

2025-1363

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

CHRIS J. KROENUNG,

Petitioner

v.

DEPARTMENT OF DEFENSE,

Respondent

Petition for Review from the Merit Systems Protection Board
in CH-0752-23-0234-I-1

**CORRECTED/SUPPLEMENTED REPLY BRIEF OF PETITIONER
CHRIS J. KROENUNG**

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ARGUMENT IN REPLY

The Board's affirmance and the government's urging that the Board be summarily affirmed here flouts both the CSRA statutory text and the Supreme Court's admonition that the Board work with this Court to deliver "meaningful judicial review" to Kroenung. Any demand for medical information or examination must be pursuant to a written policy and must adhere to basic rules set forth in statute and OPM regulation. The agency, Board, and now Respondent flout that requirement as well and point to testing requirements on different dates in 2022 with no clarity as to which were ordered pursuant to a written policy in the record. Respondent thus does not squarely address the Board's finding that DHP was the source of the testing policy and that DHP was "clearly unlawful" because it was enjoined by *SDTX-PI*.

Requiring Petitioner to show why the testing requirement was illegal under amorphous, unwritten policies, amidst a landscape with no factual record beyond Kroenung's refusals on certain dates, puts Petitioner in an impossible bind. To show why the required test was illegal on specified dates, under the array possible policies (despite AJ's finding that DHP controlled), quickly scales to over one hundred pages, requires an additional Motion for Judicial Notice with even more exhibits than the first, and makes this reply unwieldy beyond any reasonable measure.

It is fundamentally unjust for Respondent to come to this Court and present cherry-picked facts that undermine the truth and cloud the source of discretion (in

contradiction to the agency’s presentation below, where it fully placed discretion to require testing on the President’s SFWTF).¹ Intervention and likely remand for fact-finding are therefore necessary, and Petitioner respectfully requests the judgment below be reversed in the interim.

I. SUMMARY AND OVERVIEW

Petitioner Kroenung’s agency issued an unlawful order to him, demanding he get vaccinated for COVID-19 and show them proof, and he refused to comply. The agency’s orders were made pursuant to a ‘vaccine mandate’ signed by President Biden to be imposed on the federal civilian workforce. *See* SAppx11 (EO 14043, “EO”); Appx107 ¶ b (DHP Attachment 1, i.e. “testing” requirement in effect on January 3); OB5-9. It

¹ OMB also required all agencies to comply with SFWTF. *See* SAppx1213-14 (noting in 2024 that agencies required “workplace safety plans in accordance with [SFWTF] Model Safety Principles”). *See also, e.g.*, OB7-8; SAppx1217-22 (6/10/2021 OMB); SAppx2288 (EEOC 7/12/2022 noting JRCBN “requires that employers utilize the most current medical and public health information to determine what inquires/medical examinations are appropriate”); DOD requirement that agencies follow current CDC guidance (SAppx24 n.1 (“must”); SAppx41 n.4 (“should”); SAppx52 (8/8/2022 “DOD will incorporate...as appropriate”); SAppx3530 (06/2021 GAO Report), to name a few).

Respondent now contends the agency did not need to comply with CDC guidance, nor that Petitioner explained the relevance. First, compliance with CDC is the only ground supported by the record on which this Court could affirm, and that is for the August 8 date alone (in which case the other grounds of illegality must be reached). Second, while it is possible agencies could deviate from CDC, some, *any*, justification must exist as to why, which is not present here. Third, Respondent’s citation to an Aug. 29, 2022 policy (CGR3) is irrational when the exact language was contained in all earlier “CG” policies. *See, e.g.*, SAppx51 (CGR2 same statement on 8/8/2022).

required full vaccination by November 22, 2021 and it did not have a ‘testing-option’ absent an approved or pending exception to the vaccination requirement. Kroenung maintained then, now, and at all times in between, that order is unlawful.

The Board found the agency’s order was implemented pursuant to DHP.² It is beyond dispute DHP was promulgated to carry out EO 14043 (EO), and that a nationwide injunction on January 21, 2022 prohibited its implementation or enforcement. *See Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826 (S.D. Tex. 2022) [SDTX-PI].

On January 3, 2022, Kroenung came on-site to work for the first time since the vaccination deadline (Nov. 22). Because he refused to attest, under DHP’s ‘testing requirement’ the agency ordered him to show his written covid test results. Appx107, Appx100 (MFR I). The refusal to vaccinate thus had triggered a period of counseling and initiated progressive discipline, during which Kroenung would be required to show a negative test result if coming on-site. Prior to the EO, Kroenung had never been asked to take a covid test. He refused and was sent home. He was still at home on forced leave about two weeks later when the injunction issued.

² Abbreviations used in the Opening Brief (OB) are carried forward here. An “agency order” means the agency’s testing requirement pursuant to the specific DOD Policy in effect then.

The threat of removal for refusing to vaccinate lifted off his shoulders following the injunction. Subsequent policies did not authorize removal, though some contain contradictory clauses,^{3,4} nor do OPM's regulations governing Chapter 75 permit removal for noncompliance with agency orders related to medical information, except in enumerated situations requiring unambiguous agency showings that were not made (or even attempted) here. Moreover, the OPM regulations carve out special protections for veterans like Kroenung, as does CSRA.⁵ Nevertheless, the agency proceeded to enforce disciplinary measures against Kroenung.

Around six weeks after his initial refusal, the agency shifted to a testing regime tied to community levels, as reflected in Kroenung's suspension proposal (Appx88-93,

³ Compare DD3175 (Appx120, permitting removal) with DD3150 (SAppx5556 ("Consequences of Failure to Provide Information...**Voluntary**") on *day before* the EO, and cited in Response n.1 to argue removal proper here)). Further, these forms should be compared alongside DD3112 (voluntary form from 3/17/2021 (SAppx26 (pre-EO)) returned to following the injunction (SAppx100 and all CGR (post *SDTX-PI*)).

⁴ Argument presenting the 'voluntary' illusion was prepared, but is too burdensome to be expected or included during this phase of the appeal when no record was developed below. In extreme brevity and omitting critical components of the argument, for now Petitioner merely notes it cannot be the case that the fundamental right as defined in OB is not infringed where, as here, Kroenung is terminated because he "exercised [the right] by refusing to test" as Respondent contends. Generally speaking, a fundamental liberty **right** cannot be infringed without a compelling governmental interest using the least restrictive means. A liberty **interest** means the government must follow fair procedures, not that it must justify the policy under strict scrutiny.

⁵ Rationale for the extra protections come to fruition in this case. *See infra*, n.13, n.14.

still citing DHP), although no written policy appears anywhere in the record.⁶ The only contemporaneous explanation is in the IAF, where the agency asserts the tests satisfied the “job-related and consistent with business necessity” (JRCCBN) standard because, in its view, compliance with Safer Federal Workforce Task Force directives made them so (Appx47-48). At the hearing the agency further claimed that EEOC had already “declared” DOD’s testing policy to be ADA-compliant. Appx366 (Tr. 122:9-13). Nothing in the record supports this assertion, and a full review shows that the IAF statement appears to be the agency’s only basis for JRCCBN, which in turn passes discretion to SFWTF. On appeal Respondent disavows that basis and instead relies on the single period during which SFWTF did *not* require testing, a period that existed only because the EO was in effect requiring universal vaccination. Thus an absence of any showing that the testing requirement was JRCCBN (or met any other standard to show the requirement was not arbitrary) remains. Appx85 (Kroenung’s June 6 JRCCBN challenge). The only conceivable justification would be an EEOC statement that COVID testing consistent with then-current CDC guidance satisfied the “business necessity” prong, coupled with EEOC’s position that the ADA did not interfere with CDC

⁶ That a policy used to justify agency orders for medical information, exams, or surveillance must be written is inherent to due process and an express requirement of OPM regulations, including all that permit removal for noncompliance. *See infra*, discussing 5. C.F.R. part 339.

guidance, a position that itself requires judicial review if applied here. *See* SAppx6000⁷ (Kroenung’s reply to the removal notice, explaining that shifting EEOC and CDC definitions cannot displace Congress’s JRBCN standard and that EEOC “are not elected officials and should not be interpreting law without some level of judicial oversight”).

Kroenung’s statement cuts to the heart of matters and weighs in favor of a broad reading of the grounds of illegality Kroenung is permitted to bring before this Court. It is without question Kroenung raised illegality of the agency order on grounds of it being unlawfully authorized by excessive executive overreach (OB40-47, including arguments not due at this time thus withheld), and did not meet JRBCN (OB14, 40). But another ground presented in the opening brief concerns forced use of EUA-products. Kroenung attempted to develop the theory at the hearing. OB48-54; *see also* MJN Reply (ECF No. 26 at 1-3). After the AJ foreclosed his opportunity to determine EUA status (something the agency should have been forced to answer to after Kroenung challenged it), it was during preparation for this appeal that counsel was finally able to determine from public record documents that the mandated tests had EUA-status only. This fact is highly-relevant legally and can be the sole basis for this Court to determine this case. That the

⁷ Kroenung’s reply to removal notice, which Respondent knows was incorrectly produced in MSPB’s record at Appx72, yet they cite throughout the brief, is actually at SAppx6000. *See* MJN § III, ECF No. 24-1. The AJ appears not have noticed as well. Appx5 (removal reply “repeated the same objections”). **This ground cannot be waived and alone warrants full reversal under *Stone*.** OB15-16, nn.13,14.

agency tried to keep it hidden should not now prevent Kroenung from having this Court decide the issues that this fact bears on significantly.

The AJ declined to consider the issues Kroenung raised but did not rely on the reason anticipated in the *Elgin* dissent, which was the AJ's lack of authority to decide them; instead, when denying briefing, he stated only that "future avenues" existed where the issues could be addressed.⁸ Through mid-2021 the Executive Branch itself understood that federal agencies could not compel the use of EUA products and further explained that, in the absence of a vaccination requirement, even requiring employees to disclose vaccination status was "not necessary for purposes of most employment decisions." SAppx5564 (April 2021 DOD Memo). Nothing in law changed before NGA disciplined Kroenung for acting consistently with that understanding. *See also* SAppx198; SAppx3536. NGA nevertheless disciplined him for refusing to comply with a directive grounded in the compelled use of EUA devices.

Thus this appeal presents the question *Watson v. Department of Transportation*, 983 F.2d 1088 (Fed. Cir. 1992), approached but did not reach: whether a federal employee can be removed for refusing an order that was itself unlawful. Judge Michel's concurrence

⁸ When Kroenung requested the parties brief legality, the AJ confirmed the request for the record then denied it, **adding there would be "future avenues" to raise the issue.** That this was the 'first he was hearing about' challenges to legality is unsupported and contradicted by the record. Resp. at 12; Appx281-285 (prehearing submission expressly framing legality of agency order as *the* issue for adjudication).

anticipated this situation—“a case someday” where an employee’s good-faith adherence to law must mitigate, or nullify, discipline when the underlying directive proves unlawful. *Id.* at 1093 (Michel, J., concurring). That case is now before this Court. Unfortunately it is tangled within generally broad deference⁹ (e.g. under § 7703(c)) that could undermine justice here, but *Elgin* counsels that cannot be permitted in the instant situation. This Court’s review is especially critical given the *Watson* issue and the unlawful nature of the agency’s directive.

Respondent would have this Court wear blinders, and treat the Board’s errors as discretionary, then use them to say Kroenung did not specify his objections with enough precision and they are therefore waived. Such an outcome would be the third consecutive door to close on what is promised to Kroenung under CSRA and our nation’s due process principles. The agency did not consider his replies.¹⁰ The AJ foreclosed procedures to Kroenung that could have documented his theories ‘with specificity’ Respondent demands, usually extracted through adversarial process and narrowed in the

⁹ “[T]he Board may find it difficult to adjudicate disputes about the relevancy of evidence ... Nor will the Board find it easy to figure out which facts it must find before sending the case back to the Federal Circuit.” *Elgin*, 567 U.S. at 33 (Alito, J., joined by Ginsberg, Kagan, JJ., dissenting).

¹⁰ The government did not think recertification of the record was needed. Kroenung’s actual reply is at SAppx6000 (MJN Ex. 90), where points 9 and 10 are new and constitute a relevant difference from his suspension reply. *See also supra*, n.7

record or through the course of discovery. And unlike in district court where a complaint and responsive pleading can guide these conflicts, the closest thing to that here was the hearing, where Kroenung raised the issues.

Despite § 7703(c), the Court's role at this moment is not to wear the blinders urged by the government, but to accept the Supreme Court's directive in *Elgin*. Given the *Watson* issue, it is challenging, and vexing, not only for the Board and the Court,¹¹ but the attorneys as well. Petitioner respectfully submits to whatever process this Court would have him attend, but it cannot be a ruling of waiver, closing the last and final door.

II. As presented in the Opening Brief, multiple reversible errors exist where the Board refused briefing, excluded witnesses, did not “analyze all material issues of fact and law,” and made findings unsupported by substantial evidence and contradicted by the record.

Respondent repeatedly recasts Petitioner's arguments to try and take them beyond the scope of this Court's review. The Board held DHP was the applicable policy. Appx2-3. Yet the Response does not address that DHP was enjoined by *SDTX-PI*. The Board's initial decision is required to contain “(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record; (2) The reasons or bases for those findings and conclusions.” 5 C.F.R. § 1201.111(b). These requirements go unmet for multiple reasons, e.g. treating Kroenung's JRCBN

¹¹ See *Elgin*, 567 U.S. at 33 (“Federal Circuit will be forced to address the claims in the first instance, without the benefit of any relevant factfinding at the administrative level.”) (Alito, J., joined by Ginsberg, Kagan, JJ., dissenting).

objections as “personal options” instead of the legally relevant challenge they are. The Decision also does not engage with Kroenung’s evidence on this point (which would be fair if the AJ found the agency failed to meet its burden in the first instance, thus alleviating a need to consider Kroenung’s evidence).

The Decision is not in accordance with law because it does not address material issues, and finding waiver of those issues would eviscerate Congressional intent and constitutional support for CSRA. The Board failed to apply any threshold propriety showing to the policy and/or testing requirement therein in sustaining charge. The Board *in effect* let failure to follow instructions establish nexus, yet did not require the elements of a charge of failure to follow instructions be proven despite using the outcome of such a charge’s sustainment for nexus. Said another way, the AJ conducted the nexus inquiry without making legally meaningful distinctions between misconduct, conduct, effect (or cause), thus the OPM regulation requirements of demands for medical information or tests did not serve their protective purpose to maintain removals only for efficiency of the service.¹² In not considering the significance of legality of the order, the Board further failed to “determine that the agency considered the factors significant to the particular case.” *Kumferman v. Dep’t of Navy*, 785 F.2d 286, 291 (Fed. Cir. 1986).

¹² There is also no evidence AO Nahlik actually lost trust in Kroenung, when up until the week of the removal specifications he was being asked to come in to work.

Kroenung’s objections were enough to raise the threshold issue of whether a compelled medical exam was JRCBN under 42 U.S.C. § 12112(d)(4)(A) and 5 C.F.R. § 339.301(b), 339.205, 339.214.. Before finding misconduct, the judge was required to determine whether the directive had a valid legal predicate—that is, whether mandatory diagnostic testing constituted a permissible “medical examination” that was job-related and consistent with business necessity under the ADA with requirements importing to DOD under the Rehabilitation Act. That inquiry was particularly essential here because the appellant is a preference-eligible excepted-service employee, and the regulatory framework for such veterans expressly ties the use of medical examinations and medical standards to the Part 752 adverse-action procedures designed to ensure efficiency of the service and protect them against abuses DOD has been known to attempt. See 5 C.F.R. §§ 339.102(c), 752.401(a)(13). In short, the judge skipped the threshold determination of whether the order itself was lawful, thereby collapsing the appellant’s statutory right—as a covered veteran—to challenge an improper medical-examination requirement into an ordinary conduct case. Under the Civil Service Reform Act and Part 339, that preliminary question of lawfulness is not optional; it defines whether the agency had any valid basis to discipline the employee at all. *See also* OB14, 40.

Congress “charged the Board with the job of protecting the rights of employees.” *Callahan v. Dep’t of Navy*, 748 F.2d 1556, 1558-59 (Fed. Cir. 1984) (citations

and punctuation omitted). According to the MSPB website-series Studies:¹³ “CSRA may be an example of language chosen by Congress to provide the Government with instructions on the particular manner in which Congress wants the Government to comply with constitutional requirements that exist independently from the statute itself.” These suggestions make sudden sense in light of this case and the rights infringed, and judicial review by this Court is of utmost importance.

III. *Doe v. Rumsfeld* provides a useful test on the present record.

The first EUA was granted in 2005 for an anthrax vaccine (AVA) for a new use against inhalation exposure. The Federal Register notice states that DOD informed D/HHS about a significant anthrax threat to the military, D/HHS found it was grounds for declaring the emergency, which in turn justified his authorization for AVA, as requested by DOD. SAppx7744. The notice is thoughtful. “The agency wishes to make its decision-making understandable to help ensure that members of the public, and particularly those individuals who may be eligible to receive a medical product authorized for emergency use, are informed about the basis of an EUA determination.” *Id.* Thus the delegation was off to a good start, and appeared to work

¹³ See *Why Federal Employees Have the Right to a Hearing*, https://www.mspb.gov/studies/adverse_action_report/16_WhyFederalEmployees.htm.

very well.¹⁴ Then, when one reviews the EUA Federal Register notices for the tests here, the downhill slide is very obvious. *See* SAppx890-891 (for in-vitro diagnostic (IVD) tests, which the self-test is); SAppx898-899 (3/15/2023 amendment to IVD). The observed decline is not due to nature of the product (e.g. IVD), they are all like this. *See* SAppx894-895 (medical devices); SAppx869-897 (drugs and biologics, which includes vaccines).

The AVA EUA was arguably passed in response to *Doe v. Rumsfeld*, 297 F.Supp.2d 119 (2003), wherein a group that included civilians sued DOD for mandating their use of an *investigational-use* of a product approved nearly 20 years earlier. Prior to the EUA statutes, which Congress enacted in response to DOD's malfeasance over AVA (some of which is captured by *Doe*), *Doe* provides a roadmap to determine when agency action mandating medical interventions is permissible and provides an approach that could apply here if the EUA-status of the test is not otherwise dispositive to this Court, assuming the Court will judicially notice the off-label use that was mandated (once per week instead of 'at least twice' or more per week). Otherwise an approach brings the question of illegality back to a need for further record development, like the other two

¹⁴ Considering only legality of the delegation, the thing relevant here, it appears well. Many veterans who were subject to or had experiences with it would not agree, including Kroenung. *See also* Appx366 (Tr. 117:2-5) (noting Kroenung "hesitating at the prospect of participating in a mandate that emerged from an emergency landscape that seemed chaotic to him and unlawful").

positions on illegality in this case (executive overreach, failure to meet JRCBN and EEOC's interpretation of the standard).

In the present case, DOD produced no support for its apparent position that it can require civilian use of a product released under EUA and tried to hide the mandated use. DOD's position *was* lawful with respect to vaccines, for example, it refused to mandate vaccination prior to full FDA approval. *See supra, see also* SAppx3536 (June 2021 GAO Report citing FDCA and § 1107a, explaining "DOD initially made [] vaccination voluntary due to federal law that says a vaccine released under an EUA cannot be made mandatory...DOD will revisit its decision to make vaccination voluntary if the FDA gives a vaccine full approval."); *see also* SAppx1198 (Sec. Austin Memo two months later, 9/9/2021, indicating he will request a presidential waiver for *service members* if vaccines were not fully approved within the month; full approval arrived 8/23/2021 so waiver was not needed). The report also found DOD "testing protocols generally align with CDC guidance." SAppx3531. This included DOD's directive to use tests "with an [EUA] from the FDA." *Id.* The statement came before testing was *required*. On remand, DOD can answer why it believes it can mandate EUA-products like tests but was reserved about the vaccines. A showing would arise naturally under *Doe v. Rumsfeld*, where the agency could show that its mandated testing with once-per-week self-tests of the unvaccinated without consent does not amount to arbitrary action. Otherwise the present affirmance by the Board is not in accordance with law.

CONCLUSION AND REITERATION OF RELIEF SOUGHT

The Court must set aside the Board's Decision for the reasons set forth above. The Board abused its discretion, or obtained its conclusion without procedures required by MSPB regulation having been followed, including when the AJ excluded witnesses and refused adversarial briefing and made no findings or decisions on matters presented by Petitioner that had also gone unaddressed by the agency.¹⁵ The Board abused its discretion in sustaining the agency's charge, which was unlawfully authorized and/or illegally enforced against Kroenung. The Board's affirmance must otherwise be reversed because the agency's order was illegal on at least one and likely all dates specified in the three offenses for arising from illegal overreach of the President's authority, making removal unwarranted under the circumstances. The agency's order demanded unconsented-submission to an investigatory medical examination the agency failed to show was JRCBN or met any other standard. Kroenung's removal for noncompliance does not promote the efficiency of the

¹⁵ As one last example of unaddressed matters, Kroenung's evidence that Omicron was mild was relevant to JRCBN. The AJ did not address it, and the Response only brings it up to say exists (at 11), once again missing the point the evidence was relevant to JRCBN or any other standard that must be applied to a required test where noncompliance is grounds for removal. In fact, severity is one of the many factors the agency was required to consider for its mandated testing. *See* SAppx2291 (7/12/2022 EEOC factors); *see also* other EEOC guidance at SAppx2286-2289 (re CDC guidance); SAppx2272-2273 (12/14/2021 re ADA and CDC guidance); SAppx2266-2267 (12/16/2020 re ADA, reassignment as last resort, when employers may require medical examinations, JRCBN inquires)).

service, and the Board's contrary conclusion upon review of the record before him was arbitrary, capricious, otherwise not in accordance with law, and must be set aside.

Alternatively, Petitioner respectfully requests the Court resolve threshold matters, including whether *Watson* permits a narrow exception for actual-illegality, and defining procedures for record development where warranted, followed by an opportunity for supplemental briefing applying the ruling(s) or otherwise guided by the Court. In seeking reversal Petitioner ultimately requests to be reinstated, in addition to backpay, attorneys' fees, and any other relief the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b)(1) because it contains 4,017 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

/s/ Erin D. Knese

Erin D. Knese, Esq.