

No. 11-184

In the Supreme Court of the United States

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, when a federal employee bases a complaint on an adverse personnel action appealable to the Merit Systems Protection Board (MSPB) and alleges that unlawful discrimination was a basis for the action, she has filed what is known as a “mixed case.” The question presented is:

Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over an MSPB decision dismissing a mixed case on threshold procedural grounds without reaching the merits of the employee’s civil service or discrimination claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 639 F.3d 834. The opinion of the district court (Pet. App. 11a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2011. The petition for a writ of certiorari was filed on August 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, covered federal employees may appeal adverse personnel actions, including removals, to the Merit Systems Protection Board (MSPB

or Board). 5 U.S.C. 7513(d); see 5 U.S.C. 7512 (enumerating appealable actions).

As a general rule, the United States Court of Appeals for the Federal Circuit has “exclusive jurisdiction” to review a final MSPB order or decision. 28 U.S.C. 1295(a)(9); accord 5 U.S.C. 7703(b)(1). The Federal Circuit’s jurisdiction is, however, subject to an exception set forth in 5 U.S.C. 7703(b)(2). See 5 U.S.C. 7703(b)(1). That provision states:

Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

5 U.S.C. 7703(b)(2).

b. Section 7702, to which the statutory exception in Section 7703(b)(2) refers, sets forth procedures for the resolution of what are known as “mixed cases”: that is, cases in which an employee claims both that she has been subject to an adverse employment action appealable to the MSPB and “that a basis for the action was discrimination” prohibited by Title VII of the Civil Rights Act of 1964 or other specified federal antidiscrimination statutes. 5 U.S.C. 7702(a)(1); see, *e.g.*, *Ballentine v. MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984).

Under Section 7702, an employee may initiate a mixed case either by filing a complaint with her employing agency or by filing an appeal with the MSPB. See 5 U.S.C. 7702(a)(1) and (2); see also 5 C.F.R. 1201.154(a). If the employee proceeds to the agency first, she may then appeal the agency's final decision to federal district court or to the MSPB. See 5 U.S.C. 7702(a)(2). If the employee appeals to the MSPB, Section 7702(a)(1) provides that "the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action[.]" The employee may then seek review of "the decision of the Board under [Section 7702(a)(1)]" either by (1) petitioning the Equal Employment Opportunity Commission (EEOC) for review, see 5 U.S.C. 7702(b)(1), or (2) filing a complaint in federal district court, see 5 U.S.C. 7702(a)(3). If the employee does not file a petition with the EEOC, the statute provides that the "decision of the Board under [Section 7702(a)(1)] shall be a judicially reviewable action as of * * * the date of the issuance of the decision." 5 U.S.C. 7702(a)(3)(A). Once the employee receives notice of that "judicially reviewable action" under Section 7702(a)(3)(A), the employee has 30 days to file suit in district court. 5 U.S.C. 7703(b)(2).

2. Petitioner was employed as a Senior Investigator for the Employee Benefits Security Administration of the Department of Labor (DOL) in St. Louis, Missouri. Pet. App. 1a. Beginning in May 2005, petitioner took extended leave for claimed medical reasons. Gov't C.A. Br. 5. On June 13, 2005, petitioner filed an equal employment opportunity (EEO) complaint with the agency, alleging that DOL had discriminated against her on the basis of age and sex by subjecting her to a hostile work environment. Pet. App. 1a-2a, 13a. After petitioner had

used all of her accumulated leave, as well as advanced leave granted to her by the agency, petitioner was permitted to go on leave-without-pay status. When petitioner did not respond to DOL's requests for documentation to support her absence, DOL placed her on absent-without-leave status. Gov't C.A. Br. 6. In response, petitioner in August 2005 added a retaliation claim to her EEO complaint. Pet. App. 3a. Petitioner never returned to work. *Ibid.* The agency terminated petitioner's employment in July 2006. *Ibid.*

In August 2006, while her EEO complaint remained pending before the agency, petitioner filed an appeal of her termination with the MSPB. Pet. App. 3a. One month later, however, petitioner moved to dismiss the MSPB appeal without prejudice because she was adding her claim of discriminatory removal to her already-pending EEO complaint and wished to avoid the expense of conducting discovery before both the EEOC and the MSPB. *Ibid.* In the motion, petitioner's counsel requested that the "MSPB appeal be dismissed, without prejudice, for a period of four months, to allow the discovery phase of her EEOC appeal to proceed." *Id.* at 14a.

On September 18, 2006, an MSPB administrative judge granted petitioner's motion over the agency's objection. Pet. App. 3a. The judge's order provided that petitioner's appeal was dismissed "without prejudice" to her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—whichever occurs first." *Id.* at 14a. The order further provided that "[t]his case will not be accepted for refiling after January 18, 2007." *Id.* at 14a-15a.

The EEOC scheduled a hearing, but later canceled the hearing due to petitioner's abuse of the discovery process and returned her complaint to the agency for a final decision. Pet. App. 4a. In October 2007, the agency issued a final decision rejecting petitioner's claims of discrimination and retaliation, and upholding the termination of her employment. *Ibid.* The agency's decision noted that petitioner had filed a mixed case and informed her of the available avenues for appeal in such a case: it stated that she could either appeal to the MSPB or file a civil action in federal district court within 30 days, but not both. *Id.* at 4a, 15a.

Petitioner appealed to the MSPB on November 28, 2007—within 30 days of the agency's final decision, but more than ten months after the deadline of January 18, 2007, previously imposed by the MSPB at the request of petitioner's counsel. Pet. App. 4a. On February 27, 2008, an MSPB administrative judge dismissed the appeal as untimely. *Id.* at 4a, 16a. The administrative judge's order became the final decision of the MSPB when petitioner did not seek further administrative review. *Id.* at 4a. The MSPB's final order stated that petitioner could file a petition for review in the Federal Circuit. *Id.* at 5a. Petitioner instead filed the present action in federal district court. *Ibid.*

3. The district court dismissed petitioner's case for lack of jurisdiction. Pet. App. 11a-22a. As an initial matter, the court concluded that petitioner's complaint was properly characterized as an appeal from the MSPB's decision, rather than from the agency's final decision. The court explained that once the agency issued its final decision, petitioner "was permitted either to file an appeal with the MSPB or in federal district court, but not both." *Id.* at 20a-21a. Having chosen to

appeal to the MSPB, petitioner “foreclosed her ability to appeal the [final agency decision] directly to this Court.” *Id.* at 21a. Under the CSRA’s jurisdictional provisions, the district court concluded, petitioner’s appeal of the MSPB’s decision was properly filed in the Federal Circuit rather than in federal district court. The court explained that “to qualify as a case of discrimination appealable to a federal district court, the MSPB must have resolved the merits of the discrimination claim.” *Id.* at 19a; see *id.* at 19a-20a (citing *Brumley v. Levinson*, 991 F.2d 801, 801 (8th Cir. 1993) (unpublished) (per curiam), and *Ballentine*, 738 F.2d at 1246-1247). The court held that in this case, the Federal Circuit had exclusive jurisdiction because the MSPB had not resolved the merits of petitioner’s discrimination claims, but instead had dismissed her appeal as untimely. *Id.* at 22a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The court noted that the Federal Circuit has held that the “judicially reviewable action by the MSPB which makes an appeal a ‘case of discrimination’ under § 7703(b)(2) that can be filed in district court is that the MSPB has decided both the issue of discrimination and the appealable action[.]” *Id.* at 6a (quoting *Ballentine*, 738 F.3d at 1246). But “until the merits of a ‘mixed’ discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed” to the Federal Circuit. *Ibid.* (quoting *Ballentine*, 738 F.2d at 1247).

Agreeing with the Federal Circuit’s analysis, the court of appeals held that where, as here, a federal employee seeks review of an MSPB decision dismissing her mixed-case appeal on threshold procedural or jurisdictional grounds without reaching the merits, the Federal

Circuit has exclusive jurisdiction to review the MSPB decision. Pet. App. 7a-10a. The court explained that the Federal Circuit’s “functional approach” rests on a “logic[al] infer[ence] that Congress intended to require the de novo district court review that federal anti-discrimination statutes provide when the MSPB has ruled on the merits of discrimination issues in a ‘mixed case,’ but intended that the Federal Circuit provide uniform review of MSPB rulings on procedural, non-merits issues.” *Id.* at 9a.

The court of appeals noted that the Second Circuit had reached a different conclusion in *Downey v. Runyon*, 160 F.3d 139 (1998). In *Downey*, the Second Circuit held that “[c]ases of discrimination” reviewable in district court include appeals from final MSPB decisions dismissing mixed cases on procedural grounds. See *id.* at 145; *id.* at 146 (statement respecting denial of rehearing) (distinguishing dismissals on jurisdictional grounds from dismissals on non-jurisdictional procedural grounds). The court of appeals rejected that approach in this case, explaining that *Downey* rested on “an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions between MSPB non-merits rulings that are ‘jurisdictional,’ and those that are merely ‘procedural.’” Pet. App. 10a.

Because the MSPB in this case had not reached the merits of petitioner’s discrimination claims, the court of appeals concluded that the Federal Circuit had exclusive jurisdiction to review the MSPB’s ruling that the appeal was untimely. Pet. App. 10a.

ARGUMENT

The MSPB in this case dismissed petitioner's mixed-case appeal on the ground that it was filed more than ten months after the January 18, 2007 refiling deadline that had been imposed at the request of petitioner's counsel. The court of appeals correctly concluded that the Federal Circuit is the proper forum for review of the MSPB's decision on that non-merits, threshold ground of untimeliness. The court's conclusion, which is consistent with the decisions of a majority of courts of appeals to address the issue, does not warrant further review in this case. Although the question presented is the subject of disagreement in the courts of appeals, the scope of the disagreement among the courts of appeals is narrower than petitioner suggests. And even on the view of those courts that have concluded that some MSPB non-merits mixed-case rulings are subject to de novo district court review, petitioner's case, which arises from an untimely MSPB appeal, would nevertheless be subject to dismissal for failure to exhaust administrative remedies. The petition for a writ of certiorari should be denied.

1. Under the CSRA, the Federal Circuit has exclusive jurisdiction to review all MSPB decisions, except "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). Section 7702 governs mixed cases in which an employee "(A) has been affected by an action which [she] may appeal to the Merit Systems Protection Board," *and* "(B) alleges that a basis for the action was discrimination prohibited by" a federal antidiscrimination statute such as Title VII. 5 U.S.C. 7702(a)(1)(A) and (B) (emphasis added). Section 7702 provides that when an employee appeals such a case to the MSPB, "the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and

the appealable action[.]” 5 U.S.C. 7702(a)(1). The employee may then seek review of “[a]ny decision of the Board under [Section 7702(a)(1)]”—that is, the decision on “both the issue of discrimination and the appealable action,” 5 U.S.C. 7702(a)(1)—in federal district court. 5 U.S.C. 7703(a)(3)(A); see 5 U.S.C. 7702(b)(2). The employee’s suit must be filed within 30 days after she receives notice of the “judicially reviewable action under such section 7702.” 5 U.S.C. 7703(b)(2).

In this case, however, the MSPB did not decide “the issue of discrimination and the appealable action,” 5 U.S.C. 7702(a)(1), instead dismissing petitioner’s appeal on the ground that it was untimely. The court of appeals therefore correctly held that the MSPB’s decision was not subject to the exception to the Federal Circuit’s exclusive jurisdiction set forth in Section 7703(b)(2). As the Federal Circuit has explained, “it is clear that the judicially reviewable action by the MSPB which makes an appeal a ‘case of discrimination’ under § 7703(b)(2) that can be filed in district court is that the MSPB has decided ‘both the issue of discrimination and the appealable action[.]’” *Ballentine v. MSPB*, 738 F.2d 1244, 1246 (1984) (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)); see Pet. App. 5a-7a.

Where, as here, the MSPB dismisses a mixed-case appeal on threshold procedural or jurisdictional grounds without reaching the merits of the “issue of discrimination” raised by the employee, 5 U.S.C. 7702(a)(1), the employee “is granted no rights to a trial de novo in a civil action” in district court, *Ballentine*, 738 F.2d at 1246. Rather, under the general rule governing appeals from final MSPB decisions, the Federal Circuit has exclusive jurisdiction to review the MSPB’s threshold, non-merits determination. Pet. App. 9a-10a; accord, *e.g.*,

Powell v. Department of Defense, 158 F.3d 597, 598-599 (D.C. Cir. 1998); *Sloan v. West*, 140 F.3d 1255, 1261-1262 (9th Cir. 1998). That allocation of authority “allows the application of a unified body of case law” concerning matters of MSPB jurisdiction and procedure. *Ballentine*, 738 F.2d at 1247. Conversely, a contrary rule “would result * * * [‘]not only in a waste of time and resources, but also in a lack of uniformity as each of some 94 different federal district courts (with appeals to their respective circuits) proceeds to define the metes and bounds of MSPB jurisdiction.[’]” *Ibid.* (citation omitted).

That understanding is reinforced by the provisions in Section 7702 allowing for the employee to seek review in the EEOC of “the decision of the Board under [Section 7702(a)(1)].” 5 U.S.C. 7702(b)(1). The EEOC may issue a decision that “differs from the decision of the Board” on the basis that the Board’s decision “constitutes an incorrect interpretation of any provision * * * referred to in” Section 7702(a)(1)(B) or that the Board’s “decision involving such provision is not supported by the evidence in the record as a whole.” 5 U.S.C. 7702(b)(3)(B). Consequently, a “decision of the Board under [Section 7702(a)(1)]” is one that interprets a provision of federal antidiscrimination law referred to in that provision or that “involv[es] such provision” and applies it to “the evidence in the record.” *Ibid.* If the Board does not reach the merits of the discrimination claim in that manner, the Board’s decision is not one “under subsection (a)(1)” subject to review in a district court rather than in the Federal Circuit.

Here, the Board did not reach the merits of petitioner’s discrimination claim. If petitioner had appealed the MSPB’s decision to the Federal Circuit, the only

reviewable question would be whether the MSPB correctly determined that her appeal was untimely. If the Federal Circuit had reversed the MSPB's ruling on timeliness, it presumably would have remanded the case to the MSPB to decide the merits of the discrimination claim and the appealable action. Cf. *Wall v. United States*, 871 F.2d 1540, 1543 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990). At that point, if petitioner were dissatisfied with the MSPB's decision on the merits, she could file suit in district court under Section 7703(b)(2).

2. Petitioner contends (Pet. 25-27) that the court of appeals' analysis is incorrect for three reasons. Each of petitioner's contentions lacks merit.

First, petitioner contends (Pet. 25-26) that the court of appeals' reading of the statute would require the MSPB to decide the merits of every discrimination and appealable action claim within the 120-day time limit in Section 7702(a)(1). But contrary to petitioner's contention, the court of appeals' ruling recognizes that the MSPB may not reach the merits where, as here, there is a threshold procedural or jurisdictional defect. In such cases, the Federal Circuit has exclusive jurisdiction to review the MSPB's procedural or jurisdictional ruling. See Pet. App. 9a-10a.

Petitioner also contends (Pet. 26) that, under the court of appeals' reading of the statute, "a district court would not have jurisdiction over a case in which the MSPB did decide the merits of the plaintiff's discrimination claim, but for some reason did not also reach the merits of the plaintiff's companion section 7513(d) appeal." The MSPB is, however, unlikely to separate a discrimination claim from a "companion" appealable action in the manner that petitioner hypothesizes. In a mixed case reviewable by the MSPB, the employee chal-

lenges one or more appealable actions, but contends that “a basis” for the actions was discrimination. 5 U.S.C. 7702(a)(1). If the MSPB declines to review an appealable action on threshold, non-merits grounds, then, as in this case, it presumably will have no occasion to consider the employee’s claim that the action was motivated by unlawful discrimination.

Finally, petitioner contends that any “lawsuit alleging that plaintiff was discriminated against on the basis of age or sex is surely a ‘case[] of discrimination’ without regard to why the MSPB did not award the plaintiff redress.” Pet. 26-27 (brackets in original). But Congress did not confer a right to trial de novo in district court in every case in which an employee has alleged discrimination on a prohibited basis. It instead provided for district court jurisdiction over “[c]ases of discrimination subject to the provisions of section 7702,” 5 U.S.C. 7703(b)(2), and Section 7702 in turn provides for judicial review of an MSPB decision reaching “both the issue of discrimination and the appealable action,” 5 U.S.C. 7702(a)(1) and (a)(3). The statutory scheme thus makes clear that “the judicially reviewable action by the MSPB which makes an appeal a ‘case of discrimination’ under § 7703(b)(2) that can be filed in district court is that the MSPB has decided ‘both the issue of discrimination and the appealable action[.]’” *Ballentine*, 738 F.2d at 1246 (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)).*

* Petitioner also expresses concern (Pet. 27) that “[t]he rule in *Ballentine* has the uniquely counterproductive effect” of encouraging employees to bypass the MSPB and proceed directly to district court for review of final agency decisions on their discrimination claims. It is not clear why the allocation of authority to the Federal Circuit to review threshold, non-merits rulings should have any significant effect on employees’ incentives to appeal to the MSPB, particularly since Federal

3. As petitioner correctly notes (Pet. 12-17), the courts of appeals have taken different approaches to the question presented, although the scope of the conflict is narrower than petitioner suggests.

a. As the court of appeals in this case observed, “[f]or many years, every circuit to consider the issue followed” the Federal Circuit’s decision in *Ballentine*, concluding that the Federal Circuit has jurisdiction to review the MSPB’s threshold, non-merits decisions in mixed cases. Pet. App. 7a (citing cases); see *Burzynski v. Cohen*, 264 F.3d 611, 620-621 (6th Cir. 2001); *Powell*, 158 F.3d at 598-600; *Sloan*, 140 F.3d at 1261; *Wall*, 871 F.2d at 1543; *Ballentine*, 738 F.2d at 1247; see also Pet. App. 8a (citing *McCarthy v. Vilsack*, 322 Fed. Appx. 456, 458-459 (7th Cir. 2009) (unpublished) (per curiam), cert. denied, 130 S. Ct. 1048 (2010)).

b. In *Downey v. Runyon*, 160 F.3d 139 (1998), the Second Circuit disagreed with *Ballentine*, concluding that federal district courts have jurisdiction to review an MSPB dismissal on grounds of untimeliness. The *Downey* court reasoned that nothing in the CSRA “suggests that judicially reviewable actions under subsection (a)(3) of section 7702 are limited to decisions on the merits, or that a matter becomes a ‘[c]ase[] of discrimination’ under subsection (b)(2) of section 7703 only after a merits decision.” *Id.* at 145. But on rehearing, the court in *Downey* limited the scope of its holding, distinguishing *Powell*, *Sloan*, and *Wall*, *supra*, on the ground that “[t]hose cases involved MSPB appeals that had been dismissed not for untimeliness but because they were beyond the substantive scope of MSPB jurisdiction.”

Circuit review need not foreclose further district court review on the merits of the discrimination claim, see p. 11, *supra*.

Downey, 160 F.3d at 146 (statement respecting denial of rehearing). The Second Circuit reasoned that, “[b]y definition, such a matter does not involve ‘an action which the employee or applicant may appeal to the [Board],’ 5 U.S.C. § 7702(a)(2)(A), and is therefore not a ‘[c]ase[] of discrimination subject to the provisions of section 7702[.]’” *Ibid.*

In *Harms v. IRS*, 321 F.3d 1001 (10th Cir.), cert. denied, 540 U.S. 858 (2003), an MSPB administrative judge had dismissed the plaintiff’s appeal without prejudice and ordered him to refile the appeal by July 23, 1997. The plaintiff did not, however, attempt to refile until November 1997, and the MSPB dismissed the appeal as untimely. *Id.* at 1004. Relying on the reasoning of *Downey*, the Tenth Circuit concluded that the district court had jurisdiction to review de novo the decision of the MSPB. *Id.* at 1008. But as in *Downey*, the Tenth Circuit distinguished its earlier decision in *Wall* on the ground that *Wall* had involved a jurisdictional ruling. *Ibid.* (“[W]hen the MSPB decides that it lacks jurisdiction over an appeal because the employment action is not within the MSPB’s designated appellate jurisdiction, the appeal is not a ‘case of discrimination’ under § 7702(a)(1).”) And ultimately the discussion proved immaterial to the court’s judgment: the court in the end ruled in favor of the government, holding that the plaintiff’s case was properly dismissed because his untimely appeal to the MSPB constituted a failure to exhaust his administrative remedies. *Id.* at 1009-1010.

c. The reasoning in *Downey* and *Harms* is flawed in important respects. First, the opinions in those cases overlook the fact that Section 7702(a)(3) does not provide for district court review of *any* MSPB decision in a case involving allegations of discrimination, but rather

a “decision of the Board under [Section 7702(a)(1)].” 5 U.S.C. 7702(a)(3). As noted above, a decision under Section 7702(a)(1) is a decision on “both the issue of discrimination and the appealable action.” See pp. 8-9, *supra*. When the Board does not decide the issue of discrimination and the appealable action, there is no judicially reviewable action under Section 7702(a)(3), and thus no action subject to the special jurisdictional rule of Section 7703(b)(2).

Moreover, as the court of appeals in this case noted, *Downey*’s distinction between procedural MSPB dismissals (reviewable in district court) and jurisdictional MSPB dismissals (reviewable only in the Federal Circuit) is “difficult and unpredictable.” Pet. App. 10a. The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB’s jurisdiction “does not involve ‘an action which the employee or applicant may appeal to the [Board]’” under Section 7702(a). *Downey*, 160 F.3d at 146 (statement respecting denial of rehearing). But that description applies equally to an appeal, like this one, that is not timely filed. See *Stahl v. MSPB*, 83 F.3d 409, 412-413 (Fed. Cir. 1996) (employee’s untimely assertion that removal from service was based on discrimination was not appealable to the MSPB under Section 7702(a)); see also Pet. App. 10a n.5. Moreover, as a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB’s jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, *Downey*’s approach could allow employees with

jurisdictionally deficient CSRA claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

d. In any event, some 12 years after *Downey* was decided, the disagreement among the courts of appeals about the appropriate forum for review of MSPB mixed-case decisions remains narrow and limited to cases in which the MSPB has dismissed a mixed case on non-jurisdictional procedural grounds.

4. Even if that narrow conflict might otherwise warrant this Court's intervention in an appropriate case, this would not be a suitable vehicle. As in *Harms, supra*, petitioner's case would be subject to dismissal in any event because she failed to exhaust her administrative remedies.

Petitioner, who was represented by counsel in the administrative proceedings, initially filed an appeal with the MSPB in August 2006, but moved to dismiss that appeal without prejudice because she was adding her claim of discriminatory removal to her already-pending EEO complaint. Pet. App. 3a. In the motion, petitioner's counsel specifically requested that petitioner's "MSPB appeal be dismissed, without prejudice, *for a period of four months*, to allow the discovery phase of her EEOC appeal to proceed." *Id.* at 14a (emphasis added).

On September 18, 2006, an MSPB administrative judge granted petitioner's motion. Pet. App. 14a. The MSPB issued an order stating that petitioner's appeal was dismissed "without prejudice" to her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—whichever occurs first." *Ibid.* The order reiterated that "[t]his case will not be accepted for refiling

after January 18, 2007.’” *Id.* at 14a-15a. The MSPB thus granted petitioner the very relief that she requested—*i.e.*, that her appeal be dismissed without prejudice for four months.

Petitioner thus was on clear notice that if she wanted to proceed before the MSPB, she needed to refile her appeal by January 18, 2007. Petitioner did not file her MSPB appeal by the January 2007 deadline, however. Therefore, as in *Harms*, she failed to exhaust her administrative remedies. See *Harms*, 321 F.3d at 1009-1010.

Nor can petitioner assert that the district court has jurisdiction to review the agency’s final decision, which was issued on October 23, 2007, and received by petitioner’s counsel on October 29, 2007. Pet. App. 15a; see Gov’t C.A. Br. 24-27. The agency advised petitioner that she could either appeal to the MSPB or file a civil action in federal district court within 30 days, but not both. Pet. App. 4a, 15a. Petitioner chose to appeal to the MSPB rather than district court, despite the fact that she was on clear notice that the deadline for appeal to the MSPB was January 18, 2007. Having chosen to appeal to the MSPB rather than directly to the district court, she was required to exhaust her administrative remedies. See *id.* at 21a. And in view of the fact that petitioner was assisted by counsel throughout the administrative proceedings and had ample opportunity to seek timely review from either the MSPB or the district court, there should be no basis for tolling the deadline. For those reasons, review of the question presented would not alter the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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