

July 24, 2019

Senator Ron Johnson, Chair, Senate Homeland Security and Governmental Affairs Committee (HSGAC)

Senator Gary Peters, Ranking Member, HSGAC

Senator Rand Paul, Chair, Subcommittee on Federal Spending Oversight and Emergency Management

Senator Margaret Wood Hassan, Ranking Member, Subcommittee on Federal Spending Oversight and Emergency Management

**Via:** Yelena Tsilker and David Brewer

**Subject:** A Long-Time Whistleblower's Suggestion for Resolving His Well-Evidenced Whistleblower Disclosure Against U.S. Merit Systems Protection Board

Dear Senators,

**My "Ask":**

That before the full Senate votes to confirm Mr. Bungard and the other nominees, Dennis Dean Kirk and Julia Akins Clark, to MSPB, that these nominees commit to asking the Attorney General as to the proper interpretation and application of MSPB's non-discretionary statutory duty, per 5 U.S.C. §1204(a)(3) to:

*"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."*

**Background to this suggestion:**

On June 14, 2019, my then-attorney, Dan Meyer, contacted Ms. Tsilker and Mr. Brewer of your staff about our well-evidenced concern that MSPB nominee B. Chad Bungard, when he served at the General Counsel of MSPB, was a party, either active or complicit, to a misrepresentation to a federal judge regarding MSPB's (now) 40 year refusal or failure to comply with its nondiscretionary statutory duty. I have attached his email to this letter.

In early 2007, while Mr. Bungard served as MSPB's General Counsel, MSPB, through its Department of Justice representative, justified its (undisputed) failure or refusal to perform this duty by claiming it had issued regulations authorizing its (inactions). It further claimed that since Congress had subsequently re-authorized it, Congress tacitly agreed with its nullifying this nondiscretionary statutory duty. The indisputable fact is that MSPB has NEVER issued any regulations regarding this statutory duty.

MSPB's now 40 year-long failure or refusal to comply with this non-discretionary statutory duty, hinders, if not precludes, the President from being able to comply with his primary statutory duty to over 2 million federal agency employees:

*“take any action....necessary to ensure that personnel management is based on and embodies the merit system principles.” 5 U.S.C. §2301(c).*

It also hinders, if not precludes, necessary Congressional oversight of the federal agencies. Most importantly, MSPB’s failure or refusal to comply with this duty may be a proximate cause - a “but for” factor - in much that has befallen America in past 40 years and besets America now.

MSPB has now twice argued in adjudications that, despite the explicit wording of the law, it has no such duty, therefore my whistleblower disclosure lacks a reasonable basis. In 2019, 12 years after the 2007 suit, there is still no definitive ruling - at MSPB or anywhere else - as to whether MSPB is properly interpreting and applying this law.

Why not? The involved MSPB attorneys take no exception to my claim that MSPB attorneys- up to and including its Board - have an attorney-client relationship with MSPB, their employing agency. Therefore, when someone makes a well-evidenced whistleblower disclosure against MSPB, they see their primary professional duty to be protecting their client - not ensuring MSPB is properly interpreting and applying its statutory duties. Consistent with their view of their primary professional duty to protect their client, MSPB, they have done whatever they can to prevent any objective resolution of my whistleblower disclosure - which is why it remains unresolved, fifteen years after I first brought it forward.

If nothing else, this demonstrates, beyond any reasonable doubt, why is it foolhardy for any federal agency employee to bring forward any good faith whistleblower disclosure. MSPB, itself, will do anything it can to prevent any objective resolution of any whistleblower disclosure against it - setting the clear standard for every other federal agency to do likewise.

Thank you for whatever consideration my suggestion and its background information may merit. I will be in Washington DC, July 29 and 30 to attend the annual whistleblower summit. If anyone on your staff wish to meet with me, I would greatly appreciate the opportunity.

Respectfully,

\_\_\_\_\_/s/\_\_\_\_\_  
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**joseph carson**

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**From:** Daniel P. Meyer <DMeyer@fedattorney.com>  
**Sent:** Friday, June 14, 2019 11:50 AM  
**To:** jpcarson  
**Subject:** FW: Concern regarding the upcoming confirmation vote re: Mr. Bungard  
**Attachments:** opposition\_show\_cause.pdf; Westlaw\_Document\_14\_21\_30.pdf

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**From:** Daniel P. Meyer  
**Sent:** Friday, June 14, 2019 11:49 AM  
**To:** Yelena\_Tsilker@hsgac.senate.gov; David\_Brewer@hsgac.senate.gov  
**Subject:** Concern regarding the upcoming confirmation vote re: Mr. Bungard

Yelena and David, trust you are well:

My client, Joseph Carson, previously raised an issue regarding wrongdoing by the Merit Systems Protection Board occurring when the current MSPB nominee B. Chad Bungard served as General Counsel to the Board for three years during the George W. Bush Administration.

<https://www.govexec.com/pay-benefits/2019/06/final-merit-board-nominee-promises-protect-civil-service-agency-looks-regain-teeth/157722/>

<https://www.govexec.com/pay-benefits/2019/05/federal-employee-appeals-board-poised-finally-have-members/156685/>

When Mr. Bungard was General Counsel at MSPB, a petition for writ of mandamus was filed in federal district court regarding MSPB failure to execute title 5's provisions regarding special studies. See the Decision and Justice Department brief attached. Mr. Bungard, according to my client, passively took no exception to the Department of Justice misrepresenting, to a federal judge, that the Board has regulations for its special studies function. My client's research indicates that the Board does not, and did not, have such regulations. The statement to the judge was a false statement if, indeed, the Board never adopted such regulations.

My client FOIA'd the regulations. There are and never have been Board regulations for its special studies function. Moreover, MSPB responded to Mr. Carson's subsequent FOIA request by stating it has no "administrative interpretations" of its laws beyond what is incorporated into its regulations. Given that response, the question is whether the Department of Justice, representing MSPB (with Mr. Bungard at the Board's General Counsel) made a false or misleading argument to a federal judge in 2007 in stating:

*Finally, 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). The Supreme Court has held that "[w]hen Congress revisits a statute giving rise to a **longstanding administrative interpretation without pertinent change**, the 'congressional failure to **revise or repeal the agency's interpretation** is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, (1974)); see *Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003).*

The argument at the time was that Congress reauthorized the OSC, and did not state it had an issue with the lack of regulations. Proving such a negative is impossible. These regulations are important, and Mr. Bungard's respect for the intent of Congress is an important character trait to assess before he placed in line for a confirmation vote.

My client is available for a more extensive brief, should you or other Senators desire one. My suggestion is that a hold be placed on Mr. Bungard until such time as the Attorney General can issue an Opinion Letter on the legal requirement for special studies and the Board adherence to that legal requirement.

You may reach me at the point of contact, below.

v/r

Dan