Case No. 23-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent

On petition for review from the Merit Systems Protection Board
in AT-1221-09-0543-B-2

CORRECTED REPLY BRIEF OF PETITIONER

Thad M. Guyer
T.M. Guyer and Ayers & Friends, PC
116 Mistletoe Street
Medford, OR 97501

Counsel for Petitioner

Case No. 23-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON
v.
DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF INTEREST

Counsel for Petitioner certifies the following:

1. The full names of the parties I represent are Kim Anne Farrington
2. The name of the real party in interest is the same.
3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party I represent are: N/A
4. The names of all law firms and the partners or associates that appeared before the MSPB for the party I represent are (A) The Government Accountability Project, Inc. and T.M. Guyer and Ayers & Friends, PC, Thad M. Guyer, Esq., Stephani L. Ayers, Esq. and Thomas M. Devine, Esq.; and (B) those law firms and lawyers have or are expected to enter appearances herein.
5. To the best of counsel's knowledge, there are no cases pending in this or any other court or agency that will directly affect or be affected by this Court's decision in this matter.
6. The information required by FRAP 26.1(b) and (c) is: N/A

Date: February 12, 2024 Respectfully submitted,

/s/ Thad M. Guyer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Regulations:

Statutes:

Cases:

STATEMENT OF RELATED CASES

There is no other appeal in or from the same civil action or proceeding in the originating tribunal that was previously before this or any other appellate court.

I. JURISDICTIONAL STATEMENT

The parties agree that this Court has jurisdiction under 5 U.S.C. § 7703(a)(1) which provides: "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." The initial decision ("ID", Appx17) in this case was entered on June 1, 2016, and the final reviewable MSPB order was entered on March 15, 2023. (Appx 1). There is no dispute that the Petitioner timely filed her petition review on Monday, May 15, 2023, within the 60 days allowed by statute, the 60th day having been a Sunday.

II. STATEMENT OF ISSUES PRESENTED IN REPLY

(1) Does the content of Board's final order entered after reopening the case pursuant to 5 CFR §1201.117 demonstrate a waiver of any arguments or grounds for review by Petitioner?

(2) May this Court disregard the Board's final decision and holding under 5 USC § 2302(f)(2) by assuming that section is not a jurisdictional predicate and proceed to Respondent's waiver argument regarding the alleged protected nature

and objectively reasonable belief of Petitioner's disclosures under 5 USC § 2302(b)(8)?

(3) On remand of the Board's 5 USC § 2302(f)(2) holding, may the Board revisit the Petitioner's alleged protected nature and objectively reasonable belief of her disclosures under 5 USC § 2302(b)(8)?

(4) Are the protections of 5 U.S.C. § 2302(f)(2) retroactive in application to Ms. Farrington's appeal which was pending at the time of that section's enactment?

III. STATEMENT OF THE CASE ON REPLY

The Board's March 15, 2023, final order denied the petition for review, but modified the initial decision to find that 5 U.S.C. § 2302(f)(2) applies to this matter because the appellant's disclosures were made in the normal course of her duties through normal channels. From pages 4 to 23 in her "Appellant's Brief in Support of Petition for Review" [Appx 141 to 160], Petitioner discussed at length all of her protected disclosures, the specific evidence pertaining to them, how they were made and to whom, and why they were protected under the WPEA. She then expressly incorporated that extensive argument into a separate section on page 25 labelled "C. Appellant Clearly Engaged in Protected Disclosures" [Appx 162]. That section argued:

> The ID findings that Appellant failed to prove that she made any protected whistleblower disclosures are clearly erroneous. Such a finding is one of mixed law and fact. *The above excerpted facts* plainly show that Appellant was a highly trained professional, and that her

> concerns over AirTran violations of regulations and putting passenger safety at risk *were objectively reasonable*.

(Emphasis added).

The Board asserted no "waiver" or default in preservation of arguments. It had no criticism of this manner of making and incorporating Petitioner's argument in her Petition for Review, and Brief in Support of Petition for Review. The Board made clear that it had examined all of the files, documents and record submitted with the petition:

> ¶1 *** On petition for review, the appellant makes the following arguments: (1) the statute at 5 U.S.C. § 2302(f)(2) does not apply to her because her disclosures were not made in the normal course of her duties; [and] (2) she proved that her disclosures were a contributing factor in the agency's decision to take various personnel actions against her [.] *** Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; [and/or] the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case ***[.] (5 C.F.R. § 1201.115).
>
> ¶2 After fully considering *the filings in this appeal*, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. We MODIFY the initial decision to find that 5 U.S.C. § *2302(f)(2) applies to this matter because the appellant's disclosures were made in the normal course of her duties*. We VACATE the administrative judge's findings regarding laches and the agency's burden to prove by clear and convincing evidence that it would have taken the actions absent the appellant's whistleblowing disclosures. Except as expressly modified herein, we AFFIRM the initial decision.

(Appx 1-2, emphasis added). The Board's decision under 5 U.S.C. § 2302(f)(2) while not "precedential" nonetheless is intended to influence the development of law by the corp of administrative judges: "Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions." (Appx1 at n. 1).

IV. SUMMARY OF THE REPLY ARGUMENT

The Respondent's waiver argument is without merit. The Board issued a Final Order under 5 C.F.R. § 1201.117 supplanting the initial decision, not a denial of a Petition for Review under 5 C.F.R. § 1201.115. The Board's broad authority upon reopening is not constrained by alleged preservation failures. The Board stated no criticism of the Petitioner for how she structured and incorporated by reference arguments in her Petition for Review and Brief in Support of Petition for Review. The Board stated that it had reviewed the files and record. The Board exercised its broad discretion to reopen and issue a new Final Order centered on the 5 U.S.C. § 2302(f)(2) issue. The Board can revisit other issues like protected disclosures under 5 U.S.C. § 2302(b)(8) on any remand. The Federal Circuit reviews the 5 C.F.R. § 1201.117 Final Order, not the initial administrative judge decision. The Final Order embodies the Board's resolution of the important 5 U.S.C. § 2302(f)(2) issue and development of case law for administrative

judges. The Board has reserved unto itself wide discretion regarding what issues to review and to what extent without any "waiver" effect under 5 C.F.R. § 1201.115. The Board knows how to invoke that regulation to preclude or limit review. It did not do so here. Congress intended for the Board itself to steer its review docket like the appellate courts. Respecting that role regarding when the Board decides to reopen a case is pivotal to the Board-Court review scheme.

The Board in this case correctly held that the protections of 5 U.S.C. § 2302(f)(2) apply retroactively to Ms. Farrington's appeal.

ARGUMENT

V. RESPONDENT'S WAIVER ARGUMENT IS WITHOUT MERIT

A. <u>This Court is not Reviewing a 5 C.F.R. § 1201.115 Final Decision:</u>

Under 5 C.F.R. § 1201.115 "Criteria for granting petition or cross petition for review", the Board has reserved to itself exceedingly broad discretion in what to review, to what extent, and has no waiver of review authority based on the contents of the petition for review itself as distinguished from the entire file contents before it, any or all of which it can consider without regard to the administrative judge's scope of treatment of issues. Under 5 C.F.R. § 1201.115, the "Board normally will consider only issues raised in a timely filed petition", but it "may grant a petition or cross petition for review" for reasons that "include, but are not limited to, a showing that (a) [t]he initial decision contains erroneous findings of material fact." (Emphasis added). In its discretion, when deciding whether to

grant or deny a petition for review of an administrative judge's decision, the Board may invoke 5 C.F.R. § 1201.115(a)(2), which provides that a "petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error". In that event, the Board knows how to simply affirm the initial decision and/or enter an order disqualifying a petition on that ground as a "waiver" or failure to "exhaust" or failure to "preserve" arguments or issues.

B. <u>This Court is Reviewing a 5 C.F.R. § 1201.117 Final Decision:</u>

In exceptional cases such as Ms. Farrington's, 5 C.F.R. § 1201.115 need not be the end of the review process, for the Board may elect to exercise its *sua sponte* power under 5 C.F.R. § 1201.117 and completely supplant the initial decision with its own *de novo*. And in that process of "reopening" the case under 5 C.F.R. § 1201.117, the Board can invoke waiver on any issue not sufficiently preserved or developed in the record, or take that issue up and enter a disposition on it, or decide a more important or superseding issue, as it did in Ms. Farrington's case: Whether her alleged protected disclosures were jurisdictionally before the Board based on whether she was merely doing her job such that there were no protected disclosures at all needing further review. Should this Court agree with the Board on its 5 U.S.C. § 2302(f)(2) disposition, the case may be at an end. But should this

Court disagree or modify the review standards, then the Board on remand may return to the issue of protected activity under 5 U.S.C. § 2302(b)(8). As explained in *Connolly v. U.S. Dept. of Justice*, 766 F.2d 507 (Fed. Cir. 1985), citing *Maddox v. Merit Systems Protection Board,* 759 F.2d 9 (Fed.Cir.1985): The 5 C.F.R. § 1201.115 "regulation simply spells out two circumstances under which review may be granted. But, the board's authority to review is plenary as to those actions made appealable to it by law. The presiding official's initial decision is a part of the record the board may review, but it may make its own record." *See also, Booker v. Merit Sys. Prot. Bd*., 982 F.2d 517, 518 (Fed. Cir. 1992) (The Board "need not determine if these complaints were protected disclosures under section 2302(b)(8)" if it lacks subject matter jurisdiction to consider them"); *Ramos v. Dep't of Army*, 956 F.2d 1173 (Fed. Cir. 1992) ("Although the Board held that Ramos had not submitted written evidence or argument to show he had met one or more of the criteria of the relevant regulations pertaining to reopening the AJ's decision, *** and therefore denied Ramos' request, it reopened the case on its own initiative under 5 CFR 1201.117"); and *Schaffer v. Merit Sys. Protection Bd*., 751 F.2d 1250, 1254 (Fed.Cir.1985) (under 5 C.F.R. § 1201.117, "the full Board has 'broad discretion' in deciding which initial decisions to review *sua sponte*" in contrast with 5 C.F.R. S 1201.115, "a regulation setting forth the bases for granting a petition for review of an initial decision".)

As set forth below, this Court is not called upon to short-circuit the Board's review processes and affirm on "other grounds" such as the waiver argument asserted by Respondent. The Court is called upon to review the Board's 5 U.S.C. § 2302(f)(2) disposition of the case. Federal employees retain the unilateral ability to petition for the Board's review of an administrative judge's initial decision, 5 U.S.C. § 7701(e)(1)(A); 5 C.F.R. § 1201.114(c), and so need not rely on the Board's discretion to obtain review. Upon review, the Board may "reverse, modify, or vacate" the administrative judge's decision. 5 C.F.R. § 1201.117. Moreover, "the board is free to substitute its judgment for that of one of its presiding officials." *Connolly v. U.S. Dep't of Just*., 766 F.2d 507, 512 (Fed. Cir. 1985). The "statutes and related regulations show that the Board maintains significant review authority over administrative judges' decisions", *McIntosh v. Dep't of Def*., 53 F.4th 630, 640 (Fed. Cir. 2022). See also, *Azarkhish v. Office of Personnel Management*, 915 F.2d 675 (Fed. Cir. 1990) ("Congress explicitly granted the full Board authority to reopen any initial decision upon its own motion. 5 U.S.C. § 7701(e)(1)(B) (1988). That authority was implemented in 5 C.F.R. § 1201.117").

C. <u>This Court Should Review the Matter that is the Primary Subject of the Board's Final Decision:</u>

As stated in the excerpt from *Olson v. Dep't of Agriculture*, No. CH 3443 00 0857 I 1, 2002 WL 1289867 (M.S.P.B. June 3, 2002):

> The Board may, on its own motion, reopen and reconsider its final decision, as long as proper notice is given and the right is exercised within a reasonable period of time. *Woodall v. Federal Energy Regulatory Commission*, 28 M.S.P.R. 192, 194 (1985). Determining whether to reopen and reconsider a final decision involves *balancing the desirability of finality and the public interest in reaching what ultimately appears to be the right result*; reopening and reconsideration may be appropriate where there is *** a conflict between the holding of the decision and a controlling precedent or statute, either because of an oversight or *a change in the controlling law between the date of the original decision and the reopening request.*

(Emphasis added). The MSPB's *sua sponte* authority has no time limit for reopening the record or reviewing a judge's decision. See, 5 U.S.C. § 7701(e)(1)(B) and 5 C.F.R. § 1201.118. After a reversal or remand from this Court, the Board can return to any aspect or issue of its 2023 final decision, including a more thorough review of the protected status of Farrington's alleged protected activities.

When the MSPB reopens and issues a new final decision under 5 C.F.R. § 1201.117, it displaces the initial AJ decision and establishes the binding judgment that is ripe for Federal Circuit review. The scope of the Federal Circuit's jurisdiction is focused on the 5 C.F.R. § 1201.117 reopened decision as the operative final agency action. The Federal Circuit's jurisdiction is to review only the final MSPB decision. The initial AJ determination ceases to be the operative ruling once the MSPB reopens and acts under 5 C.F.R. § 1201.117. As noted in *Olivares v. Merit Systems Protection Board*, 17 F.3d 386, 387 (Fed. Cir. 1994), when no petition for review is filed and the MSPB has not exercised its *sua sponte*

power to reopen the case, then the AJ's initial decision reflects the final agency position for Federal Circuit review. Once the 5 C.F.R. §1201.117 reopening has occurred, the resulting MSPB decision constitutes the binding final decision that is subject to Federal Circuit review.

That is where we are at in this case; there is no meritorious "waiver" issue in view of the statutory and regulatory scheme. The reopened decision under 5 C.F.R. §1201.117 becomes the binding final decision in Ms. Farrington's case that is subject to Federal Circuit review. This Court should defer to the MSPB's judgment regarding which issues to review and to what extent they will be discussed in its final decisions. The MSPB's discretion in choosing matters for review is akin to its interpretative authority, grounded in its expertise and role in administering federal personnel law. The MSPB serves as a filter, reviewing administrative decisions and ensuring only cases with substantial implications or legal questions reach the Federal Circuit. Fundamental to the relationship between the Board and this Court is respect for the MSPB's discretion in developing and clarifying the law by *sua sponte* reopening of denied petitions. The primary focus is on the issues the Board addressed and resolved with its *sua sponte* final order. Waiver is not one of them. 5 C.F.R. § 1201.117 allows the MSPB to do more than simply adjudicate narrow legal points, but instead provides the Board with a proper channel to set policy for administrative judges. Congress clearly intended for the Board itself to shape and

steer its own docket of review petitions. The Supreme Court and Federal Circuits exercise broad discretion over their respective dockets to achieve coherent development of the law. The MSPB review scheme mirrors this selective model, underscoring Congress's intent for the Board to primarily steer its own review choices.

D. Non-Precedential Decision Have Major Effect in the MSPB Operation:

5 C.F.R. §1201.117 distinguishes between precedential and nonprecedential orders. A nonprecedential Order, while not binding, may still be referenced for understanding the Board's reasoning in specific appeals. This distinction underscores the MSPB's role in developing federal employment law and ensuring consistent application across cases. It is why the Board reopened Farrington's case, reflecting the importance of its holding despite not being deemed precedential. The Federal Circuit's jurisdiction to review MSPB decisions is predicated on the examination of "final orders or decisions" of the MSPB. Given that a decision reopened under 5 CFR§ 1201.117 is the last action taken by the MSPB on an appeal, it constitutes the final decision of the Board on that matter. Therefore, it is this decision that falls within the purview of the Federal Circuit's review authority, rather than the initial decision or any interim denial of a petition for review under 5 CFR §1201.115.

VI. THE WPEA PROVISIONS AT ISSUE ARE RETROACTIVE TO PENDING CASES LIKE FARRINGTON'S

Respondent's retroactivity argument is without merit, and retroactivity is now clearly established in MSPB jurisprudence. This Court should decline to consider the issue of retroactivity in this appeal without providing for additional briefing and invitation of amicus briefs by the many employees, unions, organizations, and agencies having an interest in 5 U.S.C. § 2302(f)(2).

The Board correctly explained in this case that prior to the WPEA's enactment, disclosures made in the normal course of an employee's duties were not protected. *Salazar v. Department of Veterans Affairs*, 2022 MSPB 42 (M.S.P.R. 2022), ¶¶ 10-12. However, under that provision of the WPEA codified as 5 U.S.C. § 2302(f)(2), such disclosures are protected if the appellant shows that the agency took a personnel action "in reprisal for" the disclosures. The National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), signed into law on December 12, 2017, amended 5 U.S.C. § 2302(f)(2) to provide that disclosures "made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing," are protected if the employee demonstrates that the agency "took, failed to take, or threatened to take or fail to take a personnel action" with respect to that employee in reprisal for the disclosure. *Salazar*, 2022 MSPB 42, ¶¶ 13-14; Pub. L. No. 115-91, § 1097(c)(1)(B)(ii), 131 Stat. 1283, 1618 (2017).

As the Board held in *Salazar*, 2022 MSPB 42, ¶¶ 15-21, the 2018 NDAA's amendment to 5 U.S.C. § 2302(f)(2), which clarified the prior version of that statute enacted in the WPEA, applies retroactively to appeals pending at the time the statute was enacted. Ms. Farrington's appeal was no pending and she enjoys the retroactive protection Congress has provided.

VII. THE RESPONDENT REPEATEDLY MISAPPREHENDS THE SIGNIFICANCE OF THE WPEA AMENDMENTS ON DUTY SPEECH

The Respondent attempts to expand the scope of civil service job descriptions and shift the burden of proof from the agency to whistleblowers. This reinterpretation would undermine the statutory protections intended by Congress, specifically highlighting how it affects non-discretionary activities and impacts whistleblower protections. Respondent misconstrues the duty speech standard by not limiting it to day-to-day job requirements. This interpretation contradicts the WPEA intent to protect disclosures within the scope of an employee's position, even if it involves personal initiative.

The amendments embodied Congress' intent on clarifying, not narrowing, the scope of protection. Respondent essentially argues that these amendments reduced coverage, rather than clarifying the intended scope of protections without reducing them. This clarification from the amendments is crucial for understanding the rights and protections available to whistleblowers. Respondent regards with

irrelevance how often specific duties are performed regarding whistleblower protection, regardless of whether the work is a principal or normal duty.

Contrary to Respondent's apparent viewpoint, the statutory burden of proof for retaliation claims has not been altered by the amendments. While there may be a slightly higher burden for establishing the ultimate conclusion, the fundamental responsibilities for proving non-retaliatory motives remain unchanged, highlighting a key aspect of whistleblower protection law, with the burden resting with the agency. The ultimate conclusion of retaliation cannot be determined prematurely within the prima facie case stage. This misunderstanding by the agency underscores the procedural necessity of evaluating all evidence, including the agency's justification, before reaching a final decision on retaliatory acts, which is crucial for a protective assessment of whistleblower retaliation claims.

Respondent's brief in one of improperly shifting the burden of proof onto whistleblowers to demonstrate non-retaliatory motives, which contradicts the statutory design that places this burden on the agency. This shift would undermine the foundational principles of whistleblower protection by making it more difficult for whistleblowers to prevail.

VIII. CONCLUSION

Petitioner respectfully urges this Court to reverse the Board's decision, declare that her duties were not subsumed under 5 U.S.C. § 2302(f)(2), but that if

they are, the Respondent has failed to meet its proof burdens thereunder. This case should be remanded for further proceedings that adhere to the true spirit and intent of the WPEA. This Court stands at a pivotal juncture, not merely to adjudicate the intricacies of Ms. Farrington's appeal but to uphold the sanctity and intent of the WPEA. The Board's application of Section 2302(f)(2) in Ms. Farrington's case reflects a troubling departure from the Act's protective design by effectively narrowing the scope of protection for whistleblowers under the guise of "normal course of duties" criteria. This interpretation not only contradicts the legislative intent to fortify whistleblower protections but also sets a perilous precedent that could deter potential whistleblowers from coming forward, undermining the Act's overarching goal of fostering transparency and accountability within the federal government.

The record before this Court unmistakably demonstrates that Ms. Farrington's disclosures were not mere extensions of her official duties but rather acts of courage, driven by a commitment to public safety and regulatory compliance. The Board's failure to recognize the distinct nature of her disclosures, coupled with its flawed reliance on a restrictive interpretation of 5 U.S.C. § 2302(f)(2), necessitates correction. This Court has the opportunity—and, indeed, the obligation—to rectify this misapplication of law by reversing the Board's decision and remanding the case for proceedings consistent with the true spirit of

the WPEA. In doing so, this Court will reaffirm the principle that the protections afforded by the WPEA are not to be narrowly construed or unduly restricted by bureaucratic interpretations that undermine the statute's purpose. Instead, this Court will send a clear message that the federal judiciary remains a bulwark against retaliation, ready to enforce the protections Congress has so clearly intended for those brave enough to speak out against wrongdoing.

Respectfully Submitted by:

/s/ Thad M. Guyer

_____

Thad M. Guyer

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 16, 2024, I caused the Corrected Reply Brief of Petitioner to be served through this Court's electronic filing system on all counsel of record.

/s/ Thad M. Guyer

Thad M. Guyer

RULE 32(A)(7)(C) CERTIFICATE

This reply brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

> this brief contains 3,742 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This reply brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

> this brief has been prepared in a proportionally spaced typeface using Open Office in 14-point proportional typeface, Times New Roman.

Dated: February 16, 2024

Respectfully submitted by:

/s/ Thad M. Guyer

Thad M. Guyer