No. 18-38

IN THE

Supreme Court of the United States

ILLYA ERWIN,
Petitioner,
v.
DEPARTMENT OF THE ARMY,
Respondent.

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

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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October 25, 2018

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Comes now, Petitioner, ILLYA ERWIN, through his undersigned counsel, pursuant to Supreme Court Rule, 44.2, and moves this Honorable Court to reconsider its order denying his petition for certiorari, on the grounds of intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented, as follows:

I. SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED

A. The decision below is in conflict with another Court of Appeals on an important matter

Title 5 U.S.C. § 2302(b)(8)(A) provides as follows:

> (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;

The importance of this law in exposing government waste, mismanagement and even corruption is vital as pointed out by Sen. Charles Grassley as quoted in the original petition for certiorari. The MSPB and its Administrative Judges have not been enforcing this law as congress intended. One way in which the MSPB has failed in its duty to enforce this law is by considering grounds for termination that were not stated by the agency when terminating the employee. This is a practice which this Court should address on Certiorari.

The present case presents the question whether or not the Merit Systems Protection Board is an independent reviewing body subject to the rule of *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 (1943) (*Chenery I*). The Federal Circuit Court of Appeals has held that the rule in *Chenery I* does not apply to the MSPB because the MSPB is part of the administrative process and is charged with the duty of considering disputes between agencies and employees *de novo. Licausi v. Office of Personnel Mgmt.*, 350 F.3d 1359, 1363 (Fed. Cir., 2003) (citing *Huber v. Merit Sys. Prot. Bd.*, 793 F.2d 284, 287 (Fed.Cir.1986)).

The D.C. Circuit has ruled that the MSPB is an administrative appellate body separate and independent from the agency whose action it is reviewing. *Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150 (D.C. Cir., 1982) As such the rule of *Chenery I* should apply to the MSPB.

This argument was not presented in the original Petition for Certiorari, because the five-year window during which whistleblower appeals from the MSPB could be taken to circuits other than the Federal Circuit, set forth in 5 U.S.C. § 7703(b), had

expired. It was thought that any conflict between the circuits would no longer be of significance since the exclusive Federal Circuit Court jurisdiction has been restored. However, there may be many MSPB appeals still pending in circuits other than the Federal Circuit. So this conflict should be resolved by this Court, especially since the Federal Circuit's interpretation is wrong and deprives probationary federal employees of their important rights as whistleblowers. It also deprives the general public of the efficiency in government that whistleblower disclosures promote.

In *Frazier v. MSPB, supra*, the D.C. Circuit described the role of the MSPB, as follows:

> 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 danger to public health or safety.
>
> Section 2301(b)(9). Title I also defines a variety of "prohibited personnel practices" including actions taken in retaliation for whistleblowing, section 2302(b)(8), and those taken as a reprisal "for the exercise of any appeal right granted by any law, rule, or regulation." Section 2302(b)(9).
>
> Title II of the CSRA abolishes the Civil Service Commission and replaces it with two new agencies, the MSPB and the Office of Personnel Management (OPM). The OPM, headed by a single director responsible to the President, supervises the administration of the civil service. ***The MSPB, an independent agency consisting of three members, is charged with protecting the merit system principles and adjudicating conflicts between federal workers and their employing agencies***. See sections 1201-05. The Act also establishes within the Board an independent Special Counsel responsible for investigating and prosecuting prohibited personnel practices, employment discrimination, unlawful political activities, arbitrary withholding of information requested under the Freedom of Information Act, and any other violations of law within the federal civil service. See sections 1204 & 1206.

> As detailed in Title II, the Board's principal duty is to mediate the recurring conflict between the two most important goals of the CSRA: protection of employee rights and enhancement of government efficiency. ***There are essentially two ways in which such controversies may reach the Board: The first is through "Chapter 77" appeals brought by individual employees complaining of adverse agency personnel actions.*** The Board's role as the final administrative arbiter of such complaints is inherited from the Civil Service Commission.

Frazier v. MSPB, supra, 672 F.2d at 154-5 [emphasis added. Footnotes omitted].

If the MSPB is an independent agency charged with protecting the merit system principles and adjudicating conflicts between federal workers and their employing agencies by adjudicating appeals brought by individual employees complaining of adverse agency personnel actions, the reasoning of *Chenery I* ought to apply to such appeals as well as to reviewing courts. The instant case is a particularly good example of why this rule should apply.

In *Chenery I*, this court held that a court reviewing agency action could not affirm agency action on grounds not relied upon by the agency, because of the specialized expertise of the agency, as follows:

> If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.

Chenery I, supra, 318 U.S. at 94.

In *Licausi* and *Huber*, the Federal Circuit held that *Chenery I* does not apply to the MSPB because the MSPB is part of the administrative process and charged with the duty of determining employee claims *de novo*.

The present case shows that the reasoning of the Federal Circuit is not valid. In this case Petitioner ERWIN ("ERWIN") made several complaints which were found by the MSPB's Administrative Judge ("AJ") to be protected whistleblowing activity. This finding is undisputed. It is also undisputed that these complaints were transmitted to ERWIN'S supervisors MAJ. JENNIFER LORILLA ("LORILLA") and JAMIE REECE ("REECE"). Shortly after these complaints were made, REECE and LORILLA submitted a CPAC-25 form recommending that ERWIN be terminated for not being available for duty while he was "on call" and for not maintaining access to the hospital computer system. The "CPAC" twice rejected these requests and only eventually approved ERWIN'S termination on grounds of "lack of candor."

In the appeal before the MSPB, counsel for the Army presented the case of LORILLA and REECE rather than CPAC. They completely abandoned the "lack of candor" grounds for termination and argued only that the Army would have terminated ERWIN for not being available for duty while he was "on call" and for not maintaining access to the hospital computer system.

There was extensive conflicting testimony presented to the Administrative AJ on these issues and; in spite of the fact that the Army had twice rejected those grounds, he found that the Army would have terminated ERWIN the exact same grounds which the Army had already rejected.

The AJ's decision was affirmed by the MSPB by a split two-member panel. Chairman Grundermann wrote a separate opinion in which she would have held that the MSPB was limited to consideration of the grounds cited by the Army in its notice

of termination, as follows:

> ¶5 In evaluating the first *Carr* factor, i.e., the strength of the reasons in support of the agency's action, the administrative judge found that disciplinary action was warranted based on the appellant's failure to comply with Composite Health Care Systems (CHCS) access requirements and his failure to report for duty while on a scheduled on-call status. However, although the responsible officials cited these issues in their request for disciplinary action, Initial Appeal File, Tab 5 at 20 26, the agency did not choose to take the action on those grounds. Instead, the termination letter that was ultimately prepared by the Civilian Personnel Advisory Center and signed by one of the responsible officials explicitly states that the basis for the action was the appellant's alleged "lack of candor" in his September 17, 2013 statement concerning his lack of CHCS access. Accordingly, in considering the first Carr factor, it is appropriate to consider the strength of the evidence in support of the stated basis for the agency's action, i.e., the lack of candor charge.

App. at 3-4.

Since there was no evidence of "lack of candor" presented to the AJ or MSPB, Chairman Grundmann would have granted corrective action to ERWIN pursuant to 5 U.S.C. § 1221(e). App. 4. This reasoning is consistent with *Chenery I* and *Frazier*, and more appropriate than the reasoning of the Federal Circuit in *Licausi* and *Huber*. The Army CPAC was in a much better position to know whether or not LORILLA and REECE's allegations that ERWIN was not available for duty while "on call" and lack of access to the hospital computer system would justify termination than the MSPB and its Administrative Judge.

Furthermore, 5 C.F.R. § 315.804(a), provides:

> (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.***

[emphasis added.]

The agency action was set forth in the notice of termination. That action was termination for "lack of candor." That is the action that the MSPB and AJ were reviewing *de novo*. The MSPB and AJ were not reviewing a termination for failure to report for duty while on call or failure to maintain access to the computer a system. While the MSPB and AJ are part of the administrative process, they are separate, distinct and independent from the agency whose action is being reviewed. The MSPB should not affirm terminations on grounds not stated by the agency. The rule of *Chenery I* should apply. If an agency cannot establish that it would have terminated an employee ***on the grounds stated in the notice of termination***, in spite of the protected activity, the action should be set aside on appeal. Agencies should not be permitted to come before the MSPB and argue that they would have terminated employees for grounds other than those stated, especially in a case as this, where those grounds were specifically rejected by the agency twice.

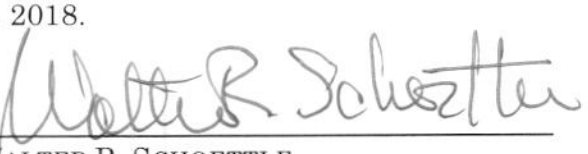
This is a very important question of administrative law that should be reviewed by this Court to encourage federal employees to disclose .

II. Intervening Circumstances of a Substantial Effect

Since the Petition for Certiorari was denied a new Justice has been appointed to this Court. This is an intervening circumstance that might have a substantial effect. Petitioner asks the full nine member Court to reconsider and grant his petition for

certiorari.

Dated: Honolulu, Hawaii, October 25, 2018.



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CERTIFICATE OF COUNSEL PURSUANT TO SUPREME COURT RULE 44.2

The undersigned hereby certifies, pursuant to Supreme Court Rule 44.2, that this Petition for Rehearing of Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay.

Dated: Honolulu, Hawaii, October 25, 2018.

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WORD COUNT CERTIFICATE PURSUANT TO SUPREME COURT RULE 33.1(h)

The undersigned hereby certifies, pursuant to Supreme Court Rule 33.1(h), that the Petition for Rehearing of Order Denying Petition for Writ of Certiorari filed herewith contains 2,076 words as reported by WordPerfect document properties. There are no footnotes in the document.

Dated: Honolulu, Hawaii, October 25, 2018.

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