

Summary of Argument

To the extent that the AJ's December 14 ruling bars any retroactive application of the WPEA, it does not reach post-WPEA filings based on pre-WPEA conduct. Under Supreme Court precedent and practice, legislative history is sufficient to evince “clear congressional intent” that the WPEA applies retroactively. *Chevron* deference may apply to the Board’s adjudicative interpretation of its own jurisdiction, depending on the outcome of a pending Supreme Court case. If *Chevron* deference applies to the Board’s determination of its jurisdiction, the Board may be entitled to deference of its determination whether the WPEA has retroactive effect.

Argument

A. The Administrative Judge’s December 14 Ruling Does Not Bar All Retroactive Application of the WPEA

The instant case involves a federal employee, Thomas F. Day, who reported wrongdoing that arguably was made to an alleged wrongdoer or during his normal course of duties. Under prior precedent, *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, (Fed. Cir. 2001), which governed at the time of Day’s disclosure, as well as when he filed his complaint with the Office of Special Counsel (“OSC”) and an Individual Right of Action (“IRA”) with the MSPB, such disclosures were deemed to be unprotected under the Whistleblower Protection Act of 1989 (“WPA”). During the pendency of this litigation, Congress enacted, and the president signed, the WPEA, which overturned *Huffman* and expressly provided protections to the types of disclosures arguably made by Day. Accordingly, a question arises whether the WPEA applies to Day’s pending appeal. The AJ ruled that the WPEA does not apply retroactively to Day’s pending appeal, but due to the significance of this issue, he certified his ruling for an interlocutory review before the full Board. *Day v. Dep’t of Homeland Security*, Docket No. DC-1221-12-0528-W-1 (Order dated Dec. 14, 2012).

Under Supreme Court precedent discussing retroactivity of statutes, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), “a tribunal must first determine whether Congress has expressly prescribed the statute’s temporal reach.” *Day*, *7 (citing *Landgraf*, 511 U.S. at 280)). “If the new statute does not contain any such express prescription, the tribunal must determine whether it would have actual ‘retroactive effect,’ that is, whether its provision ‘attaches new legal consequences to events completed before its enactment[,]’ [Landgraf, 511 U.S.] at 270, or would ‘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.* (citing *Landgraf*, 511 U.S. at 280. “The Court concluded that if retroactive application of the new statute would have the above-cited effects, it would apply ‘our traditional presumption’ against retroactivity, ‘absent clear congressional intent favoring such a result.’” *Id.*

Here, the AJ began his analysis by noting that the “WPEA contains no express prescription of retroactivity,” and that its legislative history is “contradictory and inconclusive,” because the House Committee Report accompanying the House version of the WPEA, H.R. 3289, states that “[r]ights in this Act shall govern legal actions filed after its effective date.” *Day*, *9. The AJ then noted that the House report language “expressly declaiming *any* retroactive application.” *Id.* (Emphasis added). However, it must be noted that to the extent the House report “declaim[ed] any retroactive application,” it was only with regards to legal actions pending (that is, filed before and continuing) at the time of the WPEA’s effective date. The House report said nothing about restricting retroactive application for legal actions filed *after* the WPEA’s effective date but that are based on conduct occurring *before* the WPEA’s effective date. Retroactive application would thus be appropriate for such cases if congressional intent is clear—and indeed

the legislative history for such a result is neither contradictory nor inconclusive, but straightforward. *See* Senate Rept. No. 112-155. But that is a matter for a different case.

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 pre-WPEA 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.

B. Under Supreme Court Precedent and Practice, Legislative History is Sufficient to Evince ‘Clear Congressional Intent’ of Retroactivity

In *Landgraf* the Supreme Court professed to use a clear statement test to determine whether Congress intended retroactive application of a statute, but in reality it looked at floor statements and committee reports for guidance. *Landgraf*, 511 U.S. 244. *But see concurring opinion* (Scalia, J., with Kennedy, J., and Thomas, J.) (disavowing use of any legislative history to effectuate congressional intent other than text of bill, and criticizing majority for “convert[ing] the ‘clear statement’ rule into a ‘discernible legislative intent’”). *See generally* Leonard Charles Presberg, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of Landgraf v. USI Film Products and Rivers v. Roadway Express*, 28 U. Rich. L. Rev. 1363 (Fall 1994). Accordingly, the Board may be entitled to look at floor statements and committee reports for guidance here, though this may be challenged on appeal by some composition of the courts.

C. Chevron Deference May Apply to the Board’s Adjudicative Interpretation of Its Own Jurisdiction

The U.S. Supreme Court recently heard arguments in a case that may affect the Board's decision in the instant case, or ones addressing similar issues. In *City of Arlington, Tex. v. FCC*, Docket No. 11-1545 (argued Jan. 16, 2013), the Supreme Court is expected to determine whether a court should apply *Chevron U.S.A. Inc. v. NRDC, Inc.* in reviewing an agency's determination of its own jurisdiction. In *Chevron*, the Supreme Court held that if a statute is silent or ambiguous with respect to a specific issue, an agency's interpretation will be upheld if its answer is based on a permissible construction of the statute. 467 U.S. 837, 842–843 (1984).³ *Chevron* deference is also afforded to an agency interpretation that arises in an adjudicative context. *See, e.g., Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (adjudicative interpretation by Board of Immigration Appeals); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988) (adjudicative interpretation by NLRB).

The Supreme Court has previously indicated that an agency's construction of a statute to expand its own jurisdiction might merit *Chevron* deference, *Mississippi Power and Light Co. v. Mississippi*, 487 U.S. 354, 381-82 (1988) (Scalia, J., concurring), but it is far from conclusive. *See City of Arlington, Tex. v. FCC*, 668 F. 3d 229, 248 (5th Cir. 2012) ("The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to the issue."). The Supreme Court may soon provide an answer to this question.

Here, an interpretation by the Board that the WPEA applies retroactively would make several previously-unprotected disclosures protected, and thus grant the Board jurisdiction over

³ Of course, if Congress speaks clearly, neither deference nor the presumption against retroactivity are warranted. *See Chevron*, 467 U.S. 837; *Landgraf*, 511 U.S. 244.

now-nonfrivolous allegations. *See Yunus v. Dep't of Veterans Affairs*, 242 F. 3d 1367, 1371 (Fed. Cir. 2001). This would be an expansion of the Board's own jurisdiction.

D. If Chevron Deference Applies in City of Arlington, the Board May Be Entitled to Deference of Its Determination Whether the WPEA Has Retroactive Effect

If the Supreme Court rules that an agency's determination of its own jurisdiction is entitled to *Chevron* deference, such deference may apply in the context of the Board determining whether the WPEA has actual retroactive effect. *Cf. Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106 (2d Cir. 1998) (applying *Chevron* analysis in determining whether statute applies retroactively). *But see Siddiqui v. Holder*, 670 F.3d 736, 747 (7th Cir. 2012) (employing *de novo* review in determining whether a statute applies retroactively); *Arevalo v. Ashcroft*, 344 F.3d 1, 10 (1st Cir. 2003) (same). That said, the *Henderson* court noted that "a statute that is silent with respect to retroactivity is not 'ambiguous.' In the absence of clear evidence that Congress intended some other result, such a statute does not apply retroactively." 157 F.3d at 130.

In the case at bar, Congress was not silent, but rather arguably contradictory—and thus ambiguous. The next analytical step under *Landgraf* would be for the Board to determine whether the WPEA has actual retroactive effect; whether its provision "attaches new legal consequences to events completed before its enactment" or would "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." 511 U.S. at 270, 280. Given the ambiguous nature of WPEA's legislative history, under *Chevron*, the Board might enjoy deference by the courts.

Conclusion

To the extent retroactivity is denied in *Day v. Dep't of Homeland Security*, such an outcome need not predetermine other cases where retroactivity might apply. The Board may look

past statutory language to positive legislative history governing retroactivity, and its interpretation of the WPEA may be entitled to deference.

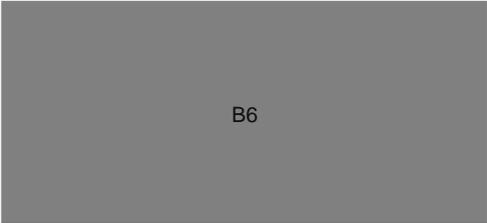
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Respectfully submitted,



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B6