



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 2, 1981:

Larry L. Simms, Esq.
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Simms:

I am writing to request your legal opinion on a question pertaining to the scope of the jurisdiction of the Office of the Special Counsel, Merit Systems Protection Board, over a complaint submitted to that office by an individual who is neither a federal employee nor an applicant for federal employment. It alleges government mismanagement and gross waste of funds. The Special Counsel believes it has jurisdiction over such complaints. My preliminary analysis reaches a contrary result.

The jurisdictional question posed arises from a complaint filed with the Merit Systems Protection Board by Thomas W. Applegate, formerly an undercover investigator for the Cincinnati Gas and Electric Company. In that capacity he was charged with the responsibility for investigating wrongdoing by employees at the Zimmer Nuclear Power Plant. He claims to have discovered many illegal acts. When Cincinnati Gas and Electric failed to take what in his view constituted appropriate action, he brought some of his claims to the attention of the Nuclear Regulatory Commission. The NRC investigated his allegations and concluded that many of his claims did not fall within its jurisdiction. Mr. Applegate was not satisfied with the scope of the NRC investigation or its conclusions on the allegations falling within NRC's jurisdiction, and filed a complaint with the Office of the Special Counsel. He claimed that the Commission violated the law by reading its jurisdiction too narrowly, and that the limited NRC investigation constituted abuse of authority, mismanagement, gross waste, and created a specific danger to public health and safety. He also argued that on the matters the NRC did investigate it did a poor job and that this also constituted abuse of authority, mismanagement, gross waste and created a danger to public health and safety.

On December 29, 1980, the Acting Special Counsel, Mary Eastwood, transmitted the Applegate complaint to the NRC pursuant to 5 U.S.C. 1206(b)(2) and directed the Commission to submit a report to her office pursuant to 5 U.S.C. 1206(b)(7). In response, the NRC's Office of Inspector and Auditor is now conducting a thorough investigation on the adequacy of the earlier inquiry. Moreover, our Office of Inspection and Enforcement is investigating the safety allegations contained in the Applegate complaint. I do not believe though that the NRC is required to submit a report to the Special Counsel.

Section 1206(b)(2) provides:

Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

The referenced paragraph (b)(1) reads:

In any case involving --

"(A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences --

"(i) a violation of any law, rule, or regulation;

or

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

if the disclosure is not specifically prohibited by law and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

or

"(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General or an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences --

"(i) a violation of any law, rule, or regulation;

or

"(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; * * *

Section 1206(b)(7) requires the agency to inform the Special Counsel in writing of the action it has taken on the matter.

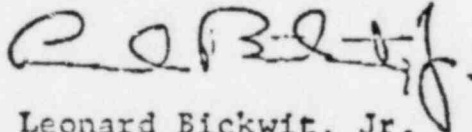
In my view, for the Special Counsel to have jurisdiction under 1206(b)(2) the information must come from an employee or applicant for employment and must allege (a) a violation of law or (b) mismanagement, gross waste, etc. Therefore it does not have jurisdiction over the Applegate complaint because he is not a federal employee or applicant for such employment. The Office of Special Counsel disagrees with my interpretation. In informal conversations with my office it has argued that the word "type" used in 1206(b)(2) refers only to the substantive nature of the complaint (violations of law or mismanagement, etc.) and therefore there is no requirement that the complainant be a federal employee or applicant for such employment.

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I believe the Special Counsel's expansive reading of its jurisdiction is inconsistent with Congressional intent. I find no indication in the legislative history of the Civil Service Reform Act that the Special Counsel is to have jurisdiction over allegations of violations of law or mismanagement reported by non-federal employees or applicants. If it had such jurisdiction it would in effect be a government-wide super Inspector General. Instead, the legislative history indicates that it has a narrower role: (1) to protect government "whistleblowers" (5 U.S.C. 1206(b)(2)); and (2) investigate allegations submitted by any source (including non-federal employees) alleging prohibited personnel practices (5 U.S.C. 1206(a)). Because Mr. Applegate makes no allegations regarding prohibited personnel practices (as defined in the Civil Service Reform Act) and is not a federal employee or applicant for federal employment, I believe that the Special Counsel lacks the authority to require the NRC to provide to it a report on the allegations raised in the Applegate complaint.

If you have further questions on this matter, please do not hesitate to contact me at 634-1465.

Sincerely,



Leonard Bickwit, Jr.
General Counsel

Enclosure:
Letter from Mary Eastwood to Chairman
Ahearne dated December 29, 1980

cc: Mary Eastwood