



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for February 2, 2018**

**Note:** These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Adam Delgado

**Respondent:** Merit Systems Protection Board

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

**Case Number:** [16-1313](#)

**Issuance Date:** January 29, 2018

**Individual right of action (IRA) appeals**

**Exhaustion of Remedies**

**Protected Disclosure**

The petitioner is a Special Agent at the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives. He filed an IRA appeal with the Board, alleging that his supervisors retaliated against him after he reported his suspicions that another agent had improperly shot at a fleeing suspect, provided an inaccurate report of the incident, and testified falsely about it in a Federal criminal trial.

The administrative judge dismissed the appeal for lack of jurisdiction, finding

that the appellant failed to prove that he exhausted his administrative remedies with the Office of Special Counsel (OSC). Specifically, although he established that he filed an OSC complaint, he did not prove that he gave OSC a sufficient basis to pursue and investigation that might lead to corrective action. The Board affirmed, and the appellant petitioned for review to the Seventh Circuit.

**Holding:** The court granted the petition for review and remanded to the Board for adjudication of the merits.

1. The Board erred by disregarding the appellant's sworn and unsworn statements regarding the information he provided to OSC. By doing so, the Board effectively required the appellant to submit a copy of his OSC complaint in order to prove exhaustion. There is no statutory or regulatory requirement for him to do so, and a complainant who uses OSC's e-filing system will likely not even have a copy of his complaint to submit. In this case, the petitioner submitted OSC's close-out letter and a declaration detailing the allegations that he raised to OSC. This was sufficient to satisfy the exhaustion requirement.

2. The Board applied an overly-stringent approach to the exhaustion requirement, effectively requiring the petitioner to allege before OSC all of the facts that he would be required to prove in his IRA appeal. All that is required is that the complainant present OSC with sufficient information to permit a legally sophisticated reader to understand his claim and investigate it further.

3. Although the petitioner did not report to his supervisors that the other agent had definitely perjured himself, he reported a reasonable suspicion of perjury. This was sufficient for his disclosure to be protected under 5 U.S.C. § 2302(b)(8).

**NONPRECEDENTIAL:**

*Mott v. Merit Systems Protection Board*, No. [2017-1222](#) (Jan. 26, 2018) (AT-0752-14-0451-I-1) (reversing and remanding the Board's decision to mitigate the petitioner's removal to a reduction in grade and pay; the Board erred in sustaining one of the charges and so a new penalty determination was necessary).

## LEGISLATION

The National Defense Authorization Act for Fiscal Year 2018, [Pub. L. No. 115-91](#), 131 Stat 1283:

Section 1097 of this Act adds and amends several sections of title 5 of the United States Code. The Act became law on December 12, 2017.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)