UNTIED STATES OF AMERICA
BEFORE THE DEPARTMENT OF JUSTICE
DEPUTY ATTORNEY GENERAL

In the Matter of	)
	) OARM-WB No. 13-4
Darin Jones	)
	)
	)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF

The National Whistleblower Center, by and through counsel, hereby submit this motion for leave to file an amicus brief in support of the motion by Complainant Darin Jones seeking reconsideration of the November 21, 2016 letter issued by John Giese, Chief of the Professional Misconduct Unit, U.S. Department of Justice. This case raises an issue of exceptional importance because it concerns the scope of protection for employees under 5 U.S.C. 2303 when the agency's deciding proposing and deciding officials, acting on behalf of the Attorney General, who take, recommend or approve a personnel action are already aware of an FBI employee's whistleblower disclosures. Under the unique circumstances of this case, where the facts show that officials involved in the removal decision were already aware of the Complainant's whistleblower disclosures those facts are sufficient to establish jurisdiction under section 2303.

WHEREFORE, the National Whistleblower Center's motion for leave to file an amicus curiae brief should be granted.

STATEMENT OF *AMICUS CURIAE*

The National Whistleblower Center ("NWC") is seeking leave to submit this brief of *amicus curiae* in support of Complainant Darin Jones. The NWC is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of employee whistleblowers. Founded in 1988, the NWC is keenly aware of the issues facing employees of the Federal Bureau

of Investigation ("FBI") who report misconduct, violations of laws, rules or regulations and abuse of authority. *See,* NWC Web Site at *www.whistleblowers.org.* Attorneys who volunteer for the NWC have represented several FBI employees before the Inspector General, the Office of Attorney Recruitment and Management ("OARM") and the Deputy Attorney General, pursuant to 5 U.S.C. § 2303 and 28 C.F.R. Part 27. Part of the NWC's core mission is to monitor major legal developments, and the NWC files amicus briefs in order to assist courts and agencies in understanding complex legal issues and important public polices raised in many whistleblower cases. Since 1990, the NWC has participated before the U.S. Supreme Court and other courts as *amicus curiae* in numerous cases that directly impact the rights of whistleblowers. Persons assisted by the NWC have a direct interest in the outcome of this case. Several persons assisted by the NWC have been FBI employees who reported serious issues of FBI misconduct to appropriate government officials and to Congress, several of them such as Robert Kobus, Bassem Yousef and Jane Turner have filed complaints with the OARM pursuant to 5 U.S.C. § 2303, and two of them, Ms. Turner and Dr. Frederic Whitehurst, are former FBI agents who currently serve in leadership positions with the NWC.

ARGUMENT

Based on current law, the Deputy Attorney General ("DAG") and Office of Attorney Recruitment and Management ("OARM") have committed reversible error and violated Administrative Procedure Act, 5 U.S.C. §§ 551 and 701-706, by dismissing Mr. Jones' whistleblower complaint for lack of jurisdiction. Where, as here, the Complainant made good faith allegations showing that all of the agency officials involved in taking, recommending or approving the personnel action had knowledge of the whistleblower disclosures and the complainant raised sufficient facts to show that the agency violated the Whistleblower Protection

Act's ("WPA") "contributing factor" test, the OARM has jurisdiction under the plain meaning of 5 U.S.C. § 2303 to consider the merits of the complainant's WPA complaint and to decide whether the personnel action must be set aside as whistleblower reprisal.

Most significantly, the OARM held that the evidence in the record showed that Mr. Jones satisfied the contributing factor test. *See In the Matter of Darin Jones,* OARM-WB-No. 13-4, Opinion on Remand, pp. 13-15 (Dec. 8, 2014). In other words, the OARM found that each of the individual officials involved in proposing the personnel action had actual or constructive knowledge of Mr. Jones' whistleblower disclosures before they proposed his removal and the OARM imputed that knowledge to higher ups that approved the removal action. *Id.,* pp. 14-15 ("we find that Complainant has nonfivolously alleged that his alleged ... [whistleblower] disclosures were a contributing factor to the FBI's decision to take a 'personnel action'). This finding was based on a factual finding that "Complainant has nonfrivolously alleged that these proposing officials had *actual knowledge* of this alleged protected disclosure(s) prior to the August 24, 2012 effective date of his termination." *Id.*, p. 14 (emphasis added). Additionally, the OARM found that based on the facts alleged and the agency official's "statement of record" that the deciding official had constructive or imputed knowledge of Complainant's alleged protected disclosures and that the deciding official's decision to terminate Complainant was influenced by others with actual knowledge of Complainant's whistleblower disclosures. *Id.,* pp. 14-15. It is also worth noting the agency terminated Complainant's employment only a few months after he made written and oral whistleblower disclosures about a non-compliant $40 million contract and other contracting and accounting violations. *Id.,* pp. 4-5, and 13-15.

Because each of the officials who had "authority to take, recommend, or approve" the "personnel action" in this case had knowledge of Mr. Jones' disclosures and he alleged facts

showing that his whistleblower disclosures were a contributing factor in the personnel decision, there is jurisdiction that he made protected disclosures within the plain meaning of the statute.

Section 2303 literally says:

> (a) Any employee of the Federal Bureau of Investigation *who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney Genera*l (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences—
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> (1) a violation of any law, rule, or regulation, or
>
> (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
>
> For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).
>
> (b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.
>
> (c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

5 U.S.C. § 2303 (emphasis added).

A fundamental principle of the law on removal authority is that, absent a clear indication to the contrary, the power to remove attends the power to appoint. *See, e.g., Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896-97 (1961); *Myers v. United States,* 272 U.S. 52, 110, 119 (1926). As the Supreme Court has noted, this principle states "a rule of constitutional and statutory construction." *Myers*, 272 U.S. at 119.

In this case, the OARM and DAG have focused almost exclusively on the particular offices stated in 28 C.F.R. § 27.1(a) where an FBI employee may make a protected disclosure

while ignoring entirely the words and purpose of the statute, 5 U.S.C. § 2303(a). Notably, each of the persons who participated in the removal action did so pursuant to the Attorney General's delegation of authority to take personnel actions. *See* 5 U.S.C. § 302[1]; 5 U.S.C. § 509.[2] Thus, the FBI officials in this case who did in fact "take, direct others to take, recommend, or approve any personnel action" against complainant, as described in section 2303(a), did so under authority delegated to them by the Attorney General. 5 U.S.C. §§ 302 and 509.

However, the OARM found that there was evidence that these very same FBI officials who were standing in the shoes of the Attorney General when they took, recommended or approved the personnel action against Complainant also were aware of his whistleblower disclosures when they took that personnel action. Based on these facts the Complainant demonstrated that he made protected whistleblower disclosures "to the Attorney General" within the meaning of section 2303(a) because these very same FBI officials who were acting for the Attorney General with respect to deciding the personnel action were already aware of the Complainant's oral and written whistleblower disclosures.

If the agency employee has authority to take or recommend or approve a personnel action, that management official is by definition acting on behalf of the Attorney General to bind the agency to that personnel action decision. 5 U.S.C. §§ 302 and 509. Any official who can bind the Attorney General for purposes of a personnel action must be considered to be acting for

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[1] 5 U.S.C. § 302, Delegation of authority, states: "(a) For the purpose of this section, 'agency' has the meaning given it by section 5721 of this title. (b) In addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him— (1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency."

[2] 5 U.S.C. § 509 states: "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General..."

the Attorney General in all respects to section 2303, including receiving a protected disclosure under the statute. It is impermissible to interpret the statute so an FBI official who can bind the agency for the Attorney General while taking, recommending or approving a personnel action can turn a blind eye towards whistleblower disclosures that the Complainant made directly or indirectly to those same officials.

Moreover, the regulations promulgated under 28 CFR 27.1(a) defining discreet offices or officials authorized to receive a protected disclosure under section 2303 cannot conflict with the statute. All regulations promulgated by the agency pursuant to 5 U.S.C. 301 must be reasonable and may not conflict with a statute. *Georgia v. United States,* 411 U.S. 526, 536 (1973). Where the Complainant has shown the officials involved with taking the personnel action had prior knowledge of the whistleblower disclosures, if the DAG finds those officials were not authorized to receive the whistleblower disclosures then the remedy is not dismissal for lack of jurisdiction under 28 C.F.R. § 27.1(a), but rather it is evidence that the Attorney General has failed to meet the requirements of section 2303(b) to prescribe regulations that ensure whistleblower reprisal is not a contributing factor in any personnel decision. That is what is required by the statute.

It would be absurd to dismiss a whistleblower complaint for lack of jurisdiction where there is a finding on the record that the Complainant alleged facts to satisfy the contributing factor test and alleged facts showing the agency officials (acting on behalf of the Attorney General) who took, recommended, or approved the personnel action were aware of the Complainant's whistleblower disclosure. Under these facts, the DAG must reverse and remand.

The DAG and OARM have interpreted section 2303 too narrowly, to limit the reach of the statute to situations like this case where the officials taking, recommending or approving the personnel action were aware of the whistleblower disclosures prior to taking the personnel

action. However, remedial statutes, like the WPA, should be interpreted broadly where such a reading is possible. *See, Pasley v. Dep't of Treasury*, 109 M.S.P.R. 105, ¶ 12 (2008); *Fishbein v. Dep't of Health & Human Servs.*, 102 M.S.P.R. 4, ¶ 8 (2006) (because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act). A remedial statute riddled with exceptions and loopholes may chill current and potential whistleblowers from coming forward because they worry that the law's unclear scope might leave them unprotected. Accordingly, the DAG and OARM are required to read the WPA to prohibit personnel actions taken by federal agencies against whistleblowers, regardless of when the affected federal employee or applicant made the disclosures at issue.

Additionally, the DAG failed to give section 2303 its plain meaning or interpret it in the context of the WPA as a whole. *See Robinson v. Shell Oil Co.,* 519 U.S. 337,341 (1997) ("The plainness or ambiguity of statutory language is determined in reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). For example, in a 1988 report on the WPA, Congress expressed frustration over actions and decisions that restricted whistleblowers' ability to obtain corrective action, emphasizing:

> The Committee intends that disclosures be encouraged. The OSC, the Board, and the courts *should not erect barriers to disclosures* which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.

S. Rep. No. 413, at 13 (1988) (emphasis added).

Once again, 24 years later, Congress specifically addressed the problem presented by this case when it clarified the original intent of the WPA in new legislation. Specifically, the Committee noted that the Federal Circuit decisions overturned by the WPEA:

> are contrary to congressional intent for the WPA. *The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA.* The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred "because of' the protected disclosure.

S. Rep. No. 112-155, at 5 (2012) (emphasis added).

Section 2303 must be read to provide the robust protection for FBI whistleblowers that Congress intended. Accordingly, the DAG should broadly construe section 2303 to prohibit whistleblower reprisal by agency officials who are delegated the authority by the Attorney General to take, recommend or approve personnel actions when the record shows that such agency officials (acting on behalf of the Attorney General) are aware of the employee's whistleblower disclosure prior to taking such personnel action.

CONCLUSION

For the foregoing reasons, the DAG should reconsider the November 21, 2016 decision, reinstate Mr. Jones' complaint and remand this matter to the OARM for further proceedings.

Respectfully submitted,

DAVID K. COLAPINTO

STEPHEN M. KOHN

Kohn, Kohn & Colapinto, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: 202-342-6980
Fax: 202-342-6984

Attorneys for National Whistleblower Center

December 6, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion for leave to submit amicus curiae brief and proposed amicus curiae brief in support of Complainant Darin Jones was served on the following persons via email on this 6th day of December, 2016:

Darin Jones, Complainant
Email: darin_jones@hotmail.com

Ethan Don
Counsel for Respondent FBI
FBI Office of General Counsel
Email: Ethan.Don@ic.fbi.gov

By: 
DAVID K. COLAPINTO