

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

<b>JOSEPH P. CARSON,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	<b>Civil Action No: 05-0537 (PLF)</b>
v.	)	
<b>U.S. OFFICE OF SPECIAL COUNSEL</b>	)	
	)	
<b>Respondent</b>	)	
	)	
	)	
	)	

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**PETITIONER’S REPLY TO RESPONDENT’S OPPOSITION TO PETITIONER’S  
CROSS-MOTION FOR MANDAMUS**

Petitioner respectfully replies respondent’s opposition to his cross-motion for mandamus.

**Previous Related Litigation Before This Court**

The now-lengthy history of related litigation before this Court- litigation focused on aspects of OSC’s nondiscretionary duties to this petitioner - includes Carson v. U.S. Office of Special Counsel, Civil Action No. 04-0315, 2006 WL 785292, (D.D.C. March 27, 2006) ("Carson I"); Carson v. U.S. Office of Special Counsel, Civil Action No. 05-0537, 2006 WL 5085253, (D.D.C. Oct. 30, 2006) ("Carson II"), *aff'd* and remanded on one unaddressed issue (i.e. this case, Carson V), No. 06-5364 (D.C. Cir. Nov. 28, 2007); Carson v. U.S. Office of Special Counsel, Civil Action No. 06-1833, 514 F. Supp. 2d 54 (D.D.C. Sept. 27, 2007) ("Carson III"), and Carson v. U.S. Office of Special Counsel, Civil Action No. 07-0649, WL 474251 (slip copy) (D.D.C. February 19, 2008) (“Carson IV”).

**It is *Res Judicata* that 5 U.S.C. 1214(e) Applies to “ANY” Law, Rule, or Regulation,  
Including Those Within OSC’s Jurisdiction**

Now, in this case, Carson V, a remand of Carson II, the respondent wrongly attempts to

re-argue an issue preclusively decided in Carson II - that 1214(e) applies to “any law, rule, or regulation” - just as it states - particularly including those within OSC’s jurisdiction. *Res judicata*, collateral estoppel, and/or issue preclusion apply and **should** have prevented the respondent from making contrary argument to this Court in its motion to dismiss, docket # 71, on page 2 and in footnote 6 on pages 6 and 7. Petitioner made the well-founded claim of *res judicata* in his opposition and cross-motion, one the respondent did not even directly address it in its reply, instead of summarily dismissing it, in passing, *see* footnote 3, of respondent’s opposition/reply.

Despite the respondent’s indirect and summary dismissal of the petitioner’s claim of *res judicata*, the case record demonstrates the scope of §1214(e) and its applicability to law, rule, or regulation within OSC’s jurisdiction was raised in the petition for writ of mandamus, docket # 3 of March 15, 2005, in paragraphs 2, 3(b), 6 (Note: paragraph 6 was modified when petitioner’s motion on June 15, 2006, docket # 46, was granted on June 19, 2006), 10, 11, 12, 17, 20, and 21.

Respondent’s motion to dismiss the petition for writ of mandamus, docket # 9, addressed the scope of §1214(e) on pages 14, 15, and footnote 16. Petitioner’s opposition, docket # 10, addressed §1214(e) in paragraphs 6 and 12-17, as did respondent’s reply, docket #14, page 3.

The scope of §1214(e) was argued to the magistrate judge at the motion hearing of June 20, 2006, docket #59, petitioner’s motion to add transcript of motion hearing to record was granted on October 24, 2006, *see* pages 18-20, 28, and 29.

The Magistrate Judge’s report and recommendation, docket #58, pages 11 and 12, found that §1214(e) applies to “any law, rule, or regulation,” including those within OSC’s jurisdiction. Respondent did not file an objection to the magistrate judge’s report, but petitioner did, docket #

60, and, on page 21, requested elaboration/clarification of this aspect of the magistrate judge's report and recommendation. In the Court's decision adopting the report and recommendation, Carson II, docket # 67, on page 2, the Court specifically confirmed the finding of the magistrate judge, that §1214(e) applies to "any law, rule, or regulation," including those within OSC's jurisdiction. The respondent did not appeal or cross-appeal any aspect of the Judge's decision, in fact it filed a motion for summary affirmance to the appeals court in Carson v. OSC, docket no. 06-5364, D.C. Cir.

Despite all this, OSC's opposition/reply does not even directly acknowledge petitioner's claim of *res judicata*. Based on the established record in Carson II, petitioner thinks the respondent's failure to directly address petitioner's claim of *res judicata* is reasonable evidence of its representative violating the ABA Model Rules of Professional Conduct Rule 3.1, "Meritorious Claims and Contentions," and Rule 3.3 "Candor Toward Tribunal," and hopes the Court will consider taking appropriate action to correct this apparent misconduct.

**OSC's Non-Compliance with §1214(e) Nullifies its Nondiscretionary Duties by §1212(a)(5) and §1216**

In its motion to dismiss, page 2 and 3, "Statutory Framework," OSC failed to mention that, by §1212(a)(5), it has enforcement jurisdiction for laws described in §1216, even though these are the relevant statutes in this case. (Note: there is also no mention of §1216 in the similar sections of Carson I - IV). Therefore, its discussion of the "statutory framework" is largely irrelevant to this issues in this case. What is specifically missing is respondent's description of OSC's duties to report its determinations of violations of law under 1216 for the 1216 investigations it conducts. If respondent had included that discussion in the "statutory

framework” section of its motion, then the nonsensical outcome OSC’s contention of §1214(e) not applying to §1216 would have been apparent -because absent §1214(e), OSC has **NO** requirement to report its determinations of §1216 violations. The result of OSC’s interpretation of §1214(e) is that it nullifies its nondiscretionary obligations by §1212(a)(5) and §1216.

As this applies to the PPP complaints considered by this Court in Carson I-II, including MA-03-1288, MA-04-1018, MA-04-1886, and MA-04-2444, it means that even though these PPP complaints alleged specific agency violations of specific civil service laws, rules, or regulations under OSC’s jurisdiction by 1216(a)(4), OSC did not investigate them by that part of its jurisdiction - why should it when it claims to have no mechanism to report its determinations of their violation? Instead, it either wrongly claimed to investigate them by 1215, a section of law that does not authorize OSC investigations, and/or limited its investigation to its jurisdiction under 1212(a)(1), (a)(2), and 1214 and to determining whether the violation of the civil service law, rule, or regulation alleged in the PPP complaint constituted a personnel action, and possible PPP, by creating “any other significant change in working conditions, *see* Carson I, 2006 WL 785292, \*4 and \*5; and Carson II, 2006 WL 5085253, \*1, \*3, \*7, and \*8. Had OSC complied with its nondiscretionary requirements per the “termination statement” of the note of 1214, in closing these PPP complaints, this situation would likely have been recognized then, *see* Carson III, 514 F.Supp.2d 54 pages 8, 9, and 10; and Carson IV, 2008 WL 474251 \*1.

Since OSC has treated the petitioner the same way it treats other complainants, this is probably universal OSC practice - to ignore violations of civil service law, rule, or regulation under its jurisdiction by 1212(a)(5) and 1216(a) in its PPP investigations, because of its incorrect interpretation about the scope of 1214(e).

OSC nullification of §1216 by its interpretation of §1214(e) also explains why OSC had no responsive records to petitioner's FOIA request about the records created by the 40 or more field investigations of possible agency FOIA malfeasance OSC has conducted since 1989. These field investigations resulted from OSC receiving complaints of "other prohibited activities" contrary to §1216(a)(3) that cited or contained the requisite Judge's finding of §552(a)(4)(F). Because OSC contends §1214(e) does not apply to the laws under its jurisdiction, and because it also (wrongly, in petitioner's opinion) claims that §552(a)(4)(F) is not applicable to its §1216(a)(3) investigations, there are no laws OSC recognizes as valid that require it to create records of these investigations and their results, which is why no records exist, which is why petitioner's related FOIA case at this Court, Carson v. Office of Special Counsel, Docket no. 06-1834, was dismissed by this Court on February 19, 2008. The petitioner has appealed this decision and dispositive motions for the appeal, Carson v. Office of Special Counsel, Docket no. 08-5047, are now being filed at CADC.

**§1214(e) Applies, As This Court Has Previously Determined, to Any Law, Rule or Regulation, Including Those Within OSC's Jurisdiction**

The respondent did not address petitioner's claims of *res judicata* about the scope of §1214(e) before summarily dismissing them and offering additional argument in support of its interpretation of §1214(e), supposedly based in the legislative history of the Civil Service Reform Act (CSRA) of 1978, P.L. 95-454, the relevant CSRA statutory language, and the changes to the that statutory language made by the Whistleblower Protection Act of 1989, P.L. 101-12.

Respondent's arguments are contained in its footnote 3 on page 3 of its opposition/reply, docket #78, which states (emphasis in original, but petitioner has added paragraph breaks to aid

reading and also added some “notes” in italics):

Petitioner devotes a large portion of his brief to his argument that §1214(e) applies to all violations of law, rule, or regulation that the Special Counsel reasonably believes have occurred, instead of only those non-criminal violations of law, rule, or regulation that the Special Counsel does not otherwise have authority to attempt to remedy.

First, neither OSC, the Magistrate Judge, nor this Court have adopted his strained interpretation of § 1214(e) - *(Note: Instead of directly responding to petitioner’s claims of res judicata, respondent indirectly makes this summary, and incorrect, claim)*. Moreover, this issue need not be resolved here because the Special Counsel has not determined that there is reasonable cause to believe that any other violation of law, rule, or regulation has been violated *(Note: The Special Counsel has not made the required determination of §1214(e) because OSC did not conduct the required §1216 investigation during its processing of MA-05-0820 in that it failed to investigate petitioner’s allegation of a prohibited activity by DOE Order 3750.1, “Work Force Discipline,” a civil service rule under his jurisdiction by §1216(a)(4))*. Finally, petitioner's interpretation is untenable.

When §1214(e) is read in context with the entirety of §1214, and in conjunction with the remainder of subchapter 12, it is clear that the subsection is an ancillary authority given to the Special Counsel to address circumstances when an OSC investigation reveals a violation of law, rule, or regulation over which OSC has not been granted specific enforcement authority. Subchapter 12 is part of a comprehensive enforcement scheme originally crafted by Congress in 1978 under the Civil Service Reform Act (CSRA). The CSRA created OSC and conferred upon it the authority and obligation to investigate prohibited personnel practices (PPPs), *inter alia*. The CSRA also provided specific mechanisms for addressing violations of law found during an OSC PPP investigation; these provisions were codified in 5 U.S.C. § 1206(c). *(Note: The error in respondent’s explanation becomes apparent when applying it to OSC’s investigations of violations of laws currently under its jurisdiction by §1216 (which almost exactly corresponds to §1206(e) of the CSRA)- such as MA-05-0820. By respondent’s explanation, OSC has no mechanism to report such violations. )*

Thus, the resolution of PPPs was governed by §1206(c)(1) *(Note: §1206(c)(1) only governs a subset of PPP’s - those for which OSC made the additional discretionary determination “which require corrective action,” see the statutory language below)*; criminal violations were governed by §1206(c)(2); and non-personnel, non-criminal violations were governed by §1206(c)(3). *(Note: the preceding phrase should be reworded to read “and civil violations other than PPP’s requiring corrective action were governed by §1206(c)(3).”)*

Substantively, this scheme was left in place when the Whistleblower Protection Act was enacted and these provisions were re-codified in 5 U.S.C. §1214. Section 1214(e)

succeeded §1206(c)(3), and thus currently governs non-personnel, non-criminal violations of law, rule, or regulation revealed during an OSC PPP investigation— *i.e.*, when, in investigating a matter within OSC's jurisdiction, the Special Counsel determines that there is reasonable cause to believe that a violation of a law, rule, or regulation outside OSC's jurisdiction has occurred. *(Note: the previous sentence should be reworded to read “Section 1214(e)...governs violations of any non-criminal law, rule, or regulation revealed in any OSC investigation, excluding OSC’s determinations of PPP’s which require corrective action.” See also S. REP. NO. 969 (95th Cong., 2d Sess.), 1978 U.S.C.C.A.N. 2723, 2756 (July 10, 1978).*

Even though the respondent allegedly cites the legislative history of the CSRA in making its untenable claim that §1214(e) does not apply to laws, rules, or regulations under OSC’s jurisdiction, respondent neither quotes from it or from the relevant law. In fact, respondent’s claims about the legislative history are clearly contradicted by it.

From 1978 U.S.C.C.A.N. 2723, 2755-2756, starting at bottom of 2755 (emphasis and *comments (in italics) added*):

Subsection (e) *(Note: what the Senate Report describes here as “subsection (e),” became §1206(c)(3) in the CSRA and is now §1214(e))* sets forth procedures to be followed if, during the course of investigation authorized by the bill or transferred to the Board or Special Counsel by Reorganization Plan No. 2 of 1978, the Special Counsel determines that there is reasonable cause to believe a law has been violated....*(Note: subsection (e) establishes the general rule, it is not “ancillary.”)*

If the Special Counsel determines that there is reason to believe a **violation of a civil statute, or a rule or regulation has occurred, the Special Counsel must report that determination to the head of the agency** involved *(Note: no exceptions for laws within OSC’s jurisdiction, no allowance to only report PPP’s “which require corrective action”)*.

...Subsection (e) differs from subsection (d) *(Note: what the Senate Report describes here as “subsection (d)” became §1206(c)(1) in the CSRA and is now §1214(b)(2)(B))* in that reports made under subsection (d) involve only personnel matters *(Note: More specifically, only PPP’s “which require corrective action”)*. Reports made under subsection (e) may involve violations of **any criminal or civil law**. *..(Note: no limitations on its scope to exclude the civil laws within OSC’s jurisdiction, particularly PPP’s for which OSC did not make the additional discretionary determination “which require corrective action”)*.

**From the CSRA of 1978, P.L. 95-454, §1206:**

(c)(1)(A) If, in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office, and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

(c)(2)(A) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(c)(3) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred which is not referred to in paragraph (1) or (2) of this subsection, the violation shall be reported to the head of the agency involved. The Special Counsel shall require, within 30 days of the receipt of the report by the agency, a certification by the head of the agency which states --,

"(A) that the head of the agency has personally reviewed the report; and

"(B) what action has been, or is to be, taken, and when the action will be completed.

**Comparing these subsections from §1206 with the current law at §1214:**

§1214(b)(2)(B) is the same as the prior §1206(c)(1)(A)

§1214(d) is the same as the prior §1206(c)(2)(A)

But §1214(e) is **NOT** the same as the prior §1206(c)(3). The first sentence in §1214(e) is different in ways that further clarify its purpose as described in the legislative history that §1214(e) creates the “universal” reporting requirement for OSC as an investigatory agency.

Petitioner uses *italics for additions* and ~~strikethrough for deletions~~ to show the changes between

the first sentence in the prior §1206(c)(3) to the current one in §1214(e):

§1214(e): If, in connection with any investigation under this ~~section~~ *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 which is not* referred to in ~~paragraph (1) or (2)-subsection (b) or (d) of this subsection~~, the *Special Counsel shall report such violation shall be reported* to the head of the agency involved.

Clearly, the current §1214(e) is completely consistent with its legislative history in the CSRA. The 1989 changes only clarify the antecedents to the indefinite pronoun “one,” when compared with the indefinite pronoun “which” in the prior law. The antecedents to “one” are “such violation” and an OSC positive PPP determination, reported to the MSPB, agency, and OPM, per 1214(b)(2)(B), because it is one “which requires corrective action.” The former 1206(c)(3) uses the indefinite pronoun “which” and its antecedent is not as clear, compared with the clear intent of the legislative history.

Consistent with the Court’s determinations in Carson II, and the legislative history, §1214(e) creates OSC’s universal nondiscretionary reporting requirement whenever OSC makes a determination a violation of “any law, rule, or regulation” has occurred, including those within its jurisdiction, particularly including PPP’s in which OSC has not made the additional discretionary determination “which require corrective action.” By §1214(e), OSC must formally report its determination to the agency head unless the determination is reported to the agency head (and others) by the alternative means specifically cited in §1214(e) - by §1214(d) for criminal violations, and by §1214(b)(2)(B) for PPP’s “which require corrective action.” This is reflected in the legislative history, which focuses on the reporting requirements for what is now 1214(e). The legislative history clearly describes OSC’s other reporting requirements as basically ancillary reporting mechanisms, limited exceptions to the general reporting mechanism

of §1214(e).

### **Application of §1214(e) to Weber v. United States**

In Petitioner's response/cross-motion for the petition of mandamus, he stated that if the Appellate Court had considered the application of §1214(e), in Weber v. United States, 209 F.3d 756, 758 (D.C. Cir. 2000), its finding would have been somewhat different, as indicated with *italics for additions* and ~~strikethrough for deletions~~ below (emphasis added):

An employee who believes he has been the victim of a prohibited personnel practice must first complain to the OSC, which is required to investigate the complaint "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred." 5 U.S.C. 1214. If the OSC determines that a prohibited personnel practice has occurred, it **must** report its findings to the *agency head* ~~Merit Systems Protection Board~~, and it **may** petition the Board to take action on behalf of the employee (emphasis added).

The respondent, in footnote 2 on page 2 of its opposition takes strong exception to petitioner's application of §1214(e) to Weber (emphasis added).

In his brief, petitioner devotes an entire section of argument to Weber, which did not address 5 U.S.C. § 1214(e), and posits what the Circuit Court *would have held* if the issue had been before it. See Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Mandamus and Cross Motion to Issue Writ of Mandamus, p. 17. Since § 1214(e) was not at issue in Weber and since the Circuit Court's decision did not address it, petitioner's *post hoc* re-drafting of the decision to read the way he wants it to read **could not be more immaterial**.

Respondent, in taking exception to petitioner's rewording of this determination of Weber, fails to address how its motions to dismiss, in their section "statutory framework," in Carson I-IV, clearly disagreed with the following Weber determination (emphasis added):

"If the OSC determines that a prohibited personnel practice has occurred, it **must** report its findings to the Merit Systems Protection Board"

The Weber court did not allow OSC the prosecutorial discretion to evaluate if the PPP "required corrective action" before reporting it to the Board, OPM, and the agency.

In contrast to this Weber determination, respondent's May 25, 2005 motion to dismiss the petition for writ of mandamus, Docket # 9, page 4, "statutory framework" states (emphasis added):

"Based on this investigation and analysis, if OSC finds reasonable grounds to believe that a PPP has occurred **that requires corrective action**, the Special Counsel reports that determination, along with the OSC's findings and recommendations, to the agency involved, the MSPB, and the Office of Personnel Management."

This Court largely adopted OSC's description of "statutory framework," including the section inconsistent with the Weber determination, in Carson I-III. Petitioner agrees with OSC's description of "statutory framework" and this Court's related findings in Carson I - III, that the law and its legislative history clearly indicate that OSC need not report its positive PPP determination to MSPB, per §1214(b)(2)(B), unless it makes the additional discretionary determination that the PPP "requires corrective action," which is contrary to the Weber determination, because the Weber court did not consider how the reporting requirement of §1214(e) dovetails with that of §1214(b)(2)(B).

OSC, in its motions to dismiss in Carson I-IV, just as in this case, in the section "statutory framework" simply does not address the situation in which OSC makes a positive PPP determination but does not make the additional discretionary determination that the PPP "requires corrective action." Petitioner suspects this has happened often, possibly several thousand times in the approximately 50,000 specific PPP allegations (contained in about 25,000 PPP complaints) OSC has investigated since 1989. Possibly to evade detection of its non-compliance with §1214(e), OSC, in closing a PPP complaint rarely states its nondiscretionary PPP determination, "OSC has determined there are NOT reasonable grounds to believe a PPP

has occurred, exists, or is to be taken.” Instead, OSC’s “determination” (as stated to complainant) almost always reflects its discretionary determination as a prosecutor, “OSC has determined there is insufficient evidence to seek further corrective action on your behalf” - something OSC can always say, given its prosecutorial discretion, regardless of the evidence revealed by its PPP investigation. Petitioner raised this issue to this Court in Carson I for MA-03-0151 and for MA-03-1288 in Carson II. This Court did not rule on this issue in Carson I because of statute of limitations, *see* Carson I, 2006 WL 785292 \*4, and did not rule on it in Carson II because it ruled the issue had not been properly raised before the Court, *see* Carson II, 2006 WL 5085253 \*6.

OSC’s apparent long-standing practice of trumping its nondiscretionary obligations as an investigatory agency with its prosecutorial discretion in closing PPP investigations without formally reporting its positive PPP determination, depends on its interpretation of §1214(e). Additionally, OSC’s interpretation of §1214(e) may well explain why OSC will not provide complainants with the additional information described in the “termination statement” of the “note” of §1214, *see* Carson III, 514 F.Supp.2d 54 pages 8, 9, and 10. If OSC complied with this nondiscretionary obligation, the result would likely be OSC’s informing many PPP complainants that it: 1) failed to make the nondiscretionary PPP determination, or 2) OSC made a positive PPP determination but also decided, per its prosecutorial discretion, that it did not “require corrective action,” and so did not formally report it.

As the legislative history and the wording of the law makes clear, OSC simply does not have the prosecutorial discretion to not report a positive PPP determination because it has determined, per its discretion as a prosecutor, that the PPP does not “require corrective action.” But that is

quite possibly what OSC has done, likely thousands of times since 1989, which is a likely explanation for why it will not accept the *res judicata* determination of this Court about the scope of §1214(e). It also may explain why OSC has changed its legal arguments about the application of §1214(e) to §1216 several times in its filings for this case.<sup>1</sup>

The key to understanding the interplay between §1214(e) and §1214(b)(2)(B) was briefed to and accepted by this Court in Carson II - when OSC makes a positive PPP determination, the §1214(e) report creates a permanent, public record of that determination and the agency's response, per §1219(a)(3), consistent with the agency head's responsibility, per §2302(c), to "prevent PPP's" in their agency. §1214(b)(2)(B) report is used in situations in which OSC, per its prosecutorial discretion, determines the PPP is one "which requires corrective action" and is used to establish jurisdiction to do so at MSPB.

Since this Court, in Carson II, issued a decision consistent with that understanding of §1214(b)(2)(B) and §1214(e), and since the respondent does not accept its *res judicata* status, the petitioner's analysis of Weber and §1214(e) in his response/cross-motion is both relevant and material, respondent's claims of "could not be more immaterial" in footnote 2 of its opposition notwithstanding.

### **Other Inaccuracies in Respondent's Opposition**

Footnote 1 on page 2 of respondent's opposition makes a number of inaccurate claims about this case and other related cases, petitioner's *comments in italics*:

In his brief, petitioner defines the allegation at issue as being whether Department of Energy

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<sup>1</sup> In OSC's original motion to dismiss, §1214(e) apparently applied to §1216; in OSC's filings for the appeal at CADC the "may" in §1216(c) gave OSC discretion about applying §1214(e) to §1216; and, now, on remand §1214(e) never applies to §1216.

officials violated DOE Order 3750.1, "Work Force Discipline" by failing to comply with a 1994 order from the Merit Systems Protection Board. See, e.g., Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Mandamus and Cross Motion to Issue Writ of Mandamus, p. 10. *(NOTE: That is incorrect, MA-05-0820 initially involved a claim of violation of civil service law and regulation in connection with the agency's material breach of the 1994 MSPB Order accepting a settlement agreement into the record. It was supplemented to include an allegation of a violation of a civil service rule, DOE Order 3750.1, which is the allegation at issue in this case.)* Petitioner mischaracterizes his allegation. Petitioner's June 20, 2005, motion to supplement was explicit and limited to the defamation allegation he made during OSC's investigation of MA-05-0820. See Petitioner's Motion to Supplement the Relief Requested, p. 1 (June 20, 2005). Moreover, his allegations regarding DOE compliance with the 1994 order were raised in relation to MA-03-1288 and were dismissed by this Court, a decision affirmed by the Circuit Court *(NOTE: MA-03-1288 involved a 2000 Board Order, different from the 1994 Board Order. Petitioner's claims that the agency's non-compliance with the 2000 Board Order were not dismissed by this Court, they were not ruled upon, and that decision - to not rule upon them - is what was affirmed by the Circuit Court).*

**DOE Order 3750.1, "Work Force Discipline" is a Civil Service Rule Within OSC's Jurisdiction by §1216(a)(4)**

§1216(a)(4) corresponds to §1206(e)(1)(D) in the CSRA. However, by §1206(e)(2), OSC had discretion about investigating an allegation of "other prohibited activities" if it determined it could be resolved more appropriately under an administrative appeals procedure. §1206(e)(2) corresponds to §1216(b) in the current law, except the current law no longer allows OSC about investigating such an allegation. The legislative history for the Whistleblower Protection Act of 1989, P.L. 101-12, 1989 U.S.C.C.A.N. 11, refers to H. Rpt No. 100-274, August 5, 1987. Page 37 of that report (Exhibit 1) specifically states OSC's discretion about conducting such investigations was being removed. Despite this being part of the legislative history, the respondent, in footnote 6 on page 5 of its response/reply incorrectly states (emphasis added):

Furthermore, there is **nothing in the legislative history of the CSRA or Whistleblower Protection Act (WPA)** that suggests that Congress intended for OSC to take on auditor-like responsibilities in relation to an agency's compliance with its own internal personnel directives.

Whatever the respondent may be trying to connote by term “auditor-like,” the legislative history for §1216(a)(4) is explicit on Congressional intent that OSC investigate all complaints alleging activities prohibited by (i.e. violations of commission) any civil service law, rule, or regulation.

### **OSC Apparently and Improperly Investigated MA-05-0820 by §1215**

Carson I involved an initial complaint to OSC alleging activities prohibited by civil service law and regulation involving the agency’s “willful and knowing failure or refusal to comply with a Board Order,” specifically the Board Order of Corrective Action of February 3, 2000 in Carson v. Department of Energy, 85 MSPR 171 (2000). Therefore, OSC should have investigated it per §1216 and reported its determination, if positive, per §1214(e). Instead, OSC claimed to the Court that it investigated it per §1215 *see Carson I*, 2006 WL 785292, \*4.

However, §1215 does not authorize OSC to conduct investigations. Given respondent’s arguments about the scope of §1214(e), with the result that it has no nondiscretionary duty to report its determinations of violations of law under its jurisdiction by §1216, probably explains why it claimed in Carson I to investigate the initial claim in MA-03-1288 by §1215, instead of §1216.

The initial allegation of violation of civil service law and regulation that resulted in MA-05-0820 was quite similar to the initial allegation in MA-03-1288, alleging the agency’s “willful and knowing failure or refusal to comply with a Board Order,” specifically the 1994 Board Order implementing a February 1994 settlement agreement of a whistleblower appeal, a settlement agreement in which the agency was later found to be in “material breach” in Carson v. Department of Energy, 77 MSPR 453 (1998).

Petitioner's point is that OSC's claims in footnote 5 of its opposition/reply should be understood in the context of its apparent error that §1215, not §1216(a)(4), gave it jurisdiction to investigate MA-05-0820.

Footnote 5 (emphasis added):

On January 21, 2005, OSC notified petitioner that it had opened MA-05-0820 in response to a complaint he filed against his employer, the Department of Energy, and specifically stated the allegation under investigation was whether DOE knowingly and willfully failed to comply with an MSPB order. On April 11, 2005, while OSC was investigating this allegation, petitioner requested that OSC make a referral under 5 U.S.C. § 1214(e) based on his allegation that he had been defamed by DOE officials. **He did not allege that any civil service law, rule, or regulation had been violated, and he did not request that OSC investigate this allegation under 5 U.S.C. § 1216(a)(4).**

Had OSC realized that §1215 does not authorize it to conduct investigations, there would be no question that OSC's investigation of MA-05-0820 was only authorized by §1216(a)(4), both before and after the petitioner supplemented it. Additionally, contrary to OSC's naked, unsupported, assertion, are petitioner's claims contained in a declaration submitted as part of his response/cross-motion, in paragraphs 5-7. Despite OSC's claims, petitioner is not responsible for its ignorant or knowing failure to comply with its statutory obligations at §1214(e) and §1216 in MA-05-0820.

**OSC's Current Claims of Fact and Law About MA-05-0820, §1214(e), and §1216  
Contradict Its Previous Claims to the D.C. Circuit**

OSC's claims of fact and law in its motion to dismiss and its opposition/reply, when compared with contrary ones it made to the D.C. Circuit during the appeal of Carson II, *aff'd* and remanded on one unaddressed issue (i.e. this case, Carson V), No. 06-5364 (D.C. Cir. Nov. 28, 2007) may reasonably evidence professional misconduct in violation of ABA model rules for professional conduct 3.1, "Meritorious Claims and Contentions" and 3.3, "Candor Towards

Tribunal,” and petitioner prays this Court will take appropriate action if so.

From Footnote 3, page 7, of respondent’s the motion to dismiss:

The issue of reviewability under §1216(a)(4) was first raised during the pending litigation.

From page 8 of its motion to dismiss, OSC states (emphasis added):

In sum, petitioner’s defamation allegations **did not trigger OSCs investigatory duties under §1216(a)(4)**, because DOE order 3750.1 is not a civil service law, rule, or regulation.

From footnote 3 of its opposition/reply (emphasis added):

...§1214(e)...is an ancillary authority given to the Special Counsel to address circumstances when OSC investigation reveals a violation of law, rule, or regulation over which OSC has **not** been granted specific enforcement authority.

From page 5 of its opposition/reply, OSC states (emphasis added):

“OSC **must** investigate an allegation “concerning activities prohibited by any civil service law, rule, or regulation.””

From page 5 of its opposition/reply, OSC states: (emphasis added):

In short, **petitioner did not**, and has not, made an allegation that would trigger OSC’s investigative obligations under §1216(a)(4).

Yet, in contradiction of OSC current claims of fact and law are claims twice made to the D.C.

Circuit Court as part of Carson v. Office of Special Counsel, docket no. 06-5364. They are found on page 3 of “Appellee’s Reply in Support of Its Motion for Summary Affirmance,” of April 25, 2007 (Exhibit 2), and were repeated on pages 5 and 6 of “Appellee’s Opposition to Motion for Remand,” of August 9, 2007 (Exhibit 3),

From OSC’s April 25, 2007 filing to D.C. Cir. (emphasis in original):

Under §1216(a), OSC has the authority to investigate complaints. §1216(c), however, states: If the Special Counsel receives an allegation concerning any matter under paragraph 1, 3, 4, or 5 of subsection (a), the Special Counsel **may** investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the

same way as if a prohibited personnel practice were involved. Thus, *at OSC's discretion*, it may investigate, make a determination and make a referral of a §1216(a) complaint in a manner as it would for PPP complaint under §1214. Significantly, section 1216 does not mandate that OSC followed procedural requirements of section 1214(e) (referring alleged wrongdoing to agency heads) for §1216(a)(4) complaints.

The appellant acknowledges that OSC resolved his MA- 05- 0820 complaint - just not in the manner in which he desired.... Because OSC did comply with its statutory duty under §1216(a)(4) for Appellant's MA-05-0820 complaint, mandamus relief would be improper.

Comparing its current claims to this Court with its previous claims to the D.C. Circuit, OSC's contradictory claims in fact and and law include:

- 1 that §1214(e) "may" apply, given the "may" in §1216(c), to §1216(a)(4) investigations,
- 2 that OSC did not contest the petitioner's claims that he made a valid §1214(a)(4) complaint alleging a violation of DOE Order 3750.1, "Work Force Discipline," which it investigated as a supplement to his initial complaint in MA-05-0820, and
- 3 that OSC did comply with its statutory obligations to investigate his allegations, including the violation of DOE Order 3750.1, in MA-05-0820 because the "may" in §1216(c) gave OSC discretion about whether and how it investigated and reported the determinations for both his initial §1216(a)(4) complaint and its supplement.

It should be noted that petitioner disagreed with OSC's wide-ranging interpretation of the "may" in §1216(c) to the D.C. Circuit. Petitioner argued to the D.C. Circuit that the "may" in §1216(c) exists to give OSC the ability to use §1214(a) in conducting a §1216 investigation, the ability to use §1214(b) in seeking corrective action as a result of a §1216 investigation, and the ability to use §1215 in seeking disciplinary action as a result of a §1216 investigation.

In particular, petitioner argued to the D.C. Circuit that the "may" in §1216(c) does not apply

to OSC's nondiscretionary obligations per §1214(e). The D.C. Circuit did not rule on any of this in its order of November 28, 2007.

**Department of Energy Order 3750.1, "Work Force Discipline," Is a Civil Service Rule**

In its motion of March 4, 2008 to dismiss the petition for writ of mandamus (docket #71) page 7, respondent claims that DOE Order 3750.1 is not a civil service rule, even though respondent admitted that "civil service rule" as used in §1216(a)(4) is not defined in the statute or case law. Respondent then described the Administrative Procedure Act (APA) and its guidance for "rules," but did not apply them to DOE Order 3750.1, "Work Force Discipline," nor address to what degree the APA would apply to "civil service rules." In its opposition/reply, docket #78, respondent again cites Court rulings defining "rules" per the APA, but does not apply them to DOE Order 3750.1, "Work Force Discipline," or show what specifically is lacking in DOE Order 3750.1 for it to be considered a "civil service rule" by APA criteria.

However, by law and Supreme Court precedent, an agency disciplinary procedures such as DOE Order 3750.1, is a "rule." Specifically, §7701(c)(2)(A), the Merit Systems Protection Board (MSPB) is required to overturn an agency disciplinary action if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." More particularly, per §7703(c)(2), the US Court of Appeals for the Federal Circuit, in reviewing MSPB decisions shall (emphasis added):

"set aside any agency action found to be obtained without procedures required by law, **rule**, or regulation having been followed."

Both the Federal Circuit and Supreme Court have established precedent that agency disciplinary procedures are "rules" by §7703(c)(2), *see Doyle, v. VA*, 229 S.Ct. Cl. 261 (1982),

*following* Brewer v. USPS, 647 F.2d 1093 (Ct. Cl. 1981) and Mercer v. DHHS, 772 F.2d 856, 859-860 (Fed. Cir. 1985). Clearly, DOE Order 3750.1, “Work Force Discipline,” is a civil service rule that “prohibits activities” including agency employees from making “false, unfounded, or highly irresponsible statements against other employees” - which is why violations of this “prohibited activity” are described as “breaches.”

### **Conclusion and Relief Sought**

It is uncontested that petitioner initially alleged a violation of a civil service law or regulation to OSC - the agency’s “knowing and willful failure or refusal to comply” with a 1994 Board Order implementing a settlement agreement - and his complaint resulted in MA-05-0820. In argument to the D.C. Circuit, OSC did not contest he supplemented it with an allegation of a violation of DOE Order 3750.1, “Work Force Discipline,” a civil service rule per §1216(a)(4). To the D.C. Circuit, OSC claimed to have investigated MA-05-0820, including petitioner’s supplement, per §1216(a), and that because the “may” in §1216(c) gave it complete discretion in whether or how it investigated MA-05-0820, whatever it did it fulfilled its statutory obligations to petitioner.

However, to this Court, OSC now makes much different claims, including:

- 1) It did not conduct a §1216 investigation of petitioner’s supplement to MA-05-0820 because petitioner’s claims did not warrant one (OSC apparently investigated the initial complaint that resulted in MA-05-0820 by §1215, a section of law that does not authorize OSC to conduct investigations). It offers no declarations or other records from its investigation of MA-05-0820 to substantiate this claim, despite petitioner’s contrary claims in his declaration and the documents in the case record that support his claims.

- 2) Contrary to its position to the D.C. Circuit, OSC now argues that DOE Order 3750.1, “Work Force Discipline,” is not a civil service rule under its jurisdiction by §1216(a)(4)
- 3) In explicit contradiction of to its position to the D.C. Circuit, it now disavows that the “may” in §1216(c) gives it complete discretion about investigating a §1216(a) complaint.
- 4) In explicit contradiction to its position to the D.C. Circuit, where it claimed the “may” in §1216(c) gave it discretion about applying §1214(e) to §1216 investigations, it now claims that it is not authorized to make §1214(e) reports of its determinations of violations of law under its jurisdiction by §1216.
- 5) OSC makes no attempt to reconcile its contradictory arguments to the two different tribunals. Regardless of OSC’s contradictory arguments, it is *res judicata* by Carson II that §1214(e) applies to the laws, rules or regulations under OSC’s jurisdiction, a claim OSC made no attempt to directly refute.

By law and Supreme Court precedent, agency disciplinary procedures as DOE Order 3750.1, “Work Force Discipline,” are civil service rules. By DOE Order, 3750.1, “Work Force Discipline, it is a “prohibited activity” - a violation or breach of cause 21 - to “make false, unfounded, or highly irresponsible statements against other employees, supervisors, other officials, or subordinates with the intent to destroy or damage the reputation, authority or official standing of those concerned.”

Therefore, by the criteria of Weber v. United States, 209 F.3d 756, 760 (D.C. Cir. 2000) and Carson II, petitioner has demonstrated a clear and indisputable right to the extraordinary relief requested - that the Court direct OSC comply with its nondiscretionary obligations by conducting an investigation, by §1216, per its jurisdiction at §1216(a)(4), of petitioner’s allegation of

activities prohibited by DOE Order 3750.1, “Work Force Discipline,” to determine whether “there is reasonable cause to believe” any violations of DOE Order 3750.1 occurred, and, if so, to report that determination to the agency per §1214(e).

Respectfully Submitted,

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**Certificate of Service**

I certify that the following documents for Carson v. Office of Special Counsel, docket no. 05-0537:

1. Reply to opposition to motion for petition for writ of mandamus and its exhibits

was served, via ECF on:

**OSC Representative:**

Raymond Martinez  
US Attorneys Office  
555 Fourth St, NW  
Room E4417  
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<raymond.martinez2@usdoj.gov>

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Joseph P. Carson

April 23, 2008