UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

[redacted]

Appellant,

DOCKET NUMBER
[redacted]

v.

DEPARTMENT OF HOMELAND SECURITY,

Agency.

DATE: August 27, 2024

Hon. Paul DiTomasso

APPELLANT'S AMENDED RESPONSE TO MOTION TO DISMISS APPEAL WITHOUT PREJUDICE, SUBJECT TO AUTOMATIC REFILING[1]

Appellant [redacted] ("Appellant") files this response to the Department of Homeland Security's ("Agency") Motion to Dismiss Appeal Without Prejudice, Subject to Automatic Refiling. Appellant objects to the Agency's motion because (1) granting the Motion would not be in the interests of fairness to the Appellant, (2) further delay would prejudice the Appellant and his financial interests, (3) the Agency's cited reasons for its motion are insufficient to justify delay, and (4) the Agency's reasons are due to no fault of the Appellant, and in fact reflect exactly the sort of negative harm the Appellant has attempted to prevent with protected disclosures over the years.

BACKGROUND

The Appellant first filed a retaliation complaint with the Office of Special Counsel ("OSC") on March 27, 2018. The OSC notified him of his right to file an Individual Right of Action ("IRA") appeal on February 4, 2020. He filed his appeal with the Board on March 31, 2020. The Board's initial decision dismissing Appellant's appeal for lack of jurisdiction was filed on May 6, 2020.

[1] This Response is amended to reflect pay data for 2018.

The Appellant filed a Petition for Review ("PFR") to the full Board on June 9, 2020. More than four years later, on July 19, 2024, the Board granted the Appellant's PFR, reversed the initial decision on three grounds, and remanded the case to the Washington Regional Office.

ARGUMENT

"The Board's policy of deciding appeals within 120 days is based on the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (CSRA), which reflects Congressional intent that appeals be decided expeditiously." *Milner v. Dep't of Justice*, 87 M.S.P.R. 660, ¶ 10 (2001). "This policy was implemented, in accordance with the intent of Congress, because delays adversely affect employees who might be unemployed while their appeals are pending, or who, at the least, are subject to great uncertainty about the future course of their careers." *Thomas v. Dep't of Veterans Affairs*, 51 M.S.P.R. 218, 220 (1991). Generally, the Board will not accept an agency's request for a dismissal without prejudice:

> In keeping with the statutory language and the legislative intent [the Board] [has held] that, as a matter of policy, an agency's request for a dismissal without prejudice should not be granted. When the delay is for the benefit of the agency, the appellant should not face the additional burden of refiling or otherwise reinstating his appeal. Rather, where the circumstances of a case warrant, a continuance should be granted and the agency should be required to set a date certain by which it agrees to proceed with the appeal.

Id. at 221. Even a dismissal "subject to automatic refiling" is a misnomer, as the Board does not have an automated mechanism for refiling cases, and an appellant therefore bears the responsibility of monitoring to ensure a case is refiled.

Further, as the Agency notes, dismissal without prejudice is only appropriate where "in the interests of fairness, due process, and administrative efficiency." *Gidwani v. Dep't of Veterans Affs*., 74 M.S.P.R. 509, 511 (1997). Here, it would certainly not be in the interests of fairness.

Although the Appellant recently retired, his complaint outlines reprisal he suffered at the hands of the Agency over multiple years. He first filed his appeal with the Board more than four years ago. It was incorrectly dismissed. Because of circumstances outside the Board's control, it took four years to reverse that decision and remand the appeal for further proceedings. He has waited patiently for his right to discovery and a hearing, but any continuing delay is not in the interest of fairness to the Appellant. It is also not in the interests of fairness to other past or prospective whistleblowers at the Agency, as Agency officials responsible for unlawful reprisal against the Appellant have now evaded accountability for years, emboldening them in potentially retaliating against other whistleblowers.

The Agency mistakenly asserts that corrective action in this case "would have no benefit or impact on Appellant's life outside the agency." In support of its assertion, the Agency claims in a footnote this Appellant's "related EEOC cases have established . . . . there is no monetary impact associated with any of these nine actions." That is inaccurate. First, none of the Appellant's other EEOC cases involve the nine personnel actions at issue in this case, so "related" EEOC cases have not established anything related to the monetary impact of this case. Second, one of the Appellant's other EEOC cases resulted in a substantial settlement—certainly a monetary impact.

Third, at least one of the personnel actions at issue in this case (the May 2018 lateral reassignment) had a monetary impact on the Appellant. The Appellant was informed in 2017 that, because he allegedly didn't have operations experience, he was ineligible for a particular promotion for which he applied. Thus, in 2018 he applied for two different lateral reassignments in order to obtain that operations experience: a January 2018 lateral reassignment (which was the subject of an EEOC complaint) and the May 2018 lateral reassignment (one of the personnel actions at issue in this case). Both were denied him because of retaliation by the Agency. In March

2020 the Department of Homeland Security issued a Final Agency Decision (FAD) finding the denial of the January 2018 lateral reassignment was reprisal. As corrective action, that lateral reassignment was granted in July 2020. Because of the operations experience he obtained in that lateral reassignment position, he was finally able to promote to the GS-14 level just five months later, in December 2020. Had the Agency not retaliated in May 2018 by denying the lateral reassignment, he would have had the operations experience to promote approximately two whole years earlier. The difference between a GS-13 and GS-14 position in 2018 was approximately $20,000 per year. Each day the Agency delays results in clear financial prejudice to the Appellant.

In addition to a dismissal not being in the interests of fairness and the Appellant suffering prejudice from any continued delay, the Agency has not provided sufficient grounds for dismissing for four whole months. The Agency's law enforcement personnel support the United Nations General Assembly (UNGA) every September, and presidential elections take place every four years. (This presidential protective cycle should arguably have had a lighter staffing impact on the Agency than any in modern times, given that both of the major two party's presidential candidates were already receiving Agency protection prior to the presidential campaign.) The Federal Bureau of Investigation is conducting a criminal investigation of the July 13 attempted assassin, not an investigation that will involve the Agency's Office of Professional Responsibility or Inspection Division. While the congressional and other investigations are indeed outside of the Agency's control, the Agency at this point has no idea what they will entail or what obligations they will impose on the Agency. The idea that the three particular employees the Agency identifies "may be called on to participate in these matters" is too speculative to justify delaying this case.

Not only are the challenges the Agency is facing not due to any action of the Appellant's, they reflect exactly the sort of negative harm the Appellant has attempted to prevent with his

protected disclosures over the years. Further, they appear to be challenges either of the Agency's own making or of which the Agency has been on notice for almost a decade. As a confidential whistleblower to Congress, the Appellant served as a source for a congressional report entitled "United States Secret Service: An Agency in Crisis." H.R. Rep. No. 114-385 (2015), https://oversight.house.gov/wp-content/uploads/2015/12/Oversight-USSS-Report.pdf. That over 200-page report from the House of Representatives Committee on Oversight and Government Reform forcefully concluded:

> USSS is an agency in crisis. The Committee's bipartisan investigation found the agency's recent [security] failures are not a series of isolated events, but the product of an insular culture that has historically been resistant to change. It is likely USSS's challenges will become more difficult in the immediate future . . . [A] fundamental fact about the problems that plague the agency [is] USSS cannot repair itself without first restoring the trust of its employees and increasing personnel dramatically to meet mission and training requirements. Whether from missteps at the executive level or at the field office supervisor level, it is clear many of the rank-and-file have lost confidence in USSS's current leadership. USSS can restore pride in the agency by excelling at its primary mission: ensuring the safety of the president and other protectees. Senior agency leadership has publicly lamented the fact that rank-and-file employees are more comfortable speaking with people outside the agency than they are with their supervisors. Until the Secret Service's culture changes so employees who identify ways to reform the agency can make suggestions and air grievances without fear of reprisal, it will be difficult for leadership to fully realize the extent of the reforms necessary.

Id. at 195. On May 14, 2015, Inspector General John Roth testified before that Committee:

> [O]ne of the things about the . . . 2013 report [the Office of Inspector General conducted] is that of the 2,500-and-some electronic survey respondents, 44 percent of them felt that they could not report misconduct without fear of retaliation if they, in fact, reported that. So within that report itself there are some very, very disturbing trends. And I think, given the nature of what it is that we've seen since then, I believe that there is a serious problem within the Secret Service.

U.S. Secret Service: Accountability for March 4, 2015 Incident: Hearing Before the H. Comm. on Oversight and Gov't Reform,114th Cong. 39-40 (2015) (statement of John Roth, Inspector Gen., Dep't of Homeland Sec.). And the *last* blue-ribbon panel, appointed by the Secretary of

Homeland Security in 2014, concluded that the Agency's protective mission depended on it demonstrating accountability across the board:

> The agency's zero-failure mission requires that its high standards be met. In order for the Service's agents and officers to meet its high standards, they must see that the organization itself believes in its standards and enforces them in a consistent, evenhanded manner. In other words, agency leadership, managers, and front line supervisors must believe and show that they are accountable for their mission. These are not just morale issues, or issues of fairness or trust. Accountability creates the culture of performance that the Secret Service needs to meet its zero-failure mission.

Executive Summary to the Report from the United States Secret Service Protective Mission Panel to the Secretary of Homeland Security 4 (2014), https://www.dhs.gov/sites/default/files/publications/14_1218_usss_pmp_0.pdf. This case is precisely about that kind of accountability. It is extremely likely that challenges at the Agency will continue into 2025. (As the panel added: "[T]he Service has often made recommendations and proposed solutions as it identified problems, but has frequently failed to implement its own recommendations." *Id.* at 6.) But continued oversight and scrutiny of the agency should not be a basis for further delaying accountability and fairness.

Even if the Administrative Judge believes the Agency has provided sufficient grounds for some delay, a dismissal without prejudice until 2025 is not reasonable. UNGA will be over by the end of September, the Agency's filing states its Mission Assurance Investigation will be complete by approximately mid-October, and the presidential election will take place on November 4, 2024, at which point the presidential campaign will end and there will be significantly less protectee travel. The Agency's motion itself only specified that its "operational demands through the [p]residential election" will impact the case; beyond that, it appears to erase two months merely for the holidays. There is no reason whatsoever why the case should not be able to proceed after the November 4 election.

CONCLUSION

For the reasons stated above, the Appellant respectfully requests that the Administrative Judge deny the Agency's motion to dismiss the appeal without prejudice, subject to automatic refiling on January 2, 2025. In the alternative, should the Administrative Judge believe the Agency has made the case for some delay, the Appellant requests such delay not extend beyond November 4, 2024.

Respectfully submitted,

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