

NO. 20-1834

BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEBRA TAO,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR REVIEW OF A DECISION OF THE
MERIT SYSTEMS PROTECTION BOARD IN NO. SF-1221-19-0147-W-1

Respectfully submitted,

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DATE: October 29, 2020

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for the respondent Merit Systems Protection Board states that he is unaware of any other appeals stemming from this action that were previously before this Court or any other appellate court under the same or similar title. Counsel is also unaware of any case pending before this or any other court that will directly affect or be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

NO. 20-1834

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEBRA TAO,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

PETITION FOR REVIEW OF A DECISION OF THE
MERIT SYSTEMS PROTECTION BOARD IN NO. SF-121-19-0147-W-1

STATEMENT OF THE ISSUES

Whether the Court should vacate the decision of the Merit Systems Protection Board dismissing the petitioner's whistleblower individual right of action appeal because the administrative judge erred in failing to address the petitioner's claims that the Department of Veterans Affairs retaliated against her based on her nonfrivolous allegations of protected activities under 5 U.S.C. § 2302(b)(9), and should remand for adjudication of these claims.

Whether the Court should also remand for reconsideration of the petitioner's retaliation claim based on her nonfrivolous protected disclosure under 5 U.S.C. 2302(b)(8) questioning the legality of her supervisor's temporary detail to his position.

STATEMENT OF THE CASE

I. Nature of the Case

The petitioner, Debra Tao, seeks review of a final decision of the Merit Systems Protection Board (“MSPB” or “Board”) dismissing her individual right of appeal (“IRA”) under 5 U.S.C. § 1221 for lack of jurisdiction. The initial decision of the administrative judge (“AJ”) became the final decision of the MSPB when neither party filed an administrative petition for review. Tao v. Dep’t of Veterans Affairs, MSPB Docket No. SF-1221-19-0147-W-1 (issued on February 11, 2020, and final on March 17, 2020). Appx0001-0016.

II. Statement of Facts and Disposition Below

The petitioner was employed as a GS-660-13 Pharmacist with a 30-year career at the Department of Veterans Affairs (“agency” or “DVA”) Greater Los Angeles Healthcare System (VAGLAHS) Pharmacy Service at the time the events underlying this case began. Appx0001, Appx0231. Dr. Tao was then a Pharmacy Program Manager at the Los Angeles Ambulatory Care Center (LAACC). Appx0231. On March 8, 2017, Dr. Yusuf Dawoodbhai, who was formerly employed by the DVA in Portland, Oregon, was detailed to the VAGLAHS to be an Acting Chief of Pharmacy to whom the petitioner would report. Appx0231. The petitioner and other employees

believed that Dawoodbhai was brought in “to clean house” following a 2016 Inspector General investigation. Appx0269.

According to the petitioner, during the months of April and May 2017, she provided witness statements in coworker Elizabeth Luevano’s equal employment opportunity (EEO) case, which apparently named Dawoodbhai as a Responsible Management Official. Appx0214, Appx0190.

Thereafter, a series of interactions began between the petitioner and Dawoodbhai concerning her performance. At two meetings between them in May 2017, Dawoodbhai criticized what he viewed as serious performance deficiencies on the petitioner’s part. The petitioner stated that he yelled and pointed his finger at her and spoke to her in a manner she viewed as threatening, amounting to abuse of authority and creating a hostile work environment. Appx0214, Appx0223-0229. On June 5, 2017, Dawoodbhai issued the petitioner a proposed 3-day suspension for failure to follow supervisory instructions. Appx0071. The proposed suspension indicated the petitioner’s written reply should be submitted through Dawoodbhai to the VAGLAHS Chief of Staff, Scotte Hartronft. Appx0072.

On June 20, 2017, the petitioner reported Dawoodbhai’s conduct as an abuse of authority to Hartronft and to Human Resources managerial employees. Appx0214. On June 26, 2017, she followed with a letter to the

office of Senator Dianne Feinstein of California, reporting her alleged harassment by Dawoodbhai, Hartronft and Associate Chief of Pharmacy Irene Marshall, and alleging that Dahwoodbhai had been improperly detailed from a GS-13 position to a GS-15 position with no GS-14 experience. Appx0212, Appx0231-0234.

On June 26, 2017, Tao met with Hartronft to provide her oral reply to the 3-day suspension proposed on June 5. Appx0232. On July 10, Hartronft issued a decision sustaining the 3-day suspension, directing that it be served from July 17 to July 19, 2017. Appx0238, Appx0070.

On July 13, 2017, the petitioner sent disclosures of abuse of authority affecting other employees as well as herself to an agency investigatory component, the Office of Accountability and Whistleblower Protection (OAWP). Appx0213, Appx0215. The disclosures also notified OAWP that the petitioner had contacted Senator Feinstein's office on June 26, 2017, and that she had been told that VAGLAHS had provided a "generic response" when Senator Feinstein's office inquired about Dawoodbhai's alleged abusive behavior. Appx0238.

On July 24, 2017, the petitioner received notice that, effective immediately, she was detailed to a Staff Pharmacist position in the DVA's West Los Angeles Outpatient Pharmacy, pending a fact-finding

investigation concerning her performance and conduct issues. Appx0322. The detail letter stated that her grade and base pay would not change. Appx0322. A subsequent letter issued on August 15, 2017, stated that her title and series on detail would also not change. Appx0323. On August 15, 2017, the petitioner filed an unfair labor practice claim with the Federal Labor Relations Authority (FLRA), in which she challenged the agency's amendment of her detail letter to provide that she remained a management employee despite her temporary staff pharmacist placement and that she therefore was not eligible for union representation. Appx0213.

On November 13, 2017, Tao filed a request with the Disclosure Unit of the Office of Special Counsel (OSC) for an investigation of Dawoodbhai and Irene Marshall, alleging abuse of authority and violations of law, rule and regulation, and questioning the propriety of Dawoodbhai's detail. Appx0219, Appx0244, Appx0270. On January 6, 2018, the petitioner provided a witness affidavit to support a state court action filed by Elizabeth Luevano, who was seeking a restraining order against Dawoodbhai based on her sexual harassment claim against him. Appx0215. On February 5, 2018, the petitioner also provided a witness affidavit for a former Chief of Pharmacy, Jeffrey Sayers, for the hearing in his MSPB appeal of his removal. Appx0215, Appx0219.

On February 16, 2018, the Chief of Staff, Scotte Hartronft, issued the petitioner a proposal to remove her under the authority of 38 U.S.C. § 714.¹ Appx0215. The proposal cited four specifications, including alleged shortfalls in maintaining the Los Angeles Ambulatory Care Center pharmacy and alleged failure to submit required paperwork to the Drug Enforcement Administration. Appx0325-0326.

On February 20, 2018, the petitioner filed a Form 11 prohibited personnel practice complaint with OSC, in which the above alleged protected disclosures and protected activities were presented. Appx0178, Appx0207-Appx0219. The retaliatory personnel actions initially alleged by the petitioner were the three-day suspension proposed June 5 and imposed July 17, 2017, her detail to a staff pharmacist position in another DVA pharmacy on July 24, 2017, and the proposed removal. Appx0270.

On July 24, 2018, OSC sent a letter notifying petitioner that it had made a preliminary determination to close her case. Appx0270. The letter summarized the facts set forth above. Appx0269-0270. It then stated that OSC considered her claims under 5 U.S.C. §§ 2302(b)(8), (b)(9) and (b)(12). Appx0270-0271. However, OSC's analysis of the case is largely

¹ The proposed removal was to be held in abeyance until the petitioner's OSC and OAWP claims were resolved, as directed by OAWP. Appx0378, Appx0410.

blacked out in the exhibit she provided MSPB. Appx0271-0272. The letter notified the petitioner that she was entitled to respond, Appx0273, and her counsel filed a response on behalf of the petitioner on August 6, 2018. Appx0274-275. Among other objections, petitioner's letter stated OSC had not addressed the agency's failure to give her a performance rating for 2017, which she alleged was another retaliatory action. Appx0274.

On October 11, 2018, OSC responded in a letter that is again partially blacked out in MSPB's copy, but noted that petitioner had received a fully successful rating in all critical elements for 2017, although other issues with respect to the rating (blacked out) had been raised. Appx0318-0319. A second OSC letter issued on October 11, 2018, informed the petitioner of her right to seek corrective action through an IRA appeal to the MSPB. Appx0320-0321.

The petitioner filed her IRA appeal with the MSPB on December 17, 2018. Appx0020. The AJ issued detailed orders informing the petitioner of the extent of the Board's jurisdiction and requiring the petitioner to more fully explain her claims. Appx0002. He found that the petitioner responded by asserting that she made a variety of "protected disclosures," Appx0002, citing her lengthy Response to Order on Jurisdiction and Proof Requirements. The AJ identified seven "disclosures:" 1) her email on June

20, 2017, to Chief of Staff Hartronft and Human Resources alleging that Dawoodbhai abused his authority by yelling and pointing his finger at her while threatening discipline; 2) her letter of June 26, 2017, to a U.S. Senator complaining that Dawoodbhai, Hartronft and Marshall acted improperly toward her, and improperly detailed Dawoodbhai without competition and detailed his wife to an HR position, creating an improper alliance; 3) informing OAWP on July 13, 2017, that Dawoodbhai and Hartronft were improperly disciplining employees who had not previously been so treated; 4) disclosing to the FLRA an unfair labor practice by amending her detail letter to deny her union assistance; 5) informing the OSC Disclosure Unit that Dawoodbhai was improperly disciplining employees; 6) testifying in support of Luevano's discrimination claim in a local court; and 7) disclosing to an MSPB AJ improper discipline of employees when she testified in support of a coworker's MSPB removal appeal. Appx0002-0003, Appx0006.

The AJ then set out a thorough discussion of the case law pertaining to claims of retaliation for protected disclosures under 5 U.S.C. § 2302(b)(8). Appx0003-0005. The AJ found that the sixth disclosure was excluded because it involved EEO-related matters which are covered by sections 2302(b)(1) and (b)(9) and are excluded from coverage under section

2302(b)(8). Appx0006. He found that the petitioner's objections to Dahwoodbhai's manner and to disciplinary actions taken against herself or others in the first, third and seventh disclosures were insufficient to nonfrivolously allege a violation of law, rule or regulation. Appx0006. He found that her objections to the agency's decision to detail Dawoodbhai and his wife, to its determination that a detailee remains in her permanent position with respect to union status, and to other disciplinary actions under the second, fourth and fifth disclosures, also failed to nonfrivolously allege facts supporting a reasonable belief they evidenced a violation of a law, rule or regulation. Appx0006-0007. He also found that none of these disclosures were sufficient to constitute a disclosure of gross mismanagement, a gross waste of funds, or a substantial and specific danger to public health and safety for purposes of section 2302(b)(8). Appx0007-0008. Concluding that the petitioner had not made a nonfrivolous allegation that she had made a protected disclosure, the AJ determined that the petitioner failed to establish the Board's jurisdiction and therefore dismissed her appeal. Appx0008-0009.

The petitioner's appeal to this Court followed.

SUMMARY OF ARGUMENT

The petitioner filed an IRA appeal under 5 U.S.C. §1221 challenging adverse personnel actions by the agency that she alleged were prohibited personnel practices because they were taken or proposed in retaliation for her disclosures and activities protected under 5 U.S.C. §§ 2302(b)(8) and (b)(9)(B) and (C). Ultimately, the AJ found that none of the petitioner's alleged "disclosures" were sufficient to meet the jurisdictional requirement of section 2302(b)(8) (a nonfrivolous allegation of any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to health or safety), and he dismissed her appeal.

The AJ erred in his decision by using the standard applicable to a protected disclosure claim under section 2302(b)(8) to evaluate protected activity claims under section 2302(b)(9)(A)(i), (B), (C) or (D). The Board's case law is clear that the section 2302(b)(8) requirement does not apply in evaluating section 2302(b)(9) protected activities. The petitioner has nonfrivolously alleged that she engaged in protected activities under 2302(b)(9)(B) – testifying and assisting other employees in exercising their appeal rights – and under 2302(b)(9)(C) – disclosing information to the OSC Disclosure Unit. Accordingly, the case should be remanded for the AJ to

further adjudicate these protected activity claims, including, as well, a related claim based on providing information to an agency investigating component to which section 2302(b)(9)(A)(i) may apply. It would also be appropriate to remand for further consideration the petitioner's nonfrivolous protected disclosure under section 2302(b)(8) alleging the violation of agency rules by her supervisor's detail to a position for which he was not qualified.

ARGUMENT

I. Standard of Review.

The Court's review of decisions of the Board is defined and limited by statute. The Court must affirm the Board's decision unless the decision is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); Barrett v. Soc. Sec. Admin., 309 F.3d 781, 785 (Fed. Cir. 2002). The Board's determination that it lacked jurisdiction is a question of law that the Court reviews de novo. Forest v. Merit Sys. Prot. Bd., 47 F.3d 409, 410 (Fed. Cir. 1995). As demonstrated below, the MSPB AJ abused his discretion by failing in his decision to address the

petitioner's protected activity claims under 5 U.S.C. §§ 2302(b)(9)(A)(i), (B), and (C).

II. The MSPB AJ Erred in His Jurisdictional Determinations by Applying to the Petitioner's Protected Activity Claims Under 5 U.S.C. § 2302(b)(9) the Requirements for Protected Disclosure Claims Under 5 U.S.C. § 2302(b)(8).

The Board's jurisdiction over IRA whistleblower appeals is set out in 5 U.S.C. § 1221(a). The statute provides that, subject to the exhaustion of OSC remedies, "an employee, former employee or applicant for employment may, with respect to any personnel action taken or proposed to be taken, against any employee, former employee or applicant for employment, with respect to any prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C) or (D), seek corrective action from the Merit Systems Protection Board." See also 5 U.S.C. § 1214(a)(3) ("An employee, former employee, or applicant for employment may seek corrective action from the Board if such employee, former employee, or applicant for employment seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)") The statute authorizes the MSPB to hear appeals from individuals who are challenging covered personnel actions that are

alleged to be based on retaliation for engaging in the different conduct that each of these provisions specifically protects.

The use of disjunctive language in section 1221 makes it clear that sections 2302(b)(8) and 2302(b)(9) are separate prohibited personnel practices and that a covered individual may seek corrective action under either or both. In Spruill v. Merit Sys. Prot. Bd., 978 F.2d 679, 690 (Fed. Cir. 1992), the Court described the difference between the two sections as prohibitions of reprisal based on disclosure of specified kinds of information (2302(b)(8)) and reprisal based on exercising a right to complain (2302(b)(9)). The Board's jurisdiction under section 2302(b)(8) depends in part on whether an appellant has made a nonfrivolous allegation of a protected disclosure of specific forms of governmental wrongdoing. The focus of section 2302(b)(9) is the protection of appellants for engaging in certain activities without such a requirement with respect to the content of the disclosures involved. See Salerno v. Dep't of the Interior, 123 M.S.P.R. 230, 237 (2016), citing Special Counsel v. Hathaway, 49 M.S.P.R. 595, 610 (1985) (finding that section 2302(b)(9)(C) covers employee disclosures that do not meet the precise terms of the actions described in 2302(b)(8), recons. denied, 52 M.S.P.R. 3745, and aff'd, 981 F.2d 1237 (Fed. Cir. 1992)). In each case,

a different analysis is required to make a determination of whether an agency has taken a retaliatory personnel action against an individual on a basis that is prohibited by the provision in question.

Here, the petitioner has alleged both making protected disclosures and engaging in protected activities. Of the seven “disclosures” addressed by the AJ, at least three and likely four are on their face protected activities. Additionally, the AJ did not list or mention another protected activity in his list of seven “disclosures.”

The petitioner filed disclosures with OSC’s Disclosure Unit, which is explicitly protected under section 2302(b)(9)(C) (“cooperating with or disclosing information to the Inspector General . . . of an agency or the Special Counsel in accordance with applicable provisions of law”). See Corthell v. Dep’t of Homeland Sec., 123 M.S.P.R. 417, 422-23 (2016) (section 2302(b)(9)(C) protects disclosures to an agency Inspector General, including perceived disclosures). In other instances, the petitioner provided an affidavit supporting coworker Luevano’s sex discrimination suit in a local court for a restraining order against Dawoodbhai and provided her written testimony supporting a former Chief of Pharmacy’s MSPB appeal from his removal. These activities are protected under section 2302(b)(9)(B), which applies to “testifying

or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii).” See Carney v. Dep’t of Vet. Aff., 121 M.S.P.R. 446, 450 (2014) (section 2302(b)(9)(B) protects lawfully assisting an individual exercising an appeal right). Similarly, although the AJ did not reference it in his initial decision, the petitioner’s prohibited personnel practice complaint to OSC alleged that during the months of April and May 2017, she provided witness statements for Luevano’s EEO case naming Dawoodbhai as a Responsible Management Official. Appx0214. This appears to be the only protected activity the petitioner engaged in prior to Dawoodbhai’s June 5, 2017 proposal to suspend her, and it is cited in the petitioner’s Response to Order on Jurisdiction and Proof Requirements as one of the reasons Dawoodbhai had animus to take action against the petitioner. Appx0196. The AJ erred in failing to consider it.

Finally, the petitioner provided information to the agency’s OAWP investigatory unit. This activity is likely covered under section 2302(b)(9)(A), which protects “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.”² Whether this

² The Office of Special Counsel Reauthorization Act, Pub. L. 115-91, section 1097, signed into law December 12, 2017, amended section

protected activity is appealable to MSPB hinges on whether the protected activity is “with regard to remedying a violation of” section 2302(b)(8).

The AJ analyzed all of these activities, along with the other disclosures, applying the jurisdictional standard for protected disclosure claims under section 2302(b)(8) stated in Yunus v. Dep’t of Vet. Affairs, 242 F.3d 1367, 1371 (Fed. Cir. 2001). The AJ determined in each case that the disclosures made did not allege evidence supporting a reasonable belief that a violation of law, rule, or regulation, an abuse of authority, gross mismanagement, gross waste of funds, or a substantial and specific threat to public health and safety had occurred. Yet the AJ never conducted any analysis under section 2302(b)(9), despite petitioner’s counsel explicitly having raised the issue.³ Respondent

2302(b)(9)(C) to include cooperating with or disclosing information to “any . . . component responsible for internal investigation or review,” as opposed to its prior applicability to the agency’s Inspector General alone. Section 1097(c)(1)(A). However, because the above-mentioned activities took place prior to this amendment, this conduct should be considered under section 2302(b)(9)(A) instead.

³ “[T]he appellant has engaged in protected activity under both 5 U.S.C. § 2302(b)(8) and (9). . . . [T]he Board gained jurisdiction over certain (b)(9) claims following the Whistleblower Protection Enhancement Act of 2012.” Appx631.

concedes that the petitioner nonfrivolously alleged that all of these claims, except the OAWP complaint, were protected activities, and requests that they be remanded for the AJ to consider whether they were contributing factors to any of the personnel actions against the petitioner.

In assessing whether the petitioner's OAWP complaint falls under section 2302(b)(9)(A)(i)—and therefore within the IRA jurisdiction of MSPB—or (ii), the AJ would have been required to examine whether the disclosure was “with regard to remedying a violation of” section 2302(b)(8). The OAWP complaint states that the petitioner had contacted a number of offices regarding Dawoodbai's alleged abuses, including Senator Feinstein's office, following which the petitioner was facing a suspension and the prospect that Dawoodbai is “acquiring additional evidence to use for future issuance of termination.” Appx0238. These facts require analysis to determine whether this meets the required threshold for being “with regard to remedying a violation of” the (b)(8) whistleblower protection provisions. Respondent requests that this claim be remanded for the AJ to conduct this jurisdictional analysis.

III. The MSPB AJ Erred in His Jurisdictional Determinations by Failing to Consider The Petitioner's Disclosures Regarding the Impropriety of Detailing Dawoodbhai to a Position for Which He Was Not Eligible.

The petitioner alleged in her June 26, 2017 letter to Senator Feinstein that Dawoodbhai lacked the requisite experience for a GS-15 position. App0233. She also represented to OSC that her November 13, 2017 disclosure to OSC's Disclosure Unit challenged his detail from a GS-13 to a GS-15 position. Appx0219. Her Response to the Order on Jurisdiction and Proof Requirements reiterated these disclosures and noted: "Appellant held a reasonable belief that Dr. Dawoodbhai's detail to the Acting Chief of Pharmacy position was inconsistent with law, rule, or regulation. Her belief is validated by the deposition testimony of Dr. Dawoodbhai, who acknowledged that he could not be boarded at the required GS-15 level." Appx0191; Appx0342. The petitioner also explained that Dawoodbhai "needed to accrue experience as a GS-14 level [sic] before he could take another position as a Chief or Acting Chief of Pharmacy at a VA healthcare system with the highest complexity rating, such as VAGLAHCS." Appx0194. The agency did not remedy this violation until November 2017. Appx0352.

Addressing these claims in his initial decision, the AJ did not recognize the alleged potential violation of law and erroneously

concluded that the petitioner simply disagreed with the agency's decision to detail Dawoodbhai. Appx0006. Accordingly, he found the petitioner did not make a nonfrivolous allegation, and did not analyze whether the disclosure was a contributing factor in any of the agency's adverse personnel actions. Appx0008. However, it is clear from the discussion above that the petitioner made a nonfrivolous protected disclosure that the agency's action in detailing Dawoodbhai to a position that he was unqualified for was a violation of applicable agency regulations. Therefore, this claim should be remanded for the AJ to complete the jurisdictional analysis – specifically, to determine whether the petitioner nonfrivolously alleged that this disclosure was a contributing factor to any of the personnel actions against her.

In light of the foregoing considerations, the respondent requests that the Court vacate the MSPB's decision and remand this case to the AJ for further adjudication. See SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (granting an agency's request for remand based on a belief its decision is incorrect is appropriate to conserve judicial resources or to provide the Court possibly useful agency views). The petitioner has made nonfrivolous allegations that she has engaged in activities that are protected under section 2302(b)(9).

She has alleged instances of testifying to assist individuals in their exercise of their appeal rights in EEO proceedings, a state court action, and an MSPB appeal, activities protected under section 2302(b)(9)(B), and she has alleged that she disclosed information to the OSC's Disclosure Unit, an activity that is protected under section 2302(b)(9)(C). The petitioner has also made a nonfrivolous allegation that she disclosed that her supervisor was detailed to his position in violation of applicable regulations, a disclosure protected under section 2302(b)(8). Her disclosure to OAWP may be a protected activity under section 2302(b)(9)(A)(i) if its purpose was to remedy a violation of section 2302(b)(8). The AJ failed to address the petitioner's protected activity claims and did not adequately address the above protected disclosure claim. Thus, the respondent requests that the Court vacate the MSPB's decision and remand the case to the AJ to address the other elements of her protected activity claims, and for further consideration of her protected disclosure claim of a violation of law, rule or regulation, with directions to complete all further appropriate adjudication of her appeal.

CONCLUSION

For the reasons set forth above, the Court should vacate the MSPB's decision and remand the case to the AJ for further adjudication.

Respectfully submitted,

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DATE: October 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the BRIEF AND ADDENDUM FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD was made upon the following individuals by electronic case filing (ECF):

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the text of the electronic version of the foregoing brief is identical to the paper copies, has been scanned by Symantec Endpoint Version 12.1 and found to be virus-free, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 4088 words as determined by the word counting feature of Microsoft Word 2010, and therefore complies with Rule 32(a)(7)(B).

/s/ Calvin M. Morrow
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