



U.S. MERIT SYSTEMS PROTECTION BOARD

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September 19, 2011

Carolyn Lerner
Special Counsel
Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036-4505

Re: Robert J. MacLean v. Department of Homeland Security
Docket No. SF-0752-06-0611-I-2

Dear Ms. Lerner:

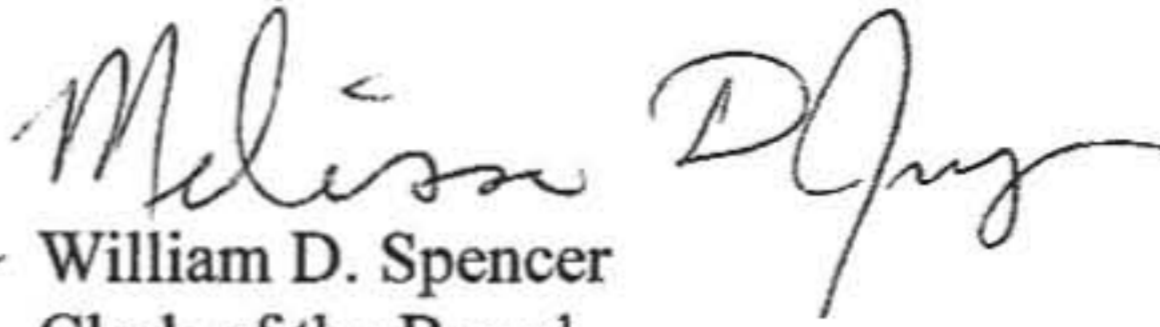
This is in response to your "Motion for Leave to File Brief as *Amicus Curiae* in Support of Appellant Robert J. MacLean." Your motion and accompanying "Brief of U.S. Office of Special Counsel as *Amicus Curiae*" were filed in relation to the above-referenced appeal on August 25, 2011. You note in your motion that it is being filed "[p]ursuant to 5 C.F.R. § 1201.34(e)."

As you know, the Board issued an Opinion and Order in Mr. MacLean's appeal on July 25, 2011. The provision in the Board's regulations which you have cited discusses the filing of *amicus* briefs while a case is pending before an administrative judge. The proceedings before an administrative judge in this appeal ended with the issuance of an initial decision on May 12, 2010. Your office also chose not to seek *amicus* status when the case was pending before the full Board on petition for review. Since there is no appeal pending in this matter anywhere at the Board, we deny your request.

In your brief, you also note that "[t]he Board has statutory and regulatory authority to reopen appeals in which it has rendered a final Board decision," and you give citations to legal authorities supporting that premise. However, your request for the Board to reopen this appeal is denied. While the Board can, in fact, reopen appeals in which it has rendered a final decision, it is extremely rare for the Board to exercise its discretion to do so. The Board does consider requests to reopen when the Director of the Office of Personnel Management (OPM) exercises the statutory right (found at 5 U.S.C. § 7703(d)) to seek reopening of a final Board decision. In the absence of a request from the Director of OPM, and in the absence of any other of the extraordinary circumstances in which the Board would exercise this authority to reopen, we decline to reopen Mr. MacLean's appeal.

Finally, while the Board is denying your request for *amicus* status and your request to reopen in this case, the Board will continue to honor requests of the Office of Special Counsel to intervene pursuant to the provisions of 5 U.S.C. § 1212 (c) in active proceedings before the Board.

Sincerely,


William D. Spencer
Clerk of the Board

cc: Robert MacLean
Thomas Devine
Larry Berger
Ellen Dizon Calaguas
Howard Schulman