



U.S. OFFICE OF SPECIAL COUNSEL
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December 19, 2018

BY ELECTRONIC MAIL

Mr. Joseph Carson
1093 Twin Harbor Drive
Knoxville, TN 37934
jpcarson@tds.net

Subject: Final Determination on DI-19-1112
Preliminary Determination on MA-19-1256

Dear Mr. Carson:

The U.S. Office of Special Counsel (OSC) has completed its review of the information you provided regarding your disclosure (DI-19-1112) and prohibited personnel practice complaint (MA-19-1256). OSC has made a final decision to close your disclosure file. We have made a preliminary determination to close your prohibited personnel practice file, but we are delaying our final decision for 13 calendar days so that you may submit a written response.

You are an engineer at the Department of Energy (DOE) in Oak Ridge, Tennessee. In your disclosure to OSC, you allege that DOE Order 140.1 "Interface with the Defense Nuclear Facilities Safety Board" violates the Atomic Energy Act, 5 U.S.C. § 2286a, by attempting to diminish the Defense Nuclear Facilities Safety Board's (DNFSB) ability to perform its obligations under the statute. On September 17, 2018, the chairman of the DNFSB sent a letter to the Secretary of Energy detailing the DNFSB's concerns regarding DOE Order 1401.1. You are not sure whether or not DOE has responded to DNFSB's letter and you suggested to OSC that if we needed additional information it would be best to reach out to DNFSB's general counsel.

In your prohibited personnel practice complaint, you allege that on September 11, 2018, you made a whistleblower disclosure in a memorandum that you sent to your branch director, division director, office manager, the Assistant Secretary for Environmental Management, and the Secretary of Energy. You informed OSC that in the memorandum you stated that OSC and the Merit Systems Protected Board (MSPB) are violating several laws. You allege that OSC's and MSPB's violations have precluded the Secretary of Energy from complying with his duty to prevent prohibited personnel practices. You allege that in your September 11, 2018 memorandum you also stated that DOE attorneys colluded to engage in reprisal against you from 1999 to 2003. You allege that DOE has significantly changed your working conditions by failing to taken any action regarding your whistleblower disclosure.

Disclosure (DI-19-1112)

OSC is authorized by law to determine whether a disclosure should be referred to the involved agency for investigation or review, and a report. OSC may refer allegations of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Disclosures referred for investigation and a report by the agency must include information sufficient for OSC to determine whether there is a substantial likelihood of wrongdoing. If a substantial likelihood determination cannot be made, OSC will determine whether there is sufficient information to exercise its discretion to refer the allegations. OSC does not have the authority to investigate disclosures and therefore, does not conduct its own investigations into disclosures.

You allege that DOE Order 140.1 violates the Atomic Energy Act. You have not provided sufficient information to demonstrate a substantial likelihood that DOE has violated a law, rule, or regulation with regard to DOE Order 140.1. You suggested to OSC that we could contact DNFSB's general counsel for more information. However, because OSC does not have the authority to investigate disclosures we cannot do so unless a DNFSB employee files a disclosure with our office. You may inform DNFSB employees that they may file a disclosure with OSC.

If you wish to pursue this matter further, you may also contact the U.S. Department of Energy, Office of the Inspector General (OIG) as follows: *mailing address* DOE Office of Inspector General, 1000 Independence Avenue, S.W., Washington, D.C. 20585; *hotline number* – (800) 541-1625; *main phone number* – (202) 586-4393; *hotline e-mail* – ighotline@hq.doe.gov.

Prohibited Personnel Practice (MA-19-1256)

In your prohibited personnel practice complaint, you allege that DOE retaliated against you for making your September 11, 2018 disclosure by failing to take any action or respond to your disclosure. OSC analyzed these allegations for potential violations of 5 U.S.C. § 2302(b)(8). It is a violation of sections 2302(b)(8) to take or fail to take, or to threaten to take or fail to take, a personnel action with respect to any employee for making a protected disclosure of information.

To establish a violation of sections 2302(b)(8), OSC must demonstrate before the Merit System Protection Board (Board) that: (1) the employee made a protected disclosure; (2) the proposing or deciding officials had knowledge of the protected disclosure or protected activity; (3) a personnel action was taken or threatened; and (4) the protected disclosure was a contributing factor in the personnel action at issue. If OSC establishes the elements of retaliation under section 2302(b)(8), the agency may defend with clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure by showing, for example, the strength of the evidence in support of the personnel action and the lack of a motive to retaliate against the employee.

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OSC does not believe that it could demonstrate a violation of 2302(b)(8) in your case. While you have asserted that DOE standing by and not responding to your whistleblower disclosure constitutes a significant change in duties, OSC does not believe that DOE's failure to respond could be considered a personnel action because it has not resulted in any change to your job duties. Accordingly, OSC does not believe that it could demonstrate a violation of section 2302(b)(8).

For the reasons discussed above, we plan to take no further action on your prohibited personnel complaint. We will delay our final decision for 13 calendar days in order to provide you the opportunity to submit written comments about our findings. Otherwise, we plan to close our prohibited personnel practice file and notify you of any additional rights you have to file before the Board.

Please contact me at 202-804-7116 if you have any questions.

Sincerely,

**SHERI
SHILLING**

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SHERI SHILLING
Date: 2018.12.19
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Sheri S. Shilling

Attorney

Retaliation and Disclosure Unit