

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| JOSEPH CARSON, |) | |
| |) | |
| Petitioner, |) | |
| v. |) | Civil Action No. 07-0445 (PLF) |
| |) | |
| U. S. MERIT SYSTEMS PROTECTION BOARD, |) | |
| |) | |
| Respondent. |) | |
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**RESPONDENT’S RESPONSE TO SHOW CAUSE ORDER AND
MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS**

Respondent, the Merit Systems Protection Board (“MSPB” or “Board”), by and through undersigned counsel, hereby responds to the Court’s Order to Show Cause, dated April 10, 2007, and respectfully moves this Court to dismiss the Petition for Writ of Mandamus filed herein, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim. A Memorandum of Points and Authorities in support of this Motion and a proposed Order granting the relief requested are attached.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF RESPONDENT’S RESPONSE TO SHOW CAUSE
ORDER AND MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS**¹

On March 5, 2007, petitioner Joseph Carson filed a petition for a writ of mandamus against the Merit Systems Protection Board (“MSPB” or “Board”), seeking to have the Court direct the MSPB “to conduct the necessary reviews of OSC, EEOC, and other agencies to determine and report ‘whether the public interest in a civil service free of PPP’s is being adequately protected,’ as it is legally empowered and required to do by 5 U.S.C. § 1204(a)(3) and (e)(3).” Petition at 4. Because the petitioner has not demonstrated that the MSPB has failed to fulfill its statutory mandate, petitioner’s request for mandamus relief should be denied and the petition should be dismissed with prejudice.

BACKGROUND

A. The Statutory Duties of the Merit Systems Protection Board

Respondent MSPB is an independent, quasi-judicial agency in the executive branch that serves as the guardian of the federal merit system of employment. 5 U.S.C.

¹ For the purpose of this Motion, and in responding to the Court’s Order to Show Cause, defendant assumes – but certainly does not agree – that there exists a private right of action that would allow a private person to bring a civil action to enforce the cited statutory requirements.

§ 1204. The MSPB was established by the Civil Service Reform Act of 1978, Public Law No. 95-454, codified at 5 U.S.C. § 1101, *et seq.* The MSPB is composed of three members appointed by the President, by and with the advice and consent of the United States Senate. 5 U.S.C. § 1201. By statute, not more than two of the members may be adherents of the same political party. *Id.*

The Board's functions and powers are set forth by statute. 5 U.S.C. § 1204. One of the Board's primary functions is to hear and decide: 1) employee appeals of personnel actions, including removals and suspensions; 2) complaints filed under the Whistleblower Protection Act, Uniformed Services Employment and Reemployment Rights Act, and Veterans Employment Opportunities Act; 3) actions brought by the Office of Special Counsel alleging prohibited personnel practices and violations of the Hatch Act; and 4) requests to review any regulations of the Office of Personnel Management that are alleged to either require or result in the commission of a prohibited personnel practice. 5 U.S.C. § 1204.

In addition to the adjudicatory functions set forth above, the Board is also authorized to “conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected . . .” 5 U.S.C. §1204(a)(3). Further, “[i]n carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.” 5 U.S.C. 1204(e)(3).

B. Petitioner's Petition for Writ of Mandamus

Petitioner argues that the MSPB has “apparently” failed, since 1989, “to review the necessary records of Office of Special Counsel (OSC), Equal Employment Opportunity Commission (EEOC), and other agencies, to determine and report, to the President and Congress, ‘whether the public interest in a civil service free of prohibited personnel practices is being adequately protected,’” in accordance with 5 U.S.C. §§ 1204(a)(3), (e)(3). Petition at 2. Petitioner subjectively believes that “the public documents created by MSPB do not contain the statutory required information.” Petition at 3. Therefore, Petitioner requests relief in the form of a writ of mandamus by this Court directing the Board to “conduct the necessary reviews and make its statutory required report.” *Id.*

Standard of Review

Issuance of a writ of mandamus is a drastic remedy to be invoked only in extraordinary situations. *See Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806 n. 2 (D.C. Cir. 1988). It is granted only when essential to the interests of justice. *See Starnes v. McGuire*, 512 F.2d 918, 929 (D.C. Cir. 1974)(en banc); *Haneke v. Secretary of HEW*, 535 F.2d 1291, 1296 (D.C. Cir. 1976); *In Re Tripathi*, 836 F.2d 1406, 1407 (D.C. Cir. 1988). While a federal district court has authority to issue a writ of mandamus pursuant to 28 U.S.C. § 1361, its issuance is not required; rather, mandamus is issued at the discretion of the Court. *National Wildlife Federation v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980).

Mandamus generally will not issue unless there is a clear right in the plaintiff to

the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available. *Northern States Power Co. V. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C.Cir. 1997); *Ganem v. Heckler*, 746 F.2d 844, 852 (D.C. Cir. 1984); *accord In Re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986); *Homewood Professional Care Center, Ltd. v. Heckler*, 764 F.2d 1242, 1251 (7th Cir. 1985); *Jones v. Alexander*, 609 F.2d 778 (5th Cir. 1980); *Billiteri v. U.S. Board of Parole*, 541 F.2d 938 (2nd Cir. 1976).

The requirement of a clear duty to act has been interpreted to mean that the duty of the federal officer sued must be “ministerial, plainly defined and peremptory.” *Jeno's Inc. v. Commissioner of Patents and Trademarks*, 498 F. Supp. 472, 476 (D. Minn. 1980). The act sought to be compelled must be “a clear nondiscretionary duty.” *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 424 (1988). *Accord, Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179 (9th Cir. 1983); *Welch v. Donovan*, 551 F. Supp. 809 (D.D.C. 1982). “It is well settled that a writ of mandamus is not available to compel discretionary acts.” *Cox v. Secretary of Labor*, 739 F. Supp. 28, 30 (D.D.C. 1990)(citations omitted).

ARGUMENT

I. The MSPB is Fulfilling its Statutory Mandate

The statutory provisions discussed herein and respondent’s exhibit clearly show that MSPB is fulfilling its statutory obligations. The MSPB accomplishes the mandate of section 1204(a)(3) through its Office of Policy and Evaluation, which routinely conducts studies and issues reports on various aspects of the civil service and other merit systems. These reports are then submitted to the President and Congress. The reports are also

made available to the public.²

This year, for example, the Board issued a special study reporting on the results of a survey of over 35,000 federal employees regarding their workplace experiences and perceptions, a report summarizing a symposium on the personnel practices of agencies that have been exempted wholly or partly from the requirements of Title 5, and a report addressing probationary periods in the civil service in light of two recent court decisions.³ In 2006, the Board issued reports on reforming federal hiring, the role of technical experts in the federal contracting process, and designing effective pay for performance compensation systems.⁴ In 2005, the Board issued reports on the use of reference checks in federal hiring, the federal career intern program, and the use of probationary periods in assessing performance.⁵ In previous years, the Board issued reports similar to those issued in 2007, 2006, and 2005. *See* Exhibit 1: List of MSPB Reports Prior to 2005.

The Board's special studies and reports are clearly "relating to the civil service

² A complete list of Board studies and reports is available at www.mspb.gov/studies/mspbstudiespage.html.

³ *Accomplishing Our Mission, Results of the Merit Principles Survey 2005*, February 2007 ; *A Report on the Proceedings, The Practice of Merit, A Symposium*, February 2007; *Navigating the Probationary Period After Van Wersch and McCormick*, January 2007.

⁴ *Reforming Federal Hiring -- Beyond Faster and Cheaper*, September 2006; *Contracting Officer Representatives Managing the Government's Technical Experts to Achieve Positive Contract Outcomes*, May 2006; *Designing an Effective Pay for Performance Compensation System*. March 2006.

⁵ *Reference Checking in Federal Hiring: Making the Call*, September 2005; *Building a High-Quality Workforce, The Federal Career Intern Program*, October 2005; *The Probationary Period: A Critical Assessment Opportunity*, September 2005.

and to the other merit systems in the executive branch.” Each special study and the resulting report addresses an important aspect of the civil service, and provides some information about whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. The federal government is a large organization and addressing the health of the merit systems is a complex undertaking. By conducting detailed studies of particular aspects of the merit systems and reporting the results of those studies to the President and to Congress, the Board is best able to use its necessarily limited resources to serve the public interest in a prohibited personnel practice free federal government. Simply put, the Board’s special studies and reports, which address comprehensive aspects of the federal civil service, individually and collectively meet the requirements of 5 U.S.C. § 1204(a)(3).

Further, for the last six years each report prepared by the Board has also included a transmittal letter to the President, Vice-President, and Speaker of the House of Representatives, indicating that the report is presented “[i]n accordance with the requirements of 5 U.S.C. 1204(a)(3). Previous reports were also presented to the President, Vice President, and Speaker of the House, though without a letter of transmittal.

Finally, at no point has Congress amended subsection 5 U.S.C.§ 1204(a)(3) to redirect the Board’s actions under the statute, despite repeated reauthorizations. *See* Pub. L. 103-424, § 9, 108 Stat. 4361 (reauthorizing the Board for fiscal years 1993 through

1997); Pub. L. 104-208 § 641, 110 Stat. 3009-365 (reauthorizing the Board for fiscal years 1998 through 2002); Pub L. 107-304, § 2(a), 116 Stat. 2364 (reauthorizing the Board for fiscal years 1993 through 2007). The Supreme Court has held that “[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, (1974)); see *Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003).

II. Petitioner Has Failed to Meet His Burden of Proof for Why a Writ of Mandamus Should Issue

Petitioner contends that the Board has not met the requirement of subsection 5 U.S.C. § 1204(a)(3), because the Board has not made a specific determination about “whether the public interest in the civil service is free of prohibited personnel practices.” However, the language of the statute does not require that the Board make such a specific determination regarding the civil service as a whole.

Further, petitioner’s contention that the Board is required to conduct a review of OSC, the EEOC, and other agencies in conducting special studies, misreads the purpose and meaning of subsection 5 U.S.C. § 1204 (e)(3). That provision provides that, in carrying out its studies under subsection (a)(3), the Board “shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and

may require additional reports from other agencies as needed.” 5 U.S.C. § 1204(e)(3). The purpose of this section of the statute is to afford the Board access to information in agency databases, the disclosure of which might otherwise be limited, so that the Board may conduct its studies. Petitioner has not demonstrated that the Board has failed to carry out studies and produce reports in accordance with the language of the statute. Accordingly, the petitioner’s mandamus request is without merit.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Response to Show Cause Order and Motion to Dismiss Petition for Writ of Mandamus, Memorandum of Points and Authorities in Support Thereof, and Proposed Order, has been made through the Court's electronic transmission facilities and by mailing copies thereof, first class postage prepaid, addressed to:

JOSEPH CARSON
10953 Twin Harbour Drive
Knoxville, TN 37922

on this 30th day of April, 2007.

/s Sherease Louis
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