



# PEER

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## Public Employees for Environmental Responsibility

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### **Abolish the U.S. Office of Special Counsel**

Testimony Submitted to

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Subcommittee on Oversight of Government Management, the Federal Workforce,  
and the District of Columbia**

**Hearing on Safeguarding the Merit System Principles:**

**A Review of the Merit Systems Protection Board and the Office of Special Counsel**

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**March 22, 2007**

Public Employees for Environmental Responsibility (PEER) urges the Committee on Homeland Security and Governmental Affairs to refrain from recommending the re-authorization of the U.S. Office of Special Counsel (OSC). Our argument is rooted in the fact that OSC helps extremely few whistleblowers, harms the causes of hundreds more whistleblowers than it helps and acts as a beacon of false hope for thousands more unsuspecting civil servants.

In short, the \$15.3 million annual budget for OSC is very possibly the least cost-effective expenditure of federal resources made in the name of assisting whistleblowers.

PEER is a service organization for public employees working on environmental issues. PEER provides legal assistance and guidance to hundreds of public servants each year. Much of our work is with federal employees, ranging from the Chief of the U.S. Park Police to chemical weapons inspectors. As such, PEER often has direct dealings with OSC on behalf of our clients. Moreover, we also work directly with the whistleblower programs administered by the U.S. Department of Labor, various federal offices of inspector generals as well as whistleblower protection programs in more than 20 states.

Our experience leads to one incontrovertible conclusion: OSC has become nothing short of a disaster area for whistleblowers. In recent years, OSC has become so profoundly dysfunctional and defensive that PEER concludes the agency is beyond rehabilitation. Instead, Congress should use this opportunity to abolish OSC and distribute its functions among other agencies.

In this testimony, PEER provides 1) an overview of the paltry results now produced by OSC; 2) an examination of some of the very few “success” stories to which OSC can point; and 3) suggestions for transferring OSC’s functions and for re-constituting the Merit Systems Protection Board (MSPB) in the context of reforms of the Whistleblower Protection Act (WPA) that are now being considered in both houses of Congress.

## **I. OSC's Dismal Track Record**

### **A. Whistleblower Retaliation**

A principal function of OSC is to protect federal employees from retaliation for reporting waste, fraud and abuse. It appears, however, that OSC protection of employee whistleblowers has become far more the exception than the rule.

This past November, OSC finally released its long-overdue FY 2005 annual report to Congress. (Although the 2007 Fiscal Year is nearly half over, OSC has yet to produce its FY 2006 report.) The 2005 report, however, reflects an abysmal track record for protecting federal servants from retaliation:

- In no case did OSC seek relief for a whistleblower where the agency had not already voluntarily agreed to the action.
- The only relief for employees comes throughout settlements, but fewer than ever cases are settling. Settlements for whistleblowers claiming retaliation declined 25% from the previous year and have declined by more than half since the current Special Counsel took office three years ago; and
- Following the forced resignation of the head of its mediation unit, no OSC cases were settled through alternative dispute resolution.

In other words, out of the hundreds of complaints of retaliation filed each year, only a tiny handful come to any resolution (other than dismissal) under the aegis of the OSC.

Last fall through the Freedom of Information Act, PEER obtained the latest annual survey conducted by OSC (under a statutory mandate) of whistleblowers and other employees who filed retaliation complaints. Perhaps not surprisingly, the survey did not reflect well upon OSC. Nearly 90% of federal employees who dealt with the OSC registered dissatisfaction with the experience in the survey. Survey results included:

- OSC did not find for a single whistleblower. Of 118 whistleblowers who filed complaints of retaliation only 4 obtained any relief, and then only because "You or OSC settled the matter";
- Nearly twice as many whistleblowers (7) obtained relief on their own after OSC had dismissed their complaints as obtained relief while their complaints were before OSC, with appeals still pending for another 14 employees; and
- Less than 6% of the respondents reported any degree of satisfaction with the results obtained by OSC while 89% were dissatisfied.

It is hard to imagine how any business with such negative "customer satisfaction" ratings could keep its doors open.

This latest survey evidences a dramatic decline in both relief obtained for whistleblowers and in their regard for OSC. For example, in the FY 1997 survey, ten times more employees (45) obtained settlements while their complaints were before OSC than in FY 2005. More than a quarter of that survey's respondents said they were satisfied with how their cases were handled. Similarly, in the FY 2001 survey, 46 employees reported full or partial resolution of their cases at OSC.

## **B. Whistleblower Disclosures**

The OSC is also supposed to serve as a place where federal employees can report waste, fraud, abuse or other wrongdoing and oversee investigation of those reports. These employee whistleblower reports are called "disclosures." The OSC is supposed to review each such disclosure and make a determination within 15 days as to whether the disclosure carries a substantial likelihood of validity. If so, OSC then orders the cabinet agency from which the disclosure emanated to provide a response back to OSC within 60 days. Once the agency response has been submitted, OSC provides the whistleblower a chance to respond.

After the whistleblower has responded to the agency review, the Special Counsel makes an independent determination as to whether the agency response was reasonable in addressing the problems raised by the whistleblower. If the Special Counsel finds the agency response to be wanting, he or she can order the agency head to provide additional information. Alternatively, the Special Counsel can find that the agency has not addressed the problems raised by the employee whistleblower and make that finding known to the president and the leadership of both houses of Congress.

While the OSC disclosure process has no teeth, in the sense that it cannot mandate that an agency take any particular action, when it is conducted properly it is a powerful tool for vindicating often embattled whistleblowers. Moreover, the OSC oversight of the agency response provides a measure of transparency lacking in agency inspector general investigations.

Unfortunately, this powerful tool for transparency is seldom used. In FY 2005, of the nearly 500 disclosures by federal employees of wrongdoing in their agencies, OSC deemed only 4% (19 cases) worthy of investigation. The rest of the whistleblower disclosures were dismissed without any follow-up or further review.

This means that fewer than one in 20 federal employees who discloses violations of law, threats to public safety or other misconduct to the OSC succeed in having the disclosure examined in any meaningful fashion. It is almost as if the OSC disclosure function is designed to stifle the disclosures rather than promote investigations.

## **C. The Best Measure**

Finally, perhaps the most telling indication as to how OSC implements the WPA is the experience of OSC's own staff. On March 3, 2005, OSC staff members and a coalition

of whistleblower protection and civil rights organizations (including PEER) filed a complaint against Special Counsel Scott Bloch for violating the very laws he is supposed to enforce. The complaint specified instances of illegal gag orders, cronyism, invidious discrimination, and retaliation in forcing the resignations of one-fifth of OSC headquarters' legal and investigative staff.

The complaint was filed with the President's Council on Integrity and Efficiency, an umbrella group of inspector general and other government oversight agencies, that has the power to review such complaints when referred by a member agency. The PCIE took no action on the complaint for more than seven months, until October 2005 when the chair of PCIE tasked the Office of Personnel Management Office of Inspector General (OPM-IG) with conducting an investigation into the charges.

This investigation by OPM-IG is ongoing, more than 17 months later. One factor slowing this probe was Special Counsel Bloch's insistence that outside investigators make appointments with OSC staff members through his office, rather than contacting them directly to set up interviews. As late as January 30, 2007, Rebecca McGinley, one of Bloch's political deputies, sent an email to all OSC employees directing she be notified if OPM-IG contacted any of them for an interview. She also asserted that OPM-IG must conduct all interviews at OSC headquarters, unless the employee affirmatively declared his or her discomfort with speaking to investigators at the worksite.

Ms. McGinley claimed that this is consistent with the procedure OSC itself follows when conducting retaliation investigations. In fact, OSC does not follow such a policy. Its website confirms that "OSC reserves the right to contact witnesses directly when appropriate" rather than scheduling interviews through the agency which is the subject of the investigation.

Not surprisingly, OSC staff members report that they are afraid to speak with OPM-IG investigators for fear they will be reported back to Bloch.

Last month, in the face of a formal protest from the attorney for the current and former OSC employees who filed the retaliation complaint and an impending *Washington Post* story, Bloch's office abruptly reversed course and withdrew the directives.

It is beyond ironic that the attorneys and investigators within OSC who are supposed to be protecting others from retaliation are themselves facing the same issues. If the Whistleblower Protection Act does not work for OSC's own staff, why would we expect it to work for anyone else?

## **II. Three Cases in Profile**

Statistics often do not communicate the frustration that public servants feel as they see their careers imploding due to their pursuit of what they believed was the morally correct course of action. These three recent cases from the PEER case files are especially

illustrative because they all represent OSC “success” stories yet capture the Kafkaesque experience of seeking help from OSC:

#### **A. Dr. Adam Finkel (OSHA)**

Dr. Adam Finkel was the Administrator for the six-state Rocky Mountain Region for the U.S. Occupational Safety and Health Administration (OSHA). In 2002, he discovered an agency database indicating that as many as 500 current and former compliance officers had taken air samples containing the toxic metal beryllium without wearing any personal protective equipment, such as respirators. Rather than act on the findings, in 2003 OSHA overrode the recommendations of its own medical and scientific staff and refused to notify or order blood tests for hundreds of its active and retired inspectors who may have been exposed to the beryllium.

Beryllium is an extremely toxic metal that carries a high risk of disease following even very low exposure. Hundreds have already died of chronic beryllium disease (CBD); a fast-progressing and potentially fatal lung disease, the only known cause of which is exposure to beryllium. A blood test used by industry and the U.S. Department of Energy can detect whether a person has been sensitized to beryllium, a necessary condition for the onset of CBD. The test costs approximately \$150 per application.

Dr. Finkel internally protested the action and also disclosed what had occurred to a publication called *Inside OSHA*. Shortly after *Inside OSHA* published an article on the topic, Dr. Finkel was abruptly involuntarily transferred from his position as Regional Administrator and ordered to report to heretofore non-existent job with negligible duties in Washington, D.C.

He filed a complaint with OSC contending that his directed reassignment was in retaliation for making protected whistleblower disclosures. Initially, OSC appeared to agree with Dr. Finkel, moving to obtain four separate “stays” or postponements of his transfer before the MSPB. Ultimately, however, OSC dismissed Dr. Finkel’s complaint, conceding that although he had made protected disclosures OSC claimed that it could find no connection between those disclosures and his abrupt removal.

With PEER, Dr. Finkel took his case directly to the MSPB. After several “smoking gun” emails connecting Dr. Finkel’s transfer with Headquarters’ displeasure at his advocacy for the inspectors were produced by OSHA in discovery leading up to the MSPB hearing, the agency asked for a settlement. A settlement was quickly reached. Today, Dr. Finkel has faculty positions in environmental and occupational health at Princeton University and the New Jersey University of Medicine and Dentistry. This past November, he received the prestigious David P. Rall Award for Advocacy in Public Health presented by the American Public Health Association.

Dr. Finkel is a success story in that he obtained a measure of relief from retaliation through the OSC-MSPB system. However, he was troubled that the beryllium exposure – the issue for which he risked his career – remained unaddressed.

In 2004, he filed a disclosure on the matter with OSC asking that OSC oversee a review by the U.S. Department of Labor, the parent agency of OSHA. After several months of inaction, OSC dismissed Dr. Finkel's disclosure on the grounds that he was not disclosing a threat to public health and safety as no inspector had reported an illness.

Dr. Finkel's disclosure was one of more than 700 disclosures pending when Scott Bloch became Special Counsel. Bloch created a special unit that dismissed more than 600 of those disclosures (it remains unclear if any of the remaining 100 were ever forwarded for investigation). That same unit also dismissed 470 of 500 pending retaliation complaints. Thus, Dr. Finkel's disclosure was part of a mass dismissal of more than one thousand whistleblower matters at the advent of Mr. Bloch's tenure.

Publicity about Dr. Finkel's case finally prompted OSHA to take some action. More than 18 months after Dr. Finkel blew the whistle, OSHA began a medical monitoring program but only for a portion of exposed compliance officers. According to an internal email sent to OSHA staff on March 24, 2005 by Acting Assistant Secretary of Labor for OSHA Jonathan Snare, ten OSHA employees out of 271 have tested positive for beryllium sensitization.

Although a number of factors suggest that the latest test results may well understate the extent of the problem, Secretary of Labor Elaine Chao never responded to a January 2005 letter by PEER, on behalf of Dr. Finkel, urging six steps to improve the beryllium testing program, including that OSHA disclose the location of facilities visited by inspectors who became sensitized so that state inspectors, EPA inspectors and the workers inside those facilities could make informed decisions about whether to seek medical testing. Instead, Mr. Snare sent PEER a letter dated March 24, 2005 that avoided any of the suggestions but assured that "We value the health of all OSHA employees."

To date, there has been no external review of OSHA's actions on this matter.

## **B. Kent Wilkinson and Bill Buge (BLM)**

Kent Wilkinson was a land appraiser and Bill Buge is a minerals appraiser with the U.S. Bureau of Land Management (BLM). Through a disclosure filed via PEER in 2002 with OSC, Mr. Wilkinson exposed a pending land exchange that was supposed to be equivalent but, in fact, would have cost the U.S. Treasury more than \$100 million.

At that time, OSC accepted the disclosure and requested that then-Interior Secretary Gale Norton undertake a review. Secretary Norton tasked the Department of Interior (DOI) Inspector General to investigate. The resultant report confirmed the whistleblower's disclosures, found several breakdowns in the system and recommended disciplinary action against named officials.

To our surprise, DOI embraced the report and in response DOI created a new agency called the Office of Appraisal Services, into which appraisers from all DOI agencies were

moved. The idea was to insulate appraisers from political pressures by placing them in a separate unit that does not answer to the managers who act as sponsors for exchanges.

While the disclosure aspects of their experience were remarkably successful, Wilkinson and Buge were ostracized by their supervisors, denied training and promotional opportunities, and Mr. Buge was even denied a requested transfer into the Office of Appraisal Services which his efforts had helped create.

Wilkinson and Buge filed whistleblower retaliation complaints with OSC. After a more than two-year investigation, OSC found that their complaints had merit but refused to share a copy of its investigative findings with the two complainants.

After concluding its investigation, OSC approached DOI seeking a settlement. When PEER asked what OSC would do if DOI refused the settlement, OSC informed us that it would dismiss the case, as it had no intention of directly advocating for Wilkinson or Buge before the MSPB.

In other words, in those very few cases where OSC fully investigates and actually finds for the whistleblower, it will seek only the relief consented to by the violating agency. Mr. Wilkinson compared it to scaling a high mountain only to reach the crest and find a deep crater.

What followed were several months of negotiation between OSC and DOI that finally reached a minimally acceptable settlement buttressed by repeated threats from OSC that it would dismiss the case because it was taking longer than the case deadlines handed down by Mr. Bloch.

### **C. Leroy Smith (Federal Bureau of Prisons)**

In September 2006, Leroy Smith, a federal prison safety manager, received the “Public Servant of the Year” award from the OSC. He was honored for coming forward with documents showing that computer terminal disassembly plants were showering particles of heavy metals, such as lead, cadmium, barium and beryllium, over both inmates and civilian prison staff at Atwater Federal Prison, a maximum-security institution located just outside of Merced, California.

Smith’s allegations were reviewed and upheld by the OSC which found the explanations offered by the Bureau of Prisons to be “unreasonable,” “inconsistent with documentary evidence,” and relying on “strained interpretations” of safety requirements.

Ironically, Smith was being honored even though OSC had dismissed Smith’s complaint that he faced retaliation for his warnings. Smith then proceeded on his own, represented by San Francisco attorney Mary Dryovage and PEER, to force a resolution following a hearing before an MSPB judge. Smith now works as the safety manager at the Federal Correctional Institution at Tucson, Arizona.

Moreover, OSC has also rejected similar complaints and disclosures from his colleagues at other prisons.

In mid-September, OSC flew Smith and his wife Theresa out to Washington, D.C. for the “Public Servant of the Year” awards ceremony. One hour before the ceremony was to begin, Special Counsel Bloch learned that Smith was holding a post-award press conference at PEER to discuss the fact that dangerous conditions inside prison industries persist despite his disclosure. Bloch then abruptly cancelled the event (using as a pretext a death in the family of an OSC staff member the week before) and dispatched security guards to prevent Smith from entering the OSC office building. Smith was told that he could not come to OSC to pick up his plaque which would instead be mailed to him. As the caterers had already delivered the food for the post-award reception, Bloch sent an email to OSC staff offering them a free lunch.

It is absurd yet telling that Special Counsel Bloch scotched a ceremony to honor a whistleblower for fear that the person would use the occasion to blow the whistle.

At the press conference later that day, Smith released a statement reporting that nearly two years after his original disclosure conditions have not changed at Atwater or the six other federal prisons with similar computer recycling plants:

- “The dangers that I identified go un-remedied to the continuing detriment of my colleagues who work in the Federal Bureau of Prisons and the inmates working in those prison industry factories.”
- “Daily, I receive calls from my colleagues working in computer recycling operations at other correctional institutions who describe coming home coated in dust. They had been assured that there was no danger. Now, many have health problems and others are scared about what lies in store for them.”

Shortly after the award fiasco, a promised Justice Department Office of Inspector General investigation into Smith’s disclosures began.

### **III. Next Steps**

A post-OSC world is not that hard to imagine. In fact, this Congress is already taking strides to transform the whistleblower protection system that will make institutional changes unavoidable. Conversely, the reforms that Congress is considering will be undermined or obviated unless the problems at OSC are effectively addressed:

#### **1. Expanding the Scope of the Whistleblower Protection Act (WPA).**

Congress is considering several proposals to expand WPA coverage to federal scientists, national security agency employees and to government contract employees. If these new classes of employees are channeled into an ineffectual, non-responsive OSC, these new protections will be compromised and employee whistleblowers will be frustrated.



## **2. Extending the Right of Jury Trial.**

Last session, Congress took the first step in providing the right to jury trials for all whistleblowers, including federal civil servants, for disclosures protected under the Energy Reorganization Act. If Congress expands the right to jury trial for whistleblowers, in major cases whistleblowers will opt for a jury trial, making the OSC-MSPB process a time-consuming, superfluous step.

## **3. Empowering Whistleblowers.**

The thrust of Congressional actions are to provide whistleblowers with more options and allowing them to choose the appropriate course. There is little about the current OSC process that is empowering – the OSC posture is that it is an OSC process and the whistleblowers have no rights. Instead, the whistleblower is to passively wait to see if OSC will deign to assist them.

Looking forward, the OSC-MSPB process should be consolidated into one step in which the employee and the agency have the opportunity to seek mediation or other alternative dispute resolution prior to heading to trial.

To the extent that any federal administrative hearing is required, Congress should strongly consider transferring that function away from the inconsistent MSPB over to the cadre of administrative law judges at the U.S. Department of Labor who now adjudicate whistleblower complaints filed under federal environmental statutes.

Congress should also seriously consider extending the whistleblower coverage in the eight environmental statutes to all statutes and thereby create one unitary system for federal administration of whistleblower protection for federal employees.

Similarly, the OSC jurisdiction under a 2004 demonstration project to enforce the Uniformed Services Employment and Reemployment Rights Act, or USERRA, passed by Congress in 1994 to protect service members' jobs when they return from active duty, should be transferred to the U.S. Department of Labor, which already has similar jurisdiction in an array of employment discrimination statutes.

The OSC disclosure function should be transferred, along with the budget and FTEs, to the Government Accountability Office (GAO). The only major departure for GAO would be taking over a process driven by employee disclosures rather than by congressional requests. GAO is more than equipped to apply the current WPA disclosure standards, oversee agency responses and evaluate whether the agency responses reasonably address the concerns raised by the whistleblower.

Moreover, the disclosure process results only in a report back to the President and the congressional leadership. This reporting function is not an inherently executive role and should not infringe on separation of powers if transferred to a legislative agency.

Most important of all, GAO has a track record that justifies confidence that it could provide a strong avenue of transparency into executive branch operations. By contrast, the record at OSC does not inspire comparable confidence.

Finally, the only significant OSC responsibility remaining would be prosecutions under the Hatch Act. Based on the far greater number of press releases it issues on Hatch Act prosecutions, OSC seems to institutionally favor prosecuting employees rather than defending them. It can be argued that combining the prosecution and defense roles in one agency creates an institutional conflict.

Nonetheless, the Hatch Act role does not justify the continuing existence of OSC. This function could easily be transferred to the Public Integrity Section of the U.S. Department of Justice. In addition, the Congress should examine the growing number of prosecutions by OSC of state and local government officials under the Hatch Act. Under OSC's view, these state and local officials are covered by the Hatch Act if they administer federally-funded programs. These local and state officials, however, are often unaware that this connection prevents them from activities such as running for school board or their city council.

In conclusion, the currently constituted OSC is so bad as to be worse than nothing at all. PEER believes that this agency is now so dysfunctional that it is beyond repair. Finally, the continued existence of OSC threatens to undo the important reforms to the Whistleblower Protection Act now proceeding through this Congress.

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