No. 09-1207

In The

# Supreme Court of the United States

JOSEPH P. CARSON,

*Petitioner,*

v.

MERIT SYSTEMS PROTECTION BOARD,

*Respondent.*

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

## SUPPLEMENTAL BRIEF AND APPENDIX FOR PETITION FOR REHEARING

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## ARGUMENT

By Supreme Court Rule 44.2, the grounds of a petition for rehearing "shall be limited to intervening circumstances of a substantial or controlling effect." By Supreme Court Rule 15.8, a supplemental petition "may be filed at any time, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing." The last filing in this case was made on June 11, 2010.

After Mr. Carson learned, late on July 6, 2010, that his petition for rehearing was distributed on July 1, 2010, he contacted the Office of Solicitor General and was informed that unless the Supreme Court requests a response to his petition for rehearing, per Supreme Court rule 44.3, it will not decide whether to support Mr. Carson's petition for rehearing.

The key decision maker in determining whether the Solicitor General will support Mr. Carson's petition for rehearing, if the Court directs a response, is probably Chairman Susan Grundmann of the U.S. Merit Systems Protection Board (MSPB). She, along with MSPB Vice Chairman, Anne Wagner, were nominated by President Obama on July 31, 2009 and confirmed by the Senate on November 5, 2009. Under their leadership, MSPB has charted a new course in fulfilling its statutory responsibilities, shared with U.S. Office of Special Counsel and agency heads, per the merit system principle codified at 5 U.S.C. § 2301(b)(9), that "employees should be protected

against reprisal for [whistleblowing]." This responsibility has been amplified with the subsequent statutory mandate "employees should not suffer adverse consequences as a result of prohibited personnel practices."[1]

MSPB recently issued 3 related press releases about its new focus on determining whether federal employees are adequately protected from prohibited personnel practices (App. 1-7). In response to them, Mr. Carson spoke at some length with MSPB's Annette Butler about his experiences and concerns and followed up, at her suggestion, with a June 16, 2010 letter to Mr. John Crum, MSPB's Director of Office of Policy and Evaluations (App. 8-24). MSPB has expressed appreciation for his letter and informed him that his concerns and suggestions are being appropriately considered.

The federal whistleblower advocacy community is now quite active, because bills to reform and restore the Federal Whistleblower Protection Act of 1989 are moving forward in the House (H.R. 1507) and Senate (S.372). Leaders of this movement have informed Mr. Carson that if the Supreme Court requests a response to his petition for rehearing, they will actively solicit many of the several hundred diverse organizations they have organized behind federal whistleblower reform (App. 25-27 is the beginning of a recent 13

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[1] See 5 U.S.C. §1201 "endnotes," quoting section 2(b)(1) of Pub. L. 101-12, the Federal Whistleblower Protection Act of 1989.

page letter to President Obama and Congress, which lists these organizations) to persuade MSPB and the Solicitor General to support Mr. Carson's petition for rehearing. They will make similar requests of the members of Congress who are championing this legislation, many of whom sit on the House and Senate Committees with oversight of MSPB.

Additionally, some scientific and engineering associations, together with a number of faith-based public policy groups and religious leaders have indicated to Mr. Carson they will openly support for his petition for rehearing if the Supreme Court requests a response from the Solicitor General.

A federal employee union, Office and Professional Employees International Union (OPEIU), sent a letter to Ms. Grundmann on July 8, 2010, urging her to support Mr. Carson's petition for rehearing, after being informed that it had been distributed to the Court (App. 28-31). This letter argues that the hundreds of thousands of federal employees represented by federal employee unions could benefit by MSPB's doing so.

Finally, Mr. Carson submitted a related "differing professional opinion (DPO)," via relevant Department of Energy directive on June 6, 2010 (App. 32-48). The Department of Energy declined to accept it on July 1, 2010 (App. 49-50), without stating any opposition to its arguments and requests.

## CONCLUSION

If the Supreme Court requests a response to Mr. Carson's petition for rehearing, it is possible, perhaps likely, that the Solicitor General will inform the Court of its support and that it will file a response in acquiescence, if given the opportunity to do so. This would be a change in circumstances "of a substantial or controlling effect" to the Court's Order of May 17, 2010.

Mr. Carson prays the Court will decide to request a response. He has acted in good faith, at significant personal and professional cost, in defending and upholding the "merit system principles" of the federal civil service together with "Code of Ethics for Engineers" of his engineering ethics" and the "rules of professional conduct" of the Tennessee Board of Architectural and Engineering Examiners, his professional engineering (PE) licensing authority.

The skepticism he has encountered from many federal employees – about the validity of the merit system principles – is deeply troubling to him. Please give MSPB, the Department of Energy, and the Solicitor General the opportunity to send a clear message to the federal workforce that such skepticism is not warranted, that America expects (and needs) them to do their duties in a trustworthy fashion, per the merit system principles, and that "the system," including this Court, stands behind the fundamental commitment of the Civil Service Reform

Act of 1978 to federal employees – that they will be adequately protected from prohibited personnel practices.[2]

Respectfully submitted,

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[2] See 5 U.S.C. §1101, "endnotes," citing section 3(a)(1) and (2), "Civil Service Reform Act of 1978 Findings and Statement of Purpose," Pub. L. 95-454.

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FOR IMMEDIATE RELEASE
May 6, 2010

**MERIT SYSTEMS PROTECTION BOARD (MSPB) ANNOUNCES THE 2010 MERIT PRINCIPLES SURVEY**

The U.S. Merit Systems Protection Board (MSPB) is pleased to announce the upcoming administration of its 2010 Merit Principles Survey (MPS). MSPB conducts this periodic survey to elicit views on the soundness of Federal merit systems. MSPB has conducted the survey since 1983 as part of its statutory oversight responsibilities [5 U.S.C. 1204(a)(3) and 5 U.S.C. 1204(e)(3)].

The Federal Government is facing many workforce challenges in the years ahead, and the results of this survey will help the President, Congress, and other Federal decision-makers develop policies that support both merit and our agency's mission. Federal employees have an opportunity to voice their opinions and concerns, thereby informing workforce management policy and practices through this survey.

The MSPB plans to administer the 2010 Merit Principles Survey to approximately 80,000 employees, including managers, in the Federal Government in late June 2010. In addition, Federal agencies and major unions are being informed of the survey and are encouraged to support Federal employee participation.

This survey effort will focus on prohibited personnel practices and whistleblower protections issues, along with other workplace issues that impact employees' abilities to carry out the missions of their agency. As we did in the 2007 MPS, the 2010 survey will be administered via the web. Participation is voluntary and responses will be kept strictly confidential by our survey staff. We will post a summary report of the survey results on the MSPB website (www.mspb.gov) and also make print versions available to the public by request.

The U.S. Merit System Protection Board (MSPB) is an independent, quasi-judicial agency that protects Federal merit systems and the rights of individuals within those systems. The MSPB also conducts studies of the civil service and other merit systems in the Executive Branch. To request a printed copy of OPE reports, email STUDIES@mspb.gov; call (202) 653-6772, ext 1350; or write to the U.S. Merit Systems Protection Board, Office of Policy and Evaluation, 1615 M Street NW, Washington, DC 20419.

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FOR IMMEDIATE RELEASE
May 6, 2010

**MERIT SYSTEMS PROTECTION BOARD (MSPB) SEEKS IDEAS FOR FEDERAL WORKFORCE MANAGEMENT ISSUES ON RESEARCH AGENDA**

The U.S. Merit Systems Protection Board (MSPB) is developing its research agenda for the next three years and invites all interested members of the Federal community to propose suggestions for inclusion in this future research. Anyone interested in providing input to this effort can take a brief survey at www.mspb.Gov/studies or email your ideas to research.agenda@mspb.gov.

Part of MSPB's statutory mandate is to conduct studies of the Government's merit systems to determine whether they are operating in accord with the Merit System Principles and are free from Prohibited Personnel Practices. Every three years, we actively seek input from our stakeholders about appropriate topics to study.

In recent years, MSPB has released studies on various aspects of Federal workforce management, including employee engagement, fair and equitable treatment, managing poor performers in the workplace, and the use of job simulations as Federal hiring tools. In the longer term, MSPB has conducted research in the broad areas of employee recruitment

and selection, fair treatment, employee development, and effective management.

The MSPB will actively solicit research ideas from Federal employees and supervisors, unions and other employee groups, HR directors, and other stakeholders during the next several weeks. We invite and welcome your participation in identifying the most important workforce management issues facing the Federal Government. Please feel free to share this invitation with anyone who may also have research ideas to share.

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FOR IMMEDIATE RELEASE
June 14, 2010

**MERIT SYSTEMS PROTECTION BOARD (MSPB) RELEASES NEW REPORT: "PROHIBITED PERSONNEL PRACTICES – A STUDY RETROSPECTIVE"**

In a newly released report, "Prohibited Personnel Practices – A Study Retrospective," the MSPB announced that it is launching a reexamination of the prevalence of prohibited personnel practices within the Federal Government, and is, therefore, issuing this retrospective report to provide its stakeholders a foundation of past MSPB research that explored these issues.

MSPB has conducted extensive research to analyze the occurrence of prohibited personnel practices in the Federal Government, as well as adherence to their complement, the merit system principles. In selected previous reports that are summarized in the new retrospective report, MSPB has noted that the percentage of employees reporting discrimination based on ethnicity/race, sex, age, and religion have declined over time, while an increasing percentage of Federal employees believe that they are being treated fairly.

However, MSPB has also acknowledged that the Federal Government still has work to do to ensure a workplace free of prohibited personnel practices. For

example, although a decreasing percentage of employees believe that they have experienced prohibited discrimination, many employees believe that personnel decisions are often based on factors other than merit, such as favoritism. There is also a continuing gap between minority and nonminority employees' perceptions of the prevalence of discrimination and other prohibited personnel practices.

Avoiding prohibited personnel practices is critical since the existence of just one such action can damage the working environment in any organization. As MSPB Chairman Susan Tsui Grundmann observes, "These prohibitions are important because they help ensure managers treat employees fairly and equitably, while strengthening the trust the American public has that their public servants are not being managed arbitrarily or based on non-merit factors."

MSPB's reexamination of prohibited personnel practices will give particular attention to whistleblower retaliation. Upcoming studies will investigate what the law requires an employee to be considered a whistleblower, an examination of the whistleblower process, barriers to reporting wrongdoing, and a review of recent cases brought to MSPB to evaluate how whistleblowers fare in the adjudication of their complaints.

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studies of the civil service and other merit systems in the Executive Branch. To request a printed copy of OPE reports, email STUDIES@mspb.gov; call (202) 653-6772, ext 1350; or write to the U.S. Merit Systems Protection Board, Office of Policy and Evaluation, 1615 M Street NW, Washington, DC 20419.

June 16, 2010

Mr. John Crum, Ph.D., Director,
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**Via:** Annette Butler

**Subject:** 31 Years of Lawbreaking at U.S. Office of Special Counsel (OSC) and Enabling Lawbreaking at U.S. Merit Systems Protection Board (MSPB) Nullifies the Fundamental Objective of the Civil Service Reform Act (CSRA) of 1978

Dear Dr. Crum,

It will take moral courage on your part and on the part of the Board members to objectively evaluate my concerns. For that reason, I suspect my concerns will be dismissed without such consideration. I hope you/MSPB prove me wrong. I wish I had a nickel for every time a Department of Energy (DOE) employee has told me something as, "You are right, Joe, but I do not have your moral courage, I must provide for myself and my family, I cannot risk openly supporting you."

On the other hand, America is much diminished and more threatened, including being at unnecessarily increased risk of a nuclear 9/11, because of 31 years of unabated OSC/MSPB lawbreaking, which impact the entire Executive Branch.

**1. Background**

There is an extraordinary amount of detailed background information available online, particularly at a blog I created for my related "Differing Professional Opinion" in DOE <http://whsknox.blogs.com/dpo>. This includes:

- My May 30, 2010 letter to President Obama, <http://whsknox.blogs.com/nolan_osc/president_may30.pdf>
- My June 5, 2010 letter to William Reukauf, the Acting Special Counsel, head of the Office of Special Counsel (OSC) <http://whsknox.blogs.com/nolan_osc/osc_reconsider_final.pdf>
- 
- The filings, including the amicus curiae brief, in my Supreme Court case, *Carson v. Merit Systems Protection Board*, S. Ct. docket no. 09-1207 <http://whsknox.blogs.com/supremecourt/>
- The "campaign" blog of Dave Nolan <www.NolanforOSC.com>. Mr. Nolan is a whistleblowing former DOE attorney, who has proposed a platform of hope and reform for the U.S. Office of Special Counsel (OSC), and is openly seeking to be nominated for the position of Special Counsel by President Obama
- and, the dated, <www.carsonversusdoe.com>

But the focus on my concerns should not the 18 years of my case, except as my experiences illustrate my contentions that OSC is a 31 year-long lawbreaking fraud of a federal law enforcement agency, MSPB is

its 31 year-long lawbreaking enabler and that this OSC/MSPB lawbreaking preclude the fundamental objective of the Civil Service Reform Act of 1978, in DOE and other agencies – that federal employees be able to do their duties in a trustworthy – ethical, competent, and accountable – fashion, per the "merit system principles,"[1] while being adequately protected from reprisal and other types of prohibited personnel practices (PPP's).[2]

**Are my Concerns credible? Am I credible?**

The established legal record of DOE lawbreaking against me makes a mockery of its oft-proclaimed policy of "zero tolerance for reprisal." From my perspective, a lack of moral courage by the DOE Inspector General and HQ Employee Concerns Manager, together with the active involvement in the lawbreaking by senior staff of DOE HQ Personnel Management and Office of General Counsel, is one reason DOE's reprisal has gone on for 18 years. Having said that, other than for their likely contributing role in one or more workplace fatalities in DOE, I no longer much blame the responsible DOE managers. They were guided in their lawbreaking, every step of way, by DOE personnel specialists and

[1] The nine "merit system principles" are codified at 5 U.S.C. §2301(b)

[2] The twelve types of PPP are codified at 5 U.S.C. §2302(b)

lawyers and the entire thing was enabled by 31 years of unabated OSC/MSPB lawbreaking.

Leah Dever, the-then manager of the Oak Ridge Office, tried to negotiate an equitable settlement in the Summer of 2001, by which I would get an equitable amount of "front pay," along with high official recognition to resign from DOE, but it was apparently stopped by Eric Fygi, DOE's long-time top career lawyer, whom I suspect played an active role in the reprisal and lawbreaking I experienced. Robert Kelley, MSPB's settlement attorney, was quite involved in this. Then 9/11 happened.

I am named for a NYC Fireman, my grandfather, and grew up in Brooklyn where I watched the erection of the World Trade Center while walking to the subway to go to high school in the late 1960's. Mixed with my anger and humiliation was a strong sense of relief, "at least it is not nuclear," knowing how dysfunctional/ corrupt DOE is (DOE could not even get whistle-blower reprisal right, something easy to do in the federal government) and its mission as the custodian of America's nuclear stockpile.

Ultimately, I am motivated by my Christian faith and worldview by which mankind is made in God's image as His "creation-caring for creature" with stewardship responsibilities for planet earth and its inhabitants, human and other. Life has been very good to me, I had an opportunity to pursue any number of careers, I chose to become a licensed professional engineer (PE). So I will be one, including the duty to "blow

whistles," when necessary to protect others, regardless of possible employer/client retribution.

As a result of many years of risk, sacrifice, loss, "suffering for righteousness' sake," and tremendous exertion to defend and uphold my profession of engineering, its code of ethics, and the public health and safety – together with the merit system principles – I am now an influential member of mankind's largest and most global profession of engineering, whose 20 million degreed members collectively hold civilization and much of the natural environment in their hands, as well as the federal civil service, whose 2 million members have vital responsibilities for America's security, health, safety, environment, and welfare.

"Suffering for righteousness' sake," is not necessarily to be shunned by a Christian. It is a privilege of a sort, because it is suffering that results from a moral choice and can – not necessarily will or must – result in tangible contributions to the common good. This is in comparison to much, if not most, human suffering which comes unbidden and unwanted and frequently apparently senseless. But it is suffering nonetheless, I can assure you.

**2. What are the issues?**

By the CSRA of 1978 (there are literally volumes about its legislative history,[3] the Senate legislative history is found in Senate Report 95-969, also found at 1978 U.S. Code and Congressional Administrative News (U.S.C.C.A.N) starting at page 2723), complementary responsibilities to ensure federal employees are adequately protected from reprisal and other PPP's were given to OSC, MSPB, and agency heads. OSC is the federal law enforcement agency specifically created to protect federal employees from PPP's.[4] [5] MSPB has a check and balance function on

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[3] See *Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982), for a background to CSRA and multiple cites to its legislative history.

[4] Since passage of the 1989 Federal Whistleblower Protection Act (WPA), OSC has the additional statutory mandate to "act in the interests" of employees seeking OSC's protection, see 5 U.S.C. §1201 endnotes, citing "finding and purposes" section of WPA. Regardless, OSC renounced any tangible nondiscretionary duty to protect federal employees from reprisal and other PPP's at its creation in 1979 when it decided, contrary to the clear wording of the law and its legislative history, that the reporting requirements of what is now 5 U.S.C. §1214(e) does not apply to PPP's and other violations within its jurisdiction. OSC has yet to make a §1214(e) report – not in 31 years, in which it has conducted over 50,000 investigations. This fact is indisputable, as these reports and the agency-head certified agency response become permanent, publicly available records, per 5 U.S.C. §1219(a)(3), and I have personally inspected OSC's public records – as anyone else can – and verified there are no §1214(e) reports. OSC's Annual Reports to Congress and OSC's response to my FOIA request for any §1214(e) reports also verify that OSC has never issued a §1214(e) report.

OSC. If OSC is too zealous as a prosecutor in seeking corrective action (or disciplinary action) for a PPP, MSPB checks it via its adjudicative function. If OSC fails to comply with its nondiscretionary statutory duties to protect federal employees from PPP's, MSPB should expose it via its "special studies" function.[6]

MSPB plays a similar role with agencies – its adjudicative function should ensure federal employees are not harmed by PPP's,[7] while its "special studies" function verifies agency heads compliance with their positive duty to "prevent PPP" – to ensure their

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[5] OSC is singular as a federal law enforcement agencies – its charter is to protect federal employees from federal agency lawbreaking. It is a unique charter and current legal ethics simply do not address the ethical issues that can arise for OSC attorneys, including the Special Counsel, in discharging it (as one example – is the Special Counsel, who must be an attorney, the boss of OSC or is OSC her client, whose interests she must hold paramount?) OSC's 31 years of lawbreaking – as the enabling MSPB lawbreaking – reflect, to a significant degree, significant and persistent deficiencies in the scope and implementation of legal ethics for government attorneys, exacerbated by OSC's singular mission.

[6] See 5 U.S.C. §1204(a)(3) and (e)(3). See 1978 U.S.C.C.A.N. pages 2751 and 2753 for associated legislative history. Bottom line, MSPB has not and cannot tell Congress and the President whether federal employees are adequately protected from PPP's because it has not conducted the requisite "special studies" of OSC and agencies.

[7] Together with OSC and agency heads, MSPB is responsible to implement a statutory mandate of the Federal Whistleblower Protection Act of 1989 (WPA) to ensure federal employee are not impacted by PPP's, see 5 U.S.C. §1201, endnotes, citing "finding and purposes" section of WPA

employees are adequately protected from PPP's. Agency heads are charged to "prevent PPP's" – to ensure their employees are adequately protected from them, relying on the information they receive from OSC and MSPB to do so.[8]

This statutory framework was stillborn in 1979, when OSC renounced any tangible nondiscretionary statutory duty to protect federal employees from PPP's and MSPB renounced its nondiscretionary statutory duty to conduct "special studies" of OSC's interpretation of and compliance with its nondiscretionary statutory duties to protect federal employees from PPP's and of agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's." As a result, agency heads are clueless about whether their employees are adequately protected from PPP's – and they are not, given the 31 years of OSC lawbreaking.[9] [10]

The harm to the federal civil service is grave and unabated – the fundamental purpose of the CSRA has

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[8] See 5 U.S.C. §2302(c) and 1978 U.S.C.C.A.N. 2745

[9] In past 8 months, I have requested records, via FOIA, of about 20 agencies for their compliance with 5 U.S.C. §2302(c), including delegations of authority. No agency, including DOE, OSC, MSPB, DNFSB, NWTRB, and OPM have any records by which their heads could tell their employees they are, in objective fact, adequately protected from reprisal and other PPP's.

[10] Including MSPB – Chairman Grundmann cannot tell MSPB employee there is an objective basis for her to claim they are adequately protected from PPP's, based on MSPB's response to my FOIA request.

been nullified because federal employees are not adequately protected from reprisal and other PPP's.[11] This has allowed corruption and dysfunction to take root and flourish in many federal workplaces, including DOE, particularly including its ES&H programs (as evidenced by the tragedy of thousands of sick workers) which has caused, in turn, inestimable harm to America, including a steep erosion in the public's trust of American institutions, including federal agencies and the institutions which they regulate.

There should be thousands of OSC's §1214(e) reports and the agency-head certified responses in OSC's publicly available records. Instead, there are none and OSC claims to have no tangible nondiscretionary duty to enforce the laws under its jurisdiction. It also claims its negative jurisdictional determinations for the PPP complaints it receives are beyond Court review. It is an unaudited and unauditable able "black box" which aggressively destroys all its investigation records in a remarkably short period of time – 3 years.

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[11] See 5 U.S.C. §1101 (endnotes) cites the "findings and purpose" section of the CRSRA of 1978, Section 3(1) states: "It is the policy of the United States that in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;" See 1978 U.S.C.C.A.N. page 2727

MSPB should have conducted regular "special studies," per §1204(a)(3), during past 31 years of OSC and agency heads (including all agencies, including intelligence ones, as well as government corporations, and the White House – the mandate is for "special studies related to the civil service and to **other merit systems in the executive branch**")[12] interpretation of and compliance with their nondiscretionary statutory duty to protect federal employees from PPP's. It should have regularly reported to the President and Congress whether federal employees were adequately protected from PPP's. It has not.[13] Additionally, it appears to have no intention of doing so in the next year – all it now plans to study is the "prevalence" of PPP's – with no consideration as to whether OSC and agency heads are, in fact, obeying the relevant laws – and how can federal employees possibly be adequately protected from PPP's if they do not?.[14]

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[12] This statutory requirement is why the name is "Merit **Systems** Protection Board," instead of the "Merit System Protection Board." MSPB jurisdiction for conducting "special studies" extends to parts of the Executive Branch for which it has no, or quite limited, adjudicatory jurisdiction.

[13] The new Chairman of MSPB, Susan Grundmann, admitted as much in her sworn testimony during her Senate Confirmation hearing – that she would conduct the necessary special studies so she could make such a report. A May 6, 2010 MSPB press release states this will be a focus of an upcoming special study, See <www.mspb.gov/netsearch/viewdocs.aspx?docnumber=497112&version=498514&application=ACROBAT>.

[14] See Chairman Grundmann's cover letter to MSPB's June 2010 Special Study, "Prohibited Personnel Practices – A Study

(Continued on following page)

I have been employed by DOE for over 20 years. In that time I have read literally hundreds of assessment reports related to DOE, documenting many significant ES&H issues. Not a single one has asked or answered the highly relevant questions: "Do the as-found conditions implicate deficiencies to the implementation of the "merit system principles" in DOE? Do they implicate that DOE employees are not adequately protected from reprisal and other types of PPP's?" The same is true of every other investigation report I have read (hundreds) involving federal agencies.

The reason is that investigations conducted by the agency inspector generals, GAO, line management, etc just do not consider such questions because they go beyond the walls of an agency – and asking such questions would require input from OSC, MSPB and/or OPM. Instead, agencies tailor the scope of their investigations to their jurisdiction, even though the agencies with jurisdiction to ensure their employees can do their duties per the merit system principles while being adequately protected from PPP's extends beyond them.

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Retrospective," page 3 of <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=506980&version=508422&application=ACROBAT>

**3) What is your recommended action?**

A) That you, Mr. Crum, exhibit the moral courage necessary to threaten to publicly resign if the members of the MSPB will not exhibit the moral courage to threaten to publicly resign, if the President will not direct the Office of Legal Counsel to issue opinions on the following sections of law, or if the Office of Legal Counsel will not issue such opinions at their request:[15]

> §1204(a)(3) – is MSPB's 31 year-long interpretation by which it does not need to conduct the necessary studies of OSC and agencies to determine and report, to the President and Congress, whether federal employees are adequately protected from PPP's correct?[16]
>
> §1214(e) – is OSC's 31 year-long interpretation that its determinations of violations within its jurisdiction are excluded from §1214(e)'s reporting requirements correct?

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[15] The President has this authority by 28 U.S.C. §511 and 28 CFR §0.25. Heads of agencies have this authority by 28 U.S.C. §512 and 28 CFR §0.25. The website of the Office of Legal Counsel describes this, See <www.justice.gov/olc/>

[16] Three different federal courts (D.C.C., CADC, and Federal Circuit) have considered my claims that MSPB is not complying with its nondiscretionary statutory mandate regarding its "special studies" function, none have given MSPB a "clean bill of health," instead the decisions did not reach to the underlying merits, See *Carson v. MSPB*, docket no. 07-445, D.D.C. 2008 WL 441509

§2302(c) – can an agency head comply with his duty to "prevent PPP's" merely by issuing policy that says "do not commit PPP's" – or does he need to positively ensure that his employees are adequately protected from PPP's?[17]

B) The members of the Board exhibit the moral courage to request the Solicitor General inform me, in response to my petition for rehearing, that it supports my petition and will file a response in acquiescence, if invited by the Supreme Court to respond to my petition for writ of certiorari in *Carson v. Merit Systems Protection Board*, S.Ct. Docket no. 09-1207. This case is all about law (as cases that warrant the attention of the Supreme Court generally are), there are no disputed facts.

The full Board was not involved in the underlying MSPB decision which is an initial decision which automatically became final (in retrospect, I would have filed a PFR, but I considered the AJ's decision so incorrect that I went directly to the Federal Circuit). The Board would be making an unmistakably clear statement, "there is a new Board in town," if it informed the Solicitor General that it wants the Supreme Court to remand the AJ's decision to it for its consideration.

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[17] OSC's 1989 Annual Report to Congress, see <www.osc.gov/documents/reports/annual%20report/annual%20report%201989.pdf>, on pages 2 and 3, describes how agency heads share the responsibility with OSC to ensure their employees are adequately protected from reprisal and other PPP's

This case, which involves no disputed facts, is all about jurisdiction, which is why MSPB is the respondent. MSPB shares a statutory mandate – with OSC and agency heads – that federal employees "should not suffer adverse consequences as a result of PPP's."[18] [19]

C) That MSPB Board Members, finally, 31 years later, exhibit the moral courage to comply with their nondiscretionary statutory duty and use MSPB's statutory power as necessary[20] to do oversight of OSC's interpretation of and compliance with its nondiscretionary statutory duties to "protect federal employees from PPP's" and agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's." How could MSPB possibly report, to the President and Congress, that "the public interest in a civil service free of PPP's be

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[18] See Pub. L. 101-12, Whistleblower Protection Act of 1989, section 2(b)(1), found in "endnotes" of 5 U.S.C. §1201.

[19] OSC's lawbreaking is the real cause of this case – if OSC were not a fraud, it would expansively interpret whistleblower protection statutes, consistent with its statutory mandate to "act in the interest" of employees who seek it protection. If it had, there would be case law at the Federal Circuit about when an agency action becomes a "personnel action" for creating "any other significant change in duties, responsibilities or working conditions." Instead, OSC cites the lack of such case law to justify its making negative jurisdictional determinations of complaints that allege this type of "personnel action." OSC is deeply corrupt and corrupting, if only the stakes were not so high for America.

[20] See 5 U.S.C. §1204(e)(3) and the related legislative history 1978U.S.C.C.A.N. pages 2751-53

adequately protected," if OSC and agency heads are not complying with their related nondiscretionary statutory duties?

**4) What could happen if there is no change in position?**

Status quo, agency heads will remain unable to demonstrate compliance with their statutory duty to ensure their employees are adequately protected from reprisal and other PPP's – and federal employees will NOT be adequately protected, because OSC will remain a lawbreaking fraud.

Bigger picture, America will continue to decline and remain at an unnecessarily increased risk of a nuclear 9/11 or other catastrophe, such as the unfolding one in the Gulf of Mexico. There will be no nuclear renaissance, America will not be the leader in moving to a new energy economy – the public trust in "experts" as Secretary Chu and in institutions at DOE will remain, as it now is, inadequate for this to happen, and rightfully so, because people with the lawful authority and responsibility cannot or will not take the actions necessary to ensure federal employees can do their jobs per the merit system principles while being adequately protected from reprisal and other PPP's.

**5) What else have you tried to do to resolve the issue?**

Everything else – DOE IG, Employees Concerns, Congress, media, five years of continuous litigation, none of this is in any corner. I have experienced a lack of the necessary moral courage by DOE IG, Employees Concerns program to resolve the issue – they point me down the hall to "someone else," apparently because they put their economic self-interest before their sworn duty as federal employees. If only the stakes were not so high – does anyone really think there is a good chance that our children and grandchildren will get to die natural deaths and/or live in desirable societies if present trends and facts are not better addressed?

**Conclusion:**

The federal civil service has missions at the crux of many of mankind's most pressing issues, but its employees will not demonstrate the necessary moral courage to put duty before self-interest when necessary. Why should they when OSC is a lawbreaking fraud, MSPB is its lawbreaking enabler, and agency heads cannot tell them that they are complying with their nondiscretionary statutory duty to ensure they are adequately protected from reprisal and other PPP's?

If I am correct, it is very **GOOD NEWS** for America! A previously unidentified, significant causal factor to

much of what has befallen and besets American has been found – and can be readily fixed!

Mr. Crum, you and your staff should feel free to contact me with any questions. I much appreciate Ms. Butler's attention to my concerns – and their basis in fact and law – on June 15, 2010. She encouraged me to contact you. I welcome a skeptical, questioning attitude, I certainly have one. I have nothing to hide about my actions and motivations.

Respectfully,

s/
Joseph Carson, PE
DOE Facility Representative
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831 (cell) 865-576-1478 (work)
jpcarson@tds.net, carsonj@oro.doe.gov

copy: I hope my concerns – and MSPB's response – warrants the attention of many stakeholders to the federal civil service. Therefore, I am widely circulating it and uploading it to a blog I created for this purpose, <http://whsknox.blogs.com/dpo>.

## 382 Organizations, Associations and Businesses Support Swift Action to Restore Strong, Comprehensive Whistleblower Rights

An Open Letter to President Obama
and Members of Congress

The undersigned organizations and corporations write to support the completion of the landmark, nine-year legislative effort to restore credible whistleblower rights for government employees. We offer our support to expeditiously pass legislation that includes the critical reforms listed below. Whistleblower protection is a foundation for any change in which the public can believe. It does not matter whether the issue is economic recovery, prescription drug safety, environmental protection, infrastructure spending, national health insurance, or foreign policy. We need conscientious public servants willing and able to call attention to waste, fraud and abuse on behalf of the taxpayers.

Unfortunately, every month that passes has very tangible consequences for federal government whistleblowers, because none have viable rights. Last year, on average, 16 whistleblowers a month lost initial decisions from administrative hearings at the Merit Systems Protection Board (MSPB). Since 2000, only two out of 54 whistleblowers have received final rulings in their favor from the MSPB. The Federal Circuit Court of Appeals, the only court which can hear federal whistleblower appeals of administrative decisions, has consistently ruled against whistleblowers, with whistleblowers winning only three

cases out of 202 since October 1994 when Congress last strengthened the law.

It is crucial that Congress restore and modernize the Whistleblower Protection Act by passing all of the following reforms:

- Grant employees the right to a jury trial in federal court;
- Extend meaningful protections to FBI and intelligence agency whistleblowers;
- Strengthen protections for federal contractors, as strong as those provided to DoD contractors and grantees in last year's defense authorization legislation;
- Extend meaningful protections to Transportation Security Officers (screeners);
- Neutralize the government's use of the "state secrets" privilege;
- Bar the MSPB from ruling for an agency before whistleblowers have the opportunity to present evidence of retaliation;
- Provide whistleblowers the right to be made whole, including compensatory damages;
- Grant comparable due process rights to employees who blow the whistle in the course of a government investigation or who refuse to violate the law; and
- Remove the Federal Circuit's monopoly on precedent-setting cases.

We know you share the commitment of every group signing the letter below to more transparency and accountability in government. Please let us know how we can participate to make this good government reform law to protect federal whistleblowers and taxpayers.

Sincerely,

382 Organizations, Associations and Businesses

Office and Professional Employees
International Union, A.F.L.-C.I.O., Local 2001

Faye Headrick, Business Representative

411 South Gay Street, Suite D (865) 637-6547 (Phone)
Knoxville, TN 37902 (865) 637-6548 (Fax)

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[Officers' Names Omitted In Printing]

July 8, 2010

Chairman Susan Grundmann
Merit Systems Protection Board (MSPB)
1615 M St, NW
Washington, DC 20419

Subject: ***Carson v. Merit Systems Protection Board*, S. Ct. No. 09-1207; Request for Your Support of Mr. Carson's Pending Petition for Rehearing**

Dear Chairman Grundmann,

The Office and Professional Employees International Union (OPEIU), Local 2001, represents Department of Energy (DOE) employees in Oak Ridge, Tennessee, including Mr. Joe Carson, P.E. Mr. Carson has prevailed in a number of whistleblower cases against DOE at considerable expense to himself. DOE's established legal record against Mr. Carson is troubling, to say the least.[1]

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[1] It is summarized in Mr. Carson's petition for writ of certiorari, available at <http://whsknox.blogs.com/supremecourt>.

The Merit Systems Protection Board (MSPB) shares a positive legal mandate, with the Office of Special Counsel (OSC) and Agency heads, " . . . that employees should not suffer adverse consequences as a result of prohibited personnel practices."[2] How has that mandate, let alone DOE's oft-repeated policy statement of "zero tolerance for reprisal," been met for Mr. Carson?

At tremendous personal and professional cost, Mr. Carson has, for 18 years now, defended and upheld the "merit system principles" and engineering ethics. It now has him in front of the Supreme Court in what could be the most important federal whistleblower case there since 1994, if not 1979. It involves a key 1994 law – 5 U.S.C. 2302(a)(2)(A)(xi) – which expands the definition of "personnel action" to include "any other significant change in duties, responsibilities or working conditions" – about which there is no precedent at the U.S. Court of Appeals for the Federal Circuit; and a key Supreme Court decision, *Burlington v. White*, 126 S.Ct. 2405 (2006) about which MSPB has to date established no precedent. The Solicitor General "waived" its response to Mr. Carson's petition for certiorari and the Supreme Court denied it on May 17, 2010 (one of the 247 out of 250 petitions it denied that day).

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[2] See 5 U.S.C. §1201 "endnote," citing P.L. 101-12, The Federal Whistleblower Protection Act of 1989, section 2(b)(1).

Unless the Solicitor General informs Mr. Carson that it supports his petition for rehearing and files a response in acquiescence, if invited by the Supreme Court, the Supreme Court will doubtlessly deny his petition for rehearing, likely by the end of July. These Solicitor General actions will not happen unless you request the Solicitor General, who is representing you, to do so.

Why should you do this? First, you would be sending an unmistakably clear signal that under your leadership, the MSPB is taking seriously its statutory mandate to protect people like Mr. Carson from reprisal and other prohibited personnel practices (PPPs). Second, if the Supreme Court remands the case to the MSPB, it would have a chance to establish precedent regarding the applicability of *Burlington* to PPPs, particularly reprisal involving "any other significant change in duties, responsibilities or working conditions." The Full Board did not review the initial decision of the administrative judge prior to its being appealed to the U.S. Court of Appeals for the Federal Circuit and the Supreme Court. Since the Federal Circuit did not issue a written opinion in upholding the MSPB decision, your requesting it to be remanded to the Full Board for further consideration is readily justifiable.

All federal employee unions should support this. This is because MSPB establishing precedent that *Burlington* applies in determining whether an agency action is a "personnel action" in a PPP case could be

cited by arbiters in resolving PPP complaints per the negotiated grievance procedure.

There are no disputed facts about the agency actions involved in the case, it is strictly about law – an important law for which there is no precedent, 16 years later at the Federal Circuit; and about the applicability of *Burlington* to that law, about which there is no precedent at MSPB, four years after *Burlington* was issued. I respectfully request you give this matter every consideration – you are likely the ultimate decision maker and the stakes are considerable.

Respectfully,

R. Max Smith, Shop Chair
OPEIU Local 2001

cc:
The Honorable Dr. Steven Chu, Secretary of Energy
The Honorable Ms. Elena Kagan,
U.S. Solicitor General
Mr. Norman L. Eisen, President's Special Counsel
for Ethics and Government Reform
Ms. Colleen M. Kelley, National President,
National Treasury Employees Union
Mr. John Gage, National President,
American Federation of Government Employees
Mr. Michael Goodwin,
International President, OPEIU

June 7, 2010

Mary Haughey
Differing Professional Opinion Manager (DPOM)
Department of Energy
Germantown, MD
<mary.haughey@eh.doe.gov>

**Subject:** A Differing Professional Opinion (DPO) – 31 Years of Lawbreaking at U.S. Office of Special Counsel (OSC) and Enabling Lawbreaking at U.S. Merit Systems Protection Board (MSPB) Nullifies the Fundamental Objective of the Civil Service Reform Act of 1978, Precludes the Secretary of Energy From Compliance with His Duty to Ensure DOE Employees Are Adequately Protected From Reprisal and Other Prohibited Personnel Practices (PPP's), and is a Significant Causal Factor in Deepwater Horizon BP Oil Spill in Gulf of Mexico

Dear Ms. Haughey,

It will take moral courage on your part to accept this DPO. If it is accepted, it will take moral courage on the part of the evaluation panel. For that reason, I suspect it will be closed without consideration. I hope you prove me wrong. I wish I had a nickel for every time a DOE employee has told me something as, "You are right, Joe, but I do not have your moral courage, I must provide for myself and my family, I cannot risk openly supporting you."

I base the format this DPO on the sample submittal form in DOE M 442.1-1, "Differing Professional Opinions Manual."[1]

**Statement about "Risk of Imminent Danger"**

The Secretary of Energy, together with the National Laboratories, have been tasked by the President to play a lead role in efforts to stem the oil leak in the Gulf of Mexico.[2] The President's Executive Order of May 22, 2010, establishing the "National Commission of the BP Deepwater Horizon Oil Spill and Offshore Drilling," names the DOE as the responsible agency for supporting the Commission.[3] So I think this DPO involves an ongoing ES&H disaster, such as our Country has not experienced before, involving DOE. Additionally, America is much diminished and more threatened, including being at unnecessarily increased risk of a nuclear 9/11, because of this issues addressed in this DPO, which transcend DOE to include the entire Executive Branch.

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[1] See https://www.directives.doe.gov/directives/current-directives/442.1-DManual-1/at_download/file

[2] See DOE May 28, 2010 press release, "DOE's Scientific Response to the Oil Spill," http://www.energy.gov/news/9017.htm

[3] See http://www.whitehouse.gov/the-press-office/executive-order-national-commission-bp-deepwater-horizon-oil-spill-and-offshore-dri

**1. Background**

There is an extraordinary amount of detailed background information available online. This includes:

- My May 30, 2010 letter to President Obama, <http://whsknox.blogs.com/nolan_osc/president_may30.pdf>
- My June 5, 2010 letter to William Reukauf, the Acting Special Counsel, head of the Office of Special Counsel (OSC) <http://whsknox.blogs.com/nolan_osc/osc_reconsider_final.pdf>
- The filings, including the amicus curiae brief, in my Supreme Court case, Carson v. Merit Systems Protection Board, S. Ct. docket no. 09-1207 <http://whsknox.blogs.com/supremecourt/>
- The "campaign" blog of Dave Nolan <www.NolanforOSC.com>. Mr. Nolan is a whistleblowing former DOE attorney, who has proposed a platform of hope and reform for the U.S. Office of Special Counsel (OSC), and is openly seeking to be nominated for the position of Special Counsel by President Obama
- and, the dated, <www.carsonversusdoe.com>

But the focus on my DPO's issues should not 18 years of my case except as it illustrates my contentions that OSC is a 31 year-long lawbreaking fraud of a federal law enforcement agency, MSPB is its 31 year-long lawbreaking enabler and that this OSC/MSPB lawbreaking preclude the fundamental objective of the Civil Service Reform Act of 1978, in DOE and other agencies, that federal employees be able to do their duties in a trustworthy – ethical, competent, and

accountable – fashion, per the "merit system principles,"[4] while being adequately protected from reprisal and other types of prohibited personnel practices (PPP's).[5]

I think one more DOE workplace fatalities, including David Wicks at ETTP in 1993 and Sam Roe at ETTP in 1997 as well as some Hanford workers, cooked alive by steam after a water hammer induced pipe failure in a piping chase in mid-1990's, together with many, if not most, of the illnesses, disabilities and premature deaths of 10,000 or more paid claimants under the Energy Employee Occupational Illness Compensation Program Act (EEOICPA) of 2000, would have been prevented if the Secretary of Energy, since 1979, had been able to comply with his duty to ensure DOE employees were adequately protected from reprisal and other types of prohibited personnel practices (PPP's).[6]

**Is this DPO credible? Am I credible?**

The established legal record of DOE lawbreaking against me makes a mockery of its oft-proclaimed policy of "zero tolerance for reprisal." From my

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[4] The nine "merit system principles" are codified at 5 U.S.C. §2301(b)

[5] The twelve types of PPP are codified at 5 U.S.C. §2302(b)

[6] See 5 U.S.C. 2302(c). The legislative history for this section of the law, which stresses objective compliance, not mere "compliance by policy statement," is at 78 U.S.C.C.A.N. 2745

perspective, a lack of moral courage by the DOE Inspector General and HQ Employee Concerns Manager, together with the active involvement in the lawbreaking by senior staff of DOE HQ Personnel Management and Office of General Counsel, is one reason DOE's reprisal has gone on for 18 years.

Having said that, other than for their likely contributing role in one or more workplace fatalities in DOE, I no longer much blame the responsible DOE managers. They were guided in their lawbreaking, every step of way, by DOE personnel specialists and lawyers.

Leah Dever, the-then manager of the Oak Ridge Office, tried to negotiate an equitable settlement in the Summer of 2001, by which I would get an equitable amount of "front pay," along with high official recognition to resign from DOE, but it was apparently stopped by Eric Fygi, DOE's long-time top career lawyer, whom I suspect played an active role in the reprisal and lawbreaking I experienced. Then 9/11 happened. I am named for a NYC Fireman, my grandfather, and grew up in Brooklyn where I watched the erection of the World Trade Center while walking to the subway to go to high school in the late 1960's. Mixed with my anger and humiliation was a strong sense of relief, "at least it is not nuclear," knowing how dysfunctional/corrupt DOE is (DOE could not even get whistleblower reprisal right, something easy to do in the federal government) and its mission as the custodian of America's nuclear stockpile.

Ultimately, I am motivated by my Christian faith and worldview by which mankind is made in God's image as His "creation-caring for creature" with stewardship responsibilities for planet earth and its inhabitants, human and other. Life has been very good to me, I had an opportunity to pursue any number of careers, I chose to become a licensed professional engineer (PE). So I will be one, including the duty to "blow whistles," when necessary to protect others, regardless of possible employer/client retribution.

As a result of many years of risk, sacrifice, loss, "suffering for righteousness' sake," and tremendous exertion to defend and uphold my profession of engineering, its code of ethics, and the public health and safety – together with the merit system principles – I am now an influential member of mankind's largest and most global profession of engineering, whose 20 million degreed members collectively hold civilization and much of the natural environment in their hands, as well as the federal civil service, whose 2 million members have vital responsibilities for America's security, health, safety, environment, and welfare.

"Suffering for righteousness' sake," is not necessarily to be shunned by a Christian. It is a privilege of a sort, because it is suffering that results from a moral choice and can – not necessarily will or must – result in tangible contributions to the common good. This is in comparison to much, if not most, human suffering which comes unbidden and unwanted and frequently apparently senseless. But it is suffering nonetheless, I can assure you.

Secretary Chu attended the University of Rochester as an undergraduate, just as I, its motto is "Meliora" and I perceive, at least at times, God's presence as I pursue "meliora" in my profession of engineering, DOE, and the federal civil service.

**2. What is the issue?**

By the CSRA of 1978 (there are literally volumes about its legislative history,[7] the Senate legislative history is found in Senate Report 95-969, also found at 1978 U.S. Code and Congressional Administrative News (U.S.C.C.A.N) starting at page 2723), complementary responsibilities to ensure federal employees are adequately protected from reprisal and other PPP's were given to OSC, MSPB, and agency heads. OSC is the federal law enforcement agency specifically created to protect federal employees from PPP's.[8] MSPB has a check and balance function on

[7] See *Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982), for a background to CSRA and multiple cites to its legislative history.

[8] Since passage of the 1989 Federal Whistleblower Protection Act (WPA), OSC has the additional statutory mandate to "act in the interests" of employees seeking OSC's protection, see 5 U.S.C. §1201 endnotes, citing "finding and purposes" section of WPA. Regardless, OSC renounced any tangible nondiscretionary duty to protect federal employees from reprisal and other PPP's at its creation in 1979 when it decided, contrary to the clear wording of the law and its legislative history, that the reporting requirements of what is now 5 U.S.C. §1214(e) does not apply to PPP's and other violations within its jurisdiction. OSC has yet to make a §1214(e) report – not in 31 years, in which it has

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OSC. If OSC is too zealous as a prosecutor in seeking corrective action (or disciplinary action) for a PPP, MSPB checks it via its adjudicative function. If OSC fails to comply with its nondiscretionary statutory duties to protect federal employees from PPP's, MSPB should expose it via its "special studies" function.[9]

MSPB plays a similar role with agencies – its adjudicative function should ensure federal employees are not harmed by PPP's,[10] while its "special studies" function verifies agency heads compliance with their positive duty to "prevent PPP" – to ensure their employees are adequately protected from PPP's. Agency heads are charged to "prevent PPP's" – to ensure their employees are adequately protected from them,

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conducted over 50,000 investigations. This fact is indisputable, as these reports and the agency-head certified agency response become permanent, publicly available records, per 5 U.S.C. §1219(a)(3), and I have personally inspected OSC's public records – as anyone else can – and verified there are no §1214(e) reports. OSC's Annual Reports to Congress and OSC's response to my FOIA request for any §1214(e) reports also verify that OSC has never issued a §1214(e) report.

[9] See 5 U.S.C. §1204(a)(3) and (e)(3). See 1978 U.S.C.C.A.N. pages 2751 and 2753 for associated legislative history. Bottom line, MSPB has not and cannot tell Congress and the President whether federal employees are adequately protected from PPP's because it has not conducted the requisite "special studies" of OSC and agencies.

[10] Together with OSC and agency heads, MSPB is responsible to implement a statutory mandate of the Federal Whistleblower Protection Act of 1989 (WPA) to ensure federal employee are not impacted by PPP's, see 5 U.S.C. §1201, endnotes, citing "finding and purposes" section of WPA

relying on the information they receive from OSC and MSPB to do so.[11]

This statutory framework was stillborn in 1979, when OSC renounced any tangible nondiscretionary statutory duty to protect federal employees from PPP's and MSPB renounced its nondiscretionary statutory duty to conduct "special studies" of OSC's interpretation of and compliance with its nondiscretionary statutory duties to protect federal employees from PPP's and of agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's." As a result, agency heads are clueless about whether their employees are adequately protected from PPP's – and they are not, given the 31 years of OSC lawbreaking.[12] [13]

The harm to the federal civil service is grave and unabated – the fundamental purpose of the CSRA has been nullified because federal employees are not adequately protected from reprisal and other PPP's.[14]

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[11] See 5 U.S.C. §2302(c) and 1978 U.S.C.C.A.N. 2745

[12] In past 8 months, I have requested records, via FOIA, of about 20 agencies for their compliance with 5 U.S.C. §2302(c), including delegations of authority. No agency, including DOE, OSC, MSPB, DNFSB, NWTRB, and OPM have any records by which their heads could tell their employees they are, in objective fact, adequately protected from reprisal and other PPP's.

[13] DOE's responses to my FOIA request HQ-2010-00089 and TFA-0346 are at <http://whsknox.blogs.com/dpo>.

[14] See 5 U.S.C. §1101 (endnotes) cites the "findings and purpose" section of the CRSRA of 1978, Section 3(1) states: "It is the policy of the United States that in order to provide the people of

(Continued on following page)

This has allowed corruption and dysfunction to take root and flourish in many federal workplaces, including DOE, particularly including its ES&H programs (as evidenced by the tragedy of thousands of sick workers) which has caused, in turn, inestimable harm to America, including a steep erosion in the public's trust of American institutions, including federal agencies and the institutions which they regulate.

There should be thousands of OSC's §1214(e) reports and the agency-head certified responses in OSC's publicly available records. Instead, there are none and OSC claims to have no tangible nondiscretionary duty to enforce the laws under its jurisdiction. It also claims its negative jurisdictional determinations for the PPP complaints it receives are beyond Court review. It is an unaudited and unauditable able "black box" which aggressively destroys all its investigation records in a remarkably short period of time – 3 years.

MSPB should have conducted regular "special studies," per §1204(a)(3), during past 31 years of OSC and agency heads interpretation of and compliance with their nondiscretionary statutory duty to protect

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the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;" See 1978 U.S.C.C.A.N. page 2727

federal employees from PPP's. It should have regularly reported to the President and Congress whether federal employees were adequately protected from PPP's. It has not.[15]

I have been employed by DOE for over 20 years. In that time I have read literally hundreds of assessment reports related to DOE, documenting many significant ES&H issues. Not a single one has asked or answered the highly relevant questions: "Do the as-found conditions implicate deficiencies to the implementation of the "merit system principles" in DOE? Do they implicate that DOE employees are not adequately protected from reprisal and other types of PPP's?"

The reason is that investigations conducted by the DOE Inspector General, HSS, GAO, line management, etc just do not consider such questions because they go beyond the walls of DOE and would require input from OSC, MSPB and/or OPM. DOE tailors the scope of its investigations to its jurisdiction, even though the agencies with jurisdiction to ensure DOE employees can do their duties per the merit system

[15] The new Chairman of MSPB, Susan Grundmann, admitted as much in her sworn testimony during her Senate Confirmation hearing – that she would conduct the necessary special studies so she could make such a report. A May 6, 2010 MSPB press release states this will be a focus of an upcoming special study, See <www.mspb.gov/netsearch/viewdocs.aspx?docnumber=497112&version=498514&application=ACROBAT>

principles while being adequately protected from PPP's extends beyond DOE.

**2) What is your recommended action?**

A) The Secretary of Energy exhibit the moral courage to threaten to publicly resign, if the President will not direct the Office of Legal Counsel to issue opinions on the following sections of law, or if the Office of Legal Counsel will not issue such opinions at the Secretary of Energy's request:[16]

> §1204(a)(3) – is MSPB's 31 year-long interpretation by which it does not need to conduct the necessary studies of OSC and agencies to determine and report, to the President and Congress, whether federal employees are adequately protected from PPP's correct?
>
> §1214(e) – is OSC's 31 year-long interpretation that its determinations of violations within its jurisdiction are excluded from §1214(e)'s reporting requirements correct?
>
> §2302(c) – can an agency head comply with his duty to "prevent PPP's" merely by issuing policy that says "do not commit PPP's" – or

[16] The President has this authority by 28 U.S.C. §511 and 28 CFR §0.25. Heads of agencies have this authority by 28 U.S.C. §512 and 28 CFR §0.25. The website of the Office of Legal Counsel describes this, See <www.justice.gov/olc/>

does he need to positively ensure that his employees are adequately protected from PPP's?[17]

B) The Secretary exhibit the moral courage to request the Solicitor General inform me that it will file a response in acquiescence, if invited by the Supreme Court to respond to my petition for writ of certiorari in *Carson v. Merit Systems Protection Board*, S.Ct. Docket no. 09-1207. This case is all about law (as cases that warrant the attention of the Supreme Court generally are), there are no disputed facts. Only DOE attorneys oppose this and DOE attorneys, up to the Eric Fygi level, are implicated in the reprisal I allege in the underlying case. So their advice is self-serving, they want the case dismissed on jurisdictional grounds to prevent their role in the reprisal I allege from being examined. Their advice is also inconsistent with the Secretary's non-discretionary statutory duty to "prevent PPP's" in DOE.

C) The Secretary to institute a DOE policy requiring it and its contractor engineers be licensed professional engineers (PE's) as a condition of their employment (with appropriate grandfathering). PE's are "mandated reporters," when necessary to protect workplace/public health and safety in

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[17] OSC's 1989 Annual Report to Congress, see <www.osc.gov/documents/reports/annual%20report/annual%20report%201989.pdf>, on pages 2 and 3, describes how agency heads share the responsibility with OSC to ensure their employees are adequately protected from reprisal and other PPP's

the course of professional duty. The number of DOE engineers who have told me over the years that they do not want to be PE's, because they do not want to be "mandated reporters" when it might be inconvenient to their economic self-interest is dismaying, to say the least. PE's, as "mandated reporters" also have greater protection from reprisal than "permissive" whistleblowers (when the employer requires the engineer to be a PE) and since the individuals who engage in the reprisal might also include PE's, PE's can "go offensive" in protecting their "right" to do their "duty" to protect others by filing professional misconduct complaints against such PE's with their licensing authority. If DOE had required this years ago, there would be much fewer, perhaps a few hundred instead of many thousand, DOE sick workers.

**3) What could happen if there is no change in position?**

Status quo, the Secretary will remain unable to demonstrate compliance with his statutory duty to ensure DOE employees are adequately protected from reprisal and other PPP's – and DOE employees will NOT be adequately protected, because OSC will remain a lawbreaking fraud.

DOE employees, including its safety professionals will continue to do well to test the waters before voicing any concern. This will harm its ES&H programs.

Bigger picture, America will continue to decline and remain at an unnecessarily increased risk of a nuclear

9/11 or other catastrophe, such as the unfolding one in the Gulf of Mexico. There will be no nuclear renaissance, America will not be the leader in moving to a new energy economy – the public trust in "experts" as Secretary Chu and in institutions at DOE will remain, as it now is, inadequate for this to happen, and rightfully so, because people with the lawful authority and responsibility cannot or will not take the actions necessary to ensure federal employees can do their jobs per the merit system principles while being adequately protected from reprisal and other PPP's.

**4) What recognized technical experts would you recommend?**

Moral courage, not technical expertise, in the key quality needed in this DPO. The facts and law are indisputable, but the costs of speaking truth to power, in DOE, as other agencies, can be daunting.

**5) What should ad hoc panel members read to help them understand the issue?**

First, only the Secretary of Energy can "resolve" the issues of this DPO. I have provided much information about the issue and links to further information in this DPO. The facts and law are not hard, it is the moral courage to address the facts and law that is the hard part.

**6) What else have you tried to do to resolve the issue?**

Everything else – DOE IG, Employees Concerns, Congress, media, none of this is in any corner. I have experienced a lack of the necessary moral courage by DOE IG, Employees Concerns program to resolve the issue – they point me down the hall to "someone else," apparently because they put their economic self-interest before their sworn duty as federal employees. If only the stakes were not so high – does anyone really think our children and grandchildren will get to die natural deaths and/or live in desirable societies if present trends and facts are not better addressed?

**Conclusion:**

DOE has missions at the crux of many of mankind's most pressing issues, but its employees will not demonstrate the necessary moral courage to put duty before self-interest when necessary. Why should they when the Secretary of Energy cannot tell them that he is complying with his nondiscretionary statutory duty to ensure they are adequately protected from reprisal and other PPP's?

If I am correct, it is very **GOOD NEWS** for America! A previously unidentified, significant causal factor to much of what has befallen and besets American has been found – and can be readily fixed! As a PE, I can be professionally sanctioned if my public statements are not truthful and objective. I consider this DPO a "public statement," so I am stamping it as a PE.

Please feel free to contact me with any questions. I welcome a skeptical, questioning attitude, I certainly have one. I have nothing to hide about my actions and motivations.

Respectfully,

Joseph Carson, PE
DOE Facility Representative
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831 (cell) 865-576-1478 (work)
jpcarson@tds.net, carsonj@oro.doe.gov

copy: I hope my DPO – and DOE's response – warrants the attention of many stakeholders to DOE. Therefore, I am widely circulating it and uploading it to a blog I created for this purpose, http://whsknox.blogs.com/dpo

[LOGO] **Department of Energy**
Washington, DC 20585

July 1, 2010

Joseph Carson
DOE Facility Representative
10953 Twin Harbour Drive
Knoxville, TN 37934

Dear Mr. Carson:

I am writing in response to your June 7, 2010, e-mail to Ms. Mary Haughey setting forth your Differing Professional Opinion (DPO) related to alleged law-breaking at the U.S. Office of Special Counsel and U.S. Merit Systems Protection Board.

I assure you that the Department takes all aspects of its mission and responsibilities very seriously, especially the protection of the public, the workers and the environment. In this regard, the Department has established a comprehensive framework of regulations, directives and technical standards to guide our operations in meeting these responsibilities. From time-to-time, professional disagreements arise in relation to the Department's mission and activities. While we encourage these technical disagreements to be fully discussed and resolved within the organization doing the work, an important tool available to all Federal and contractor employees is the DPO process established in Department of Energy (DOE) Manual (M) 442.1-1, *Differing Professional Opinions Manual for Technical Issues Involving Environment, Safety and Health.*

Pursuant to DOE Manual (M) 442.1-1, I have been assigned to be the DPO Manager to address your DPO. In accordance with DOE M 442.1-1, Attachment 2, I screened your DPO and found that it does not meet the DPO criteria (see DOE M 442.1-1, Attachment 2, Paragraph 4, pages 3-4). As stated in the Manual, paragraph 1, Purpose, the DOE DPO process is designed "to encourage and facilitate dialogue and resolution on DPOs from employees for technical issues involving environment, safety, and health (ES&H)." Upon review and based on consultations with others within the Department, the issues addressed in your e-mail are not technical in nature, are not within the jurisdiction of DOE, and are outside the scope of the DPO process. Therefore, we will not be considering your submittal further.

Sincerely,

/s/ W. A. Eckroade
William A. Eckroade
Deputy Chief for Operations
Office of Health, Safety
and Security

Enclosure