UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 114

Docket No. SF-0752-06-0611-I-2

Robert J. MacLean,

Appellant,

v.

Department of Homeland Security,

Agency.

June 22, 2009

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on an interlocutory appeal from the February 10, 2009 Order of the administrative judge (AJ) staying the proceedings and certifying for review by the Board his rulings on three issues: (1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information the appellant disclosed constituted Sensitive Security Information (SSI); (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above; and (3) whether a disclosure of information that is SSI can be a

disclosure protected by the Whistleblower Protection Act (WPA) under 5 U.S.C. § 2302(b)(8)(A). The AJ ruled in the affirmative with regard to issues (1) and (2) and in the negative with regard to issue (3). For the reasons set forth below, we REVERSE the AJ's rulings as to issues (1) and (2), AFFIRM AS MODIFIED his ruling with regard to issue (3), VACATE the stay order, and RETURN the case to the Western Regional Office for further adjudication.

BACKGROUND

¶2 Prior to his removal, the appellant was employed by the agency's Transportation Security Agency (TSA) in the SV-I position of Federal Air Marshal (FAM). Initial Appeal File (IAF) 1 (SF-0752-06-0611-I-1), Tab 1. The relevant facts are undisputed. In July of 2003, the appellant received a text message on his government-issued mobile phone stating that all RON (Remain Overnight) missions up to August 9th would be cancelled. The appellant alleged that he believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor. He then attempted to raise it with the Office of the Inspector General. On July 29, 2003, he disclosed the text message to the media. IAF 1, Tab 4, Subtab 4(J) (Exhibit 2). The agency conducted an investigation. IAF 1, Tab 4, Subtab 4(J). Thereafter, by letter dated September 13, 2005, the agency proposed to remove the appellant based on three charges: (1) Unauthorized Media Appearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(G). In the notice of removal, however, the deciding official determined that charges (1) and (2) of the proposal were not sustained by the evidence of record. He sustained charge (3), Unauthorized Disclosure of SSI. IAF 1, Tab 4, Subtab 4(A). In that charge, the agency alleged that on July 29, 2003, the appellant disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect, in violation of 49 C.F.R.

§ 1520.5(b)(8)(ii). IAF 1, Tab 4, Subtabs 4(A), 4(G). Effective April 11, 2006, the agency removed the appellant based upon its decision to sustain charge (3) and its determination that, after consideration of the *Douglas* factors, the penalty of removal was appropriate for the sustained charge. IAF 1, Tab 4, Subtab 4(A).

¶3 The appellant filed a timely appeal of the removal to the Board. IAF 1, Tab 1. He alleged, among other things, that the removal was based on whistleblowing because the agency would not have taken the action in the absence of the protected disclosures. *Id*.

¶4 Subsequently, on August 31, 2006, the agency issued a "Final Order," finding that the appellant's disclosure of information to the media, as set forth in the charge, was SSI covered by 49 C.F.R. § 1520.7(j) (2003). IAF 1, Tab 22 (Attachment). The appellant moved to dismiss the appeal without prejudice to allow him to petition for review of the Final Order to the U.S. Court of Appeals for the Ninth Circuit. *Id*., Tab 27. The agency did not object to the motion. *Id*., Tab 28. Accordingly, the AJ dismissed the appeal without prejudice to refiling, among other things, no later than 30 days after the Court of Appeals had issued a final determination in the appellant's petition for review of the agency's Final Order on SSI. IAF 1, Tab 29. On September 16, 2008, the Court of Appeals issued a decision denying the appellant's petition. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008); IAF 2, Tab 1. The court found that the agency's determination that the information the appellant disclosed to the press was SSI was supported by substantial evidence. *Id*.

¶5 The appellant timely refiled his appeal with the Board's regional office. IAF 2 (SF-0752-06-0611-I-2), Tab 1. During proceedings on the refiled appeal, the AJ convened a conference call to discuss discovery-related issues. IAF 2, Tab 3. The parties, however, agreed that it would be more efficient to obtain rulings from the AJ on certain legal issues so they could determine how to proceed. The parties agreed to confer and submit a list of the issues on which they would like rulings. Thereafter, the AJ was to issue an order framing the

issues and directing the parties to brief them, after which time he would rule on them. *Id*. The parties, however, could agree on only one issue, i.e., whether the WPA can protect a disclosure that is SSI. IAF 2, Tab 6. Subsequently, the AJ ordered the parties to brief six issues and both parties complied with his request. IAF 2, Tabs 7, 8, 10. The AJ issued an order on December 23, 2008, ruling on the six issues briefed by the parties, including the three issues that are the subject of this interlocutory appeal. IAF 2, Tab 14. As noted above, with regard to issues (1) and (2), he ruled in the affirmative. As to issue (3), he ruled in the negative. *Id*. The agency moved for certification of an interlocutory appeal on issues (1) and (2). IAF 2, Tab 20. The appellant opposed the agency's motion for certification. *Id*., Tab 21. The AJ granted the agency's motion for certification of an interlocutory appeal on issues (1) and (2). He added issue (3) and certified his rulings on the three issues for review by the Board. IAF 2, Tab 23.

Government Accountability Project (GAP) Submission

¶6 Subsequent to the AJ's certification of this interlocutory appeal to the Board, GAP filed a motion for leave to file a brief of *amicus curiae* supporting the appellant in this matter. Along with its motion, GAP submitted a brief addressing issue (3) certified for interlocutory appeal. IAF 2, Tab 25. In its brief, GAP argues that the AJ's ruling that a disclosure of information that is SSI cannot also be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A) cannot co-exist with Congressional intent or public policy underlying the WPA. In addition, GAP argues that it cannot co-exist with statutory language because the ruling would restore specific agency authority rejected by Congress, fails to recognize that Congress used different language when referring to statutory versus regulatory authority, would add loopholes to whistleblower protection not included in statutory language, and disregards the critical criteria of specificity even for statutory restrictions on whistleblowing disclosures. In addition, the Federal Law Enforcement Officers Association (FLEOA) filed a motion for leave

to join as *amicus curiae* the brief filed by GAP supporting the appellant in this matter. The motions of GAP and FLEOA are GRANTED and the Board has considered these additional legal arguments in deciding the issues in this interlocutory appeal.

ANALYSIS

¶7 An AJ may certify an interlocutory appeal if he determines that the issues presented are of such importance to the proceeding that they require the Board's immediate attention. 5 C.F.R. § 1201.91. An AJ will certify a ruling for review only if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public. *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008); 5 C.F.R. § 1201.92. With regard to the issues noted above, we find that these requirements have been met.

(1) Whether the Board lacks the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that information the appellant disclosed constituted SSI and (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him affects the issue in (1) above.

¶8 Because the analysis of these two issues is intertwined, we consider the issues together. The agency argues that the Board lacks the authority to review the agency's affirmed SSI determination because (1) Congress provided the TSA with the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s), and (2) the only avenue it provided individuals to challenge TSA's SSI determination is before the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

¶9 The starting point for every case involving statutory construction is the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681,

685 (1985); *Miller v. Department of Transportation*, 86 M.S.P.R. 293, ¶ 7 (2000). Where the statutory language is clear, it must control absent clearly expressed legislative intent to the contrary. *Lewark v. Department of Defense*, 91 M.S.P.R. 252, ¶ 6 (2002); *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). Statutory provisions should not be read in isolation; rather, each section of a statute should be construed in connection with other sections so as to produce a harmonious whole. *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 17 (2007).

¶10 The initial statutory provision at issue in this matter provides, in pertinent part, the following:

> **(s) Nondisclosure of Security Activities**.-
>
> > **(1) In general**.- Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would-
> >
> > > **(A)** be an unwarranted invasion of personal privacy;
> > >
> > > **(B)** reveal a trade secret or privileged or confidential commercial or financial information; or
> > >
> > > **(C)** *be detrimental to the security of transportation*.

49 U.S.C. § 114(s)(1) (emphasis added).

¶11 In his December 23, 2008 issues and rulings order, the AJ determined that the Board has the authority to review the determination by the deciding official in the removal action that the information the appellant disclosed was SSI. IAF 2, Tab 14. He found that the timing of the agency's issuance of a Final Order on this matter had an affect on his determination. In addition, he noted that the charge at issue in this appeal was brought on September 13, 2005, was sustained by the deciding official on April 10, 2006, and was an improper disclosure of SSI as defined in 49 C.F.R. § 1520.5(b)(8). He noted further that the agency's Final Order finding that the information the appellant disclosed constituted SSI under

the SSI regulation then in effect, 49 C.F.R. § 1520.7(j), was not issued until August 31, 2006. He reasoned that in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not bring. He further explained that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. Applying these two rules, the AJ found that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI had no effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the information the appellant disclosed met the regulatory definition of SSI. He concluded that if the agency had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then removed him based on that Final Order, the Board would be bound by any court decision on appeal of the order. He stated that, although the Board lacks the authority to review the Final Order issued by the agency on August 31, 2006, pursuant to 49 U.S.C. § 46110, the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge. *Id*.

Congress provided TSA with the responsibility of defining, regulating, and protecting SSI.

¶12 Congress initially required the federal agency responsible for civil aviation security to issue regulations prohibiting the disclosure of certain information in the interest of protecting air transportation. Federal Aviation Act of 1958, Pub. L. No. 93-366, §§ 202, 316(D), 72 Stat. 7449 (codified at 49 U.S.C. §§ 1341-1355). At that time, the Federal Aviation Administration (FAA) was the agency responsible for enforcing the requirement. *Id*. Later, Congress placed this responsibility in TSA. Aviation and Transportation Security Act of 2001 (ATSA), Pub. L. No. 107-71, § 101(e), 115 Stat. 597. Under this authority, the Under Secretary of TSA is required to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the

Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Based upon this mandate, the Under Secretary has defined certain types of information as SSI and has limited the disclosure of that information to certain circumstances. 49 C.F.R. part 1520.

¶13 Sensitive Security Information is defined in the regulations as, among other things, "[s]pecific details of aviation security measures that are applied directly by the TSA and which includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j) (2003). Information of this kind, as well as records containing such information, constitutes SSI unless the Under Secretary provides in writing to the contrary. 49 C.F.R. § 1520.7. Based upon the foregoing, we find that Congress provided TSA with the responsibility of defining, regulating, and protecting SSI under 49 U.S.C. § 114(s).

Congress provided individuals with an avenue to challenge TSA's SSI determination before the United States Court of Appeals pursuant to 49 U.S.C. § 46110, and the appellant in this case availed himself of that avenue, so the finding of the court is binding in this proceeding.

¶14 In charge (3), the appellant is alleged to have disclosed SSI when he disclosed to the media that all Las Vegas Field Office FAMs were sent a text message to their government-issued mobile phones that all RON missions would be cancelled, or words to that effect. During proceedings below, the AJ then assigned the case granted the appellant's motion to dismiss the appeal without prejudice to allow the appellant the opportunity to appeal the agency's Final Order finding that the information he disclosed constituted SSI. IAF 1, Tab 7.

¶15 Under 49 U.S.C. §§ 114(s), 46110(a), when the Under Secretary determines by final order that particular material qualifies as SSI, that determination

constitutes final agency action subject to judicial review. 49 U.S.C. § 46110. The statute authorizes review of such orders in the D.C. Circuit or the court of appeals for the circuit in which a complaining party resides or has its principal place of business. *Id*. Congress provided the D.C. Circuit or U.S. Courts of Appeals with the exclusive jurisdiction to review the agency's SSI determination. *Id*. Under 49 U.S.C. § 46110(c), only these courts are authorized to "affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." A decision by a court of appeals pursuant to this section may be reviewed only by the Supreme Court under section 1254 of title 28. 49 U.S.C. § 46110(e).

¶16 In addition, as noted above, the appellant actually appealed the agency's Final Order to the U.S. Court of Appeals for the Ninth Circuit. *MacLean*, 543 F.3d at 1145. In finding that the information contained in the text message qualifies as SSI, the court interpreted the construction it gives to the term "order" in the statute at 49 U.S.C. § 46110. The court stated, in pertinent part, that:

> [P]ursuant to 49 U.S.C. § 46110(c), we have jurisdiction to review only final agency "orders." We give "broad construction to the term 'order' in" § 46110, but the TSA's classification of its own order as a "final order" does not control our review. Generally, an order under § 46110 is reviewable if it "'carries a note of finality, and applies to any agency decision which imposes an obligation, denies a right, or fixes some legal relationship.'" We have explained that an agency decision qualifies as a final "order" under 49 U.S.C. § 46110 if it possesses four qualities: (1) it is supported by a "reviewable administrative record," (2) it is a '"definitive' statement of the agency's position," (3) it has a "'direct and immediate effect' on the day-to-day business on the party asserting wrongdoing," and (4) it '"envisions immediate compliance with the [order's] terms."'
>
> . . . . We review de novo legal questions raised by the TSA's order. We review the TSA's findings for substantial evidence. *See* 49 U.S.C. § 46110(c). We may set aside the order if it is unconstitutional, contrary to law, arbitrary and capricious, *ultra vires*, or unsupported by substantial evidence, *see* 5 U.S.C. § 706(2)(A)-(E), but we must also accord deference to an agency's interpretation of its own regulations. We may "affirm, amend,

> modify, or set aside any part of the order and may order the Secretary . . . to conduct further proceedings." 49 U.S.C. § 46110(c).

Id. at 1149-50 (citations omitted). Thus, Congress provided individuals with an avenue to challenge TSA's SSI determination in federal appellate courts pursuant to 49 U.S.C. § 46110. Further, the appellant actually availed himself of that avenue and received an adverse decision. Accordingly, we hold that, under the facts of this case, the Board does not have the authority to review TSA's SSI determination because the U.S. Court of Appeals for the Ninth Circuit has issued a decision upholding TSA's determination.

¶17 With regard to the burden of proof issue, the AJ is correct in stating that the agency has the burden to prove each of the elements of its charge by preponderant evidence, including that the information the appellant disclosed met the regulatory definition of SSI. 5 U.S.C. § 7701(c)(1)(B). In a Board appeal from an adverse action --

> an employee puts the agency in the position of plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges. The employee (while denominated appellant) has the advantageous evidentiary position of a defendant with respect to that aspect of the case.

Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (Fed. Cir. 1985).

¶18 We find that the agency can meet its burden of proof on the charge because where, as here, a federal court has determined that information relevant to a Board appeal constituted SSI, that determination is binding in the Board proceeding. In an analogous situation involving an employee's entitlement to Office of Workers' Compensation Programs (OWCP) benefits, OWCP's decisions regarding an employee's entitlement to such benefits are final and binding on the Board. *Chamberlain v. Department of the Navy*, 50 M.S.P.R. 626, 634 n.4 (1991); *see also Miller v. U.S. Postal Service*, 26 M.S.P.R. 210, 213 (1985) (where statute makes OWCP's determination regarding entitlement to benefits

"final and conclusive for all purposes," such a determination is binding in a Board proceeding).

¶19 The fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him does not alter our conclusion on issue (1) above because Congress provided individuals with an opportunity to challenge TSA's SSI determination before the United States Court of Appeals, and the appellant actually availed himself of that opportunity. Pursuant to 49 U.S.C. § 46110(c), the U.S. Court of Appeals for the Ninth Circuit gained "exclusive jurisdiction" over the appellant's petition challenging TSA's SSI determination "when [his] petition [was] sent [to the appropriate TSA official]." Because this grant of "exclusive jurisdiction" in federal court was triggered in this case, the Board lacks authority to review TSA's determination. We need not decide, and do not decide, whether the Board could make its own finding on whether particular information was SSI when the issue was in dispute and material to the outcome in a Board appeal, and there was no federal court decision on the question under 49 U.S.C. § 46110.

(3) Whether a disclosure of information that is SSI can be a disclosure protected by the WPA under 5 U.S.C. § 2302(b)(8)(A).

¶20 Title 5 U.S.C. § 2302(b)(8)(A), provides, in pertinent part, the following:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment 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, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, *if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be*

> *kept secret in the interest of national defense or the conduct of foreign affairs.*

5 U.S.C. § 2302(b)(8)(A) (emphasis added).

¶21 The agency argues that a disclosure of information that is SSI, except to "persons with a need to know," is prohibited by statute and regulation, and as such, the appellant cannot seek the protection of the WPA to cover his alleged misconduct. IAF 2, Tab 10. The appellant contends that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the exclusion from whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." IAF 2, Tabs 8, 13.

¶22 Title 5 U.S.C. § 2302(b)(8)(A) excludes from coverage disclosures "specifically prohibited by law" or Executive order. The agency does not argue that any Executive order prohibited disclosure of the information the appellant allegedly disclosed. The question then is whether any "law" prohibited the alleged disclosure. The Board has held that "prohibited by law," as that term is used in section 2302(b)(8), means prohibited by statutory law as opposed to regulation. *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993). In *Kent*, the Board addressed the question of whether the General Services Administration (GSA) regulations fell within the parameters of the "prohibited by law" language set forth in 5 U.S.C. § 2302(b)(8)(A). The Board ruled that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act of 1978 (CSRA), as amended by the WPA, after reviewing the construction of the statute and the legislative history.

¶23 Here, Congress required in the ATSA that the agency "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). For the reasons set forth below, we find that disclosures that are

prohibited by the regulations promulgated pursuant to 49 U.S.C. § 114(s) are "prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A).

¶24 The starting point for the Board's analysis of the "prohibited by law" language is *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In *Chrysler*, the Court undertook the analogous task of interpreting a statute that contained a special exception for activities "authorized by law." In considering whether an agency regulation that authorized the activity satisfied the condition, the Court explained:

> It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law. This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in [the statutory section at issue] could be held to have a narrower ambit than the traditional understanding.

441 U.S. at 295-96.

¶25 *Chrysler* thus sets up a default rule, and a specific exception. That is, agency regulations that are (1) properly promulgated, and (2) substantive, must be accorded the force and effect of law absent a clear showing of contrary legislative intent. With regard to the substantive characteristics and procedural requisites, the *Chrysler* court elaborated three conditions for a rule to have the force and effect of law. These are (1) it must be a "substantive rule"; (2) Congress must have granted the agency authority to create such a regulation; and (3) the regulations must be promulgated in conformity with any procedural requirements imposed by Congress. 441 U.S. at 301-03; *see also Hamlet v. United States*, 63 F.3d 1097, 1105 n.6 (Fed. Cir. 1995) (distilling the three conditions from *Chrysler*).

¶26 Here, these three conditions are present for initial application of the default rule to 49 C.F.R. § 1520.7 (2003).[1] A substantive rule is a "legislative-type rule" that "affect[s] individual rights and obligations." *Chrysler*, 441 U.S. at 302. Title 49 C.F.R. § 1520.7 certainly affects individual rights and obligations, by expressly limiting the speech rights of possessors of information defined by the regulation as SSI. It is also clear that 49 U.S.C. § 114(s) expressly granted the Under Secretary the authority to promulgate the regulations, which "prohibit[] the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s). Finally, the regulations at 49 C.F.R. part 1520 were properly promulgated under the Administrative Procedure Act rules governing legislative rulemaking – notice was published, comments were received, an interim final rule soliciting further comments was published, and a final rule was issued.

¶27 Consequently, "absent a clear showing of contrary legislative intent" the phrase "prohibited by law" in 5 U.S.C. § 2302(b)(8)(A) must be read to include disclosures prohibited by 49 C.F.R. § 1520.7 (2003). In *Kent*, the Board examined the language and legislative history of 5 U.S.C. § 2302(b)(8)(A) and discovered "a clear legislative intent to limit the term 'specifically prohibited by law' . . . to statutes and court interpretations of statutes." 56 M.S.P.R. at 542.

¶28 With regard to the statutory language, the Board concluded that inclusion of the phrase "specifically prohibited by law" following other statutory language referring to "a violation of any law, rule, or regulation," "indicated that the term 'law' was not intended to encompass rules and regulations." 56 M.S.P.R. at 542. We do not find that this distinction evidences a clear showing of legislative intent. The differing grammatical structures of the phrases are not compatible.

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[1] Although not separately discussed, the same analysis applies to the virtually identical language of the current rule codified at 49 C.F.R. § 1520.5.

Indeed, drawing a distinction between the phrases "of any law, rule, or regulation" and "by law" based simply on the latter's failure to include "rule, or regulation" begs the question at issue: whether the default construction of "by law" to include regulations has been overcome by clear legislative intent. Given the traditional default rule, Congress would have no reason to use the broader (and redundant) phrase "by law, rule, or regulation" when "by law" suffices. Moreover, the phrase "by law" has been in legislative use since at least the mid-19th century. *See Chrysler*, 441 U.S. at 296-98 (discussing antecedents to the Trade Secrets Act of 1947, which, since the Revenue Act of 1864, included language prohibiting disclosures except as "provided by law" or "authorized by law"). As the *Chrysler* court explained, the language has been "well-established" to encompass properly promulgated substantive agency regulations. Congress must be presumed to have been aware of these antecedents and their construction when it opted to use the phrase "by law" in the CSRA.

¶29 The Board in *Kent* also relied upon legislative history to support its conclusion that disclosures prohibited by regulation are not prohibited "by law" under the CSRA. The Board opined that "Congress' concern with internal agency rules and regulations impeding the disclosure of government wrongdoing is consistent with this restrictive reading of the statutory language." 56 M.S.P.R. at 542 (citing S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743). The Board also cited a passage from the House Conference Report explaining that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations." *Id*. at 542-43 (citing H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864).

¶30 A closer examination of the legislative history indicates that Congress' intent is at best ambiguous, and therefore does not meet the standard of clarity required by *Chrysler*. The original version of the bill as introduced in both the House and the Senate protected disclosures that were "not prohibited by law, rule,

or regulation." H.R. 11280 and S. 2640. The Senate version was amended by the Senate Committee on Governmental Affairs to substitute the phrase "not prohibited by statute." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730, 2743. The House version was amended by the House Committee on Post Office and Civil Service to substitute the phrase "not prohibited by law." The full House and Senate each passed their respective versions of the bill, both as S. 2640. In conference, the House language "not prohibited by law" was selected in lieu of the Senate language "not prohibited by statute." H.R. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864. The selection of the broader phrase "by law" evidences Congressional intent to expand the scope of the exemption beyond mere statutes to include all "law." Under the general rules of statutory construction, Congress can be presumed to have known that its selection of the broader phrase "by law," in the absence of any limiting language, could expand the scope of the exemption to include all "law." *See D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993), *overruled on other grounds, Thomas v. Department of the Treasury*, 77 M.S.P.R. 224 (1998), *Thomas overruled in part on other grounds by Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000).

¶31 Moreover, the legislative history also shows that even the Senate's adoption of the narrower phrase "by statute" was not intended to exclude substantive regulations mandated by Congress, such as those promulgated pursuant to 49 U.S.C. § 114(s). The Senate Committee on Governmental Affairs modified the original bill to limit the exemption to disclosures prohibited "by statute," out of "concern that the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule, or regulation,' would encourage the adoption of *internal procedural regulations against disclosure*, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, 95th Cong., 2d Sess. 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743-44 (emphasis added). "Rules of agency organization,

procedure, or practice" are recognized as distinct from the "substantive rules" that are authorized by Congress and can have the force of law. *Chrysler*, 441 U.S. at 301. Thus, by expressly excluding "internal procedural regulations," the Senate Committee implicitly included substantive agency regulations.

¶32 The House Conference Report explanation that "prohibited by law" refers to "statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations," could be construed in isolation to suggest an intent to the contrary to protect disclosures prohibited by a substantive regulation. However, in light of the contrary indicia of Congressional intent, this language alone cannot establish the "*clear showing* of contrary legislative intent" required before the phrase "prohibited by law" "could be held to have a narrower ambit than the traditional understanding." 441 U.S. at 295-96. And there is, in fact, no other evidence in the Congressional record to establish that the language was intended to convey such intent. Indeed, the House Report is silent with regard to its substitution of "by law" for the "by law, rule, or regulation" language of the bill as originally introduced. House Report No. 95-1403 at 17 (referring only generally to the specific prohibited personnel practices enumerated at new section 2302(b)(2)-(11)), *reprinted in Legislative History of the Civil Service Reform Act of 1978,* Committee on Post Office and Civil Services, Committee Print No. 96-2 (1979). Furthermore, the minutes of the Conference Committee sessions from which the enacted version of the bill emerged, reflect that the selection of the House's "by law" over the Senate's "by statute" was not even discussed by the Committee members.

¶33 Although the AJ in this case did not undertake a detailed *Chrysler* analysis, his rationale for distinguishing *Kent* was based upon the standards addressed in *Chrysler*. He observed that the statute under which the regulation at issue in *Kent* was promulgated did not "require [the agency] to include in its regulations categories of information that may not be disclosed to a third party, as the GSA alleged Mr. Kent did in a charge underlying its action against him. Therefore, at

most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them." Certification Order at 9. The same point made under the *Chrysler* framework would be that one of the three prerequisites to giving the regulation the effect of law was not satisfied because Congress did not grant the GSA authority to promulgate a regulation that prohibited the disclosure of information. In other words, the Board in *Kent* went too far by holding that a regulation could *never* be a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8). The same outcome could have been reached by holding simply that the GSA regulation at issue was not entitled to the force and effect of law under the governing standards.[2] In contrast, those standards mandate that 49 C.F.R. § 1520.7 (2003) be given the force and effect of law in the context of 5 U.S.C. § 2302(b)(8)(A). Based upon the foregoing, we find that a disclosure in violation of the regulations governing SSI, which were promulgated pursuant to 49 U.S.C. § 114(s), is "prohibited by law" within the meaning of 5 U.S.C. § 2302(b)(8)(A) and thus cannot give rise to whistleblower protection.

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[2] Thus, to the extent that *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993), holds that a regulation could never be a law prohibiting disclosure within the meaning of 5 U.S.C. § 2302(b)(8)(A), we modify it.

ORDER

¶34 Accordingly, we reverse the AJ's rulings with regard to issues (1) and (2), affirm his ruling as modified with regard to issue (3), and return this appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order. This is the final order of the Merit Systems Protection Board in this interlocutory appeal. 5 C.F.R. § 1201.91.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.