



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

March 15, 2004

Mr. Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility
2001 S Street, N.W., Suite 570
Washington, DC 20009

Re: *OSC File No. MA-03-0306; Mr. James Ruggieri*

Dear Mr. Ruch:

I am writing on behalf of the Office of Special Counsel (OSC) in response to the complaint you filed for Mr. Ruggieri. In that complaint, Mr. Ruggieri alleged that he was not selected for an Electrical Engineer position with the Department of Interior, Mineral Management Service (MMS) in retaliation for his whistleblowing activities while employed by the United States Coast Guard (USCG), as well as a prior OSC complaint that he filed against the USCG.

OSC investigated Mr. Ruggieri's complaint to determine whether MMS's decision not to hire him violated 5 U.S.C. § 2302(b)(8) or 5 U.S.C. § 2302(b)(9). We have completed our investigation, and after carefully considering the evidence in this case, we have reached a preliminary determination not to seek corrective action on Mr. Ruggieri's behalf from the Merit Systems Protection Board (MSPB). As fully explained in the final paragraph of this letter, he has the opportunity to respond to our preliminary determination.

5 U.S.C. § 2302(b)(8) – It is a prohibited personnel practice under (b)(8) for an official with personnel action authority to take, fail to take, or threaten a personnel action because an employee made a protected disclosure. In order to prove a violation of (b)(8), we must show that: (1) Mr. Ruggieri made a protected disclosure¹; (2) an official with personnel action authority took, failed to take, or threatened a personnel action against him; (3) that official knew about his protected disclosure; and (4) his protected disclosure contributed to the official's decision regarding the personnel action.

5 U.S.C. § 2302(b)(9) – It is a prohibited personnel practice under (b)(9) for an official with personnel action authority to take, fail to take, or threaten a personnel action because an employee engaged in a protected activity, such as making disclosures to the OIG or filing a

¹ A protected disclosure is one that an employee reasonably believed evidenced a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. The "reasonable belief" test is satisfied when, based on the facts known to and readily ascertainable by the whistleblower, a "disinterested observer" would agree that the information disclosed evidenced one to the statutory conditions (e.g., a violation of law, rule, or regulation). See *LaChance v. White*, 174 F.3d 1378, 1381 (Fed.Cir. 1999).

U.S. Office of Special Counsel

Mr. Jeff Ruch

Re: MA-03-0306: Mr. James Ruggieri

Page 2

complaint with OSC. In order to prove a violation of (b)(9), we must show that: (1) Mr. Ruggieri engaged in a protected activity; (2) an official with personnel action authority took, failed to take, or threatened a personnel action against him; (3) that official knew about his protected activity; and (4) his protected activity was a significant factor in the official's decision regarding the personnel action.

Protected Disclosure or Activity – Previously, OSC assumed, for purposes of analysis, that Mr. Ruggieri made two protected disclosures – (1) his August 24, 1998, disclosure to the Office of the Inspector General (OIG) about improper influence in the adoption of certain regulations, and (2) his November/December 1999 disclosure to the OIG about low smoke/zero halogen cables. For purposes of our current analysis, we have also assumed that Mr. Ruggieri made protected disclosures on these occasions. Mr. Ruggieri also engaged in protected activities by making disclosures to the OIG and by filing his previous OSC complaint (MA-99-1546).

Personnel Action – On or about March 7, 2001, Joseph Levine, (former) Chief of the Operations Analysis Branch, Engineering and Operations Division, MMS (selecting official) and Elmer Danenberger, Chief of the Engineering and Operations Division (approving official), decided not to select Mr. Ruggieri for the Electrical Engineering position advertised under vacancy announcement MMS-OW-1-0008. This is a failure to take a personnel action. See 5 U.S.C. § 2302(a)(2)(A)(i).

Knowledge – The evidence shows that Messrs. Levine and Danenberger were aware of Mr. Ruggieri's OSC complaint when they made the decision not to select him. They also were both aware that Mr. Ruggieri made disclosures, although the evidence is insufficient to show that either had any specific knowledge about the substance of the disclosures or the fact that they were made to the OIG. Nevertheless, for purposes of analysis, we have assumed that the MSPB would conclude that they had sufficient knowledge to satisfy this element under both (b)(8) and (b)(9).

Nexus – Finally, in order to show a violation of either (b)(8) or (b)(9), we must be able to establish a nexus between Mr. Ruggieri's protected disclosures/activities and the decision not to select him for the Electrical Engineering position. Under (b)(8), nexus is established with evidence showing that an employee's protected disclosure was a *contributing factor* in the personnel action decision. See 5 U.S.C. §§ 1214(b)(4); Caddell v. Dep't of Justice, 52 M.S.P.R. 529, 533 (1992). Under (b)(9), nexus is established with evidence showing that an employee's protected activity was a *significant factor* in the personnel action decision. See Special Counsel v. Costello, 75 M.S.P.R. 562, 610 (1997), rev'd on other grounds, sub nom. Costello v. Merit Systems Protection Bd., 182 F.3d 1372 (Fed.Cir. 1999).

If a *prima facie* violation of (b)(8) or (b)(9) is established, then the agency has the opportunity to defend its personnel action decision, and overcome the *prima facie* showing of a prohibited personnel practice, by presenting evidence that it would have made the same decision

U.S. Office of Special Counsel

Mr. Jeff Ruch

Re: MA-03-0306; Mr. James Ruggieri

Page 3

despite the employee's protected disclosure or activity.² In assessing an agency's defense, the MSPB considers (1) the strength of the evidence in support of the agency's personnel action decision; (2) the existence and strength of a motive to retaliate; and (3) the agency's treatment of similarly-situated employees who have not made protected disclosures or engaged in protected activities. See Smith v. Dep't of Agric., 64 M.S.P.R. 46, 66 (1994).

While there is evidence of a connection between Mr. Ruggieri's discharge from the USCG and his non-selection, we do not believe the evidence here is sufficient for OSC to establish a violation of (b)(8) or (b)(9). That is, Mr. Levine testified that he was concerned that Mr. Ruggieri had been fired by his former employer. He also testified that he was unable to get a reference, either positive or negative, from the USCG, and that he received a "mixed" report from one of Mr. Ruggieri's private-sector references. He and other agency officials also testified that Mr. Ruggieri was at a disadvantage because he did not have an electrical engineering degree. Under these circumstances, we would be unable to prove a causal connection between Mr. Ruggieri's (b)(8) or (b)(9)-protected conduct and his nonselection.

Opportunity to Respond – For the reasons set forth above, we have made a preliminary determination that no further action by OSC is warranted. As previously stated, Mr. Ruggieri may respond to our preliminary determination in this matter. His response must be in writing and must be received by OSC within sixteen days from the date of this letter. See 5 U.S.C. § 1214(a)(1)(D). We will consider any comments he makes and respond to them as soon as possible after receipt. If we do not receive any comments by the end of the sixteen-day period, we anticipate closing this file, at which time we will send you a letter terminating the investigation and advising Mr. Ruggieri of any additional rights he may have. Please send any comments to me at the above address. If you have any questions or wish to discuss this matter, please contact me at (202) 254-3600.

Sincerely yours,



Kristin L. Ellis
Senior Attorney
Investigation and Prosecution Division

² The agency's burden of proof varies depending on whether (b)(8) or (b)(9) is violated. Specifically, under (b)(8), the agency must prove its defense with clear and convincing evidence whereas under (b)(9) it must prove its defense by preponderant evidence.