UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

SHANNON FAGAN,	)	ARB-2023-0006
	)	OALJ Case No. 2021-CER-00001
Complainants,	)	
	)	
against,	)	
	)	
DEPARTMENT OF THE NAVY	)	May 17, 2023
	)	
Respondent.	)	
_____	)	

AMICUS BRIEF OF RICHARD RENNER

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I. Identification and interest of the *amicus*

A. Identification

Richard Renner is an attorney who has represented whistleblowers before the U.S. Department of Labor since 1995. He practices law under the name of Tate & Renner. He was a partner with Kalijarvi, Chuzi, Newman & Fitch, P.C., in Washington, DC, until May 12, 2023. From 2008 until November 5, 2012, he worked in the Washington, DC, offices of Kohn, Kohn & Colapinto and the National Whistleblower Center. He has been an attorney since November 6, 1981, when he was admitted to practice before the Supreme Court of Ohio. He began his legal career working for the Southeastern Ohio Legal Services, a legal services program providing representation to eligible low income residents.

B. Corporate Disclosure Statement

Richard Renner is not a corporation.

C. Disclosures of Monetary or Editorial Contributions

No one made monetary or editorial contributions to this *amicus* brief by Richard Renner.

II. Summary of Argument.

The polestar for adjudicating legal issues in the Department's whistleblower program should be the remedial purpose of the law. Congress has passed about 100 laws protecting whistleblowers,[1] and has given this Department authority to adjudicate claims under 25 of them.[2] One thing these laws have in common is a remedial purpose to protect whistleblowers. By protecting whistleblowers, we encourage all employees to come forward with information about a

[1] The *amicus* maintained a list at https://kcnfdc.com/most-legal-claims-have-time-limits/
[2] This Department's list is at https://www.whistleblowers.gov/statutes

wide variety of compliance concerns.

This Board represents the Department's specialized knowledge with whistleblower claims. It is this Board's duty to apply its experience in the field and express what legal holdings are needed to accomplish its remedial purpose. When a court has taken a position that is contrary to the remedial purpose, this Board has said so. *Willy v. Costal Corp.,* 85-CAA-1, D&O of SOL at 13-14 (March 30, 1994). If the Department had no subpoena power, then in cases under laws with a kick-out provision to federal court, some whistleblowers will conclude they need to kick--out, foregoing the less expensive and more specialized proceeding before this Department.

The court in *Bobreski v. U.S. Environmental Protection Agency*, 284 F. Supp. 2d 67, 75 (D.D.C. 2003), on the other hand, took a narrow view of the whistleblower protections and denied the existence of any subpoena power without ever considering the remedial purpose of the law. This Board should not adopt or follow such a narrow view when it is inconsistent with the needs of this Department to fulfill its mission.

Finally, the Respondent's *Touhy* regulations allow the federal agency to direct who may speak for it, but do not authorize the withholding of information from the proceedings in which Respondent is a party.

III. Whistleblower laws are remedial and are construed broadly to accomplish their purpose.

A. Whistleblower laws serve a public interest in encouraging employees to speak up.

In *Lawson v. FMR LLC*, 571 U.S. 429, 447, 134 S.Ct. 1158, 1169 (2014), the Court looked for a "textual analysis" that "fits the provision's purpose." There is a need for "broad construction" of the statutes to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,

286 (6th Cir. 1983). “Narrow” or “hypertechnical” interpretations to these laws, are to be avoided as undermining Congressional purposes. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Courts have recognized that, “[t]he interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.” *Handy–Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 540 (6th Cir.2012), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

This Department’s ability to discern the true facts of a whistleblower’s case would necessarily be hampered if it could not issue subpoenas. Pivotal information about the violations the whistleblower discloses, about third-party investigations of those violations, about damages, or, as in this case, the knowledge, motivation and influences on the employer’s actual decision-maker, could be unavailable without effective use of subpoenas. The ALJ below recognized the value subpoena power would have for this Department saying it would “further the purposes of the whistleblower statutes to protect whistleblowers and promote compliance with the underlying law – and also promotevthe truth-finding function of formal hearing,”

Moreover, if this Board determined that subpoenas would be unavailable in whistleblower proceedings, some whistleblowers may conclude that they need to kick-out to federal court. This would be unfortunate as federal court proceedings are substantially more expensive and lack the specialized rules and expertise for whistleblower matters. Of course, numerous older whistleblower protection laws, including the environmental laws, lack any provision to kick-out to federal court, and whistleblowers with claims under these laws would be utterly foreclosed

from the information that could be obtained through subpoena.

B. This Board has shown that it can advance whistleblower protections even when it disagrees with a federal court.

In *Brown Root, Inc. v. Donovan*, 747 F.2d 1029, 1031 (5th Cir. 1984), the ALJ and Secretary of Labor held "that filing an NCR [nonconformance report] was a protected activity, [and] that Atchison was fired for filing the NCRs in 'good faith[.]'" However, the Fifth Circuit vacated explaining, "[s]ince the filings in this case were purely internal, we hold they were not within the scope of [the ERA, 42 U.S.C.] section 5851." 747 F.2d at 1036. The Department nevertheless consistently held that internal disclosures are protected, even under statutes that provide protection only for participation in proceedings. *Willy v. Costal Corp.,* 85-CAA-1, D&O of SOL at 13-14 (March 30, 1994). Congress eventually amended the ERA and the Fifth Circuit acknowledged that its 1984 holding was "incorrect." *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005) (vacating the Secretary's final order in part on other grounds).

This Board has an opportunity here to show the same determination to interpret a whistleblower law to accomplish its remedial purposes. Just as nuclear power whistleblowers need protection for their use of internal channels for raising concerns, environmental whistleblowers need this Department's implied authority to issue subpeonas.

C. Courts are likely to adopt this Board's analysis when it is rooted in the law's remedial purpose.

Another key issue about whistleblower laws is whether they protect concerns arising from an employee's reasonable belief about a violation. On this issue, this Board made a definitive decision upholding a broad scope of protection for such activity. *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854, *15 (ARB, May 25, 2011). This Board's holding has now

been widely supported by the federal Courts of Appeals. *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131-32 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013) (relying on *Sylvester* and holding, "there is nothing in the statutory text that suggests that a complainant's communications must assert the elements of fraud in order to express a reasonable belief that his or her employer is violating a provision"); *Nielsen v. AECOM Tech. Corp*., 762 F.3d 214, 220-21 (2d Cir. 2014) (granting *Skidmore* deference to *Sylvester*); *Rhinehimer v. U.S. Bancorp Investments, Inc*., 787 F.3d 797, 810-11 (6th Cir. 2015) (same).

On the issue of protecting internal whistleblowing, the Third Circuit followed this Board's holding in *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993). Thereafter, Congress cited the *Passaic Valley* decision with approval as it enacted the Sarbanes-Oxley Act, 15 U.S.C. § 1514a. S. Rep. 107-146, p. 19 (May 6, 2002).

This Board should use its expertise and authority in the whistleblower field to call on the courts to give the same deference to this Department's need for subpoena power in whistleblower matters.

IV. In *Bobreski*, the Court ignored the law's remedial purpose and made assumptions based on the lack of an express Congressional direction when the opposite assumption were equally available.

In *Bobreski v. U.S. Environmental Protection Agency*, 284 F. Supp. 2d 67, 75 (D.D.C. 2003), a whistleblower sought to enforce an ALJ subpoena to the EPA to produce one of its inspectors to testify as a witness in this Department's proceeding under the environmental statutes. The District Court correct stated that:

> The court should not limit itself to examining a statutory provision in isolation but must look to the language and design of the statute as a whole, as "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

> overall statutory scheme." *Food Drug Admin, v. Brown Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)")

The court then held that since the environmental statutes do not explicitly mention whether the Secretary has subpoena power, then "[t]he text clearly does not grant the Secretary of Labor subpoena authority." 284 F. Supp. 2d at 76. The court also cited "29 C.F.R. part 18 (implementing the whistleblower provisions of the six environmental statutes without mentioning subpoena authority)[.]" *Id*. Today, of course, 29 C.F.R. § 18.56 does authorize ALJs to issue subpoenas.

The court in *Bobreski* was particularly swayed by provisions in other sections of the environmental laws that authorized the environmental agencies to issue subpoenas in enforcement proceedings. However, the court could have used equivalent logic to conclude that that the other environmental laws said nothing to prohibit issuance of subpoenas.

What is completely missing from the opinion in Bobreski is any consideration of the law's remedial purpose. The word "remedial" makes no appearance in the decision. This Board core mission is to uphold and promote the remedial purpose of whistleblower protections and should not issue a decision on any important topic without consideration of this mission.

V. *Touhy* regulations permit federal agencies to direct who will speak on their behalf, but do not authorize the withholding of information from proceedings in which the agency is a party.

In the original *Touhy* case, *Touhy v. Ragen*, 340 U.S. 462, 467 (1951), the Supreme Court made clear that it was not addressing whether federal officials could withhold information from the court. It explained:

> We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court.

See also *Touhy*, 340 U.S. at 472 (J. Frankfurter, concurring):

> I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests.

The Supreme Court later clarified that the Federal Housekeeping Statute did not authorize substantive rule-making by federal agencies. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 n. 29 (1979) (1958 amendment "was not substantive authority to withhold information."). In *Houston Bus. Jour. v. Office, Comp., Treas*, 86 F.3d 1208, 1212 (D.C. Cir. 1996), the Court stated, "neither the Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to withhold documents from a federal court." Citing, *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 777-78 (9th Cir. 1994).

The *amicus* urges this Board to avoid any distraction arising from the Respondent's reliance on its own *Touhy* regulations. Accord, *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 393 (2015) ("Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.").

CONCLUSION

The *amicus* urges this Board to speak for this Department's need for subpoena power to fully develop the factual record in whistleblower proceedings. Applying the law's remedial purpose to this need makes clear why the environmental laws should be interpreted broadly to authorize issuance of subpoenas.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served through this Board's e-appeal system on all counsel of record, and on the Office of Solicitor of Labor on this 17th day of May, 2023.

Richard R. Renner