

C**Carson v. U.S. Office of Special Counsel**

D.D.C.,2006.

Only the Westlaw citation is currently available.

United States District Court, District of Columbia.

Joseph P. **CARSON**, Petitioner,

v.

UNITED STATES OFFICE OF SPECIAL

COUNSEL, Respondent.

Civil Action No. 05-0537 (PLF).

Oct. 30, 2006.

Joseph P. Carson, Knoxville, TN, pro se.

[Andrea McBarnette](#), [Madelyn E. Johnson](#), Uldric L. Fiore, Jr., U.S. Attorney's Office, Washington, DC, [Jesselyn Alicia Radack](#), Grayson & Kubli, McLean, VA, for Respondent.

MEMORANDUM OPINION AND ORDER[PAUL L. FRIEDMAN](#), District Judge.

*1 Petitioner filed a petition [3] for a writ of mandamus requesting the Court to order the Office of Special Counsel ("OSC") to take specific actions on claims that petitioner had filed. Respondent filed a motion [9] to dismiss. The Court referred [25] the motion to dismiss to Magistrate Judge Deborah Robinson for her consideration. Magistrate Judge Robinson heard oral argument on the motion to dismiss on June 20, 2006 and issued a Report and Recommendation on September 28, 2006. This matter is now before the Court on the Report and Recommendation [58] of Magistrate Judge Robinson, to which the petitioner has filed objections [60].

[Rule 72\(b\) of the Federal Rules of Civil Procedure](#) authorizes the referral of dispositive motions to a magistrate judge for a report and recommendation. When a party files written objections to any part of the magistrate judge's recommendation, the court considers *de novo* those portions of the recommendation to which objections have been made, and "may accept, reject, or modify the recommen-

ded decision[.]”[FED.R. CIV.P. 72\(b\)](#).

The petitioner objects because, *inter alia*, he thinks that the Court has not reviewed respondent's compliance with [5 U.S.C. § 1214\(e\)](#). See Petitioner's Objections at 21. That statute provides:

If, in connection with any investigation under this subchapter, *the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved.* The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states-

(1) that the head of the agency has personally reviewed the report; and (2) what action has been or is to be taken, and when the action will be completed.

[5 U.S.C. § 1214\(e\)](#) (emphasis added). Contrary to petitioner's objection, Magistrate Judge Robinson did assess respondent's compliance with this provision. She concluded that "respondent did not find reasonable grounds that a PPP [a prohibited personnel practice] occurred []" and that respondent "also did not find reasonable grounds to believe that other violations of law, rule or regulation occurred." See Report at 11-12. She concluded that the respondent therefore "fulfilled its required duty" and was not required under [5 U.S.C. § 1214\(e\)](#) to report petitioner's claims to the agency head. See *id.* at 12. The Court agrees. The Court also agrees with and adopts her reasoning and conclusions regarding the time extensions validly sought by the respondent and agreed to by the petitioner. See *id.* at 10.

"It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." [Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 \(1990\)](#); see also Report at 7. A United States District Court may issue a writ of

mandamus-if it determines that the respondent violated a non-discretionary statutory duty. See *Weber v. United States*, 209 F.3d 756, 760 (D.C.Cir.2000). In this case, the Court concludes that OSC fulfilled its statutory duty, and therefore declines to issue a writ of mandamus.

*2 Therefore, upon careful consideration of the entire record in this case, it is hereby

ORDERED that the Court ADOPTS and APPROVES the Report and Recommendation of Magistrate Judge Robinson in its entirety; it is

FURTHER ORDERED that the respondent's motion [9] to dismiss is GRANTED; and it is

FURTHER ORDERED that this case is dismissed and the Clerk of the Court shall remove this case from the docket of the Court. This is a final appealable order. See *FED. R.APP. P. 4(a)*. All other pending motions are denied as moot.

SO ORDERED.

REPORT AND RECOMMENDATION

DEBORAH A. ROBINSON, United States Magistrate Judge.

Respondent's Motion to Dismiss Petition for Writ of Mandamus (Docket No. 9) is pending for determination by the undersigned. Upon consideration of the motion, the memoranda in support thereof and in opposition thereto and the entire record herein, the undersigned will recommend that Respondent's Motion to Dismiss Petition for Writ of Mandamus be **GRANTED**.

I. BACKGROUND

On March 15, 2005, Petitioner filed a *pro se* Petition for Writ of Mandamus from the U.S. Office of Special Counsel ("Petition") (Docket No. 3), seeking to "direct [the Office of Special Counsel] to do its statutory duty to protect him from agency [prohibited personnel practices] ... to refer reason-

ably evidenced violations of agency rule and regulation to the agency ... and to provide him the information he lawfully requested." Petition, ¶ 26. In response to the petition, Respondent, the U.S. Office of Special Counsel ("OSC") filed its Motion to Dismiss Petition for Writ of Mandamus ("Respondent's Motion"). Respondent contends that "Petitioner has not demonstrated a right to this extraordinary remedy." Respondent's Motion at 1.

Petitioner has filed a number of claims with OSC, three that are relevant to the present case were central to an earlier writ of mandamus he sought from this court. See *Carson v. U.S. Office of Special Counsel*, No. 04-0315, 2006 U.S. Dist. LEXIS 17055, *7-8 (D .D.C. March 27, 2006). The instant petition concerns four grievances filed with OSC. Generally, Petitioner alleges that OSC has failed "to meet its statutory obligations in investigating allegations of prohibited personnel practices (PPP's) by completing them within the statutory established time period (*see* 5 U.S.C. § 1214(b)(2)(A)), [and] by failing to refer reasonably evidenced, related, violations of law, rule or regulation to agency heads (*see* 5 U.S.C. § 1214(e))[".]” Petition, ¶ 2.^{FN1}

^{FN1}. Petitioner also alleged that "OSC fails to maintain and make available to the public the specific information requested by statute (*see* 5 U.S.C. § 1219(a)).*Id.*

Petitioner requests that the court order Respondent to correct the alleged defects in completing its statutory obligations. Specifically, Petitioner requests an order directing OSC to take the following actions with regard to his complaints: (1) with respect to OSC File No. MA-03-1288, Petitioner requests that OSC make the statutorily required determination and "refer his well-evidenced, allegations of agency wrongdoing, relevant to his PPP complaints, to the agency head for action per [5 U.S.C. § 1214(e)][";]" and (2) with respect to OSC File Nos. MA-04-1018, MA 04-1886 and MA-04-2444, Petitioner requests that OSC "refer his well-evidenced, allegations for agency wrongdoing, relevant to his PPP complaints, to the agency head for action per

5 U.S.C. § 1214(e)].” Petitioner also requested that the court direct OSC to provide him information which he is entitled to pursuant to 5 U.S.C. § 1219(a); however, Petitioner indicated in his opposition to Respondent's motion that he now withdraws that requested relief because Respondent has provided him the requested information. *See* [Opposition] to Motion to Dismiss of May 25, 2005 (“Petitioner's Opposition”) (Docket No. 10) at 1.

II. CONTENTIONS OF THE PARTIES

*3 Respondent, in its motion to dismiss, states that Petitioner has not demonstrated a right to a writ of mandamus. Respondent's Motion at 1. Respondent claims that it was within its rights pursuant to U.S.C. § 1214(b)(2)(A)(ii) to seek an extension of time to investigate the claims made by Petitioner and informed him of the consequences if the extension was not granted. *Id.* at 13. Respondent contends that it did not threaten Petitioner when it informed him the case would be closed if the extension was not granted, and instead, advised him that because it did not yet have sufficient information to make a determination, review of his allegations would terminate unless he consented to an extension. *Id.* Respondent also contends that it was not required by law to refer Petitioner's allegations that PPPs were committed in MA-03-1288, MA-04-1886, MA-04-1018, and MA-04-2444, when Respondent found no reasonable grounds that PPPs were committed. *Id.* at 14. Respondent claims that Petitioner is misinterpreting the requirements of 5 U.S.C. § 1214(e) in that Respondent only has to make a referral if there is reasonable cause to believe that a violation has occurred other than the violation that was alleged originally. *Id.* at 15. There are four claims at issue in the present case and three of those cases have been addressed previously by this court (Friedman, J.).^{FN2}

^{FN2}. The claims MA-03-1288, MA-04-1886, and MA-04-1018 were addressed by this court in *Carson v. U.S. Office of Special Counsel*, No. 04-0315, 2006 U.S.

Dist. LEXIS 17055, *7-8 (D.D.C. March 27, 2006). In that case, the court held that Plaintiff was not entitled to relief by mandamus because OSC had complied with its statutory duty in investigating the claims and allegations made by Plaintiff.

Petitioner, in his opposition, contends that Respondent was only allowed by statute to extend the time period to conduct an investigation one time pursuant to 5 U.S.C. § 1214(b)(2)(A)(ii). Petitioner's Opposition at 4. The request for a writ of mandamus for Respondent to make a referral pursuant to 5 U.S.C. § 1214(e) is renewed. *Id.* at 5. Petitioner alleges that Respondent did determine that there was reasonable cause to believe that Petitioner's agency may have violated agency rules or laws but that it did not create a significant change in working conditions; however, Petitioner believes this was enough to have a referral made to Petitioner's agency. *Id.* at 5-6.

Petitioner raises issues which he did not present in his original petition. Petitioner contends that the Respondent failed to comply with 5 U.S.C. § 1214(a)(1)(A) and (b)(2)(A) when it made its preliminary determination notice and closure letter relating to MA-03-1288. *Id.* at 2. Petitioner claims that Respondent did not make the required determination, did not provide a summary of relevant facts, did not provide reasons for terminating the investigation, nor respond to Petitioner's comments about the preliminary determination notice. *Id.* at 3.

The Petitioner filed a motion to supplement the relief requested which the court (Friedman, J.) granted on December 16, 2005. Docket No. 12. The motion was based on Petitioner's claim that there was new evidence of OSC non-compliance with 5 U.S.C. § 1214(e). Petitioner seeks to have “the Court order OSC to reopen file no. MA-05-0820, and make a determination, based on the evidence provided OSC about the defamation he suffered, in violation of specific agency rule.” Petitioner's Motion at 1.

*4 Respondent, in its reply, again contends that it followed the proper procedure in seeking extensions of time to review MA-03-1288, and that the Petitioner's interpretation of the related statute is wrong. Respondent's Reply in Support of Defendant's Motion to Dismiss ("Respondent's Reply") at 2. Respondent contends that Petitioner's request is unfounded, and that if OSC closes a complaint under § 1214(b)(2)(A) without making a determination that reasonable grounds exist that a PPP has occurred then it cannot refer the same matter to an agency head under § 1214(e). *Id.* at 3. Respondent states that it can only refer a matter under § 1214(e) on the basis that it found reasonable cause to believe a violation of law, rule, or regulation had occurred other than the one alleged, not for generalized "wrongdoing." *Id.* Respondent denies the new issues raised in Petitioner's Opposition that claim OSC violated its statutory duty by not informing Petitioner why his MA-03-1288 claim was denied and why it was not going to be referred to the head of his agency, the Secretary of Energy.

The Coalition for a Healthy Environment (CHE) filed a motion for leave to file an amicus brief in support of Petitioner which the court (Friedman, J.) granted on December 16, 2005. CHE describes itself as an association of sick and/or disabled individuals who worked in the Department of Energy facilities in Oak Ridge, Tennessee. CHE "agrees with the position of Petitioner that "shall" means "must" in describing the statutory obligations of OSC...." CHE does not take a position regarding the compliance of OSC with its statutory duty in investigating Petitioner's claims. It states that "it is essential that this Court determine, on the merits, whether OSC has completely complied with its statutory duty to protect [Petitioner]." Amicus Curiae Brief of The Coalition for a Healthy Environment at 3-4,7,9.

III. STATUTORY FRAMEWORK

Whistleblower Protection Act

Under the Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 *et seq.*, an agency is prohibited from taking any personnel action in reprisal for the disclosure of information by an employee that the employee reasonably believes evidences violation of any law, rule, or regulation by another agency employee. *See* 5 U.S.C. §§ 1221(a), 2302(b)(8)(A)(I); *see also Stella v. Mineta*, 284 F.3d 135, 142 (D.C.Cir.2002). When an agency takes such an action, it is considered to be a prohibited personnel practice (PPP). *See* 5 U.S.C. § 2302 (e.g., discrimination based on race; obstruction of a person's right to compete for employment). The Office of Special Counsel (OSC) is an independent investigative and prosecutorial agency. *See* 5 U.S.C. §§ 1211-1215. The relevant purpose of OSC is to investigate complaints from current, present, and prospective federal employees alleging prohibited personnel practices and when appropriate, file a complaint or make a recommendation for disciplinary action. 5 U.S.C. §§ 1212(a)(2).

*5 While an investigation is pending, OSC must provide written status updates to a complainant within 90 days of the complaint being filed and 60 day intervals after that until the investigation is completed. 5 U.S.C. §§ 1214(a)(1)(C)(I), (ii). The updates must describe the current status of the complaint as well as any action that has been taken since the last update was issued. *Id.* OSC has a 240-day initial time limit to complete its investigation; however, this time can be extended if the complainant agrees to extend it to a time on which both the complainant and OSC agree. 5 U.S.C. § 1214(b)(2)(A)(ii). If the OSC finds that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than the one referred by the complainant, then it is to report such violation to the head of the agency involved. 5 U.S.C. § 1214(e). If, after investigating, OSC finds no reasonable ground to believe that a PPP has occurred, it is to send a written status report informing the complainant of the proposed findings, conclusions and reasons for terminating the investigation. *See* 5 U.S.C. §§ 1214(a)(1)(D) and

(a)(2)(A).

Writ of Mandamus

The Mandamus Act provides that “[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the petitioner.” 28 U.S.C. § 1361. The “Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions....” 28 U.S.C. § 1651. The Civil Service Reform Act of 1978 (CSRA), Pub.L. No. 94-454, 92 Stat. 1111 (codified as amended in sections of Title 5 of the United States Code) does not provide subject matter jurisdiction in United States District Courts for review of OSC decisions made pursuant to its authority under the law. However, the United States Court of Appeals for the District of Columbia Circuit has held that a United States District Court does have subject matter jurisdiction to issue a writ of mandamus if it determines that OSC violated a non-discretionary statutory duty to investigate an employee's allegations. *Weber v. United States*, 209 F.3d 756 (D.C.Cir.2000).

The remedy of mandamus “is a drastic one, to be invoked only in extraordinary circumstances.” *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Only “exceptional circumstances amounting to a judicial ‘usurpation of power’” will justify issuance of a writ. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). Mandamus is available only if: “(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C.Cir.2005) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C.Cir.2002)). The party moving for mandamus “has the burden of showing that ‘its right to issuance of the writ is clear and indisput-

able.’” *Power*, 292 F.3d at 784 (citations omitted). If the petitioner is seeking to compel an action that is discretionary, then the petitioner has no clear right to relief and mandamus is not a proper remedy. See *Weber*, 209 F.3d at 760.

IV. DISCUSSION

*6 First, the undersigned finds that the Petitioner's claim that Respondent failed to provide Petitioner with requested publicly available information pursuant to 5 U.S.C. § 1219 is moot. Petitioner's Reply at 1. Respondent has given Petitioner the materials that he requested and Petitioner no longer seeks relief for this claim. *Id.*

In addition, because it was not originally raised in the Petition, the undersigned will not address OSC's allegedly noncompliance with 5 U.S.C. § 1214 by not reporting the basis for closing its inquiry and not referring the allegations made in MA-03-1288. See Petition, ¶¶ 1-15; Petitioner's Opposition at 2-3. However, the remainder of Petitioner's claims remain ripe for adjudication.

1. Respondent OSC did not violate 5 U.S.C. § 1214(b)(2)(A) when it sought time extensions from Petitioner to complete its investigation of MA-03-1288 to determine whether there were reasonable grounds to believe a PPP had been committed.

Petitioner filed complaint No. MA-03-1288, requesting OSC to investigate a PPP claim Petitioner had against his employer, Department of Energy. Petition, ¶ 7. After 240 days, OSC requested an extension of 120 days to continue its investigation of the claim and Petitioner agreed. *Id.* Petitioner contends that after the 120-day extension, OSC violated 5 U.S.C. § 1214(b)(2)(A) when it threatened Petitioner with closing the case if he did not grant another 120-day extension. *Id.* Petitioner contends that Respondent did not complete its determination within the agreed upon time and instead of indicating that it needed more time, Respondent threatened to close the investigation unless he

agreed to an extension, a tactic which could be used indefinitely. Respondent contends that it did not threaten Petitioner with stopping the investigation if an extension was not granted, but instead outlined Petitioner's options in two letters. Respondent's Motion at 12; Petition, Exhibits 2-3. Respondent's argues that 5 U.S.C. § 1214(b)(2)(A) only sets 240 days as the target time period to conduct an investigation, but provides a mechanism that allows the investigation to continue beyond that with claimant's consent. Respondent's Motion at 12. Respondent asked for two extensions, both of which were granted by Petitioner, and Respondent completed its analysis before the expiration of the second extension. *Id.* Respondent contends that it did not violate any statutory duty owed to Petitioner and that a writ of mandamus is not appropriate. *Id.*

Pursuant to 5 U.S.C. § 1214(a)(1)(A), the Respondent is required to "investigate to the extent necessary to determine whether there are reasonable grounds to believe" that a PPP has been committed. Respondent is initially given 240 days to conduct an investigation and to "make a determination whether there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or to be taken." 5 U.S.C. § 1214(b)(2)(A)(I). If the OSC is not able to make a determination within 240 days, with the consent of the person bringing the claim, "the determination shall be made within such additional period of time as shall be agreed upon" by the OSC and the claimant. 5 U.S.C. § 1214(b)(2)(A)(ii). There is nothing in the statute that limits how long an investigation can be extended, or how many times it may be extended. *See* 5 U.S.C. § 1214(b)(2)(A). In fact, Petitioner does not argue that an extension cannot be granted more than once; nor does he offer any authority which suggests that an extension must be limited to a certain amount of time. Petition, ¶¶ 7-9. Petitioner believes that Respondent did not make a determination within the agreed upon time, contrary to Respondent's statutory obligation, and that it could have indefinitely threatened to close the case unless it received additional time extensions. *Id.*, ¶ 7.

*7 The undersigned finds that the Petitioner is incorrect in his evaluation of the facts and his interpretation of the relevant statute. The Respondent asked for an extension of time because it did not have enough information to make a determination and did not threaten to close the investigation if it did not receive an extension, but gave Petitioner three options. Petition, Exhibits 2-3. The three options given to the Petitioner were to allow OSC an indefinite time to complete its investigation, he could give OSC a mutually acceptable deadline to complete the investigation, or he could decline an extension and OSC would terminate its review of the allegations because it did not have enough information to make a determination. *Id.* The Petitioner agreed to both extensions and Respondent made a determination before the expiration of the second extension, therefore Respondent made a determination within an agreed upon time, even if it was later than Petitioner would have liked. *See* Respondent's Motion at 12; Petition, Exhibit 4.

In sum, the undersigned, for the foregoing reasons, finds that Respondent did not violate his statutory duty in seeking and receiving an extension to investigate the allegations made by Petitioner, and that relief by writ of mandamus is unwarranted.

2. *OSC is not required to send PPP complaints made by Petitioner in MA-04-1886, MA-04-1018, and MA-04-2444 to the Department of Energy under 5 U.S.C. § 1214(e).*

Petitioner alleges that in MA-04-1886, MA-04-1018 and MA-04-2444 he made several PPP complaints regarding actions which he alleges significantly changed his work conditions that contained well-evidenced violations of agency rule or regulation. Petition, ¶ 10. OSC closed those PPP complaints, and Petitioner contends OSC violated 5 U.S.C. § 1214(e) when it did not refer these "well-evidenced" violations to his agency head. *Id.* Petitioner contends that OSC acknowledged to him that there was reasonable cause to believe law or agency rules were violated but it determined it did

not amount to a “significant change in working conditions.” Petitioner's Opposition at 5.

Respondent denies that it ever acknowledged to Petitioner that in its investigation of Petitioner's claims it found evidence that established a belief that law or agency rules were violated by his agency. Respondent's Reply at 3. Respondent argues that Petitioner is incorrect and that it is not required to report an allegation made if it does not find a reasonable cause to believe a PPP occurred and it does not have to report general “wrongdoing” under 5 U.S.C. § 1214(e).*Id.* Respondent contends its is required to report to an agency head under 5 U.S.C. § 1214(e) only if OSC finds that there is a reasonable cause to believe that a violation has occurred that was not originally alleged by a complainant. Respondent's Motion at 15.

The relevant provision of 5 U.S.C. § 1214(e) states that if “reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred ... Special Counsel shall report such violation to the head of the agency involved.” Respondent did not find reasonable grounds to believe a PPP occurred in MA-04-1886, MA-04-1018 and MA-04-2444, and explained this to Petitioner in letters. *See* Petition, Exhibits 4 and 6. Respondent also did not find reasonable grounds to believe other violations of law, rule or regulation occurred. *Id.* Petitioner does not provide any evidence to prove that Respondent acknowledged that there was evidence of a PPP, and this court only has authority to issue writs of mandamus if Respondent violated its non-discretionary duty.

*8 It is the undersigned's finding that the Respondent fulfilled its required duty by investigating the claims made by the Petitioner, and used its discretion in closing the claims because it did not find sufficient evidence to support Petitioner's claims of PPP. The undersigned, therefore finds that Respondent did not violate 5 U.S.C. § 1214(e) when it did not refer the claims in MA-04-1886, MA-04-1018 and MA-04-2444 to an agency head, and that Petitioner is not entitled to a writ of mandamus

as relief.

V. CONCLUSION

Upon consideration of Respondent's Motion to Dismiss Petition for Writ of Mandamus (Docket No. 9) and entire record herein, and for the reasons set forth in this Report and Recommendation, it is hereby

RECOMMENDED that Respondent's Motion to Dismiss for Writ of Mandamus (Docket No. 9) be **GRANTED**.

D.D.C., 2006.

Carson v. U.S. Office of Special Counsel
Slip Copy, 2006 WL 5085253 (D.D.C.)

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