

United States Court of Appeals  
for the Federal Circuit

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JOHN C. PARKINSON,  
*Petitioner*

v.

DEPARTMENT OF JUSTICE,  
*Respondent*

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2015-3066

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Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0032-I-2.

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Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.\*

PER CURIAM.

**O R D E R**

Respondent, the Department of Justice, filed a petition for rehearing en banc. A response was invited by the court and filed by Petitioner John C. Parkinson. The

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\* The panel that heard the appeal included Senior Circuit Judges Plager and Linn, who did not participate in the en banc poll, but elect to sit on the en banc panel pursuant to 28 U.S.C. § 46(c) (2012).

petition and response were considered by the panel that heard the appeal, Fed. Cir. R. 35 Practice Notes (“Petition for Rehearing En Banc Referred to Panel”), and thereafter referred to the circuit judges who are in regular active service. A poll was requested and taken, and the court decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

- (1) Respondent’s petition for rehearing en banc is granted.
- (2) The court’s opinion of February 29, 2016, is vacated, and the appeal is reinstated.
- (3) The parties are requested to file supplemental briefs. The briefs should address the following issue:

Whether a preference eligible employee of the Federal Bureau of Investigation challenging an adverse employment action before the Merit Systems Protection Board under 5 U.S.C. § 7513(d) may raise whistleblower reprisal in violation of 5 U.S.C. § 2303 as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C).

Briefing should be limited to this issue.

- (4) The supplemental en banc briefs shall be electronically filed in the ECF system, and thirty paper copies of each brief shall be filed with the court. Two paper copies of each en banc brief shall be served on opposing counsel. Respondent’s en banc brief is due 45 days from the date of this order. Petitioner’s en banc response brief is due within 30 days of service of Respondent’s en banc brief. Respondent’s reply brief is due within 15 days of service of Petitioner’s response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(5) The court invites the views of amici curiae. Any such briefs may be filed without consent and leave of court, but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(6) The parties are directed to file with the court thirty paper copies of their original briefs and joint appendix within 17 days from the date of this order.

(7) This appeal will be heard en banc on the basis of the original briefs, the supplemental briefs ordered herein, and oral argument.

(8) Oral argument will be held at a time and date to be announced later.

FOR THE COURT

August 8, 2016  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

cc: Kathleen M. McClellan  
Tara K. Hogan