UNITED STATES OF AMERICA
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

THOMAS DAY,	)
	)
	)Docket No.
	)
Appellant	)SF-1221-12-0528-W-1
	)
v.	)
	)
	)
DEPARTMENT OF HOMELAND SECURITY,	)
	)
	)
	)
Agency	)
	)

AMICUS CURIAE BRIEF

Per relevant Board regulation at 5 CFR section 1201.34(e) and Federal Register notice of February 8, 2013, Vol. 8, no. 27, page 9431, I respectfully submit an amicus curiae brief in support of retroactive application of Whistleblower Protection Enhancement Act (WPEA).

Argument:

For 35 years now, the Board has failed to conduct special studies of the mandated study areas - specifically as to: 1) whether federal employees can effectively bring forward concerns, particularly classified ones to the U.S. Office of Special Counsel, and 2) whether federal employees are adequately protected from reprisal other types of prohibited personnel practices (PPPs), particularly by the Office of Special Counsel interpreting and applying its nondiscretionary statutory duties to "protect" employees from PPP and agency heads in "preventing PPPs." As a result, the President is unable to comply with his duty to 'take any action....necessary" to ensure the federal civil service "embodies" the merit system principles.[1]

America is much diminished and more threatened as a result of the Board's failure to comply

[1]See www.broken-covenant.orgfor extensive detail and legal cites.

with this essential statutory duty for 35 years. Thousands of loyal, patriotic federal employees as Mr. Day have suffered much for doing their duty to protect the health, safety, welfare and security of Americans. All these direct victims of the "broken covenant" of the Civil Service Reform Act of 1978 (CSRA) merit full-retroactive relief, because absent the Board's failure to comply with its lawful duty to determine whether OSC was effectively complying with its respective nondiscretionary statutory duties, they would not have suffered.

I hope our Country finds the moral courage to establish a "truth and reconciliation commission" after the "broken covenant" of the CSRA is exposed and ended, but given the Board's responsibility for the suffering of Mr. Day, I hope it extends retroactivity to the WPEA to his case and similar cases.

I have attached a legal analysis of an independent attorney about the validity of "broken covenant" contentions and wish it be included with this amicus brief.

Respectfully,

_____/S/_____
Joseph Carson, PE
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September 1, 2011

Mr. Joe Carson, P.E.

B6

Re: Legal Analysis

Dear Mr. Carson:

You have commissioned me to provide an impartial, expert analysis of 5 U.S.C §§1204(a)(3), 1214(e) and 2302(c) to address and articulate the requirements of these laws. In advance of this letter, we agreed that my ultimate professional opinion would be completely independent of and uninfluenced by yours. My freedom of legal analysis has not been constrained in any way.

In order to properly address these questions, a historical understanding of the legal framework is critical. The Civil Service Reform Act of 1978 ("CSRA" or "the Act" or "Act") codified merit principles and provided that employees who commit prohibited personnel practices (PPPs) receive disciplinary action and it protected employees who disclose improper government conduct. The Act defines what constitutes a "protected disclosure" and what actions are "prohibited personnel practice."[1] The Act was passed in an environment of serious concern about the integrity of the merit system in federal employment [2] and significant evidence of disturbingly aggressive retaliation against whistleblowers.[3]

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1 *See*, 5 USC § 2301 and 2302.

2 *See, e.g.*, Violations and Abuses of Merit Principles in Federal Employment Part 1; Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-19, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment Part II. Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-20, 94th Cong., 1st Sess. (1975).

3 During the term of Fred Malek as head of the White House personnel office during the Presidency of Richard M. Nixon, Malek oversaw the drafting of the *Federal Political Personnel Manual*. This manual openly referenced "the rape of the merit system." White House Personnel Office, "Malek Manual," in Select Committee on Presidential Campaign Activities, Executive Session Hearings, *Watergate and Related Activities: Use of Incumbency -- Responsiveness Program*, 93rd Cong., 2nd Sess. (1974). *See also, Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The Whistleblower Protection Act ("WPA") was passed in 1989 to strengthen the Office of Special Counsel (OSC), created under the CSRA. OSC exists in critical part to protect whistleblowers from retaliation.[4] The WPA instructed the strengthened OSC that its mission is to "protect employees, especially whistleblowers, from prohibited personnel practices."[5] Of paramount significance is the mandate that OSC is to "act in the interests of employees"[6] who petition for its protection and assistance. It cannot be overstated that rather than commissioning OSC to be an independent body that decided complaints in the fashion of an impartial court, rather, the WPA obligated OSC to assist whistleblowers.[7] Simply stated, OSC is intended to be a whistleblower advocate office. As every learned observer who has addressed the question has concluded, Congress desired that OSC "act aggressively on behalf of whistleblowers."[8] Due to its' almost uniquely strong commission to assist and protect whistleblowers, it should be accepted that federal courts may compel OSC to investigate and prosecute where there is evidence of a prohibited personnel practice.[9]

Structurally, OSC must investigate complaints, "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."[10] OSC was originally the investigatory and prosecutorial arm of the Merit Systems Protection Board (MSPB).[11] It gained independence from MSPB via the Whistleblower Protection Act of 1989. There is no doubt that OSC was meant to be a powerful and important agency as an employee may disclose to it evidence or data that is classified or confidential according to law.[12] When

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4 *See* S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3550.

5 Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b)(2)(A), 103 Stat. 16.

6 *Id.* § 2(b)(2)(B).

7 S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550. The WPA specifically requires "that the Office . . . shall act in the interests of employees who seek assistance" from it.

8 S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550.

9 *See e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975).* Might it be the case that OSC is not investigating and creating records of prohibited personnel practices to avoid being legally compelled to prosecute?

10 5 U.S.C. § 1213(a)(1)(A).

11 MSPB is charged to ensure that the federal civil service is based on merit. MSPB has jurisdiction over the personnel practices of the federal government and is tasked with conducting special studies related to the integrity of the merit system (whether it does so will be discussed below). On a practical level, it decides allegations of wrongdoing often related to adverse agency actions and may provided relief when appropriate. *See,* 5 U.S.C. §§ 1201–1206 (1978).

12 *5 U.S.C. § 2302*(b)(8)(B).

OSC finds "reasonable grounds," to believe a prohibited personnel practice "occurred, exists, or is to be taken" and such needs "corrective action" it is required to report the findings and recommendations to the Merit Systems Protection Board ("MSPB"), the Office of Personnel Management ("OPM") and the agency involved.[13] In whistleblower cases, if OSC proves that protected disclosure was a contributing factor to the personnel action, corrective action is to be ordered by the MSPB unless the agency proves by clear and convincing evidence that it would have taken the disputed personnel action even had the protected disclosure never occurred.

You first asked me to consider whether OSC's brief review of a complaint to determine it has jurisdiction satisfies its duty to investigate. The argument that by undertaking a brief analysis of a complaint and concluding it has no jurisdiction to act, OSC has "investigated" within the meaning of the law is untenable and somewhat distressing. OSC must "receive" any allegation of a prohibited personnel practice and must "investigate" to the extent necessary to determine whether there are reasonable grounds to believe that such a practice has occurred, exists, or is to be taken. Please note the language that OSC "must receive" any allegation. This phraseology would strongly imply that OSC lacks the ability to self limit its role through constrained interpretation of its own jurisdiction. Indeed, this phraseology extends the jurisdiction of OSC quite broadly to "any allegation" of a prohibited personnel practice. Two elements need be met: (1) any allegation of (2) a prohibited personnel practice.[14]

Given the statutory mandate employees are able to sue to force the OSC to conduct an "adequate" investigation.[15] This well recognized ability to sue to ensure that a substantive investigation has occurred in accordance with the law is completely inconsistent with allowing the OSC to escape its duty to investigate with the self-serving, bare assertion that it has reviewed the complaint and lacks jurisdiction. OSC is to investigate prohibited personnel practices first, not its own jurisdiction.[16] OSC is often the last and frequently the only stop for aggrieved employees.[17] Given the scope of its commission to investigate and seek corrective and disciplinary action, it remains a hotly

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13 *5 U.S.C. § 1213*(a)(1)(A) (1994); *Id.* § 1214(b)(2)(A).

14 5 U.S.C. § 1214(a)(1)(A)).

15 *See, e.g., Barnhart v. Devine, 771 F.2d 1515, 1524-25 (D.C. Cir. 1985); Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 875-76 n.9 (D.C. Cir. 1982).*

16 *5 U.S.C. § 1214*(a)(5). *5 U.S.C. § 1214*(b)(2)(A). *5 U.S.C. § 1214*(b)(2)(B). *5 U.S.C. § § 1214*(b)(4)(A) and (C); *5 U.S.C. § 1214*(a)(2)(A).

17 *Carducci v. Regan. 714 F.2d 171 (D.C. Cir. 1983). See, e.g., Booher v. U.S. Postal Serv., 843 F.2d 943 (6th Cir. 1988)* (probationary employee may not sue unless clear disregard of agency regulation shown); *Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987). But cf. Lynch v. Bennett, 665 F. Supp. 62 (D.D.C. 1987)*

debated question as to whether OSC's budget is grossly inadequate,[18] perhaps in a deliberate attempt to cripple the office.

In light of this history let us examine your concerns about the certain statutory provisions to which you referenced me.

Title 5 U.S.C. § 1204(a)(3) provides that the MSPB shall –

> conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

This duty is nondiscretionary and not qualified in any way. The action is to be taken by MSPB with no prompting required on the part of the President or Congress. While undoubtedly the phrase "from time to time" is somewhat vague, it cannot be that given the concerns pursuant to which the CSRA and WPA were enacted and the strength of Congress' desire to ensure the integrity of the merit system that "from time to time" means **never**. Nonetheless, it appears that MSPB has never conducted a special study pursuant to this provision by which the head of MSPB reports whether merit system integrity is intact. There can be no other conclusion than MSPB has willfully ignored this duty under the law. At a minimum, MSPB should have requested some level of rule making in order to specify the outer limits of "from time to time." Despite the language above, it cannot be overemphasized that no head of MSPB has ever had to sign his or her name to document indicating that the public interest in a civil service free of prohibited personnel practices is or is not being adequately protected. As such, the MSPB is deliberately out of compliance with the law.[19]

You also asked that I address that portion of the law that related to the responsibility of agency heads for preventing PPPs and the requirement of coordination between agency heads and OSC in ensuring that agency employees are informed of their rights and remedies under the CSRA and WPA. Tile 5 U.S.C. § 2302(c) in defining prohibited personnel practices provides:

> The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to

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[18] *See,* Kaplan and Hannapel, Reinvigorating the U.S. Office of Special Counsel, Suggestions for the Next Administration. American Constitution Society for Law and Policy, Issue Brief, October 20, 2008.

[19] This analysis should not be read to imply scathing toward those who administer and staff the MSPB. MSPB, like OSC, may have well intentioned public servants yet nonetheless be in contempt of its legal obligations due to budgetary issues. Whatever the case may be, if a federal agency is unable to comply with its governing laws even for practical reasons, those at the top of the agency ought to be making lots of noise about that fact.

> them under this chapter and chapter 12 of this title. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

This language is mandatory as the head of each agency "shall" be responsible. Yet, there is no evidence that the head of each agency is genuinely responsible nor is there evidence of proper consultation between OSC and each agency to ensure that employees are properly informed of their rights and remedies under the law. It may be that an agency head certifies that training has taken place but this only begs and does not answer questions. Has the training been effective? Is it preventing prohibited personnel practices? Have any occurred? If so, what did the agency head do to prevent them or redress them? It seems that OSC, like MSPB, is ignoring its duties under the law. It strongly appears that rather than being a genuine vehicle for merit system integrity, the CSRA and WPA are largely illusory. They are written to require numerous actions such as consultation and reporting to ensure merit system integrity but those words are empty as they are largely ignored.

You also asked that I address a certain section of the law related to reporting to an agency head. Title 5 U.S.C. § 1214(e) provides that:

> If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require ,within 30 days after receipt of the report by the agency, a certification by the head of the agency with states –
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> 1) that the head of the agency has personally reviewed the report; and
> 2) what action has been or is to be taken, and when the action will be completed.

At the outset, it should be noted that you have indicated that since its inception, there is no evidence OSC has ever reported a violation to an agency head pursuant to this provision. This is stunning. Regardless of how one chooses to interpret this aspect of the law, which will be discussed below, can anyone doubt that the CSRA and WPA are not being fulfilled given that OSC has apparently never once genuinely acted pursuant to section 1214(e)?

The reporting requirement under 1214(e) is unlike the legal provisions previously discussed, conditional. In order for reporting to be required, OSC must determine there is "reasonable cause" to believe a "violation of any law, rule, or regulation" has occurred "other than one referred to in subsection (b) or (d)." Subsection (d) refers to criminal violations that would reasonably be expected to be reported to the agency head and other sources under separate legal authority. Subsection (b) is somewhat vague and amorphous

but clearly encompasses situations where "there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists or is to be taken which requires corrective action." Apparently, OSC uses this and other language in subsection (b) to argue that it has no reporting duty if it determines that while reasonable grounds exist to believe that a prohibited personnel practice has "occurred, exists or is to be taken" that such does not require "corrective action." That is, in OSC's construction it never need report if it determines "corrective action" is not required. By such construction, OSC becomes Lord and Master of the reporting requirement and the very existence of such records as are obviously necessary for the head of MSPB to determine the integrity of the merit system either exist or do not exist at the whim and caprice of OSC.

It is worthy of note that even when a federal agency is entrusted with discretionary authority, judicial review may still take place to determine if the agency is abusing its discretion or is acting in an arbitrary or capricious fashion.[20] Similarly, an agency may not construe its governing statute in contravention of Congress.[21] Whether one construes 1214(e) to require reporting to the relevant agency head of all instances wherein there is reasonable cause to believe a violation of law, rule or regulation has occurred even if such are violations already within the jurisdiction and mandate of MSPB/OSC or whether one interprets 1214(e) to require reporting only when in the course of an investigation MSPB/OSC becomes aware of a violation separate from or collateral to its investigation, one thing is crystal clear: MSPB/OSC has never reported a single thing of genuine consequence under 1214(e) and it is inconceivable to believe that during its entire life span MSPB/OSC has never encountered a violation reportable under the section. The very absence of all the reporting so clearly required under the provisions cited above makes a compelling case that at its core MSPB/OSC is arbitrary and capricious and abuses its discretion as a matter of course, at a minimum by ignoring its explicit legal duties.

The reporting duties are quite important. The very duty of reporting implies the investigation of complaints and adequate records thereof, such that the head is in a position to meaningfully articulate to the President and Congress whether the integrity of the federal merit system is intact. The reporting requirements thus belie the sometimes tacit and sometimes explicit assertion of MSPB/OSC that it may unilaterally determine that corrective action need not be taken and as such avoid meaningful record keeping of violations and reporting.

It has been long understood and accepted that when the government is in contempt of or willfully neglecting its duties under law that the Courts may act in the form of a writ of mandamus or otherwise to ensure that the law if fulfilled.[22] Given that

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20 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

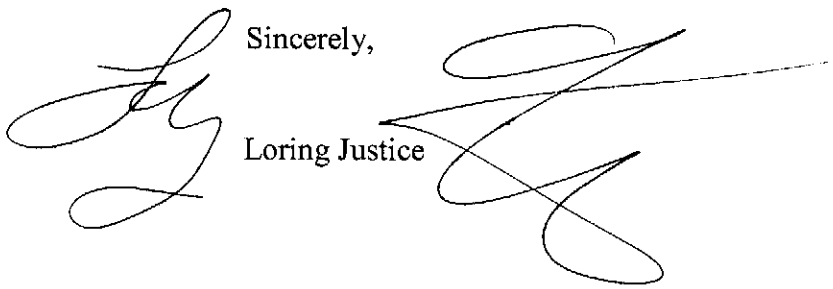
21 *Entergy Corp. v. Riverkeeper, Inc.,* 129 S.Ct. 1498 (2009). ("But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."), *Riverkeeper at p. 7, n. 4* (majority opinion).

22 *See, Weber v. United States*, 209 F.3d 756, 759 (D.C. Cir. 2000).

key provisions of the CSRA and the WPA are ignored, the Courts must one day act to ensure that the words enacted into law are not so empty and devoid of meaning as to invite mockery and diminish the standing of the law. The rule of law would soon cease to exist should Congress enact laws that go deliberately without enforcement. Before such an event happens, Congress should step in and reform these laws by defining the reporting and consultation requirements to specifically enact binding legal timelines for the important acts of reporting and consultation required and thereby enhance not only the integrity of the merit system but also avoid the current sad state of affairs where valid laws are obviously being deliberately ignored and thereby promoting scorn, ridicule and contempt for the law itself.[23]

If you need anything else, please contact me at any time. Thank you.

Sincerely,



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[23] Alternatively, this unfortunate situation could be addressed by the Attorney General of the United States. Pursuant to the Judiciary Act of 1789, the Attorney General has the authority to provide the President and the agencies of the executive branch with governing legal interpretations. The Attorney General exercises this power through the Office of Legal Counsel ("OLC") of the Department of Justice. An OLC opinion on the matters addressed herein and perhaps others could require OSC/MSPB and agency heads to properly report to the President and Congress regarding the integrity of the merit system.