THOMAS F. DAY v. DEPARTMENT OF HOMELAND SECURITY
Docket # DC-1221-12-0528-W-1
Response to Response to Amicus Briefs dated 2/5/2013
Summary Page

Case Title : THOMAS F. DAY v. DEPARTMENT OF HOMELAND SECURITY

Docket Number : DC-1221-12-0528-W-1

Pleading Title : Response to Response to Amicus Briefs dated 2/5/2013

Filer's Name : Thomas F. Day

Filer's Pleading Role : Appellant

Details about the supporting documentation

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Online Interview

1. Would you like to enter the text online or upload the file containing the pleading?

See attached pleading text document

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2. Does your pleading assert facts that you know from your personal knowledge?

Yes

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3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

THOMAS F. DAY,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
DC-1221-12-0528-W-1

DATE: March 21, 2013

APPELLANT'S RESPONSE TO THE *AMICUS* BRIEFS

By Order dated February 5, 2013, the Board informed the parties that: it had solicited *amicus* briefs in this matter; all briefs received would be served on the parties; and the parties could file a response to the *amicus* briefs by March 22, 2013. In response to the Board's solicitation for *amicus* briefs, the Appellant has received and read the briefs from the following *amici*: *amicus* United States Office of Special Counsel (OSC); *amicus* United States Department of Veterans Affairs (VA); *amicus* Government Accountability Project (GAP) including *amicus* Representative Elijah Cummings, Member of Congress and the Ranking Member of the U.S. House of Representatives Committee on Oversight and Government Reform, *amicus* Jackie Speier, Member of Congress and member of the U.S. House of Representatives Committee on Oversight and Government Reform, *amicus* Center for Financial Privacy and Human Rights (CFPHR), *amicus* Liberty Coalition, *amicus* Project on Government Oversight (POGO), *amicus* Center for Science and Democracy (CSD) at the Union of Concerned Scientists (UCS); *amicus* National Employment Lawyers Association (NELA), *amicus* National Whistleblower Center and *amicus* Dr. Ram Chaturvedi, M.D., *amicus* MSPB Watch, *amicus* Brown Center For Public Policy, also known as Whistlewatch.Org and referred to in this response as WhistleWatch, *amicus* Elizabeth Jewel Martin, *amicus* Jacques A. Durr, M.D, and *amicus* Joseph Carson, PE. Having received and read the above mentioned briefs, the Appellant provides the following response.

RECOGNITION OF A JUDGE'S MOST DIFFICULT TASK

Until recently I had believed that a Judge's most difficult task was to determine whether or not a party was not telling the truth. By observation of court proceedings, I had seen very articulate attorneys present their arguments on behalf of their client while the opposing party was less well represented and their arguments were not as convincing and/or where not as well supported by case references. Based on personal knowledge of the truth of the matters presented or on the basis of evidence excluded from trial, it has seemed to me that judges were in the unenviable position to guess, and at time made the wrong decision.

A few weeks ago, I had the opportunity to discuss the issue with a former Judge in Manaus, Brazil who specialized in labor law in that country. Judge Balark Mello de Sa Peixoto Junior offered his opinion that it was his experience that the most difficult task for a Judge was to balance justice with the law and in doing so, to formulate a decision that would stand favorably in the eyes of his peers.

I stand corrected, and relegate my previous conclusion to the second most difficult task facing a Judge. With this new information, I have tempered by review of the issues before the Board and clearly see that the Board has a difficult task in these matters. Nevertheless, I think that the various terms that have been applied to the *Horton*, *Willis*, and *Huffman* decisions, collectively under current review by the Board as "*Huffman*", are strong testimony that these decisions have not stood the test and should be repudiated as the result of these proceedings.

BACKGROUND

The Appellant finds the representation of the facts relating to whistleblower issues as presented by *amicus* National Employment Lawyers Association (NELA) to be sufficiently inclusive and incorporates them in their entirety into the Appellant's Response [NELA at 2-6].

HUFFMAN ET AL VIOLATED COMMON SENSE

One of the key principles applied in jurisdictional decisions of the past was whether or not the disclosure was made to the "wrongdoer" who was frequently the whistleblower's immediate supervisor. The Board and the Federal Circuit assumed that offenders would not be likely to bring

about a constructive change and the whistleblower should be required to go elsewhere to make their disclosure.

While it may be a measure of how often the supposed wrongdoer has failed to correct the violation by the number of whistleblower complaints filed with OSC or MSBP; what measure is there to show how often a would be offender or even a violator has taken the steps to correct the issue? Hopefully we would agree that there are no reliable statistics to show that disclosing to a wrongdoer works!

During the course of my career in acquisitions, I have participated in numerous discussions with engineers, contract specialists, contracting officers, senior acquisition managers, procurement attorneys, appropriations law attorneys and related professionals where an issue under consideration was, or was not, perceived to be allowed under the Federal Acquisition Regulations (FAR). With a constant flow of new employees into the acquisition field and with the movement of individuals from agency to agency, or from type of acquisition to type of acquisition, there are frequent discussions about what is or is not permitted by law, rule, or regulation. If those of us with corporate knowledge faded back from providing our guidance, the state of the Nation's economy could be measurably worse.

I presume that the Board is aware that the manager to whom I reported is claiming that he is "the wrongdoer" simply because he was the Chief of the Office of Contract Operations. Seemingly it is a badge of honor within the Coast Guard to fall on one's sword as indicated by Admiral Currier's introduction of Admiral Taylor during a Congressional hearing. Admiral Taylor was the Coast Guard's Chief Financial Officer who reportedly misspent $138 million dollars. He was presented to Congress as a hero because he misspent millions of dollars for Coast Guard housing. In the view of Coast Guard management, these were funds that hand been badly needed, but had not been appropriated by Congress. The documentation submitted in this case and yet to be heard, demonstrates that when an Agency's management is corrupted into believing that it has the authority to do whatever it chooses to do regardless of law, it does not matter to whom in the chain of command a whistleblower makes his or her disclosure.

Regardless of the benefits of his actions that may have been enjoyed by Coast Guard families, Admiral Taylor usurped the power of Congress and became a wrongdoer, with management's apparent approval. I submit that by failing to follow the intent of Congress and by issuing erroneous decisions, MSPB also became a wrongdoer whose actions have had to be corrected by yet another clarifying act of Congress.

Under *Huffman*, anyone to whom a whistleblower makes a disclosure may claim to be a wrongdoer and thereby deny jurisdiction to the whistleblower. If the person to whom the whistleblower made their disclosure fails to take any corrective action, the matter goes beyond a casual remark because it may be a punishable offense under Section 2302(c) of title 5, but under the current environment of negligible enforcement, they are wrongdoers who can do as they please and violate rules, regulations, and laws at will.

Huffman holds that the only way to pursue corrective action is to make the disclosure to a higher level of management. The presumption is that management is concerned about the legality of the actions of its subordinate managers, but what if the subordinates are taking direction from the senior manager? Again, the attempt to expose the infraction will fail. How about reporting the infraction to OSC? Over the years, the expressed opinion that "OSC is ineffective" is so relied upon that it is used to justified management's retaliatory actions.

I agree that taking the issue to each successively higher level of management will eventually reach the ears of someone with sufficient power to correct the problem. Prior to the appointment of the current Special Counsel, that someone was well beyond MSPB. It remains to be seen if the historic decisions that are about to be made by this Board to change the past, the present, and the future will finally -- not just comply with the intent of Congress; but will demonstrate its acceptance of the authority and power that has been granted to MSPB to play its role in creating a far more efficient and effective federal government.

Accepting the WPEA as a clarifying statute in its entirety that overturns erroneous decisions of the past, acknowledging that MSPB and its previous Boards have themselves been "wrongdoers", and then accepting the responsibility to transform itself into the agency that Congress has

envisioned it would be for thirty-five years is the task at hand. In similar situations, Courts have repudiated their decisions and much to the credit of OSC, they have embarked on a new and arduous journey.

My comments in favor of this redirection of MSPB are a demonstration of the same respect I've given to other wrongdoers with the hope and expectation that they would alter their course. I am privileged to be here, but I acknowledge that I could be joined by many others who have suffered irreparable harm as the result of erroneous MSPB decision. Now, I bring the very issued presented by *Huffman* to your doorstep, can you as a wrongdoer, do what it takes to set a new standard for the enforcement of Whistleblower protections?

Can you present an opinion that will fairly and reasonably address the act of retaliation before you in a judicial manner for all pending cases, and make it clear that MSPB will have a zero tolerance for future acts of retaliation? Infractions of the law are one thing, and every agency has the means to take corrective actions if and when and infraction is discovered. As I only recently discovered, it is required that every agency provide a schedule of penalties that may be imposed on offenders. I submit that any act of retaliation is so destructive to the credibility of our government that there can only be one penalty – termination from federal service. It is within your authority to do so; will you accept this authority and act accordingly?

APPELLANT'S OBJECTION TO ALL ARGUMENTS BEFORE THE BOARD IN THIS MATTER THAT RELY ON U.S. SUPREME COURT DECISIONS

While I recognize the U.S. Supreme Court as the highest court in the land, I must object to all arguments based on Supreme Court decisions because whistleblowers (WBs) have been denied access to the higher court. It is my contention that because Congress specifically denied whistleblowers the right of appeal to the higher courts, that Congress reserved the right of appeal for themselves. Therefore, while I view the decisions by the higher courts to be informative, I assert that Congressional intent and the decisions made by Congress are substantially superior to decisions by the Judicial Branch in this matter.

It is my understanding based on my recollections of media coverage at the time, that MSPB was created as an Executive Branch system of justice in an effort to maintain a separation of the

branches of government. I also recall that there was some resentment within the Judicial Branch since it was the voiced belief that the Judicial Branch had an effective system of justice that could address the issues that whistleblowers could have brought. Had the decisions at issue in this matter been permitted access to the higher courts, it is likely that these matters would have been overturned decades ago and would not be under consideration at this time. I welcome the changes made in the Whistleblower Protection Enhancement Act of 2012 (WPEA) that may afford WBs a right of appeal to higher courts in the future.

It is my opinion that most of the authors and readers of the documents associated with this case were educated in the traditional schools of law and their approach to legal debate was formed by that education. I am also of the opinion that having been so trained, these same people are accustomed to following the paradigms that flow from this training, and that you will automatically look to the decisions of the Supreme Court for legal guidance. Although I have no formal legal training beyond Business Law 101, it would seem to me that that when individuals are disenfranchised from one particular system of justice, they should not be held captive to any authority other than the highest level to which they have access. In the matters before the Board I proffer that Congress has given the Board wide latitude in its powers and authority; but like we whistleblowers, the Board is constrained to abide by the intent Congress.

WHETHER THE WPEA IS A CLARIFYING STATUTE OR SUBJECT TO PIECEMEAL RETROACTIVE APPLICABLE HAS BEEN ARGUED, BUT WHAT ABOUT ITS CONTENT AS IT CONTRIBUTES TO THE ISSUE?

Let me preface my comments with those presented by *amicus* NELA;

> *To make it clear that it intended to make a statute, or provision thereof, retroactive,* ***Congress must assure the reviewing court that it has already "considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.****" Landgraf, 511 U.S. at 272-73.4 Congress has clearly done this.*
> [Emphasis added, NELA at 7]

I submit that Congress has complied by clearly and unambiguously identifying the purpose of the Act;

> *An ACT*
> *To amend chapter 23 of title 5, United States Code, to* ***clarify*** *the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and*

agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.
[Emphasis Added]

Let me use another excerpt from *amicus* NELA's brief;

> *The Landgraf court instructs that this analysis is done provision by provision when analyzing a given statute, rather than merely assuming that the entire statute is to be construed as a single whole for purposes of retroactivity analysis. See Landgraf, 511 U.S. at 260-61, 261 fn.12, 280* [NELA at footnote on 7]

The issue of what is or is not subject to retroactively application has been argumentatively tainted by the initial focus on the word "retroactive". I will presume that the initial search to find guidance on what to do with pending cases used *Landgraf* as its principle source of guidance. It appears that this was applied by MSPB, OSC, and others and expanded into searches for cases that supported or denied retroactive application. I too was focused on the retroactive application and put my attention on the issues directly affecting me. I noted that Judge Weiss did not mention the issue of a clarifying statute in his analysis that was certified for Interlocutory Appeal, but he was not alone. Neither Judge Malouf, nor the Board raised the issue of clarification in the documents they produced.

However, as things progressed, attention was given to the matter of clarification and whether or not the bill would stand the *Landgraf* test of provision by provision review (regrettably I am not sufficiently familiar with the practice of providing legal citations and do not provide them in most instances). Once again the process continued to take its direction from *Landgraf* and began the provision by provision evaluation without any thought to what I will refer to as the Act's Statement of Purpose which is stated as follows in Public Law 199:

An ACT
To amend chapter 23 of title 5, United States Code, to ***clarify*** *the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.*
[Emphasis Added]

With all eyes on Senate Bill S.743, here is how it is presented in H.R. 3289;

> *To amend title 5, United States Code, to provide clarification relating to disclosures of information protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements are in conformance with certain protections; to provide certain additional authorities to the Office of Special Counsel; and for other purposes.*

Again, the focus of the arguments by MSPB and others seemed to move to the individual sections of the WPEA and in particular the specific language for the TSA portion which is specifically addressed differently from other parts of the Law. With the application of *Landgraf*, it appeared to be a sure bet "gotcha" that if Congress could be specific with TSA, then their failure to be specific with other provisions would deny retroactive application.

Going further with a more careful examination of the text of the WPEA shows that Sections 101 and 111 are prefaced as follows with emphasis added:

> ***SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.***
>
> and,
>
> ***SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR CRITICAL INFRASTRUCTURE INFORMATION.***
>
> then there is Section 115:
>
> ***SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.***

While it is does not include the *Landgraf* moniker of "clarification" as the previous sections, how is it addressed in the Statement of Purpose for the WPEA? In the WPEA Statement of Purpose the text is, "… , *require a statement in non-disclosure policies, forms, and agreements*," and H.R. 3289 has it as, "*to require a statement in nondisclosure policies, forms, and agreements."* It seems to me that the text in the Statement of Purpose is so nearly exact that Section 115 must also be a "clarification" even though it is not reinforced with the word "clarification" in its title.

Then it dawned on me that the TSA provision which is relied upon by MSPB in its arguments as the kind of language that one would expect to indicate an earlier effective date; was not an accurate conclusion, it was erroneous. Upon my retroactive re-evaluation, it is my conclusion that the

entire WPEA, as written, is intended as a clarifying statute and that in accordance with the arguments presented in the various briefs. What becomes increasingly clear is that it is Congressional intent that the WPEA is retroactively applicable to all of the issues presented except – the TSA provisions. Given the Congressional intent that the WPEA was intended to be retroactively applicable, it stands to reason that *Landgraf* required the TSA referenced effective date to specifically restrict it to a date so that it would – not – be retroactively applied beyond the specified date.

I submit that the text in the titles of Sections 101 and 111 are there to emphasize the clearly intended purpose of the WPEA and that the strengthening of the text in these provisions does not diminish the retroactive application of the other parts of the WPEA – which are also included by reference in the WPEA's Statement of Purpose – "*and for other purposes"*. It is not by accident that I am referring to the beginning of the WPEA as its "Statement of Purpose". It is not set forth as an innocuous introduction or a "preamble", but specifically informs the reader as to the purpose of the law.

Finally, I looked at the text of Section 101 as it relates to my case, keeping in mind that there is considerable disagreement about what is or is not subject to retroactive application. Bypassing whether or not disclosing to a supervisor or wrongdoer is covered, what is next? What does it mean that it doesn't matter if the matter was previously disclosed? Certainly the words "previously disclosed" create a reach-back in time that is equivalent to "retroactive application". What about the rest of the text? How about the issue that a disclosure shall not be excluded from subsection (b)(8) because of the amount of time which has passed since the occurrence of the events described in the disclosure?

Again, the WPEA has clarified the text to remove any ambiguities as to time limits that have been erroneously interpreted by MSPB and the Courts. Both of these provisions of Section 101 – the content – strongly add to the arguments that Congress did consider the impact of retroactive application or not (the TSA provisions), and has correctly identified the statute as a clarifying statute. Therefore, I submit that is retroactively enforceable in all parts. I might add that it seems

to conform to the guidance provided by other Supreme Court decisions addressing a clarifying statute and/or retroactive application as well.

STATEMENT OF THE ISSUES FROM MY POINT OF VIEW

The Appellant reminds the Board that he is not an attorney and has no formal educational training other than basic business law courses taken prior to 1971. Furthermore, I have no direct access to legal resources other than the Internet and as a result, I have liberally cut and pasted case and other references from the various briefs and other documents associated with this case. Although I have attempted to cite cases in the normally accepted format, I cannot attest to the accuracy of the case citations.

1. The issues in this matter go beyond the narrowed scope of portions of WPEA Section 101; whether or not disclosures made to a supervisor who may or may not be an alleged wrongdoer, or made through normal channels of communications, or through the course of one's normally assigned duties constituted protected disclosers under the WPA or whether such disclosures are retroactively protected by the WPEA. I would submit that the most important issue facing the Board is the motivation of the Board to comply or not to comply with Congressional intent.

2. In my objection to the application of decisions by the U.S. Supreme Court, I identified the highest level of the appellate process for whistleblowers to be directly to Congress. Congress has explicitly identified decisions by MSPB and the Federal Circuit as "erroneous" and has effectively "overturned" those decisions. Therefore, I submit that it is an issue of this case for the Board to "repudiate" its decisions as has been done by other courts. In so doing, the Board must contend with the issue of reinstating all prior cases that were erroneously dismissed.

3. The Board must then address directly whether or not the WPEA is a clarifying statute in its entirety beginning with the point that the intent of Congress is clearly identify in the ACT's Statement of Purpose as one that is "To clarify…." Related to this issue is whether the Board wants to create a separation between the Senate and the House by challenging the approval of the law by unanimous consent in both Chambers regardless as to what is stated in either Chamber's reports.

4. Next, it would be appropriate for the Board to decide if it is in the best interest of the Board to address the TSA provisions as narrowing the retroactive application of these provisions or whether it wants to send the matter back to Congress for more specific language for all of the rest of the law.

5. Because the Board solicited "briefs or other comments" in the matter before the Board, it received "other comments". If the WPEA is found to be retroactively applicable to all pending cases, then the issue of compensatory damages may also be an issue in Day v. Department of Homeland Security, making the matters raised in the WhistleWatch brief and its other comments pertaining to the King case equally germane to the matter before the Board. I submit that the matter of compensatory damages is appropriately before the Board and that the Board is very capable of deciding this issue most expeditiously at this time without further delay.

6. The details of the King case as presented in the briefs raise some serious issues with regard to the timing and intent of MSPB decisions in this case and potentially others. As an acquisition professional I am subject to ethical standards that compel me to act in an ethical manner and I must avoid even the "appearance" of wrongdoing. I submit that the Board must ensure that all of its decisions are ethically applied and that they have ended the decades old practice of seeking their own revenge on whistleblowers.

7. Similarly related are the issues of financial cost as raised by the Department of Veterans Affairs. As the keepers of the Nation's financial purse strings and in a time of particularly limited financial resources tossed repeatedly back-and-forth across the aisles and from Chamber to Chamber, is it reasonable to believe that Congress has not thought through the cost and benefits of reaching back in time to obtain disclosures of waste? Does the Board really want to rely on the financial hardship of VA's potential award of $8,000,000 as possible compensatory damages in all of its sixty or so cases against the billions the President hopes to recovery from whistleblower disclosures? I submit that the matter of compensatory damages is correctly before the Board as brought to the Board through the instructions of is Administrative Judges and by its Notice in the Federal Register.

8. Several of the *amicus* briefs addressed the issue of whether or not retroactive application of the WPEA would adversely affect persons who may have committed an act of retaliation or other infraction which may be the subject of a whistleblower's disclosures. In my view the WPEA only addresses the protection of the whistleblower and does not create a new penalty upon the retaliator. Similarly, it does not absolve them of those acts and under other statutes, rules and regulations; they might be subjected to adverse personnel actions. Similarly, I do not see the WPEA as providing any relief to a person or persons who may have acted at the direction of a superior nor does it offer relief to persons in management positions who may have failed to act to prevent the acts of retaliation. Any arguments in defense of their actions would be controlled by the statutes that they violated and not by the WPEA.

9. Because of the text in Section 101, "(f)(1) A disclosure shall not be excluded from subsection (b)(8) because -- … (B) the disclosure revealed information that had been previously disclosed; …; or (F) of the amount of time which has passed since the occurrence of the events described in the disclosure", it must be concluded that anyone may make the same disclosure that was previously made by one of the Appellant's in a pending case. It would not matter how much time has passed since the occurrence of the previously disclosed event (allowing for the retroactive application of the WPEA), -- or – for that matter who makes the new disclosure. As I read the law as newly enacted, it stands that an Appellant in a pending case could re-file immediately (or at some future point) under the WPEA receiving the full benefits of the WPEA. Would the Board prefer to have all cases refilled, or would it prefer to adjudicate them as currently filed with retroactive application of the WPEA?

10. In a related matter, OSC has acknowledge in its brief that it addressed issues brought to its attention prior to enactment of the WPEA under the guidelines of *Huffman;*

> *"Prior to the WPEA, OSC as it was required to do — applied Willis and Huffman and the other overturned court decisions to close potentially valid whistleblower claims."*
> [OSC at 21]

Therefore, the Board must give consideration to whether or not, and under what circumstances, all pending cases should be redirected back to OSC for review.

11. Next is the issue again related to Section 101 that were the principle issues that initiated this Interlocutory Appeal; "(f)(1) A disclosure shall not be excluded from subsection (b)(8) because – (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii); (B) the disclosure revealed information that had been previously disclosed; … (D) the disclosure was not made in writing;" I have included each of these three provisions because "(A)" may be applicable if the Board accepts that my disclosure to Mr. Palmer may have been to a wrongdoer, or may have been through "normal channels of communications." I have and continue to assert that neither of these is applicable. It is still possible that Mr. Palmer may assert prior knowledge as a supervisor or as I have since learned that at one time, he too had been assigned to the MPA project. I assert that to the best of my knowledge, if he had been assigned to the project, he was not serving in any capacity in the Source Selection process that was underway at the time. It has been acknowledged and not denied by the Agency that this disclosure was verbal and not in writing. I represent that the Board has the opportunity to address each of the provisions most expeditiously in the current Appeal.

12. Now we get to Section 101, (f)(2): "If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, 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.". The question before the Board is whether or not I provided sufficient information to Judge Weiss to meet the standard set by the "preponderant of the evidence" for him to have determined that this was in anyway a "normal" course of my duties.

APPELLANT'S RESPONSE TO THE AMICUS BRIEFS

I am aware that I have presented the Board with issues it may not have seen or contemplated, but I believe that all are appropriately before the Board for consideration. I think it is appropriate to mention, less it be misconstrued otherwise, that I hold Judge Weiss and the Board in high regard for having brought these matters to the forefront for contemplation and resolution. Hopefully the unpleasant history of the past is behind us and the decisions in this case will serve many more

than those immediately and directly affected. Those of us who have lived through the nightmare of retaliation would not be human if we did not harbor some level of resentment for the harm done to ourselves and our families. Most of us have walked away from the experience with far more distain for the credibility and competency of all three branches of our federal government than that voiced by the general public. Nevertheless, I hold that change from within is most effective and efficient and I look to see how well the Board is prepared to address the past and move in a direction that will benefit the entire Nation.

In his Order and Certification for Interlocutory Appeal, Judge Weiss stated as follows:

> *"Because I find the question of whether the provisions of the WPEA, including its elimination of the Huffman disclosure criteria, may be applied retroactively to pending cases involving conduct occurring prior to its effective date, is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92, the parties" joint request for certification of an interlocutory appeal is GRANTED.*

In its notice published in the Federal Register, the Board stated the following:

> *"Of particular relevance in Day is the question of the retroactive effect of section 101(b)(2)(B) of the WPEA, which provides in relevant part that a disclosure made to an alleged wrongdoer or during an employee's normal course of duties is not excluded from protection against reprisal under 5 U.S.C. 2302(b)(8)."*
>
> …
>
> *"Interested individuals or organizations may submit amicus briefs or other comments on the question presented in Day no later than March 1, 2013."*

In her Summary of Status Conference letter included as Exhibit D of the WhistleWatch brief, pertaining to the King Case (MSPB Docket Number DA-0752-09-0604-P-1), Judge Malouf states the following on page 7:

> *"I find the question of whether the provisions of the WPEA with regard to damages may be applied retroactively to pending cases involving conduct occurring prior to its effective date is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92.4 Accordingly, it appears to be appropriate to certify this issue for interlocutory appeal.*

In the footnote on page 7 she states the following:

> *"The parties are advised that an interlocutory appeal is currently pending before the Board concerning the retroactivity of the WPEA"s provisions concerning covered*

disclosures. Further, the Board has announced an opportunity to file amicus briefs on that issue. See 78 Fed. Reg. 9431 (Feb. 8, 2013).”

In the brief submitted by *amicus* Elizabeth Jewel Martin, in the Initial Decision issued by Judge Ansorge in the Martin case (MSPB Docket Number CH-1221-12-0374-W-1), he states the following at Exhibit A page 2:

> *To **clarify** the question, the Board certified the issue for interlocutory appeal in Day v. Department of Health and Human Service, MSPB Docket No. DC-1221-12-0528-W-1. The interlocutory appeal is still pending will likely include oral arguments.* [Emphasis added, Martin, Exhibit A, at 2]

It is noted in the previous quotation that the Agency is incorrectly identified as the Department of Health and Human Service instead of the Department of Homeland Security. Nevertheless, the comments and expressed statements made by persons in positions of responsibility have opened the door to topics that are appropriately addressed in the following items.

1. Will the Board Comply with Congressional Intent

The current Congressional efforts to provide protections to whistleblowers can be traced back thirty-five years ago to the Civil Rights Reform Act of 1978. Historically, I believe it was in the early days of the Nation when Congress first saw the benefit of individuals who could help curtail fraud that was enveloping a Nation in debt when it was virtually broke. Caught by historical events and erroneous decisions, the leadership of MSPB has viewed itself as powerless to change what had been carved in stone by earlier decisions. Last June, the stone began to crack with the first changes to MSPB rules after twenty years of neglect. At one end of Pennsylvania Avenue, an energized mob took the time out of their schedule of funding wars and financial crisis after financial crisis to once again debate the benefits that can be derived from the acts of a very few, carelessly-bold whistleblowers. At the other end of Pennsylvania Avenue the President of the United States viewed the benefits to be derived from whistleblowers as one means to fund favored social programs. After many years of working together across a huge political divide, they managed to pass -- and enact -the Whistleblower Protection Enhancement Act of 2012 (WPEA). With two Members of Congress signing on to one of the *amicus* briefs supporting retroactive enforcement, and a torrent of comments condemning the past practices of MSPB, I submit that the intent of Congress is unmistakably represented in the briefs submitted and in the Act itself.

Having read the briefs, I am sure that the Board could create a justifiable position regardless as to how it decides the issues. I see decisions that cradle the past as a path to even more government corruption and an increasingly disinterested public. Ahead on this path is a far more dysfunctional government where employees will be subjected to a barrage of mistreatment, I see the Bully Boss empowered to threaten subordinates at every level, I see more frequent violations of federal law by managers who publicly claim to be the creators of a model of excellence and in the shadows support a culture of intimidation, discrimination, and retaliation. I see a system of hollow justice brought on by the intimidation of potential witnesses who fear the ever more artfully disguised reprisal if they were to step forward.

Conjecture? I've lived it. I've seen it growing every more calamitous such that managers can boldly act without concern because of an ineffective OSC. Of the people listed as potential witnesses in my case, how many others have asked not even to be mentioned for fear of losing their jobs? While there is not a shred of supporting evidence that the wrongdoers will pay more than a slap on the wrist – if that – I choose not to risk the career of any fellow worker.

On the other hand, I see a federal agency with the authority and the power to provide unimaginable benefits to this Nation simply by using the power granted to it to protect whistleblowers. In a blink, the Board could hand down decisions that would send shivers of concern for their own careers through the upper levels of management. In the early years of my career with the Joint Cruise Missile Project Office, the admiral held open meetings with everyone even remotely connected to the topic invited to observe and participate if they chose to do so. Transparency in government is not new it was crushed by out-of-control managers. With choices favoring protection of whistleblowers, transparency will be the thing to restore trust in our government and our leaders regardless of their political affiliation.

My comments are in favor of decisions intended by Congress -- supported by law -- that will vanquish the past and create the opportunity for a renewed climate of progress and growth for an entire Nation. Provide anything less, and you will not demean my goal, but your reputation and that of your agency will be tarnished beyond recovery.

2. Reinstatement of All Prior Cases that were Erroneously Dismissed

Let me again preface my comments with the same cite use in the previous remarks with a slightly different emphasis.

> *To make it clear that it intended to make a statute, or provision thereof, retroactive, Congress must assure the reviewing court that it has already "considered the potential unfairness of retroactive application and* ***determined that it is an acceptable price to pay for the countervailing benefits****." Landgraf, 511 U.S. at 272-73.4 Congress has clearly done this.*
> [Emphasis added, NELA at 7]

Given the clear identification of the decisions by MSPB and the Court as erroneous by the appellate authority – Congress – let me begin by quoting the AJ in *Day*.

> *"The Court found, however, that such considerations were not sufficient to rebut the presumption against statutory retroactivity, absent express language dictating that result, a principle which is*
>
> > *deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than a Republic.* ***Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly****; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."*
>
> *Id. at 265 (quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S 827, 855 (1990))."*
> [Emphasis added, AJ at 8]

The words that I have emphasized were and are applicable to every whistleblower whose case was dismissed based on an erroneous decision. A series of decisions beginning with *Horton*, progressing with *Willis*, and resulting in *Huffman*; all of which have been overturned and must be viewed as though they never existed. Continuing with the comments made by the AJ;

> *"The Court further held that even in an era where "constitutional impediments to retroactive civil legislation are now modest," and courts are prepared to approve such legislation where that is the clear Congressional intent,*
> > *....prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about* ***how statutes ordinarily operate****, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively consid-*

ered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

Id. at 272-273."

[Emphasis added, AJ at 8]

The WPEA is anything but "ordinary", but it would seem that it has been analyzed as an "ordinary" statute. If you consider the number of cases in any law library and compare this to the number of times Congress has had to issue a clarifying statute it might be grasped as to how unusual it is to encounter a clarifying statute. If you dwell on the Senate Report and ignore the statute, then you could conclude that the Act only is applicable to pending cases. Taken as a whole, all of the verbiage regarding the intent of Congress is clearly expressed as a clarification required to correct, and overturn, erroneous MSPB and Court decisions. I would not exclude the text of the House Report, because it serves to show that there was consideration given to whether or not the stature should have been retroactively applied as a clarifying statute. It is also one of the clues to the politics of Capitol Hill.

The Board has the rare opportunity to review its own past and in my opinion should repudiate its errors while it has the opportunity to do so. As *amicus* NWC has informed us, Courts have done the same;

"Likewise, in Willy v. Admin. Review Bd., 423 F.3d 483 (5th Cir. 2005), the Fifth Circuit relied upon an amendment to the ERA to clarify its holding regarding internal protected activity under the Clean Air Act. The Fifth Circuit had originally issued a ruling under the ERA, consistent with the Federal Circuit holding in Willis, denying coverage to an employee who raised concerns to supervisors as part of his job. Id., at 501 n. 11, citing Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984). However, after the Brown & Root ruling Congress amended the ERA to explicitly cover internal whistleblower disclosures. Id. Based on this amendment the Court effectively reversed its prior holding, admitting that Congress' clarification had demonstrated that the prior court ruling was "incorrect." Id. ("Congress clarified by statute that Brown & Root was incorrect in holding that complaints to employers were not protected under 42 U.S.C. § 5851."). Notably, in Willy, the Fifth Circuit relied upon the congressional clarification to ***repudiate*** *its own prior decision that had narrowly construed protected disclosures. Id."*

[Emphasis added, NWC at 9]

The boundaries between the three branches of government must be preserved and Congress has rightfully halted at the boundary between the Executive Branch and the Legislative Branch – it cannot dictate the Board's decision to repudiate its prior decisions. It cannot dictate the Board's decision to vacate all erroneously applied decisions, and remand all of these cases back to the AJs. These are the responsibility of the Board and it must act accordingly in this instance and without hesitation.

The argument made by OSC is equally applicable to pending cases as it is to cases that were erroneously dismissed;

> ***"Landgraf only cautions against applying existing law retroactively when to do so would undermine important values****. As will be seen, retroactive application of the WPEA to insure that all federal whistleblowers receive the same rights and protections from their government cannot, in any reasonable manner, be construed as either harmful or unfair. To the contrary, retroactivity will promote the common interests shared by the public, the government and federal managers and employees in promoting greater efficiency and transparency through whistleblower protection.*
>
> *Absent limited constitutional restrictions, Congress may enact laws that have a retroactive effect. Landgraf, 511 U.S. at 267-68. To accomplish this, Congress is required to make its intentions clear so that reviewing courts can be assured that Congress "itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Id. at 272-73."*
> [Emphasis added, OSC at 5]

The scenario that I will bring to the floor of these discussions is likely to be as controversial as the topic itself. Nevertheless, it is a political reality in Washington that in order to get a piece of legislation through both Chambers with the votes needed for passage, some things have to be left on the cutting room floor. The Nation watched as Obamacare went through political contortions to circumvent the objections of a few in order to become the law of the land. Similar contortions were the political process to get the WPEA passed and enacted.

I have confirmed that the matter of the cases that were erroneous dismissed based on *Huffman* was discussed and therefore considered by Congress. Congress also considered

reinstating these cases and the potential cost, but there was the political climate on the Hill not to increase spending. In fact, I'm sure that each of you will recall that some members refused to spend any amount on anything in a political standoff. During the summer of 2012, those persons who had an interest in the matter tried to pull together in a common front to get the WPEA passed. With the recognition that anything that was going to add a dime to the federal deficit would be counterproductive a number of items were taken off the agenda of in order to get the votes to win passage of the WPEA. While I was not involved, I understand that did not sit well with some whistleblower advocates, but I can understand both sides because I had been there years ago and saw very much of the same thing.

In order to gain the votes necessary for passage, issues that would incur additional cost were not directly represented in a manner that made them as clearly presented in the text of the bill as the Board may be seeking. Instead, the Bill was crafted in the fashion that is before you as enacted law – a clarifying statute.

To settle the concerns of a few, certain provisions were emphasized in their titles with the word "Clarification". This appeased the opposition and lulled them into believing that it was only these provisions that would be a "clarification". Apparently, these few individuals also focused on the text of Landgraf, and failed to see that the entire statute was a clarifying statute.

At the same time and for similar reasons, some provisions were not identified as a clarification, such as the provision for compensatory damages. There were those who knew the implications of a clarifying statute and how it could be used to have issues made retroactive, while a significant number of their colleagues had no clue. However, the text of the Bill was what it is and it was enough to lay aside the concerns of a few who were less legislatively astute. Having fallen into the same snare, MSPB surly can appreciate the political skill that was employed.

In Washington it is all about getting the votes and there was a little more to be done. It was common knowledge that what had happened to whistleblowers over the years was grossly unfair. In this regard, some could not stomach the cost of reinstating cases going back years, but everyone could tolerate the cost of the "pending" cases. Similarly, everyone could sign up to the description of the past decisions as "erroneous'. In the briefs before the Board, the expression in one form or another and by various people that the WPEA is retroactively applicable to "pending" cases is unmistakably clear. For all of those who voted for a clarifying statute with its implications for retroactive application, the intent of Congress had been expressed.

It is not by accident that the text lays the blame squarely on MSPB for having issued these erroneous decisions in the first place. Getting the issue out of the hands of Congress and into the hands of MSPB, presents a number of possibilities. The only possibility that warrants consideration in these comments is that once the matter is in your hands, you are not tied to the political strings of the federal budget. Independent of Congress, given what has been presented to you, you have the opportunity to acknowledge the past injustice and you, only you, have the opportunity to correct it and redeem the reputation of your organization.

I've done my best to explain to you why the *Huffman* decisions were terrible beyond belief, so is there any room for the blame to be shared? How long did it take Congress to get the WPEA passed to overturn *Huffman*? How often did the advocates come up battling among themselves? There are some in all of these corners who are of the opinion that their way is the only way without realizing that their way is just another way to get things done. By the way, I do not want to avoid the opportunity to point out that is sells well back in the home districts to point the finger at MSPB as the felon in these matters. One day they can tell the gathered audience that they did their part to help whistleblowers, and the day after you repudiate Huffman and reinstate the past cases, they will claim victory too. It is also just as likely that there are holdover threads of determination within MSPB so that the Board is likely to pushback wherever it can, or some would think. Perhaps you have become blinded by the adversarial wars and just

want to believe what you want to believe and cannot see the errors of your ways or the opportunity to eradicate the past.

Somewhere in the many pages of MSPB materials there is a single mention of the Board's power to act in matters that are undeniably unjust, or words to that effect. I think I saw it in relation to negotiated grievance procedures or the denial of arbitration, but I don't have the time to retrieve the specific text. Somewhere else, there is a statement that the Board has the right to amend its own rules and I cannot see a more opportune moment for the Board to clear away old baggage. In the Courts of this country, the words "erroneous", "overturned", "rescind", "reversed", and other similar terminology have specific implications.

By my recollection, convicted criminals were turned loose because they had not been read their Miranda rights. Others were released or retried because they were not provided legal counsel. When DNA demonstrates that a convicted rapist did not commit the crime, we correct the erroneous decision by setting him free. Our law libraries are filled with cases where decision after decision has been overturned in favor of a more just decision. I believe that whistleblowers who have been irreparably harmed by erroneous decisions should be treated in a similar situation by having their cases reinstated. If a single court has renounced its own decision and repudiated that decision, the Board should do nothing less.

As you have also read in the other briefs before you, the application of a clarifying statute is not restricted to "pending cases". I submit that the text of the WPEA and all supporting legislation and reports clearly identify *Huffman* (and its related decisions) as an "erroneous" decision and that the intent of the legislation is to overturn it as an erroneous decision. As such it is within the scope of the legislation, the intent of Congress, and within the power and authority of the Board to repudiate *Huffman* and reinstate all prior cases that were dismissed for lack of jurisdiction citing *Huffman*. Once you do so, all of the cases become "pending" cases and the rights lost by some can be reinstated and an unjust past can be adjudicated.

I am not associated with anyone that I know had their case dismissed based on Huff-*man*. I have no ties to any advocacy group working in anyway whatsoever for or on behalf of any whistleblower. I have no financial interest in the outcome of the decision the Board could make in this matter. My only concern is that as an American, I cannot sit by and ignore the gross injustices that have been inflicted on men and women who did what their Nation and their conscious called upon them to do. I walked away twenty years ago to heal, but I watched as more and more people in this country only wanted what was in it for them.

While I view the actions of Congress as the final appellate authority for these past matters, I submit that they have rightfully left it to the Board to determine the action to be taken with regard to the cases that were erroneously dismissed. I hold that absent such a decision from the Board, the Board will once again demonstrate disdain for the practices that it claims to represent, injustices will forever stain the MSPB, and justice for all will continue to be a myth within the halls of every MSPB office. My integrity is intact, and as it appears that I am the last to speak on behalf of these patriots, I am honored merely to have been able to make the effort on behalf of complete strangers while others have used them to recover billions of dollars and then cast them aside. Expending the effort on their behalf in defense of our freedoms and in the pursuit of justice is part of what makes me proud to be an American.

Justice is at the very core of our society and for many throughout the world, the American system of justice is the most envied. I submit that our system of justice as it is applied to our corps of federal employees must not bear the blemish of erroneous decisions for one moment. I offer my comments so that the best to get even better, as do all most all of the *amicus* submitters. How say you?

3. Is It an Ordinary Statute or a Clarifying Statute

Public Law 112-199 is clearly defined as:

> *An Act*
> *To amend chapter 23 of title 5, United States Code, to **clarify** the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, **and for other purposes**.*
> [Emphasis Added]

I see commas separating the phrases without a colon or semi-colon in the lot. *Landgraf* aside, this is clearly a clarifying statute and is retroactively applicable in all of its parts except those provisions that are identified otherwise. This introduction is repeated in the titles of Section 101 and 111;

> ***SEC. 101. CLARIFICATION OF DISCLOSURES COVERED.***
> *(a) IN GENERAL.—Section 2302(b)(8) of title 5, United States Code, is amended—*
> *(1) in subparagraph (A)(i), by striking "a violation" and inserting "any violation"; and*
> *(2) in subparagraph (B)(i), by striking "a violation" and inserting "any violation (other than a violation of this section)".*
> *(b) PROHIBITED PERSONNEL PRACTICES UNDER SECTION 2302(b)(9).—*
> *(1) TECHNICAL AND CONFORMING AMENDMENTS.—Title 5, United States Code, is amended—*
> *(A) in subsections (a)(3), (b)(4)(A), and (b)(4)(B)(i) of section 1214 and in subsections (a), (e)(1), and (i) of section 1221, by inserting "or section 2302(b)(9) (A)(i), (B), (C), or (D)" after "section 2302(b)(8)" each place it appears; and*
> *(B) in section 2302(a)(2)(C)(i), by inserting "or section 2302(b)(9) (A)(i), (B), (C), or (D)" after "(b)(8)".*
> *(2) OTHER REFERENCES.—(A) Title 5, United States Code, is amended in subsection (b)(4)(B)(i) of section 1214 and in subsection (e)(1) of section 1221 by inserting "or protected activity" after "disclosure" each place it appears.*
> *(B) Section 2302(b)(9) of title 5, United States Code, is amended—*
> *(i) by striking subparagraph (A) and inserting the following:*
>
> *"(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—*
> *"(i) with regard to remedying a violation of paragraph (8); or*
> *"(ii) other than with regard to remedying a violation of paragraph (8);"; and*
> *(ii) in subparagraph (B), by inserting "(i) or (ii)" after "subparagraph (A)".*
> *(C) Section 2302 of title 5, United States Code, is amended by adding at the end the following:*
> *"(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—*

"(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

"(B) the disclosure revealed information that had been previously disclosed;

"(C) of the employee's or applicant's motive for making the disclosure;

"(D) the disclosure was not made in writing;

"(E) the disclosure was made while the employee was off duty; or

"(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

"(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, 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.".

[Emphasis Added]

SEC. 111. CLARIFICATION OF WHISTLEBLOWER RIGHTS FOR CRITICAL INFRASTRUCTURE INFORMATION.

Section 214(c) of the Homeland Security Act of 2002 (6 U.S.C. 133(c)) is amended by adding at the end the following: "For purposes of this section a permissible use of independently obtained information includes the disclosure of such information under section 2302(b)(8) of title 5, United States Code.".

[Emphasis Added]

Although Section 115 is not similarly identified with the use of the word "clarification", it retains the distinction of being a clarification by use of the same text as used in the introduction of the Act, "*non-disclosure policies, forms, and agreements*";

SEC. 115. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.

The text of the other sections are less specifically identified as being clarifications, but the mere failure to further preface the specific sections with the use of the word "Clarification" does not automatically remove the retroactive application of some or all of the other sections.

Having been identified as clarifying; as clarifications these sections of the WPEA are sufficiently identified to stand the test of the prior court decisions and no further text is required to further delineate a time for enactment. Statutes that are clarifying in nature

have retroactive application without any additional specificity and become enacted upon the President's signature.

Here is an excerpt from *amicus* GAP et al also addressing the issue of a clarification:

> *Applying a clarifying statute to pending cases is not retroactive application of the law. As the D.C. Circuit explained in Baptist Memorial-Golden Triangle v. Sebelius 566 F.3d 226, 229 (D.C. Cir. 2009),*
>
> *A change in statutory language need not ipso facto constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear....An amendment containing new language may be intended to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. (internal quotation marks and citations omitted)*
>
> *See also Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. Va. 2004); Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. Fla. 1999); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir.1992); Boddie v. American Broadcasting Cos., 881 F.2d 267, 269 (6th Cir.1989).*
> [GAP at 6]

I submit that the effort within the MSPB to find fault with the statute as written, is indicative of a classic case of denial and a search to find some slight thread of support where none exists. Why else would the jurists not start with the words "To clarify" and have encouraged discussion in this direction?

This remark included in *amicus* NWC's brief supports the contention that the government, through actions of another Agency, has confirmed and upheld that a clarification is to be retroactively applied to pending cases.

> *"Most recently, the U.S. Department of Labor's Administrative Review Board, a federal agency similar to the MSPB that has administrative-appellate jurisdiction over a number of other federal whistleblower laws, concluded that a "clarifying" amendment contained in the Dodd-Frank Act served to "correct a misinterpretation" of prior law, and thus applied to "pending cases. Gladitsch v. Neo@Ogilvy, 2012 WL 1003513 (S.D.N.Y.), citing to Johnson v. Siemens Building Technologies, ARB Case No. 08-032, ALJ Case No. 2005-SOX-15 (Dept. of Labor ARB Mar. 31, 2011)."*
> [NWC at 4]

Twenty years ago my life as I knew it was destroyed, my career was vanquished, my house in foreclosure, all of my belongings sold at yard sales, and financially unable to afford to buy my daughter the sports jacket to display her lacrosse letter. I will admit that I would welcome the opportunity to point the mob at the eastern end of Pennsylvania Avenue in the direction of the MSPB office. At least I've had time to mellow out enough just to point and have gained the wisdom to not leap in front of a raging mob.

I understand that referring to Members of Congress as an angry mob may seem to be disrespectful, but I think that questioning their ability to produce a clarifying statute in accordance with what the Board requires to help them parse the text of the WPEA is more disrespectful. If I were to apply the approach taken by MSPB, I would have to refer to the men and women of Congress as well educated, incompetent, public servants who are in need of training on how to write legislation. On the other hand, it is my point of view that they have intentionally and expertly created a clarifying statute that met all of the contours of the Hill's political realities, and now it is being needlessly picked apart by MSPB.

I prefer to confer on the Members of Congress the highest level of respect for having created the opportunity to redress erroneous decisions, move forward based on what is plainly visible in the WPEA and what has been there for decades; not for what is hidden within the volumes on law library shelves. If the Board places its focus on what is plainly written, you cannot lose, and will have no reason to fear the law makers for several more decades. Decide otherwise, and I submit you cannot win anything.

4. The TSA Provisions Are Deliberately Narrowed From the Remainder of the WPEA

Of course Congress had good reason to make the TSA provisions effective immediately. These people are at the front lines of the defense of our skies to prevent another 9/11. Congress and the entire travelling public wants to know immediately if there are any violations of rule, regulation or law that could threaten the safety of air travel. It used to be that all you would have to do is pick up the paper and read the headlines to see what happens when TSA makes even the slightest change in a rule; let people carry

knives on a plane and stand back. Because things do change, even if it is painfully slowly, it is more likely that your decisions will be tweeted before the newspaper reaches the newsstand.

Congress recognized the implications of accelerating the whistleblower protection coverage for these federal employees – and – recognized that making the coverage was conveying new rights to a class of federal employees. The also knew that this would not be appropriate within a clarifying stature. Therefore, they specifically made their coverage immediate, and allowed the thirty days for the law to become effective to allow for the normal administrative actions that follow with the passage of most legislation.

Personally I prefer driving because I can pick the restaurant and I've found hotel beds to be far more comfortable than an airplane seat; but there are those destinations were air travel is a reasonable alternative. There are some 50,000 TSA employees and I will not dare to suggest that they should not have been covered even one day later than immediately. You are welcome to decide differently, but I will cautiously remind you that most Members of Congress travel by air and as far as I know they still have preferential parking at Reagan National.

5. Compensatory Damages Are Retroactively Applicable

I became aware of the issue with consequential damages and compensatory damages because of the brief submitted by *amicus* WhistleWatch. I realized that the issue could have a direct impact on any relief that might be granted if I prevail in my case. The merits of my case are focused on my allegations that my management retaliated against me by re-writing my position description. The emphasis is on the act of retaliation, not the issues pertaining to the re-classification which would have followed a different route of appeal. That route, to appeal the classification of my position is very much an active issue and will be pursued separately from the current case and on its own merits. Nevertheless, prior to the WPEA it was my understanding that there was nothing recoverable as wages other than what would have been my wages from the date of actual promotion forward if that were to happen. However, under the potential application of the WPEA to my case, I may be entitled to the award of lost wages as compensatory damages. It will not bust the

federal budget by any means, and would scarcely be enough to keep up with my wife's desires to travel or my son's efforts to be an entrepreneur.

With this awareness, I began to look more carefully at the issues raised by amicus WhistleWatch. As I checked one cite and then another and viewed them on a timeline, I realized that there were different descriptions of what was being awarded or not awarded and it flip-flopped back and forth. I then compared the timeline of for the inclusion of damages in any of the whistleblower protection legislation and discovered the history of damages dating back to the CSRA. This is when it dawned on me that the inclusion of "compensatory" damages is not something new, but is required as a clarification of what was intended by Congress years ago. I will stress that this is my independent determination based on the comments presented in the various amicus briefs, and not some guidance from anyone else. This response and the arguments in the amicus briefs is adequate for the Board to determine that the matter of compensatory damages is a clarifying provision of the WPEA and is not a "new" benefit of damages to be awarded.

I am aware that some may view the inclusion of "compensatory damages" in the WPEA as a provision conferring something new. I disagree. Instead, I offer the supposition that the approach taken by MSPB and others to evaluate the retroactive application of the WPEA was erroneous from its beginning. This issue is so indicative of how MSPB arrives at erroneous conclusions that I am asserting my view here – that the inclusion of compensatory damages is a clarification of Congressional intent because it clarifies its original intent to be consistent with the Courts changing definitions of what is, or was, previously defined as "consequential damages" and/or "compensatory damages". My comments are prefaced by the following as provided by *amicus* OSC:

> *"The* ***differences between imposing liabilities on the government and imposing liabilities on individuals*** *was discussed in Lyons v. United States, 99 Fed. Cl. 552, 556-60 (Fed. Cl. 2011). In Lyons, the Court of Federal Claims stated that Supreme Court precedent on retroactivity focused on private parties and, therefore, was inapposite as to Congressional changes to government liability. Id. at 556 (comparing Landgraf v. USI film Prods., 511 U.S. 244, 271 n.25 (1994), with Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004). The Lyons Court applied the three-factor test established by the Federal Circuit in Princess Cruises v. United States, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005), to determine whether the Justice for All Act had retroactive effect. Id. at 558. First, the court held that*

> *the increase in the government's liability did not impose any new duties or create new prohibitions since the government had accepted liability before and after the enactment of the statute. Id. Second, the court held that government officials would not have refrained from committing violations if they had been aware of the impending changes in the statute. Id. at 559. Third, the court stated that the third factor focused on individual rights, and because the government bore the burden, no burden on individual rights was implicated. Id."*
> [Emphasis added, OSC at footnote on 18]

Simply put, the Courts have acknowledged a difference between the application of damages upon the government and on an individual. Continuing with remarks made by *amicus* OSC;

> *"As we noted earlier**, the government is not a private employer and its interests cannot be equated with the interests of the nations' employers** in Landgraf. The government's primary interest here, as expressed in the WPA and the WPEA, is to create a work environment that makes it safe for employees to blow the whistle, even in the course of their duties and even to the wrongdoer. In order to further this important interest, Congress determined over three decades ago that the government will protect whistleblowers and make them whole if officials, acting beyond the limits of their legal authority, cause them harm because of whistleblowing activity. If this remedial process causes minor disturbances to personnel management, they are more than offset by savings to the taxpayers from increased government efficiency and accountability through an effective whistleblower protection program."*
> [Emphasis added, OSC at 18]

Another quote from *amicus* OSC;

> *"Thus, the issue of retroactivity cannot he viewed solely through the lens that the Court employed in Landgraf Instead, the Board should look to the Court's decision in Ziffrin to determine which law to apply. The Board is not merely adjudicating a past dispute between the appellant and his employer. Although the personnel actions at issue have already occurred, **the government's final administrative determination of whether those actions should stand has yet to occur.** The final resolution of these actions must await the Board's final administrative decision, and that certainly will occur after the effective date of the WPEA."*
> [Emphasis added, OSC at 13]

Comments from *amicus* NELA also contributes to my response;

> *However, even if Congressional intent is ambiguous, a law may still have retroactive application **if, as in this case, it merely clarifies an existing law** and does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. (quoting Landgraf, 511 U.S. at 280).*
> [Emphasis added, NELA at 6-7]

This issue is also significantly affected by whether the Board interprets the WPEA as a clarifying statute or as an ordinary stature requiring specific text to identify those portions that are retroactively applicable. The issue is most directly addressed by the brief and comments received by *amicus* WhistleWatch pertaining to the *King v. Department of the Air Force*. Based on the information provided, it appears that the case is still pending in various aspects and that the Agency in this particular case has not fully complied with the decision of the AJ.

All compensatory damages which may have been awarded at the time of the AJ's decision must be viewed as continuing, compounding, and cumulative as the result of actions and/or inactions of the Department of the Air Force. After years of retaliatory practices as confirmed in the AJ decision, a person does not become cured of the affects from these retaliatory practices at the moment of an AJ's decision. Even after a victory, waiting for the next shoe to fall to see if the agency will comply with a Board Order, is no less damaging then it was the day before the decision. When an agency fails to comply with an Order, they have "continued" the issue of compensatory damages, they have "compounded" the compensatory damages with additional penalties that should be imposed by the AJ, and the damages incurred are "cumulative" with all damages incurred.

Additionally, the Board is an administrative, adjudicatory body. As such, under Supreme Court precedent, it should apply the law that exists when it issues its decision. In rendering such a decision on the legality of a personnel action, the Board acts in the present. It takes the final action on the propriety of a personnel action. In doing so, it must follow the law then existing, in this case, the WPEA.

> *"SUMMARY OF STATUS CONFERENCE*
> *On February 6, 2013, I held a telephonic conference with the appellant, her representative, and the agency's representative. During the conference, the following matters were discussed.*
> ***PENDING MATTERS** – I identified the two **proceedings** before the Board:(1) a motion for consequential damages, MSPB Docket No. DA-0752- 0604-P-1; and (2) a motion for attorney fees, MSPB Docket No. DA-0752-0604- A-1.1"*
> *[Emphasis added, WhistleWatch, Exhibit D, at 1]*

Since the proceedings have continued, the AJ's words, the Board has the authority to make a decision affirming or denying the request of commensurate damages, and because such a decision will be made after the effective date of the WPEA, the damages are appropriately before the Board. Obviously, the pending matters have not been identified to include compensatory damages, but I am contending that the intent of Congress has been to "broaden" the authority of the Board. Even the Federal Circuit has already noted that the WPEA has the intent to broaden the scope of the Board's authority.

> *"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 Whistleblower 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."*
>
> *"… 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."*
>
> [Emphasis added, Durr at 6]

I recognize that the scope addressed by the Federal Circuit is what is or is not a protected disclosure, but that is predicated on whether the Board adopts the view that the WPEA is a clarifying statute, which I assert it is. The significant fact to be taken from this quote is that the Federal Circuit has joined the chorus of parties supporting the overall broadening of the powers of the Board. One cannot overlook the fact that the Federal Circuit has also deferred to "MSPB regarding whether the WPEA should be applied retroactively."

It is understood that the AJ's decision in *King* was made prior to the effective date of the WPEA, but the key language in this matter is the attention to the "proceedings" as stated in the Senate Report for S.743:

> *"By contrast, retroactivity is suggested by comments in the Senate's version, which provides in relevant part:*
>
> *This section states the Act would take effect 30 days after the date of enactment. The Committee expects and intends that* ***the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date****. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers" rights.*
>
> *S. REP. NO. 112-155, at 52 (2012)…."*
>
> [WhistleWatch, Exhibit D, at 5]

Even amicus OSC has been able to parse the text of the Senate Report based on a plain reading of the text:

> *"In S. 743, Congress has met its burden. The WPEA's principal authors state clearly and unambiguously that the law applies to proceedings . . . pending on the Act's effective date]." S. Rep. No. 112-155, at 52 (2012). The Senate authors' complete statement reads as follows:*
>
> *The Committee expects and intends that the Act's provisions shall be applied in ()SC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights."*
> [OSC at 5]

I submit that proceedings, to include deliberations by the Board, is the appropriately broadened view of the intent of Congress, and the Board is rightfully encouraged to adopt and apply the broadening of its powers here and now. Therefore, the Board must recognize that it has the authority in the matter immediately before the Board to issue a

decision sweeping away past inequities and it must make a finding in the affirmative by awarding commensurate damages requested by the Appellant in the *King* case – and in all other pending cases.

There was no reference to "consequential" anything in the CSRA. It was not until the adoption of PL 103-424 on October 29, 1994, that a provision for "consequential" damages was added to the WPA:

> *"(a) IN GENERAL.--Section 1214 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:*
>
> *"(g) If the Board orders corrective action under this section, such corrective action may include--*
>
> *"(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and*
>
> *"(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and* ***foreseeable consequential damages****.".*
>
> [Emphasis added, PL 103-424]

However, the Courts were in the process of defining and/or redefining the definitions of "consequential" and "compensatory" damages. Two days after the enactment of PL 103-424, the Courts identified consequential damages as:

> *"... consequential damages arising from a shipowner's failure to provide maintenance and cure, including lost wages and pain and suffering, are generally recoverable. 54 F.3d at 1082-84."*
> [Deisler v. McCormack Aggregates Co 1994]

In 2001, MSPB and the Federal Circuit continued to define/redefine the application of consequential damages as addressed by amicus WhistleWatch;

> *"Instead of the common meaning of consequential damages, which includes pain and suffering and emotional distress, the court's applying the WPA referred to these damages as "compensatory damages" even though they are a consequence of the prohibited action. Bohac v Department of Agriculture, 239 F. 3d 1334 (Federal Circuit 2001), where the court strained to find a way to exclude emotional pain and suffering from the list of damages that were a consequence of the wrongful conduct."*
> [WhistleWatch at 18]

Still, in 2009, the Courts were inconsistent with what constituted either consequential damages or compensatory damages;

> *"In almost all other jurisdictions, pain and suffering damages are included within the general category and scope of "consequential" damages when they result from wrongful conduct. Delaware River & Bay Authority v Kopacz, 584 F 3d 622 (3rd Cir 2009)."* [WhistleWatch at 18-19]

Quoting from *Delaware River & Bay Authority v Kopacz, 584 F 3d 622 (3rd Cir 2009),*

> *"... citing our statement in Deisler v. McCormack Aggregates Co., that such relief is "merely an element of a plaintiff's complete compensation." 54 F.3d 1074, 1087 (3d Cir.1995)*
>
> *In Deisler, we held that consequential damages arising from a shipowner's failure to provide maintenance and cure, including lost wages and pain and suffering, are generally recoverable. 54 F.3d at 1082-84."*

Therefore, based on the information available to me, there is adequate case references to document that the Courts were inconsistent in their definitions and applications of damages such that Congress was obliged to clarify its intent with regard to what could be awarded as damages to a whistleblower. Furthermore, by its inclusion, Congress has also clearly given consideration to the cost of making such awards.

Although the matter of compensatory damages probably has not been addressed in any IRA action, it must be presumed that the AJ's have the ability to evaluate any claim for consequential and/or compensatory damages and make an award accordingly. Furthermore, since settlement is likely to be an issue in all pending cases, the Agencies may be more agreeable to finding resolution of these matters without further deliberations if the Board asserts that compensatory damages are retroactively applicable.

On its yet to be addressed merits, *Day v. Department of Homeland Security* seeks to address the issue of a rewritten position description as yet another creative method of inflicting retaliation on a whistleblower. If the Board finds that the WPEA is retroactively applicable to pending cases, then the damages incurred by the Appellant by the Agen-

cy's misclassification of the position could be construed to be compensatory damages. Therefore, the matter here to for addressed has a direct impact on the Appellant.

However, in order to circumvent another drummed up accusation by the Agency, the Appellant asserts that as a current federal employee, the Appellant is barred from representing any individual or organization in matters before a federal agency. In the matter of these arguments and specifically with regard to the comments presented herein, the Appellant asserts that he has no standing as a representative for the Appellant in *King v. Department of the Air Force*, but does represent the foregoing as an expression of his personal opinion.

I am aware that the *King* case has been certified for Interlocutory Appeal. Counsel for Ms. King and I concur that an expeditious decision from the Board as set forth herein to address the retroactive application of compensatory damages under the WPEA as intended by Congress through a clarifying statute to include the clarification of damages that may be awarded in all procedures pending and continuing before the Board because of the Board's and Court's changing definitions of damages, is most advantageous to all parties. Whether that decision is rendered in this case or in a subsequent appeal is left to the Board.

My comments strive to give the Board and all of MSPB a clean bill of health. I have many other personal projects more deserving of my attention than me standing on one of the corners of Pennsylvania Avenue pointing at the MSPB offices. More importantly, I have two grandchildren who may benefit from a Board that accepts the broadening of its powers and applies them to correct past wrongs. The point being, that whistleblowers are real human beings with limited resources who, in many cases, have suffered irreparable harm by risking all of their material wealth in an effort to serve this country. Even if all of the incurred damages were awarded in full to all whistleblowers, I suggest that the total amount would pale in comparison to the financial benefits gained through costs recovered by the federal government – an entity with vast financial wealth that

may at times be mistaken for an inanimate object. I anticipate a unanimous answer from the Board favoring the question. How say you?

6. Ensuring that Board Decisions are Ethically Applied

I find that this topic is the most difficult one for me to address because it is one which I must face from time-to-time in the performance of my duties as an acquisition professional. Regardless of the task, I must be mindful that it is not just what I do, or not do; but that I do not give even the appearance of doing something that I should not do. Therefore, I rise to address this topic because the issue has been appropriately raised that the decision was expedited so as to minimize harm to the Agency for egregious acts that were affirmed by the AJ.

The various *amici* briefs submitted in response to the Board's request make it abundantly clear that there was considerable dialogue pertaining to the retroactive application of the WPEA before it was approved by the Senate, before it was signed by the President, and before its effective date. The Appellant in the matter before the Board in this appeal is aware that discussions were held within MSPB with regard to which cases might be most appropriate to bring forward on Interlocutory Appeal to address the issue of retroactive application of *Huffman*. It is equally conceivable that discussions were held within MSPB to determine which cases to expedite to a decision so as to minimize the impact on the Agency.

The appearance is present and confirmed by historically erroneous decisions that elements within MSPB have acted in a manner to marginalize whistleblowers. It is the responsibility of the Board to ensure that any such bias is viewed as unacceptable and the best way to ensure the trust of the American public is to resolve this matter in favor of the whistleblower.

The relevant facts as I see them are that, "On September 28, 2012, the House adopted S. 743 by unanimous consent. S. 743, 112th Cong. (as passed by House, Sept. 28, 2012) [OSC at 6]. "A final decision was issued in the *King* case, in the Appellant's favor, thereby making her the pre-

vailing party, with a finding against her employer for prohibited personnel practices under 5 U.S.C. 2302. That decision was made by Administrative Judge (AJ) Marie A. Malouf on October 3, 2012." [WhistleWatch at 14]. When S. 743 returned to the Senate with the House amendment striking the intelligence community provision, the Senate passed for a second time S. 743 without dissent. S. 743, 112th Cong. (as passed by Senate, Nov. 13, 2012) [OSC at 6]. On November 20, 2012, Judge Weiss issued his order requiring me "to provide evidence and argument on the question of whether [my] July 1, 2010 communication to Mr. Palmer constitutes a protected disclosure under the criteria set forth by the Court in *Huffman*. The appellant may also address whether any subsequent ruling regarding the applicability of the recent amendment to the WPA should be certified for interlocutory appeal to the Board." [Day Jurisdiction Order at 4] followed by the President signing the Bill on November 27, 2012 (Martin, Exhibit A at 2). This was followed by the WPEA becoming effective on December 27, 2012 [OSC Brief at 21]. The Board published its Notice of Opportunity to File *Amicus* Briefs on February 8, 2013 and Judge Malouf issued her Summary of Status Conference letter on February 11, 2013 [WhistleWatch, Exhibit D at 1]. Judge Ansorge issued his decision on February 28, 2013 [Martin at 1].

There are similarities in the text of the various Orders issued by the different AJs to support a contention that there were communications within MSPB regarding the application of the Interlocutory Appeal before the Board. It is not an inconceivable reach to conclude that discussion regarding the disposition of cases also occurred within MSBP. Again, given the historical bias of MSPB against whistleblowers, all decisions made after September 28, 2012 (and perhaps earlier), are stigmatized in appearance by their timing with regard to the events leading to the enactment of the WPEA.

At the very least, an internal review is warranted with a certification from the Board that none of the decisions after September 28, 2012 were tainted by the application of a continuing bias. Although it is doubtful that all persons affected by these decisions will concur with such a certification, but I believe it will be received by most as an important indicator of the Board's intentions to correct any perception of impropriety.

My comments strive to restore public confidence, and in particular the confidence of all federal employees, in the belief that MSPB will actively reshape its reputation. I cannot see the Board, acting on behalf of all federal employees within MSPB, doing otherwise.

7. Has Congress Considered the Costs of Retroactive Application

As a Veteran myself who lost my two best friends from my adolescent years in Vietnam, and as a whistleblower who proudly stepped forward in an attempt to halt the retaliatory actions against another Veteran (Warren Wood), I must understate my annoyance that VA would be boastful about being the prevailing party against whistleblowers. As a Contract Price/Cost Analyst who has helped reduce the cost of acquisitions by hundreds of millions of dollars and who has contributed to the saving of billions more through my prior whistleblowing experience, if find the VA's presentation on cost to be, shall we say, short sighted and disingenuous.

Without any hesitation, I will assert that had there not been any retaliation against any of the whistleblowers at VA or at any other federal agencies, there would not be any cost. The only reason these cases have been brought forward is that there has been at least an allegation of retaliation. Although VA has not provided any supporting documentation for their estimated cost $8,000,000 as potential awards to all of the 60 or so cases allegedly affected by the Board's pending decisions [VA at 12], it can be accepted as true only because I have nothing as firm evidence that it is not true. However, given the Congressional Budget Office's (CBO) estimate of 450 whistleblower cases per year for all federal agencies [CBO at 3]; it would seem that the estimated number of cases affected by the pending Board's decisions are artificially inflated in an effort to support its argument. I submit that MSPB would have a more reliable estimate of this cost based on the number of cases directly affected by its decision and the requests for relief therein contained.

A cost estimate is based on the information available at the time of the estimate. CBO has based its estimate on the average settlements made to whistleblowers and other statistical information. Congress has considered this cost by virtue of the report's existence. Whether or not the CBO estimate is accurate is not indicative that Congress has failed to consider the impact of retroactive application.

By its submission of this information, we can assume that in all 60 of VA's pending cases the whistleblower has been subject to retaliation and all of their allegations are true. In this case, there are an unmeasured amount of dollars that are recoverable as the result of the actions of these individuals and -- **that** -- is the offsetting cost that Congress has seen as the benefit of making all of the provisions of the WPEA retroactive.

Adding to their estimate of VA costs, VA contends that the CBO's cost estimate of $24,000,000 – over five years – is an indication of a lack of retroactive intent:

> *Further proof of Congress' lack of retroactive intent can be found in the Congressional Budget Office's Report on cost estimates to be incurred under the WPEA. The Congressional Budget Office (CBO) prepared a Cost Estimate Report for the WPEA.[29] The CBO Report provides no analysis of any potential impact that would result from retroactive enforcement of the Act. As previously noted, Congress has in numerous instances expressly stated its intent to give a statute retroactive effect.*
> [VA at 10]

Two points to be considered, first the $24 million dollars is spread over a six year period (2012-2017) or about $3 million dollars per year. Then, of the $24 million dollars; $4 million is the cost for GAO to prepare two reports and to provide funding to federal agencies for their whistleblower training and nondisclosure policies. Even if we add all of the VA's estimated cost as though it were paid in a single year to the CBO estimate for a single year, the total would still pale in comparison to the $90 to $180 million in recoverable costs if the allegations in *Day v. Homeland Security* are sustained.

The real significance of the benefits that Congress has considered come from a quick analysis of the Department of Justice's, Civil Division, Fraud Statistics Overview, *at* *http://www.taf.org/FCA-stats-DoJ-2008.pdf* showing $21,605,658,699 recovered by settlement or judgment in Qui Tam and non-Qui Tam cases since 1987 [WhistleWatch at 10]. That would be 2,700.7 ($21,605,658,699/$8,000,000 = 2,700.7) times the VA's estimated cost for awards in all of their pending cases. Even adjusted for a yearly equivalent, the amount recovered is still 128.6 (((($21,605,658,699/21)/$8,000,000) = 128.6) times greater than the VA cost. While I do not have any direct knowledge of the amounts recovered by the whistleblowers that brought their

cases to MSPB, I doubt that many of them resulted in Qui Tam proceedings where the whistle-blower may have received a share of the recovered amount.

I believe it is an essential matter to draw attention to the DoJ report that from year 2000 and thereafter there is a significant decline in the number of cases. Since *Huffman* was decided by the Board on December 14, 1999, I would submit that there is a significant basis to correlate the decline in whistleblower activity to *Huffman*. If true, then for the period between 2000 and 2008, there might have been an additional $12 billion dollars or more in recovered amounts. Since 2008, I believe the recovered amounts are even higher particularly in the amounts recovered by the IRS http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html?_r=0.

My impression is that the recoverable amount in many of the MSPB cases are too small to justify the expense or time associated with the filing, investigating, and prosecuting the matters – if the whistleblower even knows how to proceed with a Qui Tam case. There is another unknown factor to be considered and that is the number of times a whistleblower has reported an infraction to a supervisor or other person within their normal channels of communications and the matter has been corrected without any retaliation against the whistleblower. If we assume that most supervisors at any level of the management chain do act in accordance with their management responsibilities, then the recovered costs could be many times greater than those reported by the Department of Justice.

I mentioned in the Statement of the Issues that it is reasonable to conclude that Congress is fully aware of the cost and the benefits to be derived from whistleblowers. It bears repeating. As the keepers of the Nation's financial purse strings and in a time of particularly limited financial resources tossed repeatedly back-and-forth across the aisles and from Chamber to Chamber, is it reasonable to believe that Congress has not thought through the cost and benefits of reaching back in time to obtain disclosures of waste? I suspect that more than one or two Members of Congress are fully aware of the amounts recovered by the IRS and by the amounts potentially recoverable in other cases.

There is a cost that I do not readily see addressed adequately in these considerations. That is the cost born by those who see the acts of intimidation, discrimination, and retaliation being carried out on persons who may sit beside them. For each of them there is recognition that if they stepped forward to voice their intolerance of these practices that they too would become victims. Instead, they almost always retreat to the sidelines to contemplate their own integrity. I've seen it too many times, but I understand completely the dilemma they face. I've asked myself, if knowing what I know now, would I have made the same choice; my answer has always been that it has contributed to my character and I am satisfied with who I am. I have considered using subpoenas or other the legal resources to compel some of the potential witnesses to provide their testimony, but that would make be just as intimidating as any of the wrongdoers, and I have chosen not to follow their patterns of behavior.

My comments strive for the sigh of relieve that will be exhaled from thousands of federal employees who may breathe a little better knowing that their careers are not threatened by the performance of the tasks assigned. It is the choice of the Board to do likewise or to maintain a cloud of distrust for management over the entire federal workplace.

8 Does Protecting Whistleblower Equate to Adverse Actions Against the Retaliator

I will rebut the issues raised by *amicus* VA under this caption. In cases such as *King vs. Department of the Air Force*, it should be noted that it was the responsibility of the Agency's counsel to have more carefully evaluated the management practices and that should include as assessment of the advice provided by the Agency's Office of Human Resources. More than one supervisor has accepted the advice of their HR office without realizing that HR advice is just that, advice. It is the manager who accepts the advice and is then held accountable for any decision they may make to include inadvertently committing a prohibited personnel practice. In some cases, I would suggest that not only is the manager subject to prosecution, but the Human Resource Specialist should also face similar prosecution.

I understand that it is customary in the private sector for an attorney to defend their client until proven guilty. However, I find it to be a problem for Agency counsel to automatically assume that their role is to defend a manager who has committed violations of law and then has retaliated

against the whistleblower in response to those disclosures. Internal review processes within an Agency are nearly non-existent which leads the Agency to spend countless hours and tens of thousands of dollars to defend a person that never should have been defended in the first place. After all, even attorneys within the government are tasked to act in the best interest of the government, not in the interest of wrongdoers.

As for subjecting wrongdoers to the conditions of a "new" law, the WPEA does not bring new law to the table, merely a clarification of what should have been the case all along.

> *"The WPA assigned to the head of every agency the responsibility to prevent prohibited personnel practices and ensure their agency complies with applicable civil service laws, rules and regulations, including the very whistleblower protections at stake in this appeal. 5 U.S.C. § 2302(c)."*
> [OSC at 18].

Amicus Carson presents the subject as:

> *"5 U.S.C. § 2302(c) in defining prohibited personnel practices provides:*
>
> *The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.*
>
> *This language is mandatory as the head of each agency "shall" be responsible.'*
> [Carson at 6-7]

Amicus GAP brings another point to the table with its remarks concerning the Code of Ethics:

> *"... there can be no question that agency managers are aware of another law that "implements or directly concerns merit system principles" under 5 USC 2302(b)(11) -- the Code of Ethics for Government Service. PL 96-303, 94 Stat. 855 (July 3, 1980) and 5 CFR Part 2635. They have seen the Code's controlling guidance in its first principle every day, because it is required by law to be displayed in every government office: "I. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department." The point of enacting section 2302(b)(8) in 1978 was so that an employee can "fulfill those obligations without putting his or her job on the line."*[GAP at 14]

In the case of *Day*, I have asserted that senior management has shrunk away from meeting the application of 2302(c) so as to claim a plausible deniability or ignorance of any act of retaliation. It remains to be seen how this will be represented by the Agency or decided by the AJ when it gets to consideration of the merits. Continuing on the subject:

> *"Clearly this case presents a different set of equities from those facing the Court in Landgraf. First, the individuals responsible for the retaliation here will suffer no harm or penalty if an application of the WPEA to their conduct results in a finding of retaliation. In an IRA, only corrective remedies are available. 5 U.S.C. § 1221(g)."*
> [OSC at 19].

So, what this means is that at this stage of the proceedings, even if I, or any other whistleblower prevails, management personnel are not subject to any harm what-so-ever.

> *"If this were a disciplinary proceeding, considerations of fairness to the individual managers might carry more weight, but that is not at issue here. Second, assuming that the individual managers were aware that erroneous court decisions insulated their acts of retaliation from WPA remedies, they were nonetheless expected to know that retaliation against any subordinate because of disclosures of wrongdoing was still wrong."*
> [OSC at 19-20

It is more than just wrong; it is a violation of the law:

> *"Regardless of whether the courts erroneously excluded such activities from WPA protection, other civil service law and merit system principles regulate supervisory conduct. For example, all federal managers know that vindictive retaliation based on a subordinate employee's disclosure of wrongdoing, regardless of the circumstances, could not satisfy the efficiency of the service standard that governs their personnel decision-making authority.* ***5 U.S.C. § 7513.7*** *Additionally, managers are expected to know that they should act with high standards of integrity, conduct and concern for the public interest, and that they should strive to protect their employees from arbitrary action.* ***5 U.S.C. §§ 2301(b)(4), (b)(8)(A)****. Retaliation against a public servant for exposing waste, fraud, abuse or corruption is an arbitrary use of authority and can never serve the interests of the public or advance the efficiency of the service.*
>
> *Thus, it cannot be said that a "retroactive" application of the WPEA to the personnel actions in this appeal would alter the legitimate expectations of managers who might assert that they relied on those decisions to retaliate. Even though the Federal Circuit majority weakened whistleblower protections such that the WPA was construed not to restrict certain retaliatory conduct, funda-*

> *mental rules and policies governing the exercise of supervisory authority restrained federal supervisors from using their authority to punish whistleblowers for reporting wrongdoing in the course of duty or to the wrongdoer. The WPEA did not "sweep away settled expectations suddenly," Landgraf, 511 U.S. at 266, nor did it "attach new legal consequences" to otherwise legal actions, Id. at 269. The WPEA did nothing to unsettle the settled expectations of federal supervisors; it merely reinforced the expectation that supervisors exercise their discretionary authority in compliance with existing civil service law and merit system principles.8 See Watkins v. United States Postal Serv., 85 M.S.P.R. 141, 144 (2000) (applying final rule retroactively to prevent certain disadvantaging employee if interim rule applied; finding final rule did materially alter duties, liabilities or rights of employer).”*
> [OSC at 20]

If I were in the position to issue a verdict and penalty on anyone who is found to have committed an act of retaliation or who has failed to exercise their duties to prevent such acts, I would not hesitate to remove each and every one of them from federal service. Not only have they brought harm to an individual whistleblower, they have discredited every federal employee and the government as a whole in the eyes of the public. For these acts there must be a firm policy of zero tolerance and each should be placed in the well to defend themselves in much the same way that they have robo-signed the terminations papers for their subordinates.

That is not the end of the story, because in each of the incidents of whistleblowing that directly affected me, I have seen individuals who I highly respected get caught up in the aftermath. I have seen the careers of some who had much more to give in service to the country, unceremoniously retired or terminated from federal service. This is an opportunity cost that is not measured in any agency statistics, but an unmistakable cost to this Nation.

As a veteran, I have seen the cost of war. While I did not serve in combat, most of my classmates from Officer Candidate School (OCS) class of 46-67 did. All of us understood that if called upon to serve in Vietnam is was our responsibility to do so. Edsall A. Frick was among those that went, served, and was killed in action. He and others are rightfully honored as they lie in this country’s National Cemeteries having paid the ultimate price. I submit that those who have stepped forward to risk the life they once knew to report one infraction or another, only to suffer the acts of retaliation from their leaders, have served on a similar battlefield and their courage is has been just shy of those who not hesitated to leap on top of a live grenade.

My comments strive to recognize the bravery of every whistleblower while recognizing that everyone who claims to be one is not. Is the Board brave enough to do the same?

9. Can or Should All Pending Cases Be Re-filed?

I have considered whether this option may be open to me and to any of the other pending Appellants. The text in Section 101 reads as follows:

> "(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—
> "(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
> "(B) **the disclosure revealed information that had been previously disclosed**;
> "(C) of the employee's or applicant's motive for making the disclosure;
> "(D) the disclosure was not made in writing;
> "(E) the disclosure was made while the employee was off duty; or
> **"(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.**

It may be concluded that anyone could make the same disclosure that was previously made by one of the Appellant's in a pending case. It would not matter how much time has passed since the occurrence of the previously disclosed event (allowing for the retroactive application of the WPEA), -- or – for that matter who makes the new disclosure.

Since the WPEA is now effective, the issues of retroactive application to new cases should not be an issue. Therefore, having no knowledge of any prohibition against re-filing, it would seem that dismissing pending cases without prejudice (it seems to have happened in all but my case) and then re-filing immediately (or at some future point) under the WPEA would garnish the full benefits of the WPEA immediately. Would the Board prefer to have all cases refilled, or would it prefer to adjudicate them as currently filed with retro-active application of the WPEA?

10. Should All Pending IRA Cases Be Returned to OSC for Further Review?

When I received the phone call informing me that the Office of Special Counsel was going to submit an *amicus* brief in my case, I was stunned. Frankly, I am more than stunned by the turn of events in this case. After twenty some years of misfortune with every attempt to get OSC to do their job (as I see if of course) they had moved right to the front of the line. It had to be a prank call.

When this dream turned into reality, it was with indescribable emotion that I read page by page and was overwhelmed by the quality of their work under the leadership of Ms. Lerner. Here then was the solid evidence that OSC is dormant no more and their reputation is on-track to turn the tide to eradicate the days of retaliation without consequences. The quality of that work is not diminished by the following:

> *"On the eve of the WPEA's effective date, OSC confronted the same issue presented in this appeal: whether to apply overruled court decisions to pending OSC complaints, If expediency were the sole criterion, there is no question that applying Willis and Huffman would help OSC to close complaints more quickly. Prior to the WPEA, OSC as it was required to do — applied Willis and Huffman and the other overturned court decisions to close potentially valid whistleblower claims."*
> [OSC at 21]

If we are going to turn the page on a dark past, then consideration ought to be given as to whether any or all of the pending cases might be better served if they were reviewed by OSC under current law. I suspect that this might result in better prepared cases and/or situations where other solutions other than litigation might be available.

In this matter my comments strive for what is best for everyone concerned and I defer to whatever decision is made by the Board working with OSC to determine the best course of action.

11. Addressing the Retroactive Application of Section 101 (f)(1)

For this matter, I would like to first acknowledge that the names Passman and Kaplan are recognizable names in Washington even if one has never had any direct contact with their firm. Meaning no disrespect to the other signers on the brief submitted by the National Employment Lawyers Association, I acknowledge and appreciate the effort that all of you have put into your brief and incorporate it by the quotes as herein contained.

> *"Congress made clear that it intended the Whistleblower Protection and Enhancement Act of 2012 ("WPEA") to apply to pending cases and, as the WPEA does not make any substantive changes to the standards for protected disclosures, but rather clarifies what the law has always been and overturns1 decisions that did not correctly interpret it, retroactive application is appropriate. When determining whether a disclosure made prior to the enactment of the WPEA is protected by 5 U.S.C. § 2302(b)(8), the Board must therefore apply the standards set forth in Section 101 of the WPEA, and must not apply the er-*

> *roneous standard established by the Federal Circuit in Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352 (Fed. Cir. 2001), or any of the other decisions that the WPEA overturned."*
> [NELA at 2]

Section 101 addresses all of the disclosure issues brought to the Board's attention. The following is what the WPEA has to say about reporting to a wrongdoer:

> *"(f)(1) A disclosure shall not be excluded from subsection (b)(8) because— the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);"*

As a reminder, Section 101 is entitled as, "SEC. 101. CLARIFICATION OF DISCLOSURES COVERED." Once the Board is able to parse the WPEA in its entirety and comes to the conclusion as I have -- that the WPEA is a clarifying statute – it will no doubt conclude that the title of Section 101 explicitly reasserts the intent of Congress that this is a clarifying provision within a clarifying statute and must rule that my disclosure to Mr. Palmer was and is in full compliance with the intent of the WPEA. As to whether the Agency could or should be permitted to rescind its assertion that Mr. Palmer was a wrongdoer by virtue of his position as Chief of the Office of Contract Operations thereby indicting the entire U.S. Coast Guard chain of command, I respectfully would object; but would certainly afford him and the rest of the chain of command an opportunity to defend themselves for actions they took or failed to take before a newly empowered MSPB.

12. Addressing the Retroactive Application of Section 101 (f)(2)

To resolve MSPB concerns regarding the differences between the House Report, the Senate Report and the WPEA, I will incorporate the following:

> *"First, immediately before the House considered S. 743, Congressman Todd Platts, one of the principal sponsors of whistleblower reform in that chamber, told his colleagues from the floor of the House that the new law they were about to pass would apply to "pending" Board cases. In fact, he read verbatim the Senate Report's statement of intent into the record. 158 Cong. Rec. E1664 (2012). Second, although the House struck the section of S, 743 entitled, "Intelligence Community Whistleblower Protections," from the bill, it left untouched the portions of Title 1 of S. 743 that concerned protected disclosures by federal employees. S. 743, 112th Cong. § 1 (as passed by House, Sept. 28, 2012)."*
> [OSC at 6]

Given the title of Section 101 in the WPEA, the comments contained in the Senate Report, and this reference to floor debate in the House, and previously presented comments; the question of the retroactive application to pending cases affected in any way by the content of Section 101, must be affirmatively concluded and the Board must recognize this to be so.

Specifically what is relevant to the comments under this topic are the following extractions:

> *"Accordingly, to the extent the appellant's July 1, 2010 communication with Mr. Palm constitutes a disclosure made as part of his normal duties, through normal channels, and to an alleged wrongdoer, it is not protected under the WPA."*
> [AJ at 3]
>
> *"Under the erroneous interpretation of Huffman, all that is at stake here is the application of specific provisions of the WPEA that expressly overrule Huffman's erroneous interpretation of what constitutes protected whistleblowing."*
> [OSC at 3]
>
> *"Congress explicitly stated that the WPEA would apply to all "pending" Board cases. In finding ambiguity, where none existed, the AJ mistakenly relied on a statement casting doubt on the retroactivity of a wholly different statute from the WPEA, indeed, a statute Congress never enacted."*
> [OSC at 3]
>
> *"CONGRESS MADE ITS INTENT CLEAR THAT THE WPEA APPLIES TO ALL PENDING CASES … Rather than engage in speculation in order to construct ambiguity where none exists, the Board should follow the straightforward directions Congress provides and allow this appeal."*
> [OSC 5-10].

The Appellant agrees with the arguments presented by *amicus* OSC with regard to the erroneous conclusion by AJ's that Congress failed to adequately clarify its intentions with regard to retroactive application of the WPEA.

However, with regard to the disclosures that are retroactively covered by the Act, the principle issue in *Day v. Department of Homeland Security*, the arguments supporting the Act as a clarifying statute are even more compelling. Therefore, the Appellant supports his comments favoring retroactive application of the WPEA by incorporating the arguments of various *amici* with these notable extracts;

"Congress did not create new rights and liabilities in the WPEA when it overruled the flawed decisions of the Federal Circuit. Rather, Congress, as it explicitly states, clarified existing law by restoring earlier protections granted by the WPA that were eliminated by erroneous court decisions. When Congress acts to clarify existing law, retroactivity is not at issue. See, Republic of Iraq v. Beaty, 556 U.S. 848, 864 (2009); *Brown v. Thompson,* 374 F.3d 253 (4th Cir. 2004); *Piamba Cortes v. Am. Airlines, Inc., 177* F.3d 1272, 1283 (1lth Cir. 1999).

"The courts "have long recognized that clarifying language is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of enactment." ABKCO Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000). In determining whether an amendment clarifies or changes an existing law, a court looks to several factors, including statements of intent made by the legislature that enacted the amendment. See, e.g., Piamba Comes, 177 F.3d at 1284 ("[C]ourts may rely upon a declaration by the enacting body' that its intent is to clarify [a] prior enactment."); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992) (using the "legislature's expression of what it understood itself to he doing" to determine whether an amendment is a clarification)."
[OSC at 10]

"... Furthermore, as the WPEA is clearly a remedial statute, it should be liberally construed to achieve its ends. If a retroactive interpretation "will promote the ends of justice," the Court has stated, the statute should "receive such construction." Landgraf 511 U.S. at 264 n.16 (citing Karl N. Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules of Canons About How Statutes are to be Construed, 3 Vand. L. Rev. 395, 402 (1950))."
[OSC at 11]

"... Clearly, the court in Caddell confronted a provision that conferred new rights on federal whistleblowers. In contrast, this case concerns only the restoration of whistleblower rights that were erroneously denied by the court. While the 1994 Amendments created new rights where none existed, the WPEA merely clarifies that rights created under the WPA, once denied by court decision, must be respected again. Therefore, the AJ's reliance on Caddell to deny appellant his IRA is misplaced…."
[OSC at 12]

"... Thus, the issue of retroactivity cannot he viewed solely through the lens that the Court employed in Landgraf Instead, the Board should look to the Court's decision in Ziffrin to determine which law to apply. The Board is not merely adjudicating a past dispute between the appellant and his employer. Although the personnel actions at issue have already occurred, the government's final administrative determination of whether those actions should stand has yet to occur. The final resolution of these actions must await the

Board's final administrative decision, and that certainly will occur after the effective date of the WPEA."
[OSC at 13]

"Denying the appellant the benefit of Congress's restorative law would therefore undermine, rather than promote, the very governmental interest that Congress advances in the WPEA. That interest is so fundamental to good government that it easily outweighs competing interests, e.g., potential administrative costs, or liability for back pay or attorneys' fees. The WPEA is intended to strengthen the protections for whistleblowers -so that they can more effectively help root out waste, fraud, and abuse in the federal government." S. Rep, No. 112- 155, at 1 (2012). Acknowledging appellant's IRA right here would only further that legislative purpose."
[OSC at 19

*"The AJ also read the Senate committee report language—"proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date"—and believed it to be "difficult to parse." Day, * 9. However, a plain reading of the phrase shows that the Senate intended the WPEA to apply to proceedings initiated by pro se or represented whistleblowers, which were filed and continuing before the WPEA's effective date or filed after but borne of preWPEA conduct. Indeed, the context of that phrase was sufficiently clear to signal to the AJ that it was "designed to apply the Act retroactively to pending cases involving conduct occurring prior to its effective date." Id. at *9-10."*
MSPB Watch at 4

Without doubt, the AJ was incorrect in a number of his conclusions pertaining to whether or not the provisions of Section 101 of the WPEA were subject to retroactive application in accordance with a clarifying statute, and with regard to clarifying provisions within that statute.

There is another aspect of the provision that should also be address, whether or not, by the preponderance of the evidence available to the AJ that I provided as evidence and argument, was sufficient to demonstrate that my actions were not my "normal" duties. In reaching his conclusion, the AJ relied on my position description and on my own description of events which was and remains a true representation of fact. Absent in this conclusion is any indication that the AJ gave consideration to what is "normal" and simply determined that because a person "can" do something that it must be "normal".

However, my representation of the facts was attributable to Mr. Palmer's assertion that I had violated conditions of a Source Selection as first stated in his decision on July 7, 2011, in response to my grievance filed with regarding my 2011 EARS final rating. This document was provided to the AJ electronically at the time my case was file with MSPB as TFD CG 2011-07-07-0000 TFD GRI EARS 2011 Step-1 Decision.pdf. In this document, Mr. Palmer states the following:

> *The balance of your narrative explains various items such as another employee's reassignment, your history with a previous MPA acquisition, and* ***your curious discussion of another cost analyst's evaluation of the most recent*** *MPA proposals despite the fact that you were not a member of the source selection organization.* ***This potential violation of source selection procedures and the Procurement Integrity Act is beyond the scope of this grievance.***
> [EARS Grievance Decision at 5r]

This description of the events is critical to these comments and demonstrates that in July of 2011, Mr. Palmer had insinuated that my discussion with Mr. Wood was anything but "normal". Furthermore, well after the retaliation had commenced against me and Mr. Wood, Mr. Palmer's intimidating statement accusing me of a "potential violation" is indicative of the Coast Guard's culture of intimidation, discrimination, and retaliation.

During verbal discussions with the parties, the AJ was told by counsel for the Agency that my disclosure to Mr. Palmer on July 1, 2010 was the release of "classified" information. When I rebutted this accusation as absurd because there was no classified information involved, the Agency represented that Mr. Palmer had indicated that the information constituted the release of source selection information and she cited the FAR. Unfortunately I was unable to catch the specific reference, if there was one offered. The discussion went to the issue of a disclosure prohibited by law, but again without any specifics as to what law might have been violated. [Day response to AJ's Order, 11/29/2012 at 18].

In the Agency's Response to the Board Order of November 20, 2012, on November 26, 2012, the Agency states as follows:

> *"All of the above suggests that Appellant's communication to Mr. Palmer of the unallowable costs on July 1, 2010 was "****reporting in connection with assigned normal duties****", which is not a protected disclosure covered by the WPA. Huffman, 263 F.3d at 1352."*[Emphasis added, Agency at 6]

If wrongdoers are permitted to change their version of events at will, then I submit that we should set every convicted criminal free the moment they change their story. If it genuinely a Judge's second most difficult task to discern when a party is not telling the truth, then this should be an easily determined conclusion. In this matter, the Agency cannot be permitted to alter its position at will simply to bolster its defense and I believe that sanctions are appropriate.

I submit that the AJ knew, or should have known, by the preponderance of the evidence and verbal discussions before him that I had not acted in what could be perceived as my "normal" duties. While I cannot perceive a decision from the Board that will not accept the WPEA as a clarifying statute, and/or that the provisions directly attributable to Section 101 are not also clarifying and therefore retroactive to all pending cases, I must ask the Board to reverse the decision of the AJ and remand this case back to the AJ to be heard on its merits.

CONCLUSION

I am of the opinion that if you wanted a purely legalistic view of these matters that you could have selected any other cases where the whistleblower was represented by any well-known attorney. I am not sure that what you have received from me is quite what you expected, but I have responded with sincere desire to have you find in the affirmative for all of the issues presented. I have tempered my anger at the injustices that I have seen, and modified my humor to bring a smile into an arena of adversarial conflict.

I considered the consequences of getting all that I have asked, for getting nothing of what I have asked, and getting something in between. I am firmly in disagreement with some who believe that a strategy of winning issues piece-by-piece in cases presented to MSPB or through legislative bill after bill is the way forward. That strategy yielded very little for the whistleblower over the years and it has failed to maximize the benefits that could have been derived for the Nation. The WPEA has been a very long time coming, far too long, but it presents the opportunity to do much more than simply deciding whether or not it has retroactive application to *Huffman* and only to pending cases. I am certainly aware that the Board may be more intent on holding on to the past and could render and adverse decision with regard to the awarding of compensatory damages in any pending case.

It is my position that we, the Board and all of us concerned and affected by the outcome of the Board's decision, must take this opportunity to do everything possible to create the very best way forward. When in the future will the Board have the opportunity to correct the wrongs inflicted on whistleblowers because their cases were dismissed because of an erroneous decision? Never. When in the future will you have the opportunity to adopt the view that the WPEA is a clarifying statute and not just another ordinary statute with some provisions that are clarifications of Congressional intent? Hopefully never.

Relying on my view that the WPEA is a clarifying statute clearly presented in conformance with the intent of Congress and with the guidance provided by the Courts, the Board must find that the WPEA is retroactively applicable to all pending cases with the exception of the TSA provisions which were specifically excluded from retroactive application by the specific text of the WPEA. I am convinced that while the issue of pending cases is too obvious to overlook, that my comments in favor of the repudiation of *Huffman* and its related decisions is paramount to MSPB's ability to correct the past and provide American justice to those who were harmed by erroneous decisions. If Congress wanted to create an "ordinary" statute with provisions that were to be retroactive, they could have. They didn't do that. I hold that as soon as the Board acts to repudiate the past and reinstate erroneously dismissed cases, that they too then become "pending" cases.

I believe the other points I have provided are sufficient presented and the Board is capable of addressing each of them. Again, I acknowledge that I want it all to be decided in an affirmative manner so that we can all move forward in the most positive manner to set the past behind us. While some of my opinions vary from some of the other briefs, I nevertheless hold that all of my comments are well within the authority of the Board to grant and should be affirmed by the Board. On the other hand, I have no doubt that if the Board wants to box itself in on any of these issues and deny any of them because you believe you can't do this, or can't do that, you will. There are those who believe very strongly that your purpose is to find a way to reject any or all of the issues before you to maintain the status quo. If the Board was genuinely focused on this course of action in whole or in part, it would be most regrettable.

Furthermore, in looking at the landscape before us, I do not see any serious opposition to any of the issues to be decided. Is a whistleblower going to object to being protected, I don't think so? There may be issues with the amount of damages in any category that may be awarded, but those are all resolvable within the system as it exists. Individual agencies may object to damage awards, but then they have the option of recovering the funds that were wasted, or getting supplemental funding from Congress. It is likely that there will be some mutterings from some Agencies, but faced with the negative publicity that will surely come, it would be a foolish act by them and politically unwise. If it becomes the law of the land, as enforced by MSPB, that there is zero toleration for retaliation of any kind, then I submit that the CBO cost estimate is more accurately a representation of potential awards for "pending" cases because the cost of future cases will be zero. Other than that, everyone I see from horizon to horizon wants you to step up and become what you were meant to be. Just do it.

Congress has expressed that it wants no barriers to inhibit a person's efforts to disclose wrongdoing. Give them what they asked for. They have expressly made it a point that they want to broaden the opportunity for disclosures. Give them what they asked for. Congress wants access to this information and they know they are going to have to foot the bill at one end of the process in order to recover far more at the other end. Give them what they asked for.

While I have the highest respect for Judge Weiss for having brought this matter forward for an Interlocutory Appeal, I assert that he was misled into arriving at an incorrect decision with regard to what was or was not my normal duties and whether or not Mr. Palmer was, at the time of my disclosure to him, a wrongdoer. Once again, this gives me pause to contemplate whether a Judge's most difficult task is to determine the truth in the matter before them. Nevertheless, I ask that my case be remanded to him to be heard on its merits in accordance with the WPEA.

By issuing its notice in the Federal Register and inviting interested individuals or organizations to submit amicus briefs, the Board demonstrated leadership in addressing difficult issues. I am sure that it is recognized that the Board received comments and opinions from many of the most respected advocates for whistleblower protections. I am grateful for the briefs received from them and for those submitted by and on behalf of whistleblowers. I would suggest that if the

MSPB guidance were more explicit for what an Interlocutory Appeal is, and if any of the whistleblowers, or their counsel, knew what they could do as the result of their cases being dismissed without prejudice, you may have received far more responses.

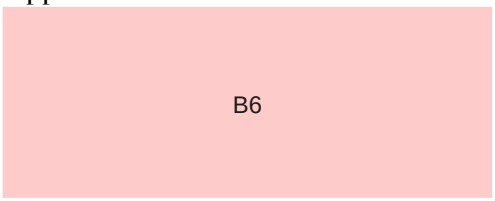
Finally, after weeks of deliberation on just what is or is not correct under the law and how it can be balanced with justice, for the moment I will concur with Judge Balark Mello de Sa Peixoto Junior's opinion with regard to what is a Judge's most difficult task. I view the decision you are about to make as an historic moment for this country. While its immediate impact will be on the sixty or so pending cases, it could affect many other cases that were erroneously dismissed, and it will affect every current and future federal employee by showing them what will be the future if they choose to bring a case to MSPB for resolution.

Historic decisions are not rendered by ordinary Judges. They are written by men and women who have been exceptionally bold to go against the tide of public opinion to resolve generations of injustice. So, I leave you with what may be the most difficult task of your chosen career and challenge you to write a unanimous decision that will grant all that I have asked, and one that stands firm in every venue.

I extend my sincerest thanks to the Board and to each of the *amici*, for without them and without the information they imparted to me and to the Board, this response would have lacked the citations and good guidance they have provided.

Respectfully Submitted,

Thomas F. Day
Appellant



AFFIDAVIT OF THOMAS F. DAY

I have read the foregoing consisting of 56 pages, this page, and the following Certificate of Service for a total of 58 pages and I hereby attest under penalty of perjury that it is true and correct to the best of my knowledge and belief.

Thomas F. Day, Appellant

3/21/2013
Date

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Electronic Mail

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3/21/2013
(Date)

Thomas F. Day
Appellant

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties. Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Response to Response to Amicus Briefs dated 2/5/2013	e-Appeal / e-Mail
Nicole M. Heiser Agency Representative	Response to Response to Amicus Briefs dated 2/5/2013	e-Appeal / e-Mail
Lorna J. Jerome Agency Representative	Response to Response to Amicus Briefs dated 2/5/2013	e-Appeal / e-Mail