MEMORANDUM

TO: F. Douglas Hartnett, Esquire

FROM: National Legal Research Group, Inc.
Suzanne Bailey, Senior Attorney
Brett Linn, Research Attorney

RE: DC-Federal/United States/Statutes/Whistleblower—OSC-MSPB—Ethical Duties

FILE: 54-128257-0513 August 31, 2022

YOUR FILE: Joe Carson

I. Preliminary Statement

According to an August 6, 2022 letter drafted by F. Douglas Hartnett and provided to NLRG ("Hartnett August 6, 2022 Letter"), Joseph Carson PE has for some 30 years been a federal agency whistleblower. In particular, "he has been making whistleblower disclosures against the President, the Secretary of Energy (DOE), the Special Counsel of the US Office of Special Counsel (OSC), and the Board Members of the US Merit Systems Protection Board (MSPB) regarding their interpretation and application of a variety of civil service laws—laws central to protecting merit-based employment practices in DOE and other federal agencies" (Hartnett August 6, 2022 Letter, p. 1).

These observations are reinforced in several emails received directly from Mr. Carson, who writes in part:

> Please accept my claim that my whistleblower disclosures against OSC and MSPB are undisputed but unresolved. There are not disputed facts, they all involve how OSC and MSPB have interpreted and applied, since their creation in 1979 in most cases, about a dozen non-discretionary statutory

duties in 5 USC section 1214 (OSC) and one non-discretionary statutory duty found in 5 USC 1204(a) (MSPB)

(August 22, 2022 email from Joe Carson).

Mr. Carson believes that, in his capacity as a professional engineer licensed in Tennessee, he "has a positive legal duty to 'blow whistles' about violations of law . . . ." (Hartnett August 6, 2022 Letter, p. 1).

In furtherance thereof, NLRG has been asked in an assignment memorandum to research the following issues:

1. Does the Special Counsel, the Senate-confirmed head of the U.S. Office of Special Counsel (OSC) have an inherent attorney-client relationship with OSC, the agency which employs the Special Counsel and which the Special Counsel also leads (by law, the Special Counsel must be an attorney)?

2. If so, does the Special Counsel face an inherent conflict of interest in resolving whistleblower disclosures alleging OSC has misinterpreted and misapplied various civil service laws, directly impacting . . . every federal agency/federal agency employee, in some cases going back decades, to the creation of OSC in 1979?

3. What is the legal and/or professional duty of the Special Counsel in such a situation—request the Attorney General to issue his opinion on the proper interpretation of these civil service laws, given they impact every federal agency, or do his best to prevent it, because such an Attorney General opinion might find his client—OSC—in the wrong?

4. Do the Senate Confirmed Board Members of the U.S. Merit Systems Protection Board (MSPB) have an inherent attorney-client relationship with MSPB, the agency that employs them which they also lead (in practice all the Senate-confirmed members of MSPB have been lawyers)?

5. If so, do the Members of MSPB face an inherent conflict of interest in resolving a whistleblower disclosure alleging they and their predecessors have misinterpreted and misapplied a specific statutory duty, impacting the ability of the President and agency heads to comply with their respective statutory duties for ensuring merit-based federal agency employment practices, going back to the creation of MSPB in 1979?

6. What is the legal and/or professional duty of the Members of MSPB in such a situation—request the Attorney General to issue his opinion on the proper interpretation of their duty, given its relevance to federal agency employment practices, or do their best to prevent it, because such an Attorney General opinion might find their client—MSPB—in the wrong?

It has been agreed that NLRG will spend up to 10 hours researching these issues. This memorandum embodies NLRG's findings within that time frame. It is noted that, given the breadth of the inquiry, a broad case search across multiple jurisdictions has been conducted.

II. Office Of Special Counsel And Merit Systems Protection Board

A. General Constituency, Powers, and Duties of Each Agency

According to the U.S. Office of Special Counsel's website,[1] it "is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). . . . OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing." The OSC was first established on January 1, 1979, under the Civil Service Reform Act of 1978[2], as the independent investigative and prosecutorial arm of

[1] osc.gov

[2] The CSRA "appears to have been intended to provide comprehensive protection to whistleblowers through the establishment of a Merit Systems Protection Board and an Office of Special Counsel, which would preclude independent lawsuits by individual claimants. 5 U.S.C. § 1206-07. *See* S. Rep. No. 95-969, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723." *Braun v. United States*, 707 F.2d 922, 925 (6th Cir. 1983).

the Merit Systems Protection Board. It was transformed into an independent agency by the Whistleblower Protection Act (5 U.S.C. § 1211 *et seq*.)

Under this statute "[t]here is established the Office of Special Counsel, which shall be headed by the Special Counsel" (5 U.S.C. § 1211(a)). The Special Counsel is appointed by the President and "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office" (5 U.S.C.§ 1211(b)). S/he "shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position" (5 U.S.C. § 1211(b)).

Among the enumerated powers and functions of the Office of Special Counsel is the following:

(a) The Office of Special Counsel shall ---

> (3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures or violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]

(5 U.S.C. § 1212 (a)(3)).[3] Whenever such a disclosure is received by an employee, former employee, or applicant for employment, the Special Counsel must review it and "within 45 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross

[3] As the assignment memo to NLRG indicates, all public service employees have an obligation to "disclose waste, fraud, abuse, and corruption to appropriate authorities" (5 C.F.R. § 2635.101(b)(11)).

mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety" (5 U.S.C. § 1213[b]).

The Merit Systems Protection Board, as it presently exists, was likewise created by the Civil Service Reform Act of 1978. It is comprised of three members appointed by the President "who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board" (5 U.S.C. § 1201). It appears from the agency's website that the three current members, Cathy A. Harris, Raymond A. Limon, and Tristan L. Leavitt are, in fact, all attorneys.

According to its website,[4] the MSPB "is an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of the Federal merit systems. . . . The mission of the MSPB is to 'Protect the Merit System Principles and promote an effective Federal workplace free of Prohibited Personnel Practices." Among other powers and functions, the MSPB shall "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board[.]" (5 U.S.C. § 1204(a)(1)). In addition:

> (a) The Merit Systems Protection Board shall –
>
> . . . .
>
> (3) conduct, from time to time, special studies relating to the civil service and other merit systems in the executive branch, and 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[.]

(5 U.S.C. § 1204(a)(3)).[5]

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[4] mspb.gov

[5] Mr. Carson's "key whistleblower disclosure" has been MSPB's failure to comply with this mandate (Hartnett August 6, 2022 Letter, p. 2).

Under the Civil Service Reform Act and other related statutes, there is somewhat of a symbiotic relationship between OSC and the MSPB:

> The CSRA provides a comprehensive remedial scheme governing federal personnel matters including reprisal for whistleblowing. Generally, under the CSRA, a federal employee is entitled to pursue a whistleblowing complaint outside the employee's own agency including, ultimately, review in the federal courts. Under the CSRA, an employee may report whistleblowing allegations to the Office of Special Counsel ("OSC"), an independent office within the Executive Branch, which must then investigate the matter. If the OSC fails to act favorably on the complaint, the employee may seek redress from the Merit Systems Protection Board ("MSPB"), also an independent office within the Executive Branch. Finally, the employee may seek judicial review of any adverse MSPB decision in the United States Court of Appeals for the Federal Circuit.

McGrath v. Mukasey, No. 07 Civ. 11058 (SAS), 2008 U.S. Dist. LEXIS 32120, at *6-9 (S.D.N.Y. Apr. 18, 2008).

The issues raised herein relate to whistleblower complaints against the agencies themselves. Notwithstanding the broad search conducted by NLRG, very little case law has surfaced relating specifically to the questions raised, i.e. the nature of any attorney-client relationship between the heads of the agencies and the agencies themselves, as well as the conflicts which result therefrom.

B. Allegations by Employees of OSC

With respect to internal complaints made by employees of the Special Counsel, the provisions of 5 U.S.C. § 1212 are very clear:

> (i) The Special Counsel shall enter into at least 1 agreement with the Inspector General of an agency under which —
>
> (1) the Inspector General shall –

> (A) receive, review, and investigate allegations of prohibited personnel practices or wrongdoing filed by employees of the Office of Special Counsel; and
>
> (B) develop a method for an employee of the Office of Special Counsel to communicate directly with the Inspector General; and
>
> (2) The Special Counsel –
>
> (A) May not require an employee of the Office of Special Counsel to seek authorization or approval before directly contacting the Inspector General in accordance with the agreement; and
>
> (B) May reimburse the Inspector General for services provided under the agreement.

(5 U.S.C. § 1212(i)(1) & (2)).[6]

Accordingly, at least with respect to agency employees, it is submitted that notwithstanding any issues of an attorney-client relationship and affiliated conflicts of interest, under 5 U.S.C. § 1212(i) the Special Counsel would have an obligation to refer the matter to the Inspector General for investigation. There would be no need to analyze the exact nature of the relationship between Special Counsel and the OSC. However, as Special Counsel's responsibility to investigate is more broadly triggered by "any disclosure of information by an employee, former employee, or applicant for employment . . ." (5 U.S.C. § 1213 (a)(1)), further inquiry is necessary.

The above-quoted provision does, however, evince an intent to recognize the inherent conflict of interest that arises when either an investigative /prosecutorial agency

[6] This provision appears in the 2022 version of 5 U.S.C. § 1212 in govregs.com and is believed to be current.

such as the OSC, or a quasi-judicial agency such as MSPB, becomes involved with complaints against the respective agencies themselves. This recognition is born out in other authorities, including case law as sparse as it is.

C. Attorney-Client Relationship

In *Coastal States Gas Corp. v. Dep't of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 863 (D.C. Cir. 1980), the court held it to be "clear that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the [attorney-client] privilege" (*Id. .)* The attorney-client privilege protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252, 184 U.S. App. D.C. 350 (D.C. Cir. 1977). "In government agencies, an attorney-client relationship is inferred when the agency 'deal[s] with its attorneys as would any private party seeking advice to protect personal interests." *Jud. Watch, Inc. v. United States Dept. of State*, 349 F. Supp. 3d 1, *6-7 (D.D.C. 2018).

It is certainly arguable, in applying these standards, that the attorneys heading both the OSC and the MSPB have attorney-client relationships with their respective agencies subjecting them to the panoply of ethical rules governing all such relationships, at least with respect to the agencies' reliance on their counsel for professional advice. Such advice would seem to be inherent within any investigation as to the adequacy of a whistle-blower complaint.

Rule 1.7 of the American Bar Association "Model Rules of Professional Conduct for Lawyers" indicates, in pertinent part, as follows[7]:

> Rule 1.7: Conflict of Interest: Current Clients
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> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client, or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or by a personal interest of the lawyer.

Rule 1.7 is expressly applicable to lawyers currently serving as public officers or employees (ABA Model Rule 1.11 [d][1]).

ABA Model Rule 1.8 provides, in pertinent part, as follows:

> Rule 1.8: Current Clients: Specific Rules
>
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the

[7] These rules were cited as references in the assignment memo provided to NLRG.

> transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

These rules, among other ethical considerations and rules applicable to attorneys, would place Special Counsel and MSPB attorneys in a precarious position should they investigate internal whistleblowing complaints in their official capacities. As heads of their respective agencies, they have independent duties to fully and fairly investigate and/or adjudicate the claims before them. However, as attorneys representing the agencies, they must likewise protect the "best interests" of the agency itself, which would almost certainly conflict with an adverse determination against the agency. In short, the attorneys would be placed into a classic "Catch 22" position. For purposes of Rule 1.7, the attorneys would effectively be representing two sets of clients with adverse interests. Likewise, for purposes of Rule 1.8, counsel would essentially be in an adverse business relationship with the agency itself.

D. Other Bases for Conflict of Interest

In addition to ethical rules governing attorneys, it should also be considered that Special Counsel and MSPB are employees of federal agencies and, accordingly, have inherent financial and protective interests in those agencies. These interests would, even outside the context of attorney rules, present intrinsic conflicts of interest when presented with investigating or adjudicating internal whistleblower complaints.

For example, 5 C.F.R. pt. 2635 sets forth the "Standards of Ethical Conduct for Employees of the Executive Branch." Section 2635.502 proscribes employees from participating in matters where s/he "knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter[.]" (5 "CFR 2635.502(a)). The definition of "covered relationship" under this provision is very broad, including such relationships as "[a] person . . . with whom the employee has or seeks a business, contractual or other financial relationship . . . ."; "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee"; and "[a]n organization . . . in which the employee is an active participant[.]" (5 CFR § 2635.502(b)(1)(k), (iv), (v); see, also 18 U.S.C. § 208 (Acts affecting a personal financial interest)).

These rules have prompted the U.S. Department of the Interior's Departmental Ethics Office to advise government employees in a written memorandum[8] that "[y]ou must take appropriate steps to avoid any appearance of loss of impartiality in the performance of your official duties" (Department of the Interior's Departmental Ethics Office: "Government-Wide Ethics Laws," citing 5 C.F.R. § 2635.502). The Ethics Office has also indicated that "[a]ll Department of Interior (DOI) employees and all Special Government Employees of DOI may be required to consider recusing from a matter in order to avoid a

[8] Found at doi.gov.

conflict of interest or the appearance of a conflict of interest" (Department of the Interior's Departmental Ethics Office: "Recusal Best Practices for DOI Employees). It is granted that these memoranda apply to DOI employees and not specifically to other federal agencies, but nonetheless they represent reasonable interpretations of conflict rules applicable across the board.

Given the authorities cited above, it appears that the answers to Questions 1, 2, 4 & 5, as set forth in the preliminary statement, are all in the affirmative. Both Special Counsel and MSPB members would face an inherent conflict of interest in the circumstances described. The final questions involving their responsibilities in such instances is addressed below.

E. Obligations of Special Counsel and MSPB Members in Conflict of Interest Situations

Other than the specific provisions of 5 U.S.C. § 1212, as recited in Section B above, there is a dearth of well-defined authority as to specific measures that should be taken by Special Counsel or MSPB members in conflict-of-interest situations. Given the attorney and governmental ethics rules discussed above, however, it is at least very clear that the officials should recuse themselves, that is, they should refrain from participating in the investigation or adjudication in their official capacities.

Measures after recusal are more ambiguous. However, the case of *Bloch v. Exec. Off. of the President*, 164 F. Supp. 3d 841 (E.D. Va. 2016) is both interesting and instructive. Plaintiff in *Bloch* was the former U.S. Special Counsel, the head of OSC. In

his complaint, Bloch alleged that he was removed from office in violation of constitutional and statutory law as the result of a wide-ranging conspiracy by various federal agencies and officials. Although his complaint was ultimately dismissed, the circumstances surrounding his predicament offer some guidance.

Shortly after assuming his duties as Special Counsel, Bloch enacted a series of controversial reforms including, for example, reversing his predecessor's conclusion that 5 U.S.C. § 2032 provides broad protection for federal employees against discrimination based on sexual orientation. Formal complaints were filed against him accusing him of committing prohibited personnel practices and other wrongs. As these complaints would have ordinarily fallen under the OSC's jurisdiction, Bloch did the right thing and recused himself. Ultimately, the OSC authorized the Office of Personnel Management ("OPM"), through the Inspector General's office, to investigate the complaints on the OSC's behalf.

While this factual scenario was not an integral part of the court's holding, it is a clear example of the way Special Counsel and members of the MSPB should conduct themselves in circumstances as described in the assignment memo provided to NLRG: they should (a) recuse themselves; and (b) ascertain that an independent agency is authorized to conduct a formal, thorough, and impartial investigation.

The *Bloch* case also brings things full circle back to the provisions of 5 U.S.C. § 1212. As whistleblower allegations involve personnel management, the agency best suited

in most instances to investigate would be OPM and, specifically, its Inspector General.[9] In certain circumstances, as suggested by the assignment memo, the Attorney General may also be the most appropriate office to conduct such a review.

III. SUMMARY

It appears that authority exists by which it could reasonably be argued that (a) Special Counsel and attorney members of the Merit Systems Protection Board have inherent attorney-client relationships with their respective agencies to the extent that professional advice as counsel is rendered; (b) these relationships, as well as their relationships with the agencies as federal employees, would give rise to inherent conflicts of interest in resolving whistleblower disclosures alleging that the respective agencies have misinterpreted and misapplied various civil service laws; and (c) in such instances Special Counsel and MSPB members should recuse themselves and ascertain that another appropriate federal agency is authorized to conduct a thorough investigation on their behalf.

[9] The Office of Inspector General (OIG) is an independent office within the Office of Personnel Management (OPM) dedicated to promoting accountability and transparency both within and outside of the agency (opm.gov).