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No.2007-3050

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TERESA C. CHAMBERS

Petitioner,

v.

U.S. DEPARTMENT OF THE INTERIOR,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE MERIT SYSTEMS PROTECTION BOARD IN DC-1221-04-0616-W-1
AND DC-0752-04-0642-I-I

BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER URGING REVERSAL

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March 14, 2007

CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. Rule 47.4, the undersigned, Elaine Kaplan, states as follows:

(1) The full name of the amicus I am representing in this case is the National Treasury Employees Union.

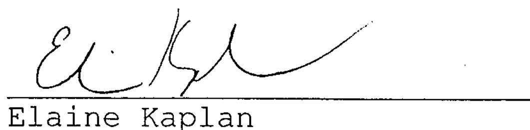
(2) The name of the real party in interest is stated in the caption.

(3) All parent corporations and any publicly held companies that hold ten percent or more of the stock of the amicus represented by the undersigned: None

(4) There is no such corporation as stated in paragraph 3.

(5) No law firms, partners, or associates have appeared for the amicus before the Merit Systems Protection Board, and none are expected to appear before this Court.

3/14/07
Date



Elaine Kaplan

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AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER URGING REVERSAL

INTEREST OF THE AMICUS CURIAE[1]

The National Treasury Employees Union ("NTEU") is a federal sector labor organization serving as exclusive bargaining representative of nearly 150,000 federal employees nationwide. NTEU represents many employees who, like the Petitioner, Teresa Chambers, are engaged in law enforcement.[2] The Union also

[1] In accordance with Fed Cir. Rule 29(a), the National Treasury Employees Union has secured the consent to the filing of this amicus brief from both the petitioner and the respondent.

[2] NTEU represents some 15,000 Customs and Border Protection Officers who work for the Bureau of Customs and Border Protection (CBP) (a component of the United States Department of

represents employees who have other public health and safety responsibilities.[3] These employees have an important stake in the Court's disposition of this appeal, which concerns the scope of the protection that the Whistleblower Protection Act (WPA) affords federal employees against retaliation when they "make a disclosure of information which they reasonably believ[e] evidences . . . a substantial and specific danger to the public health or safety." 5 U.S.C. 2302(b)(8)(A)(ii).

In its decision below, the Merit Systems Protection Board (MSPB) held that employees who disclose what they reasonably believe are substantial and specific dangers to the public health and safety are not protected against retaliation unless they also prove that the underlying agency policies that caused the dangerous conditions are "illegitimate." See Addendum to Brief for the Petitioner ("A") at 31. This unprecedented and exceptionally narrow interpretation of the "substantial and specific danger" proviso of the WPA is contrary to the plain language of the Act, its purposes, and the public interest. Accordingly, NTEU is filing this brief urging the Court to reverse the decision of the Board below.

Protection (CBP) (a component of the United States Department of Homeland Security).

[3] These include, among others, employees of the Nuclear Regulatory Commission and the Food and Drug Administration.

STATEMENT OF THE ISSUES

Whether the MSPB erred when it held that the Whistleblower Protection Act does not protect employees who disclose conditions they reasonably believe evidence a "substantial and specific danger to the public health and safety" unless they also show that the "illegitimacy" of the policy that creates such dangers is "not debatable among reasonable people."

SUMMARY OF ARGUMENT

This case is before the Court on a petition filed by former Park Police Chief Teresa Chambers (Chief Chambers) seeking review of an adverse ruling that the MSPB issued on September 21, 2006. The Board, in a 2-1 decision (Member Sapin, dissenting), rejected Chief Chambers' appeal of her removal by the Department of the Interior. A.24-A.58. It is not disputed that the immediate catalyst for Chief Chambers' removal was an interview she had with a reporter for the Washington Post. During the interview, Chief Chambers identified what she believed were risks to the public health and safety on park lands within the Washington Metropolitan area, as well as at national "icons" such as the Washington Monument. She attributed those risks to the inadequate staffing and funding of the U.S. Park Police. A.29-A.30.

The Board opined that Chief Chambers' remarks reflected "a classic policy disagreement" about how to allocate limited law

enforcement resources. A.30-A.31. It observed that "the statutory protection for whistleblowers 'is not a weapon in arguments over policy or a shield for insubordinate conduct'." Id. at 30 (quoting LaChance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999). It criticized Chief Chambers for expressing disagreement with what it called "a considered decision by executive and legislative officials" to focus resources "on the national core area rather than its periphery." A.32. It ruled that, under 5 U.S.C. 2302(b)(8)(A)(ii), "a statement that a particular policy choice raises risks to the citizenry is protected only if the desirability of the trade-off that the policy choice represents is 'not debatable among reasonable people'." Id. at 31 (quoting White, 391 F.3d at 1382).

The Board's restrictive interpretation of the WPA was legally erroneous. Neither the Board, nor this Court has ever held that a public safety whistleblower must, in effect, prove the "illegitimacy" of the considerations that led to an agency policy that endangers the public health and safety. The imposition of this onerous new burden on public safety whistleblowers is inconsistent with the plain language of the statute and the Act's purposes. Indeed, it effectively negates the separate basis for protection that Congress afforded to public safety whistleblowers because it requires them to meet the same burden of proof that is applicable to whistleblowers

who disclose "gross mismanagement." Further, it ignores the public's interest in being alerted to any substantial and specific dangers to its health and safety, regardless of their underlying cause, and regardless of whether the underlying "trade-offs" an agency made were at least arguably "legitimate."

Accordingly, NTEU urges the Court to reject the Board's analysis and reverse the decision below.[4]

ARGUMENT

THE BOARD'S RULING THAT CHIEF CHAMBERS' STATEMENTS TO THE WASHINGTON POST WERE NOT PROTECTED DISCLOSURES UNDER THE WHISTLEBLOWER PROTECTION ACT WAS ERRONEOUS AND SHOULD BE REVERSED

I. Chief Chambers' Disclosures Were Protected Under 5 U.S.C. 2302(b)(8)(A)(ii) Because She Reasonably Believed that the Information She Provided to the Reporter Evidenced Substantial and Specific Dangers to the Public Health and Safety

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 687, 692 (1999). It should be construed to effectuate that purpose, for Congress intended that "disclosures be encouraged." Horton v.

[4] Amicus agrees with the petitioner that the Board majority committed multiple legal errors in upholding her dismissal. This brief focuses on the lawfulness of the new standard the Board created for employees who disclose what they reasonably believe are substantial and specific dangers to the public health or safety.

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)).

At issue in this case is the proper interpretation and application of a critical provision of the WPA: 5 U.S.C. 2302(b)(8)(A)(ii). That provision states that an agency may not "take . . . a personnel action with respect to any employee . . . because of any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a substantial and specific danger to the public health or safety." Id.

As in all cases involving issues of statutory construction, the interpretation of this provision "begins with the plain language of the statute." White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003)(citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). Here, the plain language of section 2302(b)(8)(A)(ii) provides that an employee must establish two prerequisites to invoke the protection of the WPA: 1) that she made a disclosure of information which she reasonably believ[ed]" evidenced "a danger to the public health or safety"; and 2) that the danger she identified is both a "substantial" and "specific" one.

As we show below, both statutory conditions are met here. Therefore, Chief Chambers' remarks concerning dangerous conditions in areas subject to the jurisdiction of the U.S. Park

Police were protected by the WPA, and the Board's holding to the contrary must be reversed.

A. The Dangers Chief Chambers Disclosed Were Substantial and Specific

During the media interview that triggered the decision to fire her, Chief Chambers told a reporter for the Washington Post that the Park Police 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." Specifically, Chief Chambers told the Washington Post that:

--Parks and parkways in the Washington Metropolitan 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;

--Many officers were working 12-hour shifts and those who were guarding the monuments could take only limited bathroom breaks;

-- The Park Police was so short-staffed that it had to use high ranking officers for guard duty;

--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.

A.29-A.30.

Chief Chambers' disclosures concerned dangers that are clearly substantial: the dangers of criminal and/or terrorist activity resulting from inadequate police presence. Chief Chambers' disclosures were also specific. She identified the locations that she 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 identified 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.

The legislative history of the WPA shows that the "substantial and specific" language of 5 U.S.C. 2302(b)(8)(A)(ii) was intended 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. 969, 95th Cong., 2d Sess. 21 (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 (1997)(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. Dep't of Justice, 193 F.3d 1375 (Fed. Cir. 1999).

Chief Chambers' disclosures certainly cannot be described as vague, imprecise communications concerning "remote" or "ill-defined perils." 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). They are analogous to the protected disclosures of the hypothetical NRC engineer described in the legislative history, who reveals that the cooling system of a nuclear reactor is "inadequate." Her disclosures bear no resemblance to the grousing of the hypothetical EPA employee, who complains generally that the agency "is not doing enough to protect the environment."

Chief Chambers' disclosures are at least as substantial and specific as others that the Board has found protected by the WPA. In Gady v. Department 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." Id.

Clearly, 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.

Similarly, in Braga v. Department 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 Army had not accurately assessed the worldwide threat from anti-personnel mines and that the risks were more substantial than those 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.

B. Chief Chambers Reasonably Believed that the Substantial and Specific Dangers Existed

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 only other pre-condition to securing the protection of the WPA requires a showing that Chief Chambers' belief that such dangers existed was a "reasonable" one.

In order to demonstrate a "reasonable belief" that there existed a "substantial and specific danger to the public health and safety," an employee must show that "a disinterested observer with knowledge of the essential facts known to and

readily ascertainable by the employee" could "reasonably [so] conclude." See White v. Dep't of the Air Force, 391 F.3d 1377, 1381 (Fed. Cir. 2004)(quoting White v. Dep't of the Air Force, 174 F.3d 1378, 1381 (Fed. Cir. 1999)). Under this standard, an employee is not required to 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 such danger. See id.; 5 U.S.C. 2302(b)(8).

In this case, Chief Chambers identified the facts that supported her belief that dangers existed in specified parks and local highways. Further, Chief Chambers' concerns were consistent with those expressed by Interior's Inspector General, and with the testimony of officials who were familiar with park security issues. See A.39-A.40 (Member Sapin, dissenting). Indeed, given Chief Chambers' unique position and experience, Chief Chambers' belief that public health and safety were in danger at the specific locations she identified is entitled to some deference. She was not only the head of law enforcement for the U.S. Park Police, but had 27 years of police experience. Cf. Coppens v. Dep't of Defense, 117 Fed. Appx. 110, 112 (Fed. Cir. 2004)(citing Haley v. Dep't of Treasury, 977 F.2d 553, 556-

58 (Fed. Cir. 1992))(recognizing that "experience is a key factor to consider when determining the reasonableness of [a whistleblower's] belief"). Accordingly, Chief Chambers established the second pre-requisite for securing the Act's protection: reasonable belief.

II. The Board Committed Legal Error by Concluding that, Even if Chief Chambers Reasonably Believed That A Substantial and Specific Danger to Public Safety Existed, Her Disclosures Were Not Protected Because She Did Not Prove that the Underlying Policy Causing the Danger Was "Illegitimate"

A. The New Standard the Board Applied is Contrary to the Statutory Language and Purposes and its Imposition Violates Cardinal Rules of Statutory Interpretation

In its decision below, the Board did not focus upon, much less address, whether the dangers that Chief Chambers disclosed were "substantial and specific." Nor did it address whether Chief Chambers' belief that such dangers existed was a "reasonable" one. Instead, the Board was harshly critical of Chief Chambers for "publicly disagree[ing]" with the choices "made by officials who outrank her" to cut back on Park Police patrols on the Baltimore-Washington Parkway and to reduce enforcement of traffic and drug laws in areas under its jurisdiction. A.30. It also took Chief Chambers to task for expressing the same views as the police union regarding the allocation of resources, notwithstanding that she was "the highest level management official at the Park Police." Id.

The Board majority then added a new and unprecedented burden that public safety whistleblowers must meet in order to secure the Act's protection: proof that a reasonable person would conclude that the underlying policies regarding the proper allocation of the Park Police's resources were "illegitimate." A.31. It then concluded that Chief Chambers had not discharged this burden because "after the September 11, 2001 terrorist attacks, no one can reasonably claim that beefing up security measures at monuments and memorials along the mall is an illegitimate use of public resources." Id. Chief Chambers' disclosures were not protected, the Board found, because she failed to show that a reasonable person would conclude that the policy makers "had no right to make the choice [to de-emphasize the other law enforcement functions of the Park Police] in the first place." Id.

The flaw in the Board's approach is obvious. It has conflated two distinct disclosure categories: those revealing gross mismanagement, and those that reveal a danger to the public health and safety. The requirement that a disclosure reveal more than "debatable" management errors is derived from the Board's separate 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 White v. Dep't of the Air

Force, 391 F.3d 1377, 1382-1383 (Fed. Cir. 2004) (explaining statutory basis for not protecting disclosures that reflect "debatable differences of opinion concerning policy matters" under the gross mismanagement standard); Carolyn v. Dep't of Interior, 63 MSPR 684, 691 (1994); Nafus v. Dep't of the Army, 57 MSPR 386, 393 (1993).

The requirement that a disclosure of "gross mismanagement" involve more than a "debatable" matter of policy exists to ensure that employees not receive the increased protection afforded by the WPA for pressing routine disagreements with management decisions that are at least arguably reasonable. See LaChance v. White, 174 F.3d 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. Dep't 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 imposition of this requirement was an effort to give content to specific statutory language: the phrase "gross mismanagement." It was based on the specific history and evolution of the "gross mismanagement" provision. White v. Dep't of the Air Force, 391 F.3d at 1382-1383.

On the other hand, this Court has summarily rejected the imposition of a "non-debatable" proviso for disclosures involving violations of law, rule, or regulation. White v. Dep't of the Air Force, 391 F.3d at 1382 n.2. There is similarly no statutory basis for imposing that proviso in the context of dangers to the public health and safety. All the statute requires is that the employee reasonably believe that he or she is disclosing a substantial and specific danger to the public health and safety. It is irrelevant whether an agency's contrary view is or is not also a reasonable one. Most significantly, it is irrelevant whether the agency's decisionmakers are to blame for the dangerous conditions, or whether the conditions were caused by arguably reasonable priorities that they had to adopt because of finite resources.

If Congress had wished to condition an employee's protection upon whether the agency's policy were an "illegitimate" one, it surely could have added that proviso to the statutory language. The Board's decision to require employees to meet a burden of proof that has no basis in the language of the statute collides with the "presum[ption] that a legislature says in a statute what it means, and means what it says." Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992).

Further, the Board's new standard violates another "cardinal principle of statutory construction": that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001) (citations omitted); see also TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (court has duty to give effect "to every word and clause in the statute")(internal citations omitted). By requiring employees who disclose dangers to the public health and safety to meet the same standards as those employees who disclose of "gross mismanagement," the Board has made the "public health and safety" category superfluous. Any disclosure of a public health and safety risk that meets the Board's new standard would also constitute a disclosure of "gross mismanagement."

In addition, the Board's imposition of this extra burden is inconsistent with the approach it has taken in other cases which can similarly be characterized as involving "policy decisions." For example, in Gady, supra, the Board afforded protection to an employee's claim that an agency smoking policy (negotiated with the union) resulted in a danger to the public health and safety. The Board did not require the employee to show that the underlying smoking policy was "illegitimate" or that such "illegitimacy" was "not debatable among reasonable people."

Similarly, as Member Sapin pointed out in dissent, the Board did not require such a showing in Braga. A.42.

The Board's imposition of this new requirement in the context of public safety disclosures betrays a fundamental misunderstanding of the purpose of protecting such disclosures. The purpose of protecting disclosure of public safety risks is not solely or even necessarily to assign blame. Rather, the purpose is to secure whatever action is needed to abate the public safety risk. The other purpose is to alert the public to the existence of such dangers so that they may take steps to avoid them. The disclosure of such risks is important even if they result from reasonable choices made amongst competing agency priorities on the basis of finite resources.

In this case, for example, Chief Chambers' remarks to the Washington Post were not merely a call for the Park Service to change its priorities. She was also giving the public and elected representatives information that might inspire the provision of additional resources to the Park Police. Her disclosures could also lead local police departments to increase the number of police patrols to fill in the gaps left by insufficient Park Police presence. Her remarks further served to alert members of the public who frequented the local parks or highways that she identified to exercise extra care, given the increased crime rates and inadequate police presence.

In short, contrary to the Board's analysis, even if it was "debatable" whether the agency's allocation of resources was or was not a "legitimate" policy choice, Chief Chambers would still be protected by the WPA so long as her belief that a danger existed was reasonably based. The Board's contrary view cannot be reconciled with the Act's language, past precedent or statutory purposes. Accordingly, its decision should be reversed.

B. **The Board's Narrow Interpretation of the WPA Threatens the Public Health and Safety**

The Board's holding in this case will discourage law enforcement and other public safety 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 public safety whistleblowers generously.

The following hypotheticals illustrate the adverse effects of applying the Board's narrow interpretation of the scope of protection for public safety whistleblowers:

--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 superiors have responded that the training budget has been cut this year, and moneys reallocated to other important priorities. This Customs Officer would not be protected against retaliation by the WPA if he disclosed the inadequate training and safety risks to the head of the agency, in order to convince him to seek the appropriation of more funds for training.

--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 staffing shortages exist. So far, no one has died in the ICU because of the inadequate staff, but there have been some close calls. Under the Board's reasoning, the Chief Nurse is not protected by the WPA if she goes to the Head of the Hospital or the Secretary of the Department of Veterans Affairs to report this risk to the health and safety of patients because the underlying policies regarding staffing levels cannot be proven "unreasonable" or "illegitimate" in light of other priorities.

--After raising his concerns internally, to no avail, a maintenance worker at Walter Reed Army Hospital discloses to the Washington Post that some of the outpatient facilities have dangerously high amounts of mold, as well as asbestos hanging

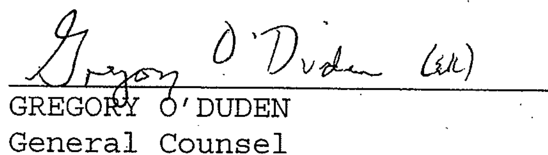
from the ceiling. Walter Reed has suffered a cutback in funds because of its scheduled closing and has many other important health and safety issues to address, in light of the increasing number of wounded military personnel being admitted to the facility. Its choice not to prioritize the problem identified by the worker is arguably reasonable, given other needs. Nonetheless the conditions pose a substantial and specific danger to the health and safety of wounded veterans, as well as employees of Walter Reed. Under the Board's decision, the worker's disclosures to the Washington Post are not protected.

As these examples make abundantly clear, the standards the Board 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. The Court, accordingly, should reject the Board's crabbed interpretation of the WPA and reverse the decision below.

CONCLUSION

For the foregoing reasons and for those set forth in the Petitioner's brief, the Board's decision should be reversed.

Respectfully submitted,



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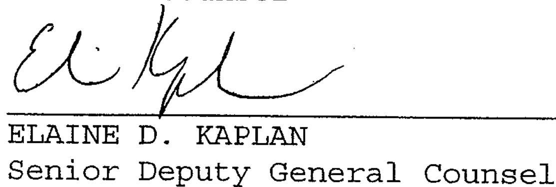

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March 14, 2007

CERTIFICATE OF COMPLIANCE UNDER FEDERAL CIRCUIT RULE 32(a)(7)(C)

I certify that the Brief for Amicus Curiae National Treasury Employees Union contains 4,790 words, and is therefore within the limitations set forth in Federal Circuit Rules 29(d) and 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I certify that corrected copies of the foregoing Brief of the National Treasury Employees Union As Amicus Curiae in Support of Petitioner were served this day by first class and electronic mail on the following:

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