No. 20-525

In The

Supreme Court of the United States

ORIGINAL

HAROLD E. RUTILA, IV,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Merit Systems Protection Board violated Petitioner's due process rights when an administrative judge failed to provide him a hearing, in violation of 5 U.S.C. § 7701(a), having not produced evidence of a hearing right waiver or that the required elements for a waiver, as held by this Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), had been met.

PARTIES TO THE PROCEEDING

Petitioner is Harold E. Rutila, IV. The respondent at the Merit Systems Protection Board and the Court of Appeals for the Federal Circuit is the Department of Transportation.

RELATED CASES

- *Rutila v. Department of Transportation*, No. 19-1712, U.S. Court of Appeals for the Federal Circuit, Judgment entered February 10, 2020
- *Rutila v. Department of Transportation*, No. DC-1221-18-0474-W-1, Merit Systems Protection Board, Judgment entered December 20, 2018

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-11a) is not reported. The opinion of the Merit Systems Protection Board (App. 12a-25a) is also unreported.

JURISDICTION

The Federal Circuit Court of Appeals entered its judgement on February 10, 2020 (App. 1a-11a). A petition for rehearing (App. 30a-52a) was denied on June 5, 2020 (App. 28a-29a).

Petitioner did not file for any extensions of time. This Court granted a blanket extension in response to the COVID-19 virus, revising Petitioner's deadline to file this Petition to 150 days from the date of the denial of his petition for rehearing. Supreme Court Miscellaneous Order of March 19, 2020.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions, as in effect on April 22, 2018 when Petitioner filed a notice of appeal with the Federal Circuit, are involved:

5 U.S.C. §2302. 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;

. . .

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure 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.

(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;

. . .

(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);

. . .

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. . . .

5 U.S.C. § 7701. Appellate procedures.

(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. . . .

5 U.S.C. § 1204. Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the

Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter; . . .

5 U.S.C. § 3105. Appointment of administrative law judges.

. . . Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

5 C.F.R. § 1201.24 Content of an appeal; right to a hearing.

. . . **(d)** *Right to hearing.* An appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.

(e) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

5 C.F.R. § 1201.41 Judges.

. . . **(b)** *Authority.* Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. . . .

5 C.F.R. § 1201.51 Scheduling the hearing.

(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.

(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (*See* appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.

INTRODUCTION

The Whistleblower Protection Act, 5 U.S.C. § 2302 ("WPA"), protects federal government employees from adverse personnel actions following their disclosure of any information they reasonably believe evidences any violation of any law, rule, or regulation. 5 U.S.C. § 2302(b)(8). Congress enhanced the WPA in 2012, reaffirming its decades-long commitment to "the strong national interest in protecting good faith whistleblowing," insisting upon "broad protection of whistleblower

disclosures." S. Rep. No. 112-155, at 5 (2012). If left unreviewed, the decisions below would endorse the unfettered dismantling of the WPA where administrative judges (AJs) of the Merit Systems Protection Board (MSPB) abrogate appellants' statutory due process right to a hearing in favor of instituting a summary judgment standard that Congress has not authorized. Congress has expressly *not* granted the MSPB summary judgment authority. App. 134a.

In 2016, Petitioner was terminated from his long-aspired career as an Air Traffic Control Specialist Trainee at the Federal Aviation Administration (FAA)[1]. Petitioner initiated an appeal to the MSPB alleging he had been subject to retaliation pursuant to sections b(8) and b(9) of the WPA. The AJ assigned to his case found Petitioner had (a) filed a timely appeal, (b) invoked MSPB jurisdiction, and (c) requested a hearing. App. 63a-64a. Thus, Petitioner was entitled to a hearing as a matter of law. 5 U.S.C. § 7701; 5 C.F.R. § 1201.24(d). Nevertheless, the AJ issued a single-sentence declaration stating Petitioner had withdrawn his request for a hearing, without providing any supporting evidence. App. 62a. No hearing was conducted. Instead, the AJ instituted a summary judgment process, discussed below, and issued a decision denying Petitioner relief.

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[1] Petitioner holds a B.S. in aviation management from Purdue University, where he studied air traffic control. He worked as an FAA certificated flight instructor from 2014 to 2016 before being hired by the FAA, and now works as a commercial airline pilot.

There is no evidence that Petitioner waived his right to a hearing, nor is there evidence that a waiver could have been effected knowingly, intelligently, and voluntarily as espoused by this Court's holding in *Johnson v. Zerbst*, 304 U.S. 458 (1938), among other of this Court's precedent pertaining to waivers of statutory due process rights. On these grounds, among others, Petitioner appealed to the Federal Circuit, where a panel charged with conducting a *de novo* review deferred to the AJ's conclusions to uphold that Petitioner had waived his hearing right, citing no other evidence. Following a petition for panel rehearing, argued by Petitioner's counsel, the panel issued a *per curiam* summary denial.

Because these decisions depart far beyond the accepted and usual course of judicial proceedings, this Court is petitioned to invoke its supervisory power under Rule 10(a) and grant *certiorari*. A statutory right cannot be found to have been waived where there is, in fact, no evidence of a waiver.

STATEMENT OF THE CASE

1. Statutory and Regulatory Framework

The MSPB is a quasi-judicial executive branch agency tasked by statute with reviewing individual right of action (IRA) appeals brought forth by federal employees seeking WPA protection. 5 U.S.C. § 1204, § 1221. Unlike other quasi-judicial executive branch agencies, the MSPB does not have the power to grant

summary judgment. *Crispin v. Department of Commerce*, 732 F.2d 919, 924 (Fed. Cir. 1984); *see also Whistleblower Protection*, Government Accountability Office, Report No. GAO-17-110 (2016) (App. 133a-139a). Thus, to decide on the merits of timely-filed appeals over which it has jurisdiction, the MSPB is compelled by federal laws and regulations to conduct hearings. *See* 5 U.S.C. § 1204(a)(1); § 7701(a); 5 C.F.R. § 1201.24(d)-(e).

MSPB precedent states "An appellant may only waive his right to a hearing by clear, unequivocal, or decisive action." *Campell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 5 (MSPB 2006). Further, the waiver must be an informed one. *Id.* An appellant's waiver of the right to a hearing is informed when he has been fully apprised of the relevant adjudicatory requirements and options in his case. *Id.* Federal Circuit precedent states "When the appellant believes the written record contains all the necessary information, the appellant can waive the right to a hearing and ask for a decision based on that written record." *Alberg v. Department of Health and Human Services*, 804 F.2d 1238, 1243 (Fed. Cir. 1986).

If prehearing conference statements are to be relied upon to establish a hearing waiver, the conference should be documented to establish that all adjudicatory requirements and options were discussed. *See McBurney v. OPM*, 39 M.S.P.R. 126, 130-31 (1988); *Phillips v. Department of Air Force*, 71 M.S.P.R. 381, 383-84 (1996) (remanding case to properly explain,

with reference to prehearing conference, basis for conclusion that hearing was waived).

2. Factual and Procedural Background

a. In 2016, Petitioner Harold E. Rutila, IV was an Air Traffic Control Specialist Trainee at the FAA, pursuing a lifelong dream to become an air traffic controller. App. 13a. During his second-to-last day of training, while completing an assessment in a computerized simulator, his assessment became compromised due to the onset of several known software malfunctions. *See, e.g.*, App. 89a. Petitioner has consistently alleged that two FAA evaluators, Michael Taylor and Dan Henderson, failed to account for and properly address those malfunctions. App. 42a. The evaluators issued Petitioner a career-ending score that directly caused his termination. App. 3a. Immediately prior to this assessment, Petitioner had filed and won an appeal with FAA management, citing agency rules contained in a Grading Guidelines document and FAA Order 7110.65, in which he alleged and obtained relief from Henderson's misapplication of those rules while grading Petitioner's previous assessment. App. 2a. On these grounds, having reasonably believed he disclosed Henderson's wrongdoing, and having been subsequently terminated due to Henderson's undue involvement in his subsequent testing[2], Petitioner believed his

[2] Agency policy states "Students will have a different evaluator for each scenario." App. 129a. Contravening this policy, the FAA has admitted that Henderson "might have" influenced

disclosure was protected under sections b(8) and b(9) of the WPA, and that he was entitled to relief from his termination.

b. On April 22, 2018, Petitioner filed an individual right of action (IRA) appeal with the MSPB seeking restorative relief under the WPA. App. 103a-110a. On June 28, 2018, the AJ found Petitioner had properly invoked MSPB jurisdiction over his appeal pursuant to 5 U.S.C. §§ 1214(a)(3), 1221(a), and (e), and that he was entitled to his requested hearing. App. 12a-15a. In a prehearing conference summary dated October 26, 2018, the AJ declared that Petitioner "withdrew" his hearing request[3]. App. 62a. That record, however, does not support that the AJ informed Petitioner of his adjudicatory rights and options prior to seeking or accepting his purported waiver, required by *McBurney*, 39 M.S.P.R. 126, 130-31, and *Phillips*, 71 M.S.P.R. 381, 383-384. *Id.* On December 20, 2018, the AJ issued a decision without a hearing, denying Petitioner relief. App. 12a-25a.

c. At the time of the AJ's prehearing conference, held on the Friday afternoon preceding the Monday morning hearing, Petitioner's motions for a subpoena and to compel discovery (which the AJ required Petitioner to file with less time than the regulations allot)

Petitioner's score on a second assessment, the one which caused Petitioner's termination. App. 119a-120a.

[3] Confusingly, the AJ then made reference to a *future* hearing on the merits in the same document. App. 64a.

were still outstanding before the AJ. Petitioner therefore moved for a postponement of the hearing.

> I am moving for a postponement of the hearing date in this Appeal. . . . I have two outstanding motions before the Board: The first is a motion for a subpoena of former Agency employee Dan Henderson, who is expected to testify as a witness on behalf of the Agency . . . . The second outstanding motion is a motion to compel discovery. . . . The Board gave me six days to file a motion to compel, which is four days less than the regulations provide. 5 C.F.R. § 1201.73(d)(3).

App. 69a[4].

This demonstrates Petitioner did not "believe[] the written record contain[ed] all the necessary information" for a decision to be made without a hearing. *See Alberg*, 804 F.2d 1238.

The AJ never addressed Petitioner's motion to postpone the hearing, contrasting sharply with her treatment of the agency's numerous motions for postponement. *See, e.g.*, App. 114a (granting agency a 42-day delay); App. 113a (granting agency a 12-day delay); App. 112a (granting agency a 7-day delay). Having repeatedly eroded the number of days between prehearing filing deadlines and the date of the hearing, the AJ prejudiced Petitioner when she ignored his motion to

[4] "Any motion for an order to compel or issue a subpoena must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired." 5 C.F.R. 1201.73(d)(3).

postpone, because this ultimately ensured Petitioner would have no significant time to review any of the agency's filings or otherwise prepare for his hearing.

d. On appeal to the Federal Circuit, Petitioner argued that he never waived his rights and that there was no evidence of any waiver. App. 121a-126a. He also argued that during the prehearing conference, a waiver could not have been entered under the MSPB's standard requiring clear, unequivocal, decisive, and informed action. *Id.*

The Federal Circuit was required to conduct a *de novo* review of the AJ's legal conclusions. *See Campbell v. Merit Systems Protection Board*, 27 F.3d 1560, 1564 (Fed. Cir. 1994). Nevertheless, the Federal Circuit relied on deference to the AJ to uphold her conclusion that Petitioner had withdrawn his hearing request, without citing evidence supporting the existence of any waiver, and without addressing whether a waiver could have been legally obtained in the first place. App. 10a-11a. Regarding Petitioner's motion to postpone his hearing, the panel reasoned, with one poorly-written sentence, "Mr. Rutila failed to preserve his objection to the denial of his motion to postpone by foregoing his right to a hearing." App. 11a. But the lack of any evidence of a waiver, beyond the AJ's disputed conclusion, speaks for itself. The Federal Circuit erred when it allowed deference to corrupt its *de novo* review.

e. Petitioner obtained counsel to petition the panel for a rehearing, filed May 19, 2020. App. 30a-52a. The panel was supplied with a plethora of MSPB and

Federal Circuit case law highlighting the importance of Petitioner's hearing right. *Id.* None of the circumstances in which a hearing could have been waived existed in this case. *See, e.g.*, App. 35a-39a. The panel was exhorted to reconsider how the AJ's truncation of prehearing deadlines without a corresponding delay of hearing prejudiced Petitioner. App. 40a. On June 5, 2020, the Federal Circuit issued a *per curiam* summary denial of that petition. App. 28a-29a.

f. The record does not support that Petitioner waived his hearing right. Petitioner is entitled as a matter of law to a hearing on the merits of his claims. Even if Petitioner had waived his hearing right during a prehearing conference, the AJ was required to document that she had informed him of the relevant adjudicatory requirements and options in his case. *Campell*, 102 M.S.P.R. 178, ¶ 5. This did not occur. Nor can it be ascertained that Petitioner, if he did effect a waiver during a prehearing conference, did so clearly, unequivocally, and decisively, *id.*, or knowingly, voluntarily, and intelligently. *See Johnson v. Zerbst*, 304 U.S. 458 (1938). The evident violation of Petitioner's due process right to a hearing renders this case ripe for Court intervention.

REASONS FOR GRANTING THE WRIT

1. The decisions below endorse rogue decision making by an administrative judge that went far beyond the normal course of WPA litigation, because summary judgment was imposed on Petitioner without a basis in law, prejudicing Petitioner's due process right to a hearing.

Under 5 U.S.C. § 7701(a)(1), an MSPB appellant has a fundamental right to a hearing. *Frampton v. Department of Interior*, 811 F.2d 1486, 1488, 1489 (Fed. Cir. 1987). The standard for Petitioner to establish MSPB's subject matter jurisdiction and the right to a hearing is assertion of a non-frivolous claim. *Langer v. Department of Treasury*, 265 F.3d 1259, 1265 (Fed. Cir. 2001) (quoting *Montana Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951)). Likewise, the 7th Circuit acknowledges that MSPB regulations provide detail as to "what must be included in an appeal to invoke a whistleblower's right to a hearing." *Delgado v. Merit Systems Protection Board*, 880 F.3d 913, 921 (7th Cir. 2018) (citing 5 C.F.R. §§ 1209.6(a)(1), 1201.24(a)(1)-(9)). Here, as the AJ found Petitioner properly invoked the MSPB's jurisdiction, App. 14a, there should have been no question that Petitioner was entitled to a hearing. That right cannot be effectively waived unless it is unequivocal after an appellant is fully informed of adjudicatory requirements and options. *Pariseau v. Department of the Air Force*, 113 M.S.P.R. 370, 373-374 (2010). Rather than uphold this right, the AJ abrogated it by insisting that

Petitioner "withdrew" his request for a hearing. App. 13a. If this conclusion were true, the evidence would need to be much more compelling than one sentence in the decision, *id.*, and the corresponding summary, App. 62a. The record does not demonstrate there was a legally sufficient hearing right waiver.

Here, the Federal Circuit's analysis of Petitioner's purported hearing request "withdrawal" pales in comparison to a recent analysis of a hearing right waiver by the 1st Circuit. In assessing the waiver of an MSPB appellant's hearing right, the 1st Circuit found evidence of a waiver by citing an MSPB appellant's memorandum, wherein he stated that the case "ha[d] a very well-developed record," and that "[he found the] hearing burdensome and unnecessary." *Mount v. Department of Homeland Security*, 937 F.3d 37 (1st Cir. 2019). *Mount* starkly contrasts with this case. Whereas in *Mount* there is written evidence from the appellant affirming his waiver, here, there is no such evidence at all. Whereas in *Mount*, the record was clearly closed as required by *Campell*, 102 M.S.P.R. 178, here, the record was not. Petitioner's motion to compel discovery, App. 74a-102a, was still pending, demonstrating he could not have reasonably believed the record to be "well-developed" enough to permit a decision without a hearing. The AJ's subsequent demand for supplemental briefing in the form of an "Initial Brief," App. 111a (the criteria for which remains undefined) demonstrates that the AJ herself did not view the record as sufficiently complete to warrant a decision

without a hearing. In short, this case did not meet the legal prerequisites necessary to forego a hearing.

2. The Merit Systems Protection Board's failure to provide Petitioner with a hearing, and the Federal Circuit's upholding of the same, caused undue harm to Petitioner that should compel this Court's intervention.

After neglecting to uphold Petitioner's right to a hearing, the AJ issued a decision which did not properly apply the evidentiary burdens to Petitioner's claims and Respondent's affirmative defense, causing Petitioner undue harm. For example, the AJ upheld Respondent's claim that Petitioner underperformed merely by citing Respondent's unsupported arguments that Petitioner "misdirected an aircraft" and, vaguely, "mishandled the situation," during his third end-of-course assessment in a computerized simulator. App. 117a[5]. To support this finding, the AJ cited unsworn, unsigned testimony which directly contradicted sworn, signed testimony by the same official, Ronald Ward, in other proceedings. App. 21a. When Petitioner timely motioned to compel discovery, highlighting inconsistent testimony by Ward, App. 88a-93a, the AJ left this matter unresolved through a summary denial of that motion two days after it was filed. App. 67a.

Respondent's burden in its affirmative defense was to prove independent causation under the clear

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[5] The AJ copied and pasted this language into her decision verbatim. App. 21a.

and convincing evidence standard. *See Miller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016). The defense Respondent presented was merely an indictment of Petitioner based on alleged, unproven underperformance that did not satisfy any evidentiary burden. App. 115a-120a. Underperformance, to the extent any actually occurred, is not an acceptable affirmative defense in a WPA claim. *See*, *e.g.*, *Smith v. General Service Administration*, Case No. 2018-1604 (Fed. Cir. Jul. 19, 2019). "The merits cannot be the determinative factor that there was no reprisal. A meritorious adverse action must be set aside where there is reprisal." *Siler v. Environmental Protection Agency*, 908 F.3d 1291, 1298-1299 (Fed. Cir. 2018). Even if Petitioner had underperformed, he would still be entitled to relief.

On appeal, the Federal Circuit stated "The Board highlighted the agency's evidence that Mr. Rutila in fact 'misguided an airplane and mishandled the situation' during his third evaluation." App. 7a. As has already been pointed out, these two conclusions originated in Respondent's Initial Brief before the MSPB AJ, App. 115a-120a, and are not supported by any evidence[6]. They are, "in fact," *not* facts.

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[6] Petitioner requested evidence from his assessments during discovery. App. 85a-93a. Respondent opposed, and the AJ issued a summary denial. App. 67a. The Federal Circuit affirmed the summary denial of discovery, App. 9a-10a, while implicating Petitioner for underperformance, App. 7a, despite that evidence Petitioner expected to obtain in discovery would have proven that he did not underperform at all. *See*, *e.g.*, App. 39a-45a.

The Federal Circuit also refused to acknowledge the effect of the AJ's summary denial of Petitioner's 241-page motion to compel, or the fact that she required Petitioner to file it within 6 days, when 5 C.F.R. § 1201.73(d) allots 10 days. App. 123a. The panel reasoned "Mr. Rutila does not explain how a contrary ruling would have affected the outcome." App. 10a. This is perplexing in light of the panel's upholding of the remainder of Respondent's affirmative defense based on *no evidence*. App. 8a. As argued in a petition for rehearing, evidence *did* exist to counter Respondent's affirmative defense, and additional evidence was stymied by the AJ's summary denial of Petitioner's discovery motion. App. 47a-51a. In light of these circumstances, the AJ's summary denial of Petitioner's motion to compel discovery and the panel's *per curiam* summary denial of Petitioner's petition for rehearing should not evoke this Court's confidence in the strength of the MSPB or the Federal Circuit's reasoning.

The necessity of a hearing in this case is obvious because a plain text reading of 5 U.S.C. §§ 7701(a), 1204(a), and 5 C.F.R. § 1201.24(d) requires one. Without a hearing, the proper legal standard for assessing Respondent's defense was not applied. A verbal presentation of the standards and the evidence at a fair hearing, as required by law, would have mitigated the rampant error contained in the AJ's unlawful quasi-summary judgment decision making process.

What Petitioner wrote in his reply brief on appeal to the Federal Circuit applies equally here: "Put simply, as the Congress has established MSPB

appellants' rights to a hearing, and the MSPB acknowledges this in its judges' handbook, there is a clear harm to public policy when an AJ arbitrarily and coercively retracts that right on made-up grounds which themselves make no sense." App. 125a-126a. This Court should be confounded under Rule 10(a) to grant *certiorari* because the decisions below vastly departed from the course of normal proceedings.

3. The MSPB's and the Federal Circuit's decisions gravely threaten WPA protections for a wide swath of future whistleblowers.

Although this petition concerns two non-precedential decisions by the MSPB and the Federal Circuit, the decisions constitute grave threats to WPA protections across a broad spectrum of cases. The MSPB's overly rigid decisions, and their routine upholding by the Federal Circuit, have been the subject of decades of Congressional scorn. *See, e.g.*, Senate Report No. 112-155 (2012) ("Despite the clear legislative history . . . the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning . . . ."). The issue here—how MSPB AJs handle cases that persevere into the merits stage—is extraordinarily important, because improper application of the law to meritorious appeals renders the law entirely unenforceable.

Here, the AJ's unsubstantiated conclusion that Petitioner "withdrew" his hearing request dealt a fatal blow to Petitioner's statutory due process right to a hearing. Whereas statute indeed infers that an

appellant may waive his hearing right, § 1201.59(b), in this case, the term "waive" cannot be found in the record. The Federal Circuit failed to substantiate its upholding of this conclusion with any evidence. It did not demonstrate how the AJ's summary alone could be sufficient to justify that a waiver occurred, particularly in light of MSPB precedent, which negates the credibility of AJ summaries as standalone evidence. *See McBurney*, 39 M.S.P.R. 126, 130-31; *Phillips*, 71 M.S.P.R. 381, 383-84.

Petitioner was entitled to the Federal Circuit's *de novo* review of the AJ's legal conclusions. *See Campbell v. Merit Systems Protection Board*, 27 F.3d 1560, 1564 (Fed. Cir. 1994). "*De novo* review occurs when a court decides an issue without deference to a previous court's decision." Cornell Law School, Legal Information Institute (2020). Because the record does not support a clear and explicit waiver, and because the AJ was not entitled to deference during the appellate court's *de novo* review, the Federal Circuit erred in upholding the existence of a waiver.

The Federal Circuit's decision went one step further by failing to overturn the AJ's institution of an unspecific, quasi-summary judgment procedure, which was entirely outside of her authority and the authority of the entire MSPB. Congress has refused to extend MSPB summary judgment authority in WPA appeals. App. 133-134a.

The AJ's prehearing conference summary did not address Petitioner's burdens to prevail in his case

without a hearing. The ensuing "initial brief" structure, imposed on the parties by the AJ, App. 111a, seems to have prioritized expediency at any cost, even at the cost of Petitioner's statutory rights[7]. Important questions about this briefing process were left unaddressed: Which party's facts were entitled to favorable presumptions? Which party should file first, and why? While simultaneously imposing this unlawful briefing structure, the AJ proceeded to further dismantle Petitioner's rights to due process by summarily denying his subpoena and discovery motions without explanation. The Federal Circuit failed to substantively address these obvious issues. *See* App. 4a-11a.

This is not the way Congress intended WPA appellants to be treated. Petitioner's experience at the MSPB amounted to a complete dismantling of his statutory rights and an unwarranted indictment on his merit. If the Federal Circuit continues to endorse rogue decision making by MSPB AJs, as it did in this case, then whistleblowers like Petitioner, whose case survived all the way to the merits stage, will continue to

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[7] The AJ's decision was issued on December 20, 2018, two days before a 35-day federal government shutdown. The decision quotes Respondent's briefs verbatim multiple times, but does not address a single aspect of Petitioner's arguments, his rebuttals, or his cited evidence, indicating that this process, in addition to being arbitrarily constructed without statutory authority, was insufficient on its face. The core of due process is a meaningful opportunity to be heard. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). The record supports that Petitioner was not heard because he was not provided a hearing and because the decision does not address any arguments or evidence he presented in his written briefs.

be deprived of their statutory rights, eliminating any opportunity for them to prevail on the merits of their cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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