MERIT SYSTEMS PROTECTION BOARD

MARK ABERNATHY

v.

DEPARTMENT OF ARMY

DC-1221-14-0364-W-1

AMICUS BRIEF
OF PETER BROIDA

Interest of the Amicus: Peter Broida is a private practitioner with an interest in development of civil service law before the MSPB and its reviewing court.

The Facts: the MSPB request for amicus briefs does not recite facts. Reference to the initial decision by AJ Hudson of January 23, 2015, briefly states that the appellant filed a complaint with the agency OIG asserting, variously, breach of federal contracting requirements or misallocation of contracting funds. At the time of the disclosure, the Appellant was a federal contractor. Although the AJ does not identify the contractor who employed Appellant, given her description of the type of work he was doing and the knowledge reflected by his disclosures, coupled with the types of positions he applied for, it appears a fair inference that at the time the Appellant was working for the contractor, the contractor was engaged by the Agency to which Appellant subsequently made application for employment—employment allegedly denied based on the prior disclosures.

Question Presented: under what circumstances does a contractor employee qualify for protection against whistleblower reprisal during and following that individual's application for federal employment?

Answer to Question Presented: the issue has already been resolved by precedential decisions.

Greenup v. Dept. of Agric., 106 MSPR 202, 297 (2007), already decided the issue. An individual who makes a covered disclosure, while neither an applicant or employee, is protected against reprisal once she becomes an applicant or employee and the past disclosure taints the later personnel action. The Board recognizes the case in its Federal Register notice, but the Board suggests nothing to undermine its essential holding:

> The statute does not specify that the disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment. In the case of applicants for employment who were not Federal employees at any time prior to their application, such a limitation would severely restrict any recourse they might otherwise have, since the disclosure would necessarily have to be made while their application was pending. We do not believe that Congress intended to grant such a limited right of review, when it determined to protect applicants for employment. *See, e.g., Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4, ¶ 8 (2006) (because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act).

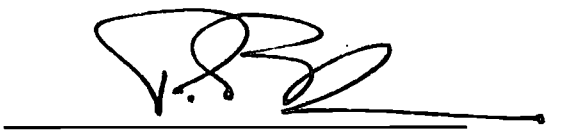
Nothing has changed that would alter the analysis in *Greenup*. The WPEA did not change the operative statute. The analysis has since been followed by Board precedential decision. *Weed v. SSA*, 113 MSPR 221, 229-30 (2010).

Greenup has not been criticized, questioned, and certainly not overruled, by any precedential or nonprecedential decision of the Federal (or other) Circuit. Nor has the case been the subject of adverse commentary in congressional reports leading to the WPEA, which addressed and corrected several misinterpretations or misapplications of whistleblowing law by the Board and its reviewing court.

Congressional silence on the *Greenup* construction is worthy of attention. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991); *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 870, 55 L. Ed.2d 40 (1978) (When Congress adopts a new law incorporating sections of a prior law, it normally can be presumed to have knowledge of the judicial or administrative interpretation given to the incorporated law); *Isabella v. Dept. of State*, 109 MSPR 453, 458 ¶ 11, 2008 MSPB 146 (2008) (it is presumed that Congress will specifically address statutory language that it wishes to change); *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 14–15 (1998) (When Congress adopts a new law incorporating a section of a prior law without change, Congress is presumed to

have been aware of the administrative or judicial interpretation of the incorporated sections and to have adopted that interpretation), *aff'd*, 230 F.3d 1373 (Fed. Cir. 1999) (Table).").

Why then is the *Greenup* result subject to re-examination now? The Federal Register notice does not say. Absent compelling circumstances compelling reevaluation and stated in the Federal Register notice, Board precedent should be followed. Mr. Abernathy's case should be remanded for further factual development and legal analysis.



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