UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MILES V. WILLIAMS, Appellant, v. DEPARTMENT OF DEFENSE, Agency, and OFFICE OF PERSONNEL MANAGEMENT, Intervenor.	DOCKET NUMBER NY075290S0119 DATE: JAN - 7 1991

Miles V. Williams, New York, New York, pro se.

Mona Segner, New York, New York, for the agency.

Jaime Ramon, Esquire, Washington, D.C., for the intervenor.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on a Petition for Reconsideration filed, pursuant to 5 U.S.C. § 7703(d), by the Office of Personnel Management (OPM). OPM requests that the Board reconsider its May 10, 1990 Opinion and Order granting appellant's request for a stay of his removal. That decision, a ruling in an interlocutory appeal, is not a final decision. It is not, therefore, subject to reconsideration under section 7703(d). *Brown* v. *Veterans*

Administration, 44 M.S.P.R. 635, 637 (1990). However, the Board's regulations, at 5 C.F.R. § 1201.34(c), allow for parties that will be affected by the outcome of a Board decision to move for permission to intervene. Because of the potential impact of the Board's decision on the civil service, we shall treat OPM's petition as a motion for permission to intervene and grant OPM status as a permissive intervenor. For these reasons, we hereby DENY OPM's Petition for Reconsideration, and GRANT OPM intervenor status as a party to the case. For the reasons set out below, we REVERSE the Board's Opinion and Order of May 10, 1990.

BACKGROUND

Appellant was removed by the agency from his position as Contract Analyst, GS-11, on December 16, 1989. He timely appealed the removal to the Board and, soon after filing his appeal, requested, pursuant to 5 U.S.C. § 1221(c), that the removal be stayed. A stay of a personnel action may be sought under section 1221(c) by an employee who believes that the action was taken in reprisal for the disclosure of the violation of any law, rule, or regulation. *See* 5 U.S.C. § 2302(b)(8). The presiding administrative judge denied appellant's request.

Appellant then filed an interlocutory appeal with the full Board, pursuant to section 1209.18 of the Board's

regulations,[1] seeking reversal of the administrative judge's determination. After establishing jurisdiction over the appeal, the Board reversed the administrative judge's determination, and granted a stay of appellant's removal. In its reversal the Board held that the activity -- the filing of an Equal Employment Opportunity (EEO) complaint -- was among those disclosures protected by 5 U.S.C. § 2302(b)(8) because it alleges the violation of a law, Title VII of the Civil Rights Act of 1964. OPM then filed its Petition for Reconsideration and its Supporting Memorandum (Petition). The Special Counsel was offered the opportunity to comment on OPM's brief, and she did so. Her brief statement agrees with the OPM construction of 5 U.S.C. § 2302(b)(8).

ANALYSIS

In its petition, OPM argues, *inter alia*, that the Board erred in exercising jurisdiction over the stay request. This error, OPM asserts, stems from the Board's determination that appellant's protected activity -- the filing of an EEO complaint -- was a disclosure covered by the provisions of 5 U.S.C. § 2302(b)(8). OPM argues that the filing of an EEO complaint is an activity protected by section 2302(b)(9), which protects, at subsection (A), "the exercise of any appeal, complaint, or grievance right

[1] Because, on July 6, 1989, the Board republished its Part 1209 regulations on an interim basis, 54 Fed. Reg. 28,632 (1989), appellant's interlocutory appeal was filed under those interim regulations.

granted by any law, rule, or regulation."[2] Because only personnel actions alleged to have been taken for section 2302(b)(8) activities are subject to a stay under section 1221, and because OPM contends that appellant's activity is not covered by section 2302(b)(8), OPM argues that "the Board was without jurisdiction to consider or to grant a stay in the circumstances in this case." Petition at 13.[3] Upon further review, we agree.

Section 2302(b)(8) proscribes the taking of a personnel action because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --
>
> (i) a violation of any law, rule, or regulation . . .

This controversy turns on what Congress intended when it made section 2302(b)(8) applicable to disclosures concerning violations of "any law."

The United States Court of Appeals for the Federal Circuit addressed a similar issue in *Horner* v. *Merit Systems Protection Board*, 815 F.2d 668 (Fed. Cir. 1987). In that case the Board had exercised jurisdiction over a complaint

---

[2] Although OPM disputes the Board's rulings on several other issues in its May 10, 1990 decision, the jurisdictional issue is the pivotal one here. Based on our decision regarding that issue, we need not address the others.

[3] Appellant has filed a response to OPM's petition. The response, however, does not address any of the issues raised by OPM, including the argument that the Board lacks jurisdiction over the request for a stay.

filed by the Special Counsel alleging the illegal receipt of gifts from subordinates by a federal employee. Although the governing statute did not specifically authorize the Special Counsel to bring a disciplinary action against an employee for the illegal receipt of gifts, it did authorize the Special Counsel to investigate and prosecute violations of "any civil service law, rule, or regulation." 5 U.S.C. § 1206(e)(1)(D) (West Supp. 1982).

The court, however, reversed the Board's decision. Noting that where the language is clear and the provision consistent with the rest of the statute, preference must be given to the plain meaning of the statute, the court held that "where other provisions of the statute raise significant questions about the plain meaning of the subsection, it is necessary to analyze the statute as a whole and to consult the legislative history." *Horner* at 673.

In its analysis of the Special Counsel's jurisdiction, the court reached conclusions that apply to the statute in question here. First the court noted that several provisions of section 1206 granted the Special Counsel authority in very specific areas, such as the authority to investigate Hatch Act violations, the authority to investigate arbitrary withholding under the Freedom of Information Act, and the authority to investigate personnel actions involving prohibited discrimination. The court then held that to construe subparagraph (D) -- providing for the

investigation of violations of "any civil service law, rule, or regulation" -- as broadly as the Board had, would encompass, and would be incompatible with the narrow authority granted by its neighboring provisions. This interpretation would render the other provisions superfluous.

Similarly, should the Board interpret section 2302(b)(8) as applying to the filing of an EEO complaint, the specificity of section 2302(b)(9) protecting the filing of appeals (including EEO complaints) would be rendered superfluous. If the employee filing a grievance, complaint, or appeal were protected against reprisal by section 2302(b)(8), there would be no need for the section 2302(b)(9) protections.

The court in *Horner* also noted that because the overall construction of section 1206 is detailed and specific, "section 1206(e)(1)(D) should not be given a literal construction such that it broadly overrides or makes redundant other provisions, particularly those within the same section of the statute." *Id.* at 674. The same problem is present here. Section 2302 delineates specific prohibited personnel practices in a detailed manner. To interpret section 2302(b)(8) literally would both broadly override and make redundant the provisions of section

2302(b)(9). It must therefore be concluded that such an interpretation was not intended.[4]

Additionally, the very wording of sections 2302(b)(8) and 2302(b)(9) suggests protection for distinctly different activities. The filing of an appeal, complaint, or grievance, is the exercise of a statutory or regulatory right. It is the initial step toward taking legal action against an employer. The employee who exercises this option seeks vindication for the perceived violation of his or her rights. The wording of section 2302(b)(8), protecting "a disclosure of information," suggests a different type of activity not necessarily based on a personal grievance that distinguishes it from "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." This adds additional force to the argument that section 2302(b)(8) was not intended to apply to the filing of an EEO complaint.[5]

---

[4] The Board recognizes, as it did in *In re Frazier*, 1 M.S.P.R. 163, 190-92 & n. 36, that "the various provisions of section 2302(b) overlap to some extent" and that reprisal for filing an EEO complaint violates both sections 2302(b)(1) and (b)(9). *See also Acting Special Counsel* v. *Department of Defense*, 13 M.S.P.R. 130, 132 (1982). The Board's previous interpretation of section 2302(b)(8) in the instant case did not merely create an overlap between that section and section 2302(b)(9) but made the latter superfluous, as discussed in the text.

[5] The Board recognizes that personal motivation is irrelevant to whether an employee's disclosure is protected under section 2302(b)(8), as the Board held in *In re Frazier*, 1 M.S.P.R. at 187, and as Congress reiterated in the Whistleblower Protection Act by substituting "any disclosure" for "a disclosure" in that section in order to overrule *Fiorello* v. *Department of Justice*, 795 F.2d 1544,

Moreover, there is evidence in the legislative history of the statute that suggests that Congress paid specific attention to limiting the applicability of section 2302(b)(8). An earlier version of the statute, the WPA of 1987, contained an early version of section 1221 for seeking a stay of a personnel action taken "as a result of any prohibited personnel practice." *Whistleblower Protection Act of 1987, Hearings on S. 508 Before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong. 1st Sess. 138-39 (1987). The Senate subcommittee hearing at which this version of the statute was presented featured the testimony of several witnesses, including that of Special Counsel Mary F. Wieseman. In her testimony, the Special Counsel expressed concern about granting an individual right of action to employees who had at their disposal the Equal Employment Opportunity Commission as an avenue to seek redress for alleged discrimination. *Id.* at 379. She suggested limiting the individual right of action provided by section 1221 to cases of reprisal based on whistleblowing. *Id.* at 380.

A revised version of the Act was presented by the subcommittee in a subsequent report, in which it was stated that numerous changes were made in the statute in response to suggestions made at the aforementioned hearing, and

---

1550 (Fed. Cir. 1986). *See* S. Rep. No. 413, 100th Cong. 2d Sess. at 12-13.

during subsequent discussions with representatives of concerned federal agencies. S. Rep. No. 413, 100th Cong. 2d Sess., 7. Among the changes in the revised version is a limitation of the individual right of action, including the right to seek a stay, to the subject of a personnel action taken "as a result of a prohibited personnel practice described in section 2302(b)(8)." *Id.* at 66; *See also* pp. 32-34. The final version of the statute includes this revision.

This clear narrowing of the applicability of the statute indicates a desire by Congress to limit stays to the specific case of whistleblower reprisals. Section 2302(b)(9), however, which undisputably applies to the filing of EEO complaints, is not mentioned in the revised section 1221. This omission underscores the intention to limit the individual right of action to reprisals for whistleblowing, as distinct from those for the filing of complaints.[6]

CONCLUSION

The examination of the statute as a whole, and its legislative history, as required by the court's holding in *Horner*, compels the conclusion that the filing of an EEO complaint does not constitute whistleblowing under section 2302(b)(8). Accordingly, we find that the consideration of

[6] The legislative history of both the 1987 and 1988 versions of the WPA is meant to be included with that of the WPA of 1989. *See* 135 Cong. Rec. H747 (daily ed. March 21, 1989) (statement of Rep. Sikorski).

a stay request under these circumstances is beyond our jurisdiction. Our previous decision is, therefore, REVERSED.

FOR THE BOARD:

for Matthew Shannon
Robert E. Taylor
Clerk of the Board

Washington, D.C.