U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for October 27, 2017

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COURT DECISION

PRECEDENTIAL:

Petitioner: John C. Parkinson
Respondent: Department of Justice
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2015-3066 (en banc)
MSPB Docket No. SF-0752-13-0032-I-2
Issuance Date: October 26, 2017

In 2012, the Federal Bureau of Investigation (FBI) removed the appellant, a preference-eligible veteran, from his position as a Special Agent based on charges of theft, obstruction of the Office of Professional Responsibility process, unprofessional conduct, and lack of candor. He appealed his removal to the Board and raised affirmative defenses of whistleblower reprisal and discrimination based on military service under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The administrative judge dismissed the appellant's whistleblower reprisal affirmative defense, finding that, pursuant to Board precedent, FBI agents are not entitled to raise a whistleblower reprisal affirmative defense under 5 U.S.C. § 7701(c)(2)(B)—which requires reversal of an agency's decision that was based on any prohibited personnel practice described in section

2302(b)—because the FBI is excluded from the definition of "agency" in 5 U.S.C. § 2302. The administrative judge also found that the appellant was ineligible to raise an affirmative defense under USERRA, sustained the charges of lack of candor and obstruction and affirmed the removal. On the appellant's petition for review, the Board affirmed the initial decision.

The appellant appealed the Board's decision to the Federal Circuit, which sustained only the obstruction charge and found that the appellant was entitled to bring an affirmative defense of whistleblower reprisal under 5 U.S.C. § 7701(c)(2)(C)—which requires reversal of an agency decision shown to be "not in accordance with law." *Parkinson v. Department of Justice*, 815 F.3d 757 (Fed. Cir. 2016). The court vacated the Board's affirmance of the appellant's removal and remanded the matter for the Board to consider the obstruction charge, the appellant's whistleblower reprisal affirmative defense, and the appropriate penalty, if any. Subsequently, however, the court granted the agency's petition for rehearing en banc, vacated its prior decision, and requested additional briefing from the parties regarding whether a preference-eligible FBI employee challenging an adverse action before the Board under 5 U.S.C. § 7513(d) may raise an affirmative defense of whistleblower reprisal under 5 U.S.C. § 7701(c)(2)(C). *Parkinson v. Department of Justice*, 691 F. App'x 909 (Fed. Cir. 2016).

Holding: In the majority opinion, the en banc court found that preference-eligible FBI employees challenging an adverse action before the Board may not raise an affirmative defense of whistleblower reprisal. Accordingly, the court vacated the portion of the panel opinion finding that FBI employees may raise whistleblower reprisal as an affirmative defense before the Board; reinstated the panel opinion as to all other issues; and remanded the case to the Board for consideration of the appropriate penalty.

(1) The court found that it was undisputed that, as a preference-eligible FBI employee, the appellant may appeal adverse employment actions to the Board, 5 U.S.C. §§ 7513(d), 7511(a)(1)(B)(i), but that he may not bring whistleblower claims to the Board through an individual right of action (IRA) appeal under § 1221 or as an affirmative defense under 5 U.S.C. § 7701(c)(2)(B) because those statutory provisions depend on the whistleblower reprisal provision in § 2302(b)(8), which does not apply to any FBI employees.

(2) The court further found that, considering the language of 5 U.S.C. §§ 2302(b), 2303, 7701(c)(2), a preference-eligible FBI employee

may not raise an affirmative defense of whistleblower reprisal under section 7701(c)(2)(C), which requires reversal of any agency action that is "not in accordance with law."

(3) Specifically, the court found that, while Congress exempted FBI employees from whistleblower protections provided in sections 1214, 1221, and 2302(b)(8), it provided them "a separate but parallel" review process for claims of whistleblower reprisal in 5 U.S.C. § 2303. This section prohibits FBI employees from taking or failing to take a personnel action "with respect to" an FBI employee as a reprisal for certain disclosures of information to certain people and offices within the Department of Justice. In addition, it requires the President to "provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221," and gives the Attorney General the authority to prescribe regulations to ensure that personnel actions are not taken against FBI employees as reprisal for making a protected disclosure.

(4) The court found that "[t]he broad and encompassing language of § 2303, and the corresponding broad exclusion of the FBI from § 2302, indicates Congress's intent to establish a separate regime for whistleblower protection within the FBI." Therefore, the court concluded that allowing preference-eligible FBI employees to raise whistleblower reprisal claims at the Board "would contradict the unambiguous statutory language of § 2303 and inappropriately expand the protections provided to FBI employees by Congress."

(5) The court further found that allowing the Board to review FBI whistleblower reprisal claims under the broad language of § 7701(c)(2)(C) would render the specific provisions of § 7701(c)(2)(B) superfluous, which "violates the general/specific canon of statutory construction."

(6) The court found that the legislative history further supported this conclusion, as well as the fact that Congress has recently reconsidered and amended section 2303 and chose not to alter the remedies available to FBI employees.

(7) The court concluded that the Board did not err in concluding that it lacked jurisdiction to hear the appellant's claim of whistleblower reprisal under section 7701(c)(2)(C).

Judges Linn and Plager each issued a dissenting opinion and joined in each other's dissent. They would have found that a preference-eligible FBI employee may raise an affirmative defense of whistleblower reprisal

in connection with their appeal of an adverse action before the Board.