

April 2, 2011

Honorable Steven Chu
Secretary of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Subject: Request for Opinions by the Department Of Justice's Office of Legal Counsel on Three Key, Interlocked, Civil Service Laws Created by Civil Service Reform Act of 1978

Dear Secretary Chu,

The Department of Energy entrusts me with important aspects of its vital missions. I support and uphold DOE's management principles, in particular principle no. 3, "We will treat our people as our greatest asset."¹ I am part of the Office of Environmental Management's "Journey to Excellence."² I am dedicated to performing my professional duties, competently and ethically, per the merit system principles - the bedrock values of the federal civil service. To do this, I must be adequately protected from reprisal and other types of prohibited personnel practices (PPP's).³

The September 2010 determination by the DOE Inspector General (IG) that a PPP occurred in the hiring of a senior manager in the Office of Energy Efficiency and Renewable Energy and its referral to the U.S. Office of Special Counsel (OSC) for further investigation and possible prosecution is troubling, as is the IG December 2009 report detailing a corrosive work atmosphere at the Department's Savannah River Office.^{4 5} These situations do not arise in a vacuum and evidence my concern that DOE employees are not adequately protected from PPPs. It is reasonable to think such issues create a substantial distraction to DOE's vital and urgent missions.

Several days ago, in an EM-wide teleconference, I brought this concern to the attention of Dr. Ines Triay, the Assistant Secretary for Environmental Management. In the past year, I have also:

- 1) brought my concerns to the DOE Inspector General
- 2) filed an employee concern, per the DOE Order.
- 3) submitted a differing professional opinion (DPO), per the DOE Order
- 4) made a disclosure to the U.S. Office of Special Counsel, per 5 U.S.C. section 1213
- 5) submitted an employee grievance, per the negotiated grievance procedure
- 6) received a precedential decision from the 6th Circuit Court of Appeals (Carson v. Office of

Special Counsel, 2011 WL 650495 (C.A. 6 (Tenn))).

7) brought my concerns to the attention of the White House ethics office

8) brought my concerns to Congressional oversight committees

9) brought my concerns to the media

10) brought my concerns to leaders of major federal employee unions

11) brought my concerns to leaders of “good government” groups.

The result? My concerns still have yet be objectively addressed. The system is broken, Secretary Chu, broken in ways with significant explanatory power for catastrophes as last years Deepwater Horizon Gulf Oil Spill.⁶ Broken in ways that warrant your attention - DOE’s workforce cannot be optimized if my concerns are valid and remain uncorrected.

What are my concerns, in summary? I contend the U.S. Office of Special Counsel is a 32 year-long fraud of as a federal law enforcement agency, the U.S. Merit Systems Protection Board is its 32 year-long enabler, leaving you unable to demonstrate objective compliance with your fundamental duty to DOE employees - that they can perform their duties in a trustworthy fashion, per the merit system principles, while being adequately protected from PPPs.⁷

No one officially says I am wrong. No one officially says I am right. Everyone, in my perception, responds with something as, “I am afraid to get involved, good luck.” That is an unacceptable answer, but is consistent with my contention that federal employees - everywhere - are not adequately protected from PPPs. I am now writing to you in the hope you will invoke your statutory authority to request a review of the 32 year-long interpretations of three civil service laws, central to the protection of federal employees from PPPs.⁸

By the Civil Service Reform Act of 1978 (CSRA), the responsibility to ensure federal employees are adequately protected PPPs is divided between the agency head, OSC, and the U.S. Merit Systems Protection Board (MSPB). Agency heads are responsible to “prevent PPPs” in their agencies.⁹ OSC has the nondiscretionary duty to investigate allegations of PPPs, determine whether there are reasonable grounds to believe a PPP occurred and, if so, to report its determination to the involved agency head.¹⁰ MSPB is responsible to conduct “special studies” necessary to determine whether agency employees are adequately protected from PPPs.¹¹

I am concerned that OSC, the federal law enforcement agency created by the CSRA to protect federal employees from PPPs, has, for 32 years - since its creation - violated/misinterpreted/misapplied its 5 U.S.C. §1214(e) reporting requirement in claiming that it does NOT apply to the civil service laws, rules, and regulations within its enforcement jurisdiction. I am concerned that MSPB, also created by the CSRA, has

violated/misinterpreted/misapplied 5 U.S.C. §1204(a)(3) for 32 years in claiming that it does not require MSPB to conduct the special studies of OSC's interpretation of and compliance with its nondiscretionary duties to protect federal employees from PPPs as well as agency heads interpretation of and compliance with their nondiscretionary duties to prevent PPPs.¹² I am concerned this leaves you (as other agency heads) unable to demonstrate compliance with your duty, per 5 U.S.C. §2302(c), to "prevent PPPs."

The undisputed facts include: 1) OSC has investigated over 50,000 complaints alleging over 100,000 PPPs since 1979 but its public records indicate it has not reported a single PPP to the involved agency head;¹³ 2) MSPB has never reported to the President and Congress, based on the results of its special studies, whether federal employees in any agency were adequately protected from PPPs (Note: Last year, it announced it would conduct a special study focused on the "prevalence" of PPPs, not necessarily whether OSC and agency heads are complying with their respective nondiscretionary statutory duties - MSPB should conduct a reactive "special study" - perhaps on the Deepwater Horizon disaster - to determine whether PPPs played a role, if they did, then "the public interest in a civil service free of PPPs is NOT adequately protected" and MSPB should plainly say so);¹⁴ and 3) you, as other agency heads, cannot tell agency employees they are adequately protected from PPPs - i.e. while relevant policies may exist, there has been no assessment whether they are effective in "preventing PPPs."¹⁵

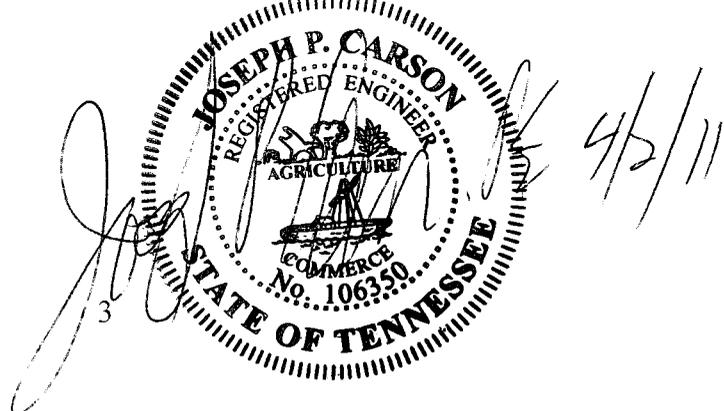
Secretary Chu, your hope for DOE playing an essential role in transforming how America creates and uses energy requires Americans to trust federal officials and agencies.¹⁶ Developing and maintaining this public trust requires a DOE workplace culture where employees are adequately protected from PPPs, which requires OSC and MSPB to properly interpret and implement their relevant nondiscretionary duties.¹⁷

The stakes - for DOE and America - are high if DOE employees are not adequately protected from PPPs. Therefore, I respectfully request you invoke your statutory authority to task the Office of Legal Counsel to issue interpretations of these vital civil service laws to substantiate or dispel these concerns.¹⁸ I am sharing this letter with many stakeholders to DOE and the federal civil service and asking them to contact you in support of my request that you task OLC to substantiate or dispel my concerns.

I wish to held to my professional obligations, as a licensed professional engineer (PE), to make public statements in a truthful and objective fashion. Therefore I am stamping this letter as a PE and invite anyone to file a professional misconduct complaint against me with my licensing jurisdiction if they believe my concerns and the claims that underlie them are not truthful and objective.

Respectfully,

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1. See <http://management.energy.gov/administrative_services/principles.htm>

2. See <<http://www.em.doe.gov/pages/AsstSecMsg.aspx>>

3. The Civil Service Reform Act of 1978 (CSRA) was the most sweeping reform of the federal civil service since its creation in 1883. 5 USC §1101 “endnotes” contains the “CSRA Findings and Statement of Purpose” which describes the fundamental purpose of the CSRA - to create a statutory framework and implementing agencies so federal employees could perform their duties in a trustworthy fashion per the merit system principles while being adequately protected from reprisal and other types of prohibited personnel practices (PPP’s). The nine “merit system principles” are defined at 5 U.S.C.§2301(b) while the 12 types of PPP’s are defined at §2302(b).

4. Audit Special Inquiry OAS-SR-10-04, dated September 22, 2010, "Review of Allegations Regarding Hiring and Contracting in the Office of Energy Efficiency and Renewable Energy" <www.ig.energy.gov/documents/OAS-SR-10-04.pdf>

5. Special Inquiry Report S09IS024, dated December 29, 2009, "Review of Allegations Involving Potential Misconduct by a Senior Office of Environmental Management Official" <www.ig.energy.gov/documents/S09IS024.pdf>

6. By 5 U.S.C. section 1213(g)(1), OSC can receive a disclosure of any violation of any law, rule, or regulation, gross waste, abuse of authority or substantial and specific risk to public safety and health - from anyone (i.e. a DOE contractor, an employee in a federally regulated facility or operation as an off-shore oil rig, etc) - and can refer it for investigation by the involved agency. The law allowing it to do so what created in 1989, as a result of a 1981 opinion by the Office of Legal Counsel, 5 U.S. Op. Off. Legal Counsel 77, 1981 WL 30880 (O.L.C.), that it could not. Consistent with my claims of OSC being a 32 year-long fraud of a federal law enforcement agency, OSC still claims the 1981 OLC opinion controls and has not made a single such referral since 1989.

7. By 5 U.S.C. section 1212(a)(4), OSC has a nondiscretionary statutory to review Office of Personnel Management regulations to ensure they do not create PPPs. Consistent with its being a 32 year-long fraud of a federal law enforcement agency, it has no records of doing so based on its FOIA response. Last year, not as a result of OSC performing its duty, but by wronged applicants for federal employment pursuing justice on their own, MSPB determined that OPM regulations had created possibly tens of thousands of PPPs in hiring practices between 2000 and 2010 in the Federal Career Intern Program (FCIP), a program heavily used in DOE.

8. As an agency head, you have the statutory authority to task the Office of Legal Counsel of the Department of Justice to issue final and binding opinions (within the Executive Branch) for civil service laws impacting the Department of Energy, see 28 U.S.C. §§510-512 and 28 C.F.R. §0.25 and www.justice.gov/olc/

9. By 5 U.S.C. §2302(c): The head of each agency shall be responsible for the prevention of prohibited personnel practices, Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

In DOE, there is no record for the delegation of this authority. EM's "Journey Towards Excellence" may warrant such a delegation to appropriate EM officials.

10. By 5 U.S.C. §1214(e): If, in connection with any investigation under this 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 referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

- (1) that the head of the agency has personally reviewed the report; and
- (2) what action has been or is to be taken, and when the action will be completed.

However, since its creation in 1979, OSC has claimed that the reporting requirements of §1214(e) do not apply to PPPs - a claim that has yet to receive a published judicial review.

11. By 5 U.S.C. §1204(a)(3): The Merit Systems Protection Board shall conduct, from time to time, special studies relating to the civil service and to 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.

However, from 1979 to late 2009, when Susan Grundmann was confirmed as Chairman, MSPB claimed it had no obligation to conduct the special studies necessary to report whether federal employees were adequately protected from PPPs - and it did not do so. During this time MSPB conducted a sizable number of special studies on diverse topics "relating to the civil service."

12. By the CSRA, OSC was an autonomous part of MSPB. OSC became an independent Executive Branch agency by the Federal Whistleblower Protection Act of 1989 which also renumbered the laws relevant to OSC and MSPB.

13. OSC has apparently made about one hundred and fifty §1214(b)(2)(B) reports of PPPs since 1979, which also satisfy the §1214(e) reporting requirement. However, such reports are not made to the agency head and do not require an agency head certified response. Neither do they become permanent, publicly available records per §1219(a)(3).

14. See MSPB's May 6, 2010 press release about its "2010 Merit Principles Survey" and its June 14, 2010 press release about its previous studies involving prohibited personnel practices indicate (available at <www.mspb.gov/publicaffairs/publicaffairs.htm>).

15. By DOE FOIA Case no. HQ-2010-00089-F and DOE Office of Hearing and Appeals (OHA) Case no. TFA-0346 (available at <www.oha.doe.gov/cases/foia/tfa0346.pdf>), DOE has no records demonstrating its policies to prevent PPPs are adequate in scope and/or implementation - specifically, you are unable to tell DOE employees that DOE's policies to "prevent PPPs" are effective in scope and implementation.

16. Americans' trust in the federal government and its agencies is at an all-time low, see "Better, Not Smaller" by Center for American Progress <www.americanprogress.org/issues/2010/07/what_americans_want.html>. Additionally, only 35% of federal employees now believe promotions in their agencies are based on merit. See question 21 of 2010 U.S. Office of Personnel Management (OPM) federal employee survey <www.fedview.opm.gov/>

17. According to MSPB's June 14, 2010 Press Release, "Avoiding PPPs is critical since the existence of just one such action can damage the working environment of any organization." <www.mspb.gov/publicaffairs/publicaffairs.htm>

18. See the August 6, 2010 letter of William Lewis, the DOE HQ Employee Concerns Manager, to OPEIU about the well-founded and reasonable nature of these concerns, available at <http://whsknox.blogs.com/olc/lewis_opieiu.pdf>. The Supreme Court denied Mr. Carson's petition for certiorari and subsequent petition for rehearing.