

JOSEPH P. CARSON v. DEPARTMENT OF ENERGY

Docket # AT-1221-19-0536-W-1

Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile
Summary Page

Case Title : JOSEPH P. CARSON v. DEPARTMENT OF ENERGY

Docket Number : AT-1221-19-0536-W-1

Pleading Title : Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile

Filer's Name : Daniel P. Meyer, Esq.

Filer's Pleading Role : Private Attorney

Details about the supporting documentation

N/A

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JOSEPH P. CARSON v. DEPARTMENT OF ENERGY

Docket # AT-1221-19-0536-W-1

Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile
Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

JOSEPH P. CARSON,

Appellant,

v.

Docket No. AT-1221-19-0536-W-1

July 1, 2019

DEPARTMENT OF ENERGY,
Agency.

**APPELLANT’S THIRD MOTION FOR EXTENSION OF TIME OR, IN THE
ALTERNATIVE, TO DISMISS WITHOUT PREJUDICE TO REFILE**

Appellant respectfully submits this third motion for an open-ended extension of time to respond to the jurisdictional order of June 12, 2019, currently due by July 8, 2019. In the alternative, Appellant requests the appeal be dismissed without prejudice to refile for the following good cause.

The Office of Special Counsel, in response to Appellant’s Section 1214 “reasonable questions” filing of May 13, 2019 (made in response to the “termination statement” and pursuant to the requirements codified at 5 U.S.C. § 1214), informed the Appellant that the Special Counsel was reconsidering its termination of the underlying whistleblower reprisal complaint, MA-19-1256. That complaint is part of the jurisdictional basis for this appeal. *See* TAB A, Email string, OSC to Appellant’s counsel, regarding Section 1214 review.

As of a week ago, OSC informed Appellant’s representative that it is still reconsidering its termination of his whistleblower reprisal complaint. OSC has yet to provide the Appellant with a date by which its reconsideration will be complete and/or by which it will comply with its non-discretionary Section 1214 statutory duty to respond to appellant’s “reasonable questions.” A review of the Appellant’s “reasonable questions” of OSC shows they are material to the jurisdictional issues of this appeal. Requiring the Appellant respond to the jurisdictional order without his first

obtaining OSC's non-discretionary responses to his "reasonable questions," could be prejudicial to his establishing jurisdiction for his appeal. As OSC's decision may change on the underlying evidence, this reconsideration may also change the evidence upon which the tribunal will depend in rendering its findings.

Respectfully,

A handwritten signature in green ink, appearing to read "Dan Meyer", with a long horizontal flourish extending to the right.

Dan Meyer, Esquire

CERTIFICATE OF SERVICE

I, Dan Meyer, certify that the foregoing document was served this day as indicated below:

For The Agency, by MSPB E-Filing:

Kristopher D. Muse, Esq.
U.S. Department of Energy
P.O. Box 2001
Oak Ridge, TN 37831
Telephone No.: (865) 576-1217
Facsimile No: (865) 576-6363
Email: Kristopher.Muse@Science.doe.gov



A handwritten signature in green ink, appearing to read "Dan Meyer", is positioned above a solid black horizontal line.

TAB A

Daniel P. Meyer

From: McMurray, Elizabeth <emcmurray@osc.gov>
Sent: Friday, June 21, 2019 11:17 AM
To: Daniel P. Meyer; Shilling, Sheri S.
Subject: RE: OSC Final Determination - Carson

Thanks, Dan. I am still reviewing the file and will get back to you as soon as possible.

Kind regards,
Elizabeth

Elizabeth McMurray
Chief, Retaliation and Disclosure Unit
United States Office of Special Counsel
1730 M Street, NW
Washington, DC 20036
(Tel) 202.804.7089
(Fax) 202.254.3711
emcmurray@osc.gov



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From: Daniel P. Meyer <DMeyer@fedattorney.com>
Sent: Friday, June 21, 2019 10:41 AM
To: Shilling, Sheri S. <sshilling@osc.gov>
Cc: McMurray, Elizabeth <emcmurray@osc.gov>
Subject: RE: OSC Final Determination - Carson

Sheri and Elizabeth, checking in;

v/r

Dan

Daniel P. Meyer
PARTNER
DMeyer@fedattorney.com



Tully Rinckey PLLC
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From: Shilling, Sheri S. <sshilling@osc.gov>
Sent: Friday, June 7, 2019 10:04 AM
To: Daniel P. Meyer <DMeyer@fedattorney.com>
Cc: McMurray, Elizabeth <emcmurray@osc.gov>
Subject: RE: OSC Final Determination - Carson

Dan,

I cannot answer that question at this time because the response is not yet complete. Also, under OSC's request for reconsideration process, my supervisor, Elizabeth McMurray, is reviewing the request.

Thanks,
Sheri

From: Daniel P. Meyer <DMeyer@fedattorney.com>
Sent: Friday, June 7, 2019 10:01 AM
To: Shilling, Sheri S. <sshilling@osc.gov>
Cc: McMurray, Elizabeth <emcmurray@osc.gov>
Subject: RE: OSC Final Determination - Carson

Got it; so can you answer the question as to whether there is a Section 1214 response requirement in that response?

v/r

Dan

Daniel P. Meyer
PARTNER
DMeyer@fedattorney.com



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From: Shilling, Sheri S. <sshilling@osc.gov>
Sent: Friday, June 7, 2019 9:56 AM
To: Daniel P. Meyer <DMeyer@fedattorney.com>
Cc: McMurray, Elizabeth <emcmurray@osc.gov>
Subject: RE: OSC Final Determination - Carson

Dan,

OSC is addressing Mr. Carson's request as a request for reconsideration. OSC will provide a response once it has completed its review process.

Thanks,
Sheri

Sheri S. Shilling
Attorney
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
202-804-7116
sshilling@osc.gov



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From: Daniel P. Meyer <DMeyer@fedattorney.com>
Sent: Friday, June 7, 2019 9:25 AM
To: Shilling, Sheri S. <sshilling@osc.gov>
Subject: RE: OSC Final Determination - Carson

Checking in again;

v/r

Dan

Daniel P. Meyer
PARTNER
DMeyer@fedattorney.com



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From: Daniel P. Meyer <DMeyer@fedattorney.com>
Sent: Monday, May 13, 2019 9:16 PM

To: Shilling, Sheri S. <sshilling@osc.gov>
Subject: RE: OSC Final Determination - Carson

Thanks Sheri, for your attention to this matter. Can you answer the following with respect to file no. MA-19-1256, which OSC reported closed on March 27, 2019?

There are some relevant non-discretionary statutory close-out items remaining in the record. See the Whistleblower Protection Act of 1989, Pub. L. 101-12, "Congressional Statement of Findings and Purpose" Section (b)(2)(B) (note – the entire Statement can be found in the "notes" of 5 U.S.C. section 1201) which states "the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel;" also note from the OSC Reauthorization Act of 1994, Pub. L. 103-424 Section 12(b), "Termination Statement" (note – the "Termination Statement" can be found in the "notes" of 5 U.S.C. section 1214):

"The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel **who is available to respond to reasonable questions** from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations."

It is Mr. Carson's position that OSC has always failed or refused to comply with the above statutory duties subsequent to its closing his many whistleblower reprisal complaints over the years. To comply with the statutory requirements, please answer the following reasonable questions. If you consider MA-19-1256 closed and the above statutory requirements moot, please inform us of that too.

Section 1214 (a)(2) Questions:

- 1) Does Carson have "reasonable belief" in his disclosures? If OSC did not make that determination, why not?
- 2) Does Carson have "reasonable grounds to believe" that his agency ignoring his whistleblower disclosures creates (or can create) "any other significant change in his working conditions"? Why or why not?
- 3) Does OSC have "reasonable grounds to believe," particularly given the new law - 5 U.S.C. section 4302(b) - for federal agency supervisors not to ignore their subordinates whistleblower disclosures, that MSPB will find an agency ignoring an employee's whistleblower disclosures creates or can create "any other significant change in working conditions" due to its chilling effect on other concerned employees? Why or why not?
- 4) Did the Special Counsel confer with other whistleblower programs to ascertain other agency readings on the definition of "significant change in working conditions"?
- 5) Did the Special Counsel apply OSC Directive 57 for those queries in Mr. Carson's 13-Day Response which could not be reviewed by the CEU, IPD, or DU non-senior management staff due to a conflict of interest
- 6) Did the Special Counsel route to the CIGIE those queries in Mr. Carson's 13-Day Response which could not be reviewed by the Special Counsel or senior leadership due to a conflict of interest?

w/r

Dan

Daniel P. Meyer

PARTNER

DMeyer@fedattorney.com



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From: Shilling, Sheri S. [<mailto:sshilling@osc.gov>]
Sent: Friday, March 29, 2019 4:05 PM
To: Daniel P. Meyer <DMeyer@fedattorney.com>
Subject: OSC Final Determination - Carson

Dan,

Attached are two letters informing Mr. Carson that OSC has made a final determination to close his prohibited personnel practice complaint and informing him of his appeal rights before the MSPB.

Thanks,
Sheri

Sheri S. Shilling
Attorney
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
202-804-7116
sshilling@osc.gov



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Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Atlanta Regional office	Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile	e-Appeal / e-Mail
Joseph P. Carson Appellant	Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile	e-Appeal / e-Mail
Kristopher D. Muse, Esq. Agency Representative	Third Motion for Extension, or, in the Alternative, Motion to Dismiss w/o Prejudice to Refile	e-Appeal / e-Mail