No. 24-187

ORIGINAL

In the Supreme Court of the United States

ERICE MAURICE KENCY,

Petitioner,

v.

CHRISTINE E. WORMUTH
SECRETARY DEPARTMENT OF THE ARMY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Erice M. Kency, pro se
6205 Independence Way
Grovetown, GA 30813
Phone: (912) 536-0940
Email: emkency@gmail.com

QUESTIONED PRESENTED

Under Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a, Congress established procedures for redress of alleged violations of veterans' reemployment rights. Preference-eligible veterans contending that their rights have been violated in either a hiring setting would be directed to file a complaint with DOL. If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the aggrieved veteran may elect to appeal the alleged violation to the Merit Systems Protection Board (MSPB) in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought...(A) before the 61st day after the date on which the complaint is filed; or (B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2)

1. The question presented is whether Congress intended for VEOA, 5 U.S.C. 3330a(d)(1)(B) "except that in no event, may any such appeal be brought—later than 15 days after the date on which the complainant receives written notification" to mean that the time period is not mandatory and veterans are authorized a procedural right to file an appeal after 15 days with the MSPB after receiving written decision from the Secretary of Labor.

STATEMENT OF RELATED PROCEDING

This case is related to the following proceedings in the United States Court of appeal Federal Circuit

U.S. Court of Appeals for the Federal Circuit in *Kirkendall v. Dept. of Army*, 479 F.3d (Fed. Cir. 2007) (reversed and remand the case)

U.S. Court of Appeals for the Federal Circuit in *Walls v. Merit Systems Protection Board,* 29 F.3d (Fed. Cir. 1994) (reversed and remand the case)

TABLE OF CONTENTS

TABLE OF CONTENTS-Continued

TABLE OF CONTENTS-Continued

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES-Continued

TABLE OF AUTHORITIES-Continued

STATUES and FED RULE:

TABLE OF AUTHORITIES: STATUES and FED RULE -Continued

OTHER AUTHORITIES

OTHER AUTHORITIES continued

PETITION FOR A WRIT OF CERTIORARI

Plaintiff, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case Appendix A.

OPINIONS BELOW

The per curium decision of the Federal Circuit is reported at 2024-1068 in Appendix A (App. 1)

The decision of the Merit Systems Protection Board is reported at Docket No 2065084 in Appendix B (App.4)

The initial decisions of the administrative law judge are reported at Docket No 1477306 in Appendix C (App.14)

JURISDICTION

The Federal Circuit entered judgment on April 02, 2024 Appendix A at App.1-3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3330a of Title 5 of the United States Code is reproduced in appendix (D) (App.20) to this petition.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clauses of the Fifth Amendment protect citizens when the federal government deprives them of life, liberty, or property, and limits the government's arbitrary exercise of its powers.

Veterans Employment Opportunities Act of 1998, 5 USC 2101 in Appendix D At App.20-36

STATEMENT OF THE CASE

Congress believes veterans who have served in the armed forces do not have an advantage when competing for Federal jobs. Government agencies' selections rules would typically exclude these veterans from competition for many government jobs. Accordingly, the Committee believes that it is incumbent upon the Federal Government to recognize the valuable Federal service those veterans have performed. Legislators amend Title 5 United States Code, to provide that consideration may not be denied to preference eligibles applying for certain positionns. With that, this case concerns MSPB unfair practices and rules interpretation on time limits for administrative appeals from the denial of claims alleging a violation of the veterans' preference law.

To establish "a uniform redress mechanism for the enforcement of veterans' preference laws in both hiring and reductions-in-force decisions," S. Rep. No. 340, 105th Cong., 2d Sess. 15 (1998); accord H.R. Rep. No. 40, 105th Cong., 1st Sess., Pt. 1, at 9 (1997), Congress enacted the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. 3330a et seq. The VEOA provides that "a preference eligible veteran who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." 5 U.S.C. 3330a(a)(1). Such a complaint "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. 3330a(a)(2)(A). If the Secretary of Labor (Secretary) is unable to resolve the complaint within 60 days of its filing, the complainant may elect to appeal the

alleged violation to the Merit Systems Protection Board (MSPB or Board). 5 U.S.C. 3330a(d)(1). In the language at issue here, the VEOA section 3330a(d)(1)(B) provides that "in no event may any such appeal be brought * * * before the 61st day after the date on which the complaint is filed; or * * * later than 15 days after the date on which the complainant receives written notification from the Secretary" that he was unable to resolve the complaint.

Plaintiff is a 100 percent disabled veteran who applied for a civilian position of Intelligence Specialist (Staff Management) at the Dept of the Army base on Fort Eisenhower, Georgia. The Dept of Army denied plaintiff's the right to apply for the vacancy under preference eligible status. Preference eligible defined under 5 U.S.C. § 2108: Veteran; disabled veteran. In accordance, the agency did not follow 5 U.S. Code § 3304 (f), Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications.

Congress addressed veteran preference eligibility in 5 U.S.C. § 2302. Prohibited personnel practices. The law states, "any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority. knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or who knowingly fail to take, recom-

mend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement.[1]

Plaintiff, a preference eligible veteran, pro se sought relief from the Secretary of Labor, contending that the Army violated the Veterans Employment Opportunities Act of 1998 (VEOA), when the Depart of the Army denied his veterans' preference status when they denied his application as a preference eligible on a vacancy announcement subject this complaint. Plaintiff filed a complaint with DOL within the 60 day statutory time limit. When his investigation was closed, the Department of Labor, Veterans' Employment and Training Service (DOL VETS) sent two separate email notifications informing of the Secretary's decision and his right to file an appeal. The Secretary sent the first email notification on 6 December 2017. Five days later the Secretary sent a second email notification on 11 December 2017. The Secretary's email notifications did not provide any specific instructions explaining which of the two dates from the two separate email notifications should be used to initiate the appeal with MSPB. Each email notification stated "the appellant must file the VEOA appeal with the Board "within 15 days "after the date of receipt of the Secretary's notice. DOL never provided an explanation on which email notification to follow. Plaintiff utilized the Dec 11, 2017, email notification to establish the timeline to file an appeal in accordance with DOL instructions. DOL instructions conflict with Con-

---

[1] PUBLIC LAW 105–339—OCT. 31, 1998

gress intent. Dol instructions specifically uses mandatory language "within". Congress wrote that for this procedural step in veteran redress "except that in no event may any such appeal be brought—later than 15 days after the date on which the complainant receives written notification". [2]

Plaintiff filed an MSPB appeal later than 15 days after receiving notification from the Secretary of Labor. The administrative judge's initial order dismissed his appeal, finding that the petitioner's MSPB appeal was untimely filed. The AJ stated that the MSPB appeal was not filed with the Board "within 15 days after the date of receipt..." siting 5 CFR § 1208.22 (B). Here. MSPB has placed a mandatory statutory time limit that contradicts Congress intent behind the rules established for disabled veteran's redress.

Plaintiff then filed an administrative petition for review with the full Board. Plaintiff's understanding of the MSPB administrative process was that this was the fairest step. Plaintiff argued that his appeal was filed timely based on 5 U.S.C. 3330a(d)(1)(B) that the 15- day period for filing his appeal did not begin until after the second email notification was received on December 11. A Couple years later, the Board denied plaintiffs petition for review. The Board affirmed the administrative judge's initial decision, dismissing the petitioner's appeal as untimely filed.[3]

---

[2] H. Rept. 105-40 and S. Rept. 105-340

[3] MSPB regulations and case law establish that the Board will not consider an argument raised for the

Plaintiff timely filed an appeal with the United States Court of Appeals for the Federal Circuit. The Fed Circuit misunderstood plaintiffs' key arguments. Plaintiff primarily argued that he timely filled an appeal with the Board on December 11, 2017, He continued by stating it was timely based on 5 U.S.C. 3330a(d)(1)(B). The Federal Circuit dismissed that argument as unpersuasive. Whereas the Fed Circuit only referred to plaintiff's procedural right based on the contradicting MSPB regulation, 5 C.F.R. § 1208.22(b). The Federal Circuit decision further references that there is a mandatory 15-day deadline. This opinion further ignores plaintiff's procedural rights, under the Due Process class, as they are authorized by congress in 5 U.S.C. 3330a(d)(1)(B) may any such appeal be brought... later than 15 days after the date on which the complainant receives written notification from the Secretary.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari because Congress did not authorized MSPB to issue a Rule that change the statutory intent for veterans' redress under section 3330a.[4] In MSPB's initial order, they AJ stated "To have been timely,

---

first time on review without a showing that it is based on new and material evidence not previously available despite the party's due diligence. E.g., *Clay v. Dep. of the Army*, 123 M.S.P.R. 245, 249 (2016); *Banks v. Dep't of the Air Force*, 4 M.S.P.R. 268, 271 (1980); 5 C.F.R. § 1201.115(d).

[4] PUBLIC LAW 105–339—OCT. 31, 1998

the appellant's appeal must have been filed 15 days after he received notification that the DOL VETS had closed his complaint. 5 U.S.C. § 3330a (d)(1)(B)." MSPB issued its final order deciding, "A VEOA appeal must be filed within 15 days after the complainant receives written notification from DOL that the complaint could not be resolved. The 15-day deadline is statutory and mandatory, with no provision to waive the deadline for good cause shown." MSPB has expressly redefined the statutory time period to be a mandatory time limit in 5 CFR 1208.22. MSPB has gravely erred when it misinterprets Congress intent for veteran redress in 5 U.S.C. § 3330a(d)(1)(B).

(A) Congress statutory language in VEOA, section 3330a(d)(1)(B) which states "except in no event may any such appeal be brought... LATER THAN 15 days after the date on which the complainant receives written notification from the Secretary" is an important issue for addressing violations of procedural rights under the Due Process Clause.

In S. REP. NO. 105-340, 1998 WL 658809, at *16 (1998), Congress amended title 5 to create a uniform redress mechanism, modeled after the procedures established in the Uniformed Services Employment and Reemployment Rights Act of 1994 for redress of alleged violations of veterans' reemployment rights.

Congress enacted a stepped process for veteran redress. Congress writes in section 3330a(d)(1), If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe. Next Congress further instructs, "except that in no event may any such appeal be brought—"(A) before the 61st day after the date on which the complaint is filed; or (B) later than 15 days after the date on which the complainant receives written notification from the secretary.

The administrative judge denied plaintiff appeal as untimely. The AJs decision provides conflicting interpretation of congress intent behind the language in 3330a(d)(1)(B).[5] In *Kirkendall v. Dept. of Army*, 479 F.3d 830, 833 (Fed. Cir. 2007) the Fed Circuit examined the statue to determine if Congress allowed equable trolling. In deciding if equitable trolling was allowed, the Fed Circuit

---

[5] Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). *Kirkendall v. Dept. of Army*, 479 F.3d 830, 840 (Fed. Cir. 2007)

examine Congress intent with the specific statutory language "in no event" section 3330a(d)(1). In that case Fed Circuit Court ignored the remaining part of the statute where in Section 3330a(d)(1)(B) congress attached statutory language that allowed VEOA appeals to be filed "LATER THAN 15 days". Whereas Congress used "except in no event" to prevent any possibility that the MSPB could establish procedures or policies that would obstruct or prohibit appeals from being brought in cases of alleged violations of veterans' preference rights.

Kirkendall v. Dept. of Army argues how Congress intent should be interpreted.

In *Kirkendall v. Dept. of Army, 479 F.3d 830, 860 (Fed. Cir. 2007)*, Congress may not have allowed for exceptions because it did not intend for there to be any — as the "in no event" language plainly suggests. Moreover, when Congress speaks clearly expressing its intent that "in no event" may the time period be extended, it seems inappropriate to conclude that the fact that it did not say it twice ought to weigh against giving force and effect to Congress's words. The opinion in Kirkland further stated, "particularly where the statute upon which the VEOA was based included no time limits for filing an appeal." See *Kirkendall v. Dept. of Army*, 479 F.3d 830, 859 (Fed. Cir. 2007) Further the opinion explained, "the purpose of the "in no event" clause within section 3330a(d)(1), we find that the statutory language itself is not unusually emphatic. Rather, in this context, it is analogous to the statutory language of "barred" and "shall be filed"

found in *Glus*, 359 U.S. at 231, 79 S.Ct. 760; *Irwin*, ; *Bailey v. West*, 160 F.3d at 1361; and *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, 1293 (Fed. Cir.2004) *Kirkendall v. Dept. of Army*, 479 F.3d 830, 840 (Fed. Cir. 2007)

GAJARSA, Circuit Judge, concurring, with whom Circuit Judge NEWMAN and Senior Circuit Judge PLAGER join." *Kirkendall v. Dept. of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) Judge Gajarsa argues, It defies logic to suppose that when Congress adopted the VEOA in 1998, well after the Supreme Court's decision in *Irwin*, it intended the narrow interprettation that the government gives it. *See Young*, 535 U.S. at 49-50, 122 S.Ct. 1036 (citations omitted). *Kirkendall v. Dept. of Army*, 479 F.3d 830, 841 (Fed. Cir. 2007)

The relevant case, in Kirkland, mainly focused on language ripe for deciding equitable trolling. In doing so, the court had to determine if the specific language in section 3330a(d)(1) was jurisdictional while utilizing opinions from *Irwin* and *Brockamp*. The opinion points out that the Supreme Court nevertheless cites it in *Young, 535 U.S. at 49, 122 S.Ct. 1036,* to support the proposition that limitation periods are customarily subject to equitable tolling, unless it "would be `inconsistent with the text of the relevant statute.'" (citations omitted). *Kirkendall v. Dept. of Army, 479 F.3d 830, 838 (Fed. Cir. 2007).* Here the Federal Circuit's precedent conflict with the statutory language in section 3330a(d)(1)(B).[6]

---

[6] Congress chose a more rigid time period for bringing actions to the Board once the administrative

Congress established that an appeal had to be filed "within 60 Days" to DOL. Then congress removed the language "within". Whether congress provided that "except that in no event may any such appeal be brought—" First before the 61st day after the date on which the complaint is filed. This rule gives DOL 60 days to investigate. Next Congress introduces an exception "except that in no event" to the process to prevent MSPB from implementing rules against a veteran's decision to proceed with an appeal. Lastly, after DOL has concluded its investigation then an appeal may be brought later than 15 days after the date on which the complainant receives written notification from DOL.

(B) MSPB's administrative rules in 5 CFR 1208.22 (b) VEOA "must file the

---

process was underway. Again, proper weight should be given to the words Congress chose, especially where Congress itself has drawn a distinction in the words it used in the same statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n. 9, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (stating that there is a "usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" (internal citations and quotations omitted)); *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (6th ed. 2000) *Kirkendall v. Dept. of Army*, 479 F.3d 830, 857-58 (Fed. Cir. 2007)

VEOA appeal with the board within 15 days after the date of receipt of the Secretary's notice" conflict with congress's statutory language that VEOA appeals may be brought "later than 15 days after the date on which the complainant receives written notification from the Secretary" in section 3330a(d)(1)(B).

According to Black's Law Dictionary, "later than" typically denotes an action or event occurring after a specified time or date. *In Smith v. Department of Labor, 20 F.3d 123 (2d Cir. 1994)*, the Second Circuit Court of Appeals analyzed the phrase "later than" in a similar context to allow for actions or -ings after the initial deadline, provided certain conditions were met. Congress reveals that the intent behind establishing the timeframe for appealing to the MSPB was to ensure complainants have a reasonable opportunity to exhaust administrative remedies after initial attempts at resolution.

The use of the language "within" under 5 CFR 1208.22 clearly provides a statutory time limit that does not comply with Congress decision to enact a procedural process that provides uniform redress mechanism for the enforcement of veterans' preference laws. When Congress explicitly establishes a requirement—such as filing a complaint within a certain time period—the Board generally cannot waive it. See *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 385 (1990) (explaining that a statutory deadline cannot be waived except in rare circumstances) Notwithstanding, MSPB erroneously

decided that where Congress is silent and the Board has the power to establish a requirement, that requirement can be waived. MSPB established an additional conflicting time requirements that states, "If DOL issues a letter, the appeal cannot be filed "more than 15 days after receipt of the letter". In the article sited below, MSPB explains that parties must look to the rules established for their specific subject matter or risk having their case be dismissed. Absent equitable tolling, a failure to timely file a complaint with DOL will deprive MSPB of jurisdiction.[7] The article clearly articulate MSPBs decision to ignore Congress intent for VEOA section 3330a(d)(1)(B). Veterans filing appeals pro se, can easily interpret the statutory language "except in no event may an appeal be brought" in section 3330a(d)(1) combined with the statutory language "later than 15 day after receiving notice" in section 3330a(d)(1)(B) to be interpreted as Congress's intent for VEOA appeals to be filed after 15 days.

The statutory language in section 3330a(d)(1)(B) provides no clear indication that Congress wanted that provision to be treated as having mandatory and jurisdictional attributes. Section 3330a(d)(1)(B) expressed that Congress intent is that veterans may file an appeal with the MSPB later than 15 days after receiving notification from the

---

[7] Veterans Employment Redress Laws in the federal civil service article, https://www.mspb.gov/studies/studies/Veterans_Employment_Redress_Laws_in_the_Federal_Civil_Service_1103655.pdf

Secretary of Labor. If Congress had wanted the 15 day time to be treated as mandatory and jurisdictional it could have cask that provision in language that stated "within 15 days after receiving from the Secretary of Labor or no later than 15 days after receiving notice from the Secretary of Labor.[8]

In *Kirkendall v. Dept. of Army*, the government argues section 3330a(d)(1)(B) contains such "unusually emphatic language. The government further acknowledges that the VEOA statue does not provide language that a VOEA appeal must be filed within 15 days or that a VEOA appeal shall be barred unless it is filed within 15 days. The government sites Irwin, 489 U.S.at 94-95 (discussing status worded in that manner). Siting Judge Moore noted in her dissenting opinion in *Kirkendall v Dept. of Army* "Congress could not have been clearer." Judge Moore statement rejects MSPB erroneously interpretation of the language in section 3330a(d)(1)(B) and in its implementtation of the language in CFR 1208.22. Whereas Judge Moore's statement supports congress intent in section 3330a(d)(1)(B) that VEOA appeals may be brought "later than 15 days after the claimant receives notice from the Secretary of Labor.

Kirkendall v Dept. of Army further exploits the government attempt to disprove congress intent for

---

[8] In *Kirkendall v. Dept. of Army*, the government argued that the 15 day time limit was mandatory and jurisdictional. The Court of appeal rejected the government's argument that the 15 day statutory time limit for filing a VEOA appeal with MSPB is jurisdictional.

VEOA section 3330a(d)(1)(B) and denial of statutory language conflict with CFR 1208.22. The government argued, in other federal statutes establishing filing deadlines, the phrase "in no event" has consistently been strictly construed. Several major statutes provide that an action must be brought within a specified limitations period and "in no event" may be brought outside a longer period of repose. See, e.g., 15 U.S.C. 77m (Securities Act of 1933); 15 U.S.C. 78i(e) (Securities Exchange Act of 1934); 31 U.S.C. 3731 (False Claims Act). In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbert son, 501 U.S. 350 (1991).* The government's argument continued, that statute provides, in relevant part, that "in no event shall any * * * action be brought * * * more than three years after the security was bona fide offered to the public." 15 U.S.C. 77m. The Court reasoned that "the purpose of the 3-year limitation is clearly to serve as a cutoff." Lampf, 501 U.S. at 363. Lower courts construing similarly worded statutes have reached the same result. See, e.g., *Cook v. Deltona Corp.*, 753 F.2d 1552, 1562 (11th Cir. 1985); *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1042-1043 (10th Cir. 1980). Here it is apparent that MSPB adoption of mandatory language "within" in CFR 1208.22 is not authorized by congress. Unlike other statutes and rules, Congress did not intend for section 3330a(d)(1)(B) to have a cutoff. Congress intended for section 3330a(d)(1)(B) to be the final procedural step that provides that "a preference eligible veteran who alleges that an agency has violated such individual's rights under any statute or regulation

relating to veterans' preference may file a complaint with the Secretary of Lab

(C) Plaintiff's procedural rights under due process were violated by the Administrative Judge's initial decision when he filed his appeal to the board Later than 15 days after receiving notice from the Secretary of Labor.

The appellant filed a timely appeal with the MSPB. DOL investigator sent an email on 6 December 2017. Attached in the email was a letter that stated VEOA appeal must be filed "within 15 days after receiving notice". On 11 December 2017, the DOL investigator sent a second email that contained a letter that informs VEOA appeals "must be filed within 15 days after receiving notice. The second email notice was sent in order for the DOL investigator to provide an error free letter with the correct case number that references the appellant's case. The appellant proceeded to file an appeal with the MSPB based on the notice that was received on 11 December 2017 per guidance Under 5 U.S.C. § 3330a(d)(1)(B). The AJ's initial decision improperly dismissed the appellant's appeal for failing to file an appeal with the board based on 5 CFR 1208.22 (b) Veterans "must file the VEOA appeal with the board within 15 days after the date of receipt of the Secretary's notice an appeal. MSPB and Federal Circuit affirmed the AJ's decision on subsequent opinions.

In his handling this VEOA appeal, the AJ ignored internal MSPB rules providing an unfair

process. Thousands of appeals are filed with the Board every year. For the 2022 fiscal year, administrative judges in the regional offices and field offices issued 4,867 decisions. U.S. Merit Systems Protection Board, Annual Report for FY 2022, at 1 (Apr. 18, 2023), https://www.mspb.gov/about/annual_reports/MSPB_FY_2022_Annual_Report_2022671.pdf. Generally, "about 50%" of appellants are pro se. MSPB, Congressional Budget Justification, supra, at 18.

Because of the frequency of pro se status, the Board's Judges' Handbook states: "The MSPB's policy is to make special efforts to accommodate pro se appellants. Generally, the AJ should not reject filings by pro se appellants for failing to comply with technical requirements, unless the violations are repeated after a clear warning." U.S. Merit Systems Protection Board, Judges' Handbook, ch. 2, § 7, at 11 (Oct. 2019), https://www.mspb.gov/appeals/files/ALJHandbook.pdf.

Consistent with that policy, the procedural deadlines governing adjudication before the Board are flexible to accommodate employees who often proceed without counsel. The deadline to file an appeal of most agency decisions with the Board is 30 days. 5 C.F.R. § 1201.22(b)(1) ("An appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later."). This deadline is non-jurisdictional, and noncompliance may be excused for good cause. *Lacy v. Dep't of the Navy, 78 M.S.P.R. 434, 436–39 (1998).* And when an appeal is dismissed

without prejudice, and the appellant misses the refiling deadline, the Board may waive the refiling deadline for good cause, 5 C.F.R. § 1201.29(d), and the appellant's pro se status is a factor supporting a finding of good cause, *Gaddy v. Dep't of the Navy, 100 M.S.P.R. 485, 489 (2005).*

This VEOA appeal was filed in accordance with the procedural process outlined in 5 U.S.C. § 3330a(d)(1)(B). Despite DOL investigator's decision to send multiple notices to file an appeal with the Board, Congress established a non-restricted procedural step for veteran's appeal to proceed through the administrative process of the Board. *Kirkland v Dept. of Army* satisfies key arguments that Congress did not intend for appeal to be denied based on the 15 day time period. The AJ's initial decision violated that right when he erroneously interpreted the statutory language in 5 U.S.C. § 3330a(d)(1)(B) to contain strict words such as "within". Thus the Federal Circuit opinion affirms the CFR 1208.22(b) erroneously interpretation of Congress intent. Federal Circuit repeatedly has deprived federal employees, usually proceeding pro se, of judicial review of their employment rights by summarily dismissing untimely appeals. The Federal Circuit incorrect interpretation of this deadline therefore explodes Congress's statutory scheme to protect disabled veterans" rights.[9]

---

[9] In Henderson, this Court explained that statutory filing deadlines should not be interpreted to create jurisdictional bars for litigants unless Congress clearly intended that result. 562 U.S. at 434–35; see

The Federal Circuit and Board denial decisions conflict with *Walls v. Merit Systems Protection Board* (1994) in which Fed Cir ruled that a Veterans' pro se status and minimal delay collectively constitute good cause for the untimely filing of petitioner's appeal.

In *Walls v. Merit Systems Protection Board (1994)*, the Federal Circuit considered factors such as inadequate notice, the appellant's pro se status, and emotional strain as contributing to "good cause" despite a minimal delay in filing. The Federal Circuit reversed the MSPB's dismissal of Walls' appeal as untimely filed. The Federal Circuit determined that the notice provided to Walls was inadequate, especially considering his pro se status and the emotional stress he experienced. The court emphasized that even minimal delays, when combined with other factors such as pro se and emotional strain, can collectively constitute "good cause" for an untimely filing. This decision emphasized the importance of understanding and leniency in procedural rules.

Appellants' arguments based on being pro se, minimum delay and other mitigating factors resonates with the precedent set in *Walls v. Merit Systems Protection Board (1994)*, where the Federal Circuit emphasized that even minor delays, when coupled with efforts to comply and demonstrated diligence,

---

also *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 25 n.9 (2017).

was enough justification for granting relief. Similarly, in *McCarthy Barnes, Jr. v. MSPB (2015)*, the Federal Circuit reversed a dismissal based on a minor filing delay of 3 days caused by efforts to comply with procedural rules. In appeals brought with similar arguments, the MSPB reversed the AJ's decision, remanding those cases for further proceedings on the merits, establishing a precedent for evaluating "good cause" in similar cases before the MSPB. In *Washington v. Department of Veterans Affairs (1996)*, the board reopened the appeal even after deciding to affirm the AJs decision after deciding not to hear arguments based on evidence that was available for the before the close of the record. In *Jack R. Daniel v. Tennessee Valley Authority (1996)*, the board vacated the AJ's order because it recognized the appellant's confusion, being pro se and brief delay in filing as justifying waiver of the filing deadline. See similar cases, *Helen J. Lipscomb v. Department of Defense (1996)*, *Woodyard-Hamilton v. Office of Personnel Management (1994)*, where the Board echoing principles established in Walls vacated the AJs decision and remanded the cases for further processing. These records implicate the Federal Circuit and MSPB inconsistencies and unfair implementation of the veteran's redress statue under Section 3330a.

CONCLUSION

MSPB erroneously misrepresented the statutory intent for filling VEOA appeals with the board as defined in Section 3330a(d)(1)(B). MSPB lacked the authority to change the statutory language and

Congress intent from "allowing appeals to be filed later than 15 days" to "mandating veteran's appeals has to be filed within 15 days" in 5 CFR 1208.22.[10] The petition for a writ of certiorari should be granted.

DATED: August, 14, 2024

Respectfully submitted,

s/

Erice M. Kency, pro se
6205 Independence Way
Grovetown, GA 30813
Phone: (912) 536-0940
Email: emkency@gmail.com

[10] Administrative Procedure Act