MERIT SYSTEMS PROTECTION BOARD

THOMAS F. DAY (petitioner)

v.

DEPARTMENT OF HOMELAND SECURITY (agency)

Amicus Brief

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STATEMENT OF INTEREST

Pursuant to the **Notice of Opportunity To File Amicus Briefs**[1] in the matter of *Thomas F. Day* v. *Department of Homeland Security,* MSPB Docket Number SF–1221–12–0528–W–1, published in the **Federal Register**/Vol. 78, No. 27/Friday, February 8, 2013, by the Merit Systems Protection Board (MSPB or Board), I submit this amicus brief as a pro se an interested party. I wish also to speak on behalf of (probably hundreds) other aggrieved whistleblowers who have their respective cases working their slow pace up from the OSC to the MSPB, in their long cycles of dismissals, appeals and remands. Indeed, after having split, my initial case survived as docket # AT-1221-10-0216-W-1, but soon became docket # AT-1221-10-0215-W-2, and now is on remand back as docket # AT-1221-10-B-1. I have had the same AJ for the last 10 years and have not moved an inch. The full Board has remanded my case back[2], after it sat dormant on appeal for more than one year:

> "Because the appellant did not have a full opportunity to present evidence and argument proving by preponderant evidence that he reasonably believed that he made a protected disclosure in 2003 when he placed a non -functioning computer in the trash and left a message on the voicemail of the IRMS, the appellant is entitled to a supplemental hearing on that issue on remand if he so requests."

CONTEXT

To a question by Mr. Padro from MSPB Watch about how MSPB uses information from cases (e.g., decisions, trends, and patterns) in its studies program, **the MSPB recently wrote**[3]:

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[1] http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=795188&version=798248&application=ACROBAT
[2] http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=795244&version=798304&application=ACROBAT
[3] http://mspbwatch.net/2013/02/15/is-a-conflict-of-interest-at-the-mspb-hampering-its-mission/

"As discussed below, MSPB's studies program makes selective use of case decisions and data. First, we may use case decisions to guide research or support reports, when the decision has implications for broad civil service policy or practice. Examples of such use include — (…)

• Whistleblower Protections for Federal Employees[4], which examined the challenges that a potential whistleblower might face when seeking legal protection from alleged retaliation for reporting wrongdoing. The report discussed relevant cases, with particular attention to the decision in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001)[5], which restricted the Board's jurisdiction in whistleblower cases. We note that the Whistleblower Protection Enhancement Act of 2012 effectively overrules *Huffman*, **an important measure that is expected to broaden the Board's ability to protect those who disclose wrongdoing from retaliation**; (…)" [Emphasis added].

As an introduction to the above study MSPB, Susan Tsui Grundmann, MSPB Chair, wrote:

"*This report spells out in greater depth the difficulties a potential whistleblower may face when navigating the law to seek protection from agency retaliation. I hope you will find this report useful as you consider issues affecting the* ***Government's ability[6] to protect employees who disclose*** *fraud, waste, abuse, and other wrongdoing within the Federal Government*." [Emphasis added].

(…)

The key role entrusted by Congress in the MSPB is to uphold merit systems principles. This role is not always as clear as it ought to be, as illustrated in the above references to the "ability" of the Board, versus that of the Government "to protect whistle-blowers." This may be why the Chair of the MSPB, in the introduction to that above referenced study, felt compelled to caution that:

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[4] http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972&version=559604&application=ACROBAT

[5] i.e., stop splitting hairs as to whether a disclosure was made to individuals within the chain of command or as part of an assignment, or made directly to the wrongdoer, or to someone who already knew of it, or was made about a wrongdoer who is not within the chain of command, etc….

[6] Note the apparent contradiction in interests. Indeed, are we talking about the Government's ability, or, as above, the Board's ability to protect whistle-blowers?

"*This report is presented as a part of the MSPB's statutory obligation to study and report upon prohibited personnel practices and the health of the merit systems. While we hope that this report will be useful to potential whistleblowers, their advocates, Federal agencies, the U.S. Congress, and the President, this report is not an official "opinion" of the Board in the adjudicatory sense. We recommend that any party appearing before the MSPB rely directly upon the pertinent statutes, regulations, and legal precedents.*

Because of the MSPB's role as the adjudicator of whistleblower retaliation claims, this report differs from most other reports issued under the MSPB's studies authority. Most MSPB studies include an evaluation of the information being provided ***and recommendations for the improvement of laws, regulations, managerial practices, or other aspects of the civil service in keeping with the merit principles****. However, in order to preserve our neutrality as adjudicators, we have limited our evaluations in this particular report to those that are necessary to help the reader understand the information being provided, and* ***we have not included recommendations for changes to Federal laws, regulations, or policies****. The absence of recommendations in this report should not be interpreted as support for – or opposition to – any part of the laws as they are currently written, any decision by the Board or the Federal Circuit interpreting those laws, or any bill that seeks to amend the laws pertaining to Federal whistleblowers.*" [Emphasis added]

Finally, in the conclusion of that study, the MSPB remarks that:

"It is not surprising that Congress has seen the need to amend whistleblower laws in the past, and has considered doing so again in recent years. **It is challenging to create a set of rules that carefully balances management rights with the public's interest in protecting whistleblowers**. **A perfect balance between management rights and whistleblower protections may never be fully achieved, but we believe that the best possible balance is worth pursuing**. **As the Senate noted when the CSRA was enacted, and whistleblower protections were put into the law for Federal employees for the first time: "Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service**."

However, the Federal Circuit, the MSPB's reviewing court has recently reversed a MSPB decision, noting in Whitmore v. Department of labor[7] (No. 2011–3084.-- May 30, 2012) that:

> "Despite Robert Whitmore's highly unprofessional and intimidating conduct, which may well ultimately justify some adverse personnel action, he is nevertheless a bona fide whistleblower. Mr. Whitmore is therefore entitled to the full scope of protection afforded by the Whistleblower Protection Act, which ensures for him and whistleblowers everywhere that they need not fear retribution for disclosing to the public such vital information concerning an agency or official as "a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. " 5 U.S.C. § 2302(b)(8). Congress decided that we as a people are better off knowing than not knowing about such violations and improper conduct, even if it means that an insubordinate employee like Mr. Whitmore becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation."

Obviously, when Congress first enacted the WPA, and then added amendments, including the latest WPEA of 2012, it did it more out of concerns for "we as a people," and needed whistle-blowers who deserve protection, rather than out of concerns for the Government. This view is clearly expressed by the Fed. Cir., in the Whitmore precedent. At the limit, we as a people are still better off knowing than not knowing about such violations and improper conduct, even if this means that it will be more difficult for the agency to discipline or terminate an employee. It has become a self-evident truth that in our society, the interests of we as people takes priority over the interests of an agency. This is why the Fed. Cir. has reversed the MSPB in Whitmore.

[7] http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3084.pdf

Finally, in Matthew v. MSPB (2012-3162, Decided: January 16, 2013) the Federal Circuit wrote:

> "*The Board appears to have also concluded that Nasuti's disclosures were inadequate because they were made to persons without authority to address the problem. See IRA Decision II, at 16-17. Since the Board's decision, however, Congress has enacted the Whistle-blower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, with the intention of broadening the scope of protected disclosures under the WPA. Id. § 101, 126 Stat. at 1465-66; see also S. Rep. No. 112-155, at 5 (2012).* ***We think that the Board should decide in the first instance whether the new statute applies retroactively and whether, if so, Nasuti has alleged a protected disclosure under the new statute****. We therefore vacate the Board's conclusion that it lacked jurisdiction over this one aspect of Nasuti's IRA appeal*." [Emphasis added]

Even though this is a non-precedential decision regarding the particular case in front of the Federal Circuit court, the above remark is nevertheless independent of the case in front of that court, and therefore can be quoted and use for its persuasive weight. Essentially the Federal Circuit defers to the MSPB regarding whether the WPEA should be applied retroactively. In last analysis, it is the province of the MSPB to decide on merit systems principles, Congress has entrusted the MSPB with this mission. Since the MSPB Chair has expressed the genuine desire to improve the situation created for example by loopholes like in *Huffman v. Office of Personnel Management*, and since the MSPB has now received the green-light from the Federal Circuit to act on this and other issue of importance to the MSPB, the MSPB should not delay rendering the proper ruling, and thereby uphold merit systems principles.

Friday, February 8, 2013, the Board issued a Notice of Opportunity to File Amicus Briefs ("Notice") in the matter of *Thomas F. Day* v. *Department of Homeland Security*, MSPB Docket Number SF–1221–12–0528–W–1, which is currently pending before the Board on interlocutory appeal. The administrative judge certified for interlocutory review the question of whether the provisions of the Whistleblower Protection Enhancement Act of 2012 (WPEA), 112 Public Law 199, may be applied retroactively to pending cases involving conduct occurring prior to its effective date.