No. 08-281

In the Supreme Court of the United States

WILLIAM N. WEBER, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had authority to adjudicate petitioner's claim under the Back Pay Act of 1966, 5 U.S.C. 5596.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-24a) is reported at 521 F.3d 1061. The initial opinion of the court of appeals (Pet. App. 25a-45a) is reported at 512 F.3d 1178. The order of the district court (Pet. App. 46a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. A petition for rehearing was denied on April 4, 2008 (Pet. App. 1a, 8a). The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has prescribed standards for the appointment, pay, discipline, and removal of Veterans

Health Administration (VHA) employees. See 38 U.S.C. 7401 *et seq.* The availability and form of review that such an employee may obtain of adverse personnel actions varies depending on whether the employee is a permanent full-time employee, as well as the nature and basis for the adverse action.

a. VHA physicians who are "employed on a full-time basis under a permanent appointment" and who have been subjected to an "adverse personnel action" are entitled to pursue an administrative appeal under either 38 U.S.C. 7462 or 38 U.S.C. 7463. See Department of Veterans Affairs Labor Relations Improvement Act of 1991, 38 U.S.C. 7461(a) and (c)(1).

i. In situations where "a major adverse action was taken" and "the case involves or includes a question of professional conduct or competence," Congress has provided that the administrative appeal authorized by Section 7461(a) shall be heard by a Disciplinary Appeals Board (Appeals Board), 38 U.S.C. 7461(b)(1), whose members are appointed by the Secretary of Veterans Affairs (Secretary), 38 U.S.C. 7464(a); see 38 U.S.C. 7461(c)(3)(A) and (B) (defining a question of professional conduct or competence as one involving "[d]irect patient care" or "[c]linical competence"). Such appeals are addressed in 38 U.S.C. 7462. Congress has further provided that the decisions of an Appeals Board are subject to review by the Secretary, see 38 U.S.C. 7462(d), and then to judicial review under a standard similar to that set forth in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 38 U.S.C. 7462(f).

ii. Administrative appeals by permanent, full-time employees that either do not involve a major adverse action or do not involve a question of professional conduct or competence are governed by 38 U.S.C. 7463. See

38 U.S.C. 7461(b)(2). Congress has provided that "Disciplinary Appeals Boards shall not have jurisdiction to review such matters." 38 U.S.C. 7463(a). Instead, in such cases, the matter is first considered by "an impartial examiner," 38 U.S.C. 7463(d)(1), whose "findings and recommendations" are subject to "a prompt review * * * by an official of a higher level than the official who decided upon the action," 38 U.S.C. 7463(d)(3). Section 7463 does not provide that the decisions of that higher-level official are subject to review by the Secretary or to judicial review.

b. The procedures described above are applicable only to employees who are "employed on a full-time basis under a permanent appointment." 38 U.S.C. 7462(c). Accordingly, probationary VHA employees who seek to challenge an adverse personnel action possess only those remedies set forth in the agency rules and regulations relating to their probationary employment.

2. In October 1997, petitioner was hired on a temporary basis to be a staff radiologist at the Veterans Administration Medical and Regional Center in Fort Harrison, Montana. Pet. App. 8a. On December 7, 1997, petitioner's position was converted into a full-time staff position. *Ibid.* As required by 38 U.S.C. 7403(b)(1) and (2), petitioner's initial full-time appointment was "for a probationary period of two years" and was made subject to "review[] from time to time by a board" (summary review board) whose members are "appointed in accordance with regulations of the Secretary." See Pet. App. 8a-9a. Section 7403(b)(2) further provides that if a summary review board "finds that [a probationary employee] is not fully qualified and satisfactory, such person shall be separated from the service."

On August 2, 1999, a summary review board was convened to review petitioner's appointment. Pet. App. 10a. Petitioner was notified 40 days in advance of the summary review board's meeting and was represented by counsel when the summary review board convened. *Id.* at 52a. On August 12, 1999, the summary review board issued a recommendation that petitioner be separated from the VHA. *Id.* at 10a. The summary review board concluded that "no single incident recounted to the Board or demonstrated by the evidence appears to warrant removal." *Id.* at 53a (citation omitted). But it found that, "taken as a whole[,] [petitioner's] pattern of behavior, attitude toward correction, and erosion of staff confidence lead the Board to conclude that his retention beyond the probationary period would prohibit the effective functioning of the Radiology Department." *Ibid.* (citation omitted). On September 13, 1999, the VHA terminated petitioner's employment. *Ibid.*

3. On March 8, 2000, petitioner filed suit against the Department of Veterans Affairs (VA) and two of its officials in federal district court, asserting that his termination had violated the APA. Pet. App. 51a, 53a, 55a.[1] On June 2, 2004, the district court granted summary judgment in favor of petitioner. *Id.* at 51a-59a. In its order, the district court concluded that the summary review board had "violated [VHA] regulations by considering charges against [petitioner] that had not been included in the notice of Summary Review." *Id.* at 55a. The court also determined that "[t]he significance and effect of the

[1] On July 9, 2002, petitioner filed a second action in which he alleged that his termination violated various civil rights statutes. See Pet. App. 53a n.1. We have been advised that petitioner's appeal from the district court's November 2005 dismissal of that action is currently on appeal to the Ninth Circuit. Accord *id.* at 47a & n.1

consideration of the undisclosed matters by the Summary Review Board [could not] be determined from the record," and it "REMANDED to the VA for further proceedings in accordance with applicable law and regulations." *Id.* at 58a-59a. On June 3, 2004, the VHA reinstated petitioner's employment and immediately placed him on administrative leave with pay. *Id.* at 11a.[2]

4. a. On September 15, 2004, petitioner filed a new action against the VA and the Secretary seeking back pay for the period between his September 13, 1999, termination and his June 3, 2004, reinstatement. Pet. App. 11a-12a. Petitioner asserted that the district court had authority to grant such relief pursuant to the Back Pay Act of 1966 (Back Pay Act), 5 U.S.C. 5596. Pet App. 46a. The Back Pay Act provides that a qualifying "employee * * * who, on the basis of a timely appeal or an administrative determination * * * is found by an appropriate authority * * * to have" suffered "the withdrawal or reduction of all or part of [his] pay, allowances, or differentials" as a result of "an unjustified or unwarranted personnel action" may recover his lost pay as well as attorney's fees. 5 U.S.C. 5596(b)(1).

b. The district court granted respondents' motion to dismiss petitioner's complaint. Pet. App. 46a-50a. The court rejected petitioner's assertion that its June 2, 2004, decision had resolved "as a matter of law, all of" the requirements for obtaining relief under the Back Pay Act. *Id.* at 48a. The court explained that its earlier decision had been "limited to a narrow issue of regulatory procedure" and had not "consider[ed] or resolve[d],

[2] After petitioner was reinstated, the VHA convened a new summary review board, which also recommended termination of petitioner's employment. Petitioner was ultimately discharged from his service with the VHA, effective December 6, 2005. Pet. App. 11a.

expressly or by implication, issues of 'withdrawal or reduction' of [petitioner's] pay or other benefits." *Id.* at 48a-49a (quoting 5 U.S.C. 5596(b)(1)).

The district court also expressed doubts about petitioner's ability to satisfy two additional requirements for relief under the Back Pay Act. First, the court observed that the Back Pay Act "does not, by itself, clothe this Court with jurisdiction over the back pay claim," and it described "the premise that this Court is an 'appropriate authority' to make a decision on [Back Pay Act] issues to be extremely doubtful." Pet. App. 49a (quoting 5 U.S.C. 5596(b)(1)). Second, the district court described the record in the previous case as having been "overwhelming with evidence of justification for [petitioner's] separation as a probationary employee." *Ibid.*; see 5 U.S.C. 5596(b)(1) (requiring a determination that employee had been subjected to "an unjustified or unwarranted personnel action").

5. The court of appeals remanded the case to the district court with instructions to dismiss petitioner's complaint based on lack of jurisdiction. Pet. App. 1a-24a. Relying on this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), the court of appeals first determined that "the APA does not provide a basis for petitioner to assert his [Back Pay Act] claim" in federal court. Pet. App. 20a. The court of appeals also rejected petitioner's alternative claim that the Back Pay Act itself "provides the necessary waiver of sovereign immunity for the district court to hear his back pay claim." *Ibid.* The court stated that "[t]he requirements to invoke jurisdiction under the [Back Pay Act] are: (1) a finding of 'an unjustified or unwarranted personnel action;' (2) by an appropriate authority.'" *Ibid.* (quoting 5 U.S.C. 5596(b)(1)). The court of appeals concluded

that petitioner could not satisfy those requirements "because the district court * * * was not an 'appropriate authority'" under that provision. *Id.* at 21a. The court explained that Congress has not authorized "probationary physicians such as [petitioner to] seek[] judicial review of summary review board determinations under the" Back Pay Act. *Id.* at 22a. It further observed that, under VA regulations, the summary review board report from which petitioner originally sought judicial review could have been the subject of further proceedings within the VHA. *Ibid.* The court of appeals "express[ed] no opinion on whether the district court properly asserted subject matter jurisdiction" over petitioner's earlier action under the APA. *Id.* at 22a n.2.

ARGUMENT

Petitioner contends (Pet. ii, 5-12) that the court of appeals erred in concluding that the district court did not have jurisdiction to consider his claim under the Back Pay Act. The court of appeals' decision is correct and does not conflict with the decisions of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the district court was not "an appropriate authority" for purposes of the Back Pay Act at the time it issued its June 2004 decision.

In *United States* v. *Fausto*, 484 U.S. 439, 447, 455 (1988), this Court held that an "excepted service" federal employee for whom the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 7501 *et seq.*), did not provide a right of review before any court could not obtain judicial review of an adverse personnel action under the Back Pay Act. The Court con-

cluded that the exclusion of certain federal employees from the remedies set forth in the CSRA "display[ed] a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter." *Fausto*, 484 U.S. at 447. The Court also explained that "under the comprehensive and integrated review scheme of the CSRA," the only "appropriate authorit[ies]" for purposes of the Back Pay Act would be "the agency itself," the Merit Systems Protection Board, or a court with "authority to review the agency's [underlying] determination." *Id.* at 454; see also *Pathak* v. *Department of Veterans Affairs*, 274 F.3d 28, 31 (1st Cir. 2001) (stating that "*Fausto* stands for the general proposition that judicial review is unavailable to a federal employee who has suffered an adverse personnel action if [the CSRA] does not provide judicial review").

Like the respondent in *Fausto*, petitioner falls squarely with the category of federal employees that Congress has specifically excluded from the remedies set forth in the CSRA. Congress has provided that the subchapter of the CSRA that governs separation from service "does not apply to" certain categories of employees. 5 U.S.C. 7511(b). Among the enumerated categories are "an employee * * * who holds a position within the [VHA] which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title." 5 U.S.C. 7504(b)(10); accord 5 U.S.C. 7511(a)(1)(C)(i) (defining "employee" for purposes of the same subchapter to include "an individual in the excepted services * * * who *is not* serving a probationary or trial period under an initial appointment pending conversion to the competi-

tive service") (emphasis added). Because Congress has provided that appointments of "health-care professionals" at the VHA shall be made "without regard to civil-service requirements," 38 U.S.C. 7403(a)(1), such positions are not part of the "competitive service," see 5 U.S.C. 2102(a)(1). In addition, appointment of "[p]hysicians" by the VHA is addressed in 38 U.S.C. 7401(1) (Supp. V 2005) rather than 38 U.S.C. 7401(3) (Supp. V 2005). Accordingly, it is clear that probationary VHA physicians like petitioner are not entitled to seek relief from adverse personnel actions under the CSRA. See *Pathak*, 274 F.3d at 31.[3]

The provisions of Title 38 governing VHA employment further underscore that the district court did not have "authority to review" (*Fausto*, 484 U.S. at 454) the merits of the VHA's decision to terminate petitioner's employment during the two-year probationary period. Congress has expressly provided that "if [a summary review] board finds that [a probationary employee] is

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[3] The fact that petitioner is not entitled to seek relief for adverse personnel actions does not mean that the CSRA "does not apply to" him (Pet. 10) or that he "is not covered at all by [it]" (Pet. 12). To the contrary, the CSRA's general definition of "employee" clearly includes physicians hired on a probationary basis by the VHA. See 5 U.S.C. 2105(f) (stating that "employees appointed under chapter 73 or 74 of title 38 shall be employees" for certain purposes); 38 U.S.C. 7403(b) (providing for appointment of probationary employees such as petitioner). It is true that "[s]ince *Fausto* was decided, the CSRA has been amended to provide review for nonpreference eligible members of the excepted service." *Bosco* v. *United States*, 931 F.2d 879, 883 n.3 (Fed. Cir. 1991) (citing Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461); see Pet. 10-11 (citing *Bosco*). But that point is irrelevant here because there is no question that probationary employees such as petitioner are still not eligible to pursue relief under the CSRA. See pp. 8-9, *supra*.

not fully qualified and satisfactory, such person *shall* be separated from the service." 38 U.S.C. 7403(b)(2) (emphasis added). In addition, Congress has *expressly* provided a non-CSRA mechanism by which certain non-probationary VHA employees may seek judicial review of certain kinds of major adverse employment actions, see 38 U.S.C. 7462; p. 2, *supra*, but it has not made that mechanism available to probationary VHA employees. Under this Court's holding in *Fausto*, petitioner was not entitled to circumvent those restrictions on the availability of judicial review in Title 38 by seeking to recast his claim as one under the APA or the Back Pay Act. Accord *Pathak*, 274 F.3d at 32 (stating that "Congress's express provision of judicial review in [38 U.S.C. 7462], coupled with a complete omission of judicial review in * * * the provision governing Pathak * * * is persuasive evidence that Congress deliberately intended to foreclose further review of such claims") (internal quotation marks and citation omitted).

Petitioner asserts that he is "entitled to back pay" because the VA "fail[ed] to follow its own rules" in terminating his employment on September 19, 1999. Pet. 8; see Pet. 6-9. But, as this Court explained in *Fausto*, see 484 U.S. at 454, that argument begs the question of whether the district court was an "appropriate authority" to determine whether petitioner suffered a loss of pay or other covered benefits as a result of "an unjustified or unwarranted personnel action." 5 U.S.C. 5596(b)(1). And, as explained previously, the answer is no. "This does not mean that the statutory remedy provided in the Back Pay Act is eliminated, or even that the conditions for invoking it are in any way altered." *Fausto*, 484 U.S. at 454. It simply means that petitioner has not obtained an appropriate determination from an

appropriate tribunal. Cf. Pet. App. 49a (district court describing the record in the previous case as having been "overwhelming with evidence of justification for [petitioner's] separation as a probationary employee").

2. Petitioner errs in contending that the court of appeals' decision in this case creates "a direct conflict" (Pet. 5) with *Ward* v. *Brown*, 22 F.3d 516 (2d Cir. 1994) (see Pet. 5-6), *Romero* v. *United States*, 38 F.3d 1204 (Fed. Cir. 1994) (see Pet. 5, 7, 11), or *Bosco* v. *United States*, 931 F.2d 879 (Fed. Cir. 1991) (see Pet. 10-11).

In *Ward*, the Second Circuit stated that "the Back Pay Act * * * provides an explicit waiver of sovereign immunity *in cases covered by that Act*." 22 F.3d at 520 (emphasis added). Here, the court of appeals simply held that petitioner's case was *not* covered by the Back Pay Act because no "appropriate authority" had determined that he had been subject to "an unjustified or unwarranted personnel action." 5 U.S.C. 5596(b)(1); see Pet. App. 21a-22a.

In *Romero*, the Federal Circuit interpreted this Court's holding in *Fausto* as being inapplicable to "a type of personnel action—withholding of pay for income tax purposes—that 'is not covered at all by the CSRA, for any employees.'" *Romero*, 38 F.3d at 1211 (quoting *Bosco,* 931 F.2d at 883); accord *Bosco*, 931 F.2d at 883 (viewing *Fausto* as holding that the CSRA is "the only means of review as to the *types* of adverse personnel action specifically *covered* by the CSRA" (first emphasis added)). But the "type of personnel action" at issue in this case—separation from service—is *expressly* addressed by the CSRA. See 5 U.S.C. 7512(1). Accordingly, there is no conflict between the court of appeals' decision in this case and the Federal Circuit's decisions in *Romero* and *Bosco*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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