

April 28, 2011

Chairman Susan Grundmann
Chairman, Merit Systems Protection Board (MSPB)
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Subject: The “Broken Covenant” between federal government and federal civil service; U.S. Merit Systems Protection Board primary responsibility for its 32 year existence; comments on draft Merit Systems Protection Board (MSPB) strategic plan FY2012 - FY2016

Dear Chairman Grundmann,

Summary

There is a 32 year-long “broken covenant” between the Federal Government and the federal civil service. Contrary to the fundamental objective of the Federal Civil Service Reform Act of 1978 (CSRA), the Federal Government is in 32 year-long breach of its duty to ensure members of the federal civil service are adequately protected from reprisal and other types of “prohibited personnel practices (PPPs)” as they perform their duties in a trustworthy fashion, per the merit system principles. As a result, the civil service is battered, corruption and dysfunction have taken root and flourish in many federal workplaces, and America is much diminished and more threatened.¹

You, as other current and former members of the Merit Systems Protection Board (MSPB), are the individuals most responsible - as lawyers, as federal employees, and Americans - for this situation. This is because MSPB has abjectly and willfully failed to comply with its nondiscretionary statutory duty to conduct the necessary “special studies” to determine whether responsible parts of the federal government - specifically the U.S. Office of Special Counsel (OSC) and agency heads - are complying with their positive nondiscretionary statutory duties to ensure federal agency employees are adequately protected from PPPs.

At no point since implementation of the CSRA, has MSPB made - or been able to make - its required report to Congress and the President, “whether the public interest in a civil service free of prohibited personnel practices is adequately protected.”² I contend that catastrophes and mishaps as 9/11, 9/11 sick workers, American torture, going to war in Iraq on false pretenses, politicization of the Department of Justice under President Bush, Madoff’s 60 billion-dollar Ponzi Scheme, loss of Space Shuttles Columbia and Discovery, failure of flood control systems in New Orleans during hurricane Katrina, inept FEMA response to Katrina, economic meltdown of 2008, scores of thousands of disabled, diseased, or prematurely deceased Department of Energy workers, an admittedly broken whistleblower protection program in the Department of Labor, the truths depicted in movie “Inside Job,” millions of America’s sickened or dead from

food poisoning in past 32 years, Veterans Administration health care scandals, a broken, insecure America border, medicare and medicaid scams, etc, etc - all them, together as well as separately - CANNOT be properly understood without understanding the OBVIOUS - they are manifestations that the public interest in a civil service free of prohibited personnel practices is NOT adequately protected. And you, Ms. Grundmann, apparently do not have the moral courage to say so.³

However, I now attribute possible moral evil, not just an apparent lack of moral courage, to you, Ms. Grundmann. You apparently want the system to continue to be broken, because it benefits the leaders of federal employee unions, where you spent most of your career, regardless of the harm to the federal civil service and America. The CSRA also, for the first time, allowed widespread federal employees unions. Even though, by the CSRA, the reason was to improve the federal civil service and its service to America (a valid purpose, one I support), these federal employee unions have devolved to protection rackets, which try to coerce/intimidate eligible federal employees to pay their \$400/year dues as “insurance” from PPPs.

How? They tell their members/prospective members that the union will use its exclusive remedy - binding arbitration - to “protect” their dues paying members from PPPs much more readily than they will for the “freeloaders” the union is “forced” to also represent - the federal employees who choose not to pay its dues.⁴ You have made your career as a beneficiary of this “protection racket,” so apparently you have no intention of having MSPB comply with its duties to conduct the special studies necessary to show whether OSC and agency heads are complying with their duties to protect federal employees from PPPs - because if MSPB did and determined they were not, it would cause positive change - but also result in fewer federal employees deciding they needed the “protection” federal employees unions claim to sell - so fewer federal employees would freely pay about \$400/year in union dues, and federal employees unions would not be able to hire as many (if any) full time attorneys.⁵

So, as I now see it, I have to expose you as a lackey of federal employee unions to expose the 32 year-long broken covenant between the federal government and the federal civil service. You know that I have tried - and failed - to persuade you, as Chair of MSPB, to use your lawful power to have my concerns about misinterpretation and misapplication of the involved civil service laws substantiated or dispelled at the Office of Legal Counsel of the Department of Justice, per the appropriate, lawfully established process.⁶ So now I will endeavor to discredit you and the agency you lead, publicly and professionally. I well-realize that I am risking being unjustly terminated from the federal civil service in doing so, but the stakes for the federal civil service and America are too high to allow the broken covenant to continue unexamined.

Background Statutory Detail

The CRSA created a “3 legged stool” by which the federal government was to ensure members of the federal civil service were adequately protected from PPPs. The CSRA created the U.S. Office of Special Counsel (OSC) as a federal law enforcement agency with the mission to protect

federal employees from PPPs (OSC is singular, in all of history, in any government - a federal law enforcement agency created to protect federal employees from federal agency lawbreaking).⁷

Additionally, the CSRA assigned agency heads the nondiscretionary statutory duty to prevent PPPs in their agencies.⁸ Finally, the CSRA created MSPB and, vis-a-vis PPPs, assigned it oversight responsibility, via its special studies function, to ensure OSC and agency head were properly interpreting and applying their respective duties to ensure federal employees are adequately protected from PPPs. MSPB was given the nondiscretionary statutory duty to ensure the 3-legged stool was standing upright and functioning properly as an integrated whole.⁹

Unfortunately, OSC renounced, at its creation, its fundamental nondiscretionary statutory duty to “protect” federal employees from PPPs when it determined it never had to determine whether a PPP occurred or report its determination to anyone - its doing so was always discretionary, only necessary if it decided to litigate at MSPB. MSPB similarly renounced its nondiscretionary duty to conduct the “special studies” of OSC and agency heads to determine “whether the public interest in a civil service free of PPPs was adequately protected,” leaving agency heads unable to comply, in any meaningful sense, with their duty to “prevent PPPs.”

Instead of a 3-legged stool, we have three disjoint, thereby broken, pieces. Instead of a robust, holistic, system to ensure federal employees are adequately protected from PPPs so they can perform their duties in a trustworthy fashion, per the merit system principles - there is a 32 year-long broken covenant between the federal government and its now-battered federal civil service - which has significantly contributed to a much diminished and more threatened America .

Specific Comments on MSPB’s draft strategic plan.¹⁰

Positive Comments:

- 1 MSPB tacitly acknowledges its 32 year-long failure to comply with its nondiscretionary duty to review OPM regulations for PPPs.¹¹
- 2 MSPB’s Mission Statement gets it right.¹²

Negative Comments:

- 1 MSPB gets it fundamentally wrong about its duty to “prevent PPPs” - that duty rests primarily with agency heads and secondarily with OSC. To the extent MSPB has this duty, it is indirectly implemented as a result of it properly performing its adjudicative, enforcement, OPM review functions, together with all-important “special studies” function to ensure agency heads and OSC are properly interpreting and complying with their duties to prevent PPPs and protect federal employees from them.¹³
- 2 The draft strategic plan makes absolutely no mention of OSC, despite OSC’s being the

primary bulwark to protect federal employees from PPPs as well as being the agency with the positive nondiscretionary duty to provide training to federal agencies about PPPs. MSPB has no lawful authority to conduct training about PPPs or preventing them, that is OSC's and the agency heads' duty, but the draft plan repeatedly calls upon MSPB to provide such training.¹⁴

3 Since the draft strategic plan has MSPB doing things not called for in its enabling legislation, MSPB needs to request legislation from Congress to authorize parts of it, but the draft plan does not state this.¹⁵

4 The draft strategic plan, by its failure to mention the existence and central relevance of OSC to ensuring federal employees are protected from PPPs and ensuring agency heads can, in fact, "prevent PPPs," fails to mention simple ways MSPB could, without any change in the law, work with OSC to achieve several of the goals of the draft strategic plan.^{16 17}

These include:

1) issue a regulation requiring all MSPB findings of all PPPs be referred to OSC for investigation for possible disciplinary action,¹⁸

2) issue a regulation requiring all finding of agency non-compliance with MSPB Orders or MSPB enforceable settlement agreements be referred to OSC for investigation for possible disciplinary action,¹⁹ and

3) change its current regulation for whistleblower stays in IRA appeals to make the evidentiary standard "reasonable grounds to believe" - the one established by statute when OSC seeks a stay at MSPB, also be employed in stays sought in IRA appeals.²⁰

Conclusion and Challenge

MSPB, in its draft strategic plan, by making no mention of OSC, seems to want to keep status quo intact - with OSC being "the last place anyone should go for protection from PPPs," as Carolyn Lerner described in her March 10, 2011 Senate Confirmation Hearing for Special Counsel.²¹ This is, I suspect, the result of your, Ms. Grundmann's, improper professional loyalty to your former longtime employer - a federal employee union - that benefits from OSC being a fraud of a federal law enforcement agency. I publicly call upon you, Ms. Grundmann, to task the Office of Legal Counsel, per your lawful authority, to substantiate or dispel my concerns about the interpretation and application of the 3 involved civil service laws.

I intend to hold you accountable, professionally as a licensed attorney, per rule of law, by filing a professional misconduct complaint with your State Bar, if you do not take responsible action to substantiate or dispel my concerns about MSPB's 32 year-long interpretation of its special studies function. If I do not make such lawful warnings, you will ignore me, because doing so is in your career interest, as you have taught me. As a licensed professional engineer (PE), I must

make public statements in a truthful and objective manner.²² If you think I am remiss in this duty, I invite you to hold me professionally accountable, by filing a professional misconduct complaint with my State Engineering licensing board in Tennessee, my license number is publicly available at its website.²³ I acknowledge your doing so would take some moral courage.

Respectfully,

/s/

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Copy: Various stakeholders to a trustworthy federal civil service, in which the federal government honors its covenant by ensuring they are adequately protected from PPPs.

Endnotes

1. I have repeatedly detailed this to many stakeholders to a trustworthy federal civil service - you, OSC, OPM, Congress, White House, media, and NGO's. See, for example, my April 2, 2011 letter to Department of Energy Secretary Chu, available at <http://whsknox.blogs.com/mspb/Carson_Sec_Chu_April_2_2011.pdf>.

Neither OSC nor MSPB have Inspector Generals, OSC has refused to process my whistleblower disclosures, submitted per 5 U.S.C. 1213(g)(1), about my concerns (consistent with my claims that OSC is a fraud of a federal law enforcement agency, OSC apparently relies on a 1981 opinion of the Office of Legal Counsel to claim that 5 U.S.C. 1213(g)(1) does not exist, even though Congress legislatively overturned the 1981 OLC opinion (1981 WL 30880 (O.L.C.), in the Whistleblower Protection Act of 1989. If MSPB complied with its lawful duty to conduct "special studies" of OSC, it would find breathtaking corruption.

2. Based on my review of MSPB "Special Studies," "Annual Reports to Congress" and MSPB's FOIA responses - as well as your sworn testimony to Congress.

3. MSPB appears to claim it would be a conflict of interest or otherwise unlawful for it to look at such an event from perspective of PPPs, while other investigators (apparently in fear of experiencing reprisal type PPPs) claim they cannot ask such questions because only MSPB can, see 5 U.S.C. section 1103(a)(5).

4. Phil Pope, the then-President of Office and Professional Employee International Union (OPEIU) Local 2001, gave this explanation in my presence several years ago and no official from any federal employee union has disavowed it.

5. I elaborate on this in a February 2011 guest column in *FedSmith*
<<http://www.fedsmith.com/article/2730/something-rotten-federal-civil-service-not.html>>
6. See 28 U.S.C. section 0.25 and the Office of Legal Counsel website
<<http://www.justice.gov/olc/>>.
7. See 5 U.S.C. sections 1212, 1214, particularly 1214(e), which requires OSC to inform the involved agency head of its “reasonable grounds to believe” determinations of violations within its jurisdiction and requires the agency head to certify his review of the OSC report and the agency’s response, which becomes a permanent, publicly available record, per section 1219(a)(3). Not a single such record exists, not for the over 50,000 investigations OSC has conducted into PPPs since 1979.
8. See 5 U.S.C. section 2302(c). I submitted FOIA requests of about 20 agencies, for records documenting compliance with this section. No agency has any record that would allow any agency head to state, “I am complying with my duty to prevent PPPs, because my employees are adequately protected from PPPs.” Of course, they are NOT adequately protected, because OSC and MSPB have misinterpreted and misapplied their vitally relevant nondiscretionary duties to ensure they are, if for no other reason.
9. See 5 U.S.C. section 1204(a)(3). MSPB has, consciously and willfully, denied it has a responsibility to conduct a “special study” of a federal agency related disaster - such as BP Gulf Oil disaster or SEC’s failure catch Madoff’s billion-dollar Ponzi scheme - to ascertain if the fact or perception of PPPs played a role. It willfully and consciously refuses to do this specific nondiscretionary statutory duty, apparently does not want to know the truth, demonstrating its corruption and supporting my concerns about your possible moral evil.
10. The MSPB March 28, 2011 press release for draft strategic plan and the draft strategic plan can be obtained from the MSPB website <<http://www.mspb.gov>> or http://whsknox.blogs.com/mspb/mspb-press-release-draft_strategicplan.pdf and http://whsknox.blogs.com/mspb/mspb-draft_strategicplan.pdf
11. See MSPB Press Release about draft strategic plan and my letter to you of March 3, 2011, available at <<http://whsknox.blogs.com/mspb/mspb-osc-opm-reviews.pdf>>.
12. See page 5 of draft strategic plan, “Protect the Merit Principles and promote an effective Federal workforce free fo Prohibited Personnel Practices.”
13. See press release and draft strategic report pages 6 (Strategic Goal 2, Objective 2C), page 8 (Performance Measure 2B and 2C), and page 9 (Strategic Goal 2 item 5, 6, 7, 8
14. The draft strategic plan does not mention 5 U.S.C. section 2302(c), nor OSC’s central role in helping agency heads implement it via training agency employees, see <<http://www.osc.gov/Intro.htm>>

15. See 5 U.S.C. section 1204(k)(1). But since MSPB does not perceive a duty to do the things the law requires, why should it feel inhibited from doing things the law does not authorize?

16. From OSC's website <<http://www.osc.gov/Intro.htm>>, "OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing.

OSC and MSPB share a joint responsibility to review OPM regulations for PPPs, compare 5 U.S.C. section 1212(a)(4) with 1204(a)(4) and 1204(f), together with 5 C.F.R. section 1203, a joint responsibility each, separately and together, failed to implement for 32 years, ultimately because of MSPB's failure to conduct the requisite "special studies." See <http://whsknox.blogs.com/mspb/osc-foia-opm.pdf>
http://whsknox.blogs.com/mspb/osc_foia_resp_opm_reviews.pdf
<http://whsknox.blogs.com/mspb/mspb-foia-opmreview.pdf>
for related FOIA requests and responses. I understand MSPB will mail its (now overdue) FOIA response by April 29, 2011, I fully expect it to state "no responsive records."

When OSC seeks to enforce its subpoena in federal district court, it is represented by MSPB, see 5 U.S.C. sections 1212(b)(3)(A) and 1204(c). In fact, from 1979 to 1989, OSC was an autonomous part of MSPB.

17. Curiously, but consistent with my concerns about your connections with federal employee unions, it does mention the Federal Labor Relations Authority (FLRA), see page 1 of draft strategic plan.

18. See 5 U.S.C. sections 1221(f)(3), 1215(a)(1), and 1214(a)(5) as well as 5 C.F.R. 1209.13. MSPB has always been able to make such referrals for all its findings of non-whistleblower reprisal type PPPs, but has failed to do so, because it is not required to do so.

19. See 5 U.S.C. section 1215(a)(3) which authorizes OSC to seek disciplinary action when any federal employee "knowingly and willfully refused to failed to comply with an order of MSPB." Based on OSC and MSPB records, this has yet to happen in 32 years, despite thousands of MSPB findings of non-compliance with its Orders.

20. Compare 5 U.S.C. 1214(b)(1)(A) and 5 C.F.R. 1201.134(a) with 5 U.S.C. 1221(c) and 5 C.F.R. 1209.9(a)(6)(iii). It makes no sense that if OSC seeks a stay, MSPB uses the evidentiary standard "reasonable grounds to believe," (as required by law), but when the employee seeks one, MSPB, via its regulation and inconsistent with the law, has established the much higher "substantial likelihood" evidentiary standard.

This is even though the federal employee, unlike a plaintiff in almost every, if not every, other "stay" situation, has no duty to show any harm if the stay does not issue, instead of the "irreparable" harm standard. Such an employee can also seek and receive a "stay" of an agency action not taken - such as a promotion - a situation unheard in other "stays." "Stay" is a

misnomer, it should be termed “preliminary relief.”

Even though the legislative history for such 5 U.S.C. 1221 “stays” stated they should be granted “liberally,” MSPB typically grants about 1-3% of the valid stay requests it receives from employees, a statistic so dismal it does not publish the results of the stay requests it receives in its Annual Report to Congress.

Of course, if MSPB did grant whistleblower stays “liberally,” it would result in many more equitable settlements as the agency would not be facing an unemployed former employee, unable to afford \$500/hour employment lawyers, not a restored, on payroll (via the stay) employee who could more likely afford to hire and retain an experienced attorney.

Agencies, after MSPB refuses to grant a stay, know they have the upper hand, and frequently throw a bone to the employee MSPB failed to protect via a stay, in order to make the case go away - and MSPB then has the moral turpitude to claim such an employee obtained “equitable relief” - even though it was a one-sided settlement against them - in its Annual Reports to Congress.

21. An archive of this hearing, which was less than an hour in length, is available for viewing at <http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=57ff6064-3358-4f08-ab00-5a2bb04ec97e>

22. See <<http://www.tn.gov/sos/rules/0120/0120-02.20091210.pdf>>

23. See <<http://www.state.tn.us/commerce/boards/ae/index.shtml>>