No. 17-

IN THE
Supreme Court of the United States

JOHN C. PARKINSON,
Petitioner,
v.

DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether preference-eligible employees of the Federal Bureau of Investigation may raise whistleblower retaliation as an affirmative defense in proceedings before the Merit Systems Protection Board.

PARTIES TO THE PROCEEDING

John C. Parkinson, petitioner here, was petitioner in the Court of Appeals.

The Department of Justice, respondent here, was respondent in the Court of Appeals.

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John C. Parkinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's divided en banc decision is reported at 874 F.3d 710. Pet. App. 1a-31a. The Federal Circuit's panel decision is reported at 815 F.3d 757. Pet. App. 32a-80a. The decision of the Merit Systems Protection Board is reported at 2014 WL 5423584. Pet. App. 81a-105a. The decision of the Administrative Law Judge is unreported. Pet. App. 106a-134a.

JURISDICTION

The en banc Federal Circuit entered judgment on October 26, 2017. Pet. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are reproduced in an appendix to this petition. Pet. App. 135a-145a.

INTRODUCTION

In the Civil Service Reform Act of 1978, Congress granted special employment protections to veterans—also known in the statute as "preference-eligible" employees—who are employed by federal agencies. The most important of these protections is the right to appeal certain adverse employment actions, such as firings and lengthy suspensions, to the Merit Systems Protection Board ("MSPB"). As part of that right, Congress gave each veteran the right to raise a set of affirmative defenses at the MSPB that, if proven, would exonerate that veteran.

In this case, the en banc Federal Circuit in a divided opinion eviscerated a key affirmative defense for veterans employed by the FBI: whistleblower retaliation. Federal law prohibits the FBI from retaliating against employees who report fraud, waste, or other forms of government misconduct to certain agency officials. *See* 5 U.S.C. § 2303(a). The court of appeals nonetheless concluded—over two separate dissents—that preference-eligible FBI employees are not entitled to raise whistleblower retaliation as an affirmative defense in proceedings before the MSPB.

The Federal Circuit's decision merits this Court's review because it is flatly irreconcilable with federal law. The Civil Service Reform Act ("CSRA") provides

preference-eligible FBI employees with the right to raise an affirmative defense that the FBI's decision is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). Because whistleblower retaliation against FBI employees violates federal law, the plain language of the CSRA requires that an affirmative defense of whistleblower retaliation be available to preference-eligible FBI employees. The Federal Circuit's decision to the contrary disregards—and effectively rewrites—the statutory text. The en banc majority's holding—that the statutory provision prohibiting whistleblower retaliation, 5 U.S.C. § 2303, *implicitly* forecloses affirmative defenses based on that provision—finds no support in the text of the statute. It also undermines many of the important "structural elements" of the CSRA that this Court has identified in its precedents. *United States* v. *Fausto*, 484 U.S. 439, 449 (1988); *see Elgin* v. *Dep't of Treasury*, 567 U.S. 1 (2012).

This Court's intervention is urgently needed to correct the Federal Circuit's mistaken interpretation of federal law. Because the Federal Circuit's holding is controlling precedent for the MSPB, and because the Federal Circuit has exclusive jurisdiction over virtually every appeal involving preference-eligible FBI employees, the decision below creates a national rule that will affect every one of the thousands of preference-eligible veterans employed by the FBI. Only this Court can overturn that national rule.

The question presented is also an extremely important one for veterans and the public as a whole. Indeed, even the Government acknowledged as much in its petition for en banc review in the Federal Circuit, calling the issue one of "exceptional importance." Pet. for Reh'g En Banc of Dep't of Justice

at 1, *Parkinson* v. *Dep't of Justice*, 874 F.3d 710 (Fed. Cir. 2017) (No. 15-3066). The decision will deprive veterans of a key statutory protection against government retaliation. And it will deter them from blowing the whistle on government misconduct, undermining the core aims of the federal whistleblower protections Congress enacted for the benefit of the public at large. This Court's intervention is essential in order to restore the statutory protections eviscerated by the Federal Circuit.

For these reasons, certiorari should be granted.

STATEMENT

A. Statutory Background

1. The Civil Service Reform Act of 1978 ("CSRA") "comprehensively overhauled the federal civil service system." *Lindahl* v. *Office of Personnel Mgm't*, 470 U.S. 768, 773 (1985). It "prescribes in great detail the protections and remedies applicable" to adverse personnel actions against federal employees. *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).

Among the most important of these protections is the right to appeal certain serious adverse actions—a removal from employment or a lengthy suspension, for example—to the Merit Systems Protection Board ("MSPB"). *See* 5 U.S.C. §§ 7512, 7513(d); *Kloeckner* v. *Solis*, 568 U.S. 41, 44 (2012). The MSPB is an independent agency that adjudicates adverse actions against employees of certain federal agencies.

The right to appeal to the MSPB is available only to some federal employees. In particular, the CSRA grants MSPB appeal rights to preference-eligible individuals—that is, veterans who were honorably discharged, and certain family members of deceased

or disabled veterans—who are employed by federal agencies. *See* 5 U.S.C. § 7511(a)(1)(B); *id.* § 2108(3) (defining "preference eligible"). The CSRA thus places preference-eligible federal employees in a "preferred position." *Fausto*, 484 U.S. at 449. Indeed, in some agencies, preference-eligible individuals are the *only* employees who have appeal rights to the MSPB. 5 U.S.C. § 7511(b)(8). That is the case, for example, in the FBI. *Id.*

Every preference-eligible federal employee who has the right to appeal to the MSPB enjoys certain procedural rights. *See id.* § 7701. Chief among them is the right to raise an affirmative defense in response to the employer's arguments for firing or suspending the employee. There are three core affirmative defenses that preference-eligible employees may raise. They are codified at 5 U.S.C. § 7701(c)(2). Section 7701(c)(2) provides that the government's action against the employee "may not be sustained" if the employee "(A) shows harmful error in the application of the agency's procedures"; "(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title"; or "(C) shows that the decision was not in accordance with law." *Id.* § 7701(c)(2). Thus, if the employee establishes that the employer's decision "was not in accordance with law," the MSPB must overturn the employer's decision.

2. In addition to establishing procedures for appeals to the MSPB, the CSRA prohibits retaliation against federal employees who report fraud, waste, and other forms of government misconduct. These protections were designed to assure federal employees that "they will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 95-969,

at 8 (1978). Congress subsequently refined those protections in the Whistleblower Protection Act of 1989 and the Whistleblower Protection Act of 2012.

For many federal employees, the key protection against whistleblower retaliation is provided in Section 2302(b)(8). *See* 5 U.S.C. § 2302(b)(8). That provision states that federal agencies may not retaliate against an employee for "any disclosure of information" that the employee "reasonably believes evidences" a "violation of any law, rule, or regulation" or certain kinds of agency "mismanagement," so long as the disclosure "is not specifically prohibited by law." *Id.*

FBI employees, however, are not covered by Section 2302(b). *Id.* § 2302(a)(2)(C)(ii)(I). Instead, a different provision prohibits whistleblower retaliation against FBI employees: Section 2303(a). Section 2303(a) states that the FBI may not take a personnel action against an employee "as a reprisal for a disclosure of information" to certain individuals in the FBI or the Department of Justice, so long as the employee "reasonably believes" that the information evidences a "violation of any law, rule, or regulation" or certain kinds of agency "mismanagement." *Id.* § 2303(a).[1] Section 2303(b) and (c) then task the

[1] As originally enacted in the CSRA, Section 2303(a) prohibited reprisal only "for a disclosure of information to the Attorney General (or any employee designated by the Attorney General for such purpose)." Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1117-18. In 2016, Congress "slightly modified" Section 2303(a) "by expanding the group of people and offices to which FBI employees may make protected disclosures." Pet. App. 16a*; see* Federal Bureau of Investigation Whistleblower Protection Enhancement Act of

Attorney General and President with "prescrib[ing] regulations" and "provid[ing] for the enforcement" of that statutory prohibition. *Id.* § 2303(b), (c).

B. Factual And Procedural Background

1. Lieutenant Colonel John C. Parkinson, a decorated combat veteran of the wars in Iraq and Afghanistan, was a preference-eligible employee of the FBI. He was a Special Agent. In 2008, Parkinson made whistleblowing disclosures to the Assistant Special Agent in Charge, Gregory Cox, about the misconduct of two co-workers. Shortly thereafter, Cox gave Parkinson a low performance rating. Cox also removed Parkinson from a leadership position and reassigned him to another office. Pet. App. 34a.

In response, Parkinson filed a complaint with the Department of Justice's Office of the Investigator General ("OIG"), alleging that Cox and others had retaliated against Parkinson for making whistleblowing disclosures. OIG began to investigate. *Id.*

However, during OIG's investigation of Parkinson's whistleblower reprisal complaint against Cox, Cox asked OIG to investigate whether Parkinson had misused government funds. OIG agreed to do so. It opened a concurrent investigation into Parkinson's conduct. *Id.* at 35a.

At the conclusion of OIG's investigation, the FBI fired Parkinson. *Id.* at 41a. The FBI alleged that

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2016, Pub. L. No. 114-302, 130 Stat. 1516 (codified at 5 U.S.C. § 2303(a)(1)). The 2016 amendment, however, did not alter the remedies available to FBI employees for violations of Section 2303(a). *See* Pet. App. 16a. The amendment thus has no bearing on the answer to the question presented.

Parkinson had been guilty of theft, unprofessional conduct on duty, obstruction of the investigative process, and lack of candor in three statements Parkinson made to investigators during the OIG investigation. *Id.* at 40a-41a.

2. Parkinson appealed to the MSPB. The MSPB did not sustain the theft and unprofessional conduct charges, but did sustain the lack of candor and obstruction charges. Most relevant here, the MSPB also concluded that Parkinson was not entitled to raise an affirmative defense of whistleblower retaliation. The MSPB recognized that the statute governing the MSPB's review, 5 U.S.C. § 7701, entitles a preference-eligible FBI employee to an affirmative defense when the FBI's decision is "not in accordance with law." Pet. App. 98a (quoting 5 U.S.C. § 7701(c)(2)(C)). But even though 5 U.S.C. § 2303 prohibits whistleblower retaliation against FBI employees, the MSPB concluded that "Congress did not authorize the Board to hear" an affirmative defense of whistleblower retaliation. *Id.*

3. Parkinson appealed the MSPB's decision to the Federal Circuit. The court reversed the lack of candor charge but sustained the obstruction charge.

As relevant here, the panel also concluded that federal law permits preference-eligible FBI employees to raise an affirmative defense of whistleblower retaliation. In reaching that conclusion, the panel focused on the text of the relevant statutes. Because Section 2303(a) "unambiguously prohibits whistleblower reprisal at the FBI," Pet. App. 57a, such reprisal against FBI employees is "not in accordance with law," *id.* at 58a. Accordingly, the panel held that FBI employees are permitted to raise whistle-

blower retaliation as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C), which permits preference-eligible FBI employees to raise an affirmative defense when they can show that the agency's "decision was not in accordance with law."

The panel rejected the Government's argument that Sections 2303(b) and (c), which give Executive Branch officials authority to promulgate regulations enforcing Section 2303(a), prohibit the MSPB from considering whistleblower reprisal against FBI employees. The panel explained that Section 7701 provides preference-eligible FBI employees with an explicit "right of review over certain adverse agency action to the Board," and that this right includes an "explicit[] protect[ion] from action that is taken 'not in accordance with law.'" Pet. App. 61a. That explicit statutory right for preference-eligible veterans could not be undermined, the panel indicated, by the mere "existence of internal FBI procedures for resolving whistleblower retaliation." *Id.* The panel therefore ordered the case to be remanded to the MSPB to consider Parkinson's affirmative defense of whistleblower retaliation. *Id.* at 70a.

Judge Taranto dissented as to the whistleblower retaliation affirmative defense. He echoed the Government's argument that Section 2303 can be enforced only by the Attorney General and the President, not the MSPB. Pet. App. 73a.

4. The Government petitioned for en banc review in the Federal Circuit on the question whether federal law permits preference-eligible FBI employees to raise an affirmative defense of whistleblower retaliation in proceedings before the MSPB. The en banc Federal Circuit agreed to hear the case.

The divided en banc Federal Circuit reversed the panel's decision on that question. Notwithstanding the explicit language of Section 7701(c)(2)(C), the en banc majority concluded that an affirmative defense of whistleblower retaliation is not available to preference-eligible FBI employees. According to the majority, that was because Section 2303 "indicates Congress's intent to establish a separate regime for whistleblower protection within the FBI." Pet. App. 11a. The en banc majority also asserted that interpreting Section 7701(c)(2)(C) as providing an affirmative defense of whistleblower retaliation to FBI employees would render superfluous Section 7701(c)(2)(B), a provision that provides an affirmative defense of whistleblower retaliation to employees of other agencies, but not the FBI. *Id.* at 12a.

Judges Linn and Plager each dissented. Judge Linn explained that the majority had invented an "implicit limitation of [the] explicit right" to raise an affirmative defense. *Id.* at 24a. As he explained, Congress "unambiguously required the Board to vacate the Agency action, even if supported by substantial or preponderant evidence, where the Board concludes that the Agency action" was "not in accordance with law." *Id.* at 25a. Because "[i]t is undisputed that a decision to remove an FBI employee motivated by whistleblower retaliation is not in accordance with law under 5 U.S.C. § 2303," preference-eligible FBI employees must have an explicit right to raise whistleblower retaliation before the MSPB. *Id.* That explicit right could not be "implicitly limit[ed]" just because Section 2303 creates an alternative option for resolving FBI retaliation complaints. *Id.* at 24a. Judge Linn also noted that the majority had ignored the time-worn interpretive

canon that any "ambiguity" in the relevant statutes "must be resolved in the veteran's favor." *Id.* at 26a.

In a separate dissent, Judge Plager explained that the majority's decision resulted in a "basic denial of the right" of preference-eligible FBI employees "to make one's best case to the designated arbiter of one's fate." *Id.* at 23a. According to Judge Plager, denying an affirmative defense of whistleblower retaliation forecloses whistleblowers who appeal to the MSPB from defending themselves "on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse action." *Id.* For that reason, Judge Plager concluded that "[i]f this case is not a denial of due process by the Government, I am hard pressed to imagine one." *Id.*

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The divided en banc Federal Circuit concluded that preference-eligible veterans who are employed by the FBI may not raise whistleblower retaliation as an affirmative defense in proceedings before the Merit Systems Protection Board. That decision disregards the plain text of federal law. And it ignores nearly every "structural element[]" of the federal civil service laws that this Court has deemed important in its precedents. *Fausto*, 484 U.S. at 449. That erroneous decision will have far-reaching consequences. The decision establishes a nationwide rule applicable to all preference-eligible FBI employees, as the decision is now controlling precedent for the MSPB and resolves an issue that falls within the Federal Circuit's exclusive jurisdiction in nearly every case. The decision also will erode the whistleblower protections Congress gave to thousands of preference-

eligible veterans employed by the FBI, harming those who have "drop[ped] their own affairs to take up the burdens of the nation" in military service and who attempt to do so once more as whistleblowers. *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). The Federal Circuit's mistaken interpretation of federal law warrants this Court's immediate review.

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN TEXT OF FEDERAL LAW AND THE MANIFEST INTENT OF CONGRESS

The Federal Circuit's en banc decision disregards the text and structure of federal law, which clearly require that preference-eligible veterans employed by the FBI be permitted to raise whistleblower retaliation as an affirmative defense when appealing an adverse employment decision to the MSPB. The Federal Circuit reached the opposite conclusion only by inventing a limitation on whistleblower retaliation defenses that finds no support in the text of the relevant statutes. The Federal Circuit's atextual interpretation is plainly wrong, and it is part of a troubling trend—one recognized even by Congress—of decisions by that court and the MSPB that have undermined the whistleblower protections explicitly conferred by Congress.[2] This Court's intervention is

[2] *See, e.g.*, S. Rep. No. 112-155, at 4-5 (2012) (Senate report on Whistleblower Protection Act of 2012 indicating that "the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning"); H.R. Rep. No. 103-769, at 18 (1994) (House report on 1994 amendments to the Whistleblower Protection Act criticizing the MSPB's "inability to understand" that the "WPA protects 'any' disclosure evidencing a reasonable belief of specified

urgently needed to correct the Federal Circuit's misguided interpretation of federal law.

A. The Decision Below Contravenes The Text And Structure Of Federal Law

1. Start, as this Court "always do[es], with the statutory language." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1658 (2017). Under the civil service laws, a preference-eligible FBI employee "who has completed 1 year of current continuous service in the same or similar positions" is entitled to appeal an adverse employment decision to the MSPB. 5 U.S.C. § 7511(a)(1)(B); *see id.* §§ 7511(b)(8), 7513(d). The Civil Service Reform Act indicates that all federal employees who are entitled to an appeal before the MSPB have a right to raise three types of affirmative defenses. Those affirmative defenses are codified at 5 U.S.C. § 7701(c)(2). That provision indicates that "the agency's decision may not be sustained" when the employee who has appealed "(A) shows harmful error in the application of the agency's procedures in arriving at such decision; (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or (C) shows that the decision was not in accordance with law." *Id.* § 7701(c)(2).

On its face, the third type of affirmative defense provided by Section 7701(c)(2)—"the decision was not in accordance with law"—is available to federal

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misconduct"); 135 Cong. Rec. 4512 (1989) (Joint Explanatory Statement of Whistleblower Protection Act of 1989 identifying "a string of restrictive Merit Systems Protection Board and federal court decisions" making it "unduly difficult for whistleblowers * * * to win redress").

employees who allege that an adverse employment decision taken by the government violates a federal statute. Indeed, a long line of this Court's precedents has recognized that the statutory phrase "not in accordance with law" refers to violations of other provisions of the U.S. Code. *See, e.g.*, *FCC* v. *Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (phrase "means, of course, *any* law, and not merely those laws that the agency itself is charged with administering"); *see also Dobson* v. *Commissioner*, 320 U.S. 489, 493 (1943); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345-346 (1937).

That third affirmative defense must cover whistleblower retaliation against FBI employees. That is because another provision of the CSRA, 5 U.S.C. § 2303, makes whistleblower retaliation against FBI employees unlawful. Section 2303(a), which was enacted as part of the CSRA and subsequently amended by the Whistleblower Protection Act of 1989, provides that FBI employees "shall not" "take or fail to take a personnel action" with respect to another FBI employee "as a reprisal for a disclosure of information" by that employee to certain FBI or Department of Justice officials. 5 U.S.C. § 2303(a). That prohibition against whistleblower retaliation applies when an FBI employee discloses information that he or she "reasonably believes evidences" a "violation of any law, rule, or regulation" or certain kinds of agency "mismanagement." *Id.* Under the plain language of Section 2303(a), retaliation against FBI employees who make qualifying whistleblowing disclosures is "not in accordance with law." Accordingly, violations of Section 2303(a) plainly fall within the heartland of the third affirmative defense.

That straightforward reading of the statutory text resolves the question presented. Section 7701 makes clear that preference-eligible FBI employees who are permitted to appeal to the MSPB must also be permitted to raise whistleblower retaliation as an affirmative defense. The Federal Circuit's contrary conclusion—that no such affirmative defense can be raised in proceedings before the MSPB—"negates [the] plain text" of federal law. *Honeycutt* v. *United States*, 137 S. Ct. 1626, 1635 n.2 (2017).

2. This Court's decisions interpreting the Civil Service Reform Act demonstrate that the en banc majority's decision also conflicts with the structure and underlying purposes of the CSRA.

a. The Federal Circuit's decision undermines what this Court has long considered to be the core structural principles underlying the CSRA. In *United States* v. *Fausto*, this Court recognized "[t]wo structural elements" that "are clear in the framework of the CSRA." 484 U.S. at 449. *First*, the CSRA grants a "preferred position" to "'preference eligibles' (veterans)." *Id*. *Second*, for these preference-eligible employees, the CSRA enshrines "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action." *Id.*

The Federal Circuit's decision undermines these structural principles because it vitiates the explicit statutory right in Section 7701(c)(2) to raise affirmative defenses. That right is crucial to the proper functioning of the MSPB's appeal process. Preference-eligible FBI employees, unlike most other FBI employees, have a right to appeal adverse employment actions directly to the MSPB. *See* 5 U.S.C. § 7511(b)(8). Under Section 7701(c)(2), the most

important aspect of the right to appeal to the MSPB is the closely associated right to raise affirmative defenses. *See id.* § 7701(c)(2). Section 7701(c)(2) provides in unqualified terms that "the agency's decision may not be sustained" when one of the specified affirmative defenses applies. *Id*. That is strong medicine: No matter the charges against the employee, if an affirmative defense applies, the employee is exonerated, and the agency's decision is overturned. As Judge Plager explained, affirmative defenses are necessary for preference-eligible employees to vindicate their appeal rights because such defenses allow employees to "defend [themselves] on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse action" against them. Pet. App. 23a (Plager, J., dissenting).

By depriving preference-eligible FBI employees of a key affirmative defense that is explicitly provided in the text of the statute, the Federal Circuit's decision diminishes the "preferred position" of preference-eligible veterans in the CSRA. *Fausto*, 484 U.S. at 449. The right to appeal to the MSPB is the most important advantage Congress afforded to preference-eligible FBI employees in the CSRA. But that advantage depends in large part on the availability of affirmative defenses. Without an affirmative defense for whistleblower retaliation, preference-eligible veterans who make whistleblowing disclosures will not be able to defend themselves fully before the MSPB. The result is that preference-eligible FBI employees who are subject to whistleblower reprisal will not be able to fully vindicate their special right to appeal to the MSPB.

The Federal Circuit's decision also undermines "the primacy of the MSPB for administrative resolution of

disputes over adverse personnel action" against preference-eligible employees. *Id.* Without the ability to mount a full defense before the MSPB, preference-eligible FBI employees who make whistleblowing disclosures will be deterred from bringing their claims before the MSPB in the first instance. These employees will have little incentive to tolerate a costly and time-consuming appeal to the MSPB and the Federal Circuit when they are not permitted to raise their best arguments in those fora. Accordingly, preference-eligible employees who wish to raise whistleblower retaliation will feel impelled to resolve disputes over adverse personnel actions within the FBI itself, and without access to judicial review. The likely result is that the Federal Circuit's decision will undermine a core purpose of the CSRA—to "enable[] the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action" with respect to preference-eligible individuals. *Id.*

b. By refusing to honor the text of the relevant statutes, the Federal Circuit's decision also vitiates the detailed statutory scheme Congress enacted in the CSRA. This Court has repeatedly made clear that a core feature of the CSRA is the specificity and precision with which it spells out the civil service protections available to preference-eligible and non-preference-eligible federal employees. As this Court explained in *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012), and *Fausto*, the CSRA is a "comprehensive" statutory scheme that "'prescribes in great detail the protections and remedies applicable to' adverse personnel actions against federal employees." *Elgin*, 567 U.S. at 10-11 (quoting *Fausto*, 484 U.S. at 443, 448); *see Perry* v. *MSPB*, 137 S. Ct. 1975,

1987 n.12 (2017). The "painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions," *Elgin*, 567 U.S. at 11-12, was "designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445.

That balance, this Court explained in *Elgin* and *Fausto*, must be honored. Thus, in both cases, this Court concluded based on the "elaborate" provisions of the CSRA that the CSRA does not afford federal employees rights beyond those that are explicitly identified in the text of the statute. *Elgin*, 567 U.S. at 11; *Fausto*, 484 U.S. at 443.

If the elaborateness of the statutory scheme prohibits courts from *inferring* rights and protections *not* articulated in the statutory text, it also assuredly prohibits them from *disregarding* the rights and protections that *are* articulated in the statutory text. Here, Congress struck the "balance" between the interests of employees and the "needs of sound and efficient administration" in the text of federal law: It opted to give preference-eligible FBI employees, but not any other FBI employees, the right to an MSPB appeal and the right to raise an affirmative defense that the FBI's adverse employment action was "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). In striking that balance, Congress weighed the "sensitive mission[]" of the FBI against the importance of permitting MSPB appeals for preference-eligible veterans. H.R. Rep. No. 101-328, at 5 (1989). The Federal Circuit's decision undermines the balance Congress struck in the statutory text and, in doing

so, disregards this Court's instruction to adhere carefully to the commands of the CSRA.

3. Even if the text and structure of federal law did not clearly establish the right of preference-eligible FBI employees to raise an affirmative defense of whistleblower retaliation, the Federal Circuit's reading of the statute would be wrong because it conflicts with this Court's instruction that any "interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). This Court has made clear that legislation must "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977) (quoting *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). That canon applies with full force to legislation in which "Congress has expressed special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). Here, the Federal Circuit eviscerated a key protection Congress granted to veterans who are employed by the FBI, and it did so in spite of the plain statutory text pointing in the opposite direction. The decision is thus irreconcilable with this Court's longstanding presumption in favor of veterans, further underscoring the need for review.

B. The Federal Circuit's Arguments To The Contrary Are Wrong

1. Instead of adhering to the statutory text, the Federal Circuit invented an "implicit limitation" on the "explicit right" to raise whistleblower retaliation as an affirmative defense before the MSPB. Pet. App. 24a (Linn, J., dissenting). According to the en banc majority, Section 2303(a) can be enforced only

by the President and the Attorney General, not the MSPB. Pet. App. 11a. But that conclusion finds no support in the text of Section 2303 and is out of step with the statutory scheme as a whole.

a. As an initial matter, nothing in the text of Section 2303 indicates that Section 2303(a) cannot be the basis for an affirmative defense before the MSPB. Section 2303(a) prohibits retaliation against FBI employees for making certain kinds of whistleblowing disclosures. 5 U.S.C. § 2303(a). Section 2303(b) requires the Attorney General to "prescribe regulations" to prevent such retaliation from occurring. *Id.* § 2303(b). And Section 2303(c) requires the President to "provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title." *Id.* § 2303(c). The provisions referenced by Section 2303(c) do not mention affirmative defenses in MSPB proceedings. *See id.* § 1214 (Office of Special Counsel procedures); *id.* § 1221 (individual rights of action before the MSPB). Thus, on its face, Section 2303 does not purport to displace the explicit textual right to raise an affirmative defense that the agency's adverse employment decision is "not in accordance with law." *Id.* § 7701(c)(2)(C).

Indeed, the contrast between Section 2303 and other provisions of federal law that *do* explicitly foreclose review is telling. For example, the provisions of the CSRA that exclude non-preference-eligible FBI employees from MSPB review make clear on their face that such review is unavailable. *See, e.g.*, 5 U.S.C. § 7511(b)(8) (noting that, with the exception of preference-eligible employees, "[t]his subchapter does not apply to an employee * * * whose position is within * * * the Federal Bureau of

Investigation"). And other statutes that create whistleblower protections for employees of specific federal agencies often clearly indicate that the agency's handling of a retaliation complaint is not subject to outside review. *See, e.g.*, 5 U.S.C. app. 3 § 8H(f) ("An action taken by the head of an establishment or an Inspector General * * * shall not be subject to judicial review."). Congress surely could have done the same in Section 2303. Its decision not to do so strongly suggests that Congress did not displace the statutory right to raise an affirmative defense. *See Knight* v. *Commissioner*, 552 U.S. 181, 188 (2008) ("The fact that [Congress] did not adopt this readily available and apparent alternative strongly supports rejecting the Court of Appeals' reading.").

b. Nor does Section 2303 *implicitly* displace the explicit right under Section 7701(c)(2) to raise whistleblower retaliation in violation of Section 2303(a) as an affirmative defense. The text and structure of the relevant statutes make that crystal clear.

As amended by the Whistleblower Protection Act of 1989, Section 2303(c) authorizes presidential enforcement of Section 2303(a) "in a manner consistent with applicable provisions of sections 1214 and 1221." 5 U.S.C. § 2303(c). Section 1214 permits certain federal employees to "seek corrective action" from the Office of Special Counsel for whistleblower retaliation. *Id.* § 1214(a)(3). And Section 1221 grants certain federal employees an individual right of action that enables them to "seek corrective action" for whistleblower retaliation directly from the MSPB itself. *Id.* § 1221(a). Sections 1214 and 1221 both allow select federal employees to file freestanding whistleblower retaliation complaints against a federal agency. In other words, those provisions

permit *employees* to file a standalone complaint "seek[ing] corrective action" for whistleblower reprisal, all without the need for a definitive adjudication of the *agency's* allegations against the employee.

Sections 1214 and 1221, however, do not apply to FBI employees. *See* Pet. App. 7a. Thus, in requiring the President to enforce Section 2303(a) in a manner consistent with Sections 1214 and 1221, Section 2303(c) fills the gap left by the inapplicability of Sections 1214 and 1221 to employees of the FBI. To that end, Section 2303(c) requires the President to provide an administrative procedure that enables FBI employees to file freestanding claims of whistleblower retaliation, as other federal employees can do under Sections 1214 and 1221.

But even though Section 2303(c) requires the President to create an administrative procedure for FBI employees to bring freestanding *claims* of whistleblower retaliation, that administrative procedure cannot displace the right to raise an *affirmative defense* of whistleblower retaliation before the MSPB or the Federal Circuit. That is because the right to raise an *affirmative defense* of whistleblower retaliation is different in kind than the right to raise a *freestanding claim* of whistleblower retaliation.

An affirmative defense is merely the employee's exculpatory response to the government's argument for taking an adverse employment action against the employee. In other words, it is part of the employee's defense against accusations of misconduct by the government. *See* Black's Law Dictionary (10th ed. 2014) (defining "affirmative defense" as a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even

if all the allegations in the complaint are true"). A freestanding claim of whistleblower reprisal, on the other hand, is an accusation by the *employee* against the government. The remedy sought by the employee may not relate to any adverse employment action against the employee, and the claim does not necessarily require an adjudication of the government's allegations against the employee.

Crucially, the CSRA and subsequent federal civil service laws treat affirmative defenses differently from freestanding claims of retaliation. The right to raise an affirmative defense is conferred not in Sections 1214 and 1221, but instead in Section 7701(c)(2)(C). And while Congress has given only a specific subset of FBI employees—preference-eligible individuals—the right to raise affirmative defenses, it has deprived *all* FBI employees of the right to raise freestanding claims of reprisal.

The difference in Congress's treatment of affirmative defenses and freestanding retaliation claims carries over into Section 2303, as well. Given that Congress explicitly gave preference-eligible employees the right to an affirmative defense through Section 7701(c)(2), Congress's choice to explicitly displace and provide a substitute for Sections 1214 and 1221, but not to do so for Section 7701(c)(2)(C), is telling. As this Court has explained, when "Congress includes one possibility in a statute, it excludes another by implication." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 392 (2013). Accordingly, if any implication is to be drawn from Section 2303, it is that Congress did *not* displace the explicit statutory right of preference-eligible FBI employees to raise an affirmative defense based on the FBI's failure to comply with Section 2303(a).

That conclusion is further reinforced by the text of Sections 2303(c), 1214, and 1221. Section 2303(c) requires the administrative scheme for enforcing Section 2303 to be administered "in a manner consistent with" Sections 1214 and 1221. 5 U.S.C. § 2303(c). Sections 1214 and 1221, for their own part, both explicitly indicate that they do not displace the right of federal employees "to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation." *Id.* § 1214(a)(3); *see id.* § 1221(b) (section "may not be construed" to displace employee's "right to appeal directly to the Board under any law, rule, or regulation"). In other words, Sections 1214 and 1221 both explicitly preserve the right of preference-eligible FBI employees to appeal adverse employment actions directly to the MSPB. Thus, in order for Section 2303 to be administered "in a manner consistent with" Sections 1214 and 1221, it must be interpreted so as to preserve the appeal rights of preference-eligible FBI employees as codified in Section 7701. That includes the right to raise an affirmative defense that the adverse employment action taken by the FBI was "not in accordance with law." *Id.* § 7701(c)(2)(C).

c. Lacking a foothold in the statutory text, the en banc majority cherry-picked a few choice snippets of the legislative history to support its conclusion that Section 2303 precludes preference-eligible FBI employees from raising whistleblower retaliation as an affirmative defense. Pet. App. 13a-15a. But "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 599 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). As this Court has warned,

"ambiguous legislative history" must not be used "to muddy clear statutory language." *Milner* v. *Dep't of Navy*, 562 U.S. 562, 572 (2011). Here, the statutory text makes plain that an affirmative defense of whistleblower retaliation must be available to preference-eligible FBI employees.

Furthermore, the legislative history cited by the en banc majority does not squarely address this issue. The floor statements and committee reports cited by the majority opinion say nothing of whether Section 2303 displaced the rights available to *preference-eligible* employees. *See* Pet. App. 31a (Linn, J., dissenting) ("[N]othing in the legislative commentary or proposed legislation referenced preference eligible FBI employees."). Other portions of the legislative history, by contrast, suggest that Congress intended to grant preference-eligible FBI employees a full suite of appeal rights. *See, e.g.*, H.R. Rep. No. 101-328, at 5; *see also* Pet. App. 63a-65a (panel).

2. The en banc majority also asserted that Section 7701(c)(2)(C) does not permit an affirmative defense of whistleblower retaliation because a contrary conclusion "would render the specific provisions of § 7701(c)(2)(B) superfluous." Pet. App. 12a. Not so.

Sections 7701(c)(2)(B) and (C) cover different ground. Subsection (B) provides an affirmative defense where the agency's adverse employment action "was based on any prohibited personnel practice described in section 2302(b) of this title." 5 U.S.C. § 7701(c)(2)(B). Among other things, Section 2302(b) prohibits retaliation against certain federal employees who make whistleblowing disclosures. *Id.* § 2302(b)(8). Crucially, however, Section 2302(b) does not apply to the FBI. *Id.* § 2302(a)(2)(C). As a

result, the en banc Federal Circuit noted that Section 7701(c)(2)(B) would not permit preference-eligible FBI employees to raise an affirmative defense of whistleblower retaliation. Pet. App. 7a.

Section 7701(c)(2)(C), however, is different. It does not provide an affirmative defense for violations of Section 2302(b). Instead, at a minimum, it provides an affirmative defense for violations of statutory provisions that may be similar to, but are not coterminous with and may not cover the same agencies as, the provisions of Section 2302(b). *Cf. Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014) ("[I]t is a familiar canon of statutory construction that catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.") (quoting *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)) (alterations omitted). Section 2303(a) is one such provision: It prescribes narrower protections than Section 2302(b)(8)'s general prohibition on whistleblower reprisal, and it applies to an agency (the FBI) not covered by Section 2302(b). *See* 5 U.S.C. § 2303(a) (protecting disclosures only to select agency officials).

Reading Section 7701(c)(2)(C) as providing an affirmative defense for whistleblower retaliation based on Section 2303(a) thus does not "undermine limitations created by" Sections 7701(c)(2)(B) and 2302(b). *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996). In Section 2303(a), Congress protected a different set of whistleblowing activities and a different set of employees than those covered by Sections 7701(c)(2)(B) and 2302(b). In those circumstances, Section 7701(c)(2)(C) covers different ground than Section 7701(c)(2)(B) and does not render it superfluous.

II. THE FEDERAL CIRCUIT'S ERRONEOUS DECISION WARRANTS THIS COURT'S IMMEDIATE REVIEW

A. The Federal Circuit's Flawed Interpretation Creates A Nationwide Rule

The Federal Circuit's mistaken interpretation of federal law will affect every single preference-eligible FBI employee in the country, depriving them of the right to raise whistleblower reprisal as an affirmative defense before the MSPB. The Federal Circuit has exclusive jurisdiction over all appeals from the MSPB involving preference-eligible FBI employees, except in limited cases involving antidiscrimination claims. *See* 5 U.S.C. § 7703(b)(1)(A); *id.* § 7703(b)(2). And Federal Circuit decisions are controlling precedent for the MSPB. *See Garcia* v. *Dep't of Agric.*, 110 M.S.P.R. 371, 379-380 (2009). Thus, the Federal Circuit's decision effectively creates a nationwide rule that is binding on every preference-eligible FBI employee who brings a claim before the MSPB. Because the en banc Federal Circuit has now decided this issue, no other court save this one will be able to reconsider the decision below or overturn the now-prevailing rule in the MSPB. This Court should therefore grant certiorari and vindicate the plain text of the statutes Congress has enacted for the protection of preference-eligible federal employees.

Indeed, this Court has on many occasions reviewed Federal Circuit decisions interpreting federal statutes in cases appealed primarily or exclusively to that court. *See, e.g.*, *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016); *Dep't of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913 (2015); *Sebelius* v. *Cloer*, 569 U.S. 369 (2013); *Henderson ex rel.*

Henderson v. *Shinseki*, 562 U.S. 428 (2011); *United States* v. *Eurodif S.A.*, 555 U.S. 305 (2009). The need for review is just as compelling in this case.

If anything, the need for review here is especially great because the decision below makes it unlikely that there will be other good vehicles in the future for addressing the question presented. The Federal Circuit's decision likely will deter preference-eligible FBI employees who wish to raise whistleblower retaliation from appealing to the MSPB and the Federal Circuit. If preference-eligible FBI employees cannot raise whistleblower retaliation as an affirmative defense, they will not be able to mount a full defense before the MSPB. In those circumstances, rather than seek a costly and time-intensive MSPB appeal in which the deck is stacked against them, many may opt out of an MSPB appeal altogether. And even among those preference-eligible FBI employees who do appeal to the MSPB, there will be little reason to raise an affirmative defense that has no chance of carrying the day in the MSPB or the Federal Circuit. Thus, in light of the en banc Federal Circuit's decision, it is unlikely that there will be another good vehicle for addressing the question presented. This Court should grant certiorari now.

B. The Question Presented Is Important

The question presented in this case is one of high importance to the thousands of preference-eligible veterans who are employed by the FBI, and to the public as a whole.[3] Indeed, the United States recog-

[3] As of September 2017, the FBI employed roughly 38,000 individuals. U.S. Office of Personnel Management, Employment—September 2017, FedScope, http://goo.gl/iFrbpV.

nized as much in its petition for rehearing en banc in the Federal Circuit: It called the question presented one "of exceptional importance." Pet. for Reh'g En Banc of Dep't of Justice at 1, *Parkinson* v. *Department of Justice*, 874 F.3d 710 (Fed. Cir. 2017) (No. 15-3066). The Government's acknowledgement of the importance of the question rings just as true at this stage of the litigation, as well.

For one thing, the issue of whistleblower retaliation against preference-eligible FBI employees has arisen repeatedly before the MSPB. *See, e.g.*, *Rosado* v. *Dep't of Justice*, No. NY-1221-13-0184-W-1, 2014 WL 5319872 (MSPB May 9, 2014); *Jones* v. *Dep't of Justice*, No. DC-315I-12-0847-I-1, 2013 WL 9661048 (MSPB Oct. 28, 2013); *Van Lancker* v. *Dep't of Justice*, 119 M.S.P.R. 514 (2013). The regular recurrence of the issue is not surprising: The FBI employs thousands of preference-eligible veterans across the country, and many federal employees report each year that they have observed government misconduct. *See, e.g.*, Merit Sys. Prot. Bd., *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* 4, 8 (Nov. 2011) (noting that over ten percent of Executive Branch employees surveyed observed illegal or wasteful government conduct in 2010, and that a majority disclosed what they saw).

Although precise statistics on the number of preference-eligible veterans employed by the FBI are not publicly available, recent data suggests that roughly 25 percent of all federal executive branch employees, and roughly 20 percent of Department of Justice employees, are preference-eligible veterans. Nat'l Ctr. for Veterans Analysis & Statistics, *Veterans Employed in the Federal Executive Branch: Fiscal Year 2012* (Jan. 2015), http://goo.gl/TSDWnG.

The question presented is also important because of the harmful consequences of the decision for federal whistleblowers. If permitted to stand, the Federal Circuit's decision will eviscerate a key protection that encourages veterans employed by the FBI to disclose fraud, waste, and other forms of misconduct in the government. Congress enacted whistleblower protections in the CSRA and subsequent federal statutes so that government employees would not be subject to "harassment and abuse" for making whistleblowing disclosures. S. Rep. No. 95-969, at 8. The protections against whistleblower retaliation provided in those statutes are essential in order for federal employees, who are well-positioned to keep close tabs on the government, to fulfill their duty to disclose misconduct in the Executive Branch. *See* 5 C.F.R. § 2635.101(b)(11). But the Federal Circuit's decision deprives preference-eligible FBI employees who make whistleblowing disclosures of the only defense against retaliation that they can raise outside the agency. The result will be that veterans, who make up a significant portion of the FBI workforce, will be more likely to fear reprisal and less likely to disclose government misconduct when they see it.

That poses a substantial threat to the public interest. As perhaps the Nation's leading law enforcement agency, the FBI wields enormous power to intervene in the affairs of ordinary citizens. The FBI uses its power every day to protect Americans from criminal activity and terrorism. But the breadth of the FBI's powers makes it especially vital that FBI employees who witness misconduct by agency officials—as petitioner did in this case—feel comfortable reporting that misconduct to their superiors and that they not suffer retaliation for doing so. As a Senate

report in 2016 explained: "The FBI's vital role" in "combating serious and complex criminal activity" and "protecting the nation against terrorism and espionage" "make[s] it all the more critical that FBI employees are encouraged to report" wrongdoing when they see it. S. Rep. No. 114-261, at 5-6 (2016).

Not only will the Federal Circuit's decision chill whistleblowing disclosures by veterans employed by the FBI, but it will also adversely affect veterans who do in fact summon the courage to make whistleblowing disclosures. As Judge Plager explained in his en banc dissent, the majority's decision deprives preference-eligible FBI employees of the "right to defend [themselves] on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse action" against them. Pet. App. 23a (Plager, J., dissenting). Without a whistleblower retaliation defense before the MSPB, veterans and other preference-eligible FBI employees will not be able to mount a complete defense in response to the government's arguments. The result is a "basic denial of the right to make one's best case to the designated arbiter of one's fate." *Id.* As Judge Plager concluded, that is a serious problem: "If this case is not a denial of due process by the Government, I am hard pressed to imagine one." *Id.*

The decision below also erodes important protections for preference-eligible veterans by requiring their retaliation defenses to be adjudicated by the retaliating agency instead of a neutral third party. Although Congress foreclosed external MSPB review for most FBI employees, it carved out an exception for preference-eligible employees. The Federal Circuit's decision, however, requires even preference-eligible veterans employed by the FBI to have their

whistleblower retaliation defenses heard not by the MSPB, but rather by "officers in the FBI agency, the same agency against whom the employee is complaining." *Id.* at 18a (Plager, J., dissenting). That will not be welcome news for preference-eligible veterans. As the Government Accountability Office recently documented, the Department of Justice's system for handling FBI whistleblower retaliation complaints is plagued by delays, inefficiencies, and unfairness. U.S. Gov't Accountability Office, GAO-15-112, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints* (Jan. 2015). Some whistleblower retaliation claims made at the FBI take over a decade to resolve, and precious few are resolved in the employee's favor. *Id.* at 22. The FBI's internal system for handling retaliation complaints is thus unlikely to be of much help to preference-eligible FBI employees who face reprisal for making whistleblowing disclosures. Indeed, by channeling the retaliation claims of thousands of preference-eligible veterans into the FBI's internal system for handling retaliation complaints, the decision below will only exacerbate the delays in that internal system.

In the end, the Federal Circuit's decision does a significant disservice to veterans. Congress created an explicit right for veterans employed by the FBI to have their employment claims adjudicated by the MSPB instead of the FBI. The Federal Circuit's decision deprives veterans of a key affirmative defense in those proceedings, stacking the deck against those who have served our country once before and who seek to continue doing so by calling attention to fraud, waste, and other forms of misconduct in the federal government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2015-3066

JOHN C. PARKINSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0032-I-2.

Decided: October 26, 2017

KATHLEEN M. MCCLELLAN, Whistleblower & Source Protection Program, ExposeFacts, Washington, DC, argued for petitioner. Also represented by JESSELYN ALICIA RADACK.

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Kobus, Jane Turner, Frederic Whitehurst. Also represented by STEPHEN M. KOHN, National Whistleblowers Legal Defense, Washington, DC.

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Before PROST, *Chief Judge*, NEWMAN, PLAGER, LOURIE, LINN, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HUGHES, in which *Chief Judge* PROST and *Circuit Judges* NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL join.

Dissenting opinion filed by *Circuit Judge* PLAGER, in which *Circuit Judge* LINN joins.

Dissenting opinion filed by *Circuit Judge* LINN, in which *Circuit Judge* PLAGER joins.

HUGHES, *Circuit Judge*.

Lt. Col. John C. Parkinson appeals from a final decision of the Merit Systems Protection Board sustaining his removal from the Federal Bureau of Investigation. A panel of this court reversed the

Board's decision, concluding, in part, that the Board erred by not permitting Mr. Parkinson to raise whistleblower reprisal as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). We convened en banc to reconsider whether FBI employees are entitled to bring such whistleblowing claims to the Board. We now conclude that 5 U.S.C. § 2303 requires all FBI employees to bring claims of whistleblower reprisal to the Attorney General. Accordingly, we vacate the portion of the panel opinion finding that FBI employees may raise whistleblower reprisal as an affirmative defense before the Board, but reinstate the panel opinion as to all other issues. This case is remanded to the Board for consideration of the appropriate penalty.

I

On April 26, 2012, the FBI dismissed Mr. Parkinson from his position as a Special Agent after finding him guilty of lack of candor, obstruction, fraud/theft, and on-duty unprofessional conduct. Mr. Parkinson, a preference-eligible veteran, appealed his removal to the Board and raised whistleblower reprisal as an affirmative defense. The Administrative Judge dismissed Mr. Parkinson's whistleblower reprisal affirmative defense based on the Board's decision in *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514 (2013), which held that FBI agents are not entitled to such affirmative defenses under 5 U.S.C. § 7701(c)(2)(B) because the FBI is excluded from the definition of agency in 5 U.S.C. § 2302. The Administrative Judge, therefore, sustained Mr. Parkinson's removal based on the lack of candor and obstruction charges. The Board affirmed.

On February 29, 2016, a panel of this court sustained the obstruction charge but found the lack of candor charge unsupported by substantial evidence. The panel also determined that the Board improperly precluded Mr. Parkinson from raising whistleblower reprisal as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C).

We granted the Department of Justice's petition for en banc review to determine whether preference-eligible FBI employees can raise whistleblower reprisal as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C).

II

A brief history of the statutory context is in order. In 1978, Congress enacted the Civil Service Reform Act (CSRA), which "comprehensively overhauled the civil service system." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 773 (1985). The CSRA replaced the Civil Service Commission with three new agencies: the Office of Personnel Management (OPM); the Federal Labor Relations Authority (FLRA); and the Merit Systems Protection Board (Board). 5 U.S.C. §§ 1101, 7104, 1201. The Board was given "the responsibility, inter alia, to adjudicate appeals of adverse personnel actions taken by a federal agency against its employees." *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc). The Board's jurisdiction, however, did not extend to all adverse actions, nor to all employees of the Federal government. Only certain covered actions are reviewable and only certain covered employees may seek review. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5–6 (2012).

Covered employees generally include those in the "competitive service," those in the "excepted service" who meet tenure and length of service requirements, and, most relevant to this case, preference-eligible employees in the excepted service. *See* 5 U.S.C. § 7511(a)(1) (limiting the definition of "employee" to certain personnel). [1] Even given those broad categories, many federal employees do not have the right to appeal to the Board. Employees of several agencies were entirely excluded from the group of employees entitled to appeal to the Board. *See, e.g.*, 5 U.S.C. § 7511(b)(1)–(10). Other agencies and their employees, including those of the FBI, were also excluded from coverage with the exception of certain preference-eligible employees. *Id.* § 7511(b)(8). That coverage continued protections for veterans and other preference-eligible employees who had previous appeal rights to the Civil Service Commission. *See* Veterans' Preference Act of 1944, Pub. L. No. 78-359, § 14, 58 Stat. 387, 390–91 (1944).

The CSRA also, for the first time, created whistleblower protections for certain federal employees. The CSRA established the Office of Special Counsel (OSC) to investigate allegations of whistleblower reprisal and seek remedies from the

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[1] The CSRA initially included only those members of the excepted service who were preference-eligible. Subsequently, Congress enacted the Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (Aug. 17, 1990) (codified in relevant part at 5 U.S.C. § 7511), which extended appeal rights to non-preference-eligible members of the excepted service who had met service and tenure requirements. *See Bennett v. Merit Sys. Prot. Bd.*, 635 F.3d 1215, 1220 (Fed. Cir. 2011).

Board on behalf of employees subject to such reprisal. *See* 5 U.S.C. § 1214. Initially, however, this was the only option available to an employee as the CSRA did not create an individual right to bring a whistleblower claim directly to the Board. Subsequently, in the Whistleblower Protection Act (WPA), Congress created a new Individual Right of Action (IRA) which permitted certain individuals to bring individual whistleblower claims directly to the Board. *See* 5 U.S.C. § 1221(a). The CSRA also defined prohibited personnel practices that certain federal employees may raise as an affirmative defense when challenging an adverse action before the Board, including whistleblower retaliation. *See* 5 U.S.C. § 7701(c)(2)(B) (requiring the Board to reverse an adverse employment action when the employee "shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title").

Relevant to this appeal, § 2302(b)(8) prohibits retaliation against certain federal employees who expose waste, fraud, and abuse. Specifically, § 2302(b)(8) prohibits taking or threatening to take a personnel action against "an employee in, or applicant for, a covered position in an agency" because that individual disclosed information "which the employee or applicant reasonably believes evidences (i) any 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 . . . ." Employees who are covered under § 2302(b)(8) may raise a whistleblower reprisal allegation in one of three ways: (i) to the OSC under

5 U.S.C. § 1214, (ii) at the Board by filing an IRA under 5 U.S.C. § 1221, or (iii) as an affirmative defense to an adverse employment action under 5 U.S.C. § 7701(c)(2)(B). As with the general coverage provisions for Board appeal rights, the whistleblower provisions of § 2302 do not apply to all agencies and their employees. *See* 5 U.S.C. § 2302(a)(2)(C). The plain language of the statute excludes the FBI. *See* 5 U.S.C. § 2302(a)(2)(C) (for purposes of § 2302, "agency" "does not include . . . the Federal Bureau of Investigation"). Therefore, FBI employees are not covered under § 2302(b)(8) and may not bring a claim of whistleblower reprisal under § 1214, § 1221, or as an affirmative defense under 5 U.S.C. § 7701(c)(2)(B).

Congress did not leave FBI employees without whistleblower protections. In fact, it enacted a specific protection regime just for FBI employees who act as whistleblowers. Although it excluded them from § 1214, § 1221, and § 2302(b)(8), it enacted 5 U.S.C. § 2303, a separate but parallel whistleblower regime designed to protect all FBI employees from retaliation. Borrowing the definition of "personnel action" from § 2302(a)(2)(A)(i)–(x), § 2303 largely tracks the relevant protections provided in the general whistleblower statute, § 2302(b)(8), insofar as the substance of the disclosures given protection against "personnel actions" is concerned. It prohibits taking or failing to take a "personnel action" with respect to:

> any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such

> purpose) which the employee or applicant reasonably believes evidences (1) a violation of any law, rule, or regulation, or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2303. One difference from § 2302(b)(8) is that § 2303 limits the protected disclosures to those made within the Department of Justice.[2] The more significant difference, for present purposes, is in the manner in which these protections are enforced.

Under § 2303, FBI employees, unlike employees covered under § 2302(b)(8), do not have the right to bring claims of whistleblower reprisal directly to the Board by filing an IRA, or raise it as an affirmative defense to an adverse employment action under 5 U.S.C. § 7701(c)(2)(B). Section 2303(c) instead requires the President to "provide for the enforcement of this section *in a manner consistent* with applicable provisions of sections 1214 [OSC investigation] and 1221 [IRA at the Board]" (emphasis added), and § 2303(b) gives the Attorney

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[2] Congress recently amended § 2303 to expand the list of people and offices to whom FBI employees may make protected disclosures. Because the appeal was filed before the amendment, we rely on the prior version of the statute. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1349 (Fed. Cir. 2015) ("'[A] statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'"); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) ("[I]f a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted.").

General the authority to prescribe regulations to ensure that personnel actions are not taken against FBI employees as reprisal for making a protected disclosure. In 1997, the President delegated his enforcement responsibilities under § 2303(c) to the Attorney General. Memorandum, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 Fed. Reg. 23,123 (Apr. 14, 1997).

Under the regulations promulgated by the Attorney General, FBI employees may bring claims of whistleblower reprisal to the Office of Professional Responsibility (OPR) and the Office of Inspector General (OIG), who are charged with investigating claims of whistleblower reprisal. 28 C.F.R. § 27.3. If OPR or OIG determines "that there are reasonable grounds to believe that a reprisal has been or will be taken, [OPR or OIG] shall report this conclusion, together with any findings and recommendations for corrective action, to the Director, Office of Attorney Recruitment and Management (the Director)." *Id.* § 27.4. "[I]f the Director determines that a protected disclosure was a contributing factor in a personnel action taken or to be taken, the Director shall order corrective action as the Director deems appropriate." *Id.* The Attorney General explained that for FBI employees' whistleblower reprisal claims, "the roles and functions of [OPR, OIG, and the Director] are thus analogous to those of the OSC and [the Board], respectively, in whistleblower cases involving federal employees generally." Whistleblower Protection for Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782, 58,783 (Nov. 1, 1999).

III

We may not set aside a Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703. Statutory interpretations, like other questions of law, are reviewed de novo. *Killeen v. Office of Pers. Mgmt.*, 558 F.3d 1318, 1323 (Fed. Cir. 2009).

It is undisputed that, as a preference-eligible FBI employee, Mr. Parkinson may appeal adverse employment actions to the Board. *See* 5 U.S.C. §§ 7513(d), 7511(a)(1)(B)(i). It is also undisputed that he may not bring whistleblower claims to the Board through an IRA 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, as shown above, does not apply to any FBI employees.

Nonetheless, Mr. Parkinson argues that the Board may still hear his claim of whistleblower reprisal as an affirmative defense under § 7701(c)(2)(C). That section requires reversal of any agency action that is "not in accordance with law." *Id.* According to Mr. Parkinson, if the FBI violates the provisions of § 2303—the statute establishing a separate whistleblower scheme specifically for the FBI—it acts not in accordance with law and therefore violates § 2302(c)(2)(C). We disagree that a violation of § 2303 can form the basis of an affirmative defense under § 7701(c)(2)(C). We also conclude that § 2303 establishes a separate and independent

whistleblower scheme for FBI employees, which does not provide for review at the Board or in this court.

A

The relevant statutory provisions make clear that the Board does not have jurisdiction to hear preference-eligible FBI employees' claims of whistleblower reprisal under § 7701(c)(2)(C).

As noted above, Congress specifically exempted the FBI from the whistleblower protection set forth in 5 U.S.C. § 2302(b)(8) and instead provided a separate review process for claims of whistleblower reprisal by FBI employees. Section 2303, including its delegation to the President of authority to create a remedy scheme specific to this section, plainly applies to "*any* employee of the Bureau." 5 U.S.C. § 2303(a) (emphasis added). It does not distinguish between preference-eligible employees and non-preference-eligible employees. The 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.[3] Allowing preference-eligible FBI employees to raise whistleblower reprisal claims at the Board when

[3] The FBI is not the only agency to have a separate statutory scheme for the protection of whistleblower rights. *See* Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, 112 Stat. 2396 (1998) (establishing whistleblower protections for employees, or contractor employees, of certain agencies excluded from 5 U.S.C. § 2302(b)(8), including the Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and the National Security Agency).

§ 2303—the only statute protecting FBI employees from whistleblower reprisal—does not provide such a right, would contradict the unambiguous statutory language of § 2303 and inappropriately expand the protections provided to FBI employees by Congress.

Moreover, 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. Section 7701(c)(2)(B) specifically requires the Board to overturn adverse actions for violations of the general whistleblower statute, § 2302(b)(8). Thus, if we interpreted § 7701(c)(2)(C) so broadly as to allow an FBI employee or applicant for employment to raise whistleblower reprisal as a "violation of law" (specifically, a violation of § 2303), then a violation of § 2302(b)(8) would also qualify as a "violation of law" under § 7701(c)(2)(C), and § 7701(c)(2)(B) would no longer serve any independent purpose. Such a result violates the general/specific canon of statutory construction. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("[Where] a general authorization and a more limited, specific authorization exist side-by-side[, t]he canon avoids . . . the superfluity of a specific provision that is swallowed by the general one, violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." (internal quotation marks and citation omitted)); *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented,

no clause, sentence, or word shall be superfluous, void, or insignificant.'").

In light of Congress's specific exclusion of all FBI employees from the whistleblower protections remediable at the Board, and its specific establishment of a separate whistleblower protection scheme for FBI employees, it is improper to read an intent by Congress to allow whistleblower affirmative defenses by preference-eligible FBI employees under the general language of § 7701(c)(2)(C). Congress was clearly aware that it had allowed preference-eligible employees to appeal to the Board, despite the general exclusion of the rest of FBI employees from such protections. It was also aware that it excluded all FBI employees, including those who were preference eligible, from the whistleblower protections of § 2302(b)(8). And it was aware that § 2303 provided no right for Board review of whistleblower claims by any FBI employees, preference-eligible or not. If it had intended preference-eligible FBI employees to use § 2303 as an affirmative defense in Board cases, it could have explicitly said so, either in § 2303 itself, or in § 7701(c)(2)(B) alongside the provision that specifically recognized whistleblower reprisal (along with other prohibited personnel practices), as an affirmative defense. It did not. To conclude that Congress nevertheless intended *sub silentio* for preference-eligible FBI employees to bring whistleblower claims to the Board, despite the plain statutory language and structure, goes too far.

The legislative history also supports the conclusion that the Board lacks jurisdiction over preference-eligible FBI employees' claims of whistleblower

reprisal under § 7701(c)(2)(C). Congress noted that "the FBI has exclusive investigative responsibility for foreign counterintelligence activities within the United States" and "is charged with the investigation of 78 different types of violations of criminal statutes relating to the integrity of Federal officials." 95 CONG. REC. H9358 (daily ed. Sept. 11, 1978) (statement of Rep. Collins). Congress was therefore concerned that the "unique problems facing an intelligence agency such as the FBI," including "[t]he rigorous and dangerous duties performed by the Bureaus' employees," did not "lend themselves to [certain] aspects of this legislation," most notably, the general whistleblower provisions of § 2302(b)(8). 95 CONG. REC. H9359 (daily ed. Sept. 11, 1978) (statement of Rep. Derwinski). Ultimately, Congress expressly exempted FBI employees from § 2302(b)(8) "on the same basis as the various national security agencies—the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency." 95 CONG. REC. H9358 (daily ed. Sept. 11, 1978) (statement of Rep. Collins). Instead, due to "the demanding, sensitive, and unique responsibilities" which require "as great a degree of insulation with regard to its personnel function as is practical," Congress gave the FBI "special authority . . . to let the President set up their own whistle-blower system so that appeals would not be to the outside but to the Attorney General." 95 CONG. REC. H9429–30 (daily ed. Sept. 11, 1978) (statement of Rep. Udall). The Conference Committee explained:

> The conference substitute excludes the FBI from coverage of the prohibited personnel practices, except that matters pertaining to

> protection against reprisals for disclosure of certain information described in section 2302(b)(8) would be processed under special procedures similar to those provided in the House bill. The President, rather than the Special Counsel and the Merit Board, would have responsibility for enforcing this provision with respect to the FBI under section 2303.

S. Rep. No. 95-1272, at 128 (1978).

Based on the language of § 2302(b), § 2303, and § 7701(c)(2), which the legislative history confirms, we conclude that the Board does not have jurisdiction to review FBI employees' whistleblower reprisal claims.

B

Since the late 1990s, § 2303's express delegation of remedy-creation authority to the President has been implemented by regulations that keep review of alleged FBI reprisals within the Department of Justice, with no Board review or judicial review. Congress reconsidered and amended § 2303 in 2016, yet chose not to alter the remedies. If the statute is to be changed to provide for Board review, the remedy lies with Congress and not this court.

The sufficiency of the whistleblower protections available to FBI employees has been debated in Congress more than once. Each time, those debates were predicated on the fact that "[a]ll complaints are investigated and adjudicated completely within the Justice Department without any opportunity for independent review." S. REP. NO. 114-261, at 4 (2016). In May 2016, Senator Grassley introduced the Federal Bureau of Investigation Whistleblower

Protection Enhancement Act of 2016. *Id.* at 21–25. That Act, as proposed, would have "provide[d] for new and enhanced procedures for the investigation and adjudication of allegations of FBI whistleblower reprisal," including judicial review by the Federal Circuit to provide "consisten[cy] with whistleblower cases under the Whistleblower Protection Enhancement Act on appeal from the Merit Systems Protection Board." *Id.* at 10, 15.

On December 16, 2016, Congress slightly modified the FBI whistleblower statute by expanding the group of people and offices to which FBI employees may make protected disclosures. The Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516 (2016). The law as enacted does not provide for judicial review of FBI employees' claims of whistleblower reprisal.

As with Board review, whether judicial review should be provided for FBI agents is a matter for Congress and not this court.

IV

We find that the Board did not err in concluding that it lacked jurisdiction to hear FBI employees' claims of whistleblower reprisal under § 7701(c)(2)(C). Therefore, we vacate the portion of the panel opinion finding that FBI employees may raise whistleblower reprisal as an affirmative defense before the Board, but reinstate the panel opinion as to all other issues. Accordingly, we remand to the Board for consideration of the appropriate penalty.

AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART AND REMANDED

No costs.

PLAGER, *Circuit Judge*, with whom LINN, *Circuit Judge*, joins, dissenting.

The majority opinion, recognizing that there is no statute directly on point, engages us in an exhaustive parsing of statutes and legislative history in an effort to infer the "right" answer. But this case is not about the history and construction of tangential statutory enactments.

Over the years the judges of this court have had to deal with the myriad of statutes applicable to federal government employees and their rights under the law. Anyone who does this knows that the statutory structure governing federal personnel that has emerged after years of Congressional additions and amendments is a structure riddled with inconsistences and puzzling provisions.[1] Sometimes, parsing the variety of statutes that could be invoked as applicable to a particular personnel problem is akin to predicting divine will by studying animal entrails, as was done by the Etruscans and Romans. In that connection, it has been remarked that, "while 'answers' of some sort will be found if one insists on finding them, many will view the process as

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[1] The Supreme Court, in a case regarding the statutes governing 'mixed case' appeals before the MSPB, once observed that it is "a complicated, at times confusing, process." *Kloeckner v. Solis*, 568 U.S. 41, 49 (2012).

unedifying." [2] My colleague, Judge Linn, in his dissent which I join, nicely shows how such parsing can support the exact opposite conclusion than that reached by the majority.

An alternative approach in this case is to address what Mr. Parkinson's case is fundamentally about, and what the fair and just result should be. It is true that, as an initial proposition, an agent of the Federal Bureau of Investigation ("FBI") who thinks he or she is being treated unfairly because they blew the whistle on some illegal conduct by other FBI agents, including administrative superiors in the agency, is entitled to have their case decided by—the FBI.[3]

Through the mechanism created under the authority of 5 U.S.C. § 2303, an initial claim by an FBI agent that an earlier whistleblower report has now led to retaliatory action will be heard by officers in the FBI agency, the same agency against whom the employee is complaining. And the final merits of the agent's complaint will be determined by those same officers, without any further review in a court or elsewhere. In short, the FBI agency is both defendant and judge of the employee's whistleblower claim of unfair treatment. Some observers might argue that, even if well intentioned in order to limit public disclosure of FBI methods, such a system is an

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[2] *See* Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 6 (Yale Univ. Press 2015).

[3] The admittedly ungrammatical "they/their" usage is to avoid repetition of the he/she phrasing.

offense to basic principles of due process and governmental authority toward people whose only sin may be that they have chosen to work for the Government.

But that is not the problem we are here called upon to address. Congress created an alternative route for certain preference-eligible employees, of which Mr. Parkinson is one. In the case of certain veterans who are employed by the FBI, designated preference-eligible employees, Congress gave such employees an opportunity to have their complaints heard by a neutral third party, specifically the Merit System Protection Board ("MSPB").[4]

The MSPB, created as part of the 1978 overhaul of the federal employment system, was designed to focus the system on merit principles. It is "responsible for safeguarding the effective operation of the merit principles in practice."[5] The MSPB is the arbiter of employee complaints against an agency employer who has taken what the statutes call an "adverse action"; dismissal from the agency is such an action.[6]

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[4] Even before the creation of the MSPB, Congress carved out a statutory right solely for veterans to appeal an adverse personnel action to the Civil Service Commission. *See* 5 U.S.C. § 7701 (1976).

[5] S. Rep. No. 95-969, at 6, U.S. Code Cong. & Admin. News 1978, p. 2728.

[6] *See* 5 U.S.C. §§ 7512(1), 7513(d); *see also* 5 U.S.C. § 7511(a)(1)(B) and (b)(8) (concerning FBI preference eligibles).

Among these merit principles, set out in 5 U.S.C. § 2301, is a general statement about federal employment in subsection (b)(2):

> All employees . . . should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

More to the point here, subsection (b)(9) specifically provides:

> Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—(A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The special protections under subsection (b)(9) have been provided for whistleblowers, employees who report bad conduct on the part of other employees, and are sometimes singled out for retaliatory treatment by agency officialdom. As § 2301 evidences, the MSPB has an important role to play when an employee alleges a retaliatory dismissal following a whistleblowing action, as was the case of Mr. Parkinson.

So Mr. Parkinson took his case to the MSPB. He had been removed from his job. He tried to tell the MSPB that his firing was not because of anything he

did wrong, but was in retaliation for his being a whistleblower. Specifically, he had reported to his chain of command, including FBI Assistant Special Agent in Charge, Gregory Cox, that two pilots—who were part of the special operations group under Mr. Parkinson's leadership—had engaged in misconduct. He alleged that the two pilots, inter alia, misused FBI aircraft to solicit prostitutes, committed time and attendance fraud, used FBI computers to view pornography, and destroyed equipment. Such alleged activities would seem fairly contrary to the merit system's principles, or any other measure of proper federal employee behavior.

Prior to being removed, but after making his protected whistleblower disclosures, Mr. Parkinson was demoted from his special operations group leadership role, issued a low performance rating, and reassigned to a different field office. Among those involved in taking these actions against Mr. Parkinson was Assistant Special Agent in Charge Mr. Cox—the same FBI employee who was the recipient of Mr. Parkinson's earlier whistleblower disclosures. Later, Mr. Cox and the FBI's Sacramento Office began the process that resulted in Mr. Parkinson's ultimate removal—an action that all three judges in the initial panel decision of this court determined could not be sustained on the grounds presented.[7] That panel decision resulted in this en banc review.

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[7] *See Parkinson v. Dep't of Justice*, 815 F.3d 757, 776 (Fed. Cir. 2016), vacated by 691 F. App'x 909 (Fed. Cir. 2016) (per curiam order granting petition for rehearing en banc).

The MSPB heard Mr. Parkinson's appeal from his dismissal, but ruled he could not present his affirmative defense that the dismissal was in retaliation for his whistleblowing activity. Not surprisingly, the Government's essentially uncontested allegations led the MSPB to affirm his dismissal.

The explanation this en banc court, and to some extent the MSPB, gives is that a claim of whistleblowing by FBI agents under the relevant statutes goes exclusively to the FBI for resolution. But this case does not involve a claim of whistleblowing in the first instance. It involves whether a preference-eligible FBI agent, pursuant to a special statutory right to take an appeal from an agency dismissal to the MSPB, can defend against the Government' s argument for dismissal by providing evidence of a retaliatory government motive. The Government alleges that, because of the employee's conduct in office, the dismissal is proper. The counter is to show a neutral decider that what he really did was to blow the whistle on the FBI's activities, and that is why they are punishing him—a prohibited retaliatory action.[8]

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[8] It is not surprising to be told that the FBI takes its time and, in many cases, concludes that the allegations of misconduct by FBI authorities—casting a disparaging light on the agency—are unjustified. *See, e.g.*, En Banc Brief of Amici Curiae National Whistleblower Center et al. in Support of Petitioner at 1–8, 16–17; GAO Report 15-112, "Whistleblower Protection, Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints" (Jan. 2015).

This is what is known in the law as an affirmative defense.[9] And in what to me is an inexplicable decision, this court holds that his right to appeal his dismissal to the MSPB does not include the right to defend himself on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse action against him. This is particularly odd because the MSPB in considering permissible penalties for wrongdoing may consider whistleblowing as a mitigating factor. *See Archuleta v. Hopper*, 786 F.3d 1340, 1352–53 (Fed. Cir. 2015) (en banc); *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 331–33 (1981).

No amount of parsing of tangential statutes and regulatory provisions can justify a basic denial of the right to make one's best case to the designated arbiter of one's fate. *See* U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985): "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . . The tenured public employee is entitled to . . . an opportunity to present his side of the story." If this case is not a denial of due process by the Government, I am hard pressed to imagine one.

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[9] *See, e.g.*, *Affirmative Defense*, under *Defense*, Black's Law Dictionary (10th ed. 2014) ("A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true. . . . Also termed plea in avoidance; plea in justification. *Cf.* negative defense; confession and avoidance.").

Congress gave Mr. Parkinson an exemption from the 'usual' FBI whistle-blower/adverse action rules and gave him a hearing before the MSPB. That hearing must be conducted in a fair and proper way under our Constitution. A right to present what may prove to be a valid affirmative defense is clearly included. Equally im portantly, if the MSPB fails in its duty to provide a fair and proper hearing, the law gives him a right to appeal to this court for correction.

Both we and the MSPB have failed in our duty. I respectfully dissent.

LINN, *Circuit Judge*, with whom PLAGER, *Circuit Judge*, joins, dissenting.

The majority concludes that Congress implicitly limited preference eligible Federal Bureau of Investigation ("FBI") employees' statutory right to challenge adverse employment actions under 5 U.S.C. §§ 7513 and 7701 by creating an administrative enforcement scheme available to all FBI employees. I respectfully dissent from this implicit limitation of an explicit right.

I

The perspective underlying much of the majority's reasoning is that Parkinson is an FBI employee first, and a preference eligible veteran second. Thus, the majority concludes that "the [Merit Systems Protection Board ('Board')] does not have jurisdiction to hear preference eligible FBI employees' claims of whistleblower reprisal under § 7701(c)(2)(C)." Maj. Op. at 9.

However, Parkinson does not ask the Board to review his claims of whistleblower retaliation—Parkinson asks the Board to review the propriety of the FBI's *adverse employment action* under 5 U.S.C. § 7513(d) ("An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.").

The majority acknowledges that Congress intended to give Parkinson the right, as a preference eligible veteran, to have the Board and this court review the FBI's adverse employment action. Maj. Op. at 4. Congress empowered the Board and this court to ask and answer the following question: was the FBI's adverse employment action taken "for such cause as will promote the efficiency of the service"? 5 U.S.C. § 7513(a). Congress unambiguously required the Board to vacate the Agency action, even if supported by substantial or preponderant evidence, where the Board concludes that the Agency action was procedurally flawed, where the basis for the Agency action is prohibited, or where "the decision was not in accordance with law." 5 U.S.C. § 7701(c)(2)(A–C). It is undisputed that a decision to remove an FBI employee motivated by whistleblower retaliation is not in accordance with law under 5 U.S.C. § 2303.

The answer to the Board's congressionally mandated inquiry of whether Parkinson's removal "will promote the efficiency of the service" rests on a determination of whether the removal was motivated by whistleblower retaliation. If Parkinson's allegation of whistleblower reprisal is proven, then Congress requires the Board to vacate the adverse employment action. Thus, the whistleblower

retaliation determination is part and parcel of the determination at the heart of the Board's jurisdiction.

The Board's review authority over adverse employment action taken against a preference eligible FBI employee is explicit, as is the Congressional intent that an action taken against such an employee may not be sustained if based on a violation of law. Because an adverse employment action against an FBI employee based on whistleblower retaliation is a violation of law, 5 U.S.C. § 2303, the Board straight-forwardly has jurisdiction to consider Parkinson's contention that his removal was premised on whistleblower retaliation.

The majority, however, concludes to the contrary. The majority instead *infers* a congressional intent to prohibit preference eligible veterans at the FBI from challenging adverse employment actions based on whistleblower retaliation. The majority broadly relies on: (1) the relationship of § 2302 and § 2303 and (2) an implication from § 7701. These are addressed below.

II

To the extent that the statutory scheme is reasonably amenable to the majority's restriction, such ambiguity must be resolved in the veteran's favor. *See Terry v. Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003) ("[I]t is a well-established rule of statutory construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" (citing *Brown v. Gardner*, 513

U.S. 115, 118 (1994)). The majority's decision is proper only if the statutes unambiguously require the restriction on Parkinson's right to present a whistleblower reprisal affirmative defense.

With respect to § 2303, I agree that § 2303 "establishes a separate and independent whistleblower scheme for FBI employees, which does not provide for review at the Board or in this Court." Maj. Op. at 9. However, nothing in the majority opinion explains why the internal procedure created under § 2303 provides the *exclusive* mechanism to consider whistleblower retaliation at the FBI.

The reference to "*any* employee of the Bureau" in § 2303, Maj. Op. at 10, merely addresses who *the offender* is—it protects FBI employees from whistleblower reprisals made by "any employee." It does not indicate that "any" (or all) allegations of whistleblower retaliation at the FBI may *only* be considered internally under the Attorney General's scheme. As I read the statute, it merely provides an administrative scheme for the enforcement of a right *available* to all FBI employees. Such an affirmative grant does not and should not implicitly limit the judicial review explicitly available to a select class of employees that implicates the same right.

The fact that § 2303 does not distinguish between preference eligible and not preference eligible employees, Maj. Op. at 10, cuts against the majority's interpretation of the overall statutory scheme that singles out preference eligible FBI employees and hamstrings their right of Board review of adverse employment actions taken against them.

The majority also wrongly relies on the combination of the "broad and encompassing language of § 2303, and the corresponding broad exclusion of the FBI from § 2302" to infer a congressional intent of exclusively internal review. Maj. Op. at 10. There are several problems with this reasoning. First, the exclusion of the FBI from § 2302 says nothing about whether the enforcement mechanism of § 2303 is the exclusive mechanism available to FBI employees. Second, § 2303 limits qualifying disclosures to those made "by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose)." The exclusion of the FBI from § 2302 thus has the effect of limiting the types of qualifying disclosures available to FBI agents. It says nothing about the adjudicatory body available to remedy whistleblower reprisal.

Section 2303 prohibits certain actions by the FBI and gives the Attorney General and the President the power to enforce those prohibitions, but it nowhere indicates that the resulting administrative enforcement scheme is intended to be exclusive, or that employees with judicial appeal rights under §§ 7701, 7511, and 7513 cannot contest adverse employment actions taken against them as based on those same prohibited actions.

III

The majority also concludes that § 7701(c)(2) itself limits Parkinson's rights to assert § 2303 as part of his challenge to the FBI's employment action. Maj. Op. at 10–13. I disagree.

First, allowing an affirmative defense of whistleblower retaliation under § 7701(c)(2)(C) referencing § 2303 does not render § 7701(c)(2)(B) superfluous. The majority does not explain how the fact that "a violation of § 2302(b)(8) would also qualify as a 'violation of law' under § 7701(c)(2)(C)," Maj. Op. at 11, applies to the instant situation, where the premise is that § 2302(b)(8) does *not* apply. In other words, the majority's hypothetical is flawed, because the FBI cannot take action that is a "violation of law" based on § 2302(b)(8) because of the FBI's exclusion from the definition of "agency" in § 2302(b)(8). Indeed, the inapplicability of § 2302(b)(8) is the reason we are considering § 7701(c)(2)(C) at all in this case. If it were otherwise, Parkinson's right to assert whistleblower reprisal to challenge his removal would be found under § 7701(c)(2)(B). The "general/specific canon of statutory construction," Maj. Op. at 11, is thus also inapplicable—there is no superfluity because the scope of the two provisions is facially different. *See Parkinson v. Dep't of Justice* ("Panel Op.") 815 F.3d 757, 774 (Fed. Cir. 2016), *vacated by* 691 F. App'x 909 (Fed. Cir. 2016) (per curiam order granting petition for rehearing en banc) (distinguishing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012)).

If § 7701(c)(2)(B) explicitly excluded FBI employees from raising an affirmative defense of whistleblower retaliation, then the majority's argument might be more convincing. Here, however, the FBI's exclusion is in § 2302(b)(8). There is no basis to conclude that Congress intended the FBI's exclusion from § 2302(b) as an affirmative restriction on the availability of

affirmative defenses at the Board described in § 7701(c)(2), rather than as a restriction on statutes that rely on the criteria of § 2302(b) to establish jurisdiction, such as the right of review in 5 U.S.C. § 1214(a)(3) and the independent right of action in 5 U.S.C. § 1221.

At bottom, there is no unambiguous exclusion of preference eligible FBI employees from the right to assert an affirmative defense of whistleblower reprisal in either §§ 2302, 2303 or § 7701.

IV

The majority bases its decision on two additional arguments based on congressional consideration and action: (1) Congressional concern for national security arising out of judicial adjudication of FBI whistleblower reprisals, Maj. Op. at 12–13, and (2) later Congressional consideration and rejection of greater whistleblower protection for FBI employees. Maj. Op. at 13–14.

The legislative history only goes to show that Congress determined that the security risk of adjudicating *all* FBI employees' whistleblower complaints at the Board outweighed the benefits, in a similar way that Congress decided that adjudicating *all* FBI employees' removals at the Board outweighed the benefits. Congress, however, granted preference eligible FBI employees the right to Board review of certain employment actions despite these risks. *Panel Op.*, 815 F.3d at 771–74. As explained in Section I above, the right to challenge the employment action on the basis of whistleblower reprisal attaches to the right to

contest the employment action. Neither the Government nor the majority argue that adjudicating whistleblower reprisals leading to adverse employment actions pose greater security and disclosure risks than adjudicating the removals themselves.

Moreover, nothing in the legislative commentary or proposed legislation referenced preference eligible FBI employees. All of the cited post-Civil Service Reform Act legislative activity is consistent with the availability of judicial review of Parkinson's removal, including his challenge that the removal was motivated by whistleblower retaliation.

V

At base, I disagree with the majority's framing of the issue from the perspective of Parkinson as an FBI employee first, and disregarding the congressional intent manifest in §§ 7701 and 7513 that gives preference eligible FBI employees a right to challenge certain adverse employment actions by alleging that the action taken was not in accordance with law. I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

No. 2015-3066

JOHN C. PARKINSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

February 29, 2016

Kathleen M. McClellan, Government Accountability Project, Washington, DC, argued for petitioner. Also represented by Jesselyn A. Radack.

Melissa M. Devine, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by Elizabeth M. Hosford, Robert E. Kirschman, Jr., Benjamin C. Mizer.

Before TARANTO, PLAGER, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge LINN. Opinion dissenting-in-part filed by Circuit Judge TARANTO.

LINN, Circuit Judge.

Lt. Col. John C. Parkinson ("Parkinson"), a preference eligible veteran, appeals from a final decision of the Merit Systems Protection Board ("Board" or "MSPB") sustaining his removal as a Special Agent at the Federal Bureau of Investigation ("FBI") for lack of candor under oath in violation of FBI Offense Code 2.6, and obstruction of process of the Office of Professional Responsibility ("OPR") in violation of FBI Offense Code 2.11. *Parkinson v. Dep't of Justice*, No. SF–0752–13–0032–I–2 (M.S.P.B. Oct. 24, 2013). The Board assumed jurisdiction under 5 U.S.C. §§ 7513(d), 7511(b)(8) and 7701, and we have jurisdiction on appeal from the Board's final decision under 5 U.S.C. § 7703.

We sustain the obstruction charge, and the Board's dismissal of Parkinson's affirmative defense of violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Because the lack of candor charge is unsupported by substantial evidence, and because the Board improperly precluded Parkinson from raising an affirmative defense of whistleblower retaliation, we reverse-in-part and vacate-in-part the Board's decision and remand for consideration of Parkinson's whistleblower defense and, if necessary, the appropriate penalty.

I. BACKGROUND

A. Parkinson and Facility Build–Out[1]

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[1] The detailed factual background herein is based on reports by the Office of the Inspector General ("OIG") and the Office of Professional Responsibility ("OPR"), the Board's opinion, and

Parkinson served as a special agent with the Sacramento field office of the FBI. Beginning in 2006, Parkinson served as the leader of a special operations group ("group" or "SOG"), and was tasked with relocating a previously compromised undercover facility.

In 2006, the FBI leased a facility from James Rodda ("Rodda"), who agreed to contribute $70,000 to be used for "construction, construction documents, permits and fees" ("tenant improvement funds"). Parkinson negotiated the terms of the lease on behalf of the FBI, and managed the tenant improvement funds.

In February of 2008, partway through the facility build-out, Parkinson met with Assistant Special Agent in Charge Gregory Cox ("Cox"), and made whistleblower-eligible disclosures, implicating two pilots involved with the group in misconduct. In August 2008, Cox and Parkinson's immediate supervisor, Supervisory Special Agent Lucero ("Lucero"), issued Parkinson a low performance rating, removed him as group leader, and thereafter reassigned him to another field office.

Believing these acts to be retaliation for his February 2008 disclosure, Parkinson sent a letter to Senator Charles Grassley, who forwarded Parkinson's whistleblower reprisal allegations to the Department of Justice's Office of the Investigator General ("OIG") for investigation. OIG, in turn, opened a whistleblower reprisal investigation.

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the testimony of record. Except where indicated, these facts are not in dispute.

B. OIG Investigation of Parkinson

In October 2008, Special Agent Robert Klimt ("Klimt") replaced Parkinson as group leader, and took over the management of the off-site build-out. The OPR report describes Klimt's testimony with respect to the state of the facility build-out as Klimt found it: "the build-out had not been completed, there were no records concerning the build-out, there was no inventory for tools and equipment, and no building plans or permits."

In December 2008, Klimt requested from Rodda all receipts, invoices, and information relating to the tenant improvement funds used during the facility buildout. Rodda explained that the $70,000 in tenant improvement funds had been spent, and that Parkinson had requested, received, and spent an additional $7,000. Rodda indicated that he would look for the requested receipts, but failed to provide them after repeated FBI requests over several months.

On August 6, 2009, Cox and the Sacramento Office of the FBI submitted a referral to investigate possible misuse of the tenant improvement funds. The request was sent to the OIG, which began a misuse investigation shortly thereafter.

The OIG investigation included consideration of paper documents, interviews with Rodda, his office manager Barbara Rawls ("Rawls"), his bookkeeper Maureen Massara, each of Parkinson's supervisors in Sacramento, and multiple interviews with Parkinson. Parkinson testified that until the Spring of 2010, he believed the interviews to be in

connection with Parkinson's whistleblower reprisal complaint against the FBI leadership in Sacramento.

In November 2009, the OIG interviewed Rodda, who provided a Vendor Balance Detail report, listing all the tenant improvement expenses and hired vendors, and subsequently provided the OIG with all receipts and invoices to support the listed expenditures. The report indicated that Parkinson had spent $78,789.48 for tenant improvements. When the OIG asked Rodda why he had not provided the report and receipts to the FBI earlier, he first responded that the FBI agents "were being snoopy," but later stated that Parkinson "had told" him "not to provide them as the OIG would be coming and asking for them in the near future." J.A. 175. The characterization and import of Parkinson's communication to Rodda to withhold the receipts from the FBI is in dispute, and is described *infra* in connection to the lack of candor determination.

In April 2010, Rodda, Rawls, and Parkinson met to come to a "mutually agreed set of facts" with regard to a check written directly to Parkinson on July 12, 2007 for $1,215.67. J.A. 14. Parkinson took notes during the meeting, gave them to Rawls to type, and had Rodda sign the resulting statement. The statement indicated that the check was made out to Parkinson to pay for a subcontractor who would only accept payment in cash. Parkinson testified that "the document was created in response to the rampant rumors that were going through the Sacramento Division about possible misuse of funds [by Parkinson]," J.A. 759, and that he was trying to "defend [him]self against those accusations." J.A. 760. The statement explains: "I authorized this check

to cover the cost of installing interior doors to the building. Upon completion of the door installation, the contractor who performed the work indicated that he required cash payment. . . . My bookkeeper was out of the office that day and, in light of my staff shortage, Mr. Parkinson took the check to my bank to acquire the cash to pay the contractor." J.A. 171–72. Rodda confirmed in a later interview that the information in the statement appeared to be correct, but that he could not verify the specific details. The OIG report noted that on June 17, 2010, two months after the meeting took place, neither Rodda nor Rawls could recall what the check was for. The Board determined that as of April 2010, Parkinson "anticipated that OIG would be investigating his handling of the build-out." J.A. 15.

Throughout 2009, and until May 2010, Parkinson was interviewed repeatedly by OIG officials. In Spring 2010, Rodda told Parkinson that he believed the OIG was targeting Parkinson, and not just investigating Parkinson's whistleblower complaint. In a May 2010 interview, OIG confirmed to Parkinson that he was indeed the target of its investigation concerning the tenant improvement funds.

In the course of the interviews, Parkinson made two groups of statements that are particularly relevant to the instant case. First, the OIG investigator, David Loftus, asked, "what were considered tenant improvement items that [Rodda,] the owner of the [group] off-site was to pay for?. . . . What was that supposed to be for, the improvements?" and Parkinson answered, "Let me be very clear on this point. Nothing was done with

any of the tenant improvement funds that was not approved by [Rodda].” J.A. 635.

Second, Parkinson was asked several times about his communication to Rodda about his desire that Rodda provide the receipts to the OIG and withhold them from the FBI. The relevant colloquies are reproduced below:

> Q: Did you instruct [Rodda] not to provide [the FBI] with receipts?
>
> A: I instructed [Rodda] to provide those to the Office of the Inspector General.
>
> . . .
>
> Q: [D]id you tell [Rodda] not to provide receipts to the FBI? It’s a simple yes or no.
>
> A: I asked him not to do that.
>
> Q: Okay. So you told him not to provide receipts to us, I mean to the FBI?
>
> A: I didn’t tell him. I asked him not to.
>
> Q: You asked him not to? And what was your purpose for that?
>
> A: Because my situation was having invoked the protections of the Whistleblower Protection Act . . . [a]nd I necessarily wanted OIG to be the fair arbiter of that.
>
> . . .
>
> A: No, no, I don’t feel like I have the authority to tell anyone anything with regard to this.

> Q: Well, you did.
>
> A: No, I asked [Rodda] to provide the information to the OIG rather than FBI management.
>
> . . .
>
> A: I did not instruct [Rodda] to refuse to do it, in terms of providing it to the FBI. I advised him that those were his private business documents.
>
> . . .
>
> Q: . . . How are those records his private records that he is not to share with FBI, who has entered into an agreement with him? If he's not paying that money, if he has paid nothing, FBI could pull out of the lease. They have every right to see it. I don't know why you're classifying this as his private records?
>
> A: I can't agree with you on this point because, as a private businessman, a private person, issuing funds that are his personal funds to improve his building, which he owns [in] fee simple, that is solely his business.

J.A. 709–713.

C. Procedural History and Parkinson's Challenges

The OIG sent the FBI its report of factual findings, and the OPR thereafter issued its own report, and proposed Parkinson's dismissal. The OPR report concluded that a preponderance of the evidence substantiated four offenses: 1) theft under FBI Offense Code 4.5 for removal of furniture from the

offsite location[2]; 2) obstruction of the OPR process under FBI Offense Code 2.11 for creating the April 2010 "mutual recollection" document for Rodda's signature; 3) unprofessional conduct on duty under FBI Offense Code 5.22 for (a) instructing Rodda and Rawls not to provide the receipts to the FBI, (b) signing a false purchase agreement for the removal of furniture from the off-site, (c) spending tenant improvement funds for nonconstruction related expenses, (d) using cash to pay a laborer; and 4) lack of candor under FBI Offense Code 2.6 for statements made during the OIG investigation, reproduced supra at 762, concerning: (a) distinguishing between advising and telling Rodda and Rawls not to provide the FBI with the receipts; (b) asserting that Rodda approved all statements—without explaining that Rodda ratified the statements only afterwards; (c) asserting that the statement signed by Rodda regarding the check made out to Parkinson was a "mutual recollection" while neither Rawls nor Rodda could remember the purpose of the check two months later; and (d) statements made about furniture removed from the SOG site.

The OPR thereafter proposed to dismiss Parkinson for the theft (FBI Offense Code 4.5), unprofessional conduct while on duty (FBI Offense Code 5.22), and lack of candor (FBI Offense Code 2.6) charges, but did not impose a separate sanction for the

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[2] Part of the tenant improvement funds were used to purchase furniture, which Parkinson removed to another of Rodda's warehouses to secure from access by persons who were the subject of his original whistleblower disclosure. Because the Board did not sustain this charge, see infra, we need not and do not further address it.

obstruction of the OPR process charge (FBI Offense Code 2.11). OPR considered the Douglas factors, Parkinson's prior history of misusing a government credit card to make $2,500 in personal purchases, and aggravating and mitigating circumstances for each of the offenses, and concluded that dismissal was the appropriate penalty. The FBI thereafter dismissed Parkinson pursuant to the OPR report, and Parkinson appealed to the Board.

The Board affirmed the AJ's dismissal of Parkinson's whistleblower and USERRA affirmative defenses, relying on its prior decision in *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514 (2013) that FBI agents were not entitled to such affirmative defenses under 5 U.S.C. § 7701(c)(2)(B) because the FBI is excluded from the definition of agency in 5 U.S.C. § 2302.

The Board did not sustain the theft charge because Parkinson did not have the specific intent required, and did not sustain the unprofessional conduct charge because Parkinson was not on duty during the alleged misconduct. The Board did sustain the obstruction charge because Parkinson "met with potential witnesses to ensure that they had their stories straight, and he persuaded a key witness to lock in his story by committing it to writing," with the result that the OIG could not obtain Rodda's and Rawls's "untainted recollection of events, but rather their recollection as affected by the appellant's efforts." J.A. 14. Though it concluded that "[t]he agency did not prove that the written statement he drafted for the landlord was incorrect or that he asked the landlord to lie about anything," J.A. 16, the Board decided that success in obstruction is not

required to sustain the charge. The Board did not sustain the lack of candor charge for two of the specifications—holding that Parkinson did not lack candor in stating that the April 2010 document was a "mutual recollection[,]" and that Parkinson did not lack candor with regard to the reasons for his moving of the furniture. It did sustain the other two specifications—that Parkinson lacked candor by distinguishing between "telling" and "asking" Rodda and Rawls not to provide the receipts to the FBI, and that Parkinson lacked candor by failing to explain that Rodda's approval was in the form of ratification, not pre-expense approval.

Despite its dismissal of several of the charges, the Board sustained the OPR's removal penalty. The Board reconsidered the *Douglas* factors, noted the unique responsibilities of FBI agents, again considered the aggravating circumstance of Parkinson's prior disciplinary record, the mitigating circumstance of Parkinson's prior record of military and FBI service, and that Parkinson believed he was the victim of improper whistleblower retaliation. The Board noted that many past removal cases "involved more egregious acts of falsification than the mischaracterizations or half-truths at issue here," but the Board nevertheless approved the removal penalty. The full Board on review added some analysis, adopted the initial decision, and came to the same conclusion. The agency did not appeal the overruled charges. Parkinson timely appealed the sustained charges.

II. DISCUSSION

A. Standard of Review and Burdens of Proof

We may set aside the Board's decision only where the Board's actions are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Credibility determinations by the Board are "virtually unreviewable." *Hambsch v. Dep't of Treasury*, 796 F.2d 430, 436 (Fed. Cir.1986). We review the Board's statutory interpretations de novo. *Weatherby v. Dep't of Interior*, 466 F.3d 1379, 1383 (Fed.Cir.2006).

The Agency has the burden to show that removal of an employee will "promote the efficiency of the service." *Doe v. Dep't of Justice*, 565 F.3d 1375, 1379 (Fed.Cir.2009) (citing 5 U.S.C. § 7513(a)).

B. Obstruction of the OPR Process

FBI Offense Code 2.11 prohibits "taking any action to influence, intimidate, impede or otherwise obstruct the OPR process." The Board held that Parkinson obstructed the OPR process in crafting the mutual recollection document, categorizing Parkinson's action as meeting with "potential witnesses to ensure that they had their stories straight," and convincing "a key witness to lock in his story by committing it to writing." J.A. 14. The Board explained that the obstruction was in preventing the OIG from acquiring Rodda's untainted recollection. There was no evidence that Rodda's testimony regarding the check was altered by the meeting or the document.

We agree that the Board's determination was supported by substantial evidence. There is no dispute that Parkinson did in fact meet with Rodda and Rawls, that he prepared the statement from his notes, and that he asked Rawls to type it and Rodda to sign it. Indeed, Parkinson testified that his motivation for the meeting and for creating the document was "to clarify the expenditure in light of the false accusation Sacramento management was levying against me that I had stole[n] $77,000 of Mr. Rodda's money." J.A. 758. The document was thus intended to improperly influence the investigation that he believed would arise from the Sacramento office's accusation.

Parkinson offers two unconvincing arguments against this charge. First, that as of April 2010, he did not know of the OPR investigation into his actions, and cites *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) and *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) for the proposition that knowledge of a particular proceeding (not an "ancillary proceeding") is necessary to support a charge of obstructing that proceeding. *Aguilar* was not interpreting FBI Offense Code 2.11, and did not purport to set overarching rules for all obstruction-based offenses, particularly as the language of the criminal statute at-issue in that case was critical to the decision, *see* 515 U.S. at 598–600, 115 S.Ct. 2357. *Arthur Andersen* also cannot stand for the broad proposition Parkinson asserts; that case interpreted a different criminal statute and required only that the

proceeding was "foreseeable" to support an obstruction charge. 544 U.S. at 708, 125 S.Ct. 2129.

Parkinson does not dispute that he knew about the OIG investigation as of April 2010, and indeed argued to the Board that he "was trying to facilitate—not obstruct—the OIG's investigation," J.A. 958–59, by meeting with Rodda and Rawls. Moreover, in his briefs to the Board, Parkinson explained that in April 2010 "Mr. Parkinson *did* believe the OIG would look into the build-out, in the context of conducting an investigation into Mr. Parkinson's whistleblower reprisal complaint." J.A. 958–59. Parkinson admitted that the reason for the April 2010 meeting—"to clarify the expenditure in light of the false accusation Sacramento management *was levying against me* that I had stole[n] $77,000 of Mr. Rodda's money," J.A. 758—was directly related to the anticipated OPR proceeding. This is sufficient to establish the nexus between the obstruction and the proceeding; the OIG investigation here was not "ancillary" to the OPR process.

Second, Parkinson argues that because Rodda later testified that the April 2010 statement was true, he cannot be said to have obstructed the OPR process. FBI Offense Code 2.11 does not require a showing that the action taken *in fact* influences the OPR process—it requires only that actions are taken for proscribed purposes. Parkinson's admission that he wanted to "clarify the expenditures in light of the false accusation Sacramento management was levying against me" provides substantial evidence to support the charge that he was trying to improperly

influence the OPR process, which is all that is required.[3]

C. Lack of Candor

Parkinson was charged with "lack[ing] candor under oath in violation of FBI Offense Code 2.6 (Lack of Candor/Lying Under Oath)." FBI Offense Code 2.6 provides for dismissal when an employee "[k]knowingly provid[es] false information in a verbal or written statement made under oath." "False information" is further defined, *inter alia*, as "false statements; misrepresentations; the failure to be fully forthright; or the concealment or omission of a material fact/information."

In *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed.Cir. 2002), this court explained that lack of candor and falsification are distinct charges. While falsification "involves an affirmative misrepresentation and requires intent to deceive," *id.* at 1284 (citing *Naekel v. Dep't of Transp*., 782 F.2d 975, 977 (Fed.Cir.1986)), lack of candor "is a broader and more flexible concept whose contours

[3] Parkinson does not argue on appeal that the Board applied a standard that lacked any requirement of impropriety in the attempted influence. Such a requirement is implicit in the FBI Offense Code 2.11, given the other words following "influence" and given that even candid action aimed at persuasion would be covered by "influence" if read without a requirement of impropriety. *Cf. Arthur Andersen*, 544 U.S. at 703–04, 125 S.Ct. 2129 (reciting legitimate reasons for persuading others to withhold evidence, thus stressing the importance of the "corruptly persuad[ing]" requirement for criminal obstruction under 18 U.S.C. § 1512). Clarity would be served if the Offense Code language were modified to reflect the implicit requirement.

and elements depend upon the particular context and conduct involved," *id.* We explained that "lack of candor is established by showing that the FBI agent did not 'respond fully and truthfully' to the questions he was asked. . . . *Although lack of candor necessarily involves an element of deception*, 'intent to deceive' is not a separate element of that offense—as it is for 'falsification.' " *Id.* at 1284–85 (emphasis added).

In the context of FBI Offense Code 2.6, we understand this "element of deception" to mean that the "failure to be fully forthright" must be done "knowingly." Indeed, this was the distinction that ultimately led this court to affirm the Board's decision in *Ludlum*: "the gross disparity between the three instances [of transporting unauthorized persons in a Bureau vehicle] he first admitted and the twelve to fourteen additional instances he admitted [to] a month later indicates *he must have known* it was substantially more than three," *id.* at 1285–86 (emphasis added), and Ludlum's "later explanation for his earlier failure to mention these additional instances—'fear of causing me further problems'—demonstrated that he was less than candid in his [earlier] statement," *id.* at 1286. Though lack of candor is distinct from falsification in that it does not require a showing of an "intent to deceive," *id.* at 1284–85, it nevertheless requires that information is conveyed "knowing" that such information is incomplete.

1. Characterization of Statements to Rodda Not to Provide Receipts to the FBI

Lack of candor, as relevant here, requires proof of two elements: that the employee failed to be fully forthright, and that the employee did so knowingly. Even assuming that Parkinson failed to be fully forthright, there is no substantial evidence that this failure was done "knowingly."

First, the Board found that Parkinson's statement, "I didn't tell him, I *asked* him not to [provide the receipts]" was "not accurate," J.A. 20, because Parkinson later stated that he "*directed* [Rodda] to provide the documents to OIG rather than—or not the FBI," and Rodda testified that "[w]e got the impression that . . . we should give it to the OIG and not the FBI." J.A. 20–21. The distinction between "asked" and "directed" was itself the only basis for the Board's inference that Parkinson "was trying to minimize his culpability by suggesting he had done something of far less concern." J.A. 22. According to the Board, "[i]n drawing a distinction between *telling* and *asking*, it appears that the appellant was trying to convey the impression that he did not have much control or influence over what the landlord did." J.A. 21. The Board concluded that "in the absence of any other plausible explanation for his mischaracterization . . . the appellant made it to deceive OIG about what had happened." J.A. 22.

The distinction between the two characterizations is not enough to allow an inference that the characterization was done knowingly, because the statements can well be read to convey the same message in different words: that Parkinson wanted the receipts to go to the OIG rather than the FBI. Indeed, Rodda later explained his statement that Parkinson "told" him not to provide the receipts,

saying that "Parkinson asked him" not to provide the receipts (quoted from the OIG report), "advised him to not give the FBI any documentation" (quoted from the OIG report), and "I think Parkinson didn't trust the FBI hierarchy, and he *requested* me to hold all documents until [the] OIG asked for them." J.A. 176 (Rodda being quoted by OIG report, emphases added). Moreover, the OIG report concluded that "Parkinson hindered the Sacramento Division's attempts to determine how the SOG offsite tenant improvement funds were spent by *asking* [Rodda] and those working for him not to provide that information to the FBI." J.A. 177. The interchangeable use of words of direction and words of request by Rodda, the OIG, and Parkinson shows that Parkinson's choice of words in explaining the communication provides no foundation upon which to infer that he knowingly lacked candor.

Moreover, Parkinson explained that the reason for his insistence on the distinction was his understanding that it was not his place to tell Rodda what to do with Rodda' s own documents:

> A: No, no, I don't feel like I have the authority to tell anyone anything with regard to this.
>
> Q: Well, you did.
>
> A: No, I asked [Rodda] to provide the information to the OIG rather than FBI management.
>
> . . .
>
> A: I did not instruct [Rodda] to refuse to do it, in terms of providing it to the FBI. I advised him

> that those were his private business documents. . . .
>
> . . .
>
> Q: . . . How are those records his private records that he is not to share with FBI, who has entered into an agreement with him? If he's not paying that money, if he has paid nothing, FBI could pull out of the lease. They have every right to see it. I don't know why you're classifying this as his private records?
>
> A: I can't agree with you on this point because, as a private businessman, a private person, issuing funds that are his personal funds to improve his building, which he owns [in] fee simple, that is solely his business.

J.A. 711–13. No evidence contradicts that this was Parkinson's reason for insisting on the distinction. The Board's simple disbelief of Parkinson is not sufficient to thus conclude that Parkinson knew he was not being forthright and complete.

To be clear, the issue is not whether he, in fact, asked or told Rodda to withhold the receipts. The issue is whether the choice of words in these circumstances is alone enough to meet the agency's burden of showing that Parkinson "knowingly" failed to be fully forthright. It is not.

We thus hold that the lack of candor charge with respect to the ask/tell distinction is unsupported by substantial evidence.

2. Pre–Approval/Ratification

The Board found that Parkinson exhibited a lack of candor when he testified that: "Nothing was done with any of the tenant improvement funds that was not approved by [Rodda]." *See* J.A. 635. The Board so held because it concluded that the statement "provides an appearance of pre-approval by the landlord of the expenses," and "for the appellant's statement to OIG to have been accurate and complete, he would have had to explain the approvals were after-the-fact ratifications, not explicit pre-expenditure authorizations to spend the funds in particular ways." With little further analysis, the Board found that "in the absence of any other plausible explanation for his misstatement . . . the appellant made it to deceive OIG about the extent of the landlord's involvement in approving the expenditures."

The problem with the Board's analysis of Parkinson's state of mind is two-fold. First, the context of the question was *whether* Rodda approved the expenses, not *when* he did so. Parkinson's use of "approved" in that context instead of "ratified" is thus not enough to prove the necessary element of a knowing failure to be forthright. Second, "approved" is a generic way of saying "pre-approved or ratified," and Parkinson's statement could thus be read to be wholly accurate. Though this does not necessarily preclude a finding of a lack of candor based on other evidence of the speaker's state of mind, the use of the generic term does not alone provide substantial evidence that Parkinson "knowingly" failed to be forthright.

We thus hold that the lack of candor charge with respect to the pre-approval/ratification distinction is unsupported by substantial evidence.

D. Availability of Judicial Review of Parkinson's USERRA and Whistleblower Claims

It is undisputed in this case that Parkinson has no right to assert before the Board an individual right of action under the Whistleblower Protection Act, 5 U.S.C. § 1201 et seq., or the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq*. The issue here is whether a preference eligible FBI agent with the right to appeal an adverse personnel action before the Board is foreclosed from asserting USERRA violations and whistleblower reprisal as affirmative defenses in such an appeal to the Board. These are issues of first impression in this court.

There is no dispute in this case that the Board has jurisdiction to consider the propriety of Parkinson's removal by the FBI as a whole. The chain of statutes creating this jurisdiction, and defining allowable affirmative defenses is as follows. Title 5, section 7513(a) allows an "agency" to "take an action covered by this subchapter [(titled "Removal, Suspension for More than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less")] against an employee only for such cause as will promote the efficiency of the service." That same section creates a judicial enforcement mechanism for this provision, by providing that "An employee against whom an action is taken under this section is entitled to appeal to the

Merit Systems Protection Board under section 7701 of this title." 5 U.S.C. § 7513(d).

Most FBI personnel are not afforded this judicial enforcement mechanism because § 7511(b) states: "This subchapter does not apply to an employee . . . (8) whose position is within the . . . Federal Bureau of Investigation." However, the statute voids the exception for employees of the FBI for whom "subsection [5 U.S.C. § 7511(a)(1)(B)] of this section . . . is the basis for this subchapter's applicability." 5 U.S.C. § 7511(b)(8). Section 7511(a)(1)(B) defines an Employee as "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar position[ ]—(i) in an Executive Agency."[4] In other words, preference eligible FBI employees against whom adverse employment action has been taken may appeal such action to the Board, though non-preference eligible FBI employees do not have such a right.

Title 5, U.S.Code, section 7701, the Board's general jurisdictional statute, provides that "[a]n employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." The Board may sustain the agency decision: "Subject to paragraph (2) of this subsection . . . only if the agency's decision . . . (B) . . . is supported by a preponderance of the evidence." 5 U.S.C. § 7701(c)(1). This section forms the basis of

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[4] It is undisputed that the FBI is "an Executive Agency" for purposes of this subchapter.

Parkinson's challenges to the factual bases of the lack of candor and obstruction of the OPR process charges above.

Paragraph (2) goes on to *preclude* the Board from sustaining agency decisions as follows:

> (2) Notwithstanding [5 U.S.C. § 7701(c)] paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—
>
> . . .
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

5 U.S.C. § 7701(c)(2). [5] The Government and Parkinson agree that this section generally allows petitioners to assert certain affirmative defenses to contest agency personnel decisions. The parties disagree whether Parkinson, as an FBI agent, can assert the Whistleblower Protection Act and USERRA rights as affirmative defenses under §§ 7701(c)(2)(B) or (C).

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[5] Section § 7701(c)(2)(B) uses the phrase "prohibited personnel practice described in section 2302(b)," and section 2302(b) uses the phrase "personnel action." Section 2302(a)(1) defines "prohibited personnel practice" as "any action described in subsection (b)." Neither Parkinson nor the Government distinguishes between the phrases "personnel practice" and "personnel action."

The relevant whistleblower protections are codified, *inter alia*, in 5 U.S.C. § 2302(b) (emphasis added): "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, *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) any violation of any law, rule, or regulation . . . [or] (11)(A) knowingly take, recommend, or approve any *personnel action* if the taking of such action would violate a veterans' preference requirement." Section 2302(a)(2)(A) (emphasis added) defines a "personnel action" as, *inter alia*, "(iii) an action under chapter 75 of this title or other disciplinary or corrective action [including removal] . . . with respect to an employee in, or applicant for, a covered position *in an agency*." In turn, section 2302(a)(2)(C) (emphasis added) defines "agency" as "an Executive Agency and the Government Publishing Office, but *does not include* . . . the Federal Bureau of Investigation."

A divided Board here dismissed Parkinson's whistleblower reprisal and USERRA affirmative defenses, relying on its previous decision in *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514 (2013). In *Van Lancker*, another divided Board dismissed a preference eligible FBI agent's affirmative defense of whistleblower retaliation, holding that "The FBI is specifically excluded from coverage under 5 U.S.C. § 2302, and therefore the reference to 2302(b) in section 7701(c) is inapplicable

to FBI employees." 119 M.S.P.R. at 517. The Board reasoned that Congress could have carved out an exception to the prohibition in § 2302 for preference eligible employees, or "refrain[ed] from referencing section 2302(b) exclusively in section 7701(c)(2)(B)" in defining a prohibited personnel practice. *Id.* at 517–18. Finally, the Board distinguished cases where it had allowed affirmative defenses of whistleblower reprisal by preference eligible Postal Service employees—though those employees too are generally excluded from coverage under § 2302. It distinguished Postal Service and FBI employees because of the likelihood of sensitive information being revealed with respect to FBI whistleblowers and Congressional intent that FBI whistleblower claims be resolved internally, as manifested by Congress's creation of § 2303 to provide a separate internal enforcement mechanism for whistleblower claims by FBI agents. *See id.* at 518–19 (discussing *Mack v. U.S.P.S.*, 48 M.S.P.R. 617 (1991) and *Butler v. U.S.P.S.*, 9 MSPB 322, 10 M.S.P.R. 45 (1982)). The Board here added that § 7701(c)(2)(C) could not allow Parkinson's whistleblower affirmative defense because, though whistleblower retaliation against FBI employees generally is not in accordance with the law under § 2303, the Board has no review authority over violations of that section in whatever posture presented.

Vice Chairman Wagner filed dissenting opinions in both *Van Lancker* and in this case. In *Van Lancker*, Vice Chairman Wagner argued that "the existence of section 2302 does not justify disregarding the holdings in *Butler* and *Mack*," since both the Postal Service and the FBI are excluded from individual

causes of action under § 2302 and both have internal procedures for enforcement of whistleblower retaliation claims. *Van Lancker*, 119 M.S.P.R. at 524–25. Vice Chairman Wagner reiterated that position in her dissent in this case.

Parkinson argues that: 1) *Van Lancker* was wrongly decided because the exclusion of the FBI as an "agency" in § 2302(a) only applies to claims made under § 2302 and not to affirmative defenses where the Board otherwise has jurisdiction over the personnel action; 2) there is no principled way to distinguish Parkinson's case from the preference eligible postal workers in *Mack* and *Butler*; and 3) the "not in accordance with law" provision in § 7701(c)(2)(C) may use the prohibition against whistle-blower retaliation at the FBI found in § 2303 and against USERRA violations at the FBI found in 38 U.S.C. § 4325 as affirmative defenses.

1. Whistleblower Retaliation Defense

With regard to his whistleblower defense, we agree with Parkinson. As a preference eligible FBI agent, Parkinson was an "employee" under § 7511, with the right to appeal his removal to the Board under 5 U.S.C. §§ 7513(d) and 7701. Section 7701(c)(2)(C) unambiguously provides, *inter alia*, that "the agency's decision may not be sustained under subsection (b) of this section if the employee . . . (C) shows that the decision was not in accordance with law."

Section 2303 unambiguously prohibits whistleblower reprisal at the FBI:

> Any employee of the Federal Bureau of Investigation . . . shall not . . . take or fail to take any personnel action with respect to any employee of the Bureau as reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—(1) a violation of any law, rule, or regulation.

5 U.S.C. § 2303(a). The statute goes on to define "personnel action" as "any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau." *Id.* Section 2302(a)(2)(A)(iii) covers adverse actions under chapter 75, such as the removal taken here against Parkinson. Thus, if Parkinson was removed in reprisal for his whistleblowing disclosures, his removal would be "not in accordance with law," and the Board would be statutorily prohibited from sustaining the agency's decision to remove Parkinson.

The only issue is whether the creation of an FBI-specific enforcement mechanism for whistleblower retaliation in § 2303 preempts the availability of an affirmative defense of whistleblower retaliation by a preference eligible FBI employee before the MSPB.

The Government offers three arguments why it does. First, the Government emphasizes that the statutory language in § 7701(c)(2)(B) does not support a distinction between individual causes of action and affirmative defenses. In either case, the FBI is not an "agency" and is thus incapable of

taking "personnel action" under 5 U.S.C § 2302(a). Thus, the Government argues, Parkinson cannot show that the FBI's removal decision "was based on any prohibited personnel practice described in section 2302(b)" for purposes of 5 U.S.C. § 7701(c)(2)(B), even as an affirmative defense. The Government notes that the Supreme Court has stated that Congress exempted the FBI from "the requirements of Section 2302(b)(8)(A) entirely," *Dep't of Homeland Sec. v. MacLean*, —— U.S. ——, 135 S.Ct. 913, 923–24, 190 L.Ed.2d 771 (2015). Even assuming without deciding that the reference in § 7701(c)(2)(B) to "prohibited personnel practice described in section 2302(b)" necessarily excludes Parkinson's *affirmative defenses*, such a determination does not undermine Parkinson's argument under § 7701(c)(2)(C) that his removal was not in accordance with the whistleblower law directly applicable to FBI personnel, i.e., § 2303.

Second, the Government argues that § 7701(c)(2)(C), as a general "catch-all" provision, cannot "evade [§ 7701(c)(2)(C)'s] clear limitations to section 2302," because, as a general rule, the "specific [statutory provision] governs the general [statutory provision], as explained in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). Section 7701(c)(2)(B) and (C) do not stand in a specific/general relation to one another with respect to the FBI." If it is true, as the Government argues, that the FBI is incapable of taking a prohibited personal action under § 2302(b), then § 7701(c)(2)(B) says nothing about affirmative defenses available to FBI employees, and there can be no conflict between

the "specific" provision of § 7701(c)(2)(B) and the "general" provision of § 7701(c)(2)(C). The FBI's exclusion from the definition of an "agency" in § 2302(a)(2)(A) does not mean that an FBI decision based on the prohibited personnel practices described in § 2302(b) would thus be in accordance with law. To the contrary, as evidenced by § 2303, the prohibited personnel practices at issue here are prohibited by law at the FBI. In other words, although the FBI is excluded from the scope of § 7701(c)(2)(B), that subsection does not prohibit the applicability of § 7701(c)(2)(C) to the FBI.

Finally, the Government argues that even if § 7701(c)(2)(C) could be used as a basis for Parkinson's affirmative defense, § 2303 cannot form the predicate violation of law because that section gives the Attorney General the power to promulgate regulations to prevent whistleblower reprisals, and gives the President the power to enforce § 2303, and these powers are to be exercised in a way that did not provide for judicial review with the Board and this court. In other words, the Government argues that the Department of Justice regulations promulgated under § 2303(b)—creating a non-judicial resolution mechanism of whistleblower retaliation claims at the FBI—preempt the right of preference eligible FBI employees from asserting whistleblower retaliation as an affirmative defense under § 7701(c)(2)(C). The Government also argues that whistleblower reprisal claims by employees in the intelligence community raise serious security concerns, as the Board held in *Van Lancker*, and allowing such defenses at the Board and this court violates the Congressional intent in § 2303 to resolve

those claims within the Department of Justice. This is roughly the argument accepted by the dissent-in-part, "that a sufficiently specific remedial regime can displace an otherwise-available general remedy whose application would impair policies evident in the specific remedial provisions." Dissent-in-part at 3 (citing cases).

This argument is ultimately unconvincing because it fails to appreciate the distinct rights Congress provided to preference eligible and non-preference eligible FBI employees. As discussed *supra*, most FBI employees have no right of appeal to the Board under 5 U.S.C. §§ 7701(a), 7513(a), and 7513(d) by virtue of the exclusion of FBI employees from the definition of "employees" under 5 U.S.C. § 7511(b)(8). As such, 28 C.F.R. § 27 provides an important, and potentially exclusive, procedure for most FBI employees to resolve whistleblower retaliation-motivated agency actions. Preference eligible FBI employees, however, *do* have a right of review over certain adverse agency action to the Board, and such employees are explicitly protected from action that is taken "not in accordance with law." Neither the Government nor the dissent explain how the existence of internal FBI procedures for resolving whistleblower retaliation undermines this statutory right. Section 2303 gives to the Attorney General the responsibility of prescribing regulations "to ensure that such personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section," and gives to the President the responsibility to "provide for the enforcement of this section in a manner consistent with applicable

provisions of sections 1214 and 1221 of this title." 5 U.S.C. § 2303. Although the promulgated regulations do not provide for judicial review, *see* 28 C.F.R. §§ 27.1–27.5, nothing in the statute prohibits judicial review of whistleblower retaliation claims when presented as affirmative defenses under a separate statute providing for such review in cases affecting preference eligible FBI employees.

This is not a situation where the statutory scheme evidences a clear Congressional intent to exclude whistleblower affirmative defenses from judicial review. *See e.g.*, *United States v. Fausto*, 484 U.S. 439, 452, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) (considering the effect of the Civil Service Reform Act of 1978, including 5 U.S.C. §§ 7701, 7511 and 7513, on the appeal rights of non-preference eligible employees in the excepted service). To the extent that the FBI's exclusion from § 2302(b) evidences a Congressional intent to exclude the actions of at least some FBI employees from judicial review, *cf*. *MacLean*, 135 S.Ct. at 923–24 (noting in dicta that Congress exempted the FBI from "the requirements of Section 2302(b)(8)(A) entirely"), [6] such a determination is more than balanced by the

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[6] *MacLean* concerned a Department of Homeland Security employee's eligibility to challenge his removal under 5 U.S.C. § 2302(b)(8) for making disclosures of sensitive information. Unlike the FBI, Homeland Security is *not* one of the agencies listed in 5 U.S.C. § 2302(a)(2)(C)(ii)(I), and the issue was whether an exception withholding whistleblower protection for statements prohibited by law extends to statements prohibited by regulation. The availability of an affirmative defense to a preference eligible FBI employee under 5 U.S.C. § 7701(c)(2)(C) or § 7701(c)(2)(B) was simply not at issue in that case.

Congressional intent evinced by the explicit statutory right given to preference eligible FBI agents to have adverse employment actions judicially reviewed and to allow affirmative defenses based on violations of law presented during such a review. Section 7701(c)(2)(C) does not exclude FBI employees, and § 2303 does not prohibit judicial review. In the absence of a clearer Congressional mandate, and in light of Congress's solicitous treatment of preference eligible FBI employees, we decline the Government's invitation to read § 2303 to impliedly overrule the explicit statutory availability of affirmative defenses under § 7701(c)(2)(C).

The legislative history of the 1978 Act manifests an intention that the appeal rights of preference eligible FBI agents be grouped with other preference eligibles rather than other FBI employees. Title 5, Sections 7701, 7511, 7513, 2302, and 2303 were all part of the Civil Service Reform Act of 1978. That Act abolished the Civil Service Commission, and assigned its adjudicative functions to the Merit Systems Protection Board. S. Rep. 95–969, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2727. At that time, preference eligible veterans, including preference eligible FBI employees, already had the right to appeal their removal to the Civil Service Commission under Section 14 the Veterans' Preference Act of 1944, 58 Stat. 390, as amended 61 Stat. 723 ("[A] preference eligible . . . shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer."). Preference eligible FBI agents could exercise this right just as well as preference eligible employees of other agencies. *See id.* (granting appeal rights to

preference eligible employees "in any establishment, agency, bureau, administration, project, or department" without qualification on agency); *Chastain v. Kelley*, 510 F.2d 1232, 1236 (D.C.Cir.1975) (discussing preference eligible FBI agent's rights under the Veterans Preference Act). *Cf. Carter v. United States*, 407 F.2d 1238, 1242 & n. 3 (D.C.Cir.1968) ("Because of the exemption of the FBI from the civil service laws, the Bureau is generally free to discharge its employees for any reasons it chooses," but "like any other employer, the FBI is subject to the provisions of § 9(c) of the Universal Military Training and Service Act by which Congress granted special rights and protections to the returning veteran," though that agent could not appeal to the Civil Service Commission because he was not preference eligible).

The focus of the 1978 Act was to expand the procedural and substantive employment rights of non-preference eligible members of the excepted service. H.R.Rep. No. 101–328, at 3, *as reprinted in* 1990 U.S.C.C.A.N. 695, 697 ("The key difference between the protections available to competitive service employees and preference eligibles in the excepted service, on the one hand, and excepted service employees who are not preference eligibles, on the other, is the right to appeal an adverse action to the Merit Systems Protection Board for independent review. H.R. 3086 eliminates that difference."). The 1978 Act was not intended to restrict the rights of preference eligible employees at the FBI:

> The bill limits the procedural protections for employees of . . . the Federal Bureau of

> Investigation (FBI) . . . solely to preference eligibles, thereby preserving the status quo. The committee preserved the status quo in relation to the FBI and NSA because of their sensitive missions.

Id. at 699. *See also id.* at 697 ("An estimated 30 to 40 percent of the remaining 445,700 excepted service employees already have appeal rights because they are veterans preference eligible."). Although the Act did not *extend* Board appeal rights for FBI employees, nothing in the text or legislative history with respect to §§ 2302, 2303, 7511, 7513, or 7701 suggests that Congress intended to curtail rights already extant—such as those available to preference eligible employees. Congress maintained this right despite a clear recognition of the security concerns of doing so. This is in contrast to employees of "some agencies, such as the Central Intelligence Agency and the General Accounting Office, [where] even veterans do not have appeal rights." *Id.* The FBI's exclusion from § 2302 and the creation of a separate offensive enforcement mechanism for FBI whistleblowers in § 2303 should thus not be read to undermine by implication rights already extant before 1978.

The dissent-in-part's cited cases are not to the contrary. For example, *United States v. Bormes*, —— U.S. ——, 133 S.Ct. 12, 18, 184 L.Ed.2d 317 (2012) held that the Little Tucker Act is not available as a waiver of sovereign immunity because the Fair Credit Reporting Act (FCRA) "contains its own judicial remedies" for its violation. The case further held that the Little Tucker Act is available only where "no special remedy has been provided," and

the FCRA created a detailed remedial scheme with particular rights, that was "plaintiff-specific," and "precisely defined the appropriate forum." *Id.* However, that case says nothing about the scope of proper adjudication where judicial review is already clearly available (under § 7513 and § 7701). In *RadLAX Gateway Hotel, LLC. v. Amalgamated Bank*, —— U.S. ——, 132 S.Ct. 2065, 2071, 182 L.Ed.2d 967 (2012), the Supreme Court addressed the interaction between two statutory provisions for repayment of a creditor by a bankruptcy debtor: one provision (clause (ii)) allowing a sale of a property and repayment with the proceeds—but requiring the debtor to allow a creditor "credit-bid"— and a second catch-all provision (clause (iii)) allowing repayment with the "indubitable equivalent" of the value of the creditor property. The Supreme Court precluded a mechanism equivalent to the first provision but without the "credit-bid" option using the second provision because otherwise the general provision would swallow up the specific one. This case too cannot apply to the instant situation—the FBI's exclusion from § 2302(b) was not directed to the availability of an affirmative defense for a preference eligible with independent Board appeal rights, and the FBI is not excluded in § 7701(c)(2)(B). As such, the allowance of the whistleblower defense to the FBI here under § 7701(c)(2)(C) would not swallow up the specific provision. The remainder of the cited cases are similarly inapposite.

Our decision is bolstered by consideration of 5 U.S.C. §§ 1214 and 1221. *See* 5 U.S.C. § 2303(c) ("The President shall provide for the enforcement of this section in a manner consistent with applicable

provisions of sections 1214 and 1221 of this title."). Those sections allow employees with "the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation" to seek corrective action for prohibited personnel action first to the Board, whereas other employees must first seek corrective action from Special Counsel. *See* 5 U.S.C. §§ 1221(a), (b), and 1213(a)(3).

We therefore reverse the Board's decision prohibiting Parkinson from raising the affirmative defense of Whistleblower retaliation under 5 U.S.C. § 2303.

2. USERRA Violation Affirmative Defense

Similarly, Parkinson argues that his removal would be not in accord with law under § 7701(c)(2)(C) if it is brought in violation of USERRA. In contrast to the whistleblower retaliation defense, however, the USERRA violation claims do manifest a clear Congressional will to withhold all judicial review of USERRA violations for FBI agents.

Parkinson does not explain the specific USERRA violation herein, and cites only 38 U.S.C. § 4315. That section, titled "Reemployment By Certain Federal Agencies" provides, *inter alia*, as follows:

> (a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 [including the FBI] shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.
>
> (b) In prescribing procedures under subsection (a), the head of an agency referred to in that

> subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

Section 4315 goes on to wholly exclude the FBI's determination of reemployability under that section from judicial review as follows:

> (c)(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.
>
> (2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.
>
> *(3) A determination pursuant to this subsection shall not be subject to judicial review.*

(emphasis added). Unlike 5 U.S.C. § 2303(a), which sets forth a procedure for the internal resolution of whistleblower rights, 38 U.S.C. § 4315 explicitly indicates that the substantive determination of reemployability "shall not be subject to judicial review." Although such a prohibition applies by its terms only for "a determination pursuant to this subsection," i.e., pursuant to internal agency procedures, the Congressional intent to insulate the

substantive determination from judicial review would be frustrated by allowance of judicial review under 5 U.S.C. § 7701(c)(2). *Cf. Dew v. United States*, 192 F.3d 366, 371–72 (2d Cir.1999) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)) (" 'Whether and to what extent a particular statute [provides or] precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.' "). We note also that unlike the whistleblower act, which protects both veteran and non-veteran employees, USERRA by its terms applies only to veterans. *See* 38 U.S.C. § 4303 (defining "service in the uniformed services") and 38 U.S.C. §§ 4311–4312 (prohibiting certain acts against those who "serve in the uniformed services"). As such, it makes little sense to allow Parkinson—by virtue of his having served in the military service—access to judicial review over an affirmative defense grounded in a USERRA violation, when claims by others who have served are explicitly insulated from judicial review.

Congress's coupling of a specific procedure for enforcing USERRA reemployment violations at the FBI and similar agencies, coupled with an affirmative prohibition on judicial review of the substantive determination made thereby, leads us to conclude that Congress intended to exclude the substantive determination from judicial review of any kind, including when presented in the context of an affirmative defense under 5 U.S.C. § 7701(c)(2).

E. Remand

In light of our disposition reversing the lack of candor determination, lifting the Board's prohibition of Parkinson's whistleblower retaliation defense, and sustaining the obstruction charge and the Board's prohibition of Parkinson's USERRA defense, we vacate the Board's affirmance of Parkinson's removal and remand. On remand, the only matters remaining for consideration are the obstruction charge, Parkinson's whistleblower-reprisal defense thereto and the appropriate penalty, if any, after such consideration.

We note that the penalty determination section of the FBI's dismissal letter relating to the obstruction charge states:

> The investigation also established you violated FBI Offense Code 2.11 (OPR Matter—Obstruction). The standard penalty for this offense is a ten-day suspension. Mitigating factors warrant a three-to seven-day suspension. Aggravating factors warrant a fifteen-day suspension to dismissal.
>
> Your misconduct was repeated. You not only had Person # 1 [Rodda, it seems] sign a document, prepared by you, setting out the facts concerning a check for $1,215.67 written directly to you, but also contacted SA # 2, after the OIG investigation had begun, and questioned her regarding her recollection of witnessing the paying of a laborer in cash, prior to her interview. Based on the circumstances of this case, I would normally impose a 30–day suspension for your 2.11 offense, aggravated due to the multiple occurrences of attempting to influence witness statements.

> However, since I am dismissing you for your 4.5, 5.22, and 2.6 offenses, I am not imposing a separate sanction for your 2.11 offense.

J.A. 114–15. We note also the AJ's observation at J.A. 16 that "[t]his was not an especially egregious case of obstruction. The agency did not prove that the written statement [Parkinson] drafted for the landlord was incorrect or that he asked the landlord to lie about anything. Tr. 105, 116. The agency's proposal suggested that this was the least serious of the charges, and that on its own it would have merited only a suspension rather than removal."

From the foregoing, it should be appreciated by the Board on remand that the penalty of removal, which was predicated on the now overturned lack of candor charge, cannot be sustained. Moreover, this court and the Board have made clear that, when "the Board sustains fewer than all of the agency's charges," the Board must defer to the agency's clear statement in "its final decision . . . that it desires a lesser penalty [than the maximum reasonable penalty] be imposed on fewer charges." J.A. 49 (Board decision in this case) (citing *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999)). Accordingly, the maximum penalty that can be sustained by the Board for the sole charge remaining in this case is a suspension of up to 30 days. Whether and to what extent the FBI, in the Board proceedings, has established more than the single instance of obstruction noted in the AJ's opinion at J.A. 14–16 and the Board's opinion at J.A. 38–40, or any other basis to warrant greater than a 10–day suspension for the obstruction charge is a question to be determined by the Board on remand.

CONCLUSION

For the foregoing reasons, the Board's decision relating to the lack of candor charge is reversed, its decision relating to the obstruction charge is vacated and the case is remanded for further proceedings consistent with this opinion.

REVERSED–IN–PART, VACATED–IN–PART AND REMANDED

COSTS

Each party shall bear its own costs.

TARANTO, Circuit Judge, dissenting in part.

I join the court's opinion except for the analysis of whistleblower reprisal, centered on Part II.D.1. In that portion of its opinion, the court holds that the Merit Systems Protection Board, in exercising its undisputed authority to review Mr. Parkinson's removal from his FBI position, *see* 5 U.S.C. §§ 7512, 7701, must adjudicate in particular Mr. Parkinson's claim that the removal constituted whistleblower reprisal in violation of 5 U.S.C. § 2303. I would hold, in agreement with the Board, that the Board may not decide that issue in deciding Mr. Parkinson's challenge to his removal.

It is plain under the statute that the prohibitions on whistleblower reprisal codified in 5 U.S.C. § 2302(b)(8) do not apply to the FBI: Congress expressly carved the FBI out of the definition of "agency" governing § 2302(b)'s coverage. 5 U.S.C. § 2302(a)(2)(A), (C). The FBI's reprisal against an employee for whistleblowing is addressed by a separate provision, § 2303, which provides more

limited protection than § 2302(b)—protecting from reprisal only whistleblower disclosures made "to the Attorney General" (or her designee), not disclosures made to outsiders. § 2303(a). With § 2302(b)(8) inapplicable, Mr. Parkinson's whistleblower-reprisal contention is necessarily a contention that the FBI violated § 2303, as Mr. Parkinson made explicit in his Petition for Review to the Board. J.A. 964.

To seek relief from the Board based on § 2303—for what is undisputedly an adverse action (removal) within the Board's review authority, 5 U.S.C. § 7512—Mr. Parkinson invokes 5 U.S.C. § 7701(c)(2). In relevant part, that provision instructs the Board that "the agency's decision may not be sustained if the employee or applicant for employment . . . (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or (C) shows that the decision was not in accordance with law." Mr. Parkinson cannot invoke (B), but he invokes (C). He argues that the FBI's removal of him was a whistleblower reprisal forbidden by § 2303, hence "not in accordance with law," requiring that his removal be set aside.

I would reject the contention that § 2303 violations come within the "not in accordance with law" directive to the Board. I would read § 2303 as sufficiently embodying a determination by Congress, the President, and the Attorney General that § 2303 claims of FBI reprisal for whistleblower disclosures made to the Attorney General (the only disclosures protected by § 2303) are outside the Board's jurisdiction and within the full and final control of the Attorney General. No provision so states expressly. But the limit on Board review of § 2303

issues seems to me a clear enough implication of the congressional and executive decisions that I would find § 7701(c)(2)(C) inapplicable under the principle that a sufficiently specific remedial regime can displace an otherwise available general remedy whose application would impair policies evident in the specific remedial provisions. *See, e.g.*, *United States v. Bormes*, —— U.S. ——, 133 S.Ct. 12, 18, 184 L.Ed.2d 317 (2012); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, —— U.S. ——, 132 S.Ct. 2065, 2071, 182 L.Ed.2d 967 (2012); *Hinck v. United States*, 550 U.S. 501, 507–08, 127 S.Ct. 2011, 167 L.Ed.2d 888 (2007); *EC Term of Years Trust v. United States*, 550 U.S. 429, 433–34, 127 S.Ct. 1763, 167 L.Ed.2d 729 (2007); *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 285, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 831–33, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).

When Congress enacted the Civil Service Reform Act of 1978, Pub.L. No. 95– 454, 92 Stat. 1111 (1978), it defined a series of "prohibited personnel practices" in § 2302, which included, in § 2302(b)(8), a bar on whistle-blower reprisal. *See* 92 Stat. at 1115–16. But Congress expressly made that provision inapplicable to the FBI. 92 Stat. at 1115. It enacted a separate section, § 2303, to protect against some whistleblower reprisals by the FBI. In subsection (a), Congress stated a limited reprisal rule to govern the FBI, protecting only disclosures made to the Attorney General or her designee, not disclosures made to anyone else. 92 Stat. at 1117–18. In subsection (b), Congress provided that the Attorney General should promulgate regulations to ensure

compliance with the reprisal bar. And in subsection (c), Congress declared that "[t]he President shall provide for the enforcement of this section in a manner consistent with the provisions of section 1206 of this title." 92 Stat. at 1117–18.

The referred-to section 1206 was the 1978 Act's provision defining the authority and duty of the Board's Special Counsel to investigate prohibited personnel practices. *See* 92 Stat. at 1125–30. Neither that provision nor others provided employees a general right to seek Board review of whistleblower reprisal. But 5 U.S.C. § 7701(c)(2) was part of the 1978 Act, *see* 92 Stat. at 1138, and that provision authorized the Board to hear (and the Board did hear) whistleblower-reprisal and other prohibited personnel-action challenges asserted by employees who had been subjected to otherwise-appealable adverse actions such as removals, with the Board's decisions then subject to judicial review. *See Knollenberg v. MSPB*, 953 F.2d 623, 625 (Fed.Cir.1992); *Hagmeyer v. Dep't of Treasury*, 757 F.2d 1281, 1283–84 (Fed. Cir.1985); *Sullivan v. Dep't of Navy*, 720 F.2d 1266, 1275 (Fed.Cir.1983).

In particular, as already noted, Congress separately directed the Board not to sustain an agency decision within its reviewing authority if the challenger "(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b)" or "(C) shows that the decision was not in accordance with law." 5 U.S.C. § 7701(c)(2). It is conspicuous that Congress, having carved the FBI out of § 2302(b) and adopted § 2303 as a limited FBI-specific counterpart, chose not to include § 2303 in the provision of § 7701(c)(2) specifically addressing

prohibited personnel practices, despite the overlap of whistleblower-reprisal subject matter. That omission on its face tends to suggest that Congress was excluding FBI whistleblower reprisal from Board review, notwithstanding the catchall "not in accordance with law" language.

In 1989, Congress enacted the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (1989). That Act strengthened the general whistleblower protections of § 2302(b)(8). Among other things, the 1989 Act created a new Office of Special Counsel (OSC) with various powers, *see* 5 U.S.C. §§ 1211–19; 103 Stat. at 19–29, and it also specifically provided a new Individual Right of Action, *see* 5 U.S.C. §§ 1214(a)(3), 1221, by which an employee, applicant, or former employee may bring to the Board whistleblower claims covered by § 2302(b)(8), *see* 103 Stat. at 24, 29–31. Those provisions replaced the former 5 U.S.C. § 1206, which now provides for certain annual reports. *See* 103 Stat. at 18–19. The 1989 Act made only one change in the limited FBI-specific whistleblower-reprisal provision, § 2303. It changed subsection (c)'s reference to "the provisions of section 1206" so that the provision now directs the President to provide for enforcement in a manner consistent with "applicable provisions of sections 1214 and 1221." *See* 103 Stat. at 34.

In 1997, the President formally delegated to the Attorney General his responsibilities under § 2303(c) to establish means for enforcing the limited reprisal protection of § 2303(a). Memorandum, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 Fed. Reg.

23,123 (Apr. 14, 1997). The President directed the Attorney General "to establish appropriate processes *within* the Department of Justice to carry out these functions." *Id.* (emphasis added).

The Attorney General, after adopting an interim rule in 1998, adopted a final rule to govern § 2303 in November 1999. 64 Fed. Reg. 58,782, 58,786–88 (Nov. 1, 1999) (adopting 28 C.F.R. §§ 27.1–27.6). Like the interim rule, the final rule establishes the Office of Professional Responsibility (OPR) and the Office of Inspector General (OIG) as investigative authorities (each labeled a "Conducting Office"), and it designates the Director of the Office of Attorney Personnel Management (Director) to "decide whistleblower reprisal claims presented to her by OPR or OIG." *Id.* at 58,783. The Attorney General explained that "the roles and functions of the Conducting Office and the Director are thus analogous to those of the OSC and MSPB, respectively, in whistleblower cases involving federal employees generally." *Id.*

She then explained a crucial difference—the retention of internal Department control of § 2303 matters. "One fundamental difference, however, between the two systems is that the procedures provided in the interim rule [not changed in the final rule in this respect] are entirely internal to the Department." *Id.* She cited in support of that determination (a) the fact that the only protected disclosures are certain disclosures within the Department, (b) the President's 1997 directive to establish processes *within* the Department, and (c) legislative history to the effect that " 'appeals would not be to the outside but to the Attorney General.' "

Id. (quoting 124 Cong. Rec. 28,770 (1978) (pre-Conference statement of Representative Udall, who came to chair the Conference Committee on the Civil Service Reform Act in 1978)). The Attorney General reiterated the point in rejecting a comment suggesting that the statute required "entities external to and independent of the Department" to carry out the § 2303 roles. *Id.* at 57,785. "If Congress had wanted to provide FBI employees with fora outside the Department to address their whistleblower reprisal claims, it could have included them in the OSC/MSPB scheme. The fact that Congress did not do so, *see* 5 U.S.C. 2302(a)(2)(C)(ii), strongly suggests that Congress, in enacting section 2303, did not envision the creation of external entities to perform the OSC/MSPB functions." 64 Fed. Reg. at 58,785–86.

Rounding out the relevant legal materials is what the Conference Committee said in explaining the conference bill that was adopted as the Civil Service Reform Act in 1978. The Conference Committee explained:

> The conference substitute excludes the FBI from coverage of the prohibited personnel practices, except that matters pertaining to protection against reprisals for disclosure of certain information described in section 2302(b)(8) would be processed under special procedures similar to those provided in the House bill. The President, rather than the Special Counsel and the Merit Board, would have responsibility for enforcing this provision with respect to the FBI under section 2303.

S.Rep. No. 95–1272, at 128 (1978). The Conference Committee's language is not limited to the special § 1206 enforcement route. The 1978 Act being addressed by the Conference Committee included 5 U.S.C. § 7701(c)(2)'s directive to the Board not to sustain removals and other adverse actions that were "not in accordance with law."

Based on the pertinent statutory provisions, their evolution, their legislative history, and the actions of the President and Attorney General under the delegated implementation authority, I would conclude that the Board is not to adjudicate claims that the FBI engaged in whistleblower reprisal proscribed by § 2303(a). To apply § 7701(c)(2)(C)'s general, catchall "not in accordance with law" provision would be to impair the determination—strongly suggested by the congressional actions and statements, and made explicit by the President and the Attorney General—that resolution of such issues should be confined to the Department of Justice, which is the only recipient of disclosures protected from reprisal in the first place. The statutory materials provide substantial support for that conclusion, and given the implementation-authority grants of § 2303(b) & (c), it seems to me that the determination to that effect by the President and the Attorney General, made after the 1989 amendments, is owed deference as a formal exercise of expressly delegated authority.

Because this is an issue-specific exclusion from Board authority, I do not see why it matters that Mr. Parkinson is eligible to bring his removal to the Board for adjudication of other challenges under 5 U.S.C. §§ 7512–7513, 7701. And I do not see why it

should make a difference that Mr. Parkinson is raising the issue of whistleblower reprisal as an affirmative defense to his removal (he has the burden of persuasion), in a proceeding in which the FBI has the burden of affirmatively justifying the removal under 5 U.S.C. § 7701(c)(1)(B). That posture does not eliminate either a general concern about outside-the-Department interference in FBI whistleblower-reprisal matters or a specific concern about the potential leaking of sensitive law-enforcement or intelligence information. *Van Lancker v. Dep't of Justice*, 119 M.S.P.R. 514, 519 (2013). The reasons for excluding the Board from ruling on the issue do not depend on the procedural posture before the Board.

For those reasons, I respectfully dissent from the holding that Mr. Parkinson may pursue his whistleblower-reprisal claim.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket No.
SF-0752-13-0032-I-2

JOHN C. PARKINSON,
Appellant,
v.
DEPARTMENT OF JUSTICE,
Agency.

October 10, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Jesselyn Radack and Kathleen McClellan, Washington, D.C., for the appellant.

Celeste M. Wasielewski, Esquire, Washington, D.C., for the agency.

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Vice Chairman Wagner issues a separate dissenting opinion.

FINAL ORDER

¶1 The appellant has filed a petition for review and the agency has filed a cross petition for review of the initial decision, which affirmed his removal from his position with the Federal Bureau of Investigation (FBI). Generally, we grant petitions such as these only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that neither party has established any basis under section 1201.115 for granting the petition or cross petition for review. Therefore, we DENY the petition for review and the cross petition for review and AFFIRM the initial

decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

DISCUSSION OF ARGUMENTS ON REVIEW

¶2 The appellant, a preference-eligible veteran, worked for the FBI as a Special Agent in the agency's Sacramento, California office. Initial Appeal File (IAF), Tab 6 at 39.[2] The appellant was a team leader and in this capacity was responsible for the preparation of a leased facility for usage in undercover operations. *Id.* at 62-63; Hearing Transcript (HT) at 10. As part of the lease agreement, the facility's landlord agreed to provide an amount of funds to be used for tenant improvements. HT at 99-100. In August 2008, the appellant was removed as team lead for the project. *Id*. at 10. In 2009, the agency's Office of the Inspector General (OIG) commenced an investigation regarding the appellant's alleged misuse of the tenant improvement funds for the facility build-out. IAF, Tab 6 at 98.

¶3 As a result of the investigation, the agency's Office of Professional Responsibility (OPR) proposed the appellant's removal based on four charges: (1) theft, (2) unprofessional conduct - on duty, (3) obstruction of the OPR process, and (4) lack of candor. *Id.* at 62. The appellant provided an oral reply to the deciding official. IAF, Tab 43. The deciding official reviewed the evidence, sustained all

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[2] Unless otherwise specified, all file references will be to the appeal file MSPB Docket No. SF-0752-13-0032-I-2. File references to appeal file MSPB Docket No. SF-0752-13-0032-I-1 will be referenced as IAF I-1 and the appropriate tab.

four charges, and directed the appellant's removal. IAF, Tab 6 at 42. The appellant initiated a Board appeal challenging his removal, claiming violation of due process, and raising affirmative defenses of whistleblower reprisal and discrimination based on his service in the military under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). IAF I-1, Tab 1 at 2, 5, 9-10. The administrative judge granted the agency's objection to the appellant's affirmative defenses of whistleblower retaliation and violation of USERRA and dismissed them. IAF, Tab 22 at 1-3. The administrative judge reasoned that an FBI employee cannot raise a whistleblower reprisal or a USERRA claim to the Board. *Id.* After conducting a hearing and allowing the parties to submit written closing statements, the administrative judge sustained the two charges of obstruction and lack of candor and affirmed the agency's removal decision. IAF, Tab 52, Initial Decision (ID) at 1.

¶4 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency has responded to the petition for review and filed a cross petition for review, challenging the administrative judge's findings that the agency did not prove its charges of theft and unprofessional conduct. PFR File, Tab 3 at 21, 24.

The administrative judge properly sustained the charge of obstruction of the OPR process.

¶5 The appellant argues that the administrative judge erred in sustaining the charge of obstruction of the OPR process. PFR File, Tab 1 at 16. According to

the appellant, the agency both failed to prove his intent to obstruct and that his actions, in fact, did obstruct the process. *Id.* at 17-19. The appellant also alleges that the OIG investigation is not part of the OPR process because the agency's OIG is an independent office from the FBI's OPR. *Id.* at 19.

¶6 We agree with the administrative judge that the agency proved this charge. The evidence in the record supports the administrative judge's conclusion that the appellant intended to influence the OPR process when he met with the landlord and a member of his staff to agree on why the landlord wrote a check directly payable to the appellant. ID at 8-10. The appellant testified at the hearing on this charge as follows, "My intent was to sit down with [the landlord and a member of landlord's staff] and look at the documents which are appended to [the landlord's statement] and come to a meeting of the minds as to what actually occurred." HT at 29. The appellant met with the landlord to review and draft for the landlord a statement regarding expenses incurred nearly 3 years prior. IAF, Tab 39 at 33 of 43. The appellant drafted the document and worked with the landlord's staff member to type it up for the landlord's signature. *Id.* at 31 of 43. This meeting occurred during the course of the OIG's investigation into the appellant's activities during the office build-out, and the appellant was not part of the OIG investigative team. HT at 157; IAF, Tab 6 at 98, 100. Contrary to the appellant's argument, we find that the appellant did intend to influence the investigation as referenced by his hearing testimony that he intended to meet with the landlord so they

could reach a common version of what actually occurred. PFR File, Tab 1 at 17; HT at 29.

¶7 The appellant argues that the agency was required to prove that he actually obstructed the OPR process to prove the charge. PFR File, Tab 1 at 18-19. We disagree. The agency code cited in the proposal notice as the basis for the charge provides that "an employee must refrain from '[t]aking any action to influence, intimidate, impede or otherwise obstruct the OPR process.'" IAF, Tab 6 at 51, 70. Actual success in obstructing the process is not required. Therefore, if the agency proves by preponderant evidence that the appellant attempted to obstruct the OPR process, then the agency has proven the charge. *See Parbs v U.S. Postal Service*, 107 M.S.P.R. 559, ¶ 8 (2007) (the agency is required to prove the charge as it is set out in the notice of proposed removal, and the charge is construed by examining the structure and language of the proposal and decision notice). Regardless, looking at the hearing transcript, it appears that the appellant, in fact, did obstruct the process. Less than 3 months after the landlord signed the statement that the appellant drafted, neither he nor his former bookkeeper could recall why a check for $1,215.67 was made out to the appellant. IAF, Tab 39 at 11 of 43. This contradicted the representation in the landlord's prior statement that this money was "to cover the cost of installing interior doors at the building." *Id.* at 33. Thus, we find that the evidence proves that, more likely than not, the appellant's actions prevented OIG from obtaining the landlord's untainted recollections.

¶8 Finally, the deciding official testified that the OIG investigation is the investigatory part of the OPR process because OPR does not investigate cases. HT at 140-42. Although the appellant contends on review, as he did below, that the OIG and OPR processes are distinct, he has provided no evidence to challenge the deciding official's testimony on this issue. IAF, Tab 38 at 14-18; PFR File, Tab 1 at 19; *see Castellanos v. Department of the Army*, 62 M.S.P.R. 315, 320-21 (1994) (declining to distinguish between the formal or informal stages of the equal employment opportunity (EEO) process for purposes of determining whether the appellant attempted to influence an EEO investigation). The appellant is correct that the OIG and OPR are separate organizational units within the Department of Justice; however, the fact that the organizations are separate units does not mean that OPR cannot rely on the OIG investigation as part of its process. PFR File, Tab 1 at 19. We agree with the administrative judge that the agency proved the obstruction charge. ID at 8-9.

The administrative judge properly sustained the charge of lack of candor.

¶9 The administrative judge determined the agency's lack of candor charge involved four different statements and considered each one as a separate specification.[3] ID at 14. The administrative judge

[3] The appellant argues that the administrative judge improperly analyzed the lack of candor charge as containing four, rather than three, specifications. PFR File, Tab 5 at 9. However, the administrative judge did not sustain the specification that the appellant claims should not have been

sustained only two of the specifications but sustained the charge overall. ID at 16-18. The appellant argues that the administrative judge erred in sustaining the lack of candor charge. PFR File, Tab 1 at 8. Neither party has sought review of the two specifications that the administrative judge did not sustain. PFR File, Tabs 1, 3. Based on our review of the record, we find no error with the administrative judge's finding on these specific specifications and adopt them as the Board's findings.

¶10 The appellant argues that he did not lack candor when he told the OIG investigator that he asked the landlord not to provide receipts to the FBI, versus telling the landlord not to do so. PFR File, Tab 1 at 10. The appellant also contends that he did not lack candor when he informed the OIG investigator that the landlord approved all purchases from the tenant improvement funds. *Id.* at 13.

¶11 The U.S. Court of Appeals for the Federal Circuit has found that, "Lack of candor and falsification are different, although related, forms of misconduct." *Ludlum v. Department of Justice*, 278 F.3d 1280, 1283-84 (Fed. Cir. 2002). To establish falsification, an agency needs to show that the employee made an affirmative representation and needs to prove an intent to deceive. *Id.* at 1284. Conversely, lack of candor is a "broader and more flexible concept." *Id.* Although deception is an

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considered. ID at 18. We find that the outcome of this specification does not affect the outcome of the appeal as two other specifications were sustained, thereby sustaining the charge. See *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990).

element of the lack of candor charge, "intent to deceive" is not. *Id.* at 1284-85. The appellant alleges that the element of deception applies only to "material facts," as opposed to "tangential o[r] semantic facts," but cites no legal authority in support of this argument. PFR File, Tab 1 at 9. We reject the appellant's argument. Lack of candor is a broad and flexible concept that "may involve a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete." *Ludlum*, 278 F.3d at 1284.

¶12 During the appellant's OIG interview, which was made under oath, he specifically denied that he "told" the landlord not to provide the receipts to the FBI, claiming that he "asked" him not to do so. IAF, Tab 39 at 14 of 55, 46 of 66. However, at the hearing, he testified that he "directed" the landlord to provide the receipts to the OIG and not to the FBI. HT at 16. On review, the appellant argues that his use of the word "direct" was "not to mean that he gave an order to the landlord, but that [he] pointed the landlord to the OIG investigator." PFR File, Tab 1 at 10. This claim is contrary to the appellant's own testimony, stating "I provided him with the agent['s card], . . ., directed him to provide the documents to OIG rather than—or not the FBI." HT at 16. Further, the landlord provided a written statement during the investigation that he did not provide the receipts to the FBI because the appellant "told him not to," and the appellant told him that he should instead provide the receipts to OIG when it requested them. IAF, Tab 39 at 22 of 43. The landlord's former office manager also provided the OIG a statement during

the investigation in which she stated that the appellant told her not to provide the receipts to the FBI and to "put them off for a while." *Id.* at 26 of 43. She provided this same testimony at the hearing and further added that the appellant told her to provide the receipts to OIG. HT at 132-33.

¶13 We agree with the administrative judge that the appellant's OIG statement was not accurate. ID at 14. The appellant's hearing testimony is consistent with the unrebutted testimony and statements of the landlord and office manager that he told them not to give the receipts to the FBI but instead told them to provide the receipts to OIG. HT at 16, 132-33; IAF, Tab 39 at 22, 26 of 43. There is no evidence in the record that supports the appellant's OIG statement that this was merely a request and that he did not have any influence over the landlord's actions. We find that the appellant's statement to OIG under oath was not a complete and accurate disclosure of his conversations with the landlord and office manager. Therefore, we affirm the administrative judge's finding that the appellant lacked candor regarding his direction to the landlord and office manager to provide the build-out receipts to the OIG.

¶14 The second specification is a much closer call, as referenced by the administrative judge. ID at 16. The appellant argues that the administrative judge erred in finding lack of candor in his statement that the landlord approved the spending of all tenant improvement funds. PFR File, Tab 1 at 13. The appellant argues that whether the landlord approved the funds before or after the money was spent was not relevant because the landlord always paid the

invoices. *Id.* We agree with the administrative judge that the appellant's statement provides an appearance of pre-approval by the landlord of the expenses. ID at 16-17. After stating that the landlord approved all expenses, the appellant continued his OIG statement stating that the landlord "was the sole arbiter and had sole discretion on the use and application of these funds to his property." IAF, Tab 39 at 26-27 of 55. The appellant's statement was contradicted by the landlord, who testified that he never approved any expenditure in advance and had no input on how the funds were spent. HT at 100; IAF, Tab 39 at 22 of 43. As noted by the administrative judge, a more complete statement would reflect that the landlord ratified all spending after-the-fact, and the appellant's failure to provide such a statement lacked candor and did not reflect the landlord's lack of involvement in the expenditures. ID at 16-17. Therefore, we find the appellant engaged in a lack of candor in his statement and affirm the administrative judge's finding on this specification.

¶15 The appellant also argues that the charge was not proven because the agency only proved two of the four specifications or 50 percent, which is lower than the 51 percent needed under the preponderance of evidence standard. PFR File, Tab 1 at 14. In addition, the appellant alleges that the specifications not sustained were more serious allegations of misconduct and should be weighted more than the two proven specifications. *Id.* at 14-15. An agency may use more than one event or specification to support a single charge. *Burroughs*, 918 F.2d at 172. In those situations, "proof of one or more, but not all,

of the supporting specifications is sufficient to sustain the charge." *Id.* We therefore find no error with the administrative judge's examining the specific instances of lack of candor as separate specifications in determining the charge. *See Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 14 (2006) (a charge that is based on more than one act can be divided into multiple specifications or charges, each corresponding to the separate acts alleged), *aff'd sub nom. Alvarado v. Wynne*, 626 F. Supp. 2d 1140 (D.N.M. 2009), *aff'd sub nom Alvarado v. Donley*, 490 F. App'x 932 (10th Cir. 2012). Here, the agency proved two specifications, so it has proven its lack of candor charge.

The agency did not prove the charge of theft.

¶16 In its cross petition for review, the agency argues that the administrative judge erred in not sustaining the theft charge. PFR File, Tab 3 at 21. The agency contends that it had possession of furniture, that the appellant removed it from the leased space, and that having possession gave the agency the right to use the furniture during the term of the lease, making the appellant's action theft. *Id.* at 21-22. The agency maintains that the appellant intended to permanently deprive the agency of the use of the furniture as demonstrated by a fake purchase agreement he drafted, and the fact that he never made any attempt to return the furniture to the agency. *Id.* at 23-24.

¶17 The administrative judge found the appellant did not have the state of mind required for theft because he believed all the furniture belonged to the landlord, and the agency had no legal interest in it.

ID at 6. The administrative judge found that the appellant believed the landlord was under no obligation to let the agency continue using the furniture. ID at 7-8. In addition, the administrative judge found that, because the landlord owned the furniture and the appellant stored the furniture in another warehouse owned by the landlord, he did not steal the furniture. ID at 6.

¶18 To sustain a charge of theft, an agency must prove a taking and possession of another's property in a manner inconsistent with the owner's rights and benefits, with an intent to permanently deprive the owner of possession or use of his property. *Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 460 (1991), *aff'd*, 43 F.3d 663 (Fed. Cir. 1994). Intent is a state of mind which is generally proven by circumstantial evidence. *Messersmith v. General Services Administration*, 9 M.S.P.R. 150, 157 (1981).

¶19 The agency had a possessory interest in the furniture. The victim of a theft does not have to be the owner of the property, only in possession of it. *See Morissette v. United States*, 342 U.S. 246, 271 (1952) (defining stealing to mean the taking away from one in lawful possession without right with the intention to keep wrongfully (citation omitted)); *Levin v. United States*, 338 F.2d 265, 268 (D.C. Cir. 1964) (holding that larceny is the felonious taking and carrying away of anything of value, and that ownership of the property does not matter); *People v. Edwards*, 236 P. 944, 950 (Cal. Ct. App. 1925), *disapproved on other grounds, In re Estrada*, 408 P.2d 948, 953-54 (Cal. 1965) (holding that ownership and possession may be regarded as synonymous terms for larceny); *People v. Davis*, 31 P. 1109, 1109

(Cal. 1893) (holding that the fact that the taken property was in possession of the victim was sufficient to show ownership). Here, the agency had possession of the furniture as it was in the office space that it had leased from the landlord, and the landlord intended the furniture to be used in the space under the terms of the lease. HT 107-08. Therefore, the agency did have a legal interest in the furniture and the appellant erred in assuming otherwise.

¶20 However, the agency has not proven that the appellant intended to permanently deprive it of the possession or use of the property. The administrative judge found that the appellant honestly, if mistakenly, believed that all the furniture belonged to the landlord, and the FBI had no interest in it. ID at 6. Ignorance or mistake of law can negate the existence of specific intent, as required in the agency's charge. *People v. Vineburg*, 177 Cal. Rptr. 819 (Cal. Ct. App. 1981). The appellant's belief must be claimed to be held in good faith. *Id.* We agree with the agency that the appellant's creation of a fake purchase agreement and receipt raises some questions about his good faith belief. PFR File, Tab 3 at 23. However, the appellant testified that his purpose was to assist the landlord in justifying the removal of the furniture and storage in another facility if the agency asked for the furniture back. HT at 32-34. Because the appellant has shown he had a good faith belief that the agency had no legal interest in the furniture, the agency has not proven that the appellant intended to permanently deprive it of the possession or use of the property. Therefore, the agency has not proven its charge of theft, and we

adopt the administrative judge's finding on this issue as the Board's final decision.

The agency did not prove the charge of unprofessional conduct while on duty.

¶21 The agency argues in its cross petition for review that the administrative judge erred in finding it did not prove the charge of unprofessional conduct while on duty. PFR File, Tab 3 at 24. It asserts that, because the appellant was still assigned to the undercover team when he engaged in the unprofessional conduct set forth in specifications one and two, he was necessarily "on duty." *Id.* at 24-26. We disagree.

¶22 An agency is not required to affix a label to a charge but may simply describe actions that constitute misbehavior in narrative form in its charge letter; however, if the agency chooses to label an act of alleged misconduct, then it must prove the elements that make up the legal definition of the charge, if any. *Hollingsworth v. Department of the Air Force*, 121 M.S.P.R. 397, ¶ 4 (2014). The Board will not sustain an agency action on the basis of charges that could have been brought but were not. *Rodriguez v. Department of Homeland Security*, 117 M.S.P.R. 188, 192 (2011). The agency charged the appellant with unprofessional conduct based on FBI offense code 5.22, which defines unprofessional conduct as occurring "while on duty." IAF, Tab 6 at 51. Based on the language of the agency's charge, the agency was required to show that the appellant was on duty when he engaged in each instance of unprofessional conduct. *See Doherty v. Department of Transportation*, 13 M.S.P.R. 274, 278 (1982) (finding

that conduct committed while an appellant was on his coffee break could not sustain a charge of careless work performance because he was not on duty).

¶23 The administrative judge found that the appellant engaged in unprofessional conduct in both specifications; however, he also found that the agency failed to prove the conduct occurred when the appellant was on duty. ID at 11. The arguments and evidence that the agency cites on review go to the issue of whether the appellant was still on the undercover team at the time of the unprofessional conduct. PFR File, Tab 3 at 24-26. However, the agency has not put forward any evidence to show that the appellant was actually on duty when he encouraged the landlord not to cooperate with the FBI investigation or when he created a fake purchase contract and receipt to make it appear as if he bought the furniture that he removed from the leased space. Therefore, even though we agree with the administrative judge that the appellant engaged in unprofessional conduct, the agency did not prove that he engaged in the conduct while on duty, as required by the language of its charge.

¶24 The agency does not allege any specific errors regarding the administrative judge's findings that it did not prove specifications three and four of the unprofessional conduct charge on review. PFR File, Tab 3 at 24-26. We have reviewed the administrative judge's findings on these specifications and find no error with the decision. ID at 11-13. We therefore adopt those findings as the Board's final decision and affirm that the agency did not prove its charge of unprofessional conduct.

The administrative judge properly dismissed the appellant's affirmative defenses of whistleblower retaliation and violation of USERRA.

¶25 Neither party has challenged in its petition or cross petition for review the administrative judge's finding that the appellant did not prove his claim that the agency violated his due process rights. ID at 19. We find no reason to disturb the administrative judge's finding on this issue and adopt it as the Board's final decision.

¶26 The appellant argues on review that the administrative judge erred in dismissing both his defenses of whistleblower reprisal and discrimination based on his military service under USERRA. PFR File, Tab 1 at 22-24. The appellant alleges that his affirmative defenses are based on his removal being in reprisal for exercising his legal rights, therefore making the agency's action "not in accordance with law." *Id.* at 22-25. We do not agree.

¶27 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board found in *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514, ¶ 11 (2013), that FBI employees are excluded from bringing a whistleblower retaliation claim before the Board. The appellant argues that our decision in *Van Lancker* only prohibits FBI employees from raising a whistleblower affirmative defense when it is based on a claim that the agency engaged in a "prohibited personnel practice." PFR File, Tab 1 at 22 (citing 5 U.S.C. § 7701(c)(2)(B)). He reasons that he can raise

his affirmative defense on the basis, instead, that the alleged whistleblower reprisal was "not in accordance with law." PFR File, Tab 1 at 22-23 (citing 5 U.S.C. § 7701(c)(2)(c)). We decline to read our decision in Van Lancker so narrowly.

¶28 Congress did not authorize the Board to hear whistleblower claims by FBI employees. *Van Lancker*, 119 M.S.P.R. 514, ¶¶ 11-12. FBI employees who allege reprisal for engaging in whistleblowing activity are covered under 5 U.S.C. § 2303, which provides that enforcement of the FBI whistleblower protection provisions will be consistent with provisions in 5 U.S.C. § 1221, but does not provide for appeal rights to the Board. Rather, the procedures for redress are to be established by the Attorney General to ensure internal resolution. *Van Lancker*, 119 M.S.P.R. 514, ¶ 14 (citing 5 U.S.C. § 2303(b), as well as the regulatory history for the applicable Department of Justice regulations). Because the Board does not have the authority to hear claims under 5 U.S.C. § 2303, the administrative judge properly dismissed the appellant's affirmative defense of reprisal for whistleblowing.

¶29 Regarding his USERRA affirmative defense, the appellant argues that it would be contrary to congressional intent and our prior holding in *Butler v. U.S. Postal Service*, 10 M.S.P.R. 45 (1982), if the Board allowed a preference-eligible FBI employee to bring an appeal but denied him the ability to make a USERRA affirmative defense. PFR File, Tab 1 at 24-25. In *Butler*, we held that a U.S. Postal Service employee may raise a race discrimination affirmative defense, even though the U.S. Postal Service was

excluded from the definition of agencies subject to the provisions of 5 U.S.C. § 2302 concerning prohibited personnel practices. *Butler*, 10 M.S.P.R. at 48 However, in *Van Lancker* we noted the distinction between the U.S. Postal Service and the FBI in the context of an affirmative defense of whistleblower reprisal, noting Congress' desire to adjudicate these claims internally within the Department of Justice, and we believe the same rationale is applicable for the present USERRA affirmative defense. *Van Lancker*, 119 M.S.P.R. 514, ¶ 14.

¶30 Congress specifically excluded the FBI from the list of agencies for purposes of filing a USERRA appeal with the Board. *Erlendson v. Department of Justice*, 121 M.S.P.R. 441, ¶ 6 (2014) (citing 38 U.S.C. § 4303(5) (defining federal agency for purposes of USERRA to exclude agencies referred to in 5 U.S.C. § 2302(a)(2)(C)(ii), which lists the FBI among other agencies)); *Hereford v. Tennessee Valley Authority*, 88 M.S.P.R. 201, ¶ 10 (2001) (USERRA defines federal executive agencies to include executive agencies as defined in 5 U.S.C. § 104, other than intelligence agencies). Employees of the excluded executive agencies, including FBI employees, are covered for USERRA purposes under 38 U.S.C. § 4315, which provides that agency heads are to prescribe appropriate remedial procedures. Again, as with whistleblower reprisal claims, Congress has provided for a separate remedial process to keep USERRA claims out of the jurisdiction of external tribunals, such as the Merit Systems Protection Board. *See Dew v. United States*, 192 F.3d 366, 372 (2d Cir. 1999) (observing that it is clear from the structure of USERRA that Congress

"inten[ded] to preclude judicial review of USERRA claims by the employees of the intelligence community"). Therefore, consistent with our decisions in *Erlendson* and *Van Lancker*, we find that the administrative judge properly dismissed the appellant's USERRA defense because the Board lacks jurisdiction over such claims from FBI employees.

The penalty of removal is reasonable based on the sustained charges.

¶31 When, as here, the Board sustains fewer than all of the agency's charges, the Board will mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981) (when not all of the charges are sustained, the Board will carefully consider whether the sustained charges merited the penalty imposed by the agency). Here, the deciding official indicated in her decision letter that she would have removed the appellant based on the lack of candor charge. IAF, Tab 6 at 54.

¶32 The appellant argues on review that the penalty of removal exceeded the tolerable limits of reasonableness for the sustained charges. PFR File, Tab 1 at 19. The appellant alleges that the misconduct in the lack of candor cases cited by the administrative judge involved more serious misconduct. *Id.* at 20; ID at 21-22. Finally, the appellant argues that the case of *Ludlum v.*

Department of Justice, 87 M.S.P.R. 56 (2000), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002), supports his mitigation argument. PFR File, Tab 1 at 21.

¶33 In evaluating a penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities. *Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 9 (2003). Law enforcement officers, like the appellant, are held to a higher standard of honesty and integrity. *Prather v. Department of Justice*, 117 M.S.P.R. 137, ¶ 36 (2011). The appellant had a prior disciplinary record of a 7-day suspension for misuse of a government credit card that was considered as an aggravating factor. ID at 21. We agree with the administrative judge and the agency that the seriousness of the appellant's conduct warranted his removal.

¶34 We also agree with the administrative judge that *Ludlum* does not support the appellant's argument for mitigation of the penalty. ID at 22. In *Ludlum*, the Board mitigated an FBI special agent's removal for lack of candor to a 120-day suspension. 87 M.S.P.R. 56, ¶ 33. As explained by the administrative judge, the appellant in *Ludlum* did not have a prior disciplinary record versus the appellant in the present appeal. ID at 22. The appellant in *Ludlum* also acknowledged that he was uncertain of the exact number of times he had misused a government vehicle and that his statement could be inaccurate due to faulty memory, again something not claimed by the present appellant. ID at 22. In addition, the Board, in *Ludlum*, commented on the numerous letters

submitted by coworkers and supervisors to the deciding official in support of mitigating the penalty for that individual as evidence of rehabilitation potential. *Ludlum*, 87 M.S.P.R. 56, ¶¶ 32-33; ID at 22. In the present appeal, the appellant has provided no comparable evidence to demonstrate rehabilitation potential. Therefore, we find the penalty of removal to be within the limits of reasonableness for the sustained charges.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5

U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF ANNE M. WAGNER

in

John C. Parkinson v. Department of Justice

MSPB Docket No. SF-0752-13-0032-I-1

¶1 I respectively dissent from the majority's determination that the administrative judge properly dismissed the appellant's affirmative defenses of whistleblower retaliation and violation of USERRA. I do so for the same reasons supporting my dissent in *Van Lancker v. Dept. of Justice*, 119 M.S.P.R. 514, 519 (2013). Citing the Board's longstanding precedent in *Butler v. U.S. Postal Service*, 10 M.SP.R. 45, 48 (1982), and *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617, 621 (1991), for the principle that employees who have the right to appeal to the Board under 5 U.S.C. § 7701(a) have the same rights, I concluded that a preference-eligible FBI agent who has properly invoked the Board's jurisdiction to challenge an agency's adverse action is entitled to raise any affirmative defense set forth in 5 U.S.C. § 7701(c)(2), including that the action is based on a prohibited personnel practice as defined in 5 U.S.C. § 2302(b)(8) or is not in accordance with law. Similarly, here, I believe that the appellant, a preference-eligible FBI agent who has properly invoked the Board's jurisdiction in challenging his removal, is entitled to raise his claims of whistleblower retaliation and USERRA violation as affirmative defenses to this adverse action.

¶2 Accordingly, I would vacate the initial decision insofar as it found that the Board lacks jurisdiction over the appellant's claims of whistleblower

retaliation and USERRA violation and remand this appeal with instructions to reopen the for the purpose of allowing evidence and to make findings of fact and conclusions of law as to these two affirmative defenses.

Anne M. Wagner
Vice Chairman

APPENDIX D

UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Docket No. SF-0752-13-0032-I-2

JOHN C. PARKINSON,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Agency.

October 24, 2013

Kathleen McClellan and Jesselyn Radack, Washington, D.C., for the appellant.

Celeste M. Wasielewski, Washington, D.C., for the agency.

BEFORE

Benjamin Gutman
Administrative Judge

INITIAL DECISION

INTRODUCTION

The agency removed the appellant based on charges of theft, obstructing the disciplinary process, unprofessional conduct, and lack of candor. Initial

Appeal File in docket number SF-0752-13-0032-I-2 (IAF), Tab 6, at 42. He timely appealed to the Board, which—because he is a preference-eligible veteran—has jurisdiction under 5 U.S.C. §§ 7511(b)(8), 7513(d). Initial Appeal File in docket number SF-0752-13-0032-I-1 (I-1 IAF), Tab 1.

For the reasons discussed below, I sustain the charges of obstruction and lack of candor, and I find that the penalty of removal was reasonable for these charges. The agency's action is therefore AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was a special agent for the Federal Bureau of Investigations (FBI). IAF, Tab 34, at 4. From 2005 to 2008, he was the lead agent on a team that was setting up a location for undercover operations. *Id.*; Transcript (Tr.) 9-11, 17. The FBI leased what had been a warehouse in an office park for this location, and the landlord agreed to provide funds for tenant improvements to turn the warehouse into a useable office space. Tr. 17, 99-100; IAF, Tab 39, at 35. (Page citations for Tabs 39 and 42, which are two of the agency's hearing exhibits, refer to the hand-numbered consecutive pagination.) The appellant was the primary person dealing with the landlord and overseeing the improvements needed to make the site operational. Tr. 10-11. Using an undercover alias, he essentially acted as the general contractor for the build-out, hiring subcontractors and other vendors, purchasing furniture, and doing some of the work himself. Tr.

62-64; IAF, Tab 39, at 145-57, 168. The landlord did not approve these expenditures in advance, but he paid the bills the appellant presented to him and was pleased with the appellant's management of the build-out project. Tr. 11, 100, 111-12.

Before the project was finished, the FBI decided to remove the appellant from the team. Tr. 9-10; IAF, Tab 39, at 155, 167-68. Just before his removal, in what he later described as a fit of pettiness, the appellant arranged with the landlord to move some of the furniture from the FBI's leased space to one of the landlord's other warehouses, to prevent certain members of the FBI team from using it. Tr. 22-27, 80, 83-84; IAF, Tab 39, at 174-76. He then prepared a purchase contract that he had the landlord sign that made it look like he had bought the furniture, although he later admitted that he had no intention of making the payments scheduled in this contract or actually taking possession of the furniture. Tr. 32-35; IAF, Tab 39, at 82, 211-219.

The appellant believed that FBI management was falsely accusing him of mismanaging the tenant improvement funds, and he also believed that it was exceeding its authority by looking into the matter. Tr. 28-29, 70, 94. He directed the landlord not to provide the receipts related to the tenant improvements to the FBI. Tr. 16, 103. Rather, he directed the landlord to provide the receipts to the agency's Office of the Inspector General (OIG), which he believed had an open investigation that would exonerate him. Tr. 16, 34, 103. The appellant also prepared a written statement for the landlord to sign that (among other things) justified one instance where the landlord's staff had written the appellant

a roughly $1,200 check, explaining that it had done so because the appellant needed cash to pay a subcontractor who refused to accept a check. Tr. 29-31, 37-44, 103-04; IAF, Tab 39, at 84-86.

OIG interviewed the appellant under oath in connection with its investigation of whether he had handled the build-out properly. IAF, Tab 39, at 128-239. During the interview, the appellant admitted that he had moved the furniture in a fit of pettiness. *Id*. at 174. For the most part, however, he denied wrongdoing. He insisted that nothing had been done with the tenant improvement funds without the landlord's approval. *Id*. at 149. He stated that he had not told the landlord to withhold the receipts from the FBI but rather had merely asked him to do so. *Id*. at 220. He also argued that the fake purchase contact he had created for the furniture was a "legal fiction" but "completely proper." *Id*. at 211, 219.

Based on OIG's investigative report, the FBI's Office of Professional Responsibility (OPR) proposed removing the appellant on four charges: theft of the furniture, obstructing the OPR process by having the landlord sign the statement about the $1,200 check, unprofessional conduct including telling the landlord not to cooperate with the FBI and creating the fake purchase agreement, and lack of candor under oath during his OIG interview. *Id*., Tab 6, at 62-75. After giving the appellant an opportunity to respond, the deciding official sustained the charges and the penalty. *Id*. at 42-57.

The appellant filed this appeal with the Board. I-1 IAF, Tab 1. At the parties' request, I dismissed the

appeal without prejudice because the appellant was simultaneously appealing the removal through an internal review process. *Id*., Tab 5. Upon refiling, I declined to delay the appeal further even though that internal review process continued. IAF, Tab 3, at 1. I also dismissed two of the appellant's affirmative defenses, finding that the Board did not have the authority to hearing whistleblower-retaliation claims involving FBI employees and that the federal-sector provisions of the Uniformed Services Employment and Reemployment Rights Act do not apply to the FBI. *Id*., Tab 22. I held a hearing in San Francisco on August 29, 2013, and the record closed after the parties submitted closing statements on September 17, 2013. Tr. 208-09. I denied the agency's motion to submit additional documents after the hearing. IAF, Tab 47.

At the hearing I reserved decision on part of one other agency exhibit (see Tr. 6), and I now admit it. The document at issue is pages 60 to 64 of agency exhibit 1 (IAF, Tab 39). Tr. 5. The appellant objected to the admission of these pages because I previously had excluded as irrelevant the same document when it was offered by the appellant. *See* IAF, Tab 38, at 7; *compare id.*, Tab 35, exhibit M, with *id.*, Tab 39, at 60-64. Unlike the version submitted by the appellant the version offered by the agency is almost entirely redacted. *Id.*, Tab 39, at 60-64. It appears to have been included only because it was an attachment to another document that I admitted. *See id.* at 56. Although the redacted pages have no bearing on my consideration of this appeal, I see no point to excluding them and no prejudice to the appellant in admitting them. I

therefore admit the disputed pages in the interest of completeness.

Applicable law

The agency had to prove by a preponderance of the evidence (1) the factual basis for its charges, (2) the nexus between the charges and the efficiency of the service; and (3) the reasonableness of the penalty. 5 C.F.R. § 1201.56(a)(1)(ii); *Pope v. U.S. Postal Service*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The appellant had to prove his affirmative defense of lack of due process by a preponderance of evidence. IAF, Tab 38, at 4; 5 C.F.R. § 1201.56(a)(2)(iii). The other affirmative defenses that the appellant originally raised were dismissed or abandoned. IAF, Tab 22; Tab 38, at 4.

The agency proved two of its four charges

Theft

The agency charged the appellant with stealing furniture from the FBI by arranging to move it from the undercover site to the landlord's warehouse across the street. IAF, Tab 6, at 69; Tr. 21-23. This furniture included a television, a sofa, an armchair chair, and six matching black leather side chairs. IAF, Tab 6, at 69; *see also* Tr. 21-22. All but two of the six side chairs had been bought with funds provided by the landlord; the remaining two chairs had been bought with FBI funds. Tr. 21-22.

Because the agency's proposal labeled this charge "Theft" (IAF, Tab 6, at 69), the agency had to prove the elements of that crime—that the appellant took

and possessed another's property in a manner inconsistent with the owner's rights and benefits with an intent to deprive the owner permanently of its possession or use. *Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 459 (1991), *aff'd*, 43 F.3d 663 (Fed. Cir. 1994); *see also Rodriguez v. Department of Homeland Security*, 117 M.S.P.R. 188, ¶ 8 (2011) ("When a charge *is* labeled, the label, and not something else, must be proven.").

Because theft is a specific-intent crime, it is a defense that the person taking the property honestly believed that he had the right to do so, even if that belief turned out to be incorrect. *Peck v. Department of Defense*, 75 M.S.P.R. 244, 248 (1997). For example, a person who honestly believed that he owned the property that he took did not commit theft even if he was not in fact the owner. *Id.*

I find that the appellant did not have the state of mind required for theft, because he honestly if mistakenly believed that all the furniture belonged to the landlord and that the FBI had no legally cognizable interest in it. Although two of the pieces of furniture were in fact bought with FBI funds, the appellant testified that at the time he believed that all of it had been bought with the landlord's funds. Tr. 77-78. I credit this testimony, which was plausible and essentially unrebutted. *See Hidden v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (discussing factors that bear on credibility). The two chairs that the FBI bought matched the four that had been bought with the landlord's funds, and it therefore is not surprising that the appellant thought they were a single set that had been purchased together. Tr. 77-78. The appellant also deliberately

avoided moving several other items that he knew had been bought with FBI funds. Tr. 77-78. This is consistent with his asserted belief that he was moving only furniture owned by the landlord.

Because the appellant arranged with the landlord to move the furniture to one of the landlord's warehouses, I find that he did not steal anything from the landlord. The landlord testified that he was aware of the move and did not believe that the appellant was trying to steal the furniture from him. Tr. 110, 115, 122. The furniture remained in the landlord's possession at all times (Tr. 81), and I find that he effectively authorized the move even if it was done at the appellant's request.

I will assume without deciding that the appellant nonetheless could have been guilty of theft *from the FBI* if the FBI had some enforceable right to use, or legal interest in, the landlord's furniture. *Cf. State v. Nelson*, 78 P. 790 (Wash. 1904) (although it is generally true that "one cannot steal property of which he is the owner," the rule may be different if the owner takes the property from a bailee or other person who has a special interest or property in it together with the right to its immediate possession); Model Penal Code § 223.0(7) (recognizing the same principle).

But I find that the appellant honestly believed that the FBI had no such right or interest in the furniture at issue here. The appellant testified that he thought this was the landlord's furniture, that it had not been purchased with the tenant improvement funds specified under the lease, and that the landlord provided it as a "gesture of good faith" but

was under no obligation to continue to let the FBI use it. Tr. 18-23. Again, I credit his testimony that he honestly believed that the furniture was the landlord's and not governed by the lease, regardless of whether that was actually the case. The lease itself said nothing about furniture whatsoever. IAF, Tab 39, at 35-47; Tr. 23. It required the landlord to provide $70,000 for tenant improvements, but it was undisputed that the landlord had already provided this to the FBI even without counting the furniture. IAF, Tab 39, at 35, 97-101. The appellant asked the landlord to provide additional money beyond the initial $70,000, and he agreed to do so. Tr. 18-21, 100-01, 114-15. I find that the appellant reasonably could have believed that this money was not covered by any provisions of the lease and that the property remained the landlord's to do with as he saw fit. I recognize that the landlord testified that he thought the FBI had the right to use the furniture during the term of the lease. Tr. 107. But even if the FBI in fact had the right to prevent the landlord from taking the furniture away, the appellant's understanding to the contrary was plausible, and I credit that he honestly held that belief.

I therefore find that the appellant did not have the intent required for theft. He honestly, if mistakenly, believed that all of the furniture at issue had been bought with the landlord's funds, and he also honestly believed that the landlord had no obligation (under the lease or otherwise) to let the FBI continue to use the furniture. That belief is inconsistent with the specific intent required to sustain a theft charge. Thus, although the appellant's actions may have

been childish and unprofessional, I find that he did not commit theft.

The charge is NOT SUSTAINED.

Obstruction of the OPR process

The agency's second charge was brought under a provision of the FBI offense code that prohibits employees from "[t]aking any action to influence, intimidate, impede or otherwise obstruct the OPR process." IAF, Tab 6, Subtab 4d, at 9. The facts related to this charge are not in dispute. The appellant believed that he was under investigation for misusing the tenant improvement funds. Tr. 28-29, 70. He therefore held a meeting with the landlord and a member of the landlord's staff at which they discussed specific entries in the accounting—in particular, the $1,200 check he received—to come to what he later described as a "mutually agreed set of facts" about the circumstances surrounding those entries. Tr. 29-31; IAF, Tab 39, at 188. The appellant took notes during this meeting and gave them to the landlord's secretary to type up as a signed statement for the landlord; the landlord made a few changes and signed the statement. IAF, Tab 39, at 181-86; Tr. 103-05. The statement asserted, among other things, that the landlord had authorized the $1,200 check to the appellant so that he could cash it and pay a subcontractor who had insisted on being paid in cash. IAF, Tab 39, at 84.

I find that these actions violated the offense code by improperly influencing the investigation. The appellant met with potential witnesses to ensure

that they had their stories straight, and he persuaded a key witness to lock in his story by committing it to writing. As the deciding official explained, when the OIG investigator later spoke to these witnesses, the investigator was not obtaining their untainted recollection of events, but rather their recollection as affected by the appellant's efforts. Tr. 157. The appellant, as an FBI special agent, should have been particularly sensitive to the risk that his actions posed of subtly (or not-so subtly) biasing the witnesses' recollection. Tr. 156-57.

The appellant offered two arguments against this charge, but I find neither one persuasive. First, he asserted that he could not have obstructed OIG's investigation because in April 2010, which is when he spoke to the witnesses and drafted the written statement, he did not yet know that he was the target of an OIG investigation. IAF, Tab 48, at 13-14. He did not learn this until May2010, when the OIG investigator told him that he was the target of an open investigation. Tr. 67-68. But even crediting this statement, I find that it does not defeat the charge. Although in April 2010 the appellant may not have *known* that he was *already* the target of an OIG investigation, at a minimum he was aware that OIG *might* decide to look into the build-out, including whether he had managed it correctly, in the near future. In 2009 he had told the landlord and his staff to provide the receipts for the build-out to CHG. IAF, Tab 39, at 219-20. He explained that he knew his supervisors had accused him of wrongdoing and was hoping to have OIG look into the situation as a "fair arbiter." *Id.* at 222. Even though he thought this investigation would target

his supervisors for alleged retaliation against him, he recognized that as part of this investigation OIG would have to examine whether the supervisors' accusations against him could be substantiated. Tr. 73. Thus, even if he did not know that an investigation was already open at the time he spoke to the witnesses and drafted the statement, I find that he anticipated that OIG would be investigating his handling of the build-out and that his actions influenced that investigation.

Second, he argued that even if he influenced the OIG investigation, he did not influence "the OPR process," as the charge stated. IAF, Tab 48, at 14-15. Again, I disagree, and for similar reasons. The appellant was trying to protect himself from possible discipline in connection with the build-out. Tr. 44. The OIG investigation was a key step in the disciplinary process. Tr. 142. If OIG exonerated him, he likely would not have faced discipline. If OIG found fault (as it did), he would face discipline by OPR. OPR does not generally conduct its own fact-finding; rather, it relies on the investigative record compiled by OIG or another agency component. Tr. 142. Thus, I find that by influencing the OIG investigation, the appellant was also indirectly influencing the OPR process. I note that although the appellant raised this argument in his closing brief, he did not suggest during the disciplinary process then that he was confused by the charge's reference to OPR rather than OIG.

This was not an especially egregious case of obstruction. The agency did not prove that the written statement he drafted for the landlord was incorrect or that he asked the landlord to lie about

anything. Tr. 105, 116. The agency's proposal suggested that this was the least serious of the charges, and that on its own it would have merited only a suspension rather than removal. IAF, Tab 6, at 72. But these circumstances are relevant to the penalty, not the charge itself. I find that the agency proved obstruction because the appellant met with potential witnesses and tried to make sure that their stories matched his.

The charge is SUSTAINED.

Unprofessional conduct

The agency's charge of unprofessional conduct was based on the provision of the FBI offense code covering an employee who "[e]ngag[es] in conduct, *while on duty*, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgment or character of the employee; or compromises the standing of the employee among his peers or his community." IAF, Tab 6, at 70 (emphasis added). Thus, the agency had to prove both that the appellant engaged in the type of inappropriate conduct specified in the code and that this conduct occurred while he was on duty. *Cf. Downey v. Department of Veterans Affairs*, 119 M.S.P.R. 302, ¶ 6 (2013) (recognizing that being on duty could be a necessary element of a charge). The charge did not explicitly separate out different factual specifications, but I construe it as involving four independent matters.

First, the agency asserted that the appellant told the landlord and one of his staff members not to cooperate with the FBI as it investigated the build-

out. IAF, Tab 6, at 70. As discussed further below, there is no dispute that the appellant directed the landlord not to provide the receipts for the build-out to the FBI, and for the reasons explained by the deciding official I have little doubt that this constituted unprofessional conduct. Tr. 16, 161-62. But the agency did not show that the appellant engaged in this conduct while on duty. I saw no evidence establishing exactly when the appellant gave this direction to the landlord—whether it was before or after he had been removed from the undercover team, for example, or whether it was during or outside of normal business hours. Neither the appellant nor the landlord could remember when the conversation had occurred. Tr. 72, 103. I also saw no reason to assume that this was on-duty conduct. When he had the conversation in question, the appellant was trying to defend himself from what he saw as an improper investigation by the FBI, not carrying out his day-to-day responsibilities as a special agent. Tr. 16, 73.

The specification is NOT SUSTAINED.

Second, the agency asserted that the appellant created a fake purchase contract and receipt to make it look like he was buying the furniture that had been moved. IAF, Tab 6, at 70; *see also id.* at 125, 127. The appellant admitted doing this, explaining that he never intended to follow through with the purchase but was trying to give the landlord an excuse for not returning the furniture if the FBI asked for it. Tr. 32-37; IAF, Tab 39, at 79-80. Once again, I have little doubt that the appellant's conduct was unprofessional, but the agency did not show that it occurred on duty. There was no evidence about

exactly when the appellant created these documents and had the landlord sign them, and I saw no reason to assume that it occurred on duty.

The specification is NOT SUSTAINED.

Third, the agency alleged that the appellant violated the provisions of the lease by using tenant improvement funds to buy furniture. IAF, Tab 6, at 71; Tr. 162. As noted earlier, under the lease the landlord had to provide $70,000 for tenant improvements. IAF, Tab 39, at 38. The lease stated that these funds "may be used for construction, construction documents, permits and fees." *Id.* After the landlord had already spent at least $70,000 on these types of expenses, the appellant asked him to provide additional money, some of which the appellant used to buy furniture. Tr. 18-19, 100-01; see also IAF, Tab 39, at 41-42. The agency asserted that this was improper because the furniture did not fall in the categories of construction, construction documents, permits, or fees. IAF, Tab 6, at 71.

I will assume without deciding that violating the terms of the lease would have been on-duty unprofessional conduct. But I find that the agency did not prove that the appellant did so. Even if the lease's language limited the allowable uses for tenant improvement funds, by its terms those limits applied only to the first $70,000-2,000 square feet times $35 per square foot—that the landlord provided:

TENANT IMPROVEMENTS. LANDLORD, at LANDLORD'S sole cost and expense shall provide a TENANT allowance of [$35.00] per usable square

f[oo]t, not to exceed 2,000 square feet. The allowance may be used for construction, construction documents, permits and fees.

IAF, Tab 39, at 38. The lease imposed no limits on any tenant improvement funds that the landlord decided to provide beyond the first $70,000. The landlord was under no legal obligation to provide any additional funds, and so he had the right to determine the purposes to which any other tenant improvement funds could be used. It was, after all, his money. And the landlord had no issue with the appellant's use of the additional money to buy furniture for the space. Tr. 108 ("And as far as the furniture was concerned, the furniture was purchased under tenant improvements, which was fine with me.").

Because the agency did not show that the appellant violated the terms of the lease, it did not establish that he engaged in unprofessional conduct in this respect.

The specification is NOT SUSTAINED.

Finally, the agency charged the appellant with paying one of the subcontractors on the build-out in cash. IAF, Tab 6, at 71. The subcontractor (after completing his work) told the appellant that he could not accept a check because he did not have a bank account or a driver's license, which he would have needed to cash a check. Tr. 38; IAF, Tab 39, at 192. As noted earlier, the appellant asked the landlord's office manager to write a check to the appellant instead. IAF, Tab 39, at 192-97. He cashed this

check and used the funds to pay the subcontractor. *Id.*

The deciding official testified that this was unprofessional conduct because it is inappropriate to make cash payments for a government contract. Tr. 163 ("it's just—it's not the way the government would do business" because "[w]e have to deal with legitimate vendors"). Although this proposition may be correct in the abstract, I find that the deciding official misunderstood the context of the payment at issue. The deciding official acknowledged that in some undercover operations it is appropriate to use cash, but she apparently believed that this was not an undercover operation because the landlord knew the appellant's true identity. Tr. 196-98. The cash payment here, however, was to a subcontractor— not the landlord. And the subcontractor was not supposed to know that the appellant was an FBI agent. Tr. 88. As far as the subcontractor was aware, the appellant was a private businessperson who was serving as the landlord's agent on the build-out. IAF, Tab 35, exhibit K; Tr. 62-64. If the appellant had insisted on paying the subcontractor by check because that is "the way the government [does] business," Tr. 163, the appellant would have signaled that this was not a regular business and might have jeopardized the cover for this facility. In the circumstances, the agency did not show that there was anything inappropriate about the appellant's decision to follow the procedures for undercover cash payments, Tr. 37, and it did not show that he failed to comply with those procedures.

The specification is NOT SUSTAINED. Because I do not sustain any of the specifications under this charge, the charge is NOT SUSTAINED.

Lack of candor

The agency alleged that the appellant lacked candor under oath during his OIG interview. IAF, Tab 6, at 71. Lack of candor is a broader and more flexible concept than falsification. *See Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). The agency must prove an element of deception, but it need not necessarily prove an affirmative misrepresentation or intent to deceive. *Id.* It may satisfy its burden by showing that the appellant failed to disclose something that, in the circumstances, should have been disclosed to make his statement accurate and complete. *Id.*; *see also Hoofman v. Department of the Army*, 118 M.S.P.R. 532, ¶ 13 (2012), *aff'd*, 2013 U.S. App. LEXIS 9597 (Fed. Cir. May 13, 2013) (per curiam). In other words, a lack-of-candor charge covers half-truths in addition to outright falsehoods.

Like the unprofessional-conduct charge, the lack-of-candor charge did not explicitly separate the factual specifications, but I understand the charge to involve four different statements that the appellant made during his OIG interview. The parties stipulated that he was under oath during this interview. IAF, Tab 34, at 5; *see also id.*, Tab 39, at 137. I discuss each statement in turn.

First, when the OIG investigator asked the appellant about the allegation that he had told the landlord not to provide receipts to the FBI, the

appellant responded, "I didn't tell him. I asked him not to." *Id.*, Tab 39, at 220. I find that this answer was not accurate. At the hearing, the appellant acknowledged that he "directed him [the landlord] to provide the documents to OIG rather than—or not the FBI." Tr. 16 (emphasis added). "Direct" is a synonym for "tell," not "ask." *See, e.g.*, *Webster's Collegiate Thesaurus* 53, 232, 821 (1st ed. 1976). The landlord's testimony was consistent with the understanding that the appellant had given a direction rather than made a request. Tr. 103 ("[W]e got the impression that . . . we should give it to the OIG and not the FBI.").

And even if the appellant's statement to OIG had been literally correct—if he had actually phrased his direction to the landlord as a request rather than an order—I would still find that his characterization left a misleading impression about what he had done and therefore displayed a lack of candor. In drawing a distinction between *telling* and *asking*, it appears that the appellant was trying to convey the impression that he did not have much control or influence over what the landlord did. The testimony at the hearing demonstrated that this was not so. In addition to the testimony quoted in the previous paragraph, the appellant made it clear that he knew that the landlord would do whatever the appellant told (or asked) him to do. The appellant testified that if the FBI had wanted the receipts, it could have asked *him* and he would have "facilitated the process" of getting them from the landlord. Tr. 77. He explained that even after he was removed from the undercover team, he still had a close enough relationship with the landlord that he could have

told the landlord to provide the receipts, and he implied that he expected the landlord would have complied. Tr. 93-94. The appellant failed to disclose to OIG the nature of his relationship with the landlord and the extent of his control over the landlord's actions. I find that without this information, his statement that he asked but did not tell the landlord to do something was not complete and accurate.

One might argue that the distinction between asking and telling is too fine, or too fuzzy, to support a finding that the appellant lacked candor. But the appellant's actions during the interview show to the contrary. The appellant was not charged merely for using the word "ask" in response to a question when "direct" or "tell" would have been more accurate. Rather, in response to the question that used the word "tell," he insisted that did *not* tell but merely asked. IAF, Tab 39, at 220. He drew this distinction repeatedly during the questioning. *Id.* at 220-21, 223. Thus, the appellant himself recognized a meaningful distinction between the two concepts, one significant enough that he thought it worth emphasizing given the investigator's choice of words. I find that the appellant, perhaps recognizing that it would have been inappropriate to *tell* the landlord not to cooperate with the FBI (*see id.* at 221), was trying to minimize his culpability by suggesting that he had done something of far less concern. And in the absence of any other plausible explanation for his mischaracterization, I find that the appellant made it to deceive OIG about what had happened. *See, e.g. Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 164 (1997) (the lack of a plausible explanation

for a mistake can be grounds for inferring intent to deceive).

The specification is SUSTAINED.

Second, when asked about how the tenant improvement funds were spent, such as the decision to use them to buy furniture, the appellant insisted that the landlord had approved all expenditures:

> Let me be very clear on this point. Nothing was done with any of the tenant improvement funds that was not approved by [the landlord].

IAF, Tab 39, at 149. Although it is a closer question than with respect to the first specification, I find that this statement lacked candor because it left the misleading impression that the landlord actively approved the expenditures before the appellant made them, not merely that the landlord had effectively ratified them after the fact. But the latter is what in fact happened. The landlord testified at the hearing that he did not think he was aware of expenditures in advance and did not have any input into how the funds were spent. Tr. 100. The appellant did not dispute this testimony.

The landlord was happy with what the appellant had done and thought the appellant had kept him sufficiently informed about the build-out. Tr. 111-12. But for the appellant's statement to OIG to have been accurate and complete, he would have had to explain the approvals were after-the-fact ratifications, not explicit pre-expenditure authorizations to spend the funds in particular ways. Because he did not do so, I find that his statement lacked candor. Once again, in the absence of any

other plausible explanation for his misstatement, I find that the appellant made it to deceive OIG about the extent of the landlord's involvement in approving the expenditures.

The specification is SUSTAINED. In any event, even if I did not sustain this specification, I would reach the same ultimate decision on the appeal.

Third, with respect to the written statement he drafted for the landlord (the subject of the obstruction charge), the appellant told OIG that it represented "mutual recollections" and a "mutually agreed set of facts that occurred." IAF, Tab 39, at 188. The agency asserted that this lacked candor because the landlord and his staff later could not recall or contradicted some of the information in the statement. *Id.*, Tab 6, at 71. But unlike with the previous specifications, I find that the appellant explained the situation to OIG accurately and completely. He explained that he "provided basically a draft" of the document to the landlord for his consideration, and that the draft was not solely based on the appellant's recollection because he had met with the landlord and his bookkeeper to discuss their recollection as well. *Id.*, Tab 39, at 181, 188. The landlord testified at the hearing that he agreed with what the statement said. Tr. 105. I recognize that the landlord and his staff may not have recalled all the details of the statement when they were interviewed by OIG, but that merely shows that their memory was not perfect. It hardly proves that it was inaccurate for the appellant to call it a mutual recollection, since he drafted it after discussing the contents with them and they agreed with its contents. I find that the appellant was candid about

the circumstances surrounding the creation of this document.

The specification is NOT SUSTAINED.

Finally, the agency noted that the appellant had to be asked several times why he had moved the furniture before responding candidly that he did so out of pettiness. IAF, Tab 6, at 72. The deciding official equivocated at the hearing about whether she had sustained this specification. Tr. 183. Regardless, I find that the agency did not prove it. The investigator did ask the same question multiple times, interspersed with other questions about the furniture. IAF, Tab 6, at 39-42. But the transcript reflects more that the appellant was not listening carefully to the questions than that he was trying to conceal anything. The first few times he was asked *why* the furniture was moved, for example, he still seemed to be continuing his previous answer about *where* and *how* the furniture was moved. *Id.* at 39. When the investigator again asked why, the investigator also noted in asking the question that other agents had said that the furniture was the appellant's personal property, and the appellant immediately disputed that statement instead of answering the original question. *Id.* at 40. The investigator asked the why-question again, and the appellant asked to confer with his lawyer. *Id.* at 41. He then gave a candid answer that it was "the more petty side of human nature" that led him to move the furniture so as to deprive other employees of its use. *Id.* at 42. It took less than three pages of the transcript from the first why-question to the appellant's response. In my experience, this sort of back and forth is not unusual during the

examination of a witness, and it sometimes takes several tries before a witness understands what the questioner really wants to know. In the context of the OIG interview as a whole, I find that the appellant's answers to the why-questions did not demonstrate a lack of candor.

The specification is NOT SUSTAINED. Because I sustained some of the specifications under this charge, however, the charge is SUSTAINED. *See Tryon v. U.S. Postal Service*, 108 M.S.P.R. 148, ¶ 5 (2008).

Due process

The appellant asserted that the agency violated his right to due process depriving him of an adequate opportunity to review the materials the deciding official relied on. IAF, Tab 48, at 35. There is no dispute that when it issued the proposal, the agency made all of those materials available to the appellant by sending one copy to the agency's Atlanta office, the closest one to his address of record, and another copy to the New York office, where his representative was located. *Id.*, Tab 42, at 26-32; Tr. 48. The appellant complained that the agency did not send a copy to Florida, where he was stationed on military duty. *Id.*, Tab 48, at 35-36. But he did not ask the agency to send a copy there. Tr. 46; *cf.* IAF, Tab 42, at 33 (email from the appellant's representative asking the agency to arrange for inspection of the supporting file, but not requesting that it be sent to anywhere in particular). Even assuming the agency knew that the appellant was in Florida, I see no reason that due process required the agency to send the file there proactively in the absence of any

request from the appellant—particularly where he had an experienced representative who was separately reviewing the file on his behalf. Tr. 48.

The appellant also complained that he did not know about one document in the file that made reference to two other pending investigations into misconduct by him. IAF, Tab 39, at 36. But the agency showed that this document was in the materials that were made available to the appellant, so I find he was adequately on notice that the deciding official would review it. Tr. 149; IAF, Tab 42, at 193-94. I find that this was not an ex parte communication within the meaning of cases such as *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). I note also that the deciding official testified without contradiction that she did not consider the allegations related to these pending investigations. Tr. 144-45. In any event, I find that the inclusion of the document in the materials made available to the appellant did not deprive him of due process.

Nexus and penalty

There is a clear nexus between the efficiency of the service and the appellant's obstructing the agency's disciplinary process and displaying a lack of candor during the agency's investigative interview. *See, e.g., Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 28 (2000) (recognizing that "lack of candor strikes at the very heart of the employer-employee relationship"), *aff'd*, 278 F.3d 1280. I find that the agency has established the required nexus here for the sustained charges.

Because I did not sustain all of the charges brought by the agency, I must consider carefully whether the sustained charges merited the penalty imposed by the agency. *Hamilton v. Department of Veterans Affairs*, 115 M.S.P.R. 673, ¶ 34 (2011). I may mitigate the agency's penalty only if it exceeded the maximum reasonable penalty for the sustained charge or if the agency indicated that it wanted to impose a lesser penalty for that charge alone. *Id.* Here, the agency indicated that it would have removed the appellant for the lack-of-candor charge alone. IAF, Tab 6, at 54; Tr. 171-72 (describing this as among the "bright lines at the FBI"). And as explained below, I find that removal did not exceed the maximum reasonable penalty for the sustained charges. I therefore affirm the agency's penalty.

The most important factor in determining the reasonableness of the penalty is the nature and seriousness of the misconduct and its relationship to the employee's duties, including whether the offense was intentional or repeated. *See Rackers v. Department of Justice*, 79 M.S.P.R. 262, 282 (1998), *aff'd*, 194 F.3d 1336 (Fed. Cir. 1999). Lack of candor under oath is a serious offense, particularly when it involves an FBI agent. *Jackson v. Department of the Army*, 99 M.S.P.R. 604, ¶ 6 (2005); *Friedrick v. Department of Justice*, 52 M.S.P.R. 126, 135 (1991), *aff'd*, 980 F.2d 742 (Fed. Cir. 1992). Law enforcement officers are held to a higher standard of conduct and integrity. *Prather v. Department of Justice*, 117 M.S.P.R. 137, ¶ 36 (2011). And FBI employees are held to a particularly high standard of candor; the agency's standard penalty for this offense is removal regardless of the circumstances. IAF, Tab

6, at 54; Tr. 171¬72; *see also* IAF, Tab 42, at 114 (noting that the agency has always imposed dismissal for this offense).

The appellant had a prior disciplinary record, which was an aggravating factor. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 340 (1981). The appellant was suspended for seven days in 2006 for misuse of his government credit card. IAF, Tab 6, at 8; Tab 39, at 35. He did not dispute that this suspension could be considered an aggravating factor under the factors set forth in *Bolling*. *Id.*, Tab 38, at 3. I also find, as did the deciding official (*id.*, Tab 6, at 54), that the appellant's lack of remorse—at least for the conduct underlying the sustained charges—demonstrated a poor prospect for rehabilitation. *See Neuman v. U.S. Postal Service*, 108 M.S.P.R. 200, ¶ 26 (2008).

There were mitigating circumstances as well. The appellant's performance ratings were good, and he had received awards and commendation for his civilian and military service. IAF, Tab 35, exhibits A-E. At the time of his removal, he had more than thirteen years of service for the FBI and more than twenty-one years of total federal service. IAF, Tab 6, at 39; Tab 34, at 4; Tab 35, exhibit C, at 1. He served multiple combat deployments in support of the global war on terrorism, including one in Iraq in 2004. Tr. 55-56. I also will assume without deciding that I may take into account the appellant's *belief* that he was the victim of improper retaliation by his supervisors and OIG, even though as noted earlier I may not consider the whistleblower defense on the merits. *See, e.g.*, Tr. 24-25, 64-68; *cf. Douglas*, 5 M.S.P.R. at 305 (noting that "unusual job tensions"

can be a relevant factor). I find that this belief was genuine regardless of whether it was correct.

I nonetheless find that removal was not beyond the tolerable limits of reasonableness here. The Board has repeatedly upheld the removal of employees who displayed a lack of candor, particularly when (as here) there was other misconduct as well. *See, e.g., Smith v. Department of the Interior*, 112 M.S.P.R. 173, ¶ 26 (2009); *Kamahele v. Department of Homeland Security*, 108 M.S.P.R. 666, ¶ 15 (2008); *Carlton v. Department of Justice*, 95 M.S.P.R. 633, ¶ 9 (2004); *cf. Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005) (noting that the Board has frequently upheld removal for falsification), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006). I recognize that many of these cases involved more egregious acts of falsification than the mischaracterizations or half-truths at issue here. But in other respects the appellant's misconduct here was more serious than in many of these cases, particularly because he was an FBI agent and made the statements under oath.

One Board decision involving an FBI special agent charged with lack of candor deserves further discussion. In *Ludlum*, 87 M.S.P.R. 56, TT 10, 33, the Board mitigated the removal of an agent who, during an administrative inquiry, signed a sworn statement that had incorrect information about the number of times he had misused a government vehicle. But that case had at least two mitigating factors not present here. First, although the agent's written statement there lacked candor the Board found that the error was caused by the agent's "confusion of recall" about the number of incidents, and he had told the investigators orally that he was

not sure about the exact number. *Id.* TT 14, 30. There is no persuasive evidence here suggesting that the appellant's statements were inaccurate because of his faulty memory or that he revealed any uncertainty about his answers to the investigators. Second, the agent in *Ludlum* had no prior disciplinary record (*Id.* ¶ 31), whereas the appellant had previously served a seven-day suspension. I therefore find that *Ludlum* does not require mitigation here.

It is not up to me to determine the penalty that I would have imposed for the sustained charges. *See Gray v. Government Printing Office*, 111 M.S.P.R. 184, ¶ 18 (2009). I may mitigate the penalty the agency selected only if it exceeded the tolerable limits of reasonableness for the sustained charges. *Id.* And for the reasons explained above, although I might have considered a lesser penalty if the decision had been mine, I cannot find that removal exceeded the tolerable limits of reasonableness for the sustained charges of obstruction and lack of candor here.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

Benjamin Gutman
Administrative Judge

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. **5 U.S.C. § 2302 provides in pertinent part:**

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title or under title 38;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Publishing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii) (I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office;

* * * * *

(b) 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) any 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; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) 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;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

* * * * *

2. **5 U.S.C. § 2303 provides:**

Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to an employee in, or applicant for, a position in the Bureau as a reprisal for a disclosure of information—

(1) made—

(A) in the case of an employee, to a supervisor in the direct chain of command of the employee, up to and including the head of the employing agency;

(B) to the Inspector General;

(C) to the Office of Professional Responsibility of the Department of Justice;

(D) to the Office of Professional Responsibility of the Federal Bureau of Investigation;

(E) to the Inspection Division of the Federal Bureau of Investigation;

(F) as described in section 7211;

(G) to the Office of Special Counsel; or

(H) to an employee designated by any officer, employee, office, or division described in

subparagraphs (A) through (G) for the purpose of receiving such disclosures; and

(2) which the employee or applicant reasonably believes evidences—

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

3. **5 U.S.C. § 7511 provides in pertinent part:**

Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) except as provided in section 1599e of title 10, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

* * * * *

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

[(5) Repealed. Pub. L. 114-328, div. A, tit. V, § 512(c), Dec. 23, 2016, 130 Stat. 2112]

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

4. **5 U.S.C. § 7513 provides:**

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. **5 U.S.C. § 7701 provides in pertinent part:**

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * * * *

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

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