No. 21-_____

In The
Supreme Court of the United States

CHARLES ABRAHAMSEN,
Petitioner,

v.

Secretary,
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal employees' whistleblower protections are determined under 5 U.S.C. § 2302(b) which requires, in pertinent part, a disclosure that the employee reasonably believed evidenced an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8).

The questions presented are:

Whether the scope of the substantial and specific danger to public health and safety provision in 5 U.S.C. § 2302(b)(8) was erroneously limited when determining whether an accomplished orthopedic surgeon with experience and knowledge of current medical literature and the evolving practice among orthopedic surgeons could have a reasonable belief he is disclosing a substantial and specific danger to public health and safety when disclosing an increased danger of death, stroke, and infection associated with the use of general as opposed to spinal (a.k.a. neuraxial or regional) anesthesia.

Whether a decision that analyzes only one event from a disclosure of a sequence of events of bullying in the healthcare setting should be presumed to have considered the other more serious events.

RELATED CASES

Abrahamsen v. Department of Veterans Affairs, No. A T-1221-17-0435-W-3, Merit Systems Protection Board. Judgment entered September 21, 2020.

Abrahamsen v. United States Department of Veterans Affairs, No. 20-14771, U.S. Court of Appeals for the Eleventh Circuit, Judgment entered November 16, 2021.

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to address Congressional concerns and provide coherence and clarity to the statutory framework applicable to federal-sector whistleblower claims. According to this Court, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted).

Federal employees' whistleblower protections are determined under the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b). A protected disclosure under 5 U.S.C. § 2302(b)(8) is "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) a 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." 5 U.S.C. § 2302(b)(8)(A). "[A] determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of

the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger." 5 U.S.C. § 2302(b).

Since passage of the WPA, Congress has repeatedly raised concerns that federal employees filing claims under 5 U.S.C. 2302(b) face differing standards than those contained in the statute compounded by a failure of consistent judicial review. Both issues are present in this case.

Here, the Eleventh Circuit deferred to the MSPB Administrative Judge's ("AJ") findings that Abrahamsen did not have a reasonable belief he was making protected whistleblower disclosures. The AJ's finding with respect to disclosures of a substantial and specific danger to the public health and safety was made after he erroneously limited the scope of such a disclosure. His finding with respect to an abuse of authority involving bullying in the healthcare setting was made without identifying and resolving all material issues of fact and law.

The public health and safety analysis ignored Abrahamsen's prior medical experience and his knowledge that he was disclosing a statistically significant likelihood of harm to the general public according to research in preeminent medical journals on the comparative effect of hip and knee replacement surgeries under general anesthesia as opposed to

spinal (a/k/a neuraxial or regional) anesthesia. Abrahamsen knew that he and other practitioners, including the preeminent orthopedic Hospital for Special Surgery (HSS), changed their anesthesia practices. HSS changed from over 90% general anesthesia to over 90% spinal (a/k/a neuraxial or regional) anesthesia in hip and knee replacements.[1]

Abrahamsen disclosed this research in stating he wanted spinal anesthesia used in his hip and knee surgeries. He also disclosed the journals at mortality and morbidity ("M & M") conferences where hip and knee patients died, had a stroke or infection. Those surgeries happened to have been conducted by his supervisor. Abrahamsen's goal was not to accuse the supervisor of malpractice. Rather, consistent with the goals of M & M conferences, it was to educate her and other orthopedic surgeons and anesthesiologists of the risks associated with the type of anesthesia utilized. None of this was given any weight by the AJ or the Eleventh Circuit under an analysis that erroneously limited the scope of the statutory language.

Regarding bullying in the healthcare setting, Abrahamsen pointed to areas throughout the record that demonstrated many incidents of bullying were addressed in his disclosures and exhausted with OSC.

[1] HSS is part of Cornell University's Medical Center and the largest academic medical center in the world focused on musculoskeletal health. It was ranked No. 1 in orthopedics and No. 2 in rheumatology by U.S. News and World Report (2016-2018).

The Secretary did not dispute those descriptions. Bullying in the healthcare setting can endanger public health and safety and, if done by supervisors, constitute an abuse of authority. The Joint Commission on Accreditation of Healthcare Organizations ("JACHO") accredits public and private healthcare facilities including the VA. In June 2016, JACHO's Division of Healthcare Improvement published *Quick Safety* 24, "Bullying has no place in healthcare" which stated, *inter alia*: "The impacts on patient and care team safety include under-reporting of safety and quality concerns, and increases in harm, errors, infections and costs."

Abrahamsen's Prehearing Submissions to the MSPB ("PHS") also described the other disclosures and included numerous Exhibits relating to public health and safety and abuse of authority (i.e., bullying) which also showed a reasonable basis for his beliefs.

After the September 2013 disclosures, Chief of Surgery Terry Wright felt it necessary to hold meetings for several months with Abrahamsen and Baumann. They did not work. Wright stepped down as Chief of Surgery and went to another VA in January 2014. Baumann immediately went about extending Abrahamsen's initial Focused Professional Practice Evaluation ("FPPE") in secret, without any discussion with Abrahamsen and in violation of Agency rules. Baumann secretly engaged in service-level reviews against Abrahamsen and extended his

FPPE without his consent for another two and one-half years. No one was aware of a longer one. As public health and safety disclosures were also made, again relying upon literature cites, additional actions were taken which restricted Abrahamsen's practice in a manner which violated his due process rights. Agency rules require consultation with the provider before undertaking service-level reviews.

The Eleventh Circuit ruled that an employee must presume the AJ considered all the evidence presented at a six-day hearing that the AJ failed to mention, analyze, or draw conclusions from despite MSPB regulations that require the initial decision to contain "[f]indings of fact and conclusions of law upon all material issues of fact and law presented on the record." 5 C.F.R. § 1201.111(b)(1). While the AJ misdescribed the one event he addressed, the error was that the AJ failed to address the many events of bullying contained in Abrahamsen's disclosures to Chief of Surgery Wright and OSC and omitted facts and law material to resolving that issue.[2] The term "bullying" never appears in the AJ's decision. The AJ also failed to address the alleged personnel actions, the timing and manner of making of which evidenced retaliation for his disclosures.

[2] The AJ maintained the supervisor never prohibited emergency surgeries on weekends. The surgery in question was an "urgent" surgery, which needed to be performed on the third day of a holiday weekend under the standard of care. The Chief of Staff testified that such surgeries can be done on the weekend.

OPINIONS AND ORDERS BELOW

The November 16, 2021 opinion of the court of appeals, which was not designated for publication, is set out at pp. 1a-14a of the Appendix. The post-appeal January 15, 2021 Erratum of the MSPB is set out at pp. 15a-17a of the Appendix. The September 21, 2020 Initial Decision of the MSPB is set out at pp. 18a-65a of the Appendix.

JURISDICTION

The decisions of the court of appeals were entered on November 16, 2021. *See* 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. § 2302(b), provides in pertinent part:

> 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) a 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;

* * *

For purposes of paragraph (8), … a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the

> essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

STATEMENT OF THE CASE

This case presents questions of importance to the resolution of claims under the WPA for thousands of federal employees.

In this case, the MSPB AJ erroneously limited the scope of the substantial and specific danger provision in Section 2302(b)(8). As a result, he failed to consider that Abrahamsen, who was an accomplished orthopedic surgeon with experience and knowledge of current medical literature and the evolving practice among orthopedic surgeons, could have a reasonable belief he was disclosing a substantial and specific danger to public health and safety when disclosing an increased danger of death, stroke, and infection associated with the use of general as opposed to spinal (a.k.a. neuraxial or regional) anesthesia.

The AJ failed to consider or address the bullying disclosures as required by 5 C.F.R. § 1201.111(b)(1). He analyzed only one event from a disclosure of multiple events of bullying in the healthcare setting. The Eleventh Circuit erred in reviewing the AJ's decision by presuming he had considered the other more serious events.

A. LEGAL BACKGROUND

Congress, while passing legislation, has repeatedly raised concerns that federal employees filing claims under 5 U.S.C. 2302(b) face differing standards than those contained in the statute compounded by a failure of consistent judicial review. Both issues are present in this case.

To address government misconduct, Congress first enacted statutory whistleblower protections with the Civil Service Reform Act of 1978 ("CSRA"). Unfortunately, the CSRA did not go far enough to ensure protection of whistleblowers. As a result of a string of MSPB and Federal Circuit decisions, Congress enacted the WPA to "modify or overturn inappropriate administrative or judicial determinations and make it more likely that whistleblowers . . . will win their cases." 135 Cong. Rec. 4512 (1989) (Joint Explanatory Statement). The WPA explicitly eased an appellant's burden of proving a prima facie case of reprisal while increasing the agency's burden of proof related to its affirmative defense. Under the WPA, an appellant need only show that a protected disclosure was a "contributing" factor in the personnel action. This standard was enacted specifically to overrule cases that required a showing that the disclosure was a "'significant,' 'motivating,' 'substantial,' or 'predominant' factor." 135 Cong. Rec. 4509 (1989) (Sen. Levin).

Previously, Congress set out to address what it viewed as a narrowing of the scope of whistleblowing protections. The House Report criticized the MSPB's and Federal Circuit's "inability to understand that 'any' means 'any,'" and that the "WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB [and Federal Circuit] remain[] blind." H.R. Rep. No. 103-769, at 18 (1994).

Nevertheless, administrative and judicial decisions have continued to erect obstacles to whistleblowing protection, so Congress again amended the WPA through the WPEA "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws." S. Rep. No. 112-155, at 3-4 (2012). As before, Congress was concerned that decisions "continued to undermine the WPA's intended meaning by imposing limitations of the kinds of disclosures by whistleblowers that are protected." *Id*. at 4-5. Through the WPEA, Congress overturned decisions denying protection for "disclosures to the alleged wrongdoer," "disclosure[s] made as part of an employee's normal job duties," and "disclosures of information already known." Congress warned against the chilling effect created by such judicially-constructed limitations. "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court

opinions. Without that assurance, whistleblowers will hesitate to come forward." *Id.* at 5.

The WPEA also expanded jurisdiction over Board IRA decisions to regional Circuits, in part, because of its displeasure with how the Federal Circuit has handled whistleblower cases and narrowed the scope of protected disclosure: "Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA). Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection." *See* S. Rep. No. 112-155, at 1–2 (2012) (internal citation omitted)). Congress made this jurisdictional expansion permanent in 2018 through passage of the All Circuit Review Act.

1. Disclosures of substantial and specific danger to public health and safety

The WPA does not define what constitutes a "substantial and specific danger to public health and safety." *See* 5 U.S.C. § 2302(b)(8)(A)(ii). By its plain language, the statute does not require identification of a particular "wrongdoing" or "wrongdoer." Rather, the statutory language requires only a disclosure of "danger" to the public that is both substantial and specific to qualify for protection. *See id.*

Federal Circuit has analyzed this type of protected disclosure in a set of cases providing guidance through the use of so-called *Chambers* factors. In *Chambers v. Department of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (*Chambers II*), the court laid out a multi-factor test for this avenue of protected activity. The first factor is "the likelihood of harm resulting from the danger." The second is "when the alleged harm may occur." Id. In a subsequent opinion on the same case, the Federal Circuit articulated a third prong – "the nature of the harm," i.e., "the potential consequences." *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1376 (Fed. Cir. 2010) (*Chambers III*). Under *Chambers II*, a disclosure of a practice that "could only result in harm under speculative or improbable conditions" is not protected. *Chambers II*, 515 F.3d at 1369. Likewise, a harm that would occur in the immediate or near future is more likely to constitute a protected disclosure than a harm that may arise only in the distant future. *Id.* A disclosure under this prong may be protected if it discloses harm that has already occurred. *Chambers III*, 602 F.3d at 1376. The need for three decisions might suggest *Chambers* itself is too narrow.

Regarding deference, *Newman v. Teigler,* 898 F.2d 1574, 1576 (Fed. Cir. 1990):

> As we have previously stated, "[t]he task of rewriting a statute is and should remain a duty reserved for Congress." . . .This court acknowledges that "an agency's interpretation of the statutes it is charged with administering

> is normally entitled to great deference by a reviewing court." . . . However, the courts are the final authorities on matters of statutory construction and "must reject agency constructions… which are inconsistent with statutory mandate or that frustrate the policy that Congress sought to implement."…Furthermore, "[e]ven contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."…

(emphasis added); *see also NLRB v. Brown,* 380 U.S. 278, 292 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co. v. National Labor Relations Board,* [380 U.S.] at

318."); *see also SEC v. Sloan,* 436 U.S. 103, 119-23 (1978).

2. Disclosures of abuse of authority

MSPB regulations require the initial decision to contain "[f]indings of fact and conclusions of law upon all material issues of fact and law presented on the record." 5 C.F.R. § 1201.111(b)(1).

"A decision of the Board which fails to resolve an issue properly before it is arbitrary and capricious." *Carrier v. MSPB,* 79 F.3d 1165 (Fed. Cir. 1996) (unpublished); *see also Motor Veh. Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (noting that agency decisions that fail to consider important aspects of the problem or that run counter to the evidence before the agency are arbitrary and capricious); *Flynn v. U.S. Securities and Exch. Commn.*, 877 F.3d 200, 208 (4th Cir 2017) ("This omission only solidifies our conclusion that the Administrative Judge did not consider Flynn's Rule 900(b) claim. Accordingly, we find the Administrative Judge's conclusion regarding Rule 900(b) cannot stand, even under our deferential standard of review.").

With respect to abuse of authority, Abrahamsen set out established law in his Prehearing Submissions (PHS):

Three of these disclosures, A, E, and F and the surrounding conduct also involve "abuse of authority" under 5 U.S.C § 2302[(b)](8)(A)(ii). The disclosure by an employee that his supervisor engaged in "threats, swearing [and] physical acts of aggression to intimidate the employee and fellow staff members into following the supervisor's requests without question" and to threaten the careers of staff members with whom the supervisor disagreed constitute abuse of authority. *Murphy v. Deptartment of the Treasury*, 86 M.S.P.R. 131, 136-137 ¶ 6, 7 (2000). The disclosure by an employee that the supervisor's use of influence to denigrate other staff members and to threaten the careers of staff members constitutes abuse of authority. *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, 114 ¶ 18 (2008). Disclosure by employee of a supervisor's denigration of him and threats against his employment constituted an abuse of authority. *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, 355-356 ¶ 29, 30 (2010). The disclosure of the accusation of a superior of accusing an employee of improperly performing a PPD (medical test) is an abuse of authority. *Chavez v. Department of Veterans Affairs*,120 M.S.P.R 285, 296 ¶ 22 (October 30. 2013). Disclosures involving harassment or intimidation of an employee, including a supervisor's threat to an employee's career can

constitute an abuse of authority. *Linder v. Department of Justice*, 122 M.S.P.R 14, 22 ¶15 (2014).

B. FACTUAL BACKGROUND

In this case, the Eleventh Circuit gave deference to the MSPB AJ's findings that Abrahamsen did not have a reasonable belief he was making protected whistleblowing disclosures. Regarding the disclosures of substantial and specific danger to the public health and safety, the AJ limited the scope of that statutory provision. He then failed to consider the evidence supporting Abrahamsen's reasonable belief that he was making a disclosure of a substantial and specific danger to the public health and safety. Regarding the disclosures of an abuse of authority involving bullying in the healthcare setting, the AJ erred by failing to include findings of fact and conclusions of law upon all material issues of fact and law presented on the record.

The AJ's substantial and specific danger analysis ignored Abrahamsen's prior medical experience and his knowledge that he was disclosing a statistically significant likelihood of harm to the general public according to research in preeminent medical journals on the comparative effect of hip and knee replacement surgeries under general anesthesia as opposed to spinal (a/k/a regional) anesthesia which medical professionals at least need to consider. Abrahamsen's position was based on several medical journals

beginning in 2010. For example, Anesthesiology, v118.n05, 2013, p.1046, "Perioperative Comparative Effectiveness of Anesthesia Technique in Orthopedic Patients," Table 3 lists serious complications with a P-value of <0.001: Pulmonary Compromise, Infections, Acute Renal Failure, Pneumonia, 30 Day Mortality, and Pulmonary Embolism is .001, while providing percentages of the enhanced risk of general over spinal anesthesia. "The thirty-day mortality was significantly lower among neuraxial and combined neuraxial-general groups compared with those undergoing surgery under general anesthesia (0.10, 0.10, and 0.18%; p<0.001)." *Id.* at 1048.

Abrahamsen knew he and other practitioners, including the preeminent orthopedic Hospital for Special Surgery (HSS), changed their anesthesia practices. HSS changed from general anesthesia (over 90%) to spinal (a/k/a regional) anesthesia (over 90%) in hip and knee replacements. Their review of the same research Abrahamsen reviewed found that spinal anesthesia reduced morbidity, mortality, length of hospital stays and costs compared with general anesthesia. HSS also noted education of patients to make rational decisions is "key." HSS noted that in 2013 over one million people underwent joint arthroplasty in the United States. That number has grown considerably. The article estimates that there will be 4 million such surgeries by 2030. If one applied the percentages listed in the literature to the 2013 patient volume, mortality and the risks for

serious morbidity to the public could be reduced in tens of thousands cases a year. Abrahamsen educated his patients on the risks and benefits of spinal anesthesia or general anesthesia in his practice, respected contraindications and patient's informed decisions.

Abrahamsen disclosed this research in stating he wanted spinal anesthesia used in his hip and knee surgeries when the patient consented. He also disclosed the journals at mortality and morbidity (M & M) conferences where hip and knee patients died, had a stroke or infection. Those surgeries happened to have been conducted by his supervisor. Abrahamsen's goal was not to accuse the supervisor of malpractice. Rather consistent with the goals of M & M conferences it was to educate her and other orthopedic surgeons and anesthesiologists of the risks associated with the type of anesthesia utilized. He had done this at a hospital in private practice and it caused some to change practices and all to understand information patients should know. None of this was given any weight by the AJ or the Eleventh Circuit because the scope of the statutory provision was erroneously limited.

With regard to bullying in the healthcare setting, Abrahamsen described areas throughout the record that demonstrated <u>many</u> incidents of bullying were disclosed. The Secretary did not dispute those descriptions. Bullying in the healthcare setting can

endanger public health and safety and, when done by supervisors, can constitute an abuse of authority. The bullying disclosed by Abrahamsen occurred in a hospital and related to patient care. The Joint Commission on Accreditation of Healthcare Organizations (JACHO) accredits public and private healthcare facilities including the VA. Abrahamsen submitted exhibits addressing the problems of bullying in the healthcare setting into evidence at the hearing. One such exhibit was JACHO's Division of Healthcare Improvement, *Quick Safety* 24, "Bullying has no place in healthcare" (June 2016). It states, *inter alia*:

> The impacts on patient and care team safety include under-reporting of safety and quality concerns, and increases in harm, errors, infections and costs. As an example, the estimated cost of replacing a nurse is $27,000 to $103,000. Bullying exacerbates the stress and demands of already stressful and demanding professions. Bullying contributes to burnout and drives talented and caring people out of the health professions. The kinds of improvements needed in patient safety and healthcare cannot be achieved if talented people are lost.

Abrahamsen testified, without contradiction, that these JACHO positions went back to before he joined the VA in 2013.

The OSC closing letter reported Abrahamsen made

bullying disclosures to Chief of Surgery Wright that included Abrahamsen's perception of a hostile work environment. The AJ not only failed to mention or consider this evidence, he failed to consider or analyze the overwhelming majority of the disclosures and the legal issues presented. As a result of retaliation Abrahamsen reasonably believed was based on his whistleblowing disclosures, Abrahamsen filed a complaint of prohibited personnel practices with the OSC in May 2016 that alleged six protected "disclosures." Some of these disclosures had components; some evidenced both abuse of authority and substantial and specific danger to public health or safety. Disclosure A involved disclosures of an abuse of authority (bullying) and substantial and specific public health and safety disclosures between September 3, 2013 and September 13, 2013 and continued through meetings and documents given the OSC. In response to the OSC's requests, Abrahamsen provided additional information and documentation about the alleged disclosures and personnel actions. As a result, Abrahamsen exhausted all bullying disclosures listed in his PHS and presented at the hearing. On February 15, 2017, the OSC sent the closure letter informing Abrahamsen the office was terminating their inquiry into his complaint and summarizing Abrahamsen's six disclosures. The OSC letter's first paragraph addresses Disclosure A and describes a critical part of his allegation: "Subsequently, you filed a complaint with Chief of Surgery Dr. Terry Wright about Dr. Baumann's

alleged bullying and intimidating behavior toward you and other staff members, which you also believe to have been part of a retaliatory hostile work environment."

On April 9, 2019, Abrahamsen filed his Pre-Hearing Submissions (PHS) which described all six disclosures. In his discussion of Disclosure A, labelled as a disclosure of both an abuse of authority and substantial and specific danger to public health or safety, Abrahamsen described the abuse of authority: "Since July 2013, Dr. Abrahamsen had seen Dr. Baumann bully and intimidate her subordinates in front of him and others." He recounted Baumann dressing down and threatening an employee who tried to respond to her, cursing and screaming at a nurse in front of patients and staff, and continually interrupting Abrahamsen's attempts to consult with a hospitalist for a particular patient. Abrahamsen then described his attempts to address Baumann's abuse of authority with the Chief of Surgery as well as the retaliation he suffered shortly thereafter:

> On September 13, 2013, Abrahamsen provided Dr. Terry Wright, Chief of Surgery, with a memorandum objecting to Dr. Baumann's actions, her foul language and outbursts which he believed were part of bullying efforts she utilized. On that same day, Dr. Baumann accused him of misconduct and threatened administrative action. When he met with Dr. Wright, Dr. Wright told him "That's not her role." Wright set up four meetings with Dr.

> Abrahamsen and Dr. Baumann over the next month or so. Wright stated that it was her role only to support the surgeons under her authority by providing what was necessary for them to do their job. It was not her role to oversee or micromanage their individual care. Shortly thereafter, Dr. Baumann separately made unsubstantiated accusations of "delay in (patient) care" and "improper medical decision making" on Dr. Abrahamsen's FPPE. The accusations were about patients he cared for after his disclosure. The original period of his FPPE was to be the normal six-month period, in his case from July 2013 through December 2013. In retaliation for confronting Dr. Baumann's misuse of authority and misinterpretation of appropriate medical treatment his FPPE was extended. When he made subsequent public health and safety and abuse of authority disclosures the FPPE was extended for a highly unusual, likely unprecedented, period until at least July 2016. He believes the actions were based on his whistleblowing disclosures because of timing and Dr. Baumann's statements and actions as a bully. He reviewed both the cases where he was accused of improper medical decision making and delay in care and saw that the patient care on both was appropriate and evidence-based.

As discussed above, Abrahamsen cited authority in the PHS, supporting his disclosure of abuse of authority. Abrahamsen's PHS also described the other disclosures and included numerous exhibits relating

to public health and safety and abuse of authority (i.e., bullying) which also showed a reasonable basis for his beliefs.

After the September 2013 disclosures, Wright felt it necessary to hold meetings for several months with Abrahamsen and Baumann, but they did not work. Wright stepped down as Chief of Surgery and went to another VA in January 2014. Thereafter, Baumann immediately went about extending Abrahamsen's incoming FPPE in secret, without any discussion with Abrahamsen and in violation of FPPE rules. She secretly engaged in service level reviews against him and extended Abrahamsen's FPPE without his written signature or consent for another year. The rules for FPPE's require that service level reviews be discussed with the provider. Elsewhere they address the need for signature and communication and state:

> (7) Communication of the Practice Evaluation Process ("The Plan and Results") includes an explanation given by the Service Chief to the provider before the start of a service level management review, an explanation of the designated FPPE form/plan prior to the start of a FPPE, or similarly before the start of an OPPE. Providers shall sign their designated FPPE plan/form prior to the start of a FPPE. Providers shall receive a blank copy of their OPPE plan/form prior to each review period/renewal cycle. This process requires the

> Service Chief to communicate the review findings and recommendations to the appropriate parties once the designated review is completed. This may include, but is not limited to, the Director, Chief of Staff. Medical Staff Executive Board, Human Resources Management Service level leadership, and the provider. Once the FPPE/OPPE is completed, documentation indicating a discussion was held covering the professional practice evaluation findings and recommendations, along with the signature of the Service Chief and the provider, is required on the FPPE/OPPE forms/plans, as delineated. (emphasis added)

These violations of the rules can show that Baumann was not acting like a reasonable manager. She subsequently failed to follow the rules repeatedly allowing her to secretly take new actions. Abrahamsen did not find out about six management-level reviews that occurred in late 2013 or January 2014 until March 25, 2015; however, immediately after COS Wright left the facility the reviews were used in January 2014 to secretly extend Abrahamsen's FPPE. After March 25, 2015, Abrahamsen reviewed the charts and learned that simple documentation errors that should have been explained to him when he first came on board formed the basis for four cases, but they became a basis for an FPPE extension after the disclosures were made.

On January 2, 2015, the FPPE was again extended, but this time Abrahamsen was notified. The extension provided in part: "At this time he is reviewing with his union representative and did not want to sign it yet provider felt the extended FPPE criteria was too vague and he wanted more clarification of the second part of his FPPE review." On January 8, 2015, Abrahamsen responded to the extension and once again reiterated the abuse of authority, bullying disclosure which included examples of Baumann belittling people, frequently swearing, criticizing or making fun of people in front of others, loud and aggressive actions, threatening employees including actually seeking to push out a nurse and much more. It also mentioned several prior bullying and patient health and safety disclosures. It also shows his reasonable belief in his disclosures. All of these documents were provided to the OSC and submitted to the MSPB when Abrahamsen appealed.

As more public health and safety disclosures were made by Abrahamsen again relying upon literature, additional actions were taken which restricted his practice and were done in a manner which violated his due process rights. Abrahamsen was proficient at a type of knee surgery (Fulkerson osteotomies) that allowed recipients to avoid knee replacements and continue an active lifestyle. Without notice or an opportunity to be heard, his supervisor began to place restrictions on his ability to do those procedures. Abrahamsen did not learn of this for years until the

discovery in his whistleblower case. Part of the corrective action he requested was to be returned to status quo ante and go before the appropriate committees to present evidence to correct these actions. What happened in this case has not only harmed Abrahamsen, it has also harmed the veterans that would have received Fulkerson osteotomies but have not and will not. Those veterans may have had a better life by allowing them to be the active people they previously were.

C. PROCEEDINGS BELOW

Petitioner Abrahamsen commenced this action in the Merit Systems Protection Board, alleging that he was subjected to retaliation in violation of the WPA for making disclosures that raised abuses of authority and substantial and specific dangers to public health and safety.

After a hearing on the merits, the AJ dismissed the IRA appeal for lack of jurisdiction on September 21, 2020. *See* 19a ("For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction."), 25a (reciting the jurisdictional standard for IRA appeals before the Board), 55a ("Accordingly, the appeal must be dismissed for lack of jurisdiction."). Simultaneously, the AJ stated that he had granted Abrahamsen's hearing request, because he had determined that Abrahamsen made "a nonfrivolous

allegation of Board jurisdiction over his appeal. 18a-19a.[3]

For the first time in the factual background section of the Initial Decision, the AJ attempted to describe Abrahamsen's "six disclosures" but failed to mention Abrahamsen's disclosures of abuse of authority related to bullying by Baumann. *See* 20a-25a.

In the analysis section, the AJ analyzed only whether Abrahamsen engaged in protected whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8). *See* 30a-55a. In doing so, the AJ again failed to address the key protected disclosures all raised before the OSC of abuse of authority related to bullying and related patient health and safety dangers. The AJ also failed to analyze the alleged personnel actions, the causal relationship or nexus between the protected activity and the personnel actions and any affirmative defense raised by the Department of Veterans Affairs (VA).

While considering petitioner's disclosures of substantial and specific danger to public health and safety related to the use of general anesthesia over spinal anesthesia for hip and knee replacement surgeries, the AJ found that the disclosures were not

[3] After Abrahamsen petitioned the Eleventh Circuit, the AJ issued an erratum changing his initial decision to a decision on the merits. Abrahamsen objected to the AJ's ability to change his decision and the basis upon which he did it. His objection was denied.

protected "as they do not constitute disclosures of a substantial and specific danger to public health and safety." Despite testimony and evidence that Petitioner's disclosures were based upon multiple scientific medical journals addressing the issues, the AJ improperly created hurdles to a valid whistleblower claim. He found that "there is no dispute that the overall risk of such complications remains very, very low" and, therefore, "there was a very low 'likelihood of impending harm,' nor was harm 'likely to result in the reasonably foreseeable future' given the low rate of occurrence of stroke or other serious complications from general anesthesia as illustrated by the medical literature." The AJ further found without any factual support that these disclosures did not evidence examples of actual past harm or the likelihood of future harm, because he found "no evidence in these particular cases of a causal correlation between the use of general anesthesia and the patients' negative outcomes," and again a "very low likelihood of harm" for future joint replacement surgery patients. 42a (emphasis added). Therefore, the AJ concluded that the disclosures were not protected, finding his conclusion "strongly supported by the fact that there is no dispute that using general anesthesia for these surgeries meets the accepted medical standard of care in the orthopedic community, as illustrated by the widespread use of general anesthesia for such procedures and testimony at the hearing." 43a.

On petition for review of the AJ's Initial Decision in the Eleventh Circuit, Petitioner argued that the Initial Decision was arbitrary and capricious, contrary to the law under any deferential standard of review, and violative of the AJ's obligations under 5 C.F.R. § 1201.111(b), which requires every initial decision to identify and resolve all material issues of fact and law and be presented in a fashion that reveals the AJ's reasoning and conclusions. More specifically, Petitioner argued that the AJ erred by ignoring his disclosures of abuse of authority (bullying) that were asserted in his OSC complaint, documents supplied and statements made to the OSC, OSC's closing letter, his filings to the MSPB, his pre-hearing submissions, and fully litigated at the hearing and argued in the closing argument. The bullying occurred in a healthcare setting involving patient care. As such, these also constituted disclosures of a substantial and specific danger to public health and safety. Petitioner also argued that the AJ erred by applying the wrong standard to Abrahamsen's disclosures B,C and D of substantial and specific danger to public health and safety.

With respect to the first issue presented by this petition, the panel stated that petitioner "does not argue the 'reasonable belief' test was incorrectly used" and echoed the AJ's findings including that there was

no breach of the standard of care.[4] The Panel found that, "[b]ecause there was no dispute that using general anesthesia for such procedures met the accepted standard of care in the orthopedic community, the MSPB declined to find that Abrahamsen made a protected disclosure of a substantial and specific danger to public health or safety. This conclusion on Disclosures B-D was supported by substantial evidence, was not arbitrary or capricious, and applied the correct law." With respect to the second issue, the panel for the Eleventh Circuit found that "[a]lthough the MSPB did not specifically identify each incident of bullying, the MSPB's overall findings regarding the protected nature of the disclosure cover those incidents."

REASONS FOR GRANTING THE WRIT

Congress has repeatedly expressed a concern for Federal employees filing WPA claims. Unwarranted limitations on disclosures evidencing a reasonable

[4] In context, this quotation appears to have a typographical error. Abrahamsen argued throughout his appellate briefs that the evidence of his reasonable belief was not even considered by the AJ, because the AJ failed to apply the law and consider the evidence. The Eleventh Circuit accepted the AJ's analysis. These issues are discussed below. While we did not cite to *LaChance*, we cited to several Board decisions dealing with the very issue of reasonable belief. *See, e.g., Parikh v. Dept. of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 17, 21-23 (2011). (reversing an AJ's decision that relied upon an investigation finding the conduct to be within the standard of care to find no substantial and specific danger to public health and safety where the appellant had a reasonable belief).

belief that a disclosure is protected have been made. Congress has identified the problem as a failure by the MSPB and reviewing courts to apply the language of the statute. At times they interpreted "terms" out of the statute (i.e., "any"). Others involve the review of decisions by the MSPB which did not consistently address their failure to follow the words and spirit of the statute. In this case, both have occurred. This Court has not addressed a WPA case as yet. However, the issues here are statutory construction and the appropriate review and the Court is familiar with those cases.

1. Disclosures of substantial and specific danger to public health and safety

With respect to the disclosures of substantial and specific danger to public health and safety, the AJ made a decision that limited the scope of that provision. It is also contradicted by numerous precedential MSPB Board decisions. This precedent was brought to the attention of the Eleventh Circuit. They were apparently not considered and certainly not discussed by the AJ. Both the AJ and the panel concluded their analysis by using the same legal standard which conflicts with the statutory language and case law. They pointed out that the use of general anesthesia for the procedures in question met the accepted standard of care in the orthopedic community supporting the conclusion that Abrahamsen had not made a protected disclosure of a

substantial and specific danger to public health or safety.

The same argument was made by an AJ in *Parikh v. Department of Veterans Affairs*, CH-1221-08-0352-B-2, 2009 WL 5252378 (MSPB Nov. 6, 2009). That AJ's decision was reversed by the Board because a decision based upon causation or breach of the standard of care ignored the employee's reasonable belief. *Parikh v. Dept. of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 17, 21-23.

Abrahamsen raised important issues about practices which led to statistically significant (p-value < 0.001) increases in rates of infection, stroke, and death. In other instances, the Board has not required an appellant to quantify the nature of the harm or increase in risk to a facility. *See, e.g., Groseclose v. Dept. of Navy*, 111 M.S.P.R. 194, 203–04 ¶¶ 24–25 (2009). In *Parikh v. Dept. of Veterans Affairs*, 116 M.S.P.R. 197, ¶ 17 (2011), *Parikh* remanded an errant AJ finding that "the question is whether the appellant had 'a reasonable belief'- not whether his reasonable belief was the only one possible."[5] *See also Miller v.*

[5] There has been no actual board to control the individual discretion of unappointed, individual AJs for some time. As a legal matter, a whistleblower must either decide to interminably wait to address retaliation until a board is one day appointed or go forward without one. If a board existed, a different standard would apply to the AJ's decisions from what the Secretary now argues. *See* 5 C.F.R. § 1201.115 (limiting the deference given to an AJ's findings to credibility determinations); *see also*

Dept. of Homeland Sec., 111 M.S.P.R. 312 (2009) (The actual board recognized that an employee's work experience could justify his reasonable belief, notwithstanding an expert's claim that he should not have held the belief.) Abrahamsen not only had work experience- he had expert literature and the actions of others supporting his reasonable belief. Conversely, the AJ readily accepts that, although at the time of trial three of Abrahamsen's supervisor's patients suffered serious complications-the most serious recognized in the literature- it cannot be proven it was "caused" by the general anesthesia Baumann always used. None of that is part of the statute. Disclosures under the WPA are intended to prepare for or avoid danger. Tort claims under the FTCA address causation.

In *Aquino v. Dept. of Homeland Sec.*, 121 M.S.P.R. 35 (2014) and *Miller v. Department of Homeland Security,* 111 M.S.P.R. 312 (2009), the appellants disclosed that changes in airport screening and crowd management procedures led to a greater risk of a breach of security. The Board found that these disclosures were substantial and specific because the consequences of the risks identified in the disclosures could result in devastating and obvious harm. *Aquino*, 121 M.S.P.R. 35, ¶¶ 14–17; *Miller*, 111 M.S.P.R. 312, ¶¶ 15–19. In each of these cases, proof of actual harm was not required. See *Chavez*, 120 M.S.P.R. at 295–

Leatherbury v. Dept. of the Army, 524 F.3d 1293, 1304 (Fed. Cir. 2008).

96, ¶¶ 19–21, (report of the failure to follow medical protocols was protected even if patients suffered no harm; there was a potential for adverse effect on treatment); *Parikh*, 116 M.S.P.R. at 207–08, ¶ 23 ("There is substantial evidence in the record to show that none of the patients that the appellant named in disclosure 9 suffered actual harm due to the allegedly unwarranted delays and that all of the patients ultimately received appropriate care. However, the mere fact that actual harm did not occur in any of the examples that the appellant cited does not mean that actual harm is unlikely to occur in the future.").

With regard to the fact that HSS and Abrahamsen both felt that it was important to educate patients about the risks of each type of anesthesia, one should consider *Cahill v. Dept. of Health and Human Servs.*, AT-1221-14-0906-W-1, 2015 WL 1477814, ¶ 15 (April 1, 2015) (unpublished) ((remanded on other grounds, *Cahill v. MSPB*, 821 F.3d 1370 (Fed. Cir. 2016)), in which the MSPB stated:

> In this case, we perceive a substantial likelihood of harm from inaccurate recommendations to the public on the prevention and treatment of HIV and AIDS from a federal agency charged with informing the public on these matters.

The AJ disagreed with the judgment of Abrahamsen and HSS and decided that the evidence presented did not represent a substantial or specific

danger to public health or safety. [6] Although the judge is correct that "some" total joints were being done at Bay Pines under spinal anesthesia, the overwhelming majority were not and we know Abrahamsen did some surgeries under spinal before the surgeries were surreptitiously taken away from him. Abrahamsen was criticized for citing information obtained by Chief of Surgery Edward Hong from nursing data showing virtually no surgeries were performed with spinal anesthesia at Bay Pines.

On the first question before the Court, the AJ and the Eleventh Circuit interpreted the word "public" out of the statute and added concepts not in the statute. The AJ and the Panel imposed a requirement of wrongdoing and causation not required under the whistleblowing statute for this type of disclosure. He also ignored the need for medical professionals to be able to discuss literature on the risks of procedures. The failure to discuss that literature is itself a danger to public health and safety. The AJ correctly cited the *Chambers* cases and listed the factors from those cases, but the way the factors were interpreted and applied was incorrect and is not entitled to deference. One can question whether the *Chambers* standard adequately covers the spectrum of dangers that would fall within the statutory provision. However, the AJ's decision does not comport with either the statutory provision or *Chambers*. The AJ's application of the

[6] The 2013 article involved scientific review of 382,256 hip and knee arthroplasty patients.

"likelihood of harm resulting from the danger" focused on his belief that the harm was not significant enough to warrant the disclosure as well as the inability to identify a particular patient at the Bay Pines VA that suffered or will suffer serious harm. Instead of *Chambers'*s focus on the likelihood that harm will occur, the AJ's analysis is heavily tilted towards a causation analysis rather than a whistleblower analysis.

The AJ and the panel undermine patients' right to know the risks of surgery at Bay Pines rather than ensuring they are aware of factors that could increase the risk of serious consequences, including death. Furthermore, the AJ seems to be concerned that if he protects someone making a disclosure they reasonably believed protects public health and safety, that automatically means the practices of an individual hospital must be immediately changed or else fall outside the standard of care. A whistleblower does not need to determine the steps that need to be taken. That is not what the WPA is about. Sometimes practices will need to change; other times changes could be gradual or may not ever occur. *Parikh* 116 M.S.P.R. at ¶¶ 16,17. The important point is that the whistleblower not be retaliated against for having made the disclosure.

The Secretary argues that there is substantial evidence to support the AJ's decision on the issue of Abrahamsen's reasonable belief. The above argument,

however, establishes that the AJ applied the wrong standard and, thus, failed to consider Abrahamsen's reasonable belief. This included Abrahamsen's prior medical experience, his discussions of his belief in the literature to colleagues before coming to Bay Pines, and his knowledge of HSS's actions. He also practiced patient education. Considering this in light of the above caselaw concerning reasonable beliefs, there is no substantial evidence in support of the AJ's decision. His decision poses the question of whether HSS had a reasonable belief in the changes it made to its own policy. Moreover, on this record, considering the medical literature, Abrahamsen's past practice from before he arrived at the VA, and the actions of others to change their practice in light of these articles, the far stronger evidence contradicts the AJ's findings and the Secretary's argument.

2. Disclosures of abuse of authority

In *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012), the Federal Circuit held that whenever findings of fact and conclusions of law are made, they must be based on the record as a whole after due consideration is given to all pertinent evidence. This includes evidence that supports the agency's case and that which detracts from it. *Aquino*, 121 M.S.P.R. at 48. Here, the AJ failed to consider significant evidence of disclosures of abuse of authority regarding Dr. Baumann's bullying efforts in a healthcare setting that was exhausted before the

OSC. *See Spithaler v. Office of Pers. Mgmt.*, 1 M.S.P.R. 587, 589 (1980) ("This means that an initial decision must identify all material issues of fact, summarize the evidence on each such issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the presiding official's conclusions of law, legal reasoning and the authorities on which that reasoning rests."). The requirements of 5 C.F.R. § 1201.111(b) are "essential" and exist to provide an adequate basis for "the parties and a reviewing court to determine the factual basis for the Board's decision and to ascertain whether the Board considered all relevant factors or made any error of judgment." *Spithaler*, 1 M.S.P.R. at 588-89.

The Secretary argued, and the Eleventh Circuit agreed that an employee must presume the AJ considered all the evidence the AJ failed to mention, analyze, or draw conclusions from despite the fact that the only instance of an abuse of authority the AJ addressed would by itself never have resulted in a WPA claim.

Here, the AJ also failed to consider all the material legal issues presented, which surpassed his failure to consider evidence. A six-day hearing had been held. MSPB regulations require the initial decision to

contain "[f]indings of fact and conclusions of law upon all material issues of fact and law presented on the record." 5 C.F.R. § 1201.111(b)(1). As stated in Abrahamsen's IB, the AJ completely ignored the issue of bullying in Abrahamsen's disclosures to Chief of Surgery Wright, and omitted facts material to resolving that issue and the unaddressed issue of the existence of a personnel actions whose timing evidences retaliation. It failed to provide any reasoning or finding that those disclosures were unprotected, improperly presented or that Abrahamsen did not have a reasonable belief in the nature of those disclosures. Abrahamsen exhausted his administrative remedies before the OSC regarding the multiple bullying components of Disclosure A as documented by OSC. Evidence of this was presented to the MSPB at various stages and litigated at the hearing.

While the AJ did not separately analyze whether the anesthesia disclosures met the "specific" requirement, the specificity of Abrahamsen's anesthesia disclosures did not appear to be in dispute. Even if Abrahamsen was unable to identify a specific patient who was actually harmed, the disclosure that the VA was overwhelmingly using general anesthesia for hip and knee orthopedic surgeries together with his reasonable belief based upon the medical literature that there was a clinical justification for spinal anesthesia, does not represent a "negligible, remote, or ill-defined peril that does not involve any

particular person, place, or thing." *Chambers II*, 515 F.3d at 1368–69. It is applicable to patients undergoing hip and knee replacement surgery. The literature addresses mortality and morbidity that occurs shortly after surgery (thirty days).

Regarding the "substantial" requirement of the WPA and the "likelihood of harm the resulting from the danger," the AJ improperly focused on the likelihood of harm to any one particular individual patient out of many, as opposed to the overall likelihood of harm to the public which includes Bay Pines veterans. After dismissing the literature, the AJ effectively engrafted an additional requirement onto the statute by conditioning protection on statistical proof of increased risk or malpractice. This is precisely the type of narrowing limitation that Congress has repeatedly criticized and attempted to eliminate. The AJ's additional limitation is also not in accordance with the language of the statute or the decisions by the actual MSPB Board discussed above.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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