

joseph carson

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