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AUTHOR: Joe Carson
AFFILIATION: TN
ADDRESSEE: Gregory Jaczko
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June 21, 2009

Mr. Gregory Jaczko
Chairman, Nuclear Regulatory Commission (NRC)
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1750

Subject: You Inability to Comply with Your Duty, Per 5 U.S.C. §2320(c), To “Prevent Prohibited Personnel Practices” in Nuclear Regulatory Commission - Because of 30 Year-Long Lawbreaking at U.S. Merit Systems Protection Board (MSPB) and U.S. Office of Special Counsel (OSC) - and What You Can Lawfully Do About It.

Dear Chairman Jaczko,

We met several years ago, when you were on Senator Reid’s staff, to discuss how my whistleblowing experiences as a licensed professional engineer (PE), employed by U.S. Department of Energy (DOE) as a nuclear safety engineer, illustrated engineering and quality issues at Yucca Mountain.

No federal employee in history of civil service has “prevailed” in more whistleblower litigation than I (one can google my names for details). I am quite analytical, as well as tenacious, DOE did not slap me around in a vacuum, DOE’s repeated, final, unappealable record of lawbreaking against me - taken to punish me for putting my professional duty to protect others before my economic self-interest and intimidate others into silence - was enabled by 30 year-long lawbreaking at OSC and MSPB. Because NRC employees are under the jurisdiction of OSC and MSPB, their lawbreaking impacts the safety culture at NRC, which then impacts the safety culture at NRC-licensees.

To summarize the relevant law and facts - by the Civil Service Reform Act of 1978, federal civilian employment is governed by “merit principles, found at 5 U.S.C. §2301. Agency violations of the “merit principles” are termed “prohibited personnel practices (PPP’s), are detailed at §2302(b) and include the whistleblower reprisal type PPP. The legislative scheme to protect federal employees from PPP’s assigns complementary duties to agency heads, OSC and MSPB. Specifically, OSC is the federal law enforcement agency responsible to protect federal employee from PPP’s, by §§1212 and 1214. Agency heads are responsible to “prevent PPP’s” in their agencies by §2302(c) and MSPB is responsible to conduct, per §1204(a)(3), the “special studies” necessary to determine and report whether OSC and agency heads are adequately performing their duties in protecting federal employees from PPP’s.

This system is broken and has been for 30 years. Most specifically, by §1214(e), OSC is required to issue a report to the involved agency head when it determines “there is reasonable cause to believe” a violation within its enforcement jurisdiction occurred and the agency head is required

to certify his review of OSC's report and the agency's response (excepting when OSC has additionally, at its complete discretion, determined the violation is one "which requires corrective action" and reported both determinations per §1214(b)(2)(B)).

By §1219(a)(3), these are permanent, publicly available records. I can personally attest, based on my review of every Annual Report to Congress OSC has issued since its creation in 1979, my personal review of its "publicly available" records, and OSC's response to a FOIA request, that OSC has not made a single §1214(e) report since 1979 - not for its about 50,000 investigations of complaints alleging about 100,000 specific violations of law, rule, or regulation (the large majority PPP's) within its jurisdiction.

Until recently, OSC claimed that §1214(e) did not apply to the laws, rules, or regulations within its jurisdiction. Now it has apparently abandoned that claim and replaced it with the claim that, regardless of the evidence, it never has to determine whether a violation within its jurisdiction occurred for the purposes of §1214(e). In a dicta statement in a recent federal court decision, Carson v. Office of Special Counsel, 2009 WL 1346052 (E.D. Tenn.) at *5, §1214(e) was found to apply to the laws within OSC's jurisdiction, including PPP's, and OSC is required to determine whether "there is reasonable cause to believe" the violations alleged to it occurred.

So there is no longer much question that OSC has failed, for thirty years, to comply with its fundamental nondiscretionary duty as a federal law enforcement agency - to determine whether there is reasonable cause to believe the alleged violations occurred and, if so, to formally report its determination to the involved agency head (including NRC Chairman), per §1214(e).

How did this happen and what can be done about it?

In large part it happened because MSPB has yet to conduct a "special study" that considered OSC's compliance with and performance of its non-discretionary duties to protect federal employees from PPP's. I can personally attest, based on FOIA responses, that the current Chair of MSPB has no formal opinion as to whether federal employees are adequately protected from PPP's - in NRC or anywhere else. Instead, he contends the purpose of MSPB's "special studies" is, in the aggregate, to help inform their readers' (including agency heads) opinions. That opinion is without basis in the clear wording of the law and its legislative history. But because the NRC is required to make this report to Congress and the President, not individual citizens, Courts will not consider suits brought by citizens about this MSPB lawbreaking (I have tried, 4 times, in 3 different courts - no Court gave what NRC is doing a "clean bill of health" though.)

So you, as other agency heads - and as the White House and Congress - are largely "in the dark" about whether they are adequately "preventing PPP's" in their agencies. Because they are not, all too often, many federal workplaces allow dysfunction and corruption to take root and flourish.

So what to you? You cannot tell NRC employees that you are complying with your duty to "prevent PPP's" in NRC - because you simply do not have the information to make an objective

statement. That inability is inconsistent with the safety-conscious work environment NRC advocates in its licensees.

What can you do about it? Neither OSC nor MSPB have Inspector Generals (in fact, OSC was an autonomous part of MSPB from 1979-1989), so that avenue is not available. Their General Counsels, who are responsible to advance and protect OSC/MSPB's interests, are therefore unable to objectively evaluate these 30 year-old interpretations of these laws.

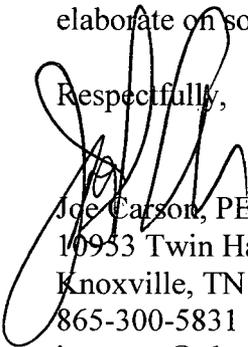
However, the NRC could request the Office of Legal Counsel (OLC) of the U.S. Department of Justice to interpret §§1204(a)(3) and 1214(e) on behalf of the government.

From OLC's website <www.usdoj.gov/olc/>:

By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement.

Thank you for your consideration of this request. I have attached my comments for the record of a recent Senate Hearing on reforming the federal whistleblower protection, S.372, which elaborate on some of these points.

Respectfully,



Joe Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831
jpcarson@tds.net

June 18, 2009

Chairman Daniel Akaka
Committee on Oversight of Gov't Management
Hart SOB
Washington, DC 20510
202-224-4551; fax 202-224-2271

Attention: Ben Rhodeside <benjamin_rhodeside@hsgac.senate.gov>

Re: Statement for the Record for June 11, 2009 hearing on Whistleblower Protection Enhancement Act of 2009, S. 372

Dear Chairman Akaka,

I must appreciate your allowing people like me to submit statements for the hearing record. I fully support H.R. 1507 and hope its provisions for jury trials and national security whistleblowers are added to S.372.

However, based on my singular experiences as a multiple-time "prevailing" whistleblower in US Department of Energy, S.372 does not address, directly at least, key factors that make the realities concerned federal employees - including national security whistleblowers - so dismal (one can google my name for details).

Simply put, OSC is supposed to be the "immune system" of the federal civil service and its near-complete failure to comply with its fundamental duty as a federal law enforcement agency - to report its determinations of prohibited personnel practices (PPP's), particularly the whistleblower reprisal type PPP to the involved agency head, per 5 U.S.C. 1214(e), has had a very corrupting impact of the federal civil service. Until I forced the issue in court, OSC claimed that somehow, despite the clear wording of the law and its legislative history, the reporting requirements of §1214(e) did not apply to PPP's and other civil service laws, rules, or regulations within its enforcement jurisdiction. In recently concluded litigation, OSC did not make this argument and the decision, in a dicta statement, found that the scope of §1214(e) includes PPP's, see Carson v. Office of Special Counsel, 2009 WL 1346052 (E.D. Tenn.) at *5.

In the past 30 years, based on its annual reports to Congress, OSC has investigated about 50,000 PPP complaints, alleging about 100,000 specific PPP's (about a third of these are whistleblower reprisal type PPP's), without ONCE making and reporting, per §1214(e), its determination "there is reasonable cause to believe" the PPP occurred. This is an incontestable, the 1978 law (now numbered §1219(a)(3)), requires such reports (and the agency-head certified responses) be retained as permanent, publicly available records at OSC. A review of OSC permanent, publicly available records (as well as OSC's responses to FOIA requests) demonstrated the absence of any such reports.

OSC is supposed to be a very transparent investigatory agency, based on the requirements of §1214(e), §1218 and §1219 which details the extensive information OSC is to provide to Congress and the public. But, for 30 years, it has been a very opaque, unaccountable, agency, despite its being, by the law, the primary bulwark to protect federal employees from PPP's, particularly the whistleblower reprisal type PPP.

MSPB has, for 30 years, failed to uncover OSC's self-nullifying interpretation of §1214(e). This is because it has yet to conduct the statutory required special studies of 5 U.S.C. §1204(a)(3) to determine whether federal employees are adequately protected from PPP's. This MSPB duty is not limited to agencies for which it has adjudicatory jurisdiction - the limitations of §2302(a)(2)(C)(ii) on its adjudicatory jurisdiction over FBI and national security agencies do not apply, given the wording (and legislative history) of §1204(a)(3) to conduct special studies of the "civil service and other merit systems in the executive branch."

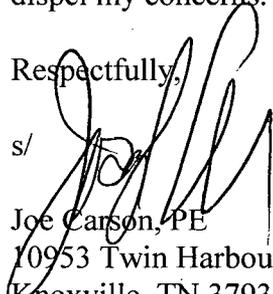
The attached questions call attention to these issues, most of which have existed since 1979, when OSC and MSPB were created by the Civil Service Reform Act of 1978 (initially OSC was a part of MSPB, it became an independent agency in 1989). I realize that only members of the Committee have the authority to insert "questions for the record" into the hearing record, together with their answers, which would be under oath, just as the written and spoken testimony at the hearing was.

I have requested Senator McCaskill to consider inserting these questions into the record. I do not know if she will so I am providing them as what I think are relevant questions that warrant the Committee's attention, even though I know that unless a Senator inserts them into the record, they will not be addressed as part of the hearing record.

Chairman Akaka, I have been raising these concerns to Congress for about 5 years, getting more and more specific based on results of my related litigation. Congress and the Courts are the two Constitutional tools someone as myself has to expose such agency non-compliance with law. I have tried to responsibly do so. I hope the Committee takes the steps necessary to substantiate or dispel my concerns.

Respectfully,

s/



Joe Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831
jpcarson@tds.net

Questions for Rajesh De, Department of Justice, about the U.S. Office of Special Counsel

1. Do the reporting requirements of §1214(e) apply to prohibited personnel practices (PPP's, particularly including the whistleblower reprisal type PPP) and other civil service laws, rules, and regulations within OSC's enforcement jurisdiction by §§1212, 1214, and 1216? If not, why not, given the clear wording of the law and its legislative history.
2. If OSC contends that the reporting requirements of §1214(e) do not apply to PPP's and/or other civil service laws, rules, and regulations within its enforcement jurisdiction, how does it explain that position in light of the recent (May 11, 2009) ruling in Carson v. Office of Special Counsel, 2009 WL 1346052 (E.D. Tenn.) at *5 in which the Judge makes a dicta determination that they do?
3. Do OSC's Annual Reports to Congress contain all the information required by §1213? If so, please elaborate on how OSC's most recent report to Congress satisfies its requirements. If not, why does the covering letter for the report state otherwise?
4. Since 1994 has MSPB ever conducted a special study focused on OSC's compliance with and implementation of its duties to protect federal employees from PPP's, particularly the whistleblower reprisal type PPP? If so, what were the results?
5. If OSC seeks corrective action on behalf of an employee adversely impacted by agency "activities prohibited by any civil service law, rule, or regulation," within OSC's enforcement jurisdiction by §1216(a)(4), are all the "make whole" remedies listed in §1214(g) available? If not, why not?
6. Should the remedies available by §1214(g) when OSC seeks corrective action at MSPB on behalf of someone adversely impacted by a PPP, including the whistleblower reprisal type PPP, include the compensatory damages S.372 makes available to employees who directly seek relief from MSPB via an IRA appeal?
7. The last change to the Whistleblower Protection Act occurred in 1994 as part of P.L. 103-424. As part of that change, OSC became required to provide extensive information to complainants, subsequent to closing its investigation, per the "termination statement" of the statutory note to §1214, which quotes section 12(b) of P.L. 103-424. A federal judge found OSC in non-compliance with that section of law in Carson v. Office of Special Counsel, 514 F.Supp. 2d 54, (D.C.D. September 27, 2007), even though he did not order the "extraordinary" relief of mandamus. OSC did not appeal this decision. What OSC internal procedures discuss compliance with the "termination statement" and how does OSC ensure compliance with it? Has OSC taken the actions necessary to comply with this section of the law for Mr. Carson and other complainants? If not, why not?
8. Do OSC's records for referring whistleblower reprisal type PPP complaints to field

investigation and their final disposition since 1994 reflect the MSPB and Federal Circuit precedent created since 1994 that severely limits the meaning of “any disclosure”? What specific data can OSC provide about how MSPB and Federal Circuit precedent since 1994 has impacted its determinations “whether there are reasonable grounds (cause) to believe” in the whistleblower reprisal type PPP complaints it has received since then? If it cannot provide such information, why not?

9. How can the heads of agencies comply with their statutory obligations to “prevent PPP’s” in their agencies (see 5 USC 2302(c)), if OSC does not formally report all its positive PPP determinations per §1214(e), which requires the head of the involved agency certify his review of the OSC report and the agency response?
10. How can the information required by the No FEAR act (see 5 USC 2301 appendix) be compiled if OSC does not formally report all its positive PPP determinations per §1214(e)?

Questions for Rajesh De, Department of Justice, about the U.S. Merit Systems Protection Board

1. When and how often since 1994, the last time the Federal Whistleblower Protection Act was amended, has MSPB conducted special studies per 5 U.S.C. §1204(a)(3), focused on determining whether federal employees are adequately protected from prohibited personnel practices (PPP’s), particularly the whistleblower reprisal type PPP?
2. What is the MSPB’s determination and when was its reported to Congress “as to whether the public interest in a civil service free of prohibited personnel practices (PPP’s, particularly the whistleblower reprisal type PPP) is being adequately protected?” If MSPB has not or cannot make this determination and report, why not?
3. Has MSPB conducted a special study since 1994 that focused on OSC’s compliance with law and implementation of its duties to protect federal employees from PPP’s, particularly the whistleblower reprisal type PPP? If so, what was the result? If not, why not?
4. Does MSPB agree that its jurisdiction to conduct special studies to determine if federal employees are adequately protected from PPP’s, particularly the whistleblower reprisal type PPP, includes FBI and the intelligence agencies exempt from its adjudicatory jurisdiction over PPP’s? If not, why not?
5. Has MSPB conducted special studies to determine if employees in FBI and intelligence agencies are adequately protected from PPP’s, particularly the whistleblower reprisal type PPP? If not, why not?

6. Does MSPB know, for each year since 1994, the last time the Federal Whistleblower Protection Act was amended, how many PPP's occurred, of which type, and in which agencies, based on its or OSC's determination? If not, why not - is not this information relevant to its special studies to determine whether federal employees are adequately protected from PPP's, particularly the whistleblower reprisal type PPP?
7. Why is the MSPB-created evidentiary standard - "substantial likelihood" - found in MSPB regulations at 5 CFR §1209.10(b)(3), for whistleblower reprisal stays made per 5 U.S.C. §1221(c) as part of an Individual Right of Action (IRA) appeal, so much greater than the statutory established evidentiary standard - "reasonable grounds to believe" - for similar OSC stay requests made to MSPB per 5 USC 1214(b)(1) and 5 CFR §1201.134(a)?
8. Does the law give MSPB the discretion to use the "reasonable grounds to believe" standard in its regulations for whistleblower stays? If so, why is it not using that standard, given the law's lack of any requirement on the part of the employee seeking the stay to show any harm, let alone the "irreparable harm" - the usual standard to obtain a stay in civil or criminal court - if the stay is not issued?
9. How many whistleblower stays in Individual Right of Action (IRA) appeals have been sought and how many granted per 5 USC 1221 since 1994? In how many cases, after MSPB denied the stay, did the employee obtain relief as a result of his whistleblower appeal? In how many cases, after MSPB granted the stay, did the employee fail to obtain relief?
10. Why do MSPB's Annual Reports to Congress not indicate how many IRA whistleblower stays are granted and how many are denied - why does it only provide the number of IRA stay requests made?