No. 22-1788

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KEVIN D. JONES,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE JUDGE MONIQUE BINSWANGER

BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER URGING REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2022-1788

Short Case Caption Jones v. MSPB

Filing Party/Entity Amicus Curiae National Treasury Employees Union

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/06/2022

Signature: /s/ Paras N. Shah

Name: Paras N. Shah

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Treasury Employees Union		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents bargaining unit employees in thirty-four federal agencies and departments. NTEU has a long tradition of using its litigation program to ensure that federal civil servants receive the protections that Congress gave them. NTEU files this brief to emphasize the Administrative Judge's (AJ) failure to adhere to this Court's precedent in the decision below, which issued when the Merit Systems Protection Board (the Board) lacked a quorum and thus became a final decision of the Board.

Congress extended Chapter 75 due process protections to any "preference eligible in the excepted service who has completed 1 year of current continuous service in the same or *similar positions* . . . in an Executive agency . . . ." 5 U.S.C. § 7511(a)(1)(B)(i) (emphasis added). In this context, positions are "similar" if they are in the same "line of work"—meaning that experience in one position "demonstrates the knowledge[], skills, and abilities required to perform the work of the other job." *Mathis v. U.S. Postal Serv.*, 865 F.2d 232, 234 (Fed. Cir. 1988).

As this Court has instructed, to determine whether two positions are in the same "line of work" and thus "similar," the Board must evaluate the skills and "fundamental character" of the two positions, as opposed to looking narrowly at specific duties. *See id.* at 234-35. And the Board must determine whether "extensive" training was required for the second position; if not, that indicates that the two positions are "similar." *See id.* at 235.

The AJ failed to apply these standards when she ruled that Petitioner Kevin Jones's Attorney-Advisor positions with the U.S. Department of Agriculture (USDA) and the Bureau of Alcohol, Tobacco, and Firearms (ATF) were *not* "similar" under Section 7511(a)(1)(B). Because this Court's standards were not applied, the AJ's ruling that Mr. Jones was not an "employee" for Chapter 75 purposes is not the product of reasoned decisionmaking. This Court should therefore set it aside as arbitrary and capricious.

If affirmed, this erroneous decision would severely restrict the ability of federal employees like Mr. Jones to challenge adverse employment actions taken against them. That would be at odds with the purpose of Congress's amendments to Section 7511(a)(1)(B) in 1990,

which aimed to "broaden the appeal rights of non-preference eligibles in the excepted service . . . ." *Greene v. Def. Intel. Agency*, 100 M.S.P.R. 447, 450 (2005). Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

The AJ's ruling that Mr. Jones's two Attorney-Advisor positions were not "similar" for purposes of Section 7511(a)(1)(B) is not the product of reasoned decisionmaking because the AJ failed to apply the proper legal standard in two ways.

First, this Court requires that when the Board assesses positions for similarity under Section 7511(a)(1)(B), it evaluates the skills and "fundamental character" of the positions, as opposed to merely comparing the specific duties of the positions. The AJ nevertheless narrowly focused her analysis on perceived distinctions between the specific duties of Mr. Jones's two employment law-focused Attorney-Advisor positions, while ignoring their fundamental character.

[1] No counsel for any party in this action authored this brief in whole or in part, and no party or party's counsel or person other than the amicus curiae or its members or its counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Second, the Office of Personnel Management's (OPM) regulations and this Court's precedent indicate that two positions are "similar" for purposes of Section 7511(a)(1)(B) if an employee could be interchanged between the positions without being *required* to undergo "extensive" training. But the AJ did not apply that standard. Instead, the AJ evaluated whether the training that Mr. Jones received for the second of his Attorney-Advisor positions was "*either useful* or necessary for his performance." The AJ then improperly weighed insignificant and optional training against Mr. Jones.

These failures to properly apply this Court's standards require that the AJ's ruling be set aside as arbitrary and capricious.

ARGUMENT

I. Standard of Review.

"The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.'" *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998). *See* 5 U.S.C. § 7703(c)(1) (importing the APA's standard of review for this Court's review of Board decisions). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it

reaches that result must be logical and rational." *Allentown,* 522 U.S. at 374.

An agency ruling applying "the wrong standard" cannot "withstand the test of reasoned decisionmaking." *Production Workers Union, Local 707 v. NLRB*, 793 F.2d 323, 332 (D.C. Cir. 1986) (then-Judges Ginsburg and Scalia, and Judge Buckley). Thus, if an agency does not "faithfully apply the applicable legal standard," the reviewing court must "vacate and remand to the agency to apply the correct legal standard . . . ." *Taylor v. USDA*, 636 F.3d 608, 617 (D.C. Cir. 2011).

II. The AJ Failed to Assess the "Fundamental Character" of Mr. Jones's Attorney-Advisor Positions. The AJ's Failure to Apply this Court's Standard Means that the Resulting Ruling is Not the Product of Reasoned Decisionmaking.

A. This Court's Jurisprudence.

This Court has instructed the Board to focus its "similar positions" inquiry on the skills and "fundamental character" of the positions in question. *See Mathis*, 865 F.2d at 235. And it has reversed the Board for merely contrasting the specific duties of the positions. *See id.*

In *Mathis*, the seminal case on the "similar positions" test, this Court overturned a "narrow[]" Board interpretation of Section 7511(a)(1)(B) that relied primarily on the differences between the

specific duties of a special delivery messenger and distribution clerk. *See* 865 F.2d at 233. According to the Board, the positions were dissimilar because they were performed in different locations and involved "different steps of the mail distribution process." *Id.* at 235. The Court, though, looked broadly to the "critical fact" that the employee "handled the mail in each position" and thus concluded that the "fundamental character" of each position was "'similar.'" *See id.*

Similarly, in *Coradeschi v. Department of Homeland Security*, this Court confirmed that a broad inquiry into the "fundamental character" of the positions in question is the correct approach—and it warned against simply comparing specific job duties. *See* 439 F.3d 1329, 1334 (Fed. Cir. 2006). This Court held that the employee's work as an Immigration and Naturalization Agent was "similar" to his work as a Federal Air Marshall because the "*skills* and *fundamental character* of both positions were closely related." *See id.*

The *Coradeshi* Court's analysis shows the high-level focus of the "similar positions" inquiry. The Court concluded that the two positions were similar because each required the employee "to apprehend and subdue criminals, carry and be proficient with a firearm, and

investigate criminal activity." *Id.* The Court also found it important that both positions had an 1801 occupation code. *Id.* It did not matter to the Court that one position enforced "criminal law primarily in the confines of planes" while the other position enforced "immigration laws primarily within business establishments." *Id.* Nor did it matter that one position required a "top secret security clearance" and "specialized training for work onboard aircraft." *Id.*

B. The AJ's Failure to Follow this Court's Direction.

The AJ failed to assess the skills and "fundamental character" of the Attorney-Advisor positions in which Mr. Jones served. This failure to "faithfully apply the applicable legal standard" means that the AJ's ruling is not the product of reasoned decisionmaking and that it must be set aside as arbitrary and capricious. *See Taylor*, 636 F.3d at 617; *Local 707*, 793 F.2d at 332.

The AJ did not evaluate the overarching characteristics of Mr. Jones's two Attorney-Advisor positions. The AJ, for example, glossed over the facts that the two positions involved legal practice in the same substantive area—employment law—and that the positions had the same title, grade level, and occupational series. *See* Appx6. These

foundational attributes show that Mr. Jones's situation is like that in *Coradeschi*, where the two positions at issue were broadly cast as law enforcement positions despite their different specific duties and where the Court found it "important" that the two positions carried the same occupation code. *See* 439 F.3d at 1334. These characteristics also show that this matter is unlike *Amend v. Merit Systems Protection Board*, which involved positions with different grade levels and occupational series. 221 F. App'x 983, 985-96 (Fed. Cir. 2007). *See* Appx11 (relying on *Amend* for ruling on similar positions issue).

Instead of evaluating the fundamental character of Mr. Jones's positions, the AJ erroneously focused on the "specific duties" and "tasks" that Mr. Jones performed in each Attorney-Advisor position to justify her ruling that the two positions were not "similar." *See* Appx6-11. For example, the AJ relied on narrow distinctions between:

- The specific type of employment law work in which Mr. Jones was engaged at each of his Attorney-Advisor positions. Appx7-8.
- The juncture at which Mr. Jones provided employment law advice at his Attorney-Advisor positions, i.e., whether that advice was "*after* particular events had occurred and a complaint had been

filed" or whether the advice was given "*prospectively* . . . so as to withstand potential legal review." Appx10 (emphases added).

- The length of Mr. Jones's legal opinions at his Attorney-Advisor positions. Appx9.
- The audience for Mr. Jones's oral advocacy at his Attorney-Advisor positions. Appx9.

The AJ's line-drawing, in-the-weeds analysis plainly conflicts with this Court's instruction in *Mathis* and *Coradeschi* that the Board broadly assess the skills and "fundamental character" of the positions in question and not focus narrowly on their specific duties. This Court should vacate the AJ's ruling and remand this matter with instructions to properly apply the governing standard.

III. The AJ Failed to Assess Whether Mr. Jones Required "Extensive" Training for his ATF Position and Instead Created a Different Standard. The Resulting Ruling is Not the Product of Reasoned Decisionmaking.

A. OPM's Regulation and this Court's Jurisprudence.

Under OPM's regulations, an individual can show that two positions are "similar" by showing that "the incumbent could be interchanged between the positions without significant training or

undue interruption to the work." *See* 5 C.F.R. § 752.402. If "significant training" is not required to move from one position to the other, that shows that the positions' duties "are similar in nature and character and require substantially the same or similar qualifications." *See id.*

This Court's precedent shows that only training that is "required" for the individual to perform the position's duties has relevance here. *See Mathis*, 865 F.2d at 235; *see also Amend*, 221 F. App'x at 985 (assessing training that "must" be completed). Optional training that might prove useful does not fall into this category.

"Significant" training in the "similar positions" context, moreover, means "extensive" training. *See Coradeschi*, 439 F.3d at 1334; *Mathis*, 865 F.2d at 235. This Court has held, for example, that up to sixty-five hours of training would not preclude a conclusion that two positions are "similar." *See Coradeschi*, 439 F.3d at 1334 (finding roughly fifteen hours of "substantively new training" was not "extensive"); *Benedict v. MSPB*, 1992 U.S. App. LEXIS 15239, at *2, *4 (Fed. Cir. June 25, 1992) (finding positions "similar" despite the 50-65 hours of training required to transition between the positions). In contrast, this Court has found that a seven-week training course for a position, followed by two years

of additional "training and developmental programs," indicated that the positions at issue "require[d] different qualifications" and were not "similar." *See Amend*, 221 F. App'x at 985-86.

B. The AJ's Disregard of the Governing Standard.

The AJ's analysis of the training issue deviated from the standard espoused in OPM's regulation and in this Court's precedent in two ways. The ruling that flowed from that analysis is therefore not the product of reasoned decisionmaking and must be set aside. *See Taylor*, 636 F.3d at 617; *Local 707*, 793 F.2d at 332.

First, the AJ did not limit her training analysis to training that was "required" for Mr. Jones's second position, as this Court's precedent instructs. *See Mathis*, 865 F.2d at 235; *see also Amend*, 221 F. App'x at 985. Instead, the AJ assessed all training that was "*either useful or* necessary." Appx9 (emphasis added). Indeed, the AJ even weighed Mr. Jones's "self-directed efforts" to further educate himself through reference books and a conference against a finding of similarity. Appx9-10. But as this Court's decisions show, only "required" training is relevant to whether two positions require different qualifications. *See Mathis*, 865 F.2d at 235; *see also Amend*, 221 F. App'x at 985.

Second, the AJ ignored that any required training must be "significant"—i.e., "extensive"—for it to weigh against a finding that two positions are similar. *See* 5 C.F.R. § 752.402; *Mathis*, 865 F.2d at 235. The AJ thus concluded that a one-week seminar at the start of Mr. Jones's employment, which served to bring him "up to speed" on certain legal principles and procedures, militated against a conclusion that the two positions were similar. Appx9-10. But even if this training was required, it was not long enough to qualify as "extensive," as this Court has used that term. *See Coradeschi*, 439 F.3d at 1334; *Benedict*, 1992 U.S. App. LEXIS 15239, at *2, *4. And it was not remotely like the seven weeks of training, followed by two years of additional training and developmental programs, in *Amend*. *See* 221 F. App'x at 985.

The AJ's failure to assess Mr. Jones's training using the standard set forth by OPM and this Court—especially when viewed in conjunction with the AJ's failure to evaluate the "fundamental character" of Mr. Jones's positions—renders the ruling below arbitrary and capricious. This Court should vacate that ruling and remand this matter for a proper application of the governing legal standard.

CONCLUSION

For the foregoing reasons and those stated in Petitioner Jones's brief, NTEU urges the Court to set aside the AJ's ruling that Mr. Jones is not an "employee" for purposes of Chapter 75 and remand this matter for further proceedings.

Respectfully submitted,

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September 6, 2022

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a). The brief contains 2319 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface in 14-point Century font using Microsoft Word for Office 365.

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