

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

JOSEPH CARSON,)	
)	
Plaintiff,)	
v.)	Civil Action No. 07-0445 (PLF)
)	
U. S. MERIT SYSTEMS PROTECTION BOARD,)	
)	
Respondent.)	
)	

**MEMORANDUM IN SUPPORT OF RESPONDENT’S REPLY
TO PETITIONER’S OPPOSITION TO RESPONDENT’S MOTION
TO DISMISS PETITION FOR WRIT OF MANDAMUS ¹**

The MSPB, through counsel, files its reply to Petitioner Joseph Carson’s Opposition to Respondent’s Motion to Dismiss the Petition for Writ of Mandamus. The points raised in Petitioner’s Opposition are discussed below.

I. 5 U.S.C. § 1204(a)(3).

Petitioner takes issue with the quote on page 7 of Respondent’s Brief. The relevant section of Respondent’s Brief states:

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.*”

(emphasis added). Petitioner takes issue with this quote because, he says, it “inaccurately and incompletely quoted the relevant law.” Pet. Opp. ¶ 1. Respondent was actually quoting Petitioner’s Petition for Writ of Mandamus at 2 and 5. Respondent was not quoting the full text of 5 U.S.C. § 1204(a)(3). The citations to the quoted text in Petitioner’s brief were inadvertently

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.

omitted. The full text of both 5 U.S.C. § 1204(a)(1-4) and 5 U.S.C. 1204(e)(3) appears below:

§ 1204. Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) 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; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

5 U.S.C. 1204(a).

(3) In 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).

II. MSPB is in Compliance with its Statutory Mandate 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.”

Petitioner next takes issue with the Board's reporting duties. As demonstrated in Respondent's Motion to Dismiss Petition for Writ of Mandamus and attached Exhibit, MSPB is clearly fulfilling its statutory obligations. The MSPB routinely conducts studies and issues reports on various aspects of the civil service and other merit systems, which are submitted to the President and Congress. The reports are also made available to the public.² By conducting detailed studies of particular aspects of the merit systems and reporting the results of those studies to the President and to Congress, in accordance with the requirements of 5 U.S.C. 1204(a)(3), the Board is best able to use its necessarily limited resources to serve the public interest in a prohibited personnel practice free federal government. The Board's special studies and reports, which comprehensively address aspects of the federal civil service, individually and collectively meet the requirements of 5 U.S.C. § 1204(a)(3).

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).

III Weber v. United States.

Petitioner argues that *Weber v. United States*, 209 F. 3d 756 (D.C. Cir. 2000) is applicable here. In *Weber*, a civilian engineer complained to the United States Office of Special Counsel (OSC) that the Army had revoked his security clearance and fired him two years after he

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

had engaged in whistleblowing. *Id.* at 757, 758. When the OSC declined to investigate, Weber sought a writ of mandamus to compel the OSC to investigate whether he had been retaliated against for whistleblowing. *Id.* The district court granted summary judgment in favor of the United States, and the Court of Appeals affirmed. In doing so, the Court of Appeals found that “the general presumption of reviewability of agency action does not apply to security clearance decisions.” *Id.* at 760. Thus, in *Weber*, a case that Petitioner argues is applicable here, neither the district court nor the Court of Appeals ordered mandamus relief. This outcome supports Respondent’s position in this case, that mandamus relief is not warranted.

Because Petitioner has not demonstrated that the Board has failed to carry out studies and produce reports in accordance with the language of the statute, Petitioner’s request for mandamus relief must be denied.

CONCLUSION

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

Respectfully submitted,

Jeffrey A. Taylor

JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

Rudolph Contreras

RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

s/Sherease Louis

SHEREASE LOUIS
Special Assistant United States Attorney
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530
202-307-0895/ FAX 202-514-8780
sherease.louis@usdoj.gov

