No. _____

IN THE

Supreme Court of the United States

_____

ILLYA ERWIN,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

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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July 2, 2018

QUESTIONS PRESENTED

1. Whether, in defense of a whistleblower claim of wrongful termination by a probationary employee, pursuant to 5 U.S.C. § 1221, the agency may claim that it would have taken the same personnel action in the absence of such disclosure based upon grounds which were not stated in the notice of termination given pursuant to 5 C.F.R. § 315.804(a)?

2. Whether, in defense of a whistleblower claim of wrongful termination by a probationary employee, pursuant to 5 U.S.C. § 1221, the agency may claim that it would have taken the same personnel action in the absence of such disclosure based upon grounds which were specifically rejected by the agency in the first instance?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

To the Chief Justice and Honorable Associate Justices of the United States Supreme Court:

Illya Erwin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit, entered on January 16, 2018.

OPINIONS BELOW

The Court of Appeals did not render an opinion in this case. The Judgment of the Federal Circuit Court of Appeals was entered on January 16, 2018 and is found at App-1. The Order of the Court of Appeals denying a timely petition for rehearing and rehearing en banc was filed on April 2, 2018 and is found at App-40. The unreported decision of the Merit Systems Protection Board is dated September 7, 2016 and is found at App-3. The Initial Decision of the Administrative Judge is dated January 12, 2016 and is found at App-8.

JURISDICTION

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Federal Circuit entered on January 16, 2018. A timely petition for rehearing and rehearing en banc was denied on April 2, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 1221 - Individual right of action in certain reprisal cases

a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

* * *

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action

through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 2302(b)(8)(A)(ii). Prohibited personnel practices

(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—

* * *

(ii) gross mismanagement, a gross waste of

> funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

5 C.F.R. § 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

(b) Termination of an individual serving a probationary period must be taken in accordance with subpart D of part 752 of this chapter if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart.

5 C.F.R. § 315.804(a) Termination of probationers for unsatisfactory performance or conduct.

(a) Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct

during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

STATEMENT OF THE CASE

On February 11, 2013, Petitioner, Illya Erwin ("Erwin") received a one year probationary appointment as Intensive Care Registered Nurse at Tripler Army Medical Center. On February 5, 2014, Erwin was terminated by memorandum signed by Jamie W. Reece. The grounds as stated in this memorandum for the termination were "lack of candor" for allegedly telling Captain Gina Healy, on September 17, 2013, that he did not have access to the Tripler CHCS computer system. App-6.

This action was taken at the request of Reece and Lt. Colonel Jennifer D. Lorilla, in a CPAC-25 Request for Disciplinary/Adverse Action form, submitted to the Civilian Personnel Advisory Center, on December 11, 2013. App-6. The grounds for the requested termination as stated in the CPAC-25 form alleged that Erwin did not have access to the CHCS computer system and did not appear for work when he was scheduled to be "on call." App-6.

Reece and Lorilla had previously submitted a CPAC-25 request for Erwin's termination for being absent without leave which was rejected because Erwin's time card showed that he was given leave without pay on that date.

Erwin appealed his termination to the Merit Systems Protection Board, pursuant to 5 U.S.C. § 1221(a), claiming that he had engaged in protected whistleblower activity. Erwin argued that he was

terminated in retaliation for complaints he made about patient care, including an email he had sent to Reece and Lorilla on October 27, 2013, as follows:

> Hey guys! Wanted to send you guys a quick email on a situation in the ICU 10/26/2013. There seems to be collaboration issue with Dr. May Ngayen . . . . The whole point is that there needs to be an atmosphere of collaboration amongst caregivers. This is one of the joint commission national pt safety goals. . . . Dr's dont need to get upset with us because we want to know why or how when it comes to getting things for our pts. With the above mentioned anxiety pt he could have been settled hours earlier if there would have been proper orders. . . . We need to have an a good collaborrative environment that encourages one another on behalf of the pt; without collaboration the whole unit declines.

App-13-4.

The Administrative Judge found that Erwin had, indeed, engaged in protected activity on several occasions which protected activity was "a contributing factor in his removal." App-25. However, the AJ found that this particular email was not protected activity, as follows:

> With respect to his disagreements about the treatment of patients, while the appellant references a variety of complaints made about

> the performance of colleagues and the doctor, referred to by the appellant as Dr. Ngayen and Dr. Nyugen as set forth above, the appellant fails to adequately show how these complaints, including the October 27, 2013 email to his superiors about a lack of "collaboration" among nurses and doctors, constitute protected disclosures.

App-22.

Having found that protected activity had contributed to Erwin's termination, the AJ went on to consider whether or not the Army had "demonstrate[d] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure[s]." 5 U.S.C. § 1221(e)(2).

The Army did not even attempt to justify termination on the grounds of "lack of candor." Instead, Reece and Lorilla again claimed that the Army would have terminated Erwin for alleged lack of access to the computer system and for failing to appear for work when "on call." The AJ agreed finding Erwin guilty of misconduct for failing to maintain computer access and failing to appear for work when "on call." App-34. The AJ considered the factors set forth in *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed.Cir. 1999) and concluded that the Army would have terminated Erwin even in the absence of his protected activity. App-38. The AJ wrote a 7,275 word decision which does not contain the word "candor" one single

time.

The AJ's decision was affirmed by a split decision of a two member Merit Systems Protection Board. App-3. The decision of the Board is one paragraph long simply adopting the AJ's initial decision as the Board's. App-3.

However, Chairman, Susan Tsui Grundmann, dissented in a separate opinion. App-4. Chairman Grundmann would have found that the October 27, 2013, email was protected as a "disclosure of a substantial and specific danger to public health or safety," protected by 5 U.S.C. § 2302(b)(8)(A)(ii). App-4-5.

In addition, Chairman Grundmann would have found that the Army failed to justify its termination of Erwin because there was no evidence of any "lack of candor," as follows:

> To prove lack of candor, the agency must establish the following elements: (1) that the employee gave incorrect or incomplete information; and (2) that he did so knowingly. *Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330, ¶ 17 (2016). Here, the agency has provided no evidence whatsoever that the appellant knowingly gave incorrect or incomplete information when he stated that he did not have access to CHCS. The appellant's statement was not a misrepresentation, as it is undisputed that the appellant did not in fact have access to CHCS at that time. Nor has the agency identified any additional information he may have

> improperly withheld. The stated basis of the agency's action is thus entirely without merit.

App-7.

Chairman Grundmann would have held that the Army had not met its burden of showing by clear and convincing evidence that it would have terminated Erwin in the absence of his protected activity without any evidence of "lack of candor." App-7.

The Federal Circuit Court of Appeals affirmed without opinion. App-1.

REASONS FOR GRANTING THE WRIT

1. Failure of Federal Circuit and MSPB to enforce Whistleblower Protection Act as Congress intended calls for this Court to exercise its supervisory power.

Whistleblowing is one of the more important aspects of good government. The first whistleblower legislation was in the False Claims Act of 1863 which allowed suits by private individuals to recover money obtained from the government by fraud. *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir., 1994).

The modern Whistleblower Protection Act (WPA) was enacted in 1989. It provided that federal employees who believe they were the victim of retaliation for whistleblowing activity could appeal an adverse employment action to the Merit Systems

Protection Board and thence to the Federal Circuit Court of Appeals. However, the MSPB and Federal Circuit have largely acted as rubber stamps affirming the over-whelming majority of whistleblower cases.

> Unfortunately, whistleblowers are not getting [credi-ble due process] at the Merit Systems Protection Board. (MSPB). As a rule, decisions by Board Members have interpreted the WPA consistent with legislative intent and backed by well-reasoned legal analysis. They have been good faith, responsible stewards of the WPA.
>
> But the hearings are conducted by Administrative Judges (AJ) who have been openly hostile to the Act. In fact, they have been far more hostile even than the Federal Circuit Court of Appeals, whose rulings sparked passage of the WPA and WPEA to restore unanimously enacted rights gutted by judicial activism. Depending on the year, AJ's rule against whistleblowers on the merits from 95-98% of decisions on the merits. Combined with the OSC's 5% corrective action rate, this means whistleblowers do not have more than a token chance for justice.

Devine, Thomas, Government Accountability Project, Testimony before House Oversight and Government Reform Committee, Subcommittee on Federal Work-force, U.S. Postal Service and the Census, Sept. 9,

2017.

The legislative history of the modern whistleblower legislation and the failure of the MSPB and Federal Circuit Court of Appeals to adequately enforce it as Congress intended, is set forth in *Aviles v. Merit Systems Protection Board*, 799 F.3d 457, 459-60 (5th Cir., 2015), by the Hon. Edward C. Prado, Judge of the Fifth Circuit Court of Appeals, as follows:

> The Civil Service Reform Act of 1978 established statutory protections to encourage federal employees to disclose government illegality, waste, fraud, and abuse; and also established the Merit Systems Protection Board as an independent agency to adjudicate these claims. Pub. L. No. 95-454, §§ 101, 202, 92 Stat. 1111, 1113-14, 1121-31. Congress later passed the Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat. 16. The WPA proscribes retaliation against a federal employee who discloses what the employee reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302(b)(8).
>
> From its inception in 1982 until 2012, the Federal Circuit Court of Appeals exercised exclusive jurisdiction over petitions for review of MSPB adjudications that involved only

federal-employee whistleblower claims. *King v. Dep't of the Army,* 570 F. App'x 863, 864 (11th Cir. 2014) (per curiam). These claims were directly appealable to the Federal Circuit and reviewed for arbitrariness or capriciousness and for substantial evidence. *Id.* at 865; see also 5 U.S.C. § 7703(c).

Concerned that the Federal Circuit and the MSPB had interpreted the WPA's definition of protected disclosures too narrowly, Congress amended the statute in 1994. See Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361; S. Rep. No. 103-358, at 8-10 (1994) (criticizing the Federal Circuit's "construction of the legislative history" and declaring that "the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing"). In 2012, Congress again significantly amended the WPA through the Whistleblower Protection Enhancement Act (WPEA) to address similar concerns. This time, to encourage diverse appellate review—which leads to circuit splits (facilitating Supreme Court review), S. Rep. No. 112-155, at 11 (2012)—Congress also expanded judicial review to all circuits, with this provision of the law scheduled to "sunset" five years later, 5 U.S.C. § 7703(b)(1)(B); see also All Circuit Review

> Extension Act, Pub. L. No. 113-170, 128 Stat. 1894 (extending the sunset of all-circuit review to five years instead of two years after enactment).

Aviles v. Merit Systems Protection Board, *supra*, 799 F.3d at 459-60.

The importance of whistleblower protection legislation was explained by pioneer WPA sponsor, Charles Grassley, (R) Iowa, as follows:

> As a Senator, I have conducted extensive oversight into virtually all aspects of the Federal bureaucracy. Despite the differences from agency to agency and from department to department, one constant remains: the need for information and the need for insight from whistleblowers. This information is vital to effective Congressional oversight, the constitutional responsibility of Congress, in addition to legislating.
>
> Documents alone are insufficient when it comes to understanding a dysfunctional bureaucracy. Only whistleblowers can explain why something is wrong and provide the best evidence to prove it. Moreover, only whistleblowers can help us to truly understand problems with the culture of government agencies, because without changing the culture, business as usual is the rule.

153 Cong. Rec. 12281 (5/14/2007).

Unfortunately, the five year trial period for appeals to Circuits other than the Federal Circuit has expired and there have beenvery few whistleblower cases brought in other Circuits. The Federal Circuit once again is the only Circuit that can hear whistleblower petitions for review. As in the instant case, the MSPB and Federal Circuit continue to "erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of wrongdoing."

In Erwin's case, he sent a long email to Reece and Lorilla, on October 27, 2013, setting forth a very serious case of inadequate treatment of a patient in the Tripler Army Medical Center Intensive Care Unit. App. 36-7. The Administrative Judge quoted portions of the email in his Initial Decision and concluded that it ***was not*** a protected disclosure. App-13-4; 22. But the AJ left out Erwin's more serious allegations of patient neglect, as follows:

> Basically pt was very confused and combative and i wasn't getting necessary orders to help pt. There was confusion between surgery and ICU. One was saying reintubate pt and the others were saying no. Patients wife witnessed pt anxiety arid was concerned why nothing was being ordered. Eventually haldol was given but ineffective. Several hours later precedex started and pt calmed down.
>
> The main issue is the quick "No" to

> suggested orders without no follow up to plan of care. It is important for nurses to know what direction were going for the pt so we can critically think on their behalf; Fullfilling our role as pt advocate. The above mentioned pt was tachy 150's, SOB with exertion and sats decreasing. He eventually pulled NG out and was yanking on TLC. I foreseen that he was detiorating quickly and needed to get pt calmed. She had said, "No benzo's just give him reassurrance" It took Sgt Widener and Resp therapist to hold pt down. At shift change for Dr's it took 2 night shift Dr's to hold down.

App-42-3.

The AJ neglected to quote the portion of the email that complains about two doctors giving conflicting orders, without explanation, and failing to follow up while the nurses struggled for hours with a critically ill patient. The portion of the email that the AJ quoted in his Initial Decision is sufficient to conclude that the email was a disclosure of "gross mismanagement . . . , or a substantial and specific danger to public health or safety," protected by 5 U.S.C. § 2302(b)(8)(A)(ii). But the portion which the AJ excluded makes it clear that his finding was "arbitrary, capricious, an abuse of discretion" and "unsupported by substantial evidence." 5 U.S.C. § 7702(c). Chairman Grundmann would have so found. App-4-5. But she was not supported by the other Board member or the Federal Circuit Court of

Appeals.

This erroneous finding by the AJ rendered his finding as to the retaliatory motive of Reece and Lorilla erroneous as well. App-5. Had the Court of Appeals written an opinion, they would have had to address this issue and vacate the AJ's Initial Decision and remand for reconsideration of the *Carr* factors. The fact that they did not even write an opinion emphasizes the need for this Court to exercise its supervisory power to enforce the WPA as Congress intended.

Further, instead of considering the grounds for termination as approved by the Civilian Personnel Advisory Center, the AJ allowed Reece and Lorilla to justify Erwin's termination by allegations which where submitted to and rejected by CPAC App-6. CPAC had decided not to terminate Erwin because of allegations that he did not have access to the computer system or that he had not appeared for work while "on call." CPAC took into account that Erwin's time card had shown that he was given leave without pay. CPAC took into account that Reece and Lorilla had given Erwin a satisfactory evaluation after the date of all of their allegations of misconduct. CPAC took into account that Reece and Lorilla had compiled a secret dossier of alleged misconduct without reviewing these charges with Erwin. Reece and Lorilla were not using the probationary period "to determine the fitness of the employee" as required by 5 C.F.R. § 315.803(a). That

would honest review of the employees performance and counseling regarding any deficiencies.

The AJ allowed the Army's attorneys to revive issues that had already been decided in Erwin's favor by CPAC. Thus, the attorneys for Respondent were actually representing Reece and Lorilla rather than the Army. The attorneys and the AJ actually enabled Reece and Lorilla to accomplish their retaliation for Erwin's protected whistleblower activity.

Chairman Grundmann attempted to correct this injustice by holding that the Army was limited to justifying its action upon the grounds stated in the notice of termination. App-7. But she was not supported by the other Board member or the Federal Circuit Court.

These are very important issues that can be addressed if this Court will grant certiorari to provide the MSPB and Federal Circuit with a proper mandate to enforce the WPA as Congress intended.

2. An important question of federal law that has not been but should be settled by this Court.

In *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1943) (*Chenery I*), this Court established:

> a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is

> authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 196 (1947) (*Chenery II*).

In *Licausi v. Office of Personnel Mgmt.*, 350 F.3d 1359 (Fed. Cir., 2003), the Federal Circuit Court of Appeals held that this rule does not apply to the Merit Systems Protection Board because the Board is authorized and mandated to consider all available evidence and determine *de novo* whether the employee has met the burden of establishing his or her entitlement to the relief requested. *Id.* at 1364-5. The Court cited *Huber v. Merit Sys. Prot. Bd.*, 793 F.2d 284, 287 (Fed.Cir.1986) holding that the Board is part of the administrative agency structure. *Licausi v. Office of Personnel Mgmt.*, 350 F.3d at 1363.

On the other hand in *O'Keefe v. U.S. Postal Service*, 318 F.3d 1310 (Fed. Cir., 2002), the Federal Circuit held that, in MSPB proceedings by a tenured employee, an agency may not assert grounds for termination that were not stated in the notice of proposed removal. *Id.* at 1315. This was said to be a denial of the employee's

right to due process. *Id.*

Of course, probationary employees are not entitled to due process because they do not have a property interest in continued employment. *Bishop v. Wood,* 426 U.S. 341, 345 (1976). As a result, an agency is limited to the grounds set forth in the proposed notice of termination in its attempt to prove that it would have terminated a tenured employee even in the absence of his or her protected activity. But for a probationary employee this is not the case.

In *Licausi*, the Court distinguished its decision there from *O'Keefe* by explaining that *O'Keefe* was not based upon the *Chenery* rule but rather on the employee's right to due process. But *O'Keefe* and *Licausi* are not consistent. If the *Licausi* rationale is applied to *O'Keefe*, an employee would not be denied due process if the agency were allowed to justify termination before the AJ on grounds other than stated in the notice of proposed termination, because the employee is entitled to a full *de novo* hearing before the AJ. There is no basis for this distinction between the rights of probationary and tenured employees.

The *Chenery* rule should be applied to the MSPB for both tenured and probationary employees for two reasons. First, while the MSPB is part of the administrative agency structure, it is a separate, distinct and independent agency from the one being reviewed. It is acting in a review capacity and should not be permitted to substitute its grounds for adverse

personnel action for the agency being reviewed. Second, all agencies should be required to state all of the grounds in support of any adverse personnel action. This is required in the notice of proposed dismissal for tenured employees and in 5 C.F.R. § 315.804(a), which states in part:

> The information in the notice as to why the employee is being terminated shall, as a minimum, consist of ***the agency's*** conclusions as to the inadequacies of his performance or conduct.

[emphasis added.]

Perpetrators of retaliation should not be permitted to come before the MSPB and claim that the employee would have been terminated on grounds not relied upon by the agency, itself. Attorneys representing an agency before the MSPB should represent the agency and not the perpetrators of the retaliation. This is especially true when, as here, the agency, itself, considered and specifically rejected the grounds being advanced before the AJ.

This case should have been settled at the Office of Special Counsel level. Instead, after more than four years of litigation, Erwin is left with nothing but the slim hope that this Court may grant relief. This Court should require agencies to state all of the grounds for adverse personnel action and prohibit AJ's from considering alternate grounds in support of an agency's claim that it would have taken the action in spite of

the protected activity. This is a very important question of federal law that has not been, but should be, settled by this Honorable Court.

CONCLUSION

For the foregoing reasons, Erwin respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

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