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International Union, A.F.L.-C.I.O. Local 2001

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April 8, 2010

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The Honorable Dr. Steven Chu
Secretary of the U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

RE: Request for Support in Mr. Joe Carson's Supreme Court Case

Dear Secretary Chu:

The Office and Professional Employees International Union, AFL-CIO, Local 2001 (OPEIU), represents the Department of Energy's (DOE's) bargaining unit employees at the Oak Ridge Office and the Office of Scientific and Technical Information. OPEIU supports and is asking that DOE request the Solicitor General to file a brief supporting Mr. Joseph P. Carson in his pending petition to the Supreme Court of the United States.

There are several reasons OPEIU supports the actions requested in Mr. Carson's brief, including:

- Currently, the lack of case law by the Federal Circuit relating to the 1994 amendment to the Whistleblower Protection Act of 1989, which added "any other significant change in duties, responsibilities, or working conditions" to be included as "personnel actions," leaves a chasm for biased interpretation. OPEIU believes this should be corrected to provide specificity to the meaning and intent of the 1994 amendment.
- The Supreme Court decision in Burlington v. White, 126 S.Ct. 2405 (2006) is likely relevant to determining when an agency action becomes a "personnel action" by creating "any other significant change in duties, responsibilities, or working conditions." Albeit decided by the Supreme Court, this case was brought under the Title VII umbrella. Since this decision, it has been argued that this case is not specifically applicable to Title V. OPEIU believes this decision should also be applicable to all federal employees.
- The U.S. Office of Special Counsel, the primary bulwark to protect federal employees from Prohibited Personnel Practices (PPP's), has apparently

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been using the absence of case law at the Federal Circuit to presumptively determine that it does not have jurisdiction for PPP complaints alleging this type of personnel action, i.e., that whatever agency action is alleged, said action did not create "any other significant change in duties, responsibilities, or working conditions."

- Such precedent would aid DOE's compliance, and specifically your statutory duty to "prevent PPP's."
- Such precedent could be cited by arbiters, regardless of whose favor the arbitration is decided, as an integral part of the negotiated grievance process.

As Secretarial policy has declared for many years, DOE employees must be adequately protected from reprisal for the overall good of DOE's missions. After reviewing Mr. Carson's *Petition for a Writ of Certiorari*, OPEIU believes that his petition to the Supreme Court is intended to provide definition and clarity to a nebulous area of the law. OPEIU further believes that the resolution of this matter will work to the benefit of both federal agencies and unions across the country. OPEIU therefore respectfully requests that DOE join in support of Mr. Carson's petition by requesting the Solicitor General to file a brief 'in acquiescence.'

Sincerely,



R. Max Smith, P.E.

Shop Chair

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The case is docketed at Supreme Court as
Carson v. Merit Systems Protection Board, docket No. 09-1207