No. 09-1207

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICI CURIAE DOROTHY PRITCHETT ET AL. SUPPORTING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

REGULATIONS

OTHER

IDENTITY OF PARTIES TO AMICI CURIAE BRIEF AND THEIR INTEREST IN THE CASE

Parties to this amici curiae brief are individuals or organizations who are aligned, for a variety of reasons – centering on patriotism – with the objectives of OSC Watch, an unincorporated "ad hoc" group with three objectives:[1, 2]

> 1) Expose 31 years of non-compliance by the U.S. Office of Special Counsel (OSC), U.S. Merit Systems Protection Board (MSPB) and agency heads with essential aspects of their respective nondiscretionary statutory duties to ensure that federal employees are adequately protected from "prohibited personnel practices (PPP's)," particularly the whistleblower reprisal type PPP.

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[1] Per Supreme Court rule 37(2)(a), the Solicitor General was timely notified of the intent to file this amici curiae brief and consented, in writing, to it. Joseph Carson, PE, is the chair of the OSC Watch Steering Committee and David Nolan is its legal advisor. Mr. Carson contributed financially to the printing of this brief. Mr. Nolan is actively seeking the nomination of President Obama to be Special Counsel, head of OSC, a position which has been vacant since October 2008. His campaign blog is www.NolanforOSC.com.

[2] Walter Bradley, Sandalio (Sandy) Gonzalez, Alfonso Diaz del Castillo, Heriberto Rivera, Janet L. Westbrook, Jennifer Anderson, David Shaller, Janet Parker, Stephen Buckley, John Gard, Larry Fisher, Joseph Palazzolo, Martin Salazar, Linda Lewis, Lenora Portillo, Anil Parikh, Ivan (John) Petric, Mary Elizabeth Bullock, Bogdan Dzakovic, John Carson, T.J. Carson, Gabe Bruno, John Jay, Carol Czarkowski, Jim Salmon, David Wetzell and Calvin Weber.

2) Stop it, and

3) Obtain some measure of justice, no matter how limited or delayed, for the direct victims of this situation – the thousands of loyal, patriotic federal employees who, since 1979, put professional duty before self-interest and were not adequately protected from PPP's.

The primary purpose of the Civil Service Reform Act of 1978 was to create a statutory framework by which federal employees can perform their duties ethically and competently, per the merit system principles – the core values of the federal civil service[3] – while being adequately protected from PPP's.[4] By harming the merit system principles, PPP's harm federal governance, the public health, safety, and welfare, the common defense, citizens' trust in the federal government and, ultimately, rule of law in America.[5] OSC has a statutory mandate to "act in the interests" of federal employees who seek its protection from PPP's.[6] Agency heads, OSC, and MSPB

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[3] The 9 merit system principles are codified at 5 U.S.C. §2301(b).

[4] The 12 types of PPP's are codified at 5 U.S.C. §2302(b).

[5] For example, App. 5-17 is a memo from former Attorney General Mukasey to Department of Justice employees that summarizes the merit system principles and PPP's, it was written in response to several reports which identified numerous PPP's in DOJ during the Bush Administration.

[6] Section 2, "Whistleblower Protection; Congressional Statement of Findings and Purpose," of Pub. L. 101-12, the Federal Whistleblower Protection Act of 1989, is in the appendix of 5

(Continued on following page)

share the statutory mandate that "the protection of individuals who are the subject of PPP's remains the paramount consideration."[7]

Parties to this amici curiae brief desire that case law be established, over 15 years after the law was passed, at the Federal Circuit regarding when an agency action becomes a "personnel action" for creating "any other significant change in duties, responsibilities or working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi).[8] They also desire precedent establishing that *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) applies to making this determination. They desire that OSC, finally – after over 15 years – start complying with its non-discretionary statutory duty to protect federal employees who allege PPP's involving this type of personnel action.

The parties to this amici curiae brief salute Joseph Carson, PE, for his loyal service to his profession of engineering and the federal civil service, despite the many years of suffering, risk, and loss it has exacted from him and his family as well as for his tremendous exertions, as a licensed professional engineer (PE) employed by the Department of Energy as a

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U.S.C. §1201. Section 2(b)(2)(B) mandates OSC to "act in the interests" of federal employees who seek its protection.

[7] Pub. L. 101-12, section 2(b)(2)(C), also found in the appendix to §1201.

[8] Pub. L. 103-424, U.S. Office of Special Counsel Reauthorization Act.

nuclear safety engineer, to defend, uphold and advance his profession of engineering, its code of ethics, the merit system principles, and the public health and safety.

This case should be very ***good news*** for America – Joseph Carson, PE, has uncovered a previously unidentified significant contributing factor for much of which has befallen America since 1979 and besets it now – a near complete breakdown in the nondiscretionary statutory framework to protect, adequately, federal employees from PPP's – and it is something that can be readily fixed.

This breakdown centers on OSC's 31-year long interpretation of (what is now) 5 U.S.C. §1214(e), that its reporting requirements do not apply to OSC's determinations about PPP's and other violations within its enforcement jurisdiction and MSPB's 31-year long interpretation of (what is now) 5 U.S.C. §1204(a)(3), that its "special studies" do not ever need to consider OSC's interpretation of and compliance with its nondiscretionary statutory duties to protect federal employees from PPP's nor agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's," per 5 U.S.C. §2302(c). As a predictable result, agency heads are unable to comply with this vital duty, because OSC's interpretation of §1214(e) and MSPB's interpretation of §1204(a)(3) keep them "in the dark" as to whether their employees are adequately protected from PPP's.

All parties to this brief desire "justice for all" where "all" are the 25,000 or more federal employees who have filed about 50,000 PPP complaints with OSC since 1979, alleging about 100,000 specific PPP's.[9] Almost all of these individuals did not obtain the tangible nondiscretionary statutory protection OSC owed them – a written determination whether "there is reasonable grounds/cause to believe" the alleged PPP occurred and, if positive, an OSC report of that determination to the involved agency head, per 5 U.S.C. §1214(e).

By §1214(e), the involved agency head is required to certify his review of both the OSC report and the agency's response containing the corrective actions and a schedule to implement them. Both the OSC report and the agency-head certified response become permanent, publicly available records per §1219(a)(3). Because OSC, at its creation in 1979, contrary to the plain meaning of the law and its legislative history, renounced its duties to report its determinations of PPP's per §1214(e), it has not issued a single §1214(e) report in 31 years.[10] Because MSPB, at its creation in 1979, renounced its duty to conduct "special studies" of OSC's compliance with its nondiscretionary statutory duty to protect federal employees from

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[9] Based on review of OSC's Annual Reports to Congress, per 5 U.S.C. §1218, since 1979.

[10] As verified by review of OSC's publicly available records, review of all its Annual Reports to Congress, and via OSC's responses to FOIA requests for such records.

PPP's, this situation has gone uncorrected for 31 years.[11]

Additionally, had OSC and MSPB complied with their duties, agency heads would have been able to comply with their duty to "prevent PPP's" for the past 31 years by correcting the deficient workplace cultures in their agencies that permit, if not reward, PPP's, thereby preventing many, if not most, of the 100,000 PPP's alleged to OSC since 1979.

A federal workplace that allows any kind of PPP, more likely allows every kind of PPP – together with other violations of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority, and/or substantial and specific danger to public health or safety. OSC is supposed to be the "immune system" of the federal civil service, its noncompliance with its nondiscretionary statutory duty to protect federal employees from PPP's has allowed much corruption and dysfunction to take root and flourish in many federal workplaces, resulting 31 years later, in a much diminished and more threatened America.

More specifically, parties to this amici curiae brief contend that if OSC, MSPB and agency heads

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[11] See App. 2-4 for current MSPB Chairman Susan Grundmann's October 2009 Senate confirmation hearing testimony which, near its end, tacitly admits MSPB has not performed the requisite special studies to make such a report. Dave Nolan, the counsel for this brief, brought this situation to Ms. Grundmann's attention during her confirmation process.

had scrupulously complied with their respective non-discretionary statutory duties to ensure federal employees were adequately protected from PPP's, it is reasonable that 9/11 could have been prevented, along with loss of space shuttles, VA health care scandals, SEC's repeated failure to catch Bernard Madoff, and many other instances of federal agency malfeasance or incompetence which has so eroded the public trust in instruments of governance since 1979.

SUMMARY OF ARGUMENT

There is often overlap between PPP's and EEO violations as explicitly stated in OSC regulations at 5 C.F.R. §1810.1. Therefore, *Burlington* is relevant to determining whether an agency's actions cause "any other significant change in duties, responsibilities, or working conditions." If the Federal Circuit establishes precedent consistent with the relevant legislative history and *Burlington*, it will force OSC to start complying with its nondiscretionary duties to protect federal employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively but retroactively to 1994. President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal. Congressional re-authorization of OSC and MSPB are overdue.

The results of this case may influence these Congressional deliberations. Legislation to reform the Federal Whistleblower Protection Act is pending in Congress.

The results of this case may influence these Congressional deliberations. There is no statute of limitations for PPP allegations and OSC has broad, even if largely untested, power to protect federal employees from PPP's, including re-opening previously closed PPP investigations.

OSC can apparently seek corrective action for victims of PPP's, even if these victims failed to obtain remedy at MSPB. *Res judicata* does not apply.

This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of interest to this Court. The putative politicization of U.S. Attorneys in the Department of Justice under President Bush was investigated by former Special Counsel Scott Bloch. Such alleged Hatch Act violations and PPP's threatened the rule of law. Are federal employees adequately protected from PPP's?

Executive branch employees must be adequately protected from PPP's. This includes the intelligence agencies and the White House. The recent conviction of former Special Counsel Scott Bloch brings additional shame to the Office of Special Counsel. There is a 20-month long vacancy for the position of Special Counsel. This Court's actions in this case may

influence the nomination and Senate confirmation process for this vital position.

There is significant and growing interest in the *Carson* case, particularly whether the Obama Administration will file a response of acquiescence, if this Court invites a response. If the Solicitor General files a response of acquiescence, there is a high probability, based on Court statistics, that this Court will grant Mr. Carson's petition for writ of certiorari.

ARGUMENT

1) There is often overlap between PPP's and EEO violations as explicitly stated in OSC regulations at 5 C.F.R. §1810.1. Therefore, *Burlington* is relevant to determining whether an agency's actions cause "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. §2302(b)(1) is the "EEO-type" PPP and includes the types of employment discrimination prohibited by EEO law. OSC is authorized to investigate allegations of EEO-type PPP's but normally defers to the EEOC. It makes no sense that *Burlington* would be relevant to an EEOC investigation, but not to an OSC investigation, into the identical allegation.

2) If the Federal Circuit establishes precedent consistent with the relevant legislative history and *Burlington*, it will force OSC to start complying with its nondiscretionary duties to protect federal employees from PPP's involving "any other significant

change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively, but retroactively to 1994. OSC uses the lack of case law at the Federal Circuit as justification for its ostensible position that absent contrary Federal Circuit precedent, OSC will presume no agency action creates "any significant change in duties, responsibilities, or working conditions."[12] Of course, OSC's posture largely precludes the Federal Circuit's establishing relevant precedent and, over 15 years since this new category of personnel action was created, there is no precedent at the Federal Circuit because OSC apparently prefers it that way.

3) President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal as evidenced by his campaign pledge to protect federal whistleblowers and by the public statements of the White House Special Counsel for Ethics and Government Reform Norm Eisen about whistleblower protection.[13] [14]

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[12] While OSC's negative determinations "on the merits" of a PPP complaint are not subject to explicit Court review, its negative jurisdictional determinations are subject to district court review and correction via a writ of mandamus, see *Weber v. United States*, 209 F.3d 756, 758 (D.C. Cir. 2000).

[13] See App. 1 for then-candidate Obama's pledges to federal whistleblowers.

[14] See App. 20-22 for a related story about the Obama Administration's unprecedented openness to federal whistleblower advocates.

4) Congressional re-authorization of OSC and MSPB are overdue. The results of this case may influence Congressional deliberations in reauthorizing them.[15]

5) Legislation to reform the Federal Whistleblower Protection Act is pending in Congress. The results of this case may influence these Congressional deliberations.[16]

6) There is no statute of limitations for PPP allegations. OSC has broad, even if largely untested, power to protect federal employees from PPP's, including re-opening previously closed PPP investigations. OSC can apparently seek corrective action for victims of PPP's, even if they failed to obtain remedy at MSPB. *Res judicata* does not apply because OSC is a different party and would be seeking corrective action by a different section of law.

7) This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of interest to this Court. Specifically, the America Bar Association's "Model Rules of Professional Conduct" which have been adopted in whole or significant part by the large majority of attorney licensing authorities, does not

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[15] In the 110th Congress, H.R.3551 and S.2057, "Federal Merit System Reauthorization Act of 2007."

[16] In the current Congress, H.R.1507 and S.372 are both approved out of committee.

address the professional obligations of a "case-worker" attorney at OSC – the OSC attorney responsible to ensure that OSC scrupulously complies with its nondiscretionary statutory duties to protect federal employees from PPP's in his/her assigned cases. Over half of OSC's 115 employees are attorneys, most are case-worker attorneys, responsible for the implementation of OSC's nondiscretionary statutory duties to protect federal employees from PPP's in their respectively assigned cases.

By currently applicable legal ethics, the client of an OSC case-worker attorney is OSC. For his/her government employer, he/she must hold the interests of OSC paramount, even if inconsistent with the best interests of the complainant. The case-worker attorney at OSC is prohibited from "blowing whistles" about any OSC non-compliance with its non-discretionary statutory duties to protect federal employees from PPP's.

Additionally, as per 5 U.S.C. §1211, the Special Counsel must be an attorney. By currently applicable legal ethics, a new Special Counsel, as an attorney, has an affirmative duty to defend how OSC, his/her client, complies with the nondiscretionary statutory duties to protect federal employees from PPP's.

A similar situation is present at MSPB where the members of the full board are usually attorneys. If a Board member disagrees with how MSPB has complied with a nondiscretionary statutory duty relevant to protecting federal employees from PPP's, can

he or she do anything but defend the past practice of the agency client absent new law or Federal Circuit decisions?

8) The putative politicization of the Department of Justice under President Bush includes Special Counsel Scott Bloch's investigation of alleged Hatch Act violations. The occurrence of PPP's in the Department of Justice (DOJ) harms the rule of law. The statutory mandate of the Office of Special Counsel is to protect federal employees from PPP's.

The four joint reports of the Department of Justice Office of Inspector General and Office of Professional Responsibility about these PPP's described how concerned employees "looked the other way" apparently, out of fear of agency reprisal – another type of PPP – if they responsibly voiced concerns.[17] However, these reports did not address whether DOJ employees were adequately protected by OSC, i.e., whether it was scrupulously complying with its nondiscretionary statutory duties to DOJ employees who alleged PPP's to it or whether MSPB was conducting the requisite "special studies" to determine and report whether DOJ employees are adequately protected from PPP's.

[17] These four reports were issued between June 2008 and January 2009 and are available at <www.justice.gov/opr/inv-rpts.htm>.

9) The MSPB has a nondiscretionary statutory duty to determine and report whether all federal employees in the Executive Branch, including intelligence agencies and the White House, are adequately protected from PPP's. Has it conducted and reported the requisite special studies, including concerning its own employees, over the last 31 years?[18] The Office of Personnel Management (OPM) is explicitly prohibited by 5 U.S.C. §1103(a)(5), from evaluating whether federal employees are adequately protected from PPP's when implementing its nondiscretionary statutory duty to review agency compliance with the merit system principles, per 5 U.S.C. §1104(b)(2). Moreover, neither the President nor Congress can confirm whether federal employees are adequately protected from PPP's. Have both OSC and MSPB complied with essential aspects of their nondiscretionary statutory duties to protect federal employees from PPP's since their creation in 1979? Congress has yet to re-authorize either entity.

10) The recent conviction of Special Counsel Scott Bloch for contempt of Congress has increased the opprobrium of the Office of Special Counsel. The position of Special Counsel has not been filled since October 2008. This Court's actions in the *Carson* case

[18] See App. 18-19 for MSPB's response to a FOIA request for such records.

may influence the nomination and Senate confirmation process for this vital position.[19] [20]

Just as at MSPB, OSC cannot even confirm that its own employees are adequately protected from PPP's after the termination of Special Counsel Scott Bloch. It is the nondiscretionary statutory duty of the Special Counsel to "prevent PPP's" in OSC, as per 5 U.S.C. §2302(c).

11) There is significant and growing interest in this case in the federal whistleblower community. The amici and other stakeholders in this case seek a trustworthy federal civil service. Their goal is to determine whether federal employees are adequately protected from PPP's.

If this Court invites a response from the Solicitor General, it will probably be a first for a federal whistleblower case. The *Carson* case generates much interest, particularly whether the Obama Administration will file a response of acquiescence.

The Obama Administration may direct, as per 28 C.F.R. §0.25, that the Office of Legal Counsel of the

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[19] See App. 25-27 for Department of Justice press release of April 27, 2010 announcing guilty plea of Scott Bloch, former Special Counsel, to criminal contempt of Congress.

[20] See App. 23-24 for April 23, 2010 press release of National Whistleblower Center, calling for President Obama to immediately appoint a new Special Counsel.

Department of Justice issue opinions on the correctness of the 31-year long applications of 5 U.S.C. §§1204(a)(3), 1214(e), and 2302(c).

12) If the Solicitor General files a response of acquiescence, there is a high probability, based on Court statistics, that this Court will grant Mr. Carson's petition for writ of certiorari and remand the case to the Federal Circuit with instructions, to develop relevant case law that addresses the *Burlington* precedent. This could result in OSC complying with its nondiscretionary, statutory duty to protect federal employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" since 1994 by reporting them per §1214(e). This would allow an agency head to provide an adversely affected employee the "make whole remedy" of 5 U.S.C. §1214(g) and to advance Congressional intent and the merit system principles of the federal civil service.

CONCLUSION

For all the above reasons, the amici respectfully request this Court to invite a response from the Solicitor General to Mr. Carson's petition for writ of certiorari and, following that, to grant it.

Respectfully submitted,

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NATIONAL WHISTLEBLOWER CENTER
SURVEY OF THE
CANDIDATES FOR PRESIDENT – 2008 – [Senator Barack Obama]

	Yes	No	No Position
1. Do you support protecting government whistleblowers under the framework of H.R. 985 (which passed the House on March 14, 2007 by a vote of 331 to 94)?	☑	☐	☐
2. If elected, do you promise to advocate for the passage of a law which would give employees who are illegally terminated for blowing the whistle the same procedural and substantive protections as other wrongfully discharged employees under laws such as Title VII of the Civil Rights Act of 1964 (i.e. the law that prohibits discrimination on the basis of race or sex)?	☑	☐	☐
3. Under the Whistleblower Protection Act, the President appoints a Special Counsel whose major job is supposed to be the protection of federal employee whistleblowers. If elected President, are you committed to ensuring that the people appointed as the Special Counsel have expertise in whistleblower law and a firm commitment to protecting whistleblowers?	☑	☐	☐
4. Should employees who expose weaknesses in Homeland Security and/or the government's efforts to combat terrorism be fully protected under the whistleblower laws?	☑	☐	☐
5. Currently the federal environmental whistleblower protection laws have a 30 day statute of limitations. The Administrative Conference of the United States recommended that this filing period be enlarged to 180 days. If elected President, will you work to ensure that the statute of limitations applicable to environmental whistleblowers is enlarged to 180 days?	☑	☐	☐
6. If elected President, will you appoint a liason responsible for interacting with whistleblower advocates in order to better ensure that no employer illegally retaliates against employees who expose violations of law or waste, fraud and abuse?	☑	☐	☐

/s/ Danielle Gerry for Obama for America — 5/8/07
Signature of Candidate or Authorized Representative — Date

Please return to the National Whistleblower Center by May 8, 2007. The responses may be faxed to (202) 342-1904 or mailed to the Center at 3238 P Street, N.W. Washington, D.C. 2007 [sic].

App. 1

U.S. Senate Committee on Homeland Security and Governmental Affairs
Hearing on the Confirmation
On the Nomination of

Susan Tsui Grundmann
to be a Member and Chairman
of the U. S. Merit Systems Protection Board

Statement for the Record
October 20, 2009

Good afternoon Chairman Akaka, Ranking Member Voinovich, and members of the Committee. Thank you for this opportunity to appear before you today as you consider confirmation of my nomination to be a Member and the Chairman of the U. S. Merit Systems Protection Board. I am honored by the confidence that President Obama has placed in me by nominating me to this important position of public trust. I pledge that, if confirmed, I will discharge my responsibilities with integrity and in accordance with law, rule and regulation. I also want to thank you for your consistent efforts to ensure that the American public is well served by a civil service system that operates effectively and efficiently.

Mr. Chairman, for most of my practice, I have served as an advocate for Federal employees. During that time, I have also worked with Federal managers at all levels. I have worked in private practice and with the state courts. I have represented the interests of both management and line employees. I have become intimately familiar with the myriad of issues

that give rise to workplace disputes. My cumulative experience has provided me with a well grounded perspective of how the merit systems process works to ensure fairness in the Federal workplace. To serve as a Member and Chairman of the Merit Systems Protection Board is the opportunity to once again practice law in a neutral capacity. At the beginning of my legal career, I clerked for the judges of the Nineteenth Judicial Circuit of Virginia and welcome this opportunity to return that experience that laid the foundation for my commitment to public service as a neutral.

As Congress explores avenues for improving certain aspects of the civil service system, the Board's role as an independent and neutral arbiter of fairness and adherence to merit principles by Executive branch agencies remains vital to the effective and efficient operation of the Federal government. In FY 2009, the average case processing time for the initial decision was 83 days. The average case processing time on petitions for review to the full Board was 94 days. These statistics provide a solid basis for confidence in the MSPB appeals process. If confirmed, I will work to build upon the Board's impressive record for timely and balanced adjudication of challenges to adverse personnel actions and other matters under its jurisdiction.

It is crucial that both employees and managers perceive that they have equal access to the process, and that the system provides them with a fair opportunity to present their respective positions. I am

committed to ensure transparency of the process through a focus on issuing clear, understandable decisions, that provide "workable" guidelines for the parties and the Board's stakeholders. This objective is particularly important in a venue such as the MSPB where a large percentage of the appeals are filed by pro se appellants. If confirmed, I commit to these fundamental principles from the outset.

The Board's statutory studies function is also a significant part of the agency's responsibility. Study reports issued by the Merit Systems Protection Board are highly regarded in the Federal human resources management community and by the stakeholders of the Board. If confirmed, I plan to work with my fellow board members as well as the Office of Policy and Evaluation to continue this record of excellence. In particular, I pledge to report to the President and the Congress as to whether the public interest in a civil service free of prohibited personnel practices is adequately protected.

Mr. Chairman, at this time, I would be pleased to answer any questions that you or other members of the panel would like to ask of me.

[SEAL] **Office of the Attorney General**
Washington, D.C.

March 10, 2008

MEMORANDUM FOR DEPARTMENT OF JUSTICE POLITICAL APPOINTEES

FROM: THE ATTORNEY GENERAL

SUBJECT: *Merit System Principles and Prohibited Personnel Practices*

The framework for Federal human resources is built on integrity and merit. It is important for all of us to understand and follow the Merit System Principles in dealing with career employees. Our actions and decisions should be within the bounds set by the Merit System Principles and the Prohibited Personnel Practices, which are set forth in the attached briefing materials.

Beginning last summer, all new political appointees (Presidential Appointees with Senate Confirmation, Noncareer Senior Executive Service, and Schedule C appointees) have been briefed on Merit System Principles and Prohibited Personnel Practices as part of the orientation process. I am committed to ensuring that all serving political appointees are provided the same information. Therefore, please review the attached briefing materials and provide acknowledgement of your review and understanding of these hiring precepts to the Justice Management Division (JMD) no later than March 28, 2008. Please email your acknowledgements to: DOJ.Hiring-Training@usdoj.gov.

Our obligation to adhere to the highest standards of ethical and professional behavior will be enhanced by continued reinforcement of our human resource responsibilities.

Thank you.

Attachments

MERIT SYSTEM PRINCIPLES

Fact Sheet

What is the Merit System Protection Board (MSPB)? MSPB is directed by law to conduct special studies of the civil service and other Federal merit systems to determine whether these statutory mandates are being met, and to report to the Congress and the President on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

Where are the Merit System Principles found in regulation? 5 USC§ 2301(b):

(A) This section shall apply to –

(1) an Executive agency; and

(2) the Government Printing Office.

(B) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal workforce should be used efficiently and effectively.

(6) Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be –

(a) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(b) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences –

(a) a violation of any law, rule, or regulation, or

(b) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) In administering the provisions of this chapter –

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives; which is

consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

PROHIBITED PERSONNEL PRACTICES

Fact Sheet – Examples

What are "Prohibited Personnel Practices?"

Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law at *§ 2302(b) of title 5* of the United States Code (U.S.C.). A personnel action (such as an appointment, promotion, reassignment, or suspension) may need to be involved for a prohibited personnel practice to occur. Generally stated, § 2302(b) provides that a Federal employee authorized to take, direct others to take, recommend, or approve any personnel action may ***not***:

(1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

- ***EXAMPLE:*** *SUPERVISOR JOE REFUSES TO PROMOTE EMPLOYEE JANE BECAUSE JANE IS A REGISTERED REPUBLICAN.*

(2) solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;

- ***EXAMPLE:*** *SELECTING OFFICIAL JOE HIRES APPLICANT JACK BASED ON SENATOR SMITH'S RECOMMENDATION THAT JACK BE HIRED BECAUSE JACK IS A CONSTITUENT.*

(3) coerce the political activity of any person;

- ***EXAMPLE:*** *SUPERVISOR JANE TAKES AWAY SIGNIFICANT JOB DUTIES OF EMPLOYEE JACK BECAUSE JACK WON'T MAKE A CONTRIBUTION TO JANE'S FAVORITE CANDIDATE.*

(4) deceive or willfully obstruct anyone from competing for employment;

- ***EXAMPLE:*** *SUPERVISOR JOE, LOCATED IN HEADQUARTERS, ORDERS THAT NO VACANCY ANNOUNCEMENTS BE POSTED IN THE FIELD OFFICE WHERE EMPLOYEE JACK WORKS BECAUSE HE DOESN'T WANT JACK TO GET A NEW JOB.*

(5) influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;

- ***EXAMPLE:*** *SUPERVISOR JANE, IN AN EFFORT TO HIRE EMPLOYEE JOE, TELLS EMPLOYEE JACK – A QUALIFIED EMPLOYEE – THAT HE SHOULDN'T APPLY FOR A POSITION BECAUSE HE ISN'T QUALIFIED AND WON'T BE SELECTED.*

(6) give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;

- ***EXAMPLE:*** *SUPERVISOR JANE SPECIFIES THAT SPANISH-SPEAKING SKILLS ARE NECESSARY FOR A VACANT*

POSITION, IN ORDER TO SELECT EMPLOYEE JACK, WHO SPEAKS FLUENT SPANISH. THE POSITION, HOWEVER, DOESN'T REQUIRE SPANISH-SPEAKING SKILLS.

(7) engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives);

- ***EXAMPLE:*** *SECOND-LEVEL SUPERVISOR JANE ASKS FIRST LEVEL SUPERVISOR JOE TO HIRE HER SON.*

(8) engage in reprisal for whistleblowing – i.e., take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);

(9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising

such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;

(10) discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others;

(11) take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and

(12) take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at *5 U.S.C. § 2301*.

- ***EXAMPLE:*** *MANAGER JANE DECIDES NOT TO HIRE APPLICANT JOE BECAUSE HE IS A MEMBER OF AN ORGANIZATION THAT OFTEN TAKES POSITIONS THAT MANAGER JANE BELIEVES ARE CONTRARY TO THE POSITIONS TAKEN BY THE CURRENT ADMINISTRATION.*

No selection based on such a factor appears to violate merit principles, which, among other things, state that:

1. Selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

2. All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, with proper regard to their privacy and constitutional rights.

Who can be protected by the Office of Special Counsel (OSC) from prohibited personnel practices?

General. OSC has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies and the Government Printing Office.

Limited Jurisdiction; whistleblower protection. OSC has jurisdiction over allegations of whistleblower retaliation for employees of – the government corporations listed at *31 U.S.C. § 9101*; the Transportation Security Administration (TSA).

Limited Jurisdiction; U.S. Postal. Service (USPS) nepotism allegations. Under a Memorandum of Understanding (MOU) between OSC and USPS, OSC refers alleged violations of the anti-nepotism statute (*5 U.S.C. § 3110*) to USPS for investigation. Once USPS completes its investigation, it reports its findings and any proposed action to OSC.

Who is not protected by OSC from prohibited personnel practices?

OSC has no jurisdiction over prohibited personnel practices committed against employees of –

- the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President;
- the General Accounting Office;
- the Federal Bureau of Investigation;
- the U.S. Postal Service (except for nepotism allegations; see above); and
- the Postal Rate Commission.

(The process for protecting FBI whistleblowers is contained at 28 CFR part 27.)

Are Federal employees required to cooperate with OSC investigations?

Title 5 of the U.S. Code authorizes the OSC to issue subpoenas for documents or the attendance and testimony of witnesses. During an investigation, the OSC may require employees and others to testify under oath, sign written statements, or respond formally to written questions.

Federal employees are also required to provide to the OSC any information, testimony, documents, and material, the disclosure of which is not otherwise prohibited by law or regulation, in investigations of matters under civil service law, rule, or regulation, The same rule requires Federal agencies to make employees available to testify, on official time, and to provide pertinent records to the OSC.

Ref: *5 U.S.C. § 1212(b)*; Civil Service Rule 5.4

What legal responsibilities do Federal agencies have to prevent prohibited personnel practices?

Section 2302(c) of title 5 requires Federal agency heads, and officials with delegated authority for any aspect of personnel management, to: prevent prohibited personnel practices, including reprisal for whistleblowing; comply with and enforce civil service laws, rules, and regulations; and ensure (in consultation with the OSC) that Federal employees are informed of their rights and remedies.

[LOGO] **U.S. Merit Systems Protection Board**
Office of the Clerk of the Board
1615 M Street, NW, 5th Floor
Washington, DC 20419
Phone: 202 653 7200, Fax: 202 652 7130, E-Mail: MSPB.gov
Clerk of the Board

December 18, 2009

Mr. Joe Carson
10953 Twin Harbour Drive
Knoxville, TN 37934

Dear Mr. Carson:

This is in response to a Freedom of Information Act (FOIA) request dated November 14, 2009, in which you request copies of all documents "related to the [Merit Systems Protection Board's (MSPB)] compliance with 5 U.S.C. 2302(c) by which the Chair/ Board members are required to 'prevent prohibited personnel practices (PPP's)' in MSPB." We have processed your request in accordance with MSPB regulations at 5 CFR Part 1204 that implement FOIA.

We have conducted a search of MSPB records based on the information you provided, and we cannot locate any documents responsive to your request.

You have the right to appeal this determination that there are no existing records. If you decide to do so, your appeal should be addressed to the Chairman, U.S. Merit Systems Protection Board, 1615 M Street, 5th Floor, Washington, DC 20419. Your appeal should be identified as a "FOIA Appeal" on both the letter

and the envelope. It should include a copy of your request, a copy of this letter, and your argument for overturning this decision. The MSPB must receive your appeal within 10 workdays of the date of this letter.

Sincerely,

/s/ William D. Spencer
William D. Spencer
Clerk of the Board

CORPORATE CRIME REPORTER – WHISTLEBLOWER ADVOCATES HAVE A SEAT AT OBAMA'S TABLE

by the Corporate Crime Reporter

For the first time in decades, advocates for government whistleblowers have a seat at the White House policy table.

"After 1,000 points of darkness, we now have 1,000 points of light," Tom Devine, legal director of the Government Accountability Project told Corporate Crime Reporter last week.

"Before President Obama – either the Republicans didn't have the time of day for us, or the Democrats like Clinton and Carter didn't have the time of day for us until the decision was made and then they would call us in and say – thank you for all you have done. But we never had a voice before the decisions were made until the decisions were made."

Devine said that President Obama "has enfranchised the civil liberties activists for the first time in 30 years."

"Now we have a voice," Devine said. "We are meeting with White House ethics counsel Norm Eisen. We are meeting with the general counsel for the Office of Management and Budget. We are meeting with the top appointees at the Department of Justice."

"It has made a major difference – step by exhausting plodding step," Devine said.

"The Obama administration started out with positions that largely reflected the career staff it inherited," Devine said. "But they were preliminary policies. And they gave us the opportunity to rebut them."

"They have listened to our rebuttals. And they have reversed many long standing bureaucratic positions. Not as many as we think are necessary for a best practices whistleblower law like the president campaigned for. But it leaves behind in the dust the concessions and flexibility of any other president."

"The result is that for the first time in 30 years, we have the key Senate approvals to get jury trials to enforce government whistleblower rights. We've been fighting for that for three decades and consistently hitting a wall."

"And this July, thanks to going to the mat, behind closed doors, all out advocacy by the Obama administration, the senate committee approved it and it's a foregone conclusion now."

"Instead of being sent to administrative boards that are kangaroo courts to enforce their rights, whistleblowers are going to have access to juries of citizens now."

"The other victory will be opening up normal access to the appeals courts to challenge interpretations of law that have gutted the whistleblower protection act in the past," Devine said. "The primary reason the whistleblower protection law has failed is because the

appeals court has functionally overturned the statute three times on non constitutional grounds. Since October 1994 when it was enacted, that court has ruled against whistleblowers in 203 out of 206 decisions on the merits."

But Devine expressed frustration with the Obama administration when it comes to national security (CIA, FBI and NSA) whistleblowers.

"The experience has almost been the opposite so far on national security whistleblowers," Devine said. "The administration has been close minded about giving them normal access to court."

"Since their disclosures have been the most important exercise of freedom of speech, defending liberty from threats by your own government, that they are the most important whistleblowers to earn first class rights," Devine said.

NWC Calls for Immediate Appointment of New Special Counsel

Washington D.C. April 23, 2010. Yesterday, former U.S. Special Counsel Scott Bloch was charged with criminal contempt of Congress for withholding "pertinent" information from the House Oversight and Government Reform Committee. Bloch was forced to resign in October 2008 amid allegations that he retaliated against employees and dismissed whistleblower cases without fully investigating them.

Stephen M. Kohn, Executive Director of the National Whistleblowers Center issued the following statement:

> The Office of Special Counsel (OSC) was disgraced under Bloch and the taxpayers are the ones who suffered. The legal guardian for protecting whistleblowers, was not only engaged in retaliation, but we now learn he criminally covered up misconduct.
>
> Since its inception in 1978, the Office of Special Counsel has failed to live up to its mission of protecting whistleblowers and has been dominated by political appointees. Although the track record of the OSC has been highly criticized over the past 30 years, having the former head of whistleblower enforcement charged with serious criminal misconduct highlights how OSC has been abused by politicians intent on having the foxes guard the chicken coop.
>
> Congress and the President must respond by immediately appointing a new Special Counsel.

The new appointee must be top notch and must have the background and experience, not only as a proven strong advocate for whistleblowers, but as a tough and aggressive enforcement official. For too long the OSC has been seeped in the culture of cover-up. Whistleblowers need a real advocate and a powerful voice within the administration. A new standard must be enforced and never again should this office be disgraced.

President Obama promised during the campaign to appoint a Special Counsel with 'expertise in whistleblower law and a firm commitment to protecting whistleblowers.' It has been over 2 years since President Obama made this promise, and no nomination has even been sent to the Senate for confirmation.

[SEAL] U.S. Department of Justice

Ronald C. Machen Jr.
United States Attorney for the District of Columbia

Judiciary Center
555 Fourth Street, NW
Washington, D.C. 20530

PRESS RELEASE

FOR IMMEDIATE RELEASE
Tuesday, April 27, 2010

For Information Contact:
Public Affairs
(202) 514-6933
http://www.usdoj.gov/usao/dc/Press_Releases/index.html

Former Head of the U.S. Office of Special Counsel Pleads Guilty to Criminal Contempt of Congress

Washington, D.C. – The former head of the United States Office of Special Counsel ("OSC"), Scott J. Bloch, pled guilty today to Criminal Contempt of Congress for willfully and unlawfully withholding pertinent information from a House committee investigating his decision to have several government computers wiped, announced U.S. Attorney Ronald C. Machen Jr., Office of Personnel Management ("OPM") Inspector General Patrick McFarland, and Federal Bureau of Investigation ("FBI") Assistant Director in Charge Shawn Henry.

The plea was entered before U.S. Magistrate Judge Deborah A. Robinson, in U.S. District Court for the District of Columbia, who scheduled sentencing for July 20, 2010. Bloch faces a maximum sentence of one-year in jail and a fine of $100,000. Bloch's likely sentencing range is 0 to 6 months in jail under the Federal Sentencing Guidelines.

The OSC is an independent federal agency charged with safeguarding the merit-based employment system by protecting federal employees and applicants from prohibited personnel practices, with an emphasis on protecting federal whistleblowers. Bloch, a presidential appointee whose title was Special Counsel, headed the OSC from 2004 through 2008.

According to the Statement of Offense, on March 4, 2008, Bloch submitted to a transcribed interview with staff members of the U.S. House of Representatives Committee on Oversight and Government Reform ("House Oversight Committee"), which was investigating, among other things, whether and why Bloch: (i) directed the deletion of emails or files on any of Bloch's OSC-issued computers in December of 2006 by using the computer repair service Geeks On Call; (ii) directed that Geeks On Call delete emails or files contained on the computers of two of his OSC aides; and (iii) directed that any such deletion of computer files be done by use of a "seven-level wipe" process. This duly empowered Congressional inquiry came after various media reports that Bloch had directed the deletion of files on several OSC-issued

computers by enlisting Geeks On Call to perform a "seven-level wipe" on them.

The Statement of Offense describes five separate exchanges during Bloch's March 4, 2008 interview with staff members of the House Oversight Committee during which Bloch unlawfully and willfully withheld pertinent information from the Committee. Bloch admitted in Court today that he refused and failed to state fully and completely the nature and extent of his instructions that Geeks On Call perform "seven-level wipes" on his OSC computers as well as the two OSC-issued computers of two non-career OSC staff members in December of 2006.

In announcing today's guilty plea, U.S. Attorney Machen, OPM Inspector General McFarland, and FBI Assistant Director in Charge Henry praised the outstanding work of the investigative agents involved in this matter, especially Special Agent Marc R. Diehl and Andrew Smallman of the FBI, as well as Jill P. Maroney, Deputy Assistant Inspector General for Investigations, and J. David Cope, Assistant Inspector General for Legal Affairs of OPM. They also acknowledged the hard work of paralegal specialists Diane Hayes and Mary Treanor, legal assistant Jamasee Lucas, former legal assistant April Peeler, Supervisory IT Specialist, Joe Calvarese, Assistant U.S. Attorneys Laurel Loomis Rimon, Dan Butler, James Mitzelfeld, and Glenn S. Leon, who is prosecuting the case.