

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. DAY,)	
Appellant,)	DOCKET NUMBER
)	DC-1221-12-0528-W-1
v.)	
)	
DEPARTMENT OF HOMELAND)	
SECURITY,)	
Agency.)	

AMICUS BRIEF

SUBMITTED BY ELIZABETH JEWEL MARTIN

IDENTITY AND STANDING OF THE AMICUS CURIAE

Amicus Curiae, Elizabeth Jewel Martin, is a Staff Attorney, GS-14, in the Department of Veterans Affairs employed at the Office of Regional Counsel in St. Louis, Missouri. She is the Appellant in a Merit Systems Protection Board whistleblowing case that was pending before the Board on December 27, 2012, the effective date of the Whistleblower Protection Enhancement Act of 2012 ("WPEA"). Because the decision in the instant case will clarify the law to be applied to Amicus Martin's whistleblowing case and therefore affect its outcome, Administrative Judge Howard J. Ansorge dismissed Ms. Martin's case without prejudice on February 28, 2013 to be reinstated subsequent to the

decision in this case. A copy of Judge Ansonge's decision is attached hereto, incorporated herein and marked as Amicus Martin's Exhibit "A". Judge Ansonge cited pendency of the instant case as the basis for his decision stating:

"The Board's decision disposing of the interlocutory appeal in *Day* will likely affect the outcome of the instant IRA appeal. Consequently, dismissal of this appeal without prejudice will serve the interests of administrative efficiency by assuring that additional resources will not be needed to reconcile outcomes that may prove to be inconsistent with the Board's ruling in *Day*."

(p. 3, Amicus Martin's Exhibit "A")

Accordingly, Amicus Martin is a person who had serious allegations that she suffered significant retaliation for whistleblowing pending before the Board on the effective date of the WPEA. Her legal rights, the outcome of her case and the course of her professional career will be directly affected by the decision of the Board this case.

STATEMENT OF THE ISSUE AND LEGAL ARGUMENT

Amicus Martin has reviewed and agrees with the Statement of the Issue and Argument set forth in the BRIEF ON BEHALF OF THE UNITED STATES

OFFICE OF SPECIAL COUNSEL AS AMICUS CURIAE submitted on February 21, 2013. In the interests of judicial economy Amicus Martin hereby endorses and adopts the cogent and well-reasoned argument of the Office of Special Counsel as effectively stating her own legal argument to the Board.

AMICUS MARTIN'S CONCLUDING STATEMENT

Amicus Martin appreciates the skill with which the Office of Special Counsel has presented the argument that the Whistle Blower Protection Enhancement Act of 2012 applies to cases such as hers that were pending on the effective date of the Act.

However, she believes it is essential to encourage the Board, while deliberating the legal issues, to consider the fundamental basis of the WPEA – the very real human issues that underlie and necessitated the legislation.

Congress enacted The Whistleblower Protection Enhancement Act of 2012 to protect our federal employees, men and women who faithfully serve the citizens and government of the United States, from unjust and prohibited personnel practices by supervisors. Accordingly, Amicus Martin respectfully states that the Merit Systems Protection Board should remand Thomas F. Day's case to the Administrative Judge with instructions to permit his individual-

right-of-action appeal to proceed because the Whistleblower Protection Enhancement Act of 2012 is perforce applicable to all cases pending before the Board on the effective date of the act.

Respectfully submitted on behalf of
Elizabeth Jewel Martin, Amicus Curiae
by her Attorneys and Designated Representatives

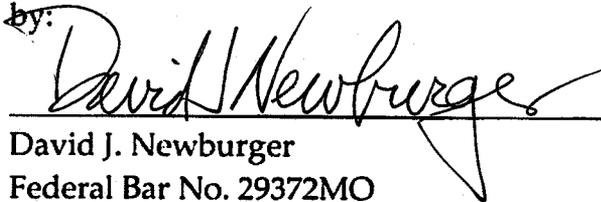
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**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE**

ELIZABETH JEWEL MARTIN,
Appellant,

DOCKET NUMBER
CH-1221-12-0374-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: February 28, 2013

David J. Newburger, Esquire, and Paul R. Hales, Esquire, St. Louis,
Missouri, for the appellant.

Evan Stein, Esquire, Los Angeles, California, for the agency.

BEFORE

Howard J. Ansorge
Administrative Judge

INITIAL DECISION

Elizabeth Jewel Martin is a Staff Attorney, GS-14, for the Department of Veterans Affairs (VA) in the Office of Regional Counsel in St. Louis, Missouri. On April 1, 2012, Ms. Martin filed the instant request for corrective action, claiming the VA retaliated against her for whistleblowing. The appellant claims she is a whistleblower against whom her agency retaliated by (1) issuing a written reprimand on October 24, 2011; (2) assigning excessive and punitive job performance requirements; (3) withdrawing authorization for telework on October 24, 2011; (4) lowering her annual performance rating from Excellent to Fully Successful in December 2011; (5) failing to award a cash bonus for "special

contribution” in December 2011; (6) assigning an unusual and excessive caseload on December 16, 2011; and (7) continuing to impose retaliatory acts, including (a) asking her to work in or enter Building 25, (b) warning her about her job performance, and (c) denying her sufficient access to equipment needed to perform her duties.

None of the actions she has identified are directly appealable to the Board. But the actions can be construed as personnel actions covered by the Whistleblower Protection Act (WPA). *See* 5 U.S.C.A. § 2302(a)(2)(A) (West 2007). Consequently, the actions are proper subjects of an individual-right-of-action (IRA) appeal under the WPA. *See* 5 U.S.C.A. § 1221(a) (West 2007). Because the appellant has exhausted her administrative remedy before the Office of Special Counsel with respect to the identified actions, the Board has jurisdiction to adjudicate her timely request for corrective action. *See* 5 U.S.C.A. § 1214(a)(3) (West 2007); 5 C.F.R. § 1209.5(a) (2012); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001).

For the reasons set forth below, the appellant’s IRA appeal is DISMISSED without prejudice.

ANALYSIS AND FINDINGS

After this appeal was filed, Congress passed the Whistleblower Protection Enhancement Act of 2012, which makes significant changes to the law applicable to the adjudication of appeals filed by whistleblowers. The Enhancement Act was signed into law by the President on November 27, 2012. The Board has recognized there is a question as to whether the Enhancement Act should be applied retroactively or prospectively. 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.

