



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for December 8, 2017**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Rory C. Flynn

**Respondent:** U.S. Securities & Exchange Commission

**Tribunal:** U.S. Court of Appeals for the Fourth Circuit

**Case Number:** [16-2122](#)

**MSPB Docket Number:** DC-1221-14-1124-W-1

**Issuance Date:** December 7, 2017

**Whistleblower Protection Act**

- Protected "Disclosure"

The agency terminated the petitioner from Federal service. Because the petitioner believed that the agency terminated him in retaliation for making protected whistleblowing disclosures, he sought corrective action from the Office of Special Counsel. Thereafter, he filed an individual right of action appeal with the Board. The administrative judge issued an initial decision that denied his request for corrective action, finding that he failed to prove that he made a protected disclosure. The petitioner filed a petition for review of the initial decision with the Board and, because the two Members could not agree on an outcome, the initial decision became the Board's final decision.

**Holding:** The court denied in part and granted in part the petitioner's

petition for review and remanded the appeal to the administrative judge for further proceedings.

1. The administrative judge properly concluded that the petitioner failed to prove that his disclosures concerning agency Rule 900(a) were protected. Although Rule 900(a) falls within the scope of 5 U.S.C. § 2302(b)(8), a disinterested observer could not reasonably conclude that the agency violated the rule considering its discretionary and aspirational language.
2. Because the administrative judge did not specifically analyze the petitioner's claim that he made protected disclosures concerning agency Rule 900(b), remand is necessary so that the administrative judge can evaluate the evidence in the first instance and perhaps allow for further development of the record.
3. If the petitioner establishes a prima facie case of whistleblower reprisal on remand, then the administrative judge may revisit the petitioner's arguments concerning evidence and discovery related to the agency's burden.

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