UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TERESA C. CHAMBERS, Appellant/Petitioner v. DEPARTMENT OF THE INTERIOR Agency/Respondent.	)	Docket Nos. DC-0752-04-0642-I-1 DC-1221-04-0616-W-1

BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT

The National Treasury Employees Union (NTEU) files this brief pursuant to the Board's order of November 9, 2004, granting it permission to participate in the case as amicus curiae.[1] For the reasons outlined below, NTEU urges the Board to grant the petition for review and reverse the decision of the Administrative Judge (AJ).

INTEREST OF THE AMICUS CURIAE

NTEU is a federal sector labor organization serving as exclusive bargaining representative of nearly 150,000 federal employees nationwide, including some 15,000 who work for the Bureau of Customs and Border Protection (CBP), which is a component of the United States Department of Homeland Security.

[1] By notice dated December 16, 2004, the Board set January 18, 2005 as the deadline for NTEU to file its brief. It subsequently granted NTEU's motion for an enlargement of time to file its brief, up to and including January 25, 2005. A motion for a second enlargement of time, up to and including January 31, is pending before the Board.

The majority of the CBP employees NTEU represents are Customs Officers who work at our national borders. These employees, like appellant Teresa Chambers (hereinafter "Chief Chambers"), perform law enforcement functions. They have an important stake in the Board's disposition of this case, which will address the scope of the government's authority to punish employees, like Chief Chambers, who speak out to alert the public about safety and security risks that arise when federal law enforcement operations are inadequately staffed and funded.

The Department of the Interior ("Interior") fired Chief Chambers because she shared with a Washington Post reporter her informed belief, based on her extensive training and experience, that the public safety and security at our national monuments and other specified areas under the jurisdiction of the U.S. Park Police had been compromised by inadequate staffing, misallocation of resources, and insufficient funding. Significantly, while the insights Chief Chambers shared were of obvious importance to the public interest in safety and security, the information she provided to the Post was not classified, or otherwise prohibited by law from being disclosed. Interior punished Chief Chambers for speaking to the press because her statements were not consistent with the message Interior wished to communicate to the public: that all was well with the Park Police.

Because Chief Chambers held a highly visible position, her well-publicized firing undoubtedly has had, and will continue to have, a chilling effect upon the willingness of other government employees engaged in law enforcement to speak out. The chilling effect is no less pronounced for employees, like those NTEU represents, who hold rank and file positions rather than management positions like Chief Chambers. Indeed, rank and file employees are even more vulnerable to retaliation than is Chief Chambers, who held a relatively high position in the chain of command.

Empowering federal agencies to punish law enforcement employees when they alert the public to security and safety risks that they observe in their jobs is anathema to the public policies served by the Whistleblower Protection Act (the "WPA") and the values embodied in the First Amendment. It bears emphasis that the justification for imposing punishment in such cases, including this one, often includes a claim that the employee has somehow endangered the public by providing information about security weaknesses because that information might also be of interest to ill-intentioned persons who might wish to exploit such weaknesses. The WPA, however, has already struck the balance in favor of public disclosure despite such ever-present risks, except in circumstances not present here, where there is a legal prohibition on the disclosure of the

information at issue or where it is required by Executive Order to be kept secret in the interests of national security. 5 U.S.C. §2302(b)(8)(B). Outside these limited circumstances, Congress has already determined in the WPA that reducing public awareness does not promote national security or safety; it undermines it. For those reasons, described more fully below, NTEU is filing this amicus brief, urging that the Board reverse the AJ's decision.

STATEMENT OF THE ISSUES

1. Whether the Administrative Judge (AJ) erred in holding that Chief Chambers did not engage in activity protected by the Whistleblower Protection Act when she revealed to a Washington Post reporter her reasonable belief that inadequate staffing, budget shortfalls and misallocation of resources by the U.S. Park Police were endangering the public safety at our national monuments, on highways in the Washington metropolitan area, and in local parks.

2. Whether the AJ misapplied the Pickering balancing test in ruling that the Department of the Interior did not violate the First Amendment when it penalized Chief Chambers for speaking with the press on matters of public concern related to public safety and national security.

STATEMENT OF THE CASE

This case is before the Merit Systems Protection Board ("MSPB" or "Board") on a petition Chief Chambers filed seeking review of an adverse decision issued by Administrative Judge Elizabeth B. Bogle on October 6, 2004. In her decision, the AJ held that disclosures that Chief Chambers made to the Washington Post concerning the public safety risks presented by the inadequate staffing and funding of the U.S. Park Police were not protected by the WPA. She also held that the Department of the Interior did not violate the First Amendment when it penalized Chief Chambers for speaking to the Washington Post about such risks.

To avoid duplication, NTEU incorporates and adopts the Statement of the Facts set forth in the Appellant's Petition for Review ("App. Br.") at pp. 19-128. Further, for purposes of this brief we assume that Chief Chambers made the statements that were attributed to her by the Washington Post.

Amicus agrees with the petitioner that the AJ committed multiple legal errors in upholding her dismissal. This brief focuses on two specific areas of particular concern to NTEU's members and federal employees generally: (1) the AJ's erroneous conclusion that Chief Chambers' statements regarding the impact of inadequate staffing and resources on safety in the Washington metropolitan area and at our national icons were not protected

by the Whistleblower Protection Act; and (2) the AJ's ruling that the Department of the Interior did not violate the First Amendment when it punished Chief Chambers because of the remarks attributed to her by the Washington Post.

ARGUMENT

I. THE AJ ERRED IN CONCLUDING THAT CHAMBERS' STATEMENTS TO THE WASHINGTON POST WERE NOT PROTECTED UNDER THE WPA

Under the WPA, it is a prohibited personnel practice for an agency to take a personnel action against an employee because the employee has disclosed information which he or she reasonably believes evidences a violation of any 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. 5 U.S.C. § 2302(b)(8). Purporting to apply these standards below, the AJ concluded that Chief Chambers did not engage in activity protected by the WPA when she spoke with a Washington Post reporter concerning the dangerously low levels of police manpower deployed at our national monuments, the Baltimore-Washington Parkway, and other "green spaces" in the Washington metropolitan area.

The AJ's conclusion was legally erroneous for several reasons, as outlined below. Moreover, the analysis the AJ employed frustrates the WPA's purposes and, we submit, endangers the public health and safety, as well as the national security,

by stifling the voices of employees who are on the front lines of the war on terror. Accordingly, NTEU urges the Board to decisively reject the AJ's analysis and reverse the decision below.

A. The AJ Committed Legal Error When She Held that Chief Chambers' Disclosures Did Not Qualify for Protection Under the WPA

1. Chief Chambers' Disclosures to the Washington Post Were Protected Because They Described Substantial and Specific Dangers to the Public Health And Safety

The AJ denied Chief Chambers the benefit of the WPA's protection against retaliation on the grounds that the dangers to the public health and safety that Chief Chambers disclosed to the Washington Post were not sufficiently "specific and substantial" to fall within the language of 5 U.S.C. 2302(b)(8). The AJ stated that "while the appellant's statements draw the obvious connection between the need for more officers and funding and safety in the public places under USPP's jurisdiction, her statements do not reveal a substantial and specific danger to particular persons, places, and things, which is required in order to qualify for WPA protection." AJ Decision 13.

The AJ's characterization of Chief Chambers' statements as too general to invoke the protection of the WPA was legally erroneous. In the statements quoted in the Post, Chief Chambers' overarching message was that her force was stretched

too thin because of budget shortfalls and staffing shortages, and that, as a result, there was a danger that "harm or death will come to a visitor or employee at one of our parks, or that we are going to miss a key thing at one of our icons." AJ Dec. 11. She described the fact that many officers were working 12-hour shifts and that those who were guarding the monuments could take only limited bathroom breaks. She explained that the Park Police was so short-staffed that it had to use high ranking officers for guard duty. She also noted that morale was low and that officers were likely to leave the force if conditions did not improve.

However, Chief Chambers did more than sound this general alarm. She provided specific details and made pointed observations about the consequences of inadequate staffing for public safety at particular locations in the Washington metropolitan area. Thus, Chief Chambers told the reporter that:

--Parks and parkways in the area were increasingly unsafe because the Park Service was being required to divert patrol officers to stand guard around the Washington Monument and the Lincoln and Jefferson memorials;

--Stationary posts on the mall had hurt anti-terrorism efforts because fewer officers were able to patrol in other areas;

--Traffic accidents had increased on the Baltimore-Washington Parkway because there were now only two officers on patrol there instead of four, and, as a result, there were 706 accidents between January and October, which was more than the annual total in the previous four years;

--There were not enough Park Police to adequately protect the parks in Washington;

--The area that includes Anacostia Park and Suitland Parkway, one of the most violent areas that the Park Police patrols, now had only two cruisers instead of four;

--Residents were complaining of increased drug crimes and vagrancy in local parks as a result of reduced police presence;

--Unarmed guards for the first time would be standing watch outside the monuments;

--Since April 2003, the number of arrests made by Park Police in the Washington area had declined about 11 percent compared with the same period last year.

AJ Dec. 8-11.

As this discussion demonstrates, Chief Chambers identified the locations that she reasonably believed were vulnerable to threats of criminal and/or terrorist activity. Those locations were the national monuments, the parkways (particularly the Suitland and Baltimore Washington Parkways), and the smaller local parks within the jurisdiction of the U.S. Park Police (including, in particular, Anacostia Park). She explained the reason for these dangers, observing that a lack of adequate staffing and funding combined with increased demands on the force for anti-terrorism efforts at the monuments meant there were not enough officers available to patrol the parks. In explaining the basis for her conclusion that public safety was compromised, she identified the specific number of officers and cruisers deployed to specific locations. She also offered solid

data to back up her claims, by citing the increase in traffic accidents on the Baltimore Washington Parkway and an 11% decline in the number of arrests made by Park Police in the past year. In short, Chief Chambers went well beyond the type of vague, imprecise communications concerning "remote" or "ill-defined perils" that are not protected under the WPA. See Sazinski v. Dep't of Housing and Urban Development, 73 MSPR 682 (1997); cf. Keefer v. Dep't of Agriculture, 82 MSPR 687, 692 (1999)(holding that specificity requirement should not be applied so stringently as to undermine the remedial purposes of the Act).

Indeed, the AJ's conclusory assertion that Chief Chambers' disclosures of safety and security risks were not sufficiently specific to invoke the protection of the WPA is irreconcilable with the AJ's simultaneous finding that Interior was justified in punishing her for disclosing too much information about such risks. The AJ, in fact, fully endorsed the agency's claim that Chief Chambers had actually jeopardized the public safety by providing potential lawbreakers with specific details that "exposed potential weaknesses in USPP security measures." A.J. Dec. 45.

Chief Chambers has strongly denied that the disclosures she made to the Post provided any material assistance to potential lawbreakers, especially as she was only confirming information already in the reporter's possession. Moreover, and in any

event, it bears emphasis that Chief Chambers was still entitled to the protection of the WPA even if the information she revealed could have conceivably been of use to potential lawbreakers, so long as the disclosure of such information was not "prohibited by law" or required by Executive Order to be kept secret in the interests of national security (which it clearly was not). See 5 U.S.C. §2302(b)(8)(B). Put another way, the WPA has already struck the balance between the potential benefits and potential harms of public disclosure of safety and security risks: it protects employees against retaliation unless there is an actual legal prohibition against their disclosures.[2]

In any event, the key point remains that the disclosures could not logically be too general to be protected if--as the AJ simultaneously concluded--they were specific enough to provide useful information to potential law breakers. The Board, accordingly, should reject the AJ's finding that Chief Chambers did not provide sufficient specificity to meet the "substantial and specific" standard set forth in the WPA.

[2] In that circumstance, of course, to enjoy the Act's protection the employee must make his disclosure either to the Inspector General or the Office of Special Counsel. 5 U.S.C. §2302(b)(8)(B).

2. The AJ's Ruling that Chief Chambers' Statements Were Too General to Qualify for Protection Under the WPA Is Irreconcilable With Congressional Intent and Board Case Law Interpreting the Act

The AJ's grudging approach to the scope of protection the WPA affords in the context of disclosures concerning the public health and safety is contrary to Congressional intent and to the public policies promoted by the WPA. It is well established that the WPA is remedial legislation, intended to improve protections for federal employees. Keefer v. Dep't of Agriculture, 82 MSPR at 692. It should be construed to effectuate that purpose, for Congress intended that "disclosures be encouraged." Horton v. Dep't of the Navy, 66 F.3d 279, 282-283 (Fed. Cir. 1995) (citing S. Rep. No. 413, 100th Cong., 2d Sess. 12-13 (1988)). Congress was clear that the courts "should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." Id.

Indeed, the legislative history of the WPA reveals that Congress added the "substantial and specific" proviso to section 2302(b)(8) for a more limited purpose than the AJ's approach requires: to ensure that employees not receive whistleblower protection for expressing non-specific dissatisfaction with an agency's general commitment to public safety. Thus, Congress clarified that "general criticism by an employee of the

Environmental Protection Agency that the agency is not doing enough to protect the environment, would not be protected under this section." S. Rep. No. 95-969, 95th Cong., 2d Sess. 21 (July 10, 1978). In contrast, the Senate Committee report notes that "an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistleblower protections." Id.; see also Sazinski v. HUD, 73 MSPR 682 at 685-687, citing Prescott v. DHHS, 6 MSPR 252, 258 (1981) and S. Rep. No. 95-969 (the "revelation of a negligible, remote or ill-defined peril that does not involve any particular person, place or thing, is not protected"); accord: Herman v. Department of Justice, 193 F.3d 1375 (Fed Cir. 1999).

Chief Chambers' disclosures are clearly more akin to the protected disclosures of the hypothetical NRC engineer than they are to the general grousing of the hypothetical EPA employee. Chief Chambers' disclosures concerned dangers that are clearly substantial, well defined, and not remote, particularly in a post-9/11 world: the danger that criminal and/or terrorist activity will succeed in the Washington metropolitan area because of inadequate police presence and misallocation of resources.

Chief Chambers' disclosures were also specific. She identified particular places and persons at risk because of the

lack of adequate funding and staffing and the misallocation of resources. These included our national icons and those who visit them; small parks or "green spaces" in the Washington metropolitan area and members of the community who use them; and local highways and those who drive upon them. She even gave specific statistical information about the number of officers patrolling in particular locations and the impact of staffing shortages on the number of arrests and traffic accidents.

Chief Chambers' disclosures are at least as substantial and specific as others that the Board has properly found protected by the WPA. In Gady v. Dep't of the Navy, 38 MSPR 118 (1988), for example, the appellant, a librarian, had complained that the policy the Navy had negotiated with the employees' union, which allowed employees and other visitors to smoke in the library, threatened the health of the staff and constituted a fire hazard. The Board concluded that "[s]ince the agency's smoking policy was a matter which the appellant reasonably believed evidenced a danger to public health and safety, her disclosures are protected."

Common sense tells us that the dangers of a terrorist attack at one of our national icons or in the Nation's capital, particularly in the post 9/11 world, are more substantial and imminent than the dangers to employees' health that may be posed by the inhalation of second-hand smoke in an agency's library.

The same is true as to the danger of criminal activity in public spaces that are not adequately patrolled. Thus, if the librarian in Gady was protected when she complained about a policy that permitted smoking in the agency library, it is inconceivable that Chief Chambers' disclosures of a more serious, widespread threat to the health and safety of the general public caused by inadequate police presence would not also merit the Act's protection.

Similarly, in Braga v. Dep't of the Army, 54 MSPR 392 (1992), aff'd, 6 F.3d 787 (Fed. Cir. 1993) (Table), the appellant, a clothing designer for the Army, disclosed his belief that the worldwide threat from anti-personnel mines was greater than the threat that the Army had designed its body armor to meet. He concluded, therefore, that the armor being provided to Army personnel placed them in danger of being maimed or killed. The Board ruled that, in revealing this threat, the clothing designer had disclosed a substantial and specific danger to the public health and safety.

The threat disclosed by the employee in Braga is not materially distinguishable from the threat disclosed by Chief Chambers in this case. Just as the employee in Braga disclosed his reasonable belief that the body armor the Army was designing was inadequate to protect against the threat of land mines, Chief Chambers disclosed her reasonable belief that the Park

Service was providing inadequate protection against the recognized threat of criminal and terrorist activity, particularly at our national icons, in local parks, and on the Baltimore-Washington Parkway. Just as the employee in Braga concluded that the inadequate armor protection placed soldiers' lives and safety in danger, Chief Chambers concluded and shared with the Post reporter her reasonable belief that the inadequate level of police protection placed visitors to these locations in physical danger. Her disclosures are protected by the WPA for the same reasons that the Board found the employees' disclosures protected in Braga.[3]

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[3] In a recent case, Mogyorossy v. Dep't of the Air Force, 96 MSPR 652 (2004), the Board appears to have taken a somewhat narrower view of the scope of the WPA's protection in the context of dangers to the public health and safety. In that case, appellant publicly disclosed that for a four-month period after September 11, 2001, the agency instructed its security guards not to fully load their weapons because there was not enough ammunition on hand. The guards alleged that, because of the shortage of ammunition, their lives and the lives of those they protected would be in danger if they were attacked. The Board concluded that the disclosure was not protected because it involved merely "speculation that there could possibly be danger at some point in the future."

The result in Mogyorossy is difficult to square with the results the Board reached in the other cases described above. But in any event, the disclosures in this case are clearly distinguishable from those involved in Mogyorossy. In this case, Chief Chambers was describing risks that had already materialized (increased accident rates on the BW Parkway, fewer arrests in Anacostia Park) as well as dangers that undeniably exist (the known, current and continuing danger to our national monuments and to the Washington metropolitan area). In short, in the context in which Chief Chambers performed her duties, the threat of terrorist attacks was real not "speculative."

3. The AJ Committed Legal Error By Requiring Chief Chambers to Demonstrate that the Existence of a Danger to the Public Health and Safety Was More than "Debatable"

In addition to finding that Chief Chambers' disclosures were too general to invoke the protection of the WPA, the AJ held that her disclosures to the Washington Post were not protected because Chief Chambers allegedly "did not identify any management action or inaction that created the alleged safety risk, and, if she had, she did not explain how it was anything other than debatable, simple negligence or wrongdoing with no element of blatancy." AJ Dec. 13. In reaching this conclusion, the AJ erroneously conflated two independent inquiries: 1) whether Chief Chambers' statements regarding inadequate staffing and funding revealed "gross mismanagement;" and 2) whether Chief Chambers disclosed information she reasonably believed evidenced a specific and substantial danger to the public health and safety.

The requirement that a disclosure involve an element of "blatancy" and that it reveal more than "debatable" management errors is derived from the Board's standard for determining whether disclosures evidence "gross mismanagement," not whether they evidence the existence of a substantial and specific danger to the public health and safety. See Carolyn v. Dep't of Interior, 63 MSPR 684, 691 (1994); Nafus v. Dep't of the Army,

57 MSPR 386, 393 (1993).[4] The disclosure of "gross mismanagement" must involve more than a "debatable" matter of policy in order to ensure that employees not receive the increased protection afforded by the WPA for pressing their disagreement with management decisions that are at least arguably reasonable. See LaChance v. White, 174 F3d 1378, 1381 (Fed Cir. 1999) (in protecting disclosures of "gross mismanagement" Congress did not intend to transform public disagreements about arguably reasonable management policies into protected activity); Willis v. Department of Agriculture, 141 F.3d 1139, 1143 (Fed Cir. 1998)(reasonable disagreements between employees and their supervisors are a normal part of most occupations; their public airing is not protected by the WPA). The law does not, however, impose a similar requirement in the context of dangers to the public health and safety. In that context, all that is required is that the employee reasonably believe that he or she is disclosing a substantial and specific

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[4] In a very recent decision, the Federal Circuit rejected the "blatancy" element of the Board's test and held that "where a dispute is in the nature of a policy dispute, 'gross mismanagement' requires that a claimed error in the adoption of, or continued adherence to, a policy be a matter that is not debatable among reasonable people." White v. Department of the Air Force, 391 F.3d 1377, 1382-1383 (Fed Cir. 2004); see also Coons v. Secretary of Treasury, 383 F.3d 879, 890 (9th Cir. 2004)(applying a similar standard). Although not directly relevant here, the Federal Circuit's decision is consistent with our general point that the protection afforded by the WPA must not be construed narrowly.

danger to the public health and safety. In that context, it is irrelevant whether an agency's contrary view is or is not also a reasonable one.

The basis for this less restrictive approach in the context of public safety is obvious: the public interest demands that a substantial and specific danger to public health and safety be abated, regardless of whether an agency is at fault for its existence. When applying the WPA in the area of public health and safety, disclosures of even "debatable" risks merit protection if the risks are specific and substantial. Indeed, as noted above, the purpose of the WPA is to encourage employees to make such disclosures by affording them protection against retaliation so long as their beliefs that a danger exists are reasonably based.

In short, contrary to the AJ's analysis, even if it were "debatable" whether the staffing of the Park Police was adequate to protect the public health and safety, Chief Chambers would still be protected by the WPA so long as her belief that it was inadequate was reasonably based. Therefore, the AJ erred in requiring Chief Chambers to prove that her employer was "negligent" to secure the Act's protection.

B. The AJ Committed Legal Error When She Speculated About Chief Chambers' Motives and Failed to Defer to Her Expert Views on the Dangers Posed by Inadequate Staffing and Budget

As shown above, Chief Chambers' disclosures to the Post reporter revealed dangers at least as substantial and specific as have existed in other cases in which the Board has ruled such disclosures protected. The AJ's finding to the contrary seems to be based, at least in part, upon her speculation that Chief Chambers' disclosures appeared to be "nothing more than an attempt to pressure the agency, and perhaps [the Office of Management and Budget] and the Subcommittee, to increase the [U.S. Park Police] budget by publicly airing her concerns about the ability of the USPP to protect the public places under its jurisdiction without a budget increase." AJ Dec. 15.

The AJ's musings about Chief Chambers' possible motives betray a fundamental hostility to the underlying purposes of the WPA. The WPA protects employees' rights to air their covered "concerns" or disagreements precisely in order to "pressure" an agency to do what is necessary to address public safety risks. Indeed, the fundamental premise of the WPA is that employees should be encouraged to speak out and bring public attention to problems in order to get them corrected. Willis v. Department of Agriculture, 141 F.3d at 1143.

Moreover, Congress expressly rejected the notion that an employee's disclosures are not protected where his "primary motivation" can be characterized as somehow personal in nature. See Horton v. Dep't of the Navy, 66 F.3d at 282-283; Carter v. Dep't of the Army, 62 MSPR 393, 402 (1994), aff'd, 45 F.3d 444 (Fed. Cir. 1995) (Table); Gady v. Dep't of the Navy, 38 MSPR 118 (1988). As the Board has held, "regardless of a whistleblower's alleged personal motivations, the law's protections . . . extend to employees who reasonably believe in their charges." Berube v. General Services Administration, 30 MSPR 581, 596 (1986) vacated on other grounds, 820 F.2d 396 (Fed. Cir. 1987).

Thus, the Board has consistently held that an appellant need not prove that the condition reported actually resulted in a substantial and specific danger to public health or safety. Wojcicki v. Dep't of the Air Force, 72 MSPR 628 (1996) (citations omitted). Rather, an employee must show that the matter reported was one that a reasonable person in the employee's position would have believed evidenced a substantial and specific danger. See id.; 5 U.S.C. 2302(b)(8).

That burden has certainly been met here. Indeed, given Chief Chambers' unique position and experience, the Board should defer to Chief Chambers' belief that public health and safety were in danger at the specific locations she identified because

of inadequate staffing and resources. Chief Chambers was, after all, the head of law enforcement for the U.S. Park Police and therefore in a better position than anyone at Interior to assess the law enforcement risks that existed. Chief Chambers had 27 years of police experience, including six years as Chief of Police. And Chief Chambers' concerns were consistent with those expressed by Interior's Inspector General, as petitioner describes in her brief (at pp. 137-138).

As the court of appeals for the Federal Circuit has recognized, "experience is a key factor to consider when determining the reasonableness of [a whistleblower's] belief." Coppens v. Department of Defense, 2004 U.S. App. LEXIS 23503 (Fed Cir. November 10, 2004), citing Haley v. Department of Treasury, 977 F.2d 553, 556-58 (Fed Cir. 1992). This consideration is especially appropriate in the field of law enforcement, where the courts have long deferred to the expertise of law enforcement officers to assess risks, an expertise derived from years of training and experience. See Brown v. Texas, 443 U.S. 47, 52 & n.2 (1979)(recognizing that a trained, experienced police officer "is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"). The AJ erred by failing to give similar deference to Chief Chambers' informed views in this case in holding that she lacked reasonable grounds to

believe that inadequate Park Police staffing and budget had endangered the public health and safety in the Metropolitan Washington area.

C. The AJ's Narrow Interpretation of the WPA Threatens the Public Safety and National Security

In addition to its inconsistency with the Board's case law and Congressional intent, amicus urges the Board to reverse the AJ's decision because the standard of specificity she imposed, and her refusal to credit Chief Chambers' assessment of the risks to the public safety she perceived, will discourage law enforcement employees from speaking out to alert the public to pressing safety and security risks. This result undermines the public safety policies that the WPA promotes. Indeed, in the context of public safety and law enforcement, and particularly in the times of heightened peril in which we live, there is an even greater need to interpret the scope of protection afforded whistleblowers generously.

If the Board endorses the AJ's narrow interpretation of the WPA, it will significantly inhibit the exposure of public health and safety risks by law enforcement and other employees. The following hypotheticals illustrate the adverse effects of applying a narrow scope of protection in this context:

--In the months prior to September 11th, the FAA's Chief of Aviation Security concludes (contrary to the views of his

superiors) that there are inadequate controls in place to prevent foreign terrorists from receiving aviation training in the United States. He also believes that the FAA's failure to prohibit passengers from carrying box-cutters or other sharp objects on passenger airplanes has increased the risk of hijacking. Under the AJ's reasoning, the Chief would not be protected by the WPA if he publicly expressed these concerns because he would not have sufficiently identified specific "persons," "places" or "things" that were endangered, nor would he have demonstrated sufficiently that the dangers were "imminent." He would have no protection against a retaliatory termination by superiors who thought his views alarmist and contrary to agency policy; they could fire him as the Park Service did Chief Chambers for "communicat[ing] to the public that the [FAA was not protecting the skies] and indicat[ing] to potential lawbreakers that these areas could be exploited." AJ Decision at 24 (paraphrasing management justification for punishing Chief Chambers).

--A Customs Officer stationed in El Paso, Texas is concerned because staff assigned to the entire El Paso district have not received adequate training in current threats to detect potential terrorists seeking to cross the Mexican border. His complaints to his superiors have been ignored, and the Inspector General's office is not interested. This Customs Officer would

not be protected against retaliation if--in an effort to exert "pressure" on the agency--he disclosed the inadequate training to the press.

--The Chief Nurse at a VA Hospital has become alarmed at the fact that she is not being provided enough staff to cover the Intensive Care Unit, and that skilled ICU nurses are being diverted to work in other parts of the Hospital, where the need is not as great. The Nurse's concerns are dismissed by her superiors. So far, no one has died in the ICU because of the staffing shortages. Under the AJ's reasoning, the Chief Nurse is not protected by the WPA if she goes to the press to report this risk to the health and safety of patients at the VA hospitals because the danger she has identified is not "substantial" and "specific" enough, and her concerns about staffing levels are "debatable."

As these examples make abundantly obvious, the standards the AJ applied discourage the very exposure of health, safety, and national security risks that the WPA was designed not only to protect but to affirmatively encourage. If the Board endorses this approach, it will seriously undermine these interests at a time in our history when the active and vocal participation of federal employees in protecting homeland security is so crucial. The Board, accordingly, should reject

the AJ's crabbed interpretation of the WPA and reverse the decision below.

II. THE AJ ERRED IN RULING THAT THE DEPARTMENT OF THE INTERIOR DID NOT VIOLATE THE FIRST AMENDMENT WHEN IT PUNISHED CHIEF CHAMBERS FOR SPEAKING TO THE WASHINGTON POST

In evaluating the constitutionality of restrictions on employee speech, a court must consider "whether the government's interest in promoting the efficiency of the public services it performs without disruption outweighs the employee's interest as a citizen in commenting upon matters of public concern, and the interest of potential audiences in hearing what the employee has to say. United States v. NTEU, 513 U.S. 454, 465 (1995); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Without presenting an extended argument on the point, we note that NTEU strongly disagrees with the AJ's application of the Pickering balance in this case.

The AJ conceded that Chief Chambers' comments to the Washington Post about inadequacies in the Park Police force involved matters of public concern. This conclusion was clearly correct. Indeed, as numerous courts and commentators have observed, the public's interest in being able to hear from government employees about such issues is "manifestly great" because government employees are in a position to offer unique insights into the workings of government. See Sanjour v. EPA,

56 F.3d 85, 94 (D.C. Cir. 1995); Waters v. Churchill, 511 U.S. 661, 674 (1994)(observing that "government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinion").

Once the AJ made the critical determination that Chief Chambers' statements involved matters of public concern, she was required to weigh the efficiency interests of the government against the free speech interests of Chambers and her potential audience. Instead, the AJ again speculated about Chief Chambers' motives for speaking to the press and denigrated them. She observed (AJ Decision at 45) that Chief Chambers "appeared to be a public employee attempting to garner support for an increase in her staffing and budget levels, not a private citizen commenting on matters of public concern."

As she did when considering the scope of protection under the WPA, the AJ once again introduced an irrelevant consideration into her analysis. Personal motivation for an employee's speech is one factor to consider in deciding whether a statement involves matters of public concern. See O'Donnell v. Barry, 148 F.3d 1126 (D.C. Cir. 1998). Once the AJ properly acknowledged that Chief Chambers was speaking on such matters, however, her motivations for doing so had no relevance whatsoever.

In fact, the AJ's analysis of other side of the balance--Interior's interest in silencing Chief Chambers--was deeply flawed. The AJ justified the Department's actions on the grounds that Chief Chambers allegedly "exposed potential weaknesses in USPP security measures" and "violated the prohibition against premature release of budget information." AJ Decision at 45.

Even if the AJ is correct that Chief Chambers' statements had these effects, such potential harms are manifestly not sufficient to outweigh the important free speech interests at stake in this case. See Harman v. City of New York, 140 F.3d 111, 122-123 2d Cir. 1998)(city policy forbidding employees of Child Welfare agency from speaking to the press without prior approval unconstitutional because city failed to demonstrate actual, as opposed to conjectural, harm arising out of disclosure of "confidential" information). In fact, the D.C. Circuit has held that, while the government has an interest in protecting sensitive national security information against disclosure, it has "no legitimate interest in censoring unclassified materials." McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983); see also United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir.), cert denied, 409 U.S. 1063 (1972). In this case, the information that Chief Chambers disclosed to the Post reporter was not only not classified; there is no evidence

whatsoever that its disclosure caused any actual harm to any legitimate government interest.[5]

In short, the AJ erred in holding that the Department of the Interior did not violate the First Amendment when it punished Chief Chambers for expressing herself on matters of public concern in conversations with the Washington Post. For this reason as well, the AJ's decision must be reversed.

CONCLUSION

For the foregoing reasons and for those set forth in the Appellant's brief, NTEU requests that the Board grant the petition for review and reverse the decision below.

Respectfully submitted,

GREGORY O'DUDEN
General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, NW
Washington, DC 20006
(202) 572 5500

[5] Obviously, the political interest of a particular Administration in keeping budget information confidential, which is protected by OMB Circular A-11, is inadequate to outweigh the interests of Chief Chambers and the public in airing her views on these crucial matters of public concern.

CERTIFICATE OF SERVICE

In accordance with 5 C.F.R. §1201.26(b)(2), I certify that copies of the foregoing Brief of the National Treasury Employees Union As Amicus Curiae in Support of Appellant were served this day by hand delivery on the following:

Richard E. Condit, Esq.
Public Employees for Environmental Responsibility
2001 S Street, NW
Suite 570
Washington, D.C. 20009

Deborah S. Charette
Office of the Solicitor
Division of General Law
1849 C Street, NW
MS 3458
Washington, D.C. 20240

1/31/05
Date

Geri Khan
Legal Assistant