No. 24A_____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN AKERMAN, PRO SE,
APPLICANT

v.

DEPARTMENT OF THE ARMY (MSPB),
RESPONDENT

APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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

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QUESTIONS TO BE PRESENTED

- Whether the Merit Systems Protection Board (MSPB) can be properly named as the respondent in appeals to the Federal Circuit when the appeal concerns the MSPB's procedural or jurisdictional decisions, and whether the Federal Circuit has jurisdiction to review such decisions, particularly when the MSPB reasserts jurisdiction over a matter that may not yet be ripe for adjudication.

- Whether the application of the Cohen collateral order doctrine is appropriate in this context, where the orders in question conclusively determine disputed procedural rights, resolve issues completely separate from the merits, and are effectively unreviewable on appeal from a final judgment, especially in cases involving alleged misconduct within the MSPB.

- Whether a Bivens action against Administrative Judges and court clerks is the only remedy available to tenured federal employees seeking to address potential breaches of statutory duties by the Merit Systems Protection Board (MSPB) under the Civil Service Reform Act (CSRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Whistleblower Protection Enhancement Act (WPEA).

ORDERS BELOW

Attachment A: MSPB Acknowledgement Order, Dated May 31, 2024

Attachment B: July 5, 2024 Order Denying Interlocutory Appeal

Attachment C: MSPB Close of Record Order, Dated July 8, 2024

Attachment D: July 22, 2024 Order Denying Rehearing

No. 24A_____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN AKERMAN, PRO SE,
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v.

DEPARTMENT OF THE ARMY (MSPB),
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APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES,
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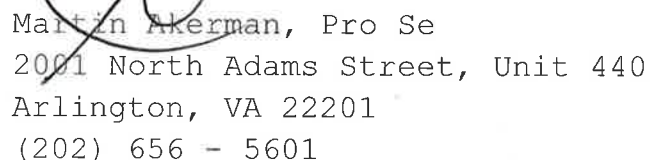
Pursuant to Supreme Court Rule 13.5, I, Martin Akerman, appearing Pro Se, respectfully request a 60-day extension of time to file a petition for a writ of certiorari, seeking a new deadline of December 19, 2024. Without this extension, the petition would be due on October 20, 2024. This application is timely, being submitted more than ten days prior to the original due date, in accordance with S. Ct. R. 13.5.

Given the complex nature and significance of the legal issues involved in this case, including the denial of interlocutory appeal and the handling of procedural rights by the Merit Systems Protection Board (MSPB), an extension of time is both reasonable and necessary. Harmonizing deadlines across multiple issues, as requested by the applicant, will enable a more thorough and cohesive presentation before the Supreme Court. This extension not only aids the applicant in preparing a comprehensive petition but also supports the Court by providing a consolidated view of the case's progression through various jurisdictions.

Recognizing the applicant's pro se status, this extension aligns with principles of fairness and due process, facilitating a more informed and equitable decision by the Court. Therefore, it is respectfully requested that the Court grants the 60-day extension for filing the petition for a writ of certiorari, setting the new deadline to December 19, 2024, in the interest of justice.

Respectfully Submitted,



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Attachment A: MSPB Acknowledgement Order, Dated May 31, 2024

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-W-2[1]

DATE: May 31, 2024

ACKNOWLEDGMENT ORDER

This case was automatically refiled following the Board's decision denying the appellant's petition for review. I am the administrative judge assigned to this appeal and all submissions filed hereafter shall be directed to me.

The parties are advised that the prior Board record in this matter, may be referred to during the adjudication of this appeal. Accordingly, any documents previously submitted by either party in connection with the original appeal should not be resubmitted.

Prior to issuing the initial decision dismissing his appeal without prejudice, I issued a jurisdictional determination. AF, W-1, Tab 85 at 1-4. In that ruling, I found the Board has jurisdiction in this case to consider the appellant's claim that that his alleged disclosure of an asserted violation of the Anti-Deficiency Act resulted in retaliation – a written counseling. *Id.* That is the sole disclosure and personnel action to be adjudicated in this appeal.

Further, I previously addressed the parties discovery disputes, and ordered the appellant to respond to the agency's discovery requests. AF, W-1, Tab 85. I

[1] MSPB Docket No DC-1221-22-0257-W-1 will be cited as W-1. Documents submitted in that case may be cited during the processing of the refiled appeal W-2. For example, the November 1, 2022 Order Regarding Jurisdiction and Discovery should be cited as Appeal File (AF), W-1, Tab 85.

will allow the appellant another opportunity to respond to the agency's discovery request. **The appellant has 10 days from the date of this order, to provide discovery responses.** The agency's discovery request may be found at AF, W-1, Tab 81 at 18-27. If the appellant fails to specifically address the interrogatories or document requests, or otherwise respond to discovery, he will not be allowed to testify about or submit evidence about matters that were requested in discovery but not provided.

The appellant requested that I join the National Guard Bureau as a responding agency in this appeal. AF, W-2, Tab 3. I find there is no basis for joining that agency to this case. The named agency was responsible for issuing the appellant the written counseling at issue in this case. Given that there are no other personnel actions before me in this case, the appellant's request for joinder is DENIED.

The appellant request that I hold a status conference. I will hold a status conference in this case on June 13, 2024 at 02:00 p.m. To participate in the conference the parties must call 1-347-690-2327 and at the prompt enter the conference ID, 591494545#. If either party is unable to attend the scheduled status conference they should consult the other party and notify me of 3 alternative dates and times at which both parties are available.

FOR THE BOARD:

Melissa Mehring

____

Melissa Mehring
Administrative Judge

Attachment B: July 5, 2024 Order Denying Interlocutory Appeal

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARTIN AKERMAN,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2024-132

On Petition for Permission to Appeal from the Merit Systems Protection Board in No. DC-1221-22-0257-W-2.

ON PETITION AND MOTION

Before STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

ORDER

Martin Akerman petitions for permission for interlocutory appeal from a May 31, 2024 Acknowledgement Order issued by an administrative judge of the Merit Systems Protection Board. Mr. Akerman also moves to hold the petition in abeyance, ECF No. 4, and objects to the caption, ECF No. 5. We deny the petition and the motions.

The May 31, 2024 order is the administrative judge's acknowledgement of the refiling of Mr. Akerman's appeal following dismissal subject to automatic reinstatement. In that order, the administrative judge denied a request for joinder of the National Guard and reiterated previous rulings as to the scope of the appeal and extent of permitted discovery. Mr. Akerman's petition here asks this court to reverse those aspects of the May 31, 2024 order.

In matters from the Board, this court's jurisdiction is generally limited to "an appeal from a *final* order or *final* decision," 28 U.S.C. § 1295(a)(9) (emphases added), and "an order is final only when it ends the litigation on the merits and leaves nothing for the [tribunal] to do but execute the judgment," *Weed v. Social Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009) (cleaned up). The May 31, 2024 order clearly does not resolve the merits of Mr. Akerman's appeal before the Board, which remains pending. And Mr. Akerman has not identified, and the court is not aware of, any basis for this court's immediate, interlocutory review of the administrative judge's order under the circumstances.

Accordingly,

IT IS ORDERED THAT:

The petition and all pending motions are denied.

FOR THE COURT

July 5, 2024
Date

Jarrett B. Perlow
Clerk of Court

Attachment C: MSPB Close of Record Order, Dated July 8, 2024

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-W-2 (W-2)

DATE: July 8, 2024

CLOSE OF RECORD ORDER

On June 25, 2024, the appellant filed a "Motion for Mistrial and to Vacate Docket." Appeal File (AF), W-2, Tab 14. In the pleading, the appellant stated that if I was unwilling to dismiss his appeal without prejudice he "requests a decision on the written record, so to not give the appearance that he is being given a fair chance to [sic – narrative ends in the middle of the sentence]. " *Id.*

Because I was unsure whether the appellant wished to withdraw his hearing request, I provided him the opportunity to rescind his apparent request for a decision on the written record. AF, W-2, Tab 15. The appellant responded to the Order and Summary of Status Conference, which contained the notice regarding his request for a decision on the written record. AF, W-2, Tab 15-16. In his response, the appellant did not indicate that he was rescinding his withdrawal of

his hearing request.[*] Accordingly, I will adjudicate this appeal on the written record.

The record in this case will close on August 9, 2024. The scope of this case and burdens of proof were set forth in Board orders issued on July 1, 2022, November 1, 2022, May 31, 2024, and June 25, 2024. AF, W-1, Tabs 65, 85; AF, W-2, Tabs 4, 15.

Applicable Law and Burdens of Proof

As a reminder, to be entitled to corrective action, the appellant must prove each element of his individual right of action (IRA) appeal by preponderant evidence, i.e., that he made a protected disclosure that contributed to a covered personnel action. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). In other words, the appellant must show that it is more likely than not that he engaged in protected whistleblowing that contributed to a covered personnel action.

A whistleblowing "disclosure" is defined at 5 U.S.C. § 2302(a)(2)(D) as "a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences-(i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *See* 5 U.S.C. § 2302(b)(8).

[**] Instead, the appellant addressed his dissatisfaction with my rulings as stated in the Order and Summary of Status Conference. AF, W-2, Tab 16 at 3-4. He also included copies of filings with the U.S. Court of Appeals for the Federal Circuit and U.S. Supreme Court. *Id.* at 5-120. To date the Board has not issued a decision on jurisdiction or the merits in this case. The only decision, thus far, was a dismissal without prejudice, which was refiled and is the instant appeal. Thus, for the appellant to have a decision that is reviewable on either jurisdiction or the merits, will require an adjudication of this appeal. Therefore, to avoid further delay, I will adjudicate this appeal and will not dismiss it without prejudice to refiling.

In the instant case, I found Board jurisdiction over the appellant's asserted disclosures on November 3, and 8, 2022, relating to claims that the agency violated the Anti-Deficiency Act. AF, W-1, Tab 65 at 5-6; AF, W-1, Tab 85. I also found Board jurisdiction over the appellant's alleged personnel action, a written counseling. AF, W-1, Tab 65; AF, W-1, Tab 85.

A list of covered personnel actions are set forth at 5 U.S.C. § 2302(a)(2)(A). The personnel action within the Board's jurisdiction in this case was a written counseling. AF, W1, Tab 65 at 6-7.

One way of establishing that whistleblowing was a contributing factor in the agency's decision to take a covered personnel action is through the knowledge/timing test. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). The knowledge/timing test provides for finding a contributing factor if the appellant is able to show that the agency official had knowledge of his protected disclosure and/or activity and the timing of the action was such that a reasonable person could conclude that the disclosure was a contributing factor. *Id.* The Board has held that a personnel action taken within approximately 1 to 2 years of the appellant's disclosures satisfies the timing component of the knowledge/timing test. *Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 22 (2010).

Even if the appellant fails to satisfy the knowledge/timing test, the Board must consider other evidence, such as that pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials and whether those individuals had a desire or motive to retaliate against the appellant. *Rumsey v. Department of Justice*, 120 M.S.P.R. 259, ¶ 26 (2013). Regardless, an appellant cannot establish the contributing factor element for purposes of establishing the Board's jurisdiction if she fails to allege that an official involved in the challenged personnel actions had knowledge of her

protected disclosure and/or activity. *See Jones v. Department of the Treasury*, 99 M.S.P.R. 479, ¶ 8 (2005).

An appellant cannot establish the contributing factor element for purposes of establishing the Board's jurisdiction when he fails to show by preponderant evidence that an official involved in the challenged personnel actions had knowledge of his protected activity. *See Jones v. Department of the Treasury*, 99 M.S.P.R. 479, ¶ 8 (2005). Actual or constructive knowledge is sufficient to satisfy knowledge requirement. *Nasuti v. Department of State*, 120 M.S.P.R. 588, ¶ 7 (2014). An appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Id.*; *Dorney v. Department of the Army*, 117 M.S.P.R. 480, ¶ 11 (2012). The Supreme Court has adopted the term "cat's paw" to describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action. *See id.* (citing *Staub v. Proctor Hospital*, 562 U.S. 411, 415–16, 419–23 (2011) (applying a cat's paw approach to cases brought under the Uniformed Services Employment and Reemployment Rights Act of 1994).

If the appellant meets this burden to establish his prima facie case by preponderant evidence, then for the agency to prevail it must show by clear and convincing evidence that it would have taken the same personnel action even if the appellant had not engaged in protected whistleblowing. In order to determine whether the agency met its clear and convincing evidence burden, the Board looks at the strength of the evidence the agency used in support of the personnel action, the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision(s), and any evidence that the agency takes similar actions against employees who are not engaged in protected activity, but who are in other ways similar to the appellant with respect to his Federal employment

Close of Record

All evidence and arguments must be filed by August 9, 2024. Evidence and related arguments filed after that date will not be accepted unless the party submitting the evidence shows that it is new and material evidence that was not available before the record closed. Notwithstanding the close of the record, however, pursuant to 5 C.F.R. § 1201.58(c), a party must be allowed to respond to new evidence or argument submitted by the other party just before the close of the record. Any rebuttal under this rule must be received within 5 days of the other party's filing.

The parties should keep in mind that I am likely to give more weight to sworn statements than to unsworn or hearsay statements. A form for a declaration under penalty of perjury is found in the Board's regulations at 5 C.F.R. part 1201, appendix IV.

Further, in their close of record submissions, the parties should cite to the documentary evidence where it appears in the Board's e-appeal record by the e-appeal fil, tab, and page number. Parties should not resubmit previously submitted documents but rather should cited to previously filed documents as relevant.

FOR THE BOARD:

Melissa Mehring

Melissa Mehring
Administrative Judge

Attachment D: July 22, 2024 Order Denying Rehearing

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MARTIN AKERMAN,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2024-132

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the Merit Systems Protection Board in No. DC-1221-22-0257-W-2.

ON PETITION FOR PANEL REHEARING

Before STOLL, CUNNINGHAM, and STARK, *Circuit Judges.*[1]

PER CURIAM.

O R D E R

On July 5, 2024, Martin Akerman filed a petition for panel rehearing [ECF No. 11].

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[1] Circuit Judge Newman did not participate.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

July 22, 2024
Date

Jarrett B. Perlow
Clerk of Court

No. 24A_____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN AKERMAN, PRO SE,
APPLICANT

v.

DEPARTMENT OF THE ARMY (MSPB),
RESPONDENT

PROOF OF SERVICE

I, Martin Akerman, hereby certify that on August 6, 2024, I delivered an original and three copies of the attached application to extend the time to file a petition for a writ of certiorari, along with all exhibits and accompanying documents, to the clerk of the Supreme Court, and a copy to the Solicitor General of the United States by mailing a true and correct copy via United States Postal Service, first-class mail, postage prepaid, addressed as follows:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Respectfully Submitted,

Martin Akerman, Pro Se
2001 North Adams Street, Unit 440
Arlington, VA 22201
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RECEIVED
AUG - 8 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.