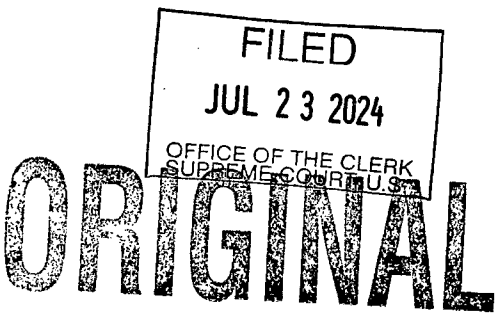
24-5177

IN THE

SUPREME COURT OF THE UNITED STATES



MARGARET M. REED,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

DOCKET NUMBER

DATE: July 19, 2024

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Whistleblower Protection Act, does an HR specialist who, after reporting her coworker and first level supervisor for harassment , engage in protected activity, sufficient to merit protection from retaliation under the Act, when she discloses to the 4th level supervisor that 1) the same coworker and supervisor later fabricated evidence against her to get her disciplined, in violation of Agency rules and the Federal Code of Ethics; 2)that the second level supervisor used that fabricated evidence to discipline the specialist without affording her any due process notice of the charges or chance to respond, in violation of the mandatory procedures set forth in the agency policy and in the Constitution; 3) that the second level supervisor then intentionally failed to address these matters that were set forth in the specialist's informal grievance of the discipline, in violation of agency policy, their HR job requirements, and the Federal Code of Ethics, and also failed to follow numerous other mandatory procedures, including, but not limited to, allowing the specialist to present the grievance orally, with a representative, 4) that the second and third level supervisor even failed to permit the 4th level supervisor to serve as deciding official to the formal grievance, as required by the agency policy, and instead, allowed the third level supervisor to write a fraudulent document that he tried to pass of as a formal grievance decision, in violation of agency policy, and 5) that the second and third level supervisor tried to prevent the specialist from meeting with the 4th level supervisor about these issues, and threatened discipline for doing so before the entire HR staff?

2. Did the Federal Circuit err in holding that the VA policy governing disciplinary actions and grievances of all VA employees, that was published in the federal register and that encompasses the statutory, regulatory and legal requirements governing disciplinary actions of all VA employees, which the VA Secretary is mandated to carry

out, is not a law, rule or regulation, and that as a result, an HR Specialist, whose very job it is to ensure agency compliance with this policy in the taking of such personnel actions, who witnesses and reports repeated willful violations of this policy by the human resources management officials charged with ensuring agency compliance, is not afforded any whistleblower protections?

3. Did the administrative judge err when she 1) determined that these disclosures were not protected; 2) unilaterally disallowed the very joint stipulations that the judge required be submitted into evidence, where the agency stipulated that the procedures I reported were required in both agency policy and job duties and that the alleged misconduct and management's failure to address the alleged misconduct, represented violations of agency policy and the Federal Code of Ethics; 3)unilaterally determined that the agency policy does not apply to me or to any other Title 5 employee, despite the fact that this is wholly inaccurate, contradicts the plain language as written, and neither party to the case would have dared to make that argument?

4. Whether an agency commits a due process violation when it disciplines an employee without providing the employee notice of the allegations and an opportunity to respond, in accordance with the mandated procedures set forth in its own policy, the Due Process Clause of the Constitution, and the ruling in Cleveland Bd. of Educ. v. Laudermill 470 U.S. 532 (1985)?

5. Whether the AJ erred and/or engaged in retaliation per se by holding that the whistleblower's written report of her supervisor's inappropriate conduct was an admission of the whistleblower's misconduct where the whistleblower's report lacks any such admission?

6. Did the AJ err when she unilaterally disallowed the joint stipulations to serve as evidence without any credible basis to do so, despite the fact that the agency had stipulated to the policy requirements, management's failure to follow those policy requirements, and to the fact that the whistleblower reported these policy violations to their superior?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES CITED

CASES

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)

Rusin v. Dept of Treasure, 92 M.S.P.R. 298 (2002) (holding that failure to follow agency's own policy is a violation of rule).

STATUTES AND RULES

Whisleblower Protection Act

Due Process Clause of the United States Constitution

Federal Code of Ethics 5 CFR 2635 (Standads of Ethical conduct for Employees of the Executive Branch)

5 U.S.C. Chapter 73
5 U.S.C. 2301
5 U.S.C. 2302

OTHER

VA Directive and Handbook 5021 (Employee Relations)

OPINIONS BELOW

- *Reed v. Dep't of Veterans Affairs*, 23-1628, U.S. Court of Appeals for the Federal Circuit. Judgment entered February 7, 2024.

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-B-1, 2023 WL 2213175 (M.S.P.B. Feb. 24, 2023).

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-B-1, 2016 WL XXXXXXX (M.S.P.B. July 27, 2016).

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-M-1, 2015 WL XXXXXXXX (M.S.P.B. Sept. 25, 2015).

- *Reed v. Dep't of Veterans Affairs*, 15-3094 U.S. Court of Appeals for the Federal Circuit. Judgment entered entered June 23, 2015.

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-R-1, 2015 WL 2XXXXXXX (M.S.P.B. January 6, 2015). 2015 MSPB 2 122 M.S.P.R. 165 (2015)

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-W-1, 2014 WL 2XXXXXX (M.S.P.B. Nov. 25, 2014). 2014 MSPB 85?

- *Reed v. Dep't of Veterans Affairs*, No. CH-1221-13-1557-W-1, 2014 WL XXXX (M.S.P.B. March 31, 2014).

JURISDICTION

Petition Denied April 24, 2024

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Whistleblower Protection Act (WPA) 5 U.S.C. §2302 (b)(8)

Due Process Clause of the Constition-5th Amendment-

Federal Code of Ethics

STATEMENT OF THE CASE

Background

In 2009, I began working in the employee and labor relations section of human resources at the Department of Veterans Affairs Medical Center in Dayton, Ohio, where I took pride in the job responsibility of ensuring that every employee, whether supervisory or not, received the rights and procedures due in every case we handled, as required in VA Handbook 5021, the mandatory policy governing disciplinary actions and grievances of employees within the Veterans Health Administration.(Appendix I-1 , I-2, I-3, J K[1]) As convoluted as that policy is, I loved it because it mandates in accordance with due process requirements, that before any employee receives formal disciplinary action, that person would first have notice of the allegations, and a chance to respond[2].(App I-2.) Any employee alleged to have committed an offense is afforded notice of the allegation and a chance to respond before any determination that disciplinary action is warranted.

I started the job as a single mom of a two- year -old, having left my legal job in DC during maternity leave, to return to my hometown after my son was born. Although this was my first job as a new mom, I had previously graduated from Howard University School of Law, where I embraced the notion of due process with passion. I still remember learning about the case of Cleveland Bd. of Educ. v.

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[1] See also Joint stipulation 15

[2] See also, Joint stipulation 5, stating that, It is stipulated that VA Handbook 5021 states, in pertinent part, "In cases involving a potential disciplinary action, information concerning the matter will be sought from the employee who is alleged to have committed the offense," and "An employee shall be given a reasonable opportunity to present his or side of the case."

Laudermill[3], from the Introduction to Legal Research, Reasoning, and Writing course taught during the first year of law school. That case held that a government employee is entitled to the due process protections of notice and a chance to respond before the government can adversely impact that person's property interest in their employment. (App L). This job required me to ensure that every employee receive due process, which I embraced. (App K).

Theresa Webb, the HR Chief who hired me, sang my praises, perhaps to the chagrin of senior coworker, Anita Carmichael, who had been a supervisor before Webb abolished the position. When the supervisory position was restored, Webb chose not to promote Carmichael, and hired someone else instead. The first person they hired had left shortly before I started and was rumored to have complained that it was a hostile work environment. I learned that we were actively recruiting a new supervisor, and the selection was Jennifer Pardun. Pardun relied heavily on Carmichael's nearly 30 years of seniority to help her learn the ropes, which might explain why Pardun seemed to condone and even partake in bullying and groundless attempts to sabotage my career. (App H p. 4)

To make matters worse, Webb, who was my third level supervisor, retired at the same time as the second level supervisor, which now left me unprotected from the bullying I had endured at the hands of Carmichael and Pardun. (App M[4]). HR Chief, Jerry Erwin and Assistant HR Chief Rolanda Watkins were their replacements. (App M p.30 no.63)

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[3] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)

[4] See Fact 16, et al

During the time most relevant to this case, both the evidence and undisputed facts show that I submitted written complaints to Watkins reporting hostile work environment by coworker Carmichael on December 21, 2011, and Pardun on January 9th, 12th, 27th, and February 3, 2012. (App M-page 18, App J 2,3).

On January 11, 2012, I met with Watkins to discuss my most recent complaint reporting Pardun. During the meeting, Watkins instructed me to notify Pardun via email in order to document the conduct and to put Pardun on notice to correct her behavior. Id. The very next morning, (January 12, 2012), I followed Watkins' advice, and emailed Pardun regarding my perception of her conduct during the exchange that had just taken place. I also forwarded that email to Watkins to let her know that I had followed her advice. (Id.)

On January 17, 2012, Watkins asked me to write a report of contact to officially document the details of my complaint regarding the interaction I had reported to Watkins via email on January 12, 2012. (Id)

My report describes Pardun's disrespectful treatment as a pattern that had, "shown its head repeatedly." In the report, I complain that Pardun had yelled at me, and that:

> I started discussing calmly my point of view, and she started reading aloud from her computer as I was talking. It was very rude, but not at all out of the ordinary in terms of blatant rudeness and open disrespectful behavior from her. I explained, 'I am trying to have an important discussion with you.' "I'm listening, she replied, "I am just reading aloud, she said teasingly, and proceeded to read aloud. I was incensed, and returned to my office to draft the attached email that I sent to her at 8:39.a.m.

On February 13, 2012, Watkins issued me an adverse personnel action (App A, dissenting opinion), charging me with "Disrespectful Conduct Toward your Supervisor." Watkins also gave me a copy of the evidence file used to support the personnel action. I was stunned as I sat in her office reading the letter of admonishment that accused me of engaging in behavior that no one had asked me about, and that struck me as an over the top fictitious scenario that lacked credibility.(App H) This letter states that I yelled repeatedly, and that I was pacing between my door and Pardun's door, which was a full hallway away, and that this pacing caused my supervisor to "feel trapped and apprehensive regarding my next move." My personnel file was hijacked. Not only that, but it was Watkins who told me to take the steps that were used to pull it off.

When I mentioned that I had been given no notice of those accusations, Watkins said that I could file a grievance. (App M 19 and 20.) Even a cursory review of the witness statements in the evidence file convinced me that the reports by everyone other than Carmichael and Pardun had been misconstrued because they seemed to be reporting Pardun as the person who was being disrespectful, which was accurate. I therefore asked Watkins if I could collect clarifying statements from other staff to submit with my grievance. Watkins told me no, but also assured me that she planned to conduct an additional fact-finding as part of the grievance process. However, Watkins did no such thing. Id.

Watkins stated that Carmichael had been the first to present a written complaint regarding the alleged incident. (App M page 19). It was clear to me that

Carmichael and Pardun had fabricated the statements, likely in review of the email Watkins had instructed me to send to Pardun. In my assessment, their written statements were incredible, implausible and inconsistent. (App H) I also assessed that the other statements within the evidence file actually proved that the incident depicted within the fabricated statements did not happen. (App N).

The day after receiving the admonishment, I emailed Watkins questions about the agency grievance process, and reiterated my report about the fabricated evidence as follows:

> The other thing I am dealing with is the blow after reading the evidence file, which I believe supports my claims of abuses of power, hostile work environment, ect, and am wondering how best to add this for consideration into the investigation of that claim. This is not the first time something like this has been attempted, though I have never been privy to the statements before because no discipline was issued. I think it worthwhile to consult Iola to see if by chance she would still have statements from the previous attempt at unfounded discipline. I wondered if, even though the grievance is pending, if I shouldn't submit a report of contact that spells out that this is a complete fabrication.

(App O, Exhibit NN p.9)

On February 24, 2013, I filed a written informal grievance with Watkins, which is the required first step in VA Handbook 5021.(App J1 p.181) Although requested, Watkins denied my request to present the grievance orally with my representative. App P-DD) The document reiterates my lack of prior knowledge of the allegations and my beliefs about Carmichael and Pardun's wrongdoing. The conclusion section of my informal grievance states:

> Consider my reaction upon receipt of the admonishment, and in reading the paragraph describing the offense. I was incredulous. I am asserting as strongly as possible that the statements provided by Jennifer and Anita are fabricated. The discussion they allege occurred simply did not occur. Moreover, it is obvious that both statements were written with motive and intent. I believe the evidence supports withdrawal of the admonishment, and I respectfully request that it be rescinded. I also request that the misconduct that has occurred against me at the hands of Jennifer and Anita be addressed for the egregious acts that they are. There is a direct nexus between the misconduct and the positions that we hold. There is no way this kind of injustice against an innocent employee should be tolerated or allowed to ever happen again." (App N p. 49)

I later submitted this document along with a fraudulently decided formal grievance and decision that again simply rubber stamped the informal decision, to the Director via email in June, and discussed the unaddressed disclosures with him on August 29, 2012. (App J, P and N at p. 62).

It is important to note that my subsequent disclosures to Director Costie took place before I collected the exonerating witness statements that corroborated my report about Carmichael and Pardun's fabrications because those corroborating witness statements that should have served to exonerated me from the admonishment were not collected until after Erwin proposed to suspend me, and the reply procedures gave me permission to collect and submit witness statements about the prior discipline in order to argue that the prior discipline should not be given any weight. (App A and Q 9-11)

I find it also noteworthy that HR withheld my reply to the proposed suspension from agency counsel when they submitted the record to MSPB, (App M p.45) but I have included those items in the appendix for review at (Id at App. Q).

On April 18, 2013, I filed the formal grievance that Watkins was supposed to forward to the Director to serve as deciding official, stating:

I have pasted the content of my written informal grievance statement for reconsideration, as it appears that the content within the informal grievance was not addressed at the informal level.

The formal grievance explains that I had asked if I could obtain witness statements to shed light on the issue, but that Watkins had instructed me not to do this. (App N p.42) Instead, Watkins had promised that she would conduct additional fact-finding with the coworkers as part of her obligation to address the matters raised within the grievance, but instead, never did so. This is why I never got due process with the admonishment. Where there is a due process violation, the grievance would have permitted that due process violation to be corrected by having the deciding official consider my response that I was not able to give before and take the steps that otherwise would have been taken before making the determination about what level of discipline is warranted, if any. In my case, the evidence demonstrated that no discipline should have been issued to me[5]. The evidence demonstrates that if this fact finding would have been done at the grievance stage

[5] This is evident based on the exonerating witness statement I was able to obtain in clarification of the statements that Watkins apparently misconstrued when she disciplined me.) (Appendix)

as promised and required[6], the exonerating witness statements would have exonerated me and implicated Carmichael and Pardun.

At the formal stage, VA Handbook 5021 expressly states that the facility Director is the decision-making official authorized to settle the formal grievance. (App 9) In fact, agency counsel uploaded the entire Handbook at the judges request. Id. Counsel also stipulated to Watkins' failure to forward the formal grievance to Costie (App J no. 19, 21,26)

In the end, none of the substantive formal grievance procedures mandated under the policy were provided to me, and the issues I raised remained ignored and unaddressed. (App J and J1)[7]39 This is a violation of the grievance policy, the obligations as an HR official processing the grievance (App I and K), as well as the obligation of management officials to conduct an inquiry into allegations of wrong-doing by Carmichael and Pardun. (App I, J, K).

Accordingly, on June 22, 2012, I alerted Costie that this was an issue for the "hotline," which was created for whistleblowers. Whistleblower may be a fancy word, but in the VA, and under the Federal Code of Ethics, the motto is, "if you see something, say something." Failure to do so is a violation of these rules, as well as it should be, because the inaction and failure to report allows the issue to remain uncorrected. (App J 11 and 12).

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[6] See Joint Stipulation that performance standards require d to address all the matters raised, the policy requires, common sense requires it, the federal code of ethics requires, management's duties to address allegations of misconduct requires it.

[7] See also Joint stipulations (24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

I ultimately reported to Costie that I had been disciplined without due process and received an unfounded admonishment based on dishonest evidence and that this issue had been ignored and unaddressed within both grievances, one of which, he was supposed to have written the decision for, but instead knew nothing about. (App P-DD). We relayed the list f procedures that were denied, including to present the informal grievance orally as well as in writing, and also relayed that Watkis was upset that I had kept the meeting and had refused to remove the admonishment that was eligible for removal after six months, but could stay in my file for two years. (Id.)

I initially emailed Costie on June 22, alerting him to an issue designated for the hotline he created for whistleblowers. On June 25, 2012, I sent a follow up email attaching my informal grievance statement and my formal grievance statement and decisions, and stated, "I would like an opportunity to meet with you to discuss this matter." (App J 41) Both grievances reported my allegations regarding Carmichael and Pardun's misconduct. Id at 42. Both grievances disclosed that my issues had been ignored and unaddressed, in violation of the policy and our job requirements and reflected management's failure to follow the rules to address my reports. My statement reporting Pardun's inappropriate behavior had been used in the evidence file to discipline me, which I believe is per se retaliation.(App R) The fact that the formal grievance was attached should have served to alert Costie at that time that Erwin had decided a formal grievance without the proper authority. This was confirmed during my meeting with the Costie on August 29, 2012, that he

had no prior knowledge of the grievance and did not have the authority to delegate the duty to Erwin, even if he wanted to. (App P). As such, the emails alone alerted Costie to the fact that 1) my supervisors had violated agency rules by intentionally failing to follow the mandatory procedures in both the taking of the discipline and in processing the grievance that was left unaddressed and was not forwarded to the Director to decide as required, and 2) my allegations of misconduct at the hands of Carmichael and Pardun. The emails showed that I saw something and I said something, and I should have been protected from any further retaliation. I should have been thanked for allowing a management official to address these issues, and it should have been acknowledged as fulfilling my duty as a federal employee .

On June 25, 2012, Costie emailed Erwin and asked him to, "start the process," even though unbeknownst to him, the process had started and finished without Costie's knowledge, in clear violation of the grievance procedures mandated by the policy, under which, he not only would have been aware, but would have also served as deciding official.

It is jointly stipulated as undisputed fact that Costie discussed or otherwise communicated with Erwin regarding my emails of June 22, 2012 and July 26, 2012. App J 45. It is jointly stipulated as undisputed fact that Costie discussed or otherwise communicated with Watkins regarding my emails of June 22, 2012 and July 26, 2012. Id at 46.

On Thursday July 26, 2012, Erwin answered the email claiming that I "had been provided my full due process, and that there is no additional process available to

me," when the truth was, none of the processes available to me that would have afforded substantive review had been provided, including that the grievance had not been submitted to the appropriate deciding official for consideration. Although the initial decision acknowledged this, the judge failed to recognize this as a policy violation despite the fact that the policy was admitted into evidence and that it was an undisputed fact. (Apps H, J)

I replied to the email, disclosing that that the agency did not provide due process as required by the policy and asked to meet with Costie to discuss the issue.

Later that day, Erwin threatened to discipline me if I were to meet the Director and held a staff meeting in which he put everyone on notice that they would be held to the same standard. (App A) Accordingly, On August 3, 2012, Erwin and Watkins advised the entire staff that they would be disciplined for going to the Director. (Id) Notably, OSC claims to have taken corrective action on this issue which should substantiate the personnel action in this case that is identified as a threat. (App M p.42).

Despite the threat of discipline that Erwin eventually followed through with, I informed Erwin on August 7, 2012, that the meeting with Costie had been scheduled. In response, Erwin and Watkins asked me to send Watkins an email alerting them of the date of my scheduled meeting with Costie. App J 49.

Later that same day, Erwin asked me to meet with Watkins regarding the probationary termination case that is referenced in the subsequent three-day suspension that Erwin proposed shortly after I reported his inappropriate conduct.

Id at 51. Despite the fact that the analysis and information I provided to nurse manager T.L Drake was correct, Watkins, Erwin, and Pardun met with Drake and arranged for Drake to submit a written statement regarding his recent consultation with me. App O, Exhibit WW. They arranged this meeting despite the fact that my email communication of August 7, 2012, to coworker Angela Madtes and my follow up email to Drake on August 8, 2012, relay my intent to prepare the probationary termination letter. App J 55.

Drake did not provide the arranged report of contact until August 15, 2012, a week after I sent Erwin and Watkins the courtesy email they asked me to send with the date that I was placed on Costie's calendar. App J 52.

On August 15, 2012, Watkins gave me the arranged report of contact from Drake regarding their conversation on August 8, 2012, and asked me for my written fact finding response. Id. Here, she gave me the notice and opportunity to respond that I complained was not given with the previous disciplinary action. This is what she should have done before deciding to discipline me with an admonishment without me even knowing that I had been accused of anything inappropriate.

The fact finding regarding my consult with Drake was baseless. Id. At 55. Nevertheless, the evidence from the fact finding was used to form the basis of the first charge in the suspension that Erwin both proposed and decided, without even allowing me the official time I was entitled to, in blatant retaliation. The facility has no history of conducting fact-findings or proposing suspensions or any other

discipline to specialists in my position for similar conduct. In addition, the cited conduct does not even rise to the level of misconduct. App M p.40 no. 113

On August 29, 2012, my representative, Attorney James Caplinger and I, met with the Director and made numerous protected disclosures about violations of VA Handbook 5021 with respect to the admonishment being issued with no due process, Pardun and Carmichael had fabricated statements, that I reported these incidents and documented the reports in my grievance, but was ignored, and that Watkins and Erwin had failed to provide numerous procedural entitlements under the grievance, including but not limited to denying me the right to present the grievance orally with my representative, and allowing their boss to even know about the grievance, let alone serve as the deciding official. The disclosures discussed with the Director encompassed the points made within the grievance, including the misconduct of Carmichael and Pardun, which also represented violations of law, rule and regulations. See, Joint Stipulations 10, 42, 12, 13 and 57.

On August 30, 2012, the very next morning after my meeting with the Director, Watkins subjected me to yet another fact-finding investigation. Id. at #58. She made it clear that she was coming after me. The fact finding was baseless. Id at 59 and 60, App Q. Nevertheless, the evidence from the fact finding was used to form the basis of the second charge within the suspension. The facility has no history of conducting fact-findings or proposing suspensions or any discipline to specialists in my position for similar conduct. In addition, the cited conduct does not amount to misconduct. Apps Q, M, 113.

On September 20, 2012, I correctly advised Christoper Marcus, administrative officer of the surgery department, that making employees check in with him upon arrival to work and check out upon departure would be a change in working conditions requiring prior bargaining with the union. App J-61. Nevertheless, on October 2, 2012, Watkins asked me to forward my previous email that I sent to Marcus on September 20, 2012, to her. Watkins proceeded to subject me to another fact-finding investigation on this issue. Id-62-63, App Q. The facility has no history of conducting fact-findings or proposing suspensions or any discipline to specialists in my position for similar conduct. In addition, the cited conduct is not misconduct.Id.

On October 4, 2012, Erwin issued a formal written notice that he was proposing to suspend me. On October 9, 2012, Erwin showcased that he did not care about the rules by denying me any official time, even though the proposed suspension notice is a form letter providing this entitlement, as required by the policy. His email denying all official time is in the record. (App Q) I perceived the denial of official time as animus for the disclosures made to his boss. As an employee relations specialist, I would be fired for advising a supervisor that he or she could deny the official time mandated under the policy. Yet, here was Erwin documenting his flagrant disregard for me and my rights.

On October 25, 2012, I submitted my written response to the proposed suspension, which included written statements from coworkers Lillian Barnett and Gloria Kinsler, stating that the alleged facts within the admonishment never

happened and that the statements in the evidence file written by Carmichael and Pardun were embellishments. (App A, dissenting) Even though the policy requires Erwin to consider my response and to determine whether the agency had met its burden of proof in charging me with these offenses, Erwin immediately notified me the very next day of his decision to move forward with the suspension that Watkins proposed. (POJ) Watkins told me that they did not even bother to read the reply, they just tossed it in the file and closed it out. (App M).

Lower Court Proceedings:

The federal circuit aptly lays out the procedural history in this case. (App A). At the prehearing stage, the AJ ordered the parties to submit joint stipulations. Counsel requested an extension to submit the stipulations, which the judge granted (App J-2). In collaboration with counsel, the joint stipulations were completed. VA counsel explained that either party could submit the filing and asked me to submit the stipulations by electronic filing on the indicated deadline of February 26, 2016, because he was tied up in another proceeding. (App J-3-8). The hearing took place with neither party raising any issue about the joint stipulations. Despite the fact that this was an electronic filing, like all the others in this case, with a declaration under penalty of perjury for each filing, the AJ refused to consider the joint stipulations, stating that they were unsigned. The AJ offered no rule or regulation in support of her finding[8]. Accordingly this was one of the issues I raised in the petition for review. (App R). I also argued that the determinations that the disclosures in this case were not protected is

[8] In fact, called the regional office, asked for the rule, and never received a return call.

erroneous, and that the AJ had overlooked the policy requirements and read the wrong portion of the provision requiring the due process notice and chance to respond, and instead focused on the portion that discusses a, 'further fact-finding." I stressed that my allegation was regarding the initial fact-finding requirement.

I also asserted that the judge erroneously considered my witness statement as testimony when I could not testify to allegations of misconduct that had never been brought to my attention. (Id). I recounted the list of policy violations with respect to both the admonishment and the grievance of the admonishment, and the fact that the judge had no basis to ignore the policy language and the stipulations regarding that language. I argued that the judge erred in finding no abuse of authority, and explained that the taking of the personnel action with no due process, the repeated intentional violations of the grievance policy and procedures, and failing to address my allegations of Pardun and Carmichael's conduct were all examples of abuse of authority.

I assert that the AJ ignored the exonerating witness statements that showed that I had a reasonable belief in these allegations, and that my position requirements, policy requirements and joint stipulations all served to demonstrate that I had a reasonable belief that these were violations of rules, and that the disclosures were entitled to protection under the WPA.

I assert that the AJ misquoted the evidence when she accused me of admitting to the misconduct for which I was admonished. I asserted that the judge erred in finding that the main issue was whether I engaged in the conduct that resulted in the admonishment and explained that this still would not have excused Watkins from giving me prior notice of the allegations and a chance to respond before determining whether or not disciplinary action was warranted.

I assert that the judge presented no basis to support her finding that the personnel action, " is a minor disciplinary action," and that it clearly was used to support the subsequent suspension.

I assert that even though the judge acknowledges that Erwin issued the formal grievance decision, she erroneously determined that VA Handbook 5021 only applies to Title 38 staff. I argued that the AJ erred in finding that I had not met my IRA burden of proof with respect to the four personnel actions at issue in this case-1) the threat of discipline, 2) the proposed suspension, 3) the decision to suspend, and 4) the refusal to remove the admonishment, despite the exonerating witness statements.

Despite the arguments and evidence, the Board affirmed the findings of the regional office.

Federal Circuit

On appeal to the federal circuit, I again presented the plain language of the policy showing that the previous determinations that VA Handbook 5021 only applies to Title 38 staff is patently false, as were the other determinations about the policy. (App S). I repeated my arguments about the joint stipulations. When the Department of Justice repeated the Board's findings about the policy only applying to Title 38 staff and joint stipulations, I mentioned in reply that the department of justice attorney could be cited for violating Rule 11 against frivolous pleadings for simply repeating the Board's findings without actually confirming the merits of the joint stipulations and the applicability of VA Handbook 5021 with the VA attorney. Accordingly, I submitted with my petition for rehearing, the evidence that agency

counsel had reviewed and approved the stipulations as well as the application of VA Handbook 5021 to the Title V non-clinical VA staff. (App U)

Despite the evidence and arguments, the panel affirmed the Board's decision, and erroneously held that VA Handbook 5021, the VA policy that was published in the federal register and that encompasses the statutory, regulatory and legal requirements governing disciplinary actions of all VA employees, which the VA Secretary is mandated to carry out, is not a law, rule or regulation, and that an employee whose very job it is to ensure agency compliance with this policy in the taking of such personnel actions, who witnesses and reports repeated willful violations of this policy by the human resources management officials charged with ensuring agency compliance, is not afforded any whistleblower protections.

REASONS FOR GRANTING THE WRIT.....

The decision conflicts with the Supreme Court Precedent set in Cleveland Bd. Of Educ v Laudermill, which establishes that a government employer is constitutionally required to provide due process of notice and an opportunity to respond before adversely impacting an employee's personnel record, amounting to a "taking."

In the same vain, the decision conflicts with the due process clause of the US Constitution;.

The decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power—specifically by refusing to consider the joint stipulations and unilaterally and inaccurately holding that the VA Policy at issue is not applicable to me, and also that the the policy violations do not amount to violations of law rule or regulation sufficient to meet the entitlement to protection under the Whistleblower Protection Act.

Federal employees are in a catch 22. Code of Ethics and the Staff Code of Conduct demands that if you see something, say something. Although the WPA says you will be protected, the federal circuit has made reporting violations of VA Handbooks

and Directives an exception from claims of abuse of authority and protected activity. The fate of employees and would be whistleblowers is now in the hands of this Honorable Court.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

/es/

M. Michelle Reed
Submitted July 23, 2024