Supreme Court, U.S.
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No. 23A701

In The

Supreme Court of the United States

MARTIN AKERMAN, PRO SE,

Applicant,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Federal Circuit Case No. 2023-2216

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT

APPLICATION FOR A STAY OF THE MANDATE
PENDING DISPOSITION
OF A PETITION FOR WRIT OF CERTIORARI
AND RESOLUTION
OF SUPREME COURT CASES 22-451 AND 22-1219

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In Forma Pauperis
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January 24, 2024

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AUTHORITIES

QUESTIONS PRESENTED

Recognizing the misuse of security clearance decisions as tools for tyranny and retaliation, Congress enacted Public Law 117-103 on March 15, 2022, Attachment F. This raises pivotal legal questions:

- How does this legislation alter the protections for federal employees facing 'for cause' adverse actions under 5 U.S.C. § 7513(d), in the context of the legal framework from Department of the Navy v. Egan, 484 U.S. 518, 525 (1988)?

- Should the Egan precedent, 484 U.S. 518 (1988), continue to guide the removal of national security whistleblowers, especially considering the integration of whistleblower protections under 50 U.S.C. § 3341(j)(8), due process rights, and the investigative adequacy requirements and legal framework of 5 U.S.C. § 2302(b)(8)?

- When Congress explicitly provides alternative directives, as predicted in Department of the Navy v. Egan, 484 U.S. 518, 530 (1988), is it permissible within Chevron deference for the Merit Systems Protection Board to overlook its obligations in interpreting and applying laws concerning employee protections and whistleblower rights?

SERVICE ON THE U.S. GOVERNMENT

In compliance with Rule 29.4(a), the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001, will be served given that the United States Government is a related party in the referenced proceedings.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(f), which authorizes review by writ of certiorari of cases adjudicated in the United States Courts of Appeals. This application arises from the decision of the United States Court of Appeals for the Federal Circuit. The final judgment in this case was entered on January 18, 2024, and this application for a stay pending the filing and disposition of a petition for a writ of certiorari is timely under 28 U.S.C. § 2101(c).

PARTIES TO THE PROCEEDING

The principal party initiating this legal action is Martin Akerman, as Chief Data Officer for the National Guard. As a federal employee with tenure, Akerman was appointed pursuant to the authority outlined in 44 U.S.C. § 3520. In this proceeding, Akerman represents not only his own interests but also those of other federal employees who may be similarly impacted. His forcible removal from office on February 14, 2022, which he contends violated due process and disregarded procedural safeguards established under 5 U.S.C. §§ 6329b and 7513, is at the center of this legal challenge.

The opposing party in this case is the Merit Systems Protection Board (MSPB), a federal agency charged with the responsibility of interpreting and enforcing regulations within its purview. The MSPB's actions and interpretations, particularly concerning the case at hand, form the basis of the legal dispute presented for review.

Congress as an Interested Party

The case under consideration has drawn the interest of Congressional representatives, notably with the involvement of Senator Tim Kaine of Virginia. On February 27, 2022, the applicant, Martin Akerman, reached out to Senator Kaine to assist in addressing the apparent deficiencies in whistleblower protections, especially for those in positions tied to national security. This outreach highlights the legislative interest and oversight in ensuring adequate protections for whistleblowers under federal law.

In response to these concerns, Congress enacted Public Law 117-103 on March 15, 2022. This legislation specifically targets the scope of review available to the Merit Systems Protection Board, an issue that is central to this case and previously addressed in the precedent of Dep't of the Navy v. Egan, 484 U.S. 518, 524 (1988).

On March 30, 2022, the Department of Defense Office of the Inspector General, following communication with Senator Kaine, confirmed the initiation of an investigation.

RELATED PROCEEDINGS

1. In the Supreme Court of the United States, case number 23A536, the applicant seeks review from the United States District Court for the Eastern District of Virginia (EDVA), related to a pending petition for writ of certiorari to the Fourth Circuit. This case involves the interpretation and application of principles established in the landmark Egan decision. The EDVA found itself unable to fully review the case due to issues related to a security clearance revocation, impacting the consideration of claims under Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, the Age Discrimination in Employment Act, and the Whistleblower Protection Act. These claims, requiring an assessment of the Department of Defense's security clearance decision, were deemed unreviewable. Claims of indefinite suspension and constructive discharge were dismissed, as evaluating their discriminatory basis would necessitate a review of the security clearance decision's merits.

2. In the District of Columbia District Court, case number 1:23-cv-02574, Martin Akerman is pursuing a Freedom of Information Act (FOIA, 5 U.S.C. § 552) request. This targeted action is against several federal entities including the Department of Defense Office of Inspector General, the Department of Labor, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Office of Special Counsel. The focus of this suit is to obtain essential information related to Akerman's employment disputes, the investigative procedures undertaken, and the handling of evidence, including any records that may have been destroyed. This legal effort highlights Akerman's pursuit of clarity and accountability in the administrative proceedings that have impacted his case.

3. DC-0752-23-0457-I-1 before the MSPB, features allegations concerning the unlawful hindrance of pay and benefits. Correspondingly, a connected claim has been filed with the Virginia Workers' Compensation Commission bearing the case number VA02000039708.

Collateral Cases

4. There are three interrelated pettitons for writ of certiorari in the Supreme Court, related to exhaustive petitions for writ of habeas corpus and replevin, in the state military jurisdiction of Nevada (23-623), in the federal military jurisdiction of the Court of Appeals for the Armed Forces (23M53), and in the administrative state jurisdiction of the Federal Circuit (23M52).

5. An active challenge to an alleged criminal conviction and an alleged designation of the petitioner as an enemy combatant can be found in the Court of Appeals for the District of Columbia, together with the active petition for writ of habeas corpus and replevin (23-5230).

6. The Supreme Court of Virginia is presently hearing an appeal under Case No.230670, addressing a Breach of Legal Insurance connected to the aforementioned administrative and habeas proceedings.

OPINIONS BELOW

Merit Systems Protection Board (MSPB)

Initial Decision, Case No. DC-343-22-0639-I-1 (Attachment A): The MSPB concluded that Martin Akerman did not provide sufficient evidence to establish the Board's jurisdiction over his appeal related to the revocation of his security clearance. This decision was pivotal, as it denied Akerman the opportunity for MSPB review.

Decision on Stay Request, Case No. DC-1221-22-0257-S-1 (Attachment B): In this case, the MSPB encountered procedural issues, including the loss of crucial documents, leading to a significant procedural breach and affecting the fairness of the proceedings.

United States Court of Appeals

for the Federal Circuit, Case No. 2023-2216

Court's Affirmation of MSPB Decision (Attachment C1): The Federal Circuit upheld the MSPB's decision on December 14, 2024.

Denial of Motion for Rehearing (Attachment C2): The court denied Akerman's motion for a rehearing on January 18, 2024.

Denial of Stay of Mandate (Attachment C3): The court declined to stay the mandate on January 22, 2024, essentially upholding the MSPB's interpretation and procedural decisions.

Additional Key Documents

Letter to Senator Tim Kaine, February 27, 2022 (Attachment D): Akerman's communication with Senator Kaine raised concerns about inadequacies in whistleblower protections, catalyzing legislative interest and action.

Initial Application for Stay, February 28, 2022, MSPB Case No. DC-1221-22-0257-S-1 (Attachment E): Lost by the MSPB, this application demonstrated that Akerman's security clearance jurisdiction process through DOD OIG met the criteria for a future appealable adverse action under 50 U.S.C. § 3341(j)(8).

Public Law 117-103, March 15, 2022 (Attachment F): This law, directly relevant to Akerman's case, addressed the MSPB's scope of review and is crucial in the context of federal whistleblower protections.

Response from Senator Kaine on OIG Investigation, March 30, 2022 (Attachment G): Documenting Senator Kaine's response and the initiation of an investigation by the Department of Defense OIG following Akerman's concerns.

TO THE HONORABLE CHIEF JUSTICE,

JOHN G. ROBERTS, JR.,

APPLICATION FOR A STAY OF MANDATE

Martin Akerman, the applicant, respectfully approaches this Honorable Court following a series of critical decisions by the United States Court of Appeals for the Federal Circuit and the Merit Systems Protection Board (MSPB). The most recent decision, a denial of a motion to stay the mandate on January 22, 2024, by the Federal Circuit, significantly impacts the applicant's pursuit of justice.

This application contests the MSPB's interpretation of 50 U.S.C. § 3341(j)(8), which has crucial implications for appeal jurisdiction under 5 U.S.C. § 2302(b)(8), considerations of mixed cases under 5 C.F.R. § 1201.151, and fundamental due process protections established in Dep't of the Navy v. Egan, 484 U.S. 518 (1988). The procedural journey leading to this application began with the initial request for a stay from the MSPB on February 28, 2022, and was followed by significant developments including the denial of Workers' Compensation and EEO Counseling on April 5, 2022, and a decision by the Office of the

Inspector General of the Department of Defense not to place Akerman on paid status pending investigation on April 25, 2022.

The Federal Circuit, in its order dated December 14, 2023, dismissed the petition for review, citing the non-final status of the MSPB decision due to pending proceedings. The court outlined potential paths for review, either through final decision from the MSPB or confirmation of withdrawal of the petition at the MSPB, leading to a final dismissal order eligible for review.

In light of these developments, and pursuant to the standards delineated in Merrill v. Milligan, 142 S. Ct. 89, 880 (2022), the applicant earnestly submits that his case meets the necessary criteria for a stay pending certiorari. There is a considerable probability that this Court will grant certiorari due to the case's relevance and alignment with established legal principles. Additionally, there exists a substantial prospect of reversal of the current decision, considering the significant legal questions and potential misinterpretations of law. Importantly, the threat of irreparable harm without a stay is immediate and

severe, underscoring the urgent need for this Court's intervention to prevent irreversible damage and uphold justice.

Thus, the applicant humbly requests this Honorable Court to grant the stay of mandate pending the filing and disposition of a petition for writ of certiorari. This stay is essential to ensure a fair review of the case under the current and applicable legal standards, offering a thorough consideration of all issues at hand.

A. Missing Docket at MSPB

1. Loss of DC-1221-22-0257-S-1:

In a significant breach of procedural integrity, the Merit Systems Protection Board (MSPB) lost vital documents associated with stay request DC-1221-22-0257-S-1. This loss is particularly egregious as these documents were crucial in demonstrating the legitimacy of the MSPB appeal. They conformed to the criteria for an appealable adverse action under 50 U.S.C. § 3341(j)(8), as confirmed by the Office of Special Counsel (OSC), and were not merely an individual right of action requiring additional

exhaustion through OSC. Despite the gravity of these allegations, the Federal Circuit declined to issue an injunction or acknowledge an adverse inference regarding the missing docket.

2. Loss of Chronology of Events:

- February 28, 2022: Martin Akerman, the applicant, initially sought a stay from the MSPB pending appeal. This initial action marked the beginning of his legal pursuit for justice in the face of alleged procedural lapses and violations of his rights as a federal employee.
- April 5, 2022: Subsequent to his initial stay request, Akerman faced further challenges as he was denied Workers' Compensation and Equal Employment Opportunity (EEO) Counseling. This denial represents a significant hindrance in his efforts to seek redress and relief for his grievances.
- April 25, 2022: In a development that further complicated his situation, the Office of the Inspector General of the Department of Defense declined to place Akerman on paid status pending investigation, under 5 U.S.C. § 6329b.

B. Denials in MSPB Quorum Crisis

The Board withheld important documents that were key to establishing the appealability of the MSPB's initial decision as a final one. This act takes on added significance given that the MSPB, grappling with a lack of quorum, had offered a broadly available accommodation allowing for an expedited appeal process for anyone with a qualifying case pending review before the Board. The Federal Circuit dismissed the case on grounds that accoring to the MSPB, the expedited appeal was never affirmed and the decision is not yet final and appealable.

Further complicating matters, the Federal Circuit, on January 18, 2024, denied a request for a rehearing of this case. Subsequently, on January 22, 2024, a motion to stay the mandate related to this decision was also denied, marking a continuation of legal challenges and procedural setbacks for the appellant.

C. Statutory Misinterpretation

On October 28, 2022, the Merit Systems Protection Board (MSPB) erroneously interpreted the law in case DC-343-22-0639-I-1, asserting that Akerman failed to provide adequate evidence or argument to justify the Board's jurisdiction over his appeal concerning the IC IG decision as an adverse action or another appealable matter. This misinterpretation was later upheld by the Federal Circuit, presumably under the doctrine of Chevron deference.

1. 50 U.S.C. § 3341(j)(8):

The enactment of Public Law 117-103, which led to the establishment of 50 U.S.C. § 3341(j)(8), significantly enhances the scope and explicit jurisdiction of the Merit Systems Protection Board (MSPB) over cases involving allegations of retaliatory revocations of security clearances. This legal development imposes a higher level of scrutiny on such cases, acknowledging the gravity and potential impacts of retaliatory actions on security clearance holders. In light of this legislative change, granting a stay in the current proceeding is justified to ensure that the case is evaluated under the updated legal framework,

providing a thorough and fair consideration of the allegations in accordance with the latest statutory guidance. This stay would allow for an assessment that aligns with the evolved legal standards and protections afforded by Public Law 117-103 and 50 U.S.C. § 3341(j)(8). Section 50 U.S.C. § 3341(j)(8) specifically addresses the issue of retaliatory revocation of security clearances and access determinations in federal employment. This section prohibits agency personnel with authority over personnel security clearances from taking or failing to take, or threatening to take or fail to take, any action against an employee's security clearance or access determination in retaliation for lawful disclosures of information. These disclosures include reporting violations of federal law, rule, or regulation, as well as exposing mismanagement, gross waste of funds, abuse of authority, or substantial and specific dangers to public health or safety. The section also covers disclosures made to the Director of National Intelligence, a supervisor, the Inspector General of an agency, or Congress, provided that such disclosures comply with the relevant subsections of the U.S. Code and do not unlawfully reveal classified information.

Importantly, this section ensures that individuals making protected disclosures are not unjustly penalized through actions affecting their security clearance, thereby promoting transparency and accountability within the federal government while safeguarding national security interests.

2. Harmonization with the WPA:

Section 50 U.S.C. § 3341(j)(8), in conjunction with 5 U.S.C. § 2302(b)(8), effectively makes retaliatory actions affecting a security clearance an adverse action enforceable by the Merit Systems Protection Board (MSPB). These sections collectively safeguard federal employees from reprisal for lawful whistleblowing, specifically including actions that impact an employee's security clearance. By prohibiting retaliation against employees for reporting violations of laws, rules, or regulations, as well as for exposing mismanagement, waste, abuse of authority, or substantial dangers to public health or safety, these provisions recognize the revocation or threat against security clearances as a potential form of adverse

personnel action. Consequently, affected employees can seek redress through the MSPB, which is empowered to enforce these protections. This framework ensures that employees who lawfully disclose sensitive information in the interest of transparency and accountability are not subjected to punitive measures that could impact their career and security status, thereby reinforcing the ethical integrity and efficiency within federal operations.

3. **The WPA (5 U.S.C. § 2302(b)(8)):**

The WPA is a pivotal provision safeguarding whistleblowing activities within federal employment. It prohibits personnel actions against employees or applicants for employment for disclosing information they reasonably believe shows a violation of laws, rules, or regulations, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

D. The WPA and Its Legal Framework

The WPA is a fundamental statute that safeguards the rights of federal employees engaged in whistleblowing activities. It explicitly prohibits personnel actions against employees or applicants who disclose information they reasonably believe demonstrates a violation of laws, rules, or regulations, as well as instances of gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. Notably, the WPA establishes a non-negotiable burden of proof and a burden-shifting framework that is not open to interpretation.

In cases such as Martin Akerman's, where allegations of retaliatory actions affecting security clearances are pivotal, this legal framework is essential. Section 50 U.S.C. 3341(j)(8), in conjunction with the WPA, effectively categorizes such retaliatory actions as adverse actions enforceable by the Merit Systems Protection Board (MSPB). This statutory construct ensures that employees who make protected disclosures are not unjustly penalized through actions that impact their security clearance, thereby

promoting transparency and accountability within federal operations

It is crucial to observe that in the case DC-343-22-0639-I-1, the MSPB's interpretation failed to properly consider these statutory protections and the associated burden of proof. The MSPB erroneously asserted that Akerman failed to provide adequate evidence to justify the Board's jurisdiction, overlooking the explicit statutory framework provided by the WPA and 50 U.S.C. 3341(j)(8). This misinterpretation, later upheld by the Federal Circuit, highlights the need for a comprehensive judicial review of the MSPB's decisions in light of the unequivocal legal standards established by these statutes.

Moreover, the significance of the Department of Defense's non-participation in the MSPB proceedings cannot be overstated. Their failure to appear or respond resulted in a default, meaning they did not meet the necessary burden of establishing by clear and convincing evidence that the actions affecting Akerman's security clearance would have been taken absent a prohibitive motive. This default is a

significant factor that further necessitates a reassessment of the MSPB's rulings and emphasizes the urgency of judicial intervention in this matter.

E. Supreme Court Cases on Agency Deference

The recent oral arguments in Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Dept of Commerce suggest a judicial inclination to reevaluate, if not curtail, Chevron deference. This potential shift in judicial philosophy towards agency statutory interpretations could have a significant bearing on the present case. The applicant's case, hinging on the interpretation of whistleblower protection laws and the scope of the MSPB's jurisdiction, is precisely the kind of scenario where a change in the application of Chevron deference could lead to a different outcome. The Supreme Court's upcoming decisions in these cases may establish new principles for statutory interpretation that could directly affect the reconsideration of the MSPB's interpretations and decisions in the applicant's case.

Furthermore, the Supreme Court's approach to stare decisis in these matters could signal a broader willingness to reconsider and potentially overturn long-standing doctrines and interpretations, particularly those relevant to federal employee rights and whistleblower protections. Such a reevaluation could provide a crucial opportunity for a more direct and less deferential judicial review of the MSPB's decision-making process in the applicant's case, especially considering the claims of statutory misinterpretation and procedural irregularities.

Given the significant overlap in legal issues and the potential for these Supreme Court cases to alter the legal landscape under which the applicant's case is being reviewed, there is a heightened need for a stay of the mandate. This stay would ensure that the applicant's case is adjudicated under the most current legal standards, providing a fair and thorough consideration of the legal issues presented.

CONCLUSION

Recognizing the significant public interest and the pivotal nature of the issues involved in protecting federal employees and whistleblowers, the applicant respectfully suggests that this case be considered not only as an application for a stay but also potentially as a petition for writ of certiorari. This consideration would enable a comprehensive review, adhering to the highest legal standards and principles. Therefore, the applicant humbly requests that the Court grant the requested stay and, recognizing the importance and complexity of the issues at stake, also consider this application in the broader context of a petition for writ of certiorari to ensure a complete, fair, and thorough examination of all pertinent issues under the most current and applicable legal standards.

County/City of Arlington
Commonwealth/State of Virginia
The foregoing instrument was acknowledged
before me this 24th day of January
2024, by Martin Akerman
(name of person seeking acknowledgement)
Notary Public
My Commission Expires: 09/30/2026

Tijer Leigh Hall
Commonwealth of Virginia
Notary Public
Commission No. 8024890
My Commission expires 9/30/2026

Respectfully Submitted,

Martin Akerman, Pro Se
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(202) 656 - 5601

RULE 33.2 CERTIFICATION

This application for stay complies with the format requirements of Supreme Court Rule 33.2 for documents presented on 8 1/2- by 11-inch paper. The document is stapled or bound at the upper left-hand corner.

This application complies with the type-volume limitation of Supreme Court Rule 33.2(b) as it contains 24 pages, which is within the 40-page limit for an application for a stay.

The text of this application has been prepared in a proportionally spaced typeface using Google Docs in Century, 12 point font size.

The original of this document is signed by the party proceeding pro se, under oath. Copies are produced on the same type of paper and are legible.

Dated and respectfully submitted, this 24th day of January, 2024.

Martin Akerman, Pro Se
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No. __A____

In The

Supreme Court of the United States

MARTIN AKERMAN, PRO SE,

Applicant,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Federal Circuit Case No. 2023-2216

PROOF OF SERVICE

I, Martin Akerman, hereby certify that on January 24, 2024, one original and ten copies of the Application for a Stay of Mandate in the case of Martin Akerman, Pro Se, v. Merit Systems Protection Board, were served on the Emergency Deputy Clerk of the Supreme Court, Mr. Robert Meek, via Priority Mail.

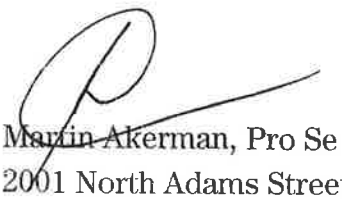
Additionally, a copy of the Application for a Stay of Mandate was served on the Solicitor General of the United States via Priority Mail. Service was made in compliance with Supreme Court Rule 29.

The documents were sent to the following addresses:

- Mr. Robert Meek
  Supreme Court of the United States
  1 First Street, NE
  Washington, DC 20543

- Solicitor General of the United States
  Room 5616, Department of Justice
  950 Pennsylvania Ave., N. W.
  Washington, DC 20530-0001

The documents were mailed from Arlington, Virginia and were sent through the United States Postal Service by Priority Mail, postage prepaid. This proof of service is made and respectfully submitted in accordance with Rule 29 of the Supreme Court Rules.



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ATTACHMENT A

Initial Decision, Case No. DC-343-22-0639-I-1: The MSPB concluded that Martin Akerman did not provide sufficient evidence to establish the Board's jurisdiction over his appeal related to the revocation of his security clearance. This decision was pivotal, as it denied Akerman the opportunity for MSPB review.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MARTIN AKERMAN,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
DC-3443-22-0639-I-1

DATE: October 28, 2022

Martin Akerman, Arlington, Virginia, pro se.

William R. Kraus, Alexandria, Virginia, for the agency.

BEFORE
Melissa Mehring
Administrative Judge

INITIAL DECISION

The appellant filed an appeal with the Merit Systems Protection Board (Board) and alleged the agency Office of Inspector General (OIG) improperly concluded that his complaint was not supported, and the Inspector General of the Intelligence Community (IC IG) refused to review that decision. Appeal File (AF), Tab 1. The appellant requested a hearing. *Id.* For the reasons discussed below, the appeal is DISMISSED for lack of jurisdiction on the written record.

BACKGROUND

The appellant filed an appeal on September 12, 2022. Appeal File (AF), Tab 1. Under the section of the appeal form addressing the appealed action the appellant checked the box "Other" and wrote "Whistleblower Right of Action."

Id. at 3. The appellant explained in the narrative portion of his appeal: "The IC has completed the review of the PPD-19 petition for review and there appears to be no further recourse. Bringing back to MSPB under the WPEA." *Id.* With his appeal, the appellant included several attachments. *Id.* at 6-13.

Among the attachments was a letter dated September 8, 2022. *Id.* at 10. In the letter from the IC IG, that office made the decision not to review a Department of Defense Office of Inspector General decision in which it declined to open an investigation. *Id.* It is the IC IG decision that appears to be the action from which the appellant is seeking redress.[1] *Id.* at 3.

Because it appeared the Board may lack jurisdiction over the appealed action, the decision by the OIG not to investigate the appellant's complaint and the affirmance of that decision by the IC IG, I issued an Order to Show Cause – Jurisdiction. AF, Tab 3. In the order, I set forth the burdens of proof for establishing Board jurisdiction and afforded both parties the opportunity to respond. *Id.*

In the appellant's response, he cited to his prior Board appeals and submitted documents from those appeals.[2] AF, Tab 4. He argued that this case

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[1] On his appeal form, the appellant wrote that he filed a complaint with Office of Special Counsel (OSC) on August 26, 2021, and received a notification of termination OSC's investigation February 28, 2022. AF, Tab 1 at 4. Because the alleged action at issue occurred on September 8, 2022, I find the IC IG determination cannot be considered part of that OSC complaint. Therefore, I did not consider the appellant's newly filed appeal to be part of his prior OSC complaint, and thus appropriate for including in his other Board appeals that were based on that OSC complaint.

[2] The appellant has filed several Board appeals. Beyond the above-captioned appeal, the appellant has 3 appeals pending in the Washington Regional Office: DC-1221-22-0257-W-1; DC-1221-22-0445-W-1; and DC-1221-22-0459-W-1. The appellant also filed two Stay requests, DC-1221-22-0257-S-1, and DC-1221-0752-22-0376-S-1, and has one appeal pending at the Board on a petition for review, DC-0752-22-376-I-1. In addition, the appellant has filed a case in the United States District Court for the Eastern District of Virginia, Civil Action No. 1:22cv696. None of these appeals included a claim regarding the OIG's decision not to further investigate the appellant's complaint.

was a continuation of those appeals. *Id.* at 5-8. To that end, the appellant submitted his February 28, 2022, OSC closure letter and complaint form upon which the closure letter was based. *Id.* at 36-65. Following the submission of his response to the Order to Show Cause, the appellant submitted a pleading in which he withdrew his request for a hearing. AF, Tab 5.

ANALYSIS AND FINDING

The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Thus, it follows that the Board does not have jurisdiction over all matters alleged to be unfair or incorrect. *Johnson v. U.S. Postal Service*, 67 M.S.P.R. 573, 77 (1995).

IC IG decision

The Board's appellate jurisdiction is set forth at 5 C.F.R. § 1201.3. A decision by an OIG and the decision whether to review that decision are not appealable actions. Beyond asserting that this was a continuation of the agency's retaliation against him for whistleblowing, the appellant offered no evidence or argument to support a claim that the appealed action is within the Board's jurisdiction.

Generally, the appellant has the burden of establishing the Board's jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(b)(2)(i)(A). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

The appellant withdrew his hearing request. AF, Tab 5. Still to reach the merits of the appellant's appeal he must establish the Board's jurisdiction. At a minimum, the appellant must make a nonfrivolous allegation of facts, which, if proven, would establish Board jurisdiction over his appeal. *Garcia v. Department*

of Homeland Security, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). A "nonfrivolous allegation" is a claim of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the appellant's appeal. Mere pro forma allegations are insufficient to satisfy the non-frivolous standard. *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006).

The appellant presented no evidence or argument in support of finding Board jurisdiction over his appeal of the IC IG decision as an adverse action or an otherwise appealable action. Therefore, I find the appellant failed to make a nonfrivolous allegation of Board jurisdiction.

Individual Right of Action (IRA) Appeal

The appellant asserted that this appeal was actually a continuation of his other IRA appeals. IRA appeals are specifically authorized by 5 U.S.C. § 1221(a) with respect to specified personnel actions that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activities. 5 C.F.R. § 1209.2(b)(1). In an IRA appeal, "if the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel [OSC] before appealing to the Board." *Id.* Moreover, he must show that he exhausted his administrative remedies before OSC prior to filing a Board appeal. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). In addition, the appellant must make nonfrivolous allegations that he made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and, the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a

personnel action as defined by 5 U.S.C. § 2302(a).[3] *Salerno v. Department of the Interior,* 123 M.S.P.R. 230, ¶ 5 (2016).

Exhaustion can be shown by establishing he brought his whistleblower or other complaint to the attention of OSC, and exhausted OSC's procedures. An appellant has "exhausted" OSC's procedures once OSC has notified him that it is terminating its investigation into his complaint. The appellant may also show he exhausted OSC's procedures if 120 days have passed since he filed his claim with OSC and he has not received a termination notice. 5 U.S.C. § 1214(a)(3).

In the instant case, the appellant stated he filed his OSC complaint on August 26, 2021 and was notified that OSC terminated its investigation on February 28, 2022. AF, Tab 1 at 4. Further, the appellant indicated on his Board appeal form that he received notice of the agency action on September 9, 2022. *Id.* at 3. Because the appellant's OSC complaint and closure letter predated the complained of agency action, I find the appellant has not exhausted his administrative remedies with OSC regarding the action at issue in this appeal.

Thus, I find the appellant's asserted IRA appeal on the denial of review by IC IG is premature. The appellant may file a new IRA appeal after he exhausts his administrative remedies if he wishes to do so pursuant to 5 U.S.C. §§ 1214(a)(3), 1221.

Based on the foregoing, I find the appellant failed to make a nonfrivolous allegation of Board jurisdiction over the IC IG decision not to review the agency's OIG decision declining to investigate the appellant's complaint. Further, I find the appellant failed to establish Board jurisdiction over his appeal as a possible IRA appeal. Accordingly, this appeal must be dismissed for lack of jurisdiction.

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[3] I do not reach the question of whether the IC IG decision not to review the OIG's decision declining to investigate the appellant's complaint is a personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A). That issue is not currently before the Board.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /S/
Melissa Mehring
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 2, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the

earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully

follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation

for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

ATTACHMENT B

Decision on Stay Request, Case No. DC-1221-22-0257-S-1: In this case, the MSPB encountered procedural issues, including the loss of crucial documents, leading to a significant procedural breach and affecting the fairness of the proceedings.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MARTIN AKERMAN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-1221-22-0257-S-1

DATE: March 7, 2022

Martin Akerman, Arlington, Virginia, pro se.

Bernard E. Doyle, Arlington, Virginia, for the agency.

BEFORE
Melissa Mehring
Administrative Judge

ORDER DISMISSING STAY REQUEST

The appellant filed a request asking the Merit Systems Protection Board (Board) to stay the agency's proposal to indefinitely suspend him from Federal Service.* Appeal File (AF), S-1, Tab 1. For the following reasons, the appellant's stay request is DISMISSED.

Background

The appellant filed a Board appeal seeking a stay of the agency's proposal to indefinitely suspend him. AF, Tab 1. In his stay request, the appellant

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* The Board has separately docketed the appellant's individual right of action (IRA) appeal. *See* MSPB Docket No. DC-1221-22-0257-W-1 (W-1). The current stay appeal will be cited as S-1.

indicated that he filed a complaint regarding his proposed suspension with the Office of Special Counsel (OSC), but has yet to exhaust his administrative remedies with OSC. *Id.* at 3-4.

Applicable Law and Analysis

OSC or an individual appellant may seek a stay of a personnel action with the Board. 5 U.S.C. §§ 1214(b)(1)(A)(i), 1221(c). The applicable statutes and regulations are dependent on which party seeks the stay. Stay requests, such as the one filed in this case by the appellant, are adjudicated pursuant to 5 U.S.C. § 1221, 5 C.F.R. §§ 1209.8 - .11.

An appellant may request a stay of a personnel action that he claimed was based on whistleblowing at any time **after** the appellant becomes eligible to file a Board appeal under 5 C.F.R. § 1209.5. 5 C.F.R. § 1209.8(a); *See* 5 U.S.C. §§ 1221(a), (c)(1). If the appealed action is not otherwise appealable to the Board, an appellant must exhaust his remedies with OSC before coming to the Board. 5 U.S.C. §§ 1214(a)(3), 1221; 5 C.F.R. §§ 1209.1, .5. An appellant exhausts with OSC once OSC has notified an appellant that it is terminating its investigation into his complaint or 120 days have passed since the appellant filed his claim with OSC and he has not received a termination notice. 5 U.S.C. § 1214(a)(3).

In the instant case, the agency proposal notice was dated February 14, 2022. AF, Tab 1 at 8. The appellant stated that he filed his OSC complaint thereafter, but is still in the process of exhausting his remedies with that agency. AF, Tab 1 at 3. Therefore, I find the appellant's stay request is premature because he has not exhausted his administrative remedies with OSC. 5 U.S.C. §§ 1214(a)(3), 1221; 5 C.F.R. §§ 1209.1, .5., .8(a).

If the appellant's asserted personnel action was directly appealable to the Board (*see* 5 U.S.C. §§ 7511-13, C.F.R. § 1201.3), he could choose either to seek corrective action with OSC before appealing to the Board or file his appeal

directly with the Board. 5 C.F.R. § 1209.5(b). Here the appellant is seeking redress for a proposed indefinite suspension. AF, Tab 1 at 8. A proposed action, however, is not an action directly appealable to the Board. *See* 5 U.S.C. §§ 7511-13, C.F.R. § 1201.3.

Therefore, I find the Board lacks jurisdiction to consider this claim because the appellant has failed to establish Board jurisdiction under 5 U.S.C. chapter 75 or 5 U.S.C. § 1221. 5 U.S.C. §§ 7511-7513, 5 U.S.C. § 1221(a), (c)(1) and 5 C.F.R. § 1209.8(a). Specifically, the record does not support a finding that the Board has jurisdiction over the personnel action as an otherwise appealable action or in the context of an IRA appeal because the appellant has failed to demonstrate that he has exhausted his administrative remedies. Thus, the Board has no authority to grant the appellant's requested stay of his proposed indefinite suspension. *See Weber v. Department of the Army*, 47 M.S.P.R. 130, 133 (1991).

Accordingly, for all of these reasons, the appellant's request that the Board stay the agency's proposed indefinite suspension must be DISMISSED.

FOR THE BOARD: /S/
Melissa Mehring
Administrative Judge

ATTACHMENT C1

United States Court of Appeals

for the Federal Circuit, Case No. 2023-2216

Court's Affirmation of MSPB Decision: The Federal Circuit upheld the MSPB's decision on December 14, 2024.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARTIN AKERMAN,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-2216

Petition for review of the Merit Systems Protection Board in No. DC-3443-22-0639-I-1.

ON MOTION

O R D E R

The Merit Systems Protection Board moves to dismiss Martin Akerman's petition for review for lack of jurisdiction. Mr. Akerman responds with a request to "[q]uash" the motion and to "[p]roperly join[] and/or remand the case to the appropriate trial court(s)." ECF No. 25 at 3. He separately moves the court to clarify and "certify" this court's October 13, 2023, order, ECF No. 27 at 1, and to "bifurcate and transfer discriminatory elements," ECF No. 3 at 1.

Mr. Akerman filed an appeal with the Board challenging decisions of the Department of Defense Office of Inspector General and the Inspector General of the Intelligence Community declining to open his requested investigation. On October 28, 2022, the administrative judge issued an initial decision dismissing the appeal, concluding the Board lacked jurisdiction over those decisions, and, to the extent this could be construed as an Individual Right of Action appeal, such appeal would be premature.

Mr. Akerman subsequently filed a timely petition seeking review of the initial decision by the full Board. On June 26, 2023, Mr. Akerman moved to withdraw his petition at the Board. The Board issued an order asking Mr. Akerman to confirm his intent to withdraw, but Mr. Akerman has so far failed to provide that confirmation. On June 27, 2023, Mr. Akerman filed this petition seeking review of the initial decision. Mr. Akerman's filings before this court state that he raised a discrimination claim before the Board and that he wishes to pursue judicial review of that claim.

This court does not yet have authority to decide this case. Although this court has jurisdiction to review final decisions of the Board, *see* 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1)(A), Mr. Akerman's timely filed petition at the Board renders the initial decision non-final for purposes of our review. *See* § 7701(e)(1)(A); 5 C.F.R. § 1201.113(a) ("The initial decision will not become the Board's final decision if within the time limit for filing . . . any party files a petition for review . . . .").

We note two potential paths to this court's future review. First, Mr. Akerman may wait to receive a final decision from the full Board on his petition for Board review, at which point Mr. Akerman may seek this court's review, if necessary, by filing a timely petition for review with this court. Alternatively, Mr. Akerman can confirm with the Board that his request to withdraw his petition was knowing and voluntary, and then timely petition for our review

if, and when, the request has been granted, as the order dismissing his petition will constitute a final Board decision.

As for Mr. Akerman's request to transfer some portion of this case to district court: the Board states that "it does not appear Mr. Akerman raised a claim of covered discrimination before the Board in connection with the challenged agency action" that might warrant such transfer. ECF No. 24 at 8. Nothing in Mr. Akerman's filings, and nothing in our review of the limited record, support a contrary conclusion. Moreover, to the extent that Mr. Akerman's case before the Board is an IRA appeal, "[d]iscrimination claims may not be raised in that context." *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323, 1327–28 (Fed. Cir. 2020). We accordingly reject Mr. Akerman's request to transfer.

Mr. Akerman's motion for clarification also asks, "whether the [October 13, 2023, order] was issued by a panel of judges or by the clerk of the court," ECF No. 27 at 2. That order (as this one) was issued by a panel of judges and merely signed by the Clerk of Court. *See* Fed. Cir. R. 45(c) (authorizing the Clerk of Court to sign a document "[f]or the [c]ourt" when directed by a judge or the court).

Accordingly,

IT IS ORDERED THAT:

(1) The Board's motion to dismiss is granted. The petition for review is dismissed.

(2) Each side shall bear its own costs.

(3) The motion to clarify, ECF No. 27, is granted to the extent provided in this order. All other pending motions are denied.

FOR THE COURT

December 14, 2023
Date

Jarrett B. Perlow
Clerk of Court

ATTACHMENT C2

United States Court of Appeals

for the Federal Circuit, Case No. 2023-2216

Denial of Motion for Rehearing: The court denied Akerman's motion for a rehearing on January 18, 2024.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARTIN AKERMAN,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-2216

Petition for review of the Merit Systems Protection Board in No. DC-3443-22-0639-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.[1]

O R D E R

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[1] Circuit Judge Newman did not participate.

On December 14, 2023, Martin Akerman filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

January 18, 2024
Date

Jarrett B. Perlow
Clerk of Court

ATTACHMENT C3

United States Court of Appeals

for the Federal Circuit, Case No. 2023-2216

Denial of Stay of Mandate: The court declined to stay the mandate on January 22, 2024, essentially upholding the MSPB's interpretation and procedural decisions.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARTIN AKERMAN,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-2216

Petition for review of the Merit Systems Protection Board in No. DC-3443-22-0639-I-1.

ON MOTION

PER CURIAM.

O R D E R

On January 22, 2024 Martin Akerman filed a motion to stay the mandate [ECF No. 32].

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

January 22, 2024
Date

ATTACHMENT D

Letter to Senator Tim Kaine, February 27, 2022: Akerman's communication with Senator Kaine raised concerns about inadequacies in whistleblower protections, catalyzing legislative interest and action.

TIM KAINE
UNITED STATES SENATOR FROM VIRGINIA

Privacy Act Release
General Casework

Provisions of the Privacy Act of 1974 (Title 5, Section 552A of the United States Code) require congressional offices to obtain written permission from an individual before a federal agency can release any specific information to the Senator. Please complete the following Privacy Release Authorization and return it to our office as directed below. Family members, friends or other interested parties generally may not authorize the release of information on your behalf.

Constituent Information

Name:
Mr. Martin Akerman

Address:
2001 North Adams Street 440 Arlington, VA 22201

Preferred Name:
Martin

Date of Birth:
[redacted]

Email Address: **Phone Number:** **Social Security Number:**
[redacted]

Case Details

Do you currently have an open case for the matter described above with another U. S. Senator or Representative?
No

Federal Agency Involved:
US Department of Defense, Office of Special Counsel

Account/Claim Number:
MA-21-1602

Date of Birth: **Your Place of Birth:**
[redacted]

Tell us about your case

Briefly describe your situation.
My name is Martin Akerman and I am the Chief Data Officer of the National Guard. I was the Director of Data Strategy at the Department of the Air Force in my previous role. The job of a good CDO is to increase organizational transparency, improve efficiencies and position data for information superiority. This has huge National Security implications in the case of CDO's in the Department of Defense. I am a leading CDO in the Department of Defense, the only one directly representing the 54 States and Territories. The Department of Defense is currently utilizing Prohibited Personnel Practices to push me out. These include falsifying documentation and leveraging a seemingly untouchable Security Clearance process to disqualify me from my position. The OSC appears powerless against the Department of Defense and I am kindly requesting for you to help me get a status on my OSC case including 9 PPPs dating back to the Air Force and through the National Guard. I am also kindly asking you to help me navigate a solution with the Department of Defense through OSC. Our country cannot afford to take our brightest digital talent and destroy them professionally for doing their job exceptionally well. This incentive to maintain

status quo and disincentive to innovate, if left unmitigated, will be the single reason we will not be able to outpace our adversaries and inevitably lose.

I hereby authorize the office of U.S. Senator Tim Kaine to intercede on my behalf, and review all relevant documentation that Senator Kaine or his staff deems necessary in connection with my request for assistance. I further understand that the Senator' s office cannot request an application be granted, and expedite requests are reviewed on a case-by-case basis by the agency. The information I have provided is true and accurate to the best of my knowledge and belief. The assistance I have requested from Senator Kaine is in no way an attempt to violate any federal, state or local law.

Signature: _____ **Date:** FEB, 17, 2022

Please return this form via mail, Email or fax to:

Senator Tim Kaine
ATTN: Constituent Services
231 Russell Senate Office Building
Washington, DC 20510
fax: (202) 228-6363
Email: Kaine_Casework@kaine.senate.gov

ATTACHMENT E

Initial Application for Stay, February 28, 2022, MSPB Case No. DC-1221-22-0257-S-1: Lost by the MSPB, this application demonstrated that Akerman's security clearance jurisdiction process through DOD OIG met the criteria for a future appealable adverse action under 50 U.S.C. § 3341(j)(8).

28 February 2022

Dear Merit System Protection Board Members,

I am filing this document to **inform you** of the 3 separate but related claims that I will be sending with or without the support of the OSC in the coming days. I kindly ask you to take any actions you can to **protect me from getting unjustly placed on Suspension without pay** illegally, for being a whistleblower.

Claim 1 (Attached) is not being sent to you for action other than to **ensure that I remain on a paid status while the DOD OIG investigates retaliatory actions** against me that contributed to the revocation of my security clearances and access determinations. OSC has informed me that despite following my case for months, protecting me from actions that have to do with security clearances falls outside of their purview. **I want you to have a copy for informational purposes**.

Claim 2: I will be filing an appeal with the MSPB against OSC for dragging their feet and not protecting me and for not helping me reach a resolution after almost a year abuses by DoD, fake ADR, withholding information, and being denied due process after making protected disclosures and being retaliated against as a whistleblower.

Claim 3: My OSC case for whistleblower protection (MA-21-001602) will be coming to you soon. OSC will be informing me whether or not they will be bringing my case/s to MSPB on my behalf soon.

Martin Akerman <makerman.dod@gmail.com> Fri, Feb 25, 11:11 AM (3 days ago)
to Emily, Kaine_Casework

Hi Emily,

I need a little more clarification. MSPB requires that before I file a whistleblower complaint, that it goes through your office and be there for 120 Days without an IRA or that you issue an IRA. Does this mean that all complaints I filed with you since the second (MA-21-001602) qualify for MSPB whistleblower appeal as of today or only MA-21-001602 does? Are you going to file on my behalf or am I doing it myself?

Also, thank you for the clarification on the need to submit the PPD-19 parts directly to DOD OIG.

Thank you.

Vir,
Martin

Thank you for your time and consideration.

Very respectfully,
Martin Akerman 202-656-5601

ATTACHMENT F

Public Law 117-103, March 15, 2022: This law, directly relevant to Akerman's case, addressed the MSPB's scope of review and is crucial in the context of federal whistleblower protections.

SEC. 417. DESIGNATION OF SENATOR ROY BLUNT GEOSPATIAL LEARNING CENTER. Missouri.

(a) DESIGNATION.—The Geospatial Learning Center in the Next NGA West facility in St. Louis, Missouri, shall after the date of the enactment of this Act be known and designated as the "Senator Roy Blunt Geospatial Learning Center".

(b) REFERENCES.—Any reference in any law, regulation, map, document, paper, or other record of the United States to the Geospatial Learning Center in the Next NGA West facility referred to in subsection (a) shall be deemed to be a reference to the "Senator Roy Blunt Geospatial Learning Center".

TITLE V—MATTERS RELATING TO OVERSIGHT

SEC. 501. HARMONIZATION OF WHISTLEBLOWER PROTECTIONS.

(a) PROHIBITED PERSONNEL PRACTICES IN THE INTELLIGENCE COMMUNITY.—

(1) THREATS RELATING TO PERSONNEL ACTIONS.—

(A) AGENCY EMPLOYEES.—Section 1104(b) of the National Security Act of 1947 (50 U.S.C. 3234(b)) is amended, in the matter preceding paragraph (1)—

(i) by striking "Any employee of an agency" and inserting "Any employee of a covered intelligence community element or an agency"; and

(ii) by inserting ", or threaten to take or fail to take," after "take or fail to take".

(B) CONTRACTOR EMPLOYEES.—Section 1104(c)(1) of such Act (50 U.S.C. 3234(c)(1)) is amended, in the matter preceding subparagraph (A), by inserting ", or threaten to take or fail to take," after "take or fail to take".

(2) PROTECTION FOR CONTRACTOR EMPLOYEES AGAINST REPRISAL FROM AGENCY EMPLOYEES.—Section 1104(c)(1) of such Act (50 U.S.C. 3234(c)(1)), as amended by paragraph (1)(B) of this subsection, is further amended, in the matter preceding subparagraph (A), by inserting "of an agency or" after "Any employee".

(3) ENFORCEMENT.—Subsection (d) of section 1104 of such Act (50 U.S.C. 3234) is amended to read as follows:

"(d) ENFORCEMENT.—The President shall provide for the enforcement of this section consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations of section 2302(b)(8) of title 5, United States Code.". President.

(b) RETALIATORY REVOCATION OF SECURITY CLEARANCES AND ACCESS DETERMINATIONS.—

(1) ENFORCEMENT.—Section 3001(j) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)) is amended—

(A) by redesignating paragraph (8) as paragraph (9); and

(B) by inserting after paragraph (7) the following:

"(8) ENFORCEMENT.—Except as otherwise provided in this subsection, the President shall provide for the enforcement of this section consistent, to the fullest extent possible, with President.

the policies and procedures used to adjudicate alleged violations of section 2302(b)(8) of title 5, United States Code.".

(2) TOLLING OF DEADLINE FOR APPEAL OF PROHIBITED REPRISAL.—Section 3001(j)(4) of such Act (50 U.S.C. 3341(j)(4)) is amended—

(A) in subparagraph (A), by inserting "(except as provided by subparagraph (D))" after "within 90 days"; and

(B) by adding at the end the following new subparagraph:

"(D) TOLLING.—The time requirement established by subparagraph (A) for an employee or former employee to appeal the decision of an agency may be tolled if the employee or former employee presents substantial credible evidence showing why the employee or former employee did not timely initiate the appeal and why the enforcement of the time requirement would be unfair, such as evidence showing that the employee or former employee—

"(i) did not receive notice of the decision; or

"(ii) could not timely initiate the appeal because of factors beyond the control of the employee or former employee.".

(c) CORRECTION OF DEFINITION OF AGENCY.—Section 3001(a)(1)(B) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(a)(1)(B)) is amended by striking "and" and inserting "or".

(d) ESTABLISHING CONSISTENCY WITH RESPECT TO PROTECTIONS FOR DISCLOSURES OF MISMANAGEMENT.—

(1) SECURITY CLEARANCE AND ACCESS DETERMINATIONS.—Section 3001(j)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(1)) is amended—

(A) in subparagraph (A)(ii), by striking "gross mismanagement" and inserting "mismanagement"; and

(B) in subparagraph (B)(ii), by striking "gross mismanagement" and inserting "mismanagement".

(2) PERSONNEL ACTIONS AGAINST CONTRACTOR EMPLOYEES.—Section 1104(c)(1)(B) of the National Security Act of 1947 (50 U.S.C. 3234(c)(1)(B)) is amended by striking "gross mismanagement" and inserting "mismanagement".

(e) PROTECTED DISCLOSURES TO SUPERVISORS.—

(1) PERSONNEL ACTIONS.—

(A) DISCLOSURES BY AGENCY EMPLOYEES TO SUPERVISORS.—Section 1104(b) of the National Security Act of 1947 (50 U.S.C. 3234(b)), as amended by subsection (a)(1)(A), is further amended, in the matter preceding paragraph (1), by inserting "a supervisor in the employee's direct chain of command, or a supervisor of the employing agency with responsibility for the subject matter of the disclosure, up to and including" before "the head of the employing agency".

(B) DISCLOSURES BY CONTRACTOR EMPLOYEES TO SUPERVISORS.—Section 1104(c)(1) of such Act (50 U.S.C. 3234(c)(1)), as amended by subsection (a), is further amended, in the matter preceding subparagraph (A), by inserting "a supervisor in the contractor employee's direct chain of command, or a supervisor of the contracting agency with responsibility for the subject matter of the disclosure,

up to and including" before "the head of the contracting agency".

(2) SECURITY CLEARANCE AND ACCESS DETERMINATIONS.—Section 3001(j)(1)(A) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(1)(A)) is amended, in the matter preceding clause (i), by inserting "a supervisor in the employee's direct chain of command, or a supervisor of the employing agency with responsibility for the subject matter of the disclosure, up to and including" before "the head of the employing agency".

(f) ESTABLISHING PARITY FOR PROTECTED DISCLOSURES.—Section 1104 of the National Security Act of 1947 (50 U.S.C. 3234) is further amended—

(1) in subsection (b), as amended by subsections (a)(1)(A) and (e)(1)(A)—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and moving such subparagraphs, as so redesignated, 2 ems to the right;

(B) in the matter preceding subparagraph (A), as redesignated and moved by subparagraph (A) of this paragraph, by striking "for a lawful disclosure" and inserting the following: "for—

"(1) any lawful disclosure"; and

(C) by adding at the end the following:

"(2) any lawful disclosure that complies with—

"(A) subsections (a)(1), (d), and (g) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

"(B) subparagraphs (A), (D), and (H) of section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 3517(d)(5)); or

"(C) subparagraphs (A), (D), and (I) of section 103H(k)(5); or

"(3) if the actions do not result in the employee unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, any lawful disclosure in conjunction with—

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

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

"(C) cooperation with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General."; and

(2) in subsection (c)(1), as amended by subsections (a), (d)(2), and (e)(1)(B)—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and moving such clauses, as so redesignated, 2 ems to the right;

(B) in the matter preceding clause (i), as redesignated and moved by subparagraph (A) of this paragraph, by striking "for a lawful disclosure" and inserting the following: "for—

"(A) any lawful disclosure"; and

(C) by adding at the end the following:

"(B) any lawful disclosure that complies with—

"(i) subsections (a)(1), (d), and (g) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);

"(ii) subparagraphs (A), (D), and (H) of section 17(d)(5) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 3517(d)(5)); or

"(iii) subparagraphs (A), (D), and (I) of section 103H(k)(5); or

"(C) if the actions do not result in the contractor employee unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, any lawful disclosure in conjunction with—

"(i) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

"(ii) testimony for or otherwise lawfully assisting any individual in the exercise of any right referred to in clause (i); or

"(iii) cooperation with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General.".

(g) CLARIFICATION RELATING TO PROTECTED DISCLOSURES.—Section 1104 of the National Security Act of 1947 (50 U.S.C. 3234) is further amended—

(1) by redesignating subsections (d) and (e) as subsections (f) and (g), respectively; and

(2) by inserting after subsection (c) the following:

"(d) RULE OF CONSTRUCTION.—Consistent with the protection of intelligence sources and methods, nothing in subsection (b) or (c) shall be construed to authorize—

"(1) the withholding of information from Congress; or

"(2) the taking of any personnel action against an employee who lawfully discloses information to Congress.

"(e) DISCLOSURES.—A disclosure shall not be excluded from this section because—

"(1) the disclosure was made to an individual, including a supervisor, who participated in an activity that the employee reasonably believed to be covered under subsection (b)(1)(B) or the contractor employee reasonably believed to be covered under subsection (c)(1)(A)(ii);

"(2) the disclosure revealed information that had been previously disclosed;

"(3) the disclosure was not made in writing;

"(4) the disclosure was made while the employee was off duty;

"(5) of the amount of time which has passed since the occurrence of the events described in the disclosure; or

"(6) the disclosure was made during the normal course of duties of an employee or contractor employee.".

(h) CORRECTION RELATING TO NORMAL COURSE DISCLOSURES.—Section 3001(j)(3) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(3)) is amended—

(1) by striking "DISCLOSURES.—" and all that follows through "because—" and inserting "DISCLOSURES.—A disclosure shall not be excluded from paragraph (1) because—";

(2) by striking subparagraph (B);

(3) by redesignating clauses (i) through (v) as subparagraphs (A) through (E), respectively, and moving such subparagraphs, as so redesignated, 2 ems to the left;

(4) in subparagraph (D), as so redesignated, by striking "or" at the end;

(5) in subparagraph (E), as redesignated by paragraph (3), by striking the period at the end and inserting "; or"; and

(6) by adding at the end the following:

"(F) the disclosure was made during the normal course of duties of an employee.".

(i) CLARIFICATION RELATING TO RULE OF CONSTRUCTION.—Section 3001(j)(2) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(2)) is amended by inserting "or clearance action" after "personnel action".

(j) CLARIFICATION RELATING TO PROHIBITED PRACTICES.—Section 3001(j)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(1)), as amended by this section, is further amended by striking "over" and inserting "to take, direct others to take, recommend, or approve".

(k) TECHNICAL CORRECTION.—Section 3001(j)(1)(C)(i) of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. 3341(j)(1)(C)(i)) is amended by striking "(h)" and inserting "(g)".

Assessment.

(l) REPORT REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Inspector General of the Intelligence Community shall submit to the congressional intelligence committees a report assessing the extent to which protections provided under Presidential Policy Directive 19 (relating to protecting whistleblowers with access to classified information) have been codified in statutes.

SEC. 502. AUTHORITIES REGARDING WHISTLEBLOWER COMPLAINTS AND INFORMATION OF URGENT CONCERN RECEIVED BY INSPECTORS GENERAL OF THE INTELLIGENCE COMMUNITY.

(a) AUTHORITY OF INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY TO DETERMINE MATTERS OF URGENT CONCERN.—Section 103H(k)(5)(G) of the National Security Act of 1947 (50 U.S.C. 3033(k)(5)(G)) is amended—

(1) by redesignating clauses (i), (ii), and (iii) as subclauses (I), (II), and (III), respectively;

(2) in the matter preceding subclause (I), as redesignated by paragraph (1), by inserting "(i)" before "In this"; and

(3) by adding at the end the following new clause:

"(ii) Within the executive branch, the Inspector General shall have sole authority to determine whether any complaint or information reported to the Inspector General is a matter of urgent concern under this paragraph.".

(b) AUTHORITY OF INSPECTORS GENERAL TO DETERMINE MATTERS OF URGENT CONCERN.—Subsection (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.) is amended—

ATTACHMENT G

Response from Senator Kaine on OIG Investigation, March 30, 2022: Documenting Senator Kaine's response and the initiation of an investigation by the Department of Defense OIG following Akerman's concerns.

TIM KAINE
VIRGINIA

COMMITTEE ON
ARMED SERVICES

COMMITTEE ON
FOREIGN RELATIONS

COMMITTEE ON
THE BUDGET

COMMITTEE ON
HEALTH, EDUCATION, LABOR,
AND PENSIONS

United States Senate

WASHINGTON, DC 20510-4607

WASHINGTON OFFICE
WASHINGTON, DC 20510-4607
(202) 224-4024

March 30, 2022

Mr. Martin Akerman
2001 N Adams St Unit 440
Arlington, VA 22201-3783

Dear Mr. Akerman:

I have received the following emailed correspondence from Department of Defense in response to my inquiry on your behalf.

> ***Your inquiry on behalf of Mr. Martin Akerman was referred to the DoD Office of Inspector General. Mr. Akerman filed a complaint with the Defense Hotline on February 27, 2022. It was referred to our Office of Whistleblower Reprisal Investigations (WRI) and our Office of Investigations of Senior Officials on March 1, 2022. Both cases remain open. Mr. Akerman alleged the revocation of his security clearance, "looming" indefinite suspension, and other Prohibited Personnel Practices (PPP) actions were taken in reprisal after reporting violations of 5 U.S.C. 5502, Unauthorized office; prohibition on use of funds to management officials.***
>
> ***Mr. Akerman's indefinite suspension action and other PPP actions are currently under review at the U.S. Office of Special Counsel (OSC). WRI is currently evaluating Mr. Akerman's security clearance revocation allegation under the provisions of Presidential Policy Directive 19, "Protecting Whistleblowers with Access to Classified Information, October 10, 2012," as implemented in the DoD by Directive-type Memorandum 13-008, "DoD Implementation of Presidential Policy Directive 19," July 8, 2013 (Incorporating Change 4, July 19, 2017). Chief, Legislative Affairs***
>
> ***Chief, Legislative Affairs***
> ***Office of Legislative Affairs and Communications***
> ***DoD Office of Inspector General***

You will continue to be updated as soon as new information becomes available to my office. If you have any questions about the status of your letter please contact my Military Coordinator, Janet Lomax, by phone at 757-518-1674.

Again, thank you for writing.

Sincerely,

Tim Kaine