

No. 24A

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IN THE SUPREME COURT OF THE UNITED STATES

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MARTIN AKERMAN, PRO SE,  
APPLICANT

v.

DEPARTMENT OF THE AIR FORCE (MSPB),  
RESPONDENT

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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,  
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 Jurisdiction Order, Dated July 10, 2024

**Attachment D:** July 22, 2024 Order Denying Rehearing

IN THE SUPREME COURT OF THE UNITED STATES

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MARTIN AKERMAN, PRO SE,  
APPLICANT

v.

DEPARTMENT OF THE AIR FORCE (MSPB),  
RESPONDENT

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APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF  
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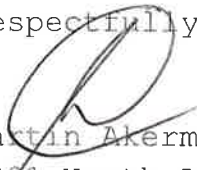
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Pursuant to Supreme Court Rule 13.5, I, Martin Akerman, appearing Pro Se, respectfully request a 60-day extension of time to file a petition for a writ of certiorari, seeking a new deadline of December 19, 2024. Without this extension, the petition 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 AIR FORCE,

Agency.

DOCKET NUMBER  
DC-1221-22-0445-W-2<sup>1</sup>

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.

In the instant case, I issued a jurisdictional order dated October 26, 2022. AF, W-1, Tab 39. Therein, I found the appellant exhausted the following:

1) the appellant's disclosures about reorganization, appropriations and the classification of positions to Air Force personnel, including individuals within his chain of command, in May 2021. AF, W-1, Tab 12 at 45.

AF, W-1, Tab 39 at 14. Yet, based on the appellant's allegations it was unclear whether the appellant's disclosure was sufficient to establish a nonfrivolous allegation that the disclosure was protected. Therefore, I explained what was

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<sup>1</sup> MSPB Docket No DC-1221-22-0257-W-1 will be cited as W-1. The appellant's pending appeal will be cited as W-2. Documents submitted in the W-1 case may be cited during the processing of the refiled appeal, W-2. For example, the October 26, 2022 Order - Jurisdiction should be cited as Appeal File (AF), W-1, Tab 39.

required of the appellant to establish jurisdiction over his disclosure and ordered him to respond. *Id.* at 15-21.

The appellant must respond to the October 26, 2022 order **within 10 days of the date of this order**. As noted above that document may be found at AF, W-1, Tab 39. **The appellant shall not resubmit materials previously submitted in this appeal**, but instead should cite to any relevant document by the e-appeal tab and page number where it appears. The agency may file a response **within 10 days of the appellant's submission**.

The appellant requested that I hold a status conference in this case to discuss the further processing of his appeal. AF, W-2, Tab 3. At this time, I find a conference is not necessary. If I find the Board has jurisdiction over the appellant's appeal, I will schedule a status conference at that time.

Further, the appellant has requested that I join the National Guard Bureau as a responding agency in this case. *Id.* I have previously notified the appellant that his request for joinder is denied. AF, W-1, Tabs 43, 45. This issue is settled, and should not be raised again before me.

*Melissa Mehring*

FOR THE BOARD:

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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**

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**MARTIN AKERMAN,**  
*Petitioner*

v.

**DEPARTMENT OF THE AIR FORCE,**  
*Respondent*

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2024-133

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On Petition for Permission to Appeal from the Merit  
Systems Protection Board in No. DC-1221-22-0445-W-2.

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**ON PETITION AND MOTION**

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

**O R D E R**

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



Jarrett B. Perlow  
Clerk of Court

July 5, 2024  
Date

**Attachment C:** MSPB Jurisdiction Order, Dated July 10, 2024

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,

Appellant,

v.

DEPARTMENT OF THE AIR FORCE,

Agency.

DOCKET NUMBER

DC-1221-22-0445-W-2 (W-2)

DATE: July 10, 2024

**ORDER - JURISDICTION**

Denial of the appellant's motion to dismiss his appeal without prejudice

After refiling the appellant's appeal, I issued an Acknowledgment Order. AF, W-2, Tab 4. Therein, I ordered the appellant to respond to the October 26, 2022 jurisdictional order. AF, W-2, Tab 4. The appellant has since filed five pleadings, but none have addressed the appellant's disclosures or the Board's jurisdiction. AF, W-2, Tabs 5, 6, 10, 13, 15.

In three pleadings, the appellant argued this case is not properly before me because he has sought review from the U.S. Court of Appeals for the Federal Circuit. AF, W-2, Tabs 5, 6, 10, 13, 15. Therefore, he requested that I dismiss this case without prejudice to refiling. Those motions are DENIED.

The Board's regulations provide that a "[d]ismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal." 5 C.F.R. § 1201.29. The regulations also provide that the decision to grant a dismissal without prejudice is left to the "sound discretion of the judge" and "may be granted on the judge's own motion or upon request by either party" based on a finding that any prejudice is outweighed by "the interests of fairness, due process, and administrative efficiency." *Id.*

The appellant asserted that the scope of the Board's jurisdiction is before the Federal Circuit. There is no final Board decision, however, on Board jurisdiction or the merits of the appellant's appeal. Therefore, that court is not in a position to issue a decision on the Board's jurisdiction in this case. In order to provide the appellant with a reviewable decision, I must first adjudicate the appellant's appeal. To date, the only decision I have issued was a dismissal without prejudice. A dismissal without prejudice will only further delay the review the appellant seeks. Therefore, I find that a dismissal without prejudice is not in the interests of fairness, due process, and administrative efficiency. Accordingly the appellant's motion to dismiss his appeal without prejudice is denied.

#### Jurisdiction

This is the appellant's final opportunity to address the Board's jurisdiction before I make a jurisdictional ruling in this case. The appellant may submit evidence and argument regarding the Board's jurisdiction and specifically whether the appellant held a reasonable belief that he made a protected disclosure that was a contributing factor in a covered personnel action. For a full discussion of my jurisdictional holdings to date the appellant should review the jurisdictional order issued October 26, 2022. AF, W-1, Tab 39. The issue outstanding is whether the appellant made a nonfrivolous allegation that he made a protected disclosure. *Id.*

As a reminder, to have made a disclosure protected under 5 U.S.C. § 2302(b)(8), an individual must have disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The term "disclosure" is defined 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- (1) any violation of any law, rule, or regulation; or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(a)(2)(D). The determination as to whether an employee reasonably believed that he disclosed information that evidenced any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger. 5 U.S.C. § 2302; *see also Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999).

Any disclosure of a violation of law, rule, or regulation is protected if it meets the reasonable belief test. The individual is not required to cite any specific law, rule, or regulation that he believes was violated if the individual's statements and the surrounding circumstances clearly implicate an identifiable law, rule, or regulation; he is only required to make a nonfrivolous allegation that he reasonably believed his disclosure evidenced one of the types of wrongdoing listed in 5 U.S.C. § 2302(b)(8). *See, e.g., Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 27 (2010). The inquiry as to whether a disclosure is protected ends upon a determination that the appellant disclosed what he reasonably believed to be a violation of law, rule, or regulation; there is no further inquiry into the type of "fraud, waste, or abuse" involved. *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶ 11 (2000). In addition, there is no exception to that rule for a disclosure of a trivial or *de minimis* violation of a law, rule, or regulation. *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 26 (2004); *see also Mogyorossy v. Department of the Air Force*, 96 M.S.P.R. 652, ¶ 14 (2004).

“An abuse of authority occurs [if] there is an arbitrary and capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to herself or to other preferred persons.” *Chavez v. Department of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 22 (2013). Gross mismanagement includes a management action or inaction that creates a substantial risk of adverse impact upon the agency’s ability to accomplish its mission. *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994). A disclosure questioning decisions that are debatable or merely negligent, with no element of blatancy, is not protected as a disclosure of gross mismanagement. *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, 112 (2000). Finally, an allegation of gross waste of funds must allege an expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. *See Webb v. Department of Interior*, 122 M.S.P.R. 248, n.3 (2015).

An employee may demonstrate that a disclosure or other protected activity was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or other protected activity, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the protected activity was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1) (*i.e.*, the knowledge/timing test); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff’d*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

The appellant must respond to the October 26, 2022 order **within 10 days of the date of this order**. As noted above, that document may be found at AF, W-1, Tab 39. The appellant shall not resubmit materials previously submitted in this appeal, but instead should cite to any relevant document by the e-appeal tab and page number where it appears. **The agency may file a response within 10 days of the appellant’s submission.**



*Melissa Mehring*

FOR THE BOARD:

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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**

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**MARTIN AKERMAN,**  
*Petitioner*

v.

**DEPARTMENT OF THE AIR FORCE,**  
*Respondent*

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2024-133

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On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the Merit Systems Protection Board in No. DC-1221-22-0445-W-2.

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**ON PETITION FOR PANEL REHEARING**

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Before STOLL, CUNNINGHAM, and STARK, *Circuit  
Judges.*<sup>1</sup>

PER CURIAM.

**ORDER**

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<sup>1</sup> Circuit Judge Newman did not participate.

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AKERMAN v. AIR FORCE

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

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT



Jarrett B. Perlow  
Clerk of Court

July 22, 2024  
Date

No. 24A \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

MARTIN AKERMAN, PRO SE,  
APPLICANT

v.

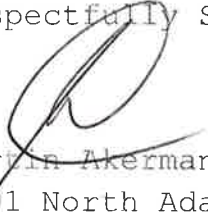
DEPARTMENT OF THE AIR FORCE (MSPB),  
RESPONDENT

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,

  
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