

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

JOSE E. ROSARIO-FÁBREGAS,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2023-2170

Petition for review of the Merit Systems Protection
Board in No. NY-0752-18-0221-I-1.

Decided: April 9, 2024

JOSE EVARISTO ROSARIO-FABREGAS, San Juan, PR, pro
se.

BRITTNEY M. WELCH, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent. Also represented by BRIAN M.
BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

Before DYK, MAYER, and TARANTO, *Circuit Judges*.

PER CURIAM.

In 2018, José Rosario-Fábregas was removed from his position as a Biologist (Project Manager) with the United States Army Corps of Engineers (Army or agency) based on charges of absence without leave (AWOL), excessive absence, and insubordination. Supplemental Appendix (SAppx)225–26. Mr. Rosario-Fábregas appealed the agency’s removal decision to the Merit Systems Protection Board. SAppx232–37. The assigned administrative judge issued an initial decision, which sustained the AWOL and excessive-absence charges but not the insubordination charge, and which sustained the removal penalty. SAppx37–64. The full Board, on Mr. Rosario-Fábregas’s petition and the agency’s cross-petition in turn, sustained the insubordination charge and affirmed the penalty of removal on that basis, thus finding no need to reach a decision on the AWOL and excessive-absence charges. SAppx1–31, *Rosario-Fábregas v. Department of the Army*, No. NY-0752-18-0221-I-1, 2023 WL 4034398 (M.S.P.B. June 15, 2023) (*Final Order*).

On Mr. Rosario-Fábregas’s appeal, we reject all but one of his challenges to the Board’s decision. The exception concerns the application of a provision of the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(13). On that issue, we see deficiencies in the Board’s analysis and a need for fuller consideration before a sound conclusion about the application of § 2302(b)(13) here can be reached. We therefore vacate the Board’s decision insofar as it found no violation of § 2302(b)(13) and remand for further proceedings, which may include the § 2302(b)(13) issue and the AWOL and excessive-absence issues the Board did not resolve.

I

The appeal before us relates to the third removal action taken by the Army against Mr. Rosario-Fábregas. *See Final Order*, 2023 WL 4034398, at *1–3. The agency first removed Mr. Rosario-Fábregas for misconduct in February

2010, but he was restored to the Army's employment rolls in November 2011 after the Board reversed the removal on due-process grounds. *Id.* at *1; *Rosario-Fábregas v. Department of the Army*, No. NY-0752-10-0127-I-1, 2011 WL 12516590, at *1–3 (M.S.P.B. Nov. 30, 2011). Upon his reinstatement, however, Mr. Rosario-Fábregas did not actually resume work due to disagreement over whether medical professionals had properly cleared him (*i.e.*, given him a proper medical release) to resume work. *Final Order*, 2023 WL 4034398, at *1. In February 2013, the agency again removed Mr. Rosario-Fábregas based on the same charges as the first removal action. *Id.* In July 2016, however, the Board, while sustaining several of the charges, reduced the penalty of removal to a 30-day suspension. *Id.*; *see generally Rosario-Fábregas v. Department of the Army*, No. NY-0752-13-0142-I-2, 2016 WL 3574965 (M.S.P.B. July 1, 2016).

After that Board decision, the parties agreed that Mr. Rosario-Fábregas would serve the 30-day suspension and return to work on September 6, 2016. *Final Order*, 2023 WL 4034398, at *2. Nevertheless, from September 2016 through June 2017, Mr. Rosario-Fábregas repeatedly failed to submit a medical release required for his return to work, and he sought and obtained sick and annual leave. SAppx104–22; *see also* SAppx123–27. On June 22, 2017, having exhausted his balance of accrued leave, Mr. Rosario-Fábregas requested advanced leave, *i.e.*, leave to which he had not yet earned an entitlement. SAppx134–36. His supervisor, Ms. White, denied the request and warned him that if he neither reported for duty nor provided a medical release by July 5, 2017, he would be marked AWOL. SAppx133. He failed to submit a medical release or report for duty by July 5, 2017, and the Army thus placed him in AWOL status. SAppx137. On August 22, 2017, Ms. White proposed his removal based on charges of AWOL and excessive absence. SAppx146–54.

Meanwhile, on June 15, 2017, one of Mr. Rosario-Fábregas's former supervisors had sent an email to Ms. White and an agency attorney alleging that Mr. Rosario-Fábregas had been sending him harassing emails. SAppx160. In the email, the former supervisor copied the text of a "recent email" from Mr. Rosario-Fábregas and requested a "plan of action to cease this harassment[] once and for all." SAppx160. Later the same day, Ms. White responded by sending Mr. Rosario-Fábregas an email "directing that [he] cease all contact with [his former supervisor] at work" and that, if he needed to speak with the former supervisor "for any official purposes," he "send the communication through [Ms. White.]" SAppx128.

On August 24, 2017, Mr. Rosario-Fábregas sent a mass-distribution email suggesting that promotions of various agency employees, including two specifically named employees, were illegal and offering to "represent" employees "against irresponsible managers." SAppx129–30. Later that day, Ms. White sent Mr. Rosario-Fábregas an email "directing that [he] not send district wide, regulatory wide, or any other email blasts to Corps employees without [her] approval." SAppx129. On September 1, 2017, Mr. Rosario-Fábregas sent another mass-distribution email, using lists that included his former supervisor, as well another email to his former supervisor and one other individual, without sending the communication through Ms. White. SAppx131–32, 163–65. In a response the same day, Ms. White informed Mr. Rosario-Fábregas that his mass-distribution email violated her previous instruction and clarified that her orders did not limit him from exercising his rights to contact the Army Inspector General, Civilian Personnel Advisory Center, Office of Counsel, Equal Employment Opportunity office, or the deciding official in the removal proposal. SAppx131.

Based on the foregoing events, on October 11, 2017, Ms. White rescinded the pending removal proposal and issued a new one that included three charges: AWOL, excessive

absence, and insubordination. SAppx167, 168–84. The agency’s insubordination charge included two specifications—the first based on Ms. White’s order to cease communication with his former supervisor, the second based on Ms. White’s order to cease sending mass emails without prior approval. SAppx181–82. The agency took some time to act on the new removal proposal. In May 2018, while it was still pending, the agency notified Mr. Rosario-Fábregas that the deciding official had been changed (the initial deciding official had retired) and that he could reply to the notice and could include documentary evidence in support of his reply if desired. SAppx198. Mr. Rosario-Fábregas submitted, and the new deciding official reviewed, a memorandum and several emails submitted in reply. SAppx205, 206. Finally, on August 23, 2018, the new deciding official upheld all three charges and removed Mr. Rosario-Fábregas effective the next day. SAppx225–26.

In September 2018, Mr. Rosario-Fábregas appealed the agency’s removal decision to the Merit Systems Protection Board. SAppx232–37. The administrative judge’s initial decision sustained the AWOL and excessive-absence charges and on that basis upheld the penalty of removal. SAppx37–64. The administrative judge did not sustain the insubordination charge, concluding that Ms. White’s orders to him about his emailing activity were overbroad because they went beyond “false or offensive statements.” SAppx52.

Mr. Rosario-Fábregas petitioned for review by the full Board, and the agency cross-petitioned regarding the insubordination charge. In its final order, the Board determined that the administrative judge should have sustained the insubordination charge. The Board first determined that Ms. White’s orders were not improper under one provision of the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), because they had not been motivated by prior protected disclosures. *Final Order*, 2023 WL 4034398, at *5 (distinguishing *Smith v. General Services*

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