U.S. Merit Systems Protection Board

Office of the Clerk of the Board
1615 M Street, NW, 5th Floor
Washington, DC 20419
Phone: 202 653 7200, Fax: 202 652 7130, E-Mail: MSPB@MSPB.gov

Clerk of the Board

March 28, 2013

[redacted]

FOIA Tracking No: MSPB-OCB-2013-000133

[redacted]

This is in response to your Freedom of Information Act (FOIA) request dated March 25, 2013. You are requesting the following:

> "I respectfully request the stay request filed by the Office of Special Counsel, with all applicable exhibits and attachments, in Special Counsel ex rel. John Does, 1-4 v. Dep't of Commerce, Docket No. CB-1208-13-0011-U-1 (filed Nov. 26, 2012)."

We have processed your request in accordance with the Merit Systems Protection Board (MSPB) regulation at 5 CFR Part 1204 that implement the FOIA.

We have conducted a thorough search of our records and found a document that is responsive information to your FOIA request. We are releasing to you the enclosed responsive document in its entirety.

You have the right to appeal this determination. If you decide to do so, address your appeal to the Chairman, Merit Systems Protection Board 1615 M Street, NW, Suite 500, Washington, DC 20419. Your appeal should be identified as a "FOIA Appeal" on both the letter and the envelope. It should include a copy of your original request, a copy of this letter, and your reasons for appealing this decision. The MSPB also accepts email and

fax submissions at foia@mspb.gov and 202-653-7130, respectively. The MSPB must receive your appeal within 10 working days from the date of this letter.

Sincerely,

Darryl R. Aaron
Director, Information Services Team

Enclosure: OSC Stay Request (24 Pages)

ENCLOSURE

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

U.S. OFFICE OF SPECIAL COUNSEL EX REL. JOHN DOES 1-4[1]	:	
	:	Docket No.
Petitioners	:	
v.	:	
	:	Date: November 26, 2012
DEPARTMENT OF COMMERCE, OFFICE OF INSPECTOR GENERAL	:	
Respondent	:	

INITIAL REQUEST FOR STAY OF PERSONNEL ACTION AND PROTECTIVE ORDER

The Special Counsel requests that the Merit Systems Protection Board (the Board) stay for a period of 45 days two personnel actions taken or threatened to be taken by senior management of the Department of Commerce, Office of Inspector General (OIG) againstfour former OIG employees ("Employees").From 2010 to 2011, OIG senior management coerced the Employees into signing nondisclosure agreementsthat restrain them from making protected disclosures to OSC, Congress, or the press; filing complaints with OSC; cooperating with OSC in the absence of a formal written request; or exercising their rights to petition Congress.The Special Counsel requests that the Board stay (1) a significant change in working conditions

[1] As discussed *infra*, John Does 1-4 are former employees of the Department of Commerce, Office of Inspector General ("OIG" or "the Agency") who were coerced into signing nondisclosure agreements that restrain them from making protected disclosures to OSC, Congress, or the press; filing complaints with OSC; cooperating with OSC in the absence of a formal written request; or exercising their right to petition Congress. Moreover, these nondisclosure agreements contain a confidentiality provision prohibiting the relators from even disclosing the existence of their nondisclosure agreements. If the relators were identified, the Agency would be able to enforce these nondisclosure agreements against them in a manner which would constitute a prohibited personnel practice. The Special Counsel therefore requests that the Board grant these relators anonymity. *See Pinegar v. Federal Election Comm'n*, 105 M.S.P.R. 677, ¶¶ 10-11 (2007). Three John Does are current federal employees.

imposed by these unlawful nondisclosure agreements; and (2) threats to send failing performance appraisals to the Employees' new employers if the Employees did not sign or later attempted to revoke their nondisclosure agreements.[2] Finally, the Special Counsel requests that the Board issue an order to protect the Employees againstany enforcement of these nondisclosure agreements, which are preventing at least one Employee from filing a complaint with OSC, and which are interfering with OSC's ongoing investigation of an independent prohibited personnel practice complaint (the "Ongoing Investigation") in which the Employees are witnesses.[3]

STATEMENT OF FACTS

***Prima Facie* Unlawful Nondisclosure Agreements**

Credible information obtained by OSC in the Ongoing Investigation shows that Inspector General (IG) Todd Zinser, and the second- and third-highest officials in his office, Deputy IG and Counsel to the IG Wade Green and Principal Assistant IG for Investigations (PAIGI) Rick Beitel, have engaged in a pattern of prohibited personnel practices designed to chill employees

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[2]In a stay proceeding, a former employee is covered if the personnel action that the Special Counsel seeks to stay was taken or to be taken when he/she was a covered employee. *See* 5 U.S.C. § 2302(a)(2)(A) ("personnel action" means a listed action "with respect to an employee in . . . a covered position in an agency"); *cf.Special Counsel ex rel. Kunert v. Department of the Army*, Docket No. CB-1208-12-0025-U-2, *et al.*, slip op. at 6-7 (M.S.P.B. Oct. 22, 2012) (NP) (declining to order stay of agency actions "taken or to be taken" against an individual who is neither a federal employee nor an applicant for federal employment "when the action was or is to be taken"); *Special Counsel ex rel. Kunert v. Department of the Army*, Docket No. CB-1208-12-0025-U-1, *et al.*, slip op. at 8-9 (M.S.P.B. Sept. 6, 2012) (NP) ("Individuals not employed in an 'agency' may seek relief for actions of retaliation taken against them while they were employed in an 'agency[.]'"). Here, the actions that OSC seeks to stay happened to the Employees when they were employees of OIG. The Special Counsel seeks to rescind these actions so that it is as though the actions never happened – at least for the duration of the stay.

[3] "Witnesses" do not necessarily have to be covered employees. *See* 5 U.S.C. § 1204(e)(1)(B)(i) (during OSC investigation or pendency of any Board proceeding, the Board may issue any order necessary to "protect a witness or other individual from harassment"); *Kunert*, No. U-2, slip op. at 7-8 (noting novel legal issues presented by OSC's request for protective order in conjunction with stay request and for benefit of alleged victims of whistleblower reprisal).

and former employees from whistleblowing, cooperating with OSC, and reporting wrongdoing to Congress. In particular, Zinser, Green, and Beitelhave coerced at least four employees to sign a nondisclosure agreement providing as follows:

> [Employee] further agrees: . . . not to disparage the Agency in any communications to any person or entity, including but not limited to Members of Congress, the Office of Special Counsel, and the media. However, nothing in this Agreement shall prevent or inhibit [Employee] from responding truthfully to direct questions posted to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body; . . .

This provision on its face prohibits the Employee from making a protected whistleblowing disclosure to OSC, Congress, or the press; filing a complaint with OSC;cooperating with OSC in the absence of a formal written request; and exercising the right to petition Congress.

The nondisclosure agreement also contains strict confidentiality provisions. The nondisclosure agreementprovides that:

> The parties agree that this Agreement . . . shall not be used, cited, or relied upon by any party in connection with any other judicial or administrative proceedings.
>
> [Employee] and the Agency agree to keep the nature and terms of this Agreement confidential. The terms of the Agreement may not be disclosed to any person or entity beyond the persons signing below and those persons and entities represented by the persons signing below, except as required by law, as necessary to implement the terms of the Agreement, or as ordered by a court or administrative body of competent jurisdiction.

These provisions on their face appeardesigned to hide the existence, nature, and terms of the unlawful agreement from OSC, among other entities.

The nondisclosure agreements that have been obtained by OSCin the course of the Ongoing Investigation[4]wereeach signed by the Employee, PAIGI Beitel as "Management Official" and Deputy IG Green as "Counsel to the Inspector General."

[4] OSC has obtained the nondisclosure agreements of at least two Employees in the course of the Ongoing Investigation of an independent prohibited personnel practice complaint. The

Coercing Employees toEnter into Unlawful Nondisclosure Agreements

Credible information obtained by OSC in the Ongoing Investigation shows thatOIG senior management wrongfully coerced each of the Employeesto enter into a nondisclosure agreement as described above. In each case, Zinser, Green and/or Beitelbegan by issuing the Employee a failing performance appraisal. The timing and content of theseappraisals shows that they did not reflect OIG senior management's honest assessment of the affected Employee's performance. Each Employee had worked at OIG for several years but, as Zinser, Green and/or Beitel knew, was actively engaged in seeking employment outside OIG. Each Employee had received superior performance evaluations in previous years, and had recently received at least a satisfactory appraisal; no Employee had been put on a PIP.The failing appraisalswere issued neither at the usual time nor in the usual manner. The newly issued appraisals reflected that, despite recent satisfactory performance, the affected Employee's performance had suddenly dropped to failure in every element.

Immediately after giving the Employee the failing performance appraisal, Zinser, Green and/or Beitelpresented the Employee with the nondisclosure agreement and stated that if the Employee signed, the failing appraisal would not go into his Official Personnel Folder and the Agency would provide all prospective employers with a neutral job reference. However, if the Employee did not sign, Zinser, Green and/or Beitelthreatened toput the failing performance appraisal into the Employee's OPF and to notify the Employee's new employer about the failing performance appraisal. In addition, the nondisclosure agreement provides that:

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complainants in the Ongoing Investigation submitted nondisclosure agreements as evidence in the investigation of their own independent complaint, but have not entered into nondisclosure agreements themselves. The Employees are witnesses, not complainants, in the Ongoing Investigation.

> In the event that [Employee] exercises his right to revoke this Agreement in writing during the revocation period contemporary with or after his transfer from employment with the OIG, the OIG will deliver a full accounting of [the Employee's] performance over the last performance year to his new employer.

Chilling Effect of Unlawful Nondisclosure Agreements

Credible information obtained by OSC in the Ongoing Investigation shows thatthe nondisclosure agreements are chilling the Employees from whistleblowing, filing complaints with OSC, cooperating with OSC, and exercising their right to petition Congress. In particular, John Doe #1 has testified that, but for the nondisclosure agreement, he/she would file a prohibited personnel practice complaint with OSC. John Doe #1 has also indicated that he/she will file a prohibited personnel practice complaint with OSC if the legal impediment of the nondisclosure agreement is removed. John Doe #2 has testified that, but for the nondisclosure agreement, John Doe #2 would have reported misconduct by OIG senior management to the Council of Inspectors General on Integrity and Efficiency (CIGIE). John Doe #3 has testified that he/she is concerned that his/her testimony given in the Ongoing Investigation may violate the terms of John Doe #3's nondisclosure agreement, and that he/she is barred from going to Congress under the terms of the nondisclosure agreement. John Doe #4 stated that he/she was bound by a nondisclosure agreement and declined to participate in the Ongoing Investigation.

In addition, the three Employees who did testify in the Ongoing Investigation were visibly and audibly terrified of retaliation, and specifically testified that they feared OIG senior management would retaliate against them by interfering with their new employment. Two Employees indicated that, even after they moved on to new jobs, Zinser and/or Beitel contacted their new employers with false negative information about them, in effect letting the Employees know that they can never be fully safe.

ARGUMENT

I. Authority of the Special Counsel to Seek a Stay and Protective Order

"The Special Counsel should not passively await employee complaints, but rather, vigorously pursue merit system abuses on a systematic basis. [She] should seek action by the Merit Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices." *Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150, 163 & n.47 (D.C. Cir. 1982) (citing S. Rep. No. 95-969, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N., at 2754). The Special Counsel is required by statute to "*protect* employees, *former employees*, and applicants for employment *from prohibited personnel practices*." 5 U.S.C. § 1212(a)(1) (emphasis added). The Special Counsel must receive "*any allegation* of a prohibited personnel practice" and investigate 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." 5 U.S.C. § 1214(a)(1)(A) (emphasis added). In addition, the Special Counsel "may, *in the absence of an allegation*, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken." 5 U.S.C. § 1214(a)(5) (emphasis added).

II. The Board Should Grant the Stay Request

A. Legal Standard for Granting Stay Requests

OSC may request any member of the Board to stay any personnel action for a period of 45 days if the Special Counsel determines that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. 5 U.S.C. § 1214(b)(1)(A)(i). OSC may file a stay request even after the effective date of a

personnel action. *Special Counsel ex rel. Perfetto v. Department of the Navy,* 83 M.S.P.R. 169, ¶ 12 (1999). The Board member shall order the stay unless the member determines that the stay would be inappropriate. 5 U.S.C. § 1214(b)(1)(A)(ii); *Special Counsel v. Department of the Treasury,* 70 M.S.P.R. 578, 580 (1996).

The Board has held that because the initial stay is designed to provide OSC with time to complete an investigation, it can be granted on the basis of relatively little information. *Dep't of Treasury,* 70 M.S.P.R. at 580. In evaluating the sufficiency of a stay request, the Board will view the facts in the record in the light most favorable to a finding that there are reasonable grounds to believe that the personnel action is the result of a prohibited personnel practice. *Id.* The Board traditionally has relied upon the judgment of OSC and granted a request for a stay as long as it is within the range of rationality. *Special Counsel ex rel. Hopkins v. Department of Transportation,* 90 M.S.P.R. 154, ¶ 6 (2001).

B. Imposition of the Nondisclosure Agreement Is a Prohibited Personnel Practice

OSC reasonably believes that the act of requiring a federal employee to enter into a nondisclosure agreement that forbids the employee to exercise his statutory rights or fulfill his ethical duty to make protected disclosures constitutes a prohibited personnel practice under 5 U.S.C. §§ 2302(b)(8), (b)(9) and (b)(12). It is a fundamental condition of federal employment that an employee has a right, and an ethical duty, to report wrongdoing to appropriate authorities. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, Sec. 2(b) (1989) (purpose of the WPA is "to strengthen and improve protection for *the rights of Federal employees*, to prevent reprisals, and to help eliminate wrongdoing within the Government[.]") (emphasis added); 5 C.F.R. § 2635.101(b)(11) (2012) ("Employees *shall disclose* waste, fraud, abuse, and corruption to appropriate authorities.") (emphasis added); *see also* E.O. 12674,

Sec. 101(k) (1989) (same).[5]Contractually requiring an employee to give up that fundamental right, or not to perform that required duty, constitutes a "significant change in duties, responsibilities, or working conditions" within the meaning of 5 U.S.C. § 2302(a)(2)(A) (defining "personnel action").The legislative history of the 1994 WPA amendments indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system."*Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, ¶ 15 n.4 (citing 140 Cong. Rec. H11,421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey); *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 24 (1999)).

Sections 2302(b)(8) and (9) prohibit employers from taking or threatening personnel actions "because of" an employee's protected disclosure to or cooperation with the Special Counsel. 5 U.S.C. § 2302(b)(8), (9). The Board has interpreted "because of" broadly to protect employees who have not actually made a protected disclosure, filed a complaint, or cooperated with OSC, but rather whom the Agency believes might make a protected disclosure, file a complaint, or cooperate with OSC. *See King v. Department of the Army*, 116 M.S.P.R. 689, ¶¶ 7-8 (2011) (collecting cases); *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278 (1990) ("The purpose of the WPA indicates that its protections are not limited to those

[5] Federal employees also have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General. 28 U.S.C. § 535(b) (2012).In addition, there are a variety of other statutes and regulations that mandate particular types of reporting and/or reporting by certain categories of employees. *See, e.g.*, 48 C.F.R. § 3.104-7 (2011) (violations of the Federal Acquisition Regulation); 31 U.S.C. §§ 1351, 1517(b) (2012) (violations of the Antideficiency Act); 38 C.F.R. § 1.201 (2011) (employee's duty to report violations of Veterans Affairs laws or regulations); 45 C.F.R. §§ 73.735-1301, -1302 (2011) (employee's duty to report violations of fraud, waste or abuse in programs of the Department of Health and Human Services); 40 U.S.C. § 611 (2006) (General Services Administration).

individuals who actually make protected disclosures."); *Special Counsel v. Harvey*, 28 M.S.P.R. 595,606 (1984), *rev'd on other grounds, Harvey v. Merit Sys. Prot. Bd.,* 802 F.2d 537 (D.C. Cir. 1986) (failing to protect employee who had threatened, but had not actually made, disclosure to OSC would frustrate the purpose of section 2302(b)(9) and "would have a chilling effect on employees' exercise of their appeal rights"). Preemptively restraining an employee from making a protected disclosure, filing a complaint, or cooperating with OSC falls within the broad ambit of taking a personnel action because the agency officials involved believed that the employee intended to disclose their wrongdoing. *See King*, 116 M.S.P.R. 689, ¶ 8 (the Board will focus its analysis on "whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures" in perceived whistleblower cases); *Harvey*, 28 M.S.P.R. at 606 ("The consequences of basing an adverse action upon such protected activity are the same here regardless of whether the draft letter [to OSC] had been sent or had not been sent.").

It is also a prohibited personnel practice to take a personnel action if taking such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. 5 U.S.C. § 2302(b)(12). An employee's right to petition Congress is protected under the Lloyd-LaFollette Act of 1912, 5 U.S.C. § 7211. "Gag rules" that forbid federal employees from communicating directly with Congress, on pain of dismissal, were explicitly cited by several legislators as the reason for enacting the Lloyd-LaFollette Act. *Bush v. Lucas*, 462 U.S. 367, 382-84 & nn.19-24 (1983). The nondisclosure agreements on their face violate the Lloyd-LaFollette Act, and thereby 5 U.S.C. § 2302(b)(12). *See* 5 U.S.C. § 2302(b) ("This subsection shall not be construed to authorize the withholding of information from the Congress or the

taking of any personnel action against an employee who discloses information to the Congress.").

Here, the nondisclosure agreements imposed a significant change in duties or working conditions on the Employees in order to restrain them from making a protected disclosure to any entity, including Congress, OSC, or the press; from cooperating with or disclosing information to OSC; andfrom exercising their right to petition Congress. These nondisclosure agreementsare not valid settlements of *bona fide* employment disputes. *Rather, they have no legitimate purpose, and are intended only to chill employees from exercising their rights.*

OSC thereforerequests that the Board stay the Agency from imposing this significant change in duties or working conditionsand restore the Employees to the *status quo ante*by issuing an Order that nullifies the nondisclosure agreements for the duration of the stay. This Order will permit at least one affected Employee to file a complaint with OSC in order to pursue a corrective action, which would include permanently nullifying the nondisclosure agreements as *per se* retaliation, and void and unenforceable as against public policy.

C. The Nondisclosure Agreement Constitutes*Per Se* Retaliation

These types of "gag" agreements have been deemed *per se* retaliationin analogous circumstances. For example, as discussed in "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes":

> Agreements that attempt to bar individuals from filing a charge orassisting in a Commission investigation run afoul of the anti-retaliationprovisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. *By their very existence*, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.

Enforcement Guidance, EEOC Notice No. 915.002 (April 10, 1997), *available at* http://www.eeoc.gov/policy/docs/waiver.html(emphasis added).

EEOC has consistently recognizedin federal sector cases that an agency's restraint or interference with the EEO process, including attempts to chill EEO activity through prior restraint, constitutes *per se* retaliation for protected EEO activity – *even though no personnel action has been taken and no protected activity has occurred.* For example, in *Jasper v. Runyon*, the Postmaster stated at a supervisors' meeting that too many managers were filing EEO complaints and that these filings would do the managers no good. The Commission found that such a statement would have a potentially chilling effect on the filing of EEO complaints. Based on its duty to insure the integrity of the EEO process, the Commission found that the Postmaster's statement constituted *per se* retaliation. *Jasper v. Runyon*, EEOC Request No. 05920370, 1992 WL 1374793, at *4 (Aug. 7, 1992).[6]

OSC reasonably believes that an agency's prior restraint or interference with whistleblowing, filing a complaint, and/or cooperating with OSC constitutes *per se* retaliation under 5 U.S.C. § 2302(b)(8) and/or (b)(9), and thus a prohibited personnel practice. The nondisclosure agreements on their face constitute a prior restraint against a signing employee's whistleblowing, filing a complaint, and/or cooperating withOSC. Moreover, since the

[6]*See also Donahue v. Holder*, EEOC Appeal No. 0120073680, 2009 WL 591068, *1 (Feb. 26, 2009) (finding *per se* reprisal where manager made statements at meeting that employees had the right to challenge his recent assignments and "could file grievances or EEO complaints, but they will lose"); *Bensing v. Danzig*, EEOC Appeal No. 01970742, 2000 WL 33541925, *3-4 (Oct. 3, 2000) (supervisor's objections to employee's contacts with EEO office and union representatives constituted *per se* reprisal); *Simpson v. Rubin*, EEOC Request No. 05930570, 1994 WL 1841189, *5 (March 11, 1994) (agency policy that precluded employee from serving in acting supervisory capacity solely because employee was an EEO counselor constituted *per se* reprisal); *Marr v. Widnall*, EEOC Appeal No. 01941344, 1996 EEOPUB LEXIS 2637, *18 (June 27, 1996) (finding unlawful interference where supervisor attempted to dissuade witness from testifying in EEO matter by calling her to private meeting in smoking area and stating that it was "in [her] best interest not to get involved.").

nondisclosure agreementsalso restrain or interfere with a signing employee's exercise of the right to petition Congress, the agreements also constitute a *per se* violation of 5 U.S.C. § 2302(b)(12), and thus a prohibited personnel practice. As the Second Circuit reasoned in similar circumstances: "Although the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet." *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89, 95-96 & n.5 (2d Cir. 1996) (affirming Dep't of Labor rulingthat act of offering settlement agreement which would restrict individual from reporting unlawful conduct to the government violatedanti-retaliation provision of Energy Reorganization Act of 1974).

D. The Nondisclosure Agreements Are Void and Unenforceable as Against Public Policy

These types of "gag" agreements have also been deemed void and unenforceable as against public policy. In *EEOC v. Astra U.S.A.*, the EEOC brought an action under Title VII of the Civil Rights Act of 1964 for a preliminary injunction enjoining an employer from entering into or enforcing settlement agreements containing provisions that prohibited settling employees from assisting EEOC in its investigation of any discrimination charges. The district court granted the injunction "because the Commission's ability to investigate charges of discrimination and to enforce anti-discrimination laws has been and continues to be impeded by the chilling effect caused by the offending provisions of the Agreements." The First Circuit affirmed, concluding that the agreements were void as against public policy, and that the public interestin having EEOC enforce Title VII outweighed the public interest involuntary settlement of employment discrimination claims. *EEOC v. Astra U.S.A.*, 94 F.3d 738, 744-45 (1st Cir 1996). As the court aptly observed:

> Congress entrusted the Commission with significant enforcement responsibilities in respect to Title VII. To fulfill the core purposes of the statutory scheme, "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired." Clearly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered.

Id. at 744 (quoting *EEOC v. Shell Oil Co.,* 466 U.S. 54, 69 (1984)) (some citations omitted);*see also EEOC v. Morgan Stanley & Co., Inc.,* 2002 WL 31108179 (S.D.N.Y. 2002) (adopting *Astra*); *SEC v. Lipson*, 1997 WL 801712 (N.D. Ill. 1997) (settlement agreement that barred signatories from "directly or indirectly discuss[ing] or caus[ing] to be discussed by any person . . . the terms of this Agreement or the Lipson Parties with . . . any governmental agency" without a subpoena was void as against public policy because it could preclude voluntary cooperation by potential witnesses with the SEC); *cf. Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1368 (Fed. Cir. 2001) (settlement agreement which would bar United States from making criminal referrals of federal employee's conduct underlying settlement agreement is unenforceable as a matter of public policy).

OSC reasonably believes that the nondisclosure agreements are void and unenforceable as against public policy. The Special Counsel has a statutory duty to investigate and seek action by the Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices.The public interest in OSC's enforcement of the laws prohibiting fraud, waste, abuse, and corruption and protecting the public health and safety outweighs the interest in promoting voluntary settlement – particularly here, where the nondisclosure agreements were not valid settlements of*bona fide* employment disputes, but rather disputes manufactured by the issuance of highly suspect failing performance appraisals.

E. The Nondisclosure Agreements Violate Annual Appropriations Law

To the extent that the nondisclosure agreements restrict communications to the Office of Special Counsel or Congress, such provisions are in violation of annual appropriations law. Specifically, since 1988 appropriations law prohibits federal agencies from using any funds appropriated by Congress to implement or enforce any nondisclosure agreement if the agreement does not contain express language to inform employees that the agreement's restrictions do not supersede, conflict with, or otherwise alter an employee's rights under section 2302(b)(8) and 7211 of title 5, United States Code. *See*P.L. 112-74, Consolidated Appropriations Act, 2012, Section 715, made current through March 27, 2012, through P.L. 112-175. Because the nondisclosure agreements do not contain such a statement or addendum, theyare unenforceable as a matter of appropriations law, and federal funds may not be used to implement or enforce them.

In addition to the annual appropriations provision, both chambers of Congress have passed legislation that would codify these restrictions on the use of nondisclosure agreements. In the current Congress, both the House and Senate have passed identical legislation that would make it a prohibited personnel practice under section 2302 of title 5 to implement or enforce any nondisclosure policy, form, or agreement that does not contain the required notification. *See* Whistleblower Protection Enhancement Act of 2012, S 743 as amended, 112th Cong. § 104 (2012).Although the final bill awaits signature by the President, Congress has expresseda clear policy intent that agencies inform employees of their rights under section 2302 to disclose waste, fraud, and abuse and communicate with Congress. Any nondisclosure agreement to the contrary, such as the ones at hand, is unenforceable and a violation of section 2302.

F. Threatening to Send the Failing Performance Appraisals to the New Employers Is Also a Prohibited Personnel Practice

Threatening to send the failing performance appraisals to the Employees' new employers also constitutes a prohibited personnel practice. First, a performance evaluation is a listed personnel action under 5 U.S.C. § 2302(a)(2)(A). More importantly,issuing a failing performance appraisal and threatening to send it to a new employer in order to coerce an employee to sign a *prima facie* unlawful nondisclosure agreement constitutes a "significant change in working conditions" because it is "harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *Covarrubias*, 113 M.S.P.R. 583, ¶ 15 n.4.

A federal employee has a right to an accurate evaluation of his or her job performance based on objective criteria. *See* 5 U.S.C. § 4302; *see also Lovshin v. Department of the Navy*, 767 F.2d 826, 841 (Fed. Cir. 1985) (*en banc*) (CSRA must be construedto effectuate Congress' expressed desire that new statute "serve the *public's interest*in . . . requiring management to act for the right reasons.") (emphasis in original). The Board has further held that "an employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework."*Thompson v. Farm Credit Admin.*, 51 M.S.P.R. 569, 578 (1991) (citing *Zang v. Defense Investigative Serv.*, 26 M.S.P.R. 155 (1985)).

Here, OIG senior management did not give the Employees an honest, accurate evaluation of their performance and gave the Employees no meaningful opportunity to improve, because the goal was not to improve their performance but rather to force them to enter into unlawful "gag" agreements as they were on their way out the door. It stands to reason that Zinser, Green, and Beitel took such extraordinary measures to "gag" the departing Employees because they were afraid that the Employees would make protected disclosures to OSC, Congress, or the press,

cooperate with OSC, and exercise their rights to petition Congress once the Employees were beyond OIG senior management's reach to take personnel actions against them.*See King*, 116 M.S.P.R. 689, ¶ 8; *Harvey*, 28 M.S.P.R. at 606.

In sum, threatening to send the failing performance appraisals to the Employees' new employers also constitutes a prohibited personnel practice. OSC therefore requests that the Board stay the Agency from imposing this significant change in working conditions and restore the Employees to the *status quo ante* by issuing an Order that stays the Agency from sending the failing performance appraisals to the Employee's new employers. This Order will permit at least one affected Employee to file a complaint with OSC in order to pursue a corrective action, which would include permanently rescinding the failing performance appraisals.

III. The Board Should Grant the Protective Order

A. Legal Standard for Granting Protective Orders

"The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment[.]" 5 U.S.C. § 1204(e)(1)(B)(i). The Board's regulations permit any member of the Board to rule on the motion. *See* 5 C.F.R. §§ 1201.4(a), 1201.146(c).[7] A motion for a protective order should be made "as early in the proceeding as practicable." 5 C.F.R. § 1201.146(b). OSC may show that the order is "necessary" by alleging that the harassment is interfering with its investigation. *Cf.*

[7]Although the Member indicated in *Kunert*, No. U-1, slip op. at 2 n.2, that an individual Board member does not have authority to issue a protective order under 5 U.S.C.§ 1204(e)(1)(B), the Board's regulations provide that a protective order can be issued by a "judge," 5 C.F.R. § 1201.146(c), and a "judge" is defined as "any member of the Board," 5 C.F.R. § 1201.4(a). A Board member who is already ruling on a stay request can properly be deemed the Board's designated "judge" for purposes of ruling on a motion for protective order subsumed within the stay request. *See Kunert*, No. U-2, slip op. at 7 & n.3 (noting that the Board's regulations permit the Board to designate a "judge" to rule on a motion for protective order).

Kunert, No. U-2,slip op. at 7 (noting that OSC did not assert that alleged harassment was interfering with its investigation).

B. The Existence of the Nondisclosure Agreements and the Outstanding Threats to Send the Appraisals to the New Employers Constitute "Harassment" of the Witnesses that is Interfering with OSC's Investigation

OSC is requesting a protective order concurrently with its initial stay request and shortly after beginning its investigation, thus satisfying the requirement that a motion for a protective order be made "as early in the proceeding as practicable." OSC alleges that the Agency is engaged in ongoing "harassment" of the Employees via the "gag" provisions of the extant nondisclosure agreements and the still outstanding threat to provide their new employers with their failing performance appraisals. The Employees are witnesses in the Ongoing Investigation, and OSC alleges that this harassment is interfering with its investigation of both the Ongoing Investigation and of the prohibited personnel practices to which the Employees themselves were subjected when they were OIG employees. *Cf. Kunert*, No. U-2, slip op. at 7 (noting that OSC failed to assert that the agency's alleged harassment of the individuals who used to work at the agency was interfering with its investigation). The Board should therefore issue an Order protecting the Employees against any enforcement of their nondisclosure agreements and any other harassment.

CONCLUSION

OIG senior management has trapped the Employees – and OSC – in an untenable Catch-22 situation. The complainants in the Ongoing Investigation have not entered into nondisclosure agreements (yet) and so cannot file a prohibited personnel practice complaint about such agreements. The Employees who have entered into nondisclosure agreements, however, cannot file a prohibited personnel practice complaint at all, because they are barred

from doing so by the agreements. Moreover, the nondisclosure agreements contain a confidentiality provision prohibiting the Employees from even disclosing the existence of their nondisclosure agreements. The only way that OSC became aware of these unlawful agreements was via the complainants in the Ongoing Investigation, who are not yet barred from disclosing the existence of the agreements to OSC.

The ultimate irony is that these gag agreements were coerced by an Inspector General – the very person sworn to protect a federal agency's employees from prohibited personnel practices and to uphold the merit system principles.

The Special Counsel therefore urges the Board to take any and all appropriate action within its power to correct this abomination and thwart this unlawful scheme.

Respectfully submitted,

Carolyn N. Lerner
Special Counsel

Bruce D. Fong
Associate Special Counsel

Jason Zuckerman
Senior Legal Advisor

Anne Glass
Attorney

_____/s/_____
Julie Martin-Korb
Attorney
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
Tel: (202) 254-3600

Fax: (202) 254-3711
jmartin-korb@osc.gov

November 26, 2012

DECLARATION OF ANNE GLASS

I, Anne Glass, hereby state:

1. I am an attorney with the U.S. Office of Special Counsel and assigned to the prohibited personnel practice complaints designated as OSC File Nos. MA-12-4575, MA-12-4816 and MA-12-4640.

2. I have personal knowledge of the contents of the aforementioned complaint files.

3. Based on this knowledge, I believe the facts alleged in the attached Request for Stay of Personnel Action and Protective Order are true and correct.

I declare under penalty of perjury that the above statements are true and correct. Executed this 26th date of November, 2012, at Washington, DC.

_____/s/_____
Anne Glass

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

U.S. OFFICE OF SPECIAL COUNSEL EX REL. JOHN DOES 1-4	:	
	:	Docket No.
Petitioners	:	
v.	:	
	:	Date: November __, 2012
DEPARTMENT OF COMMERCE, OFFICE OF INSPECTOR GENERAL	:	
Respondent	:	

[PROPOSED] ORDER

Pursuant to 5 U.S.C. § 1214(b)(1)(A), the Special Counsel has requested that the Board stay for 45 days the following personnel actions while OSC completes its investigation of whether these actions constitute prohibited personnel practices under 5 U.S.C. §§ 2302(b)(8), (b)(9) and (b)(12): (1) a significant change in working conditions imposed by nondisclosure agreements; and (2) threats to send failing performance appraisals to John Does' current employers if they did not sign or later attempted to revoke their nondisclosure agreements. Pursuant to 5 U.S.C. § 1204(e)(1)(B), the Special Counsel further requests that the Board issue a protective order to prevent the agency from any actions that may threaten John Does' current federal employment or that may otherwise be construed as retaliatory harassment. For the reasons described in my decision, the request is GRANTED. The stay shall be in effect from November __, 2012 through and including January__, 2013. It is further ORDERED that:

(1) The nondisclosure agreements entered into by John Does and any other former OIG employees are void and unenforceable as against public policy;

(2) All actions of the agency to interfere with the current federal employment of John Does and any other former OIG employees subject to a nondisclosure agreement are stayed;

(3) All actions of the agency to interfere with or restrain John Does and any other former OIG employees subject to a nondisclosure agreement from participating in the Office of Special Counsel's investigation are stayed;

(4) All actions of the agency to interfere with or restrain John Does and any other former OIG employees subject to a nondisclosure agreement from filing complaints with the Office of Special Counsel are stayed;

(5) Within five working days of this Order, the agency shall submit evidence to the Clerk of the Board showing that it has complied with this Order;

(6) Any request for an extension of the stay pursuant to 5 U.S.C. § 1212(b)(1)(B) must be received by the Clerk of the Board and the agency, together with any further evidentiary support, on or before January __, 2013. Any comments on such a request from the agency must be received by the Clerk of the Board, together with any evidentiary support, on or before January ___, 2013.

It is further ORDERED that:

(1) The agency is prohibited from providing any negative or adverse information to current or potential employers concerning John Doesand any other former OIG employees subject to a nondisclosure agreement, or taking any other action adverse to John Does and any other former OIG employees subject to a nondisclosure agreement that may reasonably be construed as harassment;

(2) This protective order shall remain in place for 45 days subject to the same renewal conditions as described in my stay order above; and

(3) In the event the agency believes it is otherwise required by law to provide information covered by the stay or protective order, it must make an affirmative request for relief from the Board's order together with a showing of good cause why the relief should be granted. This request must be served on the Special Counsel. OSC may have ten days form the date of service to file a response.

FOR THE BOARD: _____

Washington, D.C.
November __, 2012

CERTIFICATE OF SERVICE

I, Julie Martin-Korb, an employee with the U.S. Office of Special Counsel, hereby certify that on this 26th day of November 2012, I caused the Request for Stay of Personnel Action and Protective Order, Declaration of Anne Glass, and Proposed Order to be served to the following in the manner indicated:

By U.S. Mail and Electronic Mail

Wade Green
Counsel and Associate Deputy Inspector General
U.S. Department of Commerce
Office of Inspector General
1401 Constitution Avenue N.W.
Washington, DC 20230
Telephone: 202.482-1577
Electronic Mail: WGreen@oig.doc.gov

_____/s/_____
Julie Martin-Korb