UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

_____, _____, _____, Appellants, v. DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Agency.	DOCKET NUMBERS: NY-0752-03-0378-I-1 DC-1221-03-0807-W-1 NY-1221-04-0046-W-1

BRIEF ON BEHALF OF U.S. OFFICE OF SPECIAL COUNSEL AS AMICUS CURIAE

STATEMENT OF THE ISSUE

Whether the U.S. Merit Systems Protection Board (Board) has jurisdiction over Individual Right of Action (IRA) appeals brought by Transportation Security Administration (TSA or agency) screeners under 5 U.S.C. § 1221 for personnel actions that the agency has proposed, taken, or failed to take on or after March 1, 2003, the date upon which TSA became part of the Department of Homeland Security (DHS). This is an issue of first impression before the Board.[1]

[1] The agency has moved the Board to consolidate the three above-captioned matters on the basis of the common jurisdictional issue. If the Board does not consolidate these matters, OSC requests that the Board consider this brief in all three matters.

INTRODUCTION AND STATEMENT OF THE CASE

In their Initial Decisions in the above-captioned matters, the Administrative Judges ruled that the Board lacks jurisdiction over the appellants' IRA appeals, all of which involve agency personnel actions taken after March 1, 2003. The Administrative Judges concluded that TSA's personnel authority for screeners under § 111(d) of the "Aviation and Transportation Security Act" (ATSA) does not confer such jurisdiction.[2] Further, and most significantly, in their Initial Decisions in ___ and ___ , the Administrative Judges also ruled that the "Homeland Security Act of 2002" (Homeland Security Act or Act) does not affect TSA's authority under § 111(d).[3] Appellants have filed timely petitions for review (PFRs), now pending before the Board, in all three matters.[4]

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[2] Pub. L. No. 107-71, 115 Stat. 597, 620 (2001) (49 U.S.C. § 44935 note). Section 111(d) states,

> Notwithstanding any other provision of law, [TSA] may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as [TSA] determines to be necessary to carry out the screening functions [under 49 U.S.C. § 44901].

[3] Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 101-557). The Initial Decision (ID) in ___ did not address the Homeland Security Act. In ___ , the Administrative Judge cited, but did not discuss or analyze, § 883 of the Act, which, as discussed infra at p. 7, is a pivotal provision of law. See ___ ID at 4.

[4] In its ___ , response to the ___ PFR, the agency argued only that the appellant's disclosures were not protected under 5 U.S.C. § 2302(b)(8). In its ___ , response to the ___ PFR, and in its ___ , response to the ___ PFR, however, the agency argued that the Board lacks jurisdiction over TSA screeners' IRA appeals. This brief addresses only the IRA jurisdictional issue.

Amicus curiae, the U.S. Office of Special Counsel (OSC), is an independent agency charged with safeguarding the merit system in federal employment by protecting federal employees and applicants from "prohibited personnel practices," including retaliation for whistleblowing. See 5 U.S.C. §§ 1212, 2302(b). To execute its mission, OSC has authority to investigate allegations of prohibited personnel practices and, where warranted, seek corrective and disciplinary action from the Board. See 5 U.S.C. §§ 1214, 1215.

The issue before the Board in these matters is one of considerable importance to OSC and TSA screeners. The legal analysis that is determinative of whether the Board has jurisdiction over TSA screeners' IRA appeals is also determinative of whether OSC has jurisdiction over screeners' complaints of whistleblower retaliation. Therefore, the outcome in this matter will directly affect OSC's jurisdiction over the approximately 45,000 TSA screeners, including OSC's authority to independently investigate screeners' complaints and, in meritorious cases, seek corrective and disciplinary action from the Board.

SUMMARY OF ARGUMENT

The Administrative Judges were incorrect as a matter of law when they ruled in these matters that the Board lacks jurisdiction over appellants' IRA appeals. Congress, through the plain language and structure of the Homeland Security Act, clearly manifested its intention to provide full statutory whistleblower rights, including IRA appeal rights, to all DHS employees,

including TSA screeners, regardless of what personnel system applies.[5] Moreover, § 111(d) of the ATSA and § 883 of the Act can, and should, be read harmoniously to ensure whistleblower rights for TSA screeners. Finally, to the extent of any incongruity between the two sections, § 883 must prevail over § 111(d) because it is the more specific statute and would otherwise be rendered superfluous. Accordingly, the Board should find that it has jurisdiction over IRA appeals from TSA screeners for personnel actions that the agency proposed, took, or failed to take on or after March 1, 2003.

ARGUMENT

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE HOMELAND SECURITY ACT PROVIDES TSA SCREENERS, LIKE ALL DHS EMPLOYEES, WITH FULL WHISTLEBLOWER RIGHTS

Congress created a unified statutory scheme in the Homeland Security Act that ensures whistleblower rights for all DHS employees, including TSA screeners, at all times. To be sure, § 841 of the Act provides the DHS Secretary with authority to establish a personnel system for some or all of DHS that may include the waiver or modification of several provisions of Title 5. It is undisputed, however, that Section 841 does not permit any such new personnel system to waive or modify any statutory whistleblower protections.[6] Moreover, prior to the establishment of any new personnel system under § 841, or for those employees to whom the DHS Secretary decides any such new system will not apply, § 883 ensures whistleblower rights

[5] Unless otherwise noted, full statutory whistleblower rights, including IRA appeal rights, are hereinafter referred to as "whistleblower rights."

[6] See ___ ID at 4; ___ PFR Response at 15; DHS Human Resources Management System, 69

for TSA screeners, while § 1512(e)(2) protects the whistleblower rights of all other DHS employees.

A. The Homeland Security Act Ensures Whistleblower Rights For TSA Screeners Before Any New DHS Personnel System Is Established.

The ultimate goal in statutory interpretation is to give effect to the intent of Congress. See Pierce v. Principi, 240 F.3d 1348, 1352 (Fed. Cir. 2001), citing NLRB v. Lion Oil Co., 352 U.S. 282, 297 (1957). To discern Congress's intent, we must rely primarily on the language of the statute itself. See Rosete v. Office of Personnel Management, 48 F.3d 514, 517 (Fed. Cir. 1995), quoting Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). We are also required to read the statute as a whole, giving meaning and effect to all of its parts. See Meeks v. West, 216 F.3d 1363, 1366-67 (Fed. Cir. 2000), quoting U.S. Nat. Bank of Oregon v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 454-55 (1993). These well-established principles of statutory construction provide the analytical framework for discerning Congress's intent regarding TSA screeners' whistleblower rights under the Homeland Security Act.

The Homeland Security Act created DHS as an "executive department" within the meaning of Title 5. See Act § 101(a).[7] On March 1, 2003, TSA ceased to be an entity within

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Fed. Reg. 8029, 8031 (2004) (to be codified at 5 C.F.R. pt. 9701) (proposed Feb. 20, 2004).

[7] Therefore, DHS is an "agency" for purposes of 5 U.S.C. § 2302. See 5 U.S.C. §§ 105, 2302(a)(2)(C). See Attachment A for key provisions of the Homeland Security Act referred to in this brief.

the Department of Transportation and became part of DHS in conjunction with approximately twenty-one other incoming federal agencies and sub-agencies.[8]

To date, a new DHS personnel system has yet to be established.[9] In the interim, § 1512(e)(2) of the Act dictates that the "terms and conditions of employment" of employees transferred into DHS shall not be altered "except as otherwise provided in this Act, or under authority granted by this Act." Thus, under § 1512(e)(2), all DHS employees who possessed whistleblower rights prior to their transfer into DHS retain such rights. For example, employees of the former Customs Service continue to enjoy the same whistleblower rights that they had prior to becoming part of DHS.

Conversely, however, if § 1512(e)(2) is read alone (i.e., without § 883), employees lacking whistleblower rights prior to their transfer into DHS would not gain those rights upon becoming part of DHS. Such a result would be particularly significant for TSA screeners. Of the approximately 165,000 federal employees who became part of DHS on March 1, 2003, the

[8] See Act §§ 234, 303, 403, 421, 441, 503, 821, 1502(a)(1) (transferring various federal agencies and sub-agencies, including TSA, into DHS); "Department of Homeland Security Reorganization Plan," November 25, 2002 (setting March 1, 2003 as the date of such transfers), available at: http://www.whitehouse.gov/news/releases/2002/11/reorganization_plan.pdf.

[9] The agency issued a proposed rule for a new DHS personnel system. Significantly, however, as discussed infra in Part I.B. at p. 9, the proposed new system excludes TSA. See DHS Human Resources Management System, 69 Fed. Reg. 8029, 8030-31, 8050-51 (2004) (to be codified at 5 C.F.R. pt. 9701) (proposed Feb. 20, 2004).

only substantial group of employees lacking whistleblower rights before their incorporation into DHS was the 45,000-employee TSA screener workforce.[10]

Section 883 of the Act, however, provides the pivotal statutory grant of whistleblower rights for the 45,000 TSA screeners. It states:

> "*Nothing in this Act* shall be construed as exempting [DHS] from requirements applicable with respect to executive agencies . . . to provide whistleblower protections for employees of [DHS] (including pursuant to the provisions in section 2302(b)(8) and (9) of [title 5] . . .)" (emphasis added).

Section 883 thereby serves one purpose and one purpose only: to ensure whistleblower rights for DHS employees not otherwise protected by the Act; namely, TSA screeners. The intent of § 883 is further crystallized by both the qualified language of § 1512(e)(2) ("except as

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[10] Subsequent to passage of the ATSA and prior to passage of the Homeland Security Act, OSC and TSA entered into a Memorandum of Understanding (MOU) whereby TSA screeners may file allegations of whistleblower reprisal under 5 U.S.C. § 2302(b)(8) with OSC (The agency mischaracterizes the MOU as covering allegations under §§ 2302(b)(1)(8)(9). See ___ PFR Response at 3, n. 2. The MOU, however, covers only § 2302(b)(8) allegations). See Attachment B. Under the May 28, 2002, MOU, TSA allows OSC to investigate those allegations and recommend corrective and disciplinary action to TSA. The MOU, however, cannot, and does not, provide OSC with authority to petition the Board or for TSA screeners to file IRA appeals with the Board. Moreover, TSA may terminate the MOU with 90 days notice. Thus, despite the goodwill of TSA, the MOU is no substitute for the full statutory whistleblower rights provided to screeners in the Act. (The Administrative Judge in ____ incorrectly characterized the MOU as a May 2003 document. See ID at 3. As noted above, the MOU was in fact a May 2002 document.)

Approximately 800 employees of two former FBI entities that became part of DHS also lacked full statutory whistleblower rights. See 5 U.S.C. §§ 2302(a)(2)(C)(ii) (excepting the FBI), 2303 (providing limited internal whistleblower rights to FBI employees, but not the ability to file complaints with OSC or IRA appeals with the Board).

otherwise provided in this Act . . . ") and the unambiguous sweep of § 883 ("[n]othing in this Act shall be construed as exempting [DHS] from [whistleblower protection laws]"). [11]

Thus, interpreting § 1512(e)(2), or any other section of the Act, to exempt DHS from whistleblower protection laws with respect to TSA screeners would plainly violate the specific mandate of § 883. Instead, §§ 1512(e)(2) and 883, read together, ensure that screeners have whistleblower rights prior to the establishment of any new DHS personnel system that may or may not apply to them.

B. The Homeland Security Act Will Also Ensure Whistleblower Rights For TSA Screeners After Any New DHS Personnel System Is Established.

Under § 841 of the Act, the DHS Secretary "may establish, and from time to time adjust, a human resources management system for some or all of the organizational units of [DHS]." In establishing any such system pursuant to § 841, the Act grants the DHS Secretary authority to only waive or modify certain chapters of Part III of Title 5, including those relating to performance management, pay rates and systems, adverse actions, and appeals. See

[11] The agency has cited, as evidence of Congress's intent not to provide IRA rights to screeners, Congress's rejection of an amendment to the Act that included provision of such rights. See ____ PFR Response at 12-13. The agency's reliance on that legislative history is misplaced. First, it is proper to examine legislative history only when statutory language is ambiguous, which it is not here. See, e.g., Barnhill v. Johnson, 503 U.S. 393, 401 (1992); Jones v. Dep't of Transp., 295 F.3d 1298, 1304 (Fed. Cir. 2002). Second, even if it were proper to turn to legislative history, the history the agency relies upon does not support its conclusion. The provision for IRA rights for screeners was only one among many provisions in the multi-faceted amendment, making it impossible to infer on what basis Congress rejected the amendment (i.e., Congress was not necessarily rejecting IRA rights for screeners when it rejected the amendment). Moreover, it is equally reasonable to infer that Congress rejected the amendment, in part, because it believed that the Act already provided IRA rights for screeners in § 883.

5 U.S.C.

§ 9701(a)-(c).[12]

Section 841 does not, however, grant the DHS Secretary authority to waive or modify Part II of Title 5, which (in Chapter 12) provides for OSC's investigative and enforcement authority and IRA appeals to the Board. Id. See also 5 U.S.C. §§ 1214, 1215, 1221. Section 2302(b) of Title 5, which defines "prohibited personnel practices," including whistleblower reprisal, is also non-waivable. See 5 U.S.C. § 9701(a)-(c).

Thus, all DHS employees subject to any new DHS personnel system that may be established under § 841 will continue to have whistleblower rights under that system. Similarly, DHS employees not subject to any such new system will continue to have whistleblower rights pursuant to either § 1512(e)(2) or § 883, as described supra in Part I.A.

As noted above in n. 9, the agency's pending proposed rule for a new DHS personnel system under § 841 excludes TSA from that system. Nevertheless, as explained above, § 883 ensures whistleblower rights for TSA screeners. Thus, while § 841 may not directly impact screeners' whistleblower rights at this juncture, it is further evidence of Congress's intent to provide, under all personnel system scenarios, whistleblower protections for all DHS employees, including screeners.[13]

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[12] Section 841 of the Act amends Part III, Subpart I of Title 5 by adding Chapter 97 for DHS.

[13] For the reasons explained above, § 883 is not merely duplicative of § 841, as the agency argued in its ___ PFR Response (p. 16, n. 8), but has a purpose all its own. See Clark v. U.S., 322 F.3d 1358, 1365 (Fed. Cir. 2003), quoting U.S. v. Alaska, 521 U.S. 1, 59 (1997) ("We will

II. SECTIONS 111(d) AND 883 CAN, AND SHOULD, BE READ HARMONIOUSLY TO ENSURE WHISTLEBLOWER RIGHTS FOR TSA SCREENERS

"[Where two statutes are] capable of coexistence, it is the duty of the courts . . . to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974). Sections 111(d) and 883 are easily capable of co-existing. Section 111(d) does not preclude whistleblower rights for TSA screeners; it merely leaves provision of such rights to the agency's discretion. Section 883 fills in any gap by ensuring such rights. Thus, the two statutory sections are fully consistent and complementary.

The agency argues, however, that several provisions in the Homeland Security Act preserve, without modification, TSA's unique personnel authority under § 111(d) of the ATSA. See, e.g., Homeland Security Act, § 424 (maintaining TSA as a "distinct entity" within DHS for two years). See also ___ PFR Response at 13-14; ___ ID at 4; ___ ID at 5.

This argument is both incorrect and beside the point. The very provisions of the Act relied upon to preserve TSA's § 111(d) authority, such as § 424, are plainly subject to § 883, which specifies that "*nothing in this Act shall be construed* as exempting [DHS] from [whistleblower laws]" (emphasis added). Thus, construing those provisions as preserving § 111(d) without modification, and thereby exempting TSA screeners from whistleblower

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avoid an interpretation of a statute that renders some words altogether redundant.")

rights, squarely contradicts § 883's specific mandate.[14] As discussed infra in Part III.B., that result would also run afoul of the cardinal principle of statutory construction that, if possible, all parts of a statute must be given meaning and effect.[15]

Reading § 883 and § 111(d) together, however, both ensures whistleblower rights for TSA screeners and gives full effect to § 111(d). Specifically, the agency retains broad authority "to employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment" of TSA screeners without regard to most Title 5 requirements, with the narrow exception of whistleblower protections. Thus, §§ 111(d) and 883 can effortlessly be read in conjunction to give effect to each statutory provision and to the unified scheme of whistleblower protection established by Congress in the Homeland Security Act.[16]

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[14] Further, with regard to § 424, there is no basis for concluding that Congress intended that section to address TSA's personnel authority under § 111(d) of the ATSA. The legislative history of § 424 suggests that Congress's intent was only to maintain TSA as a cohesive unit (and not allow DHS to reorganize it) for two years so that it could carry out its mission and meet its statutory deadlines without the potential disruption caused by a reorganization. See, e.g., H.R. Rep. No. 107-609, pt.1, at 98 (2002), reprinted in 2002 U.S.C.C.A.N. 1352, 1379 (explanatory notes for § 407 [now § 424]: "The Select Committee recognizes that the TSA is being transferred to [DHS] at the same time it is working to meet a number of statutory deadlines as a newly created agency.")

[15] Significantly, the Administrative Judges in these matters did not acknowledge that their holdings would read § 883 out of the Act. Moreover, the agency concedes that § 883 only has meaning if applied to TSA screeners. See ___ PFR Response at 16, n. 8.

[16] See, e.g., Watt v. Alaska, 451 U.S. 259, 267 (1981) ("We must read [two] statutes to give effect to each if we can do so while preserving their sense and purpose.")

III. ANY INCONGRUITY BETWEEN SECTIONS 111(d) AND 883 MUST BE RESOLVED IN FAVOR OF SECTION 883

In maintaining that § 111(d) is the controlling law on the question of TSA screeners' whistleblower rights, the Administrative Judges and the agency rely on the principle that "notwithstanding" clauses, such as that found in § 111(d), are generally interpreted to supercede all other laws. See ___ PFR Response at 9-12, 17-18; ___ ID at 3; ___ ID at 3. This argument, however, ignores two important rules of statutory construction that apply here: (1) a later enacted, more specific statute overrides an earlier enacted, more general statute if there is any conflict between the two; and (2) regardless of which statute is more specific, all statutory provisions must be given meaning and effect. For these reasons, § 883 must prevail over § 111(d) on the question of TSA screeners' whistleblower rights.

A. Section 883 Must Prevail Over Section 111(d) Because It Is The More Specific Statutory Provision.

"[O]ur guide must be the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes." Smith v. Robinson, 468 U.S. 992, 1024 (1984) (Brennan, J., dissenting). See also Watt, 451 U.S. at 266-67.

The agency argues that § 111(d) is the more specific statutory provision because it applies only to TSA screeners, while § 883 applies to all DHS employees. See ___ PFR Response at 18. The more logical interpretation, however, is to view § 111(d) as the more general provision because it addresses the personnel system as a whole, while § 883 addresses

only a specific, narrow aspect of that system (i.e., whistleblower rights).[17] Therefore, § 883, as the more specific, later enacted statute, is the controlling law on the question of TSA screeners' whistleblower rights.

B. Section 883 Must Prevail Over Section 111(d) Because It Would Otherwise Be Rendered Superfluous.

Even assuming, however, that § 111(d) is the more specific of the two statutory provisions, § 883 still must control on the question of TSA screeners' whistleblower rights because it would otherwise be rendered superfluous.[18] The only function of § 883 is to provide whistleblower rights to TSA screeners; otherwise, § 883 lacks meaning or purpose. As explained supra in Part I.A., the only significant group of employees lacking whistleblower rights before becoming part of DHS was TSA screeners. Moreover, it is not disputed that all other DHS employees already possessed such rights, which they retain pursuant to either § 1512(e)(2) or § 841 of the Act. Thus, § 883 serves no purpose for those other DHS

[17] In _____, the Administrative Judge erroneously concluded that § 883 "made sweeping changes to organization of governmental departments, agencies, and functions related to homeland security," while § 111(d) "deals specifically with [TSA] screeners." _____ ID at 4. This grossly misstates the scope of § 883, which concerns only the whistleblower rights of DHS employees.

[18] See Radzanower v. Touch Ross & Co., 426 U.S. 148, 153 (1976) quoted in Inter-Coastal Xpress, Inc. v. U.S., 296 F.3d 1357, 1366 (Fed. Cir. 2002) ("[A] specific statute will not be controlled or nullified by a general one . . . *unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.*") (emphasis added) See also United States v. Menasche, 348 U.S. 528, 538-39 (1955), cited in Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1355 (Fed. Cir. 2003) ("The cardinal principle of statutory construction is to save and not to destroy. *It is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.*") (emphasis added)

employees. Its only purpose, therefore, is to ensure whistleblower rights for TSA screeners. Any other interpretation would read § 883 out of the Homeland Security Act.

CONCLUSION

For the foregoing reasons, the Board should find that it has jurisdiction over IRA appeals from TSA screeners for personnel actions that the agency has proposed, taken, or failed to take on or after March 1, 2003.

Respectfully submitted,

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Scott J. Bloch
Special Counsel

_____
Cary P. Sklar
Associate Special Counsel
for Investigation & Prosecution Division III

_____
Patrick H. Boulay
Attorney, Investigation & Prosecution Division III
U.S. Office of Special Counsel
1730 M Street, NW
Suite 218
Washington, DC 20036
(202) 254-3657

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Washington, D.C.