December 10, 2013

Dr. Peter Winokur, Chairman
Defense Nuclear Facilities Safety Board
625 Indiana Avenue, NW Suite 700
Washington, DC 20004

Subject: Resolving contentions of decades-long, compounded, federal agency lawbreaking relevant to DNFSB's statutory mission for safety at the Y-12 National Security Complex

Dear Chairman Winokur,

I am a deeply concerned licensed professional engineer (PE), employed by the Department of Energy in a position with nuclear safety responsibilities. While I am speaking consistent with my legal obligations as a PE, I am not representing my employer.

As a professional engineer (PE), I have a positive legal duty to "blow whistles," when necessary to "hold paramount" the public health and safety in the performance of professional duty, regardless of possible workplace retribution. Regardless of who my employer or client is, my "paramount" professional duty is to the public health and safety. That is the law.

For over 20 years now, I have defended my "right" to comply with my statutory duty to protect others in my employment as a safety engineer (including nuclear safety) in the Department of Energy (DOE). I doubt anyone in the history of the federal civil service, since its creation in 1883, has "prevailed" in more whistleblower reprisal related litigation than I. For the first ten years, I battled my agency.[1] My efforts played a positive, perhaps significant, role in the passage of the landmark "Energy Employees Occupational Illness Compensation Program Act of 2000." By this law about 100,000 diseased, disabled, or deceased DOE workers - who were put in harms' way in DOE workplaces during the Cold War, without being told of the risks, let alone be adequately protected from them - have received about 10 billion dollars in compensation.

As DOE's reprisal went on in the 1990's, I increasingly realized that it was not happening in a vacuum, that it was enabled by the U.S. Office of Special Counsel (OSC), which is supposed to be the primary bulwark to protect federal agency employees from reprisal and other types of "prohibited personnel practices (PPPs)." As you know, DOE is the custodian of America's nuclear stockpile and the lead federal agency in securing nuclear weapon material around the world. Knowing the corruption and dysfunction in DOE as I do, my lasting reaction to 9/11 is relief - at least it was not nuclear. After 9/11, I made it my personal mission to get to the bottom of why OSC repeatedly failed to do its statutory duty to protect me from DOE's unlawful reprisal because I put my duty as a PE to protect others before my personal self-interest.

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[1] See www.carsonversusdoe.com for detail.

In the past ten years, I have built my case against OSC and also the Merit Systems Protection Board (MSPB) regarding its failure to conduct mandated oversight of OSC. Now I publicly state, whatever the risk to my PE license, my federal position and pension, that OSC is a 35 year-long lawbreaking fraud and MSPB is its 35 year-long lawbreaking enabler - and that this decades-long, compounded, federal agency lawbreaking puts America at unnecessarily increased risk of a terrorist attack or other catastrophe, has allowed dysfunction and corruption to take root and flourish in many federal agency workplaces, and has contributed to a diminished and more threatened America. [2] Relevant to the mission of the DNFSB, if my contentions are correct, the DNFSB is impeded, if not precluded, from attaining its statutory mission at Y-12 or other defense nuclear facilities.

I have been bringing concerns to the DNFSB for 20 years. It has largely been an exercise in futility. So I now publicly claim, as a PE, that the DNFSB is refusing or failing to comply with its statutory responsibilities for safety oversight of DOE/NNSA in not taking action to substantiate or dispel my well-evidenced concerns about OSC and MSPB. I respectfully challenge the DNFSB to file a professional misconduct complaint against me with my PE licensing authority, the Tennessee State Board of Architectural and Engineering Examiners, if it disputes the truth and objectivity of my claims about its failure to resolve - or even attempt to resolve - my well-evidenced claims of federal agency law-breaking at OSC and MSPB negatively impacting the safety culture at the Y-12 Nuclear Security Complex and other defense nuclear facilities in DOE.

By the Civil Service Reform Act (CSRA) of 1978, every agency must rely on OSC and MSPB for essential aspects of the regulation of its management culture, particularly its safety culture. Congress created this complex statutory scheme for the regulation of the management culture in every federal agency for two basic reasons: 1) Congress wanted a comprehensive system for the regulation of the management culture in almost 300 federal agencies, and 2) Congress did not trust agencies to self-regulate their management culture.

Because of 35 years of lawbreaking at OSC and enabling lawbreaking at MSPB:

> 1) DOE/NNSA employees (just as employees of other federal agencies) cannot, as rule, effectively bring concerns forward in the statutory created ways. (Where "effective" means the concerns receive an objective and timely resolution).
>
> 2) DOE/NNSA employees (just as employees of other federal agencies) are not, as a rule, adequately protected from reprisal and other types of PPPs.
>
> 3) No one - not the President, not the Secretary of Energy, not the Administrator of the NNSA, not the DNFSB, not Congress - has an objective basis to dispute contentions 1 and 2.

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[2] See www.broken-covenant.org for extensive detail.

I have identified about a dozen civil service laws that OSC and MSPB are misinterpreting and misapplying. But I am willing to let all my contentions stand or fall on two specific claims of OSC law-breaking, in violation of the federal Whistleblower Protection Act of 1989. These violations are relevant to the DNFSB's responsibilities for safety at the Y-12 National Security Complex.

Specifically:

> 1) Is OSC unlawfully denying DOE/NNSA contractor employees at Y-12 National Security Complex and other defense nuclear facilities their statutory right to make confidential disclosures, including classified disclosures, to it, contrary to 5 U.S.C. section 1213(g)(1)?
>
> 2) If a current or former DOE/NNSA employee makes a disclosure to OSC per 5 U.S.C. section 1213(a) and (b) and OSC decides to make a discretionary referral to DOE/NNSA, must OSC comply with 5 U.S.C. section 1213(g)(2) in making it formally to the Secretary of Energy, or is OSC long-standing practice of making informal discretionary referrals to the DOE IG also lawful? [3]

The DNFSB should request the Office of Legal Counsel of the Department of Justice to resolve these issues of law, given their impact on its statutory mission of safety oversight at Y-12. Or it can continue to refuse or fail to do so. [4]

Thank you for your consideration of my claims and their basis in fact and law.

Respectfully,

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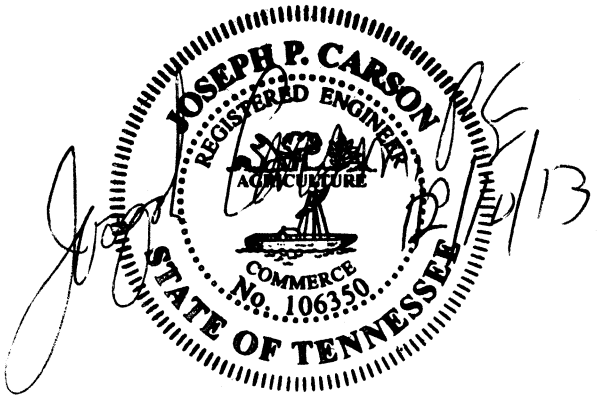

[3] I have attached a more in-depth analysis of these laws and how OSC is violating them.

[4] I have tried every mechanism DOE offers to obtain a resolution to my concerns. DOE refuses to allow me access to any of them. Given that, I have asked the Tennessee State Board of Architectural and Engineering Examiners to consider whether its Rules of Professional Conduct require me to leave DOE's employment. The Governor of Tennessee has expressed interest in the outcome.

A more detailed analysis of why people as federal agency contractor employees have a statutory right to make confidential disclosures to OSC per 5 U.S.C. section 1213(g)(1)

Office of Legal Counsel (OLC) opinions 1981 WL 30900 and 1981 WL 30880 (both were issued in 1981) were legislatively modified by the Federal Whistleblower Protection Act (WPA) of 1989, by its creation of a new statutory whistleblower disclosure mechanism, described at 5 U.S.C. sections 1213(g)(1) and 1219(a)(4). By this law, people as federal contractor employees or employees of federal licensed facilities have a statutory right to make confidential disclosures, including disclosures of classified information, to the Office of Special Counsel.

5 U.S.C. section 1213(g)(1):

> If the Special Counsel receives information of a type described in subsection (a) from an individual other than an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel may transmit the information to the head of the agency which the information concerns. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action shall be completed. The Special Counsel shall inform the individual of the report of the agency head.

What is this law's purpose?

OLC opinion 1981 WL 30900 determined that OSC could, at its discretion, informally transmit anonymous whistleblower disclosures to the involved agency, for whatever consideration the agency head (or agency IG) wished to give them.

OLC opinion 1981 WL 30880 determined that OSC could only require an agency head investigate disclosures OSC received from either a current or former federal employee of that agency or a current or former employee of another agency who became of the wrongdoing in the performance of their official duties. It tacitly allowed OSC to informally transmit other disclosures it received to the agency head for whatever consideration the agency head (or agency IG) wished to give them.

In response to these two OLC opinions, the 1989 Whistleblower Protection Act (WPA), Congress created a new, separate, whistleblower disclosure scheme at 5 U.S.C. section 1213(g)(1) that applied to "individuals" - not "employees"- who were not current or former agency employees of the involved agency or who were not current or former employees of another agency who ascertained the matter disclosed as part of their normal job duties.

The intent was not to limit OSC's discretion in referring disclosures it received from such individuals, but to create a requirement for the agency head to respond to such discretionary OSC referrals. While Congress continue to allow OSC complete discretion about referring such whistleblower disclosures for agency investigation, it created a requirement for the agency head

to respond to such discretionary OSC referrals and for OSC to make the agency responses permanent, publicly available, records.

Despite this clear statute and its legislative history, OSC has ignored or violated it since 1989. OSC wrongly claims the only individuals who can file disclosures with it by this section of law are current or former federal employees who become aware of a agency wrongdoing in ways other than their official duties. According to OSC, if someone as a federal agency contractor employee - say a security guard at Y-12 - becomes aware of a violation of a law, rule or regulation within the jurisdiction of the Department of Energy (DOE), he cannot file a whistleblower disclosure with OSC per 5 U.S.C. section 1213(g)(1). However , according to OSC, the Y-12 security guard could bring his concern to any current or former federal agency employee - perhaps someone in his family or someone he knows at his church - and that person can make the disclosure to OSC per section 1213(g)(1).

Additionally, OSC's annual reports to Congress, inspection of its public records, an its related FOIA responses all demonstrate OSC has yet to implement this law, which is the only lawful way people as current or former federal contractor employees can make classified whistleblower disclosures, confidentially, to an independent agency. OSC's website makes no mention of this other disclosure mechanism and its disclosure form, OSC-12, denies its existence in wrongly claiming that people as federal contractor employees may not make ANY disclosures to OSC.

A more detailed analysis of how OSC is not complying with 5 U.S.C. section 1213(g)(2), by which it can make discretionary referrals of current or former federal employee whistleblower disclosures to the affected agency head.

5 U.S.C. section 1213(g)(2):

> If the Special Counsel receives information of a type described in subsection (a) from an individual described in subparagraph (A) or (B) of subsection (c)(2), but does not make a positive determination under subsection (b), the Special Counsel may transmit the information to the head of the agency which the information concerns, except that the information may not be transmitted to the head of the agency without the consent of the individual. The head of such agency shall, within a reasonable time after the information is transmitted, inform the Special Counsel in writing of what action has been or is being taken and when such action will be completed. The Special Counsel shall inform the individual of the report of the agency head.

This law was created in 1989, as part of the WPA. However, OSC does not comply with it. Instead, OSC has continued its previous discretionary practice of informally referring some of the disclosures it receives to the affected Agency IG. The agency IG does not have to investigate the referral or respond to OSC, unlike what the law requires. Based on FOIA, and review of OSC's Annual Reports to Congress, OSC has apparently not made a single referral by this law in 24 years.