(2)(B) in order to repeal affirmative defenses in another provision, 7701(c)(2)(C), and to have the repeal apply for just one group of federal employees who can bring adverse action appeals: preference eligible veterans at the FBI. *See, Id.* To read an

exemption into a statute where there is none contradicts longstanding principles of statutory construction. *See, e.g., Rodriguez v. U.S.* 480 U.S. 522, 524 (1987) (repeals by implication are not favored).

There is no statute or legislative history indicating that in providing for an affirmative defense in section 7701(c)(2)(B), Congress left out Section 2303 in order to prevent FBI preference eligible veterans from bringing an affirmative defense under section 7701(c)(2)(B) or 7701(c)(2)(C). In fact, as 7701(C)(2)(C) makes clear, Congress' intent was to prevent **any** personnel action that an employee demonstrates was "not in accordance with the law." This Court should not impede adverse action appeal rights granted to FBI preference eligible veterans without an express congressional intent. *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 Services Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990).

## II. The Justice Department's Argument is Based on an Incorrect Interpretation of Legislative History

Having no support for precluding Mr. Parkinson's whistleblower retaliation affirmative defense in the statutes' plain language, the Justice Department conflates and misinterprets the legislative history of the CSRA and WPA, using

pre-WPA legislative history give the impression that the WPA somehow excludes affirmative defenses for FBI preference eligible veterans.

The Justice Department argues that preference eligible veterans at the FBI should be precluded from asserting whistleblower retaliation affirmative defenses because in crafting the CSRA and WPA, "Congress was concerned about protecting the FBI from MSPB and court interference in whistleblower matters." DOJ *En Banc* Resp, at 15. As evidence, the Justice Department points to floor statements and the Conference Committee's Joint Explanatory Statement from 1978 when Congress enacted the CSRA. *Id.,* at 15-16. Section 2303(c), the Justice Department argues, was intended to keep whistleblower allegations entirely within the Justice Department in a manner consistent with the CSRA's whistleblower protections. However, in 1978, whistleblower claims were handled differently than they are today. In 1978, whistleblower cases were governed by 5 U.S.C. § 1206, which required that ***all*** whistleblower cases be brought by the Office of Special Counsel (OSC). *See* Pub. L. No. 95-454 (Oct. 13, 1978) § 1206. During floor statements in 1978, members of Congress were not – and could not have been – concerned about individual FBI employees bringing whistleblower cases to the MSPB because, in 1978 under section 1206, no Federal employees could bring Individual Right of Action cases to the MSPB – only OSC could bring whistleblower complaints to the MSPB. *See, Id.*

Congress repealed section 1206 when it enacted the WPA in 1989, a law which expanded whistleblowers' ability to bring claims to MSPB. Pub. L. No. 101-12. The purpose of the WPA was "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." Pub. L. No. 101-12, § 2(b). As relevant here, the WPA replaced section 1206 with sections 1214 and 1221, which allow most federal employees to bring Individual Right of Action whistleblower cases to the MSPB after exhausting their rights at OSC. Pub. L. No. 101-12, § 3(a)(8). Congress also amended Section 2303 to conform with sections 1214 and 1221. Pub. L. No. 101-12, § 9(a)(1). Prior to the WPA, the President was tasked with enforcing Section 2303 in a manner consistent with section 1206. After the WPA, and currently, the President is required to enforce section 2303 in a manner consistent with the expanded whistleblower rights in sections 1214 and 1221.

The legislative history from 1978 referred to the limited whistleblower rights in section 1206 and should not be read to narrow MSPB review in a future law (the WPA), which Congress enacted specifically to expand MSPB review of whistleblower cases. Such a reading would contradict sections 1214 and 1221, which both explicitly state that the statutes should not be interpreted to limit direct MSPB appeal rights under Section 7513. *See* 5 U.S.C. §§ 1214(a)(1)(D)(3); 5 U.S.C. 1221(b); *See also* Petitioner's Supplemental *En Banc* Brief, *Parkinson v.*

*Dep't of Justice, No.* 2015-3066, at 15-18 (Fed. Cir. Sept. 26, 2016) [Hereinafter Pet. *En Banc* Brief]; *En Banc* Brief of *Amici Curiae* National Whistleblower Center, et. al., *Parkinson v. Dep't of Justice,* No. 2015-3066, at 10-11 (Fed. Cir. Oct. 3, 2016).

Contrary to indicating an intent to limit affirmative defenses for preference eligible veterans at the FBI, the CSRA's legislative history indicates a clear congressional intent to preserve full MSPB appeal rights for FBI preference eligible veterans – an intent consistent throughout out all iterations of the CSRA. *See* H.R. Rep. No. 101-328, as reprinted in 1990 U.S.C.C.A. N. 695, 699. Congress' intent to preserve preference eligible veterans' appeal rights is consistent with longstanding principle that federal statutes conveying employment rights to veterans are to be interpreted to the benefit of veterans. *See* Brief of *Amici Curiae* the Reserve Officers Association of America, et. al., *Parkinson v. Dep't of Justice,* 2015-3066 at 8-13 (Fed. Cir. Oct. 3, 2016).

The Justice Department also uses the legislative history behind section 1206 to argue that FBI cases may involve "'sensitive information' not amendable to adjudication by outside entities." DOJ *En Banc* Brief, at 16. In addition to pertaining to the now-repealed section 1206, this legislative history is also inapplicable in Mr. Parkinson's case because, as the Justice Department noted, "in his case, no disclosure of sensitive or classified information to the board would

have been required." *See* DOJ *En Banc* Brief, at 16. Moreover, Congress took into account these security concerns when considering whether to allow preference eligible veterans at the FBI to bring adverse action appeals to an outside entity (MSPB) and decided, repeatedly, to preserve MSPB appeal rights for preference eligible veterans. *See* Pet. *En Banc* Brief, at 11-12.

## III. Whether Preference Eligible Veterans at the FBI Can Raise Whistleblower Retaliation as an Affirmative Defense is a Legal Question This Court Should Review *De Novo*

Citing *Chevron v. Natural Resources Defense Counsel,* 467 U.S. 837, 842-43 (1984), the Justice Department argues that this Court should "defer to the authoritative interpretations of [sections 2303 and 7701(c)] by the agencies charged with administering them." DOJ *En Banc* Brief, at 29-30. The Justice Department's argument fails on multiple levels.

First, the *Chevron* principle that Courts should follow agencies' interpretations of statutes only applies where the intent of Congress is unclear. *Chevron,* 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In this case, Congress has expressed a clear intent. Congress unambiguously granted preference eligible veterans at the FBI MSPB appeal rights under section 7701, and expressed an intent to preserve those appeal rights. *See* H.R. Rep. No. 101-328, as reprinted in

1990 U.S.C.C.A. N. 695, 699. Congress then indicated that 5 U.S.C. §§ 1214 and 1221 were *not* to be interpreted such that direct MSPB appeal rights are limited, and mandated that the President enforce 5 U.S.C. § 2303 in a manner consistent with sections 1214 and 1221. *See,* 5 U.S.C. §§ 1214(a)(1)(D)(3), 1221(b) and 2303(c).

Second, under *Chevron,* Courts only defer to agencies' interpretations when the interpretations are consistent with statutory language, and where Congress left a gap for the agency to fill. *Chevron,* 467 U.S. at 843-44. ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Congress did task the Justice Department with implementing 5 U.S.C. § 2303, but limited the President's enforcement to "a manner consistent with" sections 1214 and 1221. U.S.C. § 2303(b)-(c). As Mr. Parkinson has explained, no agency interpretation of section 2303 that directly limits appeal rights can be consistent with sections 1214 and 1221. Pet. *En Banc* Brief, at 15-18.

However, Congress did not task the Justice Department with administering 5 U.S.C. § 7701. With respect to the adverse actions taken against preference eligible veterans at the FBI, Congress expressly placed review and adjudication of those

actions with MSPB, not the Justice Department. 5 U.S.C. § 7511(b)(8). While the Justice Department does have authority to issue regulations under section 2303(b), the agency has no authority – and is owed no deference – with respect to the MSPB appeal rights of FBI preference eligible veterans under section 7701, which includes affirmative defenses. *Chevron* does not provide a back door way for the Justice Department to receive deference from courts for statutory interpretation for statutes which the agency has no authority to administer. *Chevron,* 467 U.S. at 844 ("[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme ***it is entrusted to administer***." (emphasis added)).

Finally, the Justice Department misstates the standard of review and argues that this Court should defer to the MSPB's interpretation of sections 7701 and 2303.[1] DOJ *En Banc* Brief, at 29. The interpretation of a statute – such as whether a preference eligible veteran at the FBI can assert a whistleblower retaliation affirmative defense under section 7701(c)(2)(C) – is a legal question that this Court reviews *de novo. Weatherby v. Dep't of Interior,* 466 F.3d 1379, 1383 (Fed. Cir.

[1] The Justice Department also misstates Mr. Parkinson's argument regarding MSPB's interpretation of of laws, regulations and Collective Bargaining Agreements. *See* DOJ *En Banc* Brief, at 30. Mr. Parkinson's argument is that the MSPB is not barred from interpreting 5 U.S.C. § 2303 because the MSPB regularly evaluates laws, regulations, and Collective Bargaining Agreements that fall within its jurisdiction in adverse action appeals. *See* Pet. *En Banc* Brief, at 14-15 (citations omitted).

2006). The Justice Department cites *Cornelius v. Nutt*, 472 U.S. 638, 657-59 (1985) to support the argument that this Court should afford deference to the MSPB's interpretation of the statute under *Chevron.* DOJ *En Banc* Brief, at 30. However, *Cornelius* involved affording deference to an MSPB definition of "harmful error" put forth in regulations promulgated by the MSPB that were expressly authorized by 5 U.S.C. § 7701(i), not a statutory interpretation by the MSPB, which is a question for this Court to review *de novo. See Cornelius,* 472 U.S. at 657-58.

## IV. The Justice Department Seeks an Inefficient and Prejudicial System

The Justice Department is advocating for an unjust dual system that would prejudice preference eligible veterans at the FBI. *See* Pet. *En Banc* Brief, at 22-25. The Justice Department has offered no solution to the myriad unnecessary complications of splitting an affirmative defense of whistleblower retaliation from the underlying removal action over which the MSPB has undisputed jurisdiction.

The Justice Department points to *Garcia v. Dep't of Homeland Security,* 437 F.3d 1322, 1327 (Fed. Cir. 2006) (*en banc*) and *Meeker v. Merit Systems Prot. Bd.* 319 F.3d 1368, 1374 (Fed. Cir. 2003) to support its argument that the "scope" of the MSPB's jurisdiction should be limited to preclude Mr. Parkinson's affirmative defense of whistleblower retaliation. *See* DOJ *En Banc* Brief, at 24. However,

*Garcia* and *Meeker* were cases that involved a jurisdictional question, not a question of what defenses an employee can raise in an adverse action appeal where the MSPB already has jurisdiction. *Garcia,* 437 F.3d. at 1324 (discussing when the MSPB has jurisdiction over constructive adverse action cases); *Meeker,* 319 F.3d. at 1374 (MSPB can consider if agency actions violated section 7701(c)(2)(C) only when MSPB has underlying jurisdiction over the removal action). *Meeker* offers clarity on the difference between an employee needing to establish the MSPB's jurisdiction versus an employee asserting an affirmative defense when the MSPB already has jurisdiction: "5 U.S.C. § 7701(c)(2)(C), gives the Board authority to consider whether any agency decision is not in accordance with law, but only with respect to agency decisions that are within the Board's jurisdiction." *Meeker,* 319 F.3d, at 1374. This is the precise scenario in Mr. Parkinson's appeal: he seeks to raise an affirmative defense under 7701(c)(2)(C) in an adverse action appeal where the MSPB already has undisputed jurisdiction over the FBI's removal action. Once the MSPB has jurisdiction, adjudication of the appeal is governed by section 7701, which includes affirmative defenses. 5 U.S.C. § 7701(c).

## 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.

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November 10, 2016 /s/ Robyn Cocho
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