Testimony of ADAM MILES and THOMAS DEVINE

Government Accountability Project

"Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel"

House Government Oversight and Reform Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia

July 12, 2007

Chairman Davis, Ranking Member Marchant, and Members of the Subcommittee: Thank you for inviting testimony from the Government Accountability Project (GAP) at today's hearing on oversight and reauthorization of the U.S. Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

This hearing is long overdue. The Office of Special Counsel, a cornerstone of the merit system when it functions as Congress intended, is currently in a crisis of credibility and legitimacy from nearly every perspective. This underlying assessment is balanced during the course of this testimony with specific examples of positive and negative contributions OSC has made to the merit system since the current Special Counsel, Scott Bloch, took over the agency on January 5, 2004.

On the positive side, outside of its own staff, the OSC is not actively attacking the merit system throughout the executive branch, as during the 1980's. Moreover, when the Special Counsel allows them to, the career staff at OSC has done a professional job helping federal government employees enforce their merit system rights. OSC has done an outstanding job in a limited number of individual cases.

Unfortunately, these anecdotes have been the rare exception under Special Counsel Bloch, who also has engaged in an ingrained pattern of violating the same merit system laws he is charged with enforcing. For all practical purposes, until recently the Special Counsel has been AWOL and the OSC has been a non-factor in protecting the merit system. Mr. Bloch has politicized the office to such an extent that even OSC's good work is suspect. This politicization of OSC is not consistently partisan, but rather in the classic bureaucratic sense: OSC's mission only comes into play when that means serving the Special Counsel's political needs. It should go without saying that this is not the way it should be. The Special Counsel's job is to protect the merit system, period, and not only when it suits the institutional and personal self-interest of the Special Counsel.

GAP is a non-profit, non-partisan public interest organization whose mission is to support whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led the public campaigns for passage of the Whistleblower Protection Act in 1989, subsequent amendments to the Act in 1994, and recently, with a coalition of nearly 50 other public interest organizations, the campaign to again restore the discredited WPA through this Committee's legislation, HR 985, the Whistleblower Protection Enhancement Act of 2007, which the House passed in March by an overwhelming bipartisan majority, 331-94.

Oversight of the Office of Special Counsel is a cornerstone of GAP's work with whistleblowers. Over the year's GAP has been among OSC's biggest cheerleaders as well as one of its harshest critics. For example, when OSC's budget was rescinded in

1980 we volunteered our law school clinic students to answer the OSC phones so the agency could remain functional. By contrast, in the campaign to pass the 1989 Whistleblower Protection Act we advocated its abolition. Our judgment has always been based strictly on the agency's performance. In addition to our experience and assessment, this testimony also is intended to provide a voice for dozens of whistleblowers who have responded over the last three years to inquiries about OSC's performance. Further, it reflects and is consistent with the exhaustive OSC oversight research available on the website of Public Employees for Environmental Responsibility (PEER).

In many cases there is no practical alternative to the OSC when good faith whistleblowers are harassed. The OSC's dismal track record in this regard has helped determine the need for stronger due process channels to enforce employee free speech rights, such as those spearheaded by this Committee in H.R. 985. Yet, even if H.R. 985 becomes law, OSC will remain the primary place federal employees turn to for help when they suffer retaliation for "committing the truth." Unfortunately, the vast majority of federal employees who have sought OSC for assistance during Mr. Bloch's tenure believe that his leadership is undermining, not promoting, its vital merit system role. Despite striking exceptions, our research and experience with OSC supports this assessment in the overwhelming majority of cases.

Special Counsel Scott Bloch's own track record of merit system violations provides the most telling explanation for OSC's decline under his tenure. Rather than promoting free speech and whistleblower protections within his agency, he has demonstrated intolerance for the same rights he is responsible to enforce in the rest of the government. Morale is down. Many of the seasoned veteran professionals with a proven track record of helping employees have left or been forced out. At the same time, the number of political staff has increased along with the number of totally inexperienced professional staff drawn from the recent graduate pools of an institution ideologically aligned with Mr. Bloch.

Many of these allegations were formally raised in a Whistleblower Protection Act complaint brought by GAP, PEER, the Project on Government Oversight, Human Rights Campaign, and a group of anonymous OSC employees. In October 2005, Clay Johnson III, Chair of the PCIE, assigned the investigation of Special Counsel Bloch to Office of Personnel Management Inspector General Patrick McFarland. Frankly, we are skeptical of the nonpartisan objectivity of this probe, which appears to run hot and cold depending on the current political winds. But the investigation continues, despite Mr. Bloch's efforts earlier this year to intimidate potential witnesses within OSC. A list of the violations alleged in the complaint, originally filed on March 3, 2005, include allegations that Mr. Bloch:

- Created a hostile work environment by repeatedly retaliating against career OSC staff members, culminating in the involuntary reassignment of twelve career employees for whistleblowing;

- Gagged career staff in violation of the anti-gag statute and the Lloyd Lafollette Act, which guarantees all federal employees the right to communicate with Congress

- Abandoned merit-based competitive hiring for career positions and misused special hiring authorities;

- Refused to enforce existing statutory prohibitions against sexual orientation discrimination in the federal workforce, and provided misleading statements to Congress about this; and

- Abused his authority with disparate and politically-motivated treatment for two high-profile Hatch Act complaints.

An amendment to the complaint added the following allegations:

- That Mr. Bloch hastened the termination date of the employees who refused geographic reassignments in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments; and

- Declined to permit employees to remain on at OSC headquarters in positions they were qualified to hold, in retaliation for whistleblowing, First Amendment activity, and/or the assertion of their legal rights to hire counsel and challenge the illegal reassignments.

OSC at its Best

While it has been a difficult period for the Office of Special Counsel, we have no doubt that the agency, and especially the remaining dedicated career staff, are fully capable of upholding and advancing the agency's mission when given the opportunity. The problem is not, and never has been, the professional career staff at OSC. It is a question of priorities and leadership. Before Mr. Bloch's arrival, whistleblower support organizations regularly viewed the OSC as the first choice to help retaliation victims. While no panacea, OSC staff could be counted on to – 1) make an honest effort reviewing employees' evidence and discussing it with them, 2) conduct intensive, no stones unturned investigations, 3) pressure steadily and aggressively for

informal corrective action throughout the investigation to make a difference without litigation, 4) sustain the civil service's most effective Alternative Dispute Resolution mediation program, and 5) when dissatisfied, appeal directly to Special Counsel Kaplan or Deputy Special Counsel and informal Ombudsman Tim Hannapel, both of whom were accessible and available when needed. This was an organization that attempted to make a difference.

None of those premises are true today. This is not an editorial comment, but simply the facts of life, supported by statistical and anecdotal evidence, as well as ongoing disclosures relayed by whistleblowers from within the agency. Currently, whistleblower support groups regularly advise reprisal victims to steer clear of the Special Counsel unless unavoidable to preserve their rights. For all but a few, the Office of Special Counsel is a waste of time, energy and money.

Despite this current status quo for the overwhelming majority of OSC complainants, there remain a few illustrations of the role OSC can and should always play on behalf of concerned government employees. Just recently, GAP client Richard Conrad, a Vietnam Veteran and civilian mechanic with 25 years experience at the North Island Naval Depot (NADEP) in San Diego, brought to OSC allegations about improper maintenance practices at the Navy's flagship repair facility. For years, NADEP management did not provide his team with the tools needed to repair and overhaul certain flight critical components on F/A-18 aircraft, according to military specifications. A rash of serious F/A-18 mishaps in 2005, resulting in the loss of several air crew and aircraft, prompted Mr. Conrad to raise his concerns about the improper maintenance procedures. He knew the shoddy maintenance procedures posed reliability and readiness threats to the F/A-18 Fleet during wartime, placed an additional unnecessary burden on the taxpayers because of an increased, unnecessary number of repairs, and could be a contributing factor in the recent surge in F/A-18 flight mishaps.

He took these concerns to his supervisors, to North Island Command investigators, and then to the Naval Air Systems Command's Office of Inspector General. Instead of addressing the safety and quality control issues raised by Mr. Conrad, his supervisors focused their attention on him. Mr. Conrad was given a Letter of Reprimand the day after he contacted his Command's Waste, Fraud, and Abuse hotline. He then was reassigned to work nights in a unit that doesn't perform any repairs on second shift, where his primary activity for the last sixteen months has been reading the paperback novels he picks up on his way into work. He has been isolated from the rest of the

workforce, stripped of all his overtime pay, and no longer has any job duties,[1] but continues to be paid with tax dollars for repairs he does not perform.

After being told by the NAVAIR IG that there was nothing they could do to help him, Mr. Conrad turned to OSC. OSC Disclosure Unit Chief Catherine McMullen and staff attorney Malia Myers recognized the importance of Mr. Conrad's disclosures. On their recommendation, Special Counsel Bloch determined there was a "substantial likelihood" that the lack of torque tools for repair and overhaul of F/A-18 components constituted a "substantial and specific danger to public safety." He ordered the Department of the Navy to investigate.[2]

The completed Navy investigation substantiated Mr. Conrad's allegations about the improper maintenance procedures, and outlined a series of corrective actions to ensure that all repairs in the NADEP Generator Control Unit program would be done according to military specifications and safety guidelines. The Navy's engineering analysis determined that the changes were necessary, but that the problem did not represent an immediate "safety of flight" concern and therefore rejected Mr. Conrad's recommendation to recall all affected parts.

In his formal comments to OSC on the Navy investigation,[3] Mr. Conrad accepted the Navy's resolution of the safety issues, but expressed ongoing concern about the reliability of the remaining improperly repaired units in the Fleet. OSC Disclosure Unit staff respected his comments and took the initiative to demand evidence from the Navy that in fact no aircraft or crew had been lost because of the maintenance problems identified by Mr. Conrad. In the OSC analysis on the disclosure and investigation,[4] Special Counsel Bloch recommended disciplinary action for a NADEP supervisor who had provided Navy investigators with misleading and false statements about the availability of proper tools for repairs, and who also made false statements to investigators about the job duties Mr. Conrad currently performs. Through its mediation program, OSC is currently following through on a separate reprisal complaint that has reached Agreement in principle, helping to make sure that Mr. Conrad, who is eligible for retirement, is able to leave government service with a clean record and relief for the sixteen months that he was isolated, harassed, and denied overtime pay because of his whistleblowing.

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[1] Mr. Conrad says he has averaged approximately 10 minutes of work per 8 hour shift for the last sixteen months.

[2] Pursuant to 5 U.S.C. § 1213(c).

[3] Pursuant to 5 U.S.C. § 1213(e)(1).

[4] See attachment 1.

Unraveling OSC's Statistics and Claims of Success

Unfortunately, this level of service from OSC has been practically unheard of since Special Counsel Bloch's arrival in 2004. The most telling statistic supporting this claim is the number of favorable actions[5] that OSC has produced for whistleblowers – in other words, how many employees OSC actually has helped. This number has dropped 60 percent since Mr. Bloch took over the agency, from 98 in 2002 to only 40 favorable actions in 2006, despite a significant increase in the number of cases OSC processed last year.

The explanations put forth by Mr. Bloch for this lack of productivity continue to shift. Initially, Special Counsel Bloch told the Congress that immediate measures were necessary to reduce a significant backlog in OSC's intake, or Complaints Examining Unit (CEU). During this process, Mr. Bloch repeatedly took credit for what he claimed was a significant increase in the number of internal referrals to OSC's Investigations and Prosecution Division (IPD). For example, in an April 28, 2005 letter to the American Spectator Magazine, Mr. Bloch wrote: "During the period of backlog reduction, we more than doubled the rate of referral to our investigation and prosecution unit [IPD] of those screened cases, so that we had more new claims that we accepted as validated in whole or in part than had been validated previously."[6]

However, after three years of case statistics, it is clear that having a case referred to IPD now in most cases means nothing more than an internal shifting of paperwork that does nothing to benefit the complainant, while giving the agency an opportunity to trash the whistleblower. Despite the alleged increase in the number of referrals to IPD, the number and percentage of complainants that received any help has continued to plummet.

A new explanation for the reduced number of favorable actions arrived in the FY2005 OSC annual report to Congress, which stated: "FY2006 will be the first year that the IPD will be able to focus primarily on cases received during the current fiscal [because of previous backlog clearing measures]. Therefore, we expect a higher

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[5] OSC defines "favorable action" as "actions taken to directly benefit the complaining employee; actions taken to punish, by disciplinary or other corrective actions, the supervisor(s) involved in the personnel action; and systemic actions, such as training or educational programs, to prevent future questionable personnel actions." More than one favorable action can be obtained for an individual complainant.

[6] See also Special Counsel Bloch's May 17, 2005, letter to Comptroller General David Walker: "I am happy to report that OSC has reduced the overall case backlog by 82 percent, from 1121 to 201 cases, by the end of Calendar Year (CY) 2004. . .Furthermore, during the backlog reduction project period, OSC increased by 22% the internal referral rate of meritorious cases for further action in the investigation and prosecution unit [IPD]."

number of favorable actions on PPPs [Prohibited Personnel Practices] in FY2006." Yet, in FY2006 the number of corrective actions generated by OSC increased only from 45 to 52 for all whistleblower and other PPP complaints. By contrast, in FY2002, the last full fiscal year for the previous Special Counsel, the number of favorable actions for all PPPs was 126, despite having 226 less complaints processed and closed than in fiscal '06. In fact, the percentage of employees helped by OSC in FY2006 for all whistleblower and other PPP cases dropped to what may be an all-time low of 2.49%.[7]

At this March's Senate OSC/MSPB reauthorization hearing, Sen. Akaka questioned Special Counsel Bloch on the free-falling number of favorable actions. In his reply Mr. Bloch shifted explanations again, and now had the audacity to blame the whistleblowers for OSC's lack of productivity. He told the Senators in attendance that "the quality [of whistleblower and other PPP complaints] was not as good....And we have struggled and scratched our head[s] to figure out, well, what can we do [given the low quality of complaints]?"

He continued, "We have tried to encourage the CEU examiners to speak with the complainants and try to find the good that is within their case. It might not be 100 percent good, but maybe there's a PPP in there...I've even sat in on the sort of round robin sessions of the CEU where they brainstorm and try to figure out where is the PPP. I've kidded with them that it's kind of like Where's Waldo? Where's the hidden PPP, because sometimes when a federal executive employee comes to you, they have a problem, and it's a bundle of things..."

Basically, Mr. Bloch's explanation is that "they don't make whistleblowers like they used to." This effort to scapegoat the reprisal victims for abandoning them cannot withstand scrutiny. This is underscored further by the experience of Natresha Dawson, who also is testifying today. Ms. Dawson was harassed and removed from federal service for actually trying to follow through on Mr. Bloch's 2005 commitments to the Senate. Ms. Dawson staffed OSC's Customer Service Unit, which Mr. Bloch created in response to criticisms about poor management of complaints at May 2005 Senate oversight hearings. Her experience illustrates that OSC's commitments from that hearing to start working closely with the whistleblowers was nothing more than a façade. Moreover, the federal employees that turn to OSC continue each year to

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[7] The number of meaningful favorable actions by OSC has been so sparse in recent years that OSC opted to recycle summaries of previous year's work in order to fill up space in the relevant section of its annual report to Congress. In early FY2003, Special Counsel Elaine Kaplan brokered a favorable settlement with the Department of Energy on behalf of a nuclear security specialist after he was suspended and had his security clearance removed in retaliation for protected whistleblowing. Despite having played no role in this action, Special Counsel Bloch took credit for brokering the settlement and misleadingly included a summary of it in his report to Congress for work completed in FY2004 and then <u>again</u> included the same summary in the FY2005 report.

surpass previous record lows in terms of their level of satisfaction with the agency. The percentage of employees "satisfied" with the courtesy, oral communications, written communications, and results from OSC has dropped by 40-50% in each of these categories in just the few short years Mr. Bloch has been in charge, according to OSC's own statistics.

The truth is that for every success story like Mr. Conrad's there are many more employees that were systematically turned away with inadequate explanation of their rights, who were not allowed to communicate with the attorney assigned to their case, and/or were shifted to the IPD and then dismissed in order to cushion Mr. Bloch's misleading claims about CEU backlog clearing measures that did nothing other than extend the amount of time complainants had to wait before being told they would not be helped. Consider the following examples:

- In one active case, OSC unilaterally decided it would no longer enforce protections against retaliatory investigations, despite long-standing case law that says retaliatory witch hunts constitute a personnel action under the WPA even when no adverse information is generated.

- In another case, OSC referred an investigation to IPD for an overseas government employee who was placed on Leave without Pay. After ten months, without any additional questions or requests for evidence from IPD, OSC sent him an initial determination letter which stated that OSC planned to close the complaint. He never received this preliminary letter, but two weeks later received notification that his file had been closed. When he called the OSC attorney to inform her that he never received the initial notification and that he had seven boxes of documentation that OSC investigators had not seen, the OSC attorney told him it wasn't their fault the letter had not been received and that she was "probably sure" that the investigator had enough information to make the decision.

- Another Department of Navy employee recently filed a complaint with OSC after being threatened with involuntary transfer for blowing the whistle on security breakdowns. OSC referred his case to the IPD shortly after he filed the complaint. His experience with the IPD unit is telling:

  I made my complaint [to OSC] in...2006. The CEU forwarded my complaint to IPD [two months later]. That was pretty quick. Then my complaint sat in IPD for months without my knowing who was assigned to it. In desperation, I finally sent them a fax in January 2007 saying that I was going to be relocated if they didn't do something...Finally IPD came along and offered minimal help arranging an informal stay. Other than [a few] status letters, I [had

not] heard anything at all from IPD until out of the blue they surprised me with their Preliminary Determination Letter [which stated OSC had found "clear and convincing evidence" that the pending transfer was not retaliatory and OSC was planning to close the complaint].

[During this process] I...communicated [with OSC] entirely by email...I expected the IPD attorney or investigator to talk to me personally by phone at some point. Surprisingly a year [went] by and they've never tried to talk to me once. Not having ever talked to me is the main reason their Preliminary Determination Letter was so completely off the mark.

I...received a number of status reports and they're a complete joke. The bulk of the reports are just generic copy and paste paragraphs about OSC's authority. The personalized part of the reports amount to just one or two sentences telling me that my complaint is still under investigation. And those paltry sentences have often had typographical errors and spelling mistakes.

The IPD never asked once about which witnesses to talk to or about their credibility or motivations. They also never went over the evidence with me. I provided them with over 100 pages of written analysis and testimony. There was probably another 50 pages of supporting documentation. Yet, all the combined communications that I've received from the IPD would fit on a single page (perhaps even a half a page). It's been an extremely one sided dialogue.

IPD [sent] me a Preliminary Determination Letter...Like the status letters, it was bulked out with generic copy and paste paragraphs and a short section about my case in which they got everything completely wrong. There was not a word in the letter about my having reported [security breakdowns]...[I]t was like they hadn't read a single word I had written. They also just accepted everything the agency said without any critical analysis whatsoever. Their mistakes were so grossly outrageous that I felt it might be intentional, i.e., a test of my will and staying power...I wrote a [detailed] response to their letter that basically did all the analysis that they should have done. With facts and numbers I poked giant holes in all the agency's arguments. How OSC could call the agency argument "clear and convincing" is beyond imagination...I've not heard a peep out of OSC [since]...

The only thing [OSC did] is arrange an informal stay during the investigation. However, it now appears that they actually might have harmed me in doing so. The wording of the stay is such that

the agency might be able to kick me out of government after 20 years of service. In fact, I've already been threatened with that loophole in the stay if OSC drops my complaint.

In retrospect I would have been better off just accepting forced relocation six months ago. This process has crushed my spirit, hurt my family, and cost me around $10k...My experience with OSC has convinced me that merit system rights and whistleblower protections are just nice talk. We feds have no protection and so next time I will turn a blind eye no matter how wrong something seems.

This type of experience has been the rule, not the exception for OSC complainants who had their cases referred from the intake unit (CEU) to IPD. The internal referral more often than not means the agency gets an opportunity to defend itself, often by trashing the whistleblower, and then OSC accepts the agency justification (as clear and convincing evidence of an independent justification for the personnel action) without the whistleblower's response.

The Navy Department employee summarized this process neatly: "CEU had my complaint for 3 months, asked me 32 questions, requested multiple pieces of evidence, and sent me 7 emails. In contrast, IPD had my complaint for 10 months, asked 0 (zero) questions, requested 1 piece of evidence, sent me 7 emails (5 of which were status updates or unrelated to the investigation), and never once talked to me personally. It's shameful." Indeed, and this from an employee who received far better service than most from OSC. Ironically, OSC will include the flawed stay it negotiated on behalf of this employee amid its paltry list of favorable actions in the fiscal 2007 report.

OSC's Disclosure Unit—Mixed Results

Surveys of federal employees repeatedly have confirmed that the primary reason would-be whistleblowers remain silent when they witness misconduct is not fear of retaliation. It is that they will not be able to make a difference in correcting the problems they identify. If functioning as Congress intended, the OSC Disclosure Unit (DU) should give whistleblowers an opportunity to do just that. Despite the best efforts of the unit's career staff, as demonstrated in the summary of Mr. Conrad's case above, by most accounts the DU under Mr. Bloch's tenure as Special Counsel has retreated from this vital good government function.

The Disclosure Unit has been responsible for some important whistleblower disclosures that were referred to agencies for investigation. The WPA, 5 U.S.C. § 1213, gives the Special Counsel the authority to order and then review agency investigations, but OSC does not conduct them. While the federal department or agency is responsible for investigating itself, this process can and has worked well in cases in which the Special Counsel is willing to hold the agency's "feet to the fire" by flunking incomplete or bad faith investigations, and by demanding corrective measures that

responsibly address the whistleblower's concerns. However, in many of the cases handled by Special Counsel Bloch, he has failed to make the politically challenging and necessary decision to refuse to accept agency reports that do not adequately resolve the whistleblower's complaint.

It appears we are on the verge of a new example that could seriously compromise homeland security. In August 2006, Disclosure Unit Chief Catherine McMullen and top DU attorney Karen Gorman recommended to Special Counsel Bloch that he order the Department of Homeland Security to investigate the Federal Air Marshal Service (FAMS) pursuant to his authority under 5 U.S.C § 1213(c). Their recommendation was based on disclosures made by air marshal Frank Terreri, which included evidence that FAMS is undermining its own mission by implementing operational procedures that compromise the anonymity of individual air marshals. He further alleged that aviation security was harmed by FAMS' repeated endorsement of promotional television pieces that contained information which could be used by terrorists, providing them in essence with a "road-map" for a successful operation to defeat air marshals in flight.

After ordering the investigation, Special Counsel Bloch made repeated public statements about the role his office played in advancing these disclosures. For example, in a letter to the Washington Post in defense of his agency's record, Mr. Bloch wrote: "While The Post was occupied with trivial dress tips, the OSC was occupied with life-or-death implications of Federal Air Marshal Service dress guidelines that might have compromised anonymity and thus national security..."[8]

Mr. Terreri's disclosures, which go well beyond concerns about the dress code, are serious, and OSC deserves credit for ordering the investigation. However, that is only an initial step. Making a difference requires following through under the statutory process Congress created, by requiring accountability and corrective action from FAMS.

Yet, Special Counsel Bloch subsequently gave an interview for Federal News Radio on Monday, May 14th. In reference to the OSC ordered investigation of FAMS, Mr. Bloch stated, "as a result of the investigation that ensued...we've become satisfied that [FAMS has] done a good job" dealing with the anonymity and other issues in the disclosure. Mr. Bloch, who is not an aviation security specialist and has no law enforcement experience, made this comment before Federal Air Marshal Terreri had seen the completed investigation or had a chance to comment, which is required by statute before the Special Counsel makes any determination on the adequacy or completeness of the investigation. This is vital, because in nearly every disclosure case the Special Counsel has no subject matter expertise or first hand experience either on the content of the disclosure or what happens in the agency after an investigation is ordered. Quite frankly, no Special Counsel is qualified to comment on the adequacy of the agency report or resolutions without first reviewing the whistleblower's comments.

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[8] Washington Post. Saturday, September 23, 2006; Page A17

Mr. Terreri was forwarded a copy of the completed investigation on May 23, more than a week after Mr. Bloch's public congratulation of FAMS (and by inference himself). Due to numerous overseas assignments, Mr. Terreri has had to request an extension of the comment period. Mr. Terreri has been working actively with the new FAMS management attempting to reform operational procedures. However, his first reaction to the investigative report is that it is incomplete and fails to address many specific allegations in the disclosure. OSC staff attempted to explain that Mr. Bloch's public approval reflected their conversations with new FAMS Director Dana Brown and not the submitted investigation. But, unless Mr. Bloch fulfills his statutory responsibilities and demands verifiable changes, his rush to declare victory could endanger the flying public by letting FAMS off the hook for confirmed gross mismanagement of the Air Marshal program.

Mr. Bloch's previous record leaves plenty of room for doubt. Two additional case studies from OSC's Disclosure Unit further help to demonstrate the failure of leadership at OSC's highest levels on significant public safety and security disclosures after career staff dedicated significant time and energy to doing the job right.

Former FAA manager Gabe Bruno is one of the "success" stories cited by Special Counsel Bloch following 2005 Senate hearings when he came under intense scrutiny for mismanagement of agency personnel. In a June 14, 2005, OSC press release declaring victory on Mr. Bruno's disclosure of air safety threats, Mr. Bloch boasted, "Nothing could be more central to the nation's overall security and the well-being of our citizenry than aviation safety...Thanks to the efforts of the whistleblowers, a problem was identified and is being corrected." However, a reality-based examination of Mr. Bruno's experience with OSC reveals Mr. Bloch decreed a "good-government" stamp of approval on the fourth successive FAA whitewash of serious air safety concerns that continue to endanger the flying public.

Mr. Bruno blew the whistle after FAA Southern Region managers abruptly canceled a mechanic reexamination program he had designed and implemented to assure that properly qualified mechanics were working on commercial and cargo aircraft. The reexamination program was necessary because of the activity of Anthony St. George, an FAA contractor that was convicted and sent to jail for fraudulently certifying over 2,000 airline mechanics. Individuals from around the world had sought out St. George to pay a negotiated rate and receive an Airframe and Power Plant Certificate without proper testing. After the conviction, Mr. Bruno instituted a follow-up re-exam program, which required a hands-on demonstration of competence. This program resulted in 75% of the St. George-certified mechanics failing when subjected to honest tests. Rather than deal with the consequences, the FAA arbitrarily canceled the retesting program, leaving well over 1,000 mechanics with fraudulently-obtained credentials, many working throughout the aviation system, including at major commercial airlines.

In June 2002, Mr. Bruno filed a whistleblower disclosure with OSC. In May 2003 Special Counsel Elaine Kaplan backed Mr. Bruno's disclosures, finding a "substantial likelihood" that the disclosure constituted a danger to public safety. OSC's "substantial

likelihood" finding resulted in a Department of Transportation (DOT) Office of Inspector General (OIG) investigation of Mr. Bruno's disclosures. At first, there was reason for faith in the OSC system. The DOT OIG submitted three bad faith reports endorsing the status quo. OSC flunked each report after receiving Mr. Bruno's comments and ordered DOT to try again. Mr. Bruno worked regularly with an OSC attorney who monitored the investigation and reports closely.

However, in June 2005, OSC accepted a fourth DOT OIG report that confirmed some mistakes, but absolved the FAA of any intentional wrongdoing. Moreover, Special Counsel Bloch endorsed the re-implementation of a disingenuous retesting program that skips the hands-on, practical test necessary to determine competence. The FAA's nearly completed reexamination program consists now of an oral and written test only, which Mr. Bruno has said is the equivalent of handing someone a driver's license without making them drive the car. In effect, this resolution decriminalized the same scenario – incomplete testing – that previously led to prison time for Anthony St. George. After years of work by his agency, the Special Counsel took the easy way out by endorsing the status quo that had proven itself vulnerable to criminal fraud.

In his transmittal letter to the President after accepting the fourth DOT report, Mr. Bloch provided rhetorical understanding of the safety issues Mr. Bruno had raised:. "It is crucial to the safety of the flying public that A&P mechanics receive proper training and master the skills necessary to perform their jobs, as evidenced by their ability to pass certification exams." Yet Mr. Bloch refused to meet personally[9] with Mr. Bruno to gain a better understanding of the inadequacies in the FAA's resolution. Also, despite acknowledging "concern" that the retesting program had again been halted, Special Counsel Bloch has done nothing to follow-up on his recommendation to immediately restart the retesting program, or to monitor the program's progress or results.[10]

Mr. Bruno made several appeals to Mr. Bloch to reconsider, all of which were ignored until a final effort last week finally penetrated.[11] Mr. Bloch forwarded the attached letter to DU Chief McMullen, and the OSC has committed to reopening a disclosure case based on Mr. Bruno's letters. Again, while we applaud the Special Counsel for now reconsidering the compromised resolution of this air safety threat, the timing is highly suspect given its proximity to this hearing.

Another example of the recent OSC leadership vacuum is demonstrated in the case of Department of Energy Nuclear Security Specialist Richard Levernier, who blew the whistle on the Department's systemic failure to adequately protect the nuclear

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[9] The previous Special Counsel met personally with a few whistleblowers whose cases weighed heavily on U.S. national security or public safety prior to making a decision on the outcome of their disclosures.

[10] The FAA has finished retesting most, but not all of the St. George certified mechanics. It has not disclosed the number of mechanics that failed their test, and states it does not know how many of these individuals were working or are currently working for commercial airlines.

[11] See attachment 2.

weapons facilities under its control. Special Counsel Kaplan found a "substantial likelihood" that Mr. Levernier's allegations constituted a substantial and specific threat to public safety and ordered DOE to investigate. In 2003, DOE issued a report denying all of Mr. Levernier's allegations. Mr. Levernier submitted numerous, detailed comments, including authoritative internal studies confirming his identical concerns of ongoing terrorist vulnerability at nuclear weapons facilities, and flatly contradicting the official public word from DOE.

Nevertheless, after two years of delays, with no additional information requested from OSC, Special Counsel Bloch closed out the case and forwarded the Department of Energy's report to the President and Congress with the following explanation: "I have concluded that I am unable to determine whether or not the agency report contains all the information required by statute or whether its findings appear to be reasonable." This defied the Special Counsel's clear, statutory duty to make findings whether the report satisfies the minimum legal requirements of the Whistleblower Protection Act.[12]

For over 25 years, as required by law, the OSC has sent reports back to agencies with instructions to keep working on them until they either pass statutory muster, or until it is clear that the agency is refusing to comply with section 1213's requirements for responsible resolution of whistleblower charges. When that has occurred, every Special Counsel has imposed accountability by flunking the agency's resolution as failing to meet legal standards. There does not seem to have been any legal or public policy basis for Mr. Bloch to wash his hands of a serious, ongoing threat to terrorist attack of nuclear weapons facilities. The stakes are unusually high, because Mr. Levernier was the Department of Energy's (DOE) top expert on quality assurance for safeguards and security at nuclear weapons facilities. He documented numerous vulnerabilities to terrorism throughout the U.S. nuclear weapons complex. Yet again, the Special Counsel's response was to let an agency off the hook, despite openly doubting DOE conclusions about "its ability to protect the nuclear assets entrusted to its care." In a January 18, 2006 letter to Mr. Levernier, Mr. Bloch noted, "[T]here is much more work to be done to safeguard the nuclear facilities of this great country. Your tireless efforts to this end have been laudatory." Yet, he refused to meet personally with Mr. Levernier to gain a better understanding of the issues, and then dropped the ball on vulnerability to terrorism that continues today.

Recommendations

The overwhelming opinion among federal government whistleblowers, with a few vocal exceptions, is that this agency should be abolished. If Congress is determined to give the Office still another chance, certain basic reforms are necessary.

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[12] As provided by 5 USC 1213(e)(2) -- (2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, **the Special Counsel shall review the report and determine whether**— (A) the findings of the head of the agency appear reasonable; and (B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

I. Service to retaliation and other PPP victims

1. The OSC's mandatory duty to investigate in 5 USC § 1212 should be further defined by statute, to include mandatory communications asking and answering questions about the initial submission, and providing guidance about any additional evidence or support needed to justify an OSC field investigation, or referral to IPD. Whether or not a field investigation is opened, the duty to investigate should not be complete unless and until an OSC attorney has: 1) made a positive determination as to whether there are reasonable grounds to believe a prohibited personnel action has occurred and met mandatory reporting requirements for any determination under section 1214; 2) reviewed any preliminary disposition; 3) prepared a menu of alternative sources for relief if there is no prohibited personnel practice jurisdiction; and 4) concluded with a second call to explain any decision to close the case as well as the other available options, and to answer any questions. Congress should mandate in 5 USC § 1212(e) that OSC "shall" prescribe regulations for the conduct of prohibited personnel practice investigations.

   Along these lines, according to the suggestions of a Department of Agriculture whistleblower, "Congress should require OSC/MSPB to make available to whistleblowers two things: a) a manual on how the two conduct themselves, comparable to the Operations Manual EEOC once posted on the internet describing how it handles EEO complaints, and b) a plain language guidance on how to write up and document a whistleblower claim so that it meets the standards for accepting a complaint (whatever those standards may be.) In conjunction with that, OSC complaint adjudicators should have a prepared checklist against which they check off whether a complaint was adequate or deficient, and make that list available to the whistleblower before closing out the complaint. Currently, whistleblowers are forced to 'toss darts at a murky target.' The OSC website currently includes only forms, a short description of whistleblower rights and a vague description of the process." If Special Counsel Bloch is committed to "finding the good in every complaint," OSC should make it easier for the complainants to help themselves.

2. The law should be reinforced to highlight the OSC's duty to report positive prohibited personnel practice findings, when it declines to act on the illegality. OSC has systematically violated the clear reporting requirements in 5 U.S.C. § 1214 (a), (b) and (e), depriving the complainants, their agencies, Congress, and the taxpayers of any public record of merit system violations within the federal workplace. The statute requires OSC, after receiving a complaint of a prohibited personnel practice, to investigate it to the extent necessary to make a

determination as to whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. It is not clear if this determination is currently being made. If it is, the complainant, the involved agency and the public has no way of knowing.

If a positive determination is made under section 1214(b), the Special Counsel is required to report that "determination together with any findings or recommendations to the [Merit Systems Protection Board], the agency involved and to the Office of Personnel Management..." Alternatively, under section 1214(e), a positive determination must be reported to the agency head, who must respond within 30 days. Both the determination and response are public records under 5 USC 1219. These determinations should be made and reported even if the Special Counsel pursues alternative means of securing corrective action on behalf of the complainant and even if the Special Counsel is able to negotiate corrective action that addresses the prohibited personnel action. The MSPB admits that it has virtually no record of ever receiving 1214(b) reports from OSC. And, a review of OSC's public records shows it has not made a single 1214(e) report between 1989 and the Spring 2006. Even though current law appears to mandate these reports clearly, OSC has not complied. It is necessary to force compliance with these reporting requirements for the following reasons: 1) There currently is no publicly available record into the frequency and type of prohibited personnel practices occurring annually in the federal workplace, 2) Heads of agencies have a statutory duty, per 5 USC 2302(c), to prevent prohibited personnel practices and are unable to do so if they're not informed about the violations occurring inside their agencies, and 3) This would provide routine violators of merit system laws within the workplace with notice of their actions, thus serving as a reasonable and welcome deterrent to prohibited personnel practices, in addition to providing agency HR departments, IGs, and general counsels with information that could help assist their efforts in preventing prohibited personnel practices within their agencies.

In addition, section 1214(a)(1)(c) should be amended to require the Special Counsel to report any action, "including a determination whether there are reasonable grounds to believe a prohibited personnel practice has occurred" to the complainant. This would provide the complainant with important documentation about the merit of their alleged complaint even if the Special Counsel decides not to pursue it.

3. Provide complainants with copies of their case files, as are available from the EEOC on discrimination cases. In 1994 Congress accepted an OSC suggestion that this step would be unnecessary, if the OSC were required by statute to

include an informal Findings of Fact and Conclusions of Law section in its closeout letters. Those summaries, however, have been virtually useless as explanatory devices or substitutes for direct human communication, and have served to mask the routine lack of effort by the Special Counsel to consider evidence submitted by reprisal victims even after opening up a field investigation. In addition, the addendum to 5 U.S.C. 1214 concerning "termination statements" needs to be enforced to provide complainants with a name and contact info of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the process.

4. Restore an Alternative Dispute Resolution unit to the Washington, D.C. headquarters, where most of the cases occur.

5. Provide independent, external, mutual strike consensus selection, shared cost arbitration for OSC staff who allege prohibited personnel practices. The history of a currently-languishing, two year investigation into Mr. Bloch's alleged Whistleblower Protection Act violations against staff members illustrate the structural vacuum for accountability. The case could not be investigated by the OSC due to conflict of interest, but a President's Council on Integrity and Efficiency (PCIE) investigation conducted by the Office of Personnel Management (OPM) Office of Inspector General (OIG) has been stalled for two years, due to lack of OSC cooperation. Since the OSC sets an example for the rest of the merit system, retaliation disputes should be resolved without delay, and without any credibility questions on accountability.

6. Specifically amend 5 USC § 1212 so that the Special Counsel shall be removed if there is a pattern of prohibited personnel practices within the Office.

7. Amend 5 USC § 1211(b) to require that the individual appointed to be Special Counsel have experience demonstrating an understanding of issues involving the protection of whistleblowers and a commitment to protecting the merit based civil service.

8. Amend 5 USC 1211 to make clear that attorneys hired by OSC to implement 5 USC 1214, including the Special Counsel, do not have an "attorney-client" relationship with their employer, OSC, and are required to "blow whistles" if they believe OSC is not fully complying with its statutory duty to protect those who seek OSC's (and their) protection from PPP's.

9. Congress should provide employees with the opportunity to seek review in U.S. District Court of OSC action or inaction when the agency is failing to comply with

its mandatory duties. Congress should provide a more liberal standard of review than is typically afforded citizens when they challenge the actions of an administrative agency. In addition, Congress should provide that employees who are successful in whole or in part in challenging the OSC should recover costs and attorneys fees.

II. Whistleblowing disclosures

1. Provide that whistleblowers are entitled to see how the OSC frames issues in their disclosures and consult with the Office, before any referrals under 5 USC § 1213. Currently the OSC does not permit whistleblowers to know how their issues have been framed for investigation. This has maximized mistakes such as investigations into charges the employee did not make or, more frequently, avoiding the point of the whistleblowing disclosure through strategic edits. At a minimum, the OSC should demonstrate to the whistleblower that it understands the full scope of their allegations by providing documentation that specifies which allegations have and have not been referred. OSC should provide the language used in referring the allegation to the agency for the whistleblower to review. OSC communications with the agency should be available to the whistleblower for greater transparency and accountability during the process.

2. As an alternative to agency investigations, permit the employee to elect nonbinding, mutual strike consensus selection, shared cost arbitration for fact-finding and recommendations on disclosures referred under 5 USC 1213(c). All too often, the inherent conflict of interest in agency self-investigations has meant that OSC backing under this section facilitates institutional drawn out cover-ups for serious problems that require expedited corrective action.

3. After making a "substantial likelihood" finding under section 1213, OSC should provide the whistleblower with written, bimonthly status updates after, as is most often the case, the agency fails to meet the 60-day deadline for submitting the report of investigation to the Special Counsel. Likewise, after the agency submits its report and the whistleblower offer's comments, OSC should provide the whistleblower with written bimonthly status reports as the OSC reviews the information.

4. Existing legislative history that Mr. Bloch is ignoring should be codified to require including the whistleblower's comments in the final file for the public record under section 1213, as well as in all associated communications to the President or Congress.

5. Enhance transparency by requiring the Special Counsel in its public records and annual reports to break down which disclosures are referred to agencies under 5

USC 1213(c) for full investigations, and which under section 1213(g) for limited review. Similarly, require the OSC to include the Disclosure Unit's work in its Customer Satisfaction Surveys. Also, all whistleblower disclosures referred to agency heads for investigation, with the exception of classified information, should be on the OSC's web site, along with the corresponding agency report of investigation, the whistleblower's subsequent comments, and the OSC analysis. In FY05, OSC sent 16 completed whistleblower disclosures to the President and Congress, according to its annual report, but information on only 2 are posted with a press release on the OSC web site. The public has a right to know about the 14 other significant cases of wrongdoing.

6. Explicitly eliminate the Special Counsel's discretion to close out a whistleblowing case under section 1213 without first taking a stand whether the agency's proposed resolution meets statutory requirements for completeness and reasonableness.

7. Require OSC to put all the public records described in 5 USC 1219 on its website.

III. MSPB

Our testimony focuses primarily on OSC, because H.R. 985 covers many of problems whistleblowers have been facing at the Merit Systems Protection Board. This is not meant to suggest that things have been any better at the formal, due process stage of enforcement for employee rights under the Whistleblower Protection Act and Civil Service Reform Act. Indeed, no whistleblower has won on the merits in a Whistleblower Protection Act case at the Board since the current Chairman McPhie, took office in 2003. The Board, like the Federal Circuit Court of Appeals, has not respected the congressional mandate in the WPA, and the record for decisions on the merits at the MSPB since May 2003 is 0-32. In addition, 0-18 is the track record against whistleblowers for decisions on the merits by the MSPB Administrative Judge who is responsible for Whistleblower Protection Act cases the Board deems politically significant. Our recommendations appropriate for the reauthorization bill are as follows:

1. The Board's annual report should be required to itemize its record in whistleblower cases, including those in which the Board provided relief and when it did not, when cases settled, what was the range of relief provided in decisions on the merits in addition to that provided for in settlements, the number of stays requested, approved, and denied broken down by OSC and employee requests, and a won-loss record for whistleblower cases decided on the merits.

2. The Board should stop requiring whistleblowers to disclose their entire case to OSC in order to exhaust their administrative remedy there. This requirement, in

effect, has meant free discovery for the agency in WPA cases. It also flatly violates the House Committee report on the 1994 WPA amendments.

3. Board rules of practice and procedure should adhere to procedures set forth in the Federal Rules of Civil Procedure and afford the parties sufficient time to engage in discovery and present all relevant evidence at the hearing. The rules of practice and procedure governing whistleblower cases before the DOL OALJ are an appropriate model.

4. Board procedures shall provide for additional time to complete discovery and present evidence at the hearing when agency motive or retaliation are issues to be litigated.

5. Board procedures shall permit the parties to present their own witnesses and evidence.

6. Congress should require the Board to conduct mandatory training for all Administrative Judges in the congressional mandate of the Whistleblower Protection Act.

7. According to a Department of Energy whistleblower who has conducted extensive research on OSC and MSPB: "MSPB has, via its regulations for whistleblower stays, negated the intent of the law that federal whistleblowers were to be protected from all possible harm, sooner rather than later. The law specifies that OSC can seek a stay at MSPB on the basis of "reasonable grounds to believe," but MSPB has abused the discretion the law allows in to write regulations requiring "substantial likelihood" when a whistleblower seeks a stay directly from it. By MSPB records from the 1990's, it only granted about 3% of stay requests made - far from the legislative history of the WPA, which called for MSPB to make "liberal" use of whistleblower stays. MSPB refused to provide Congress information about its record in granting and denying stays since 2000, but it is possible it has not granted a single whistleblower stay, not in about 400 stay requests, in past 5 years. MSPB has abused the discretion Congress gave it in 1989 in establishing an evidentiary standard for granting stays, Congress should mandate "reasonable grounds to believe," - the same standard Congress created for MSPB when OSC seeks a stay, for MSPB stay requests."

8. This same employee astutely notes, "Even though the current law appears clear that MSPB is required to conduct indirect oversight of OSC, EEOC, and other agencies such as is necessary for MSPB to determine and report, "whether the public interest in a civil service free of PPP's is being adequately protected," MSPB does not believe it has this oversight responsibility. MSPB further claims that reports which do not directly respond to this question help form public opinion on

this subject. The law needs to be clarified to ensure MSPB conducts the necessary oversight of OSC, EEOC, and other agencies to make this report on a regular basis."

We would be pleased to work with subcommittee staff to provide further bases and/or follow through on these recommendations.

Attachment 1

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

April 10, 2007

Mr. Richard F. Conrad
c/o Adam Miles, Esq.
Government Accountability Project
1612 K Street, NW, Suite 1100
Washington, DC 20006

Re: OSC File No. DI-06-0782

Dear Mr. Conrad:

We have completed our review of the agency report regarding disclosures of a violation of law, rule or regulation and a substantial and specific danger to public safety arising out of actions by employees at the Department of the Navy, Naval Air Depot, North Island, California. Specifically, you alleged that, for several years, mechanics in Shop 93503 did not have the necessary torque tools required to properly torque the screws used to assemble GCUs on F/A-18s. You further alleged that, although Shop 93503 mechanics finally received torque tools in July 2005, the GCU screws on hundreds of F/A-18s currently deployed by the U.S. military and several foreign militaries have not yet been properly torqued. Lastly, you alleged that Shop 93503 does not perform mandatory quality assurance inspections on all GCU components.

The Special Counsel required the Honorable Donald C. Winter, Secretary of the Navy, to conduct an investigation into your disclosures pursuant to 5 U.S.C. § 1213(c) and (d). The Secretary subsequently submitted a report to this office. You provided comments on the agency report to this office pursuant to 5 U.S.C. § 1213(e)(1).

We have reviewed the agency report and have determined that it contains all of the information required by statute; however, we have found that the agency's decision to refrain from disciplining any of the GCU Shop managers is unreasonable. As required by § 1213(e)(3), the Special Counsel has sent a copy of the report to the President and the Chairmen of the Senate and House Committees on Armed Services. With your consent, we have also filed a copy of the report and your comments in our public file and closed the matter.

Sincerely,

Malia S. Myers
Attorney
Disclosure Unit

Enclosure

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

Analysis of Disclosures, Agency Investigation and Report, and Whistleblower Comments

OSC File No. DI-06-0782

Summary

Richard Conrad, Electronic Mechanic Journeyman, Naval Air Depot (NADEP), North Island (NI), California, disclosed to OSC that artisans in the GCU Shop assembled generator conversion units (GCUs) for F/A-18 fighter aircraft incorrectly. Specifically, he alleged that, from March 2005 until July 2005, the artisans did not have the necessary torque tools required to properly torque the screws used inside the GCUs. Although GCU Shop artisans finally received torque tools in July 2005, Mr. Conrad stated that the GCU screws on hundreds of F/A-18s currently deployed by the U.S. military and several foreign militaries still have not been properly torqued. Mr. Conrad also alleged that the GCU Shop does not perform mandatory quality assurance (QA) inspections on all GCU components.

The Naval Office of Inspector General (OIG) investigated Mr. Conrad's allegations. The investigation substantiated Mr. Conrad's allegation that the GCU Shop artisans did not use proper torque tools to assemble GCUs for F/A-18 fighter aircraft. Nevertheless, the agency did not find that this situation posed any "safety of flight" issues. The Navy has taken corrective action to ensure that all GCU Shop artisans are currently using proper torque tools on GCU screws; however, the agency has decided against pursuing disciplinary action against any individuals for the violations. For the reasons discussed below, OSC finds that the agency's decision to refrain from disciplining any of the GCU Shop managers is unreasonable.

The Whistleblower's Disclosures

Mr. Conrad, who consented to the release of his name, has worked at NADEP, NI since February 1981, and has been an Electronic Mechanic Journeyman since 1982. He worked in GCU Shop of the Components Department from March 2005 until November 2005. Prior to working at NADEP, NI, Mr. Conrad served on active duty in the Navy for 20 years.

Mr. Conrad alleged that, from March 2005 until July 2005, NADEP, NI did not provide the artisans in GCU Shop with necessary torque tools.[1] He explained that torque tools are

[1] Although Mr. Conrad only has first-hand knowledge regarding events that occurred in the shop between March 2005 and November 2005, he stated that other shop mechanics informed him that the shop has lacked necessary torque tools for many years.

required to properly attach GCUs to F/A-18 fighter jets.[2] According to Mr. Conrad, each F/A-18 is equipped with two GCUs – one on each wing. The GCUs supply all of the aircraft's electrical power. Military specifications set forth in Technical Manual A1-211AC-420-000, Work Package 5, require mechanics to use torque tools on the screws used to assemble GCUs. The torque tools enable the artisans to tighten the screws on the GCUs to the exact torque settings specified in the manual. Mr. Conrad alleged that the artisans repeatedly requested torque tools; however, management did not provide the torque tools until July 2005. Mr. Conrad stated that, prior to July 2005, the shop supervisors merely instructed the mechanics to use wrenches to tighten the screws to the point of being "snug, but not too tight."

According to Mr. Conrad, once the artisans finally obtained the proper torque tools, they used the tools to properly attach GCUs to those F/A-18s that came into the shop for routine maintenance and repair. Nevertheless, he alleged that there still remain hundreds of other F/A-18s currently deployed by the U.S. military that have GCUs that were never properly torqued.[3] In addition, he advised that several foreign militaries have contracted with NADEP, NI to repair and maintain their F/A-18s; therefore, he maintained that there also are several hundred foreign-owned F/A-18s with this defect.

Mr. Conrad asserted that this situation poses a substantial and specific danger to public safety. He explained that the two GCUs provide all electrical power to the F/A-18 jet, including the aircraft's controls. Therefore, Mr. Conrad maintained that a malfunctioning GCU could cause an F/A-18 to lose electrical power, which could lead to catastrophic failure of the aircraft. In spite of the serious risks posed by faulty GCUs, Mr. Conrad advised that NADEP, NI has neither devised nor implemented a plan for inspecting and properly torquing the GCUs on all U.S. and foreign-owned F/A-18s.

Mr. Conrad also alleged that GCU Shop employees do not perform adequate quality assurance (QA) inspections on the GCUs. He stated that employees currently perform QA inspections on some GCU components, but they do not inspect the torque of the screws on the generator nor do they inspect the screws on the generator housing that secure the GCUs to the wings of the aircraft. Mr. Conrad advised that QA inspections on these components are required by Technical Manual A1-211AC-420-000, Work Package 5.

Department of the Navy Investigation and Report

The Naval OIG investigated Mr. Conrad's allegations. The agency report states that the investigators conducted an on-site investigation in March 2006. They interviewed Mr. Conrad, supervisors, artisans, QA personnel, and engineering personnel. The investigators also reviewed pertinent documents. According to the agency report, the investigation substantiated Mr. Conrad's allegations. Specifically, the investigators found that (1) GCU Shop artisans did not perform proper, required torquing on all GCUs for F/A fighter aircraft from 1981 to July

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[2] The F/A-18 "Hornet" is a twin-engine, mid-wing, multi-mission tactical aircraft.

[3] Mr. Conrad noted that his allegations do not pertain to the F/A-18 E/F "Super Hornet," which has a different type of GCU.

2005, in violation of requirements set forth in Technical Manual A1-211AC-420-000, Work Package 5, and (2) GCU Shop artisans did not use proper torque tools to assemble GCUs for the F/A-18 fighter aircraft, in violation of requirements set forth in Technical Manual A1-211AC-420-000.

Witness Testimony

The agency report states that William Hickman, an Electronics Mechanic, testified that the GCU artisans have not used proper torque tools since the early 1980s, when the shop was first created. He advised that, instead, the artisans have used cordless electric screwdrivers to install screws on GCUs. Mr. Hickman explained that no one ever approved the use of electric screwdrivers to torque GCU screws, and the electric screwdrivers were never calibrated.

Mr. Conrad stated that he received on-the-job-training from other artisans when he first arrived in the GCU Shop in March 2005, but he was not given a copy of the Technical Manual or other relevant publications. In July 2005, Mr. Conrad read the Technical Manual in preparation for certification, and discovered that the Manual sets forth torque and QA requirements for GCUs. After making this discovery, Mr. Conrad asked Dennis Weddle, Deputy Production Manager for Avionics and former second-line supervisor in the GCU Shop, for a manual on torque values, but Mr. Weddle denied his request. Mr. Conrad contended that, whenever he raised the issue of torque tools with his supervisors, the supervisors ordered him and the other artisans to continue working on the GCUs in spite of the fact that they did not have the necessary tools.

Robert Oxley, Electronics Mechanic and Senior GCU Artisan, advised that he first became aware that the GCU Shop was required to use specialty torque tools when he attended training on F/A-18 GCUs in the Spring of 2004. Mr. Oxley subsequently informed his supervisors that the GCU Shop needed to acquire torque tools. He stated that he raised the issue with the GCU supervisors Jessie Padilla, Dave Statham, and Dave Cross. Mr. Oxley finally initiated requisition of the torque tools in April 2005. However, according to the agency report, the GCU artisans did not actually begin using the torque tools until November 2005. The report explains that, after Mr. Oxley requested the tools, "it still took about seven months to procure the tools, get them calibrated, deliver them to buildings 66 and 378, and get the artisans qualified and certified on the use of the tools." In the interim, the GCU artisans borrowed calibrated tools from other shops in order to comply with the torque requirements set forth in the Technical Manual.

Two GCU managers contradicted the testimony of the other witnesses. Mr. Weddle, Deputy Production Manager for Avionics and former second-line supervisor in the GCU Shop, testified that the GCU Shop was always stocked with torque tools and the artisans have always torqued screws in compliance with the Technical Manual. Mr. Weddle asserted that he did not have any knowledge regarding the use of electric screwdrivers in place of torque tools. David Statham, Electronic Integrated Systems Supervisor and former GCU Shop Foreman, also denied that the artisans ever used electric screwdrivers to torque screws. The investigators ultimately found that Mr. Weddle's and Mr. Statham's testimony lacked credibility.

The investigators also confirmed Mr. Conrad's allegation that, prior to 2005, the GCUs were not subjected to mandatory QA inspections. The Technical Manual requires qualified artisans to perform QA checks on GCUs during the reassembly process, yet the investigators found that the artisans were not performing these inspections. Instead, the QA personnel performed QA verifications on GCUs in the test cell. The investigators also found that, prior to 2005, the QA Branch engaged in minimal oversight of the GCU process. After Mr. Conrad submitted his complaint, the QA Branch initiated a Quality Characteristics List (QCL) to verify that artisans were properly torquing GCU screws.

Engineering Safety Analysis

According to the agency report, NAVAIR engineers conducted an engineering analysis that concluded that the GCU Shop's failure to use torque tools to assemble GCUs did not pose a "significant safety of flight issue." William Taylor, F/A-18 Fleet Support Deputy Program Manager, explained that each F/A-18 possesses two GCUs that provide electrical power to the aircraft. Should one GCU fail, all electrical supply functions will default to the aircraft's other GCU. Mr. Taylor further advised that, in the unlikely event of a dual-generator failure, the aircraft is equipped with an emergency backup battery system that will provide electrical power for approximately 10-20 minutes, during which time the pilot must return to base. Alan Lewis, Staff Executive Director, Naval Safety Center, reported that nine F/A-18 aircraft had crashed in FY'05 and FY'06 (through March 2006), resulting in the death of three aircrew. However, none of these losses were attributed to GCU failure.

In January 2007, OSC requested an update from the Navy to learn whether any additional F/A-18 mishaps had occurred during the remainder of FY'06. OSC also requested further details regarding the cause of all FY'05 and FY'06 mishaps. The Navy supplied the requested information, which showed that five additional flight mishaps occurred in FY'06, resulting in the loss of five aircraft and one aircrew. According to the information provided by the agency, none of the losses in FY'05 or FY'06 were attributed to "maintenance error" and the majority were attributed to either "aircrew error" or a "material error" of an aircraft system unrelated to the GCUs.

The agency report states that the Navy decided that it was unnecessary to order a product recall of all GCUs in the Fleet. The report states that the Engineering Department assured investigators that "there were no catastrophic, or significant failure modes that could occur related to this torque issue that would adversely affect either safety of flight or mission accomplishment." The Engineering Department further noted that there are no records indicating that the Fleet has ever reported problems related to improperly torqued GCU screws, despite the Navy's long history of repairing these items. The investigators did locate an Engineering Investigation report indicating that some GCU screws had been under-torqued; however, the engineers explained that "under-torque could have a life cycle, but not catastrophic, effect." They further explained that over-torque could cause a crack in a thermal barrier, but is not considered a flight safety problem. For the foregoing reasons, the agency has not ordered a

product recall of GCUs currently in the Fleet, although it has taken other corrective actions to ensure that GCUs scheduled for maintenance are now properly torqued.

OSC asked the Navy whether it had considered, or would consider, issuing a Naval Air Training and Operating Procedures Standardization (NATOPS) manual or a bulletin to maintenance personnel, in order to ensure the immediate repair of GCUs on all F/A-18s in the field. The agency responded that neither of these actions would be appropriate under the circumstances. First, the agency advised that a NATOPS manual is essentially an aircraft flight manual and, therefore, it does not address maintenance issues, such as torquing GCU screws. Next, the agency explained that bulletins are issued when it is necessary to notify the Fleet and aircraft maintenance crews of a major problem, such as a safety of flight issue, affecting a class of aircraft. The agency stated that it is not necessary to issue a bulletin on the GCU screws because Navy engineers determined that this problem did not create a safety of flight issue. In addition, the Navy explained that the work required to retorque the screws should ideally be performed at the Depot level, rather than by maintenance personnel in the field. The agency further explained that, "[o]perational level maintenance personnel do not have the expertise or authorization to break down a GCU, and they do not have the equipment required to perform required tests of the unit upon reassembly."

Corrective Action

In the course of conducting the investigation, the OIG found that Mr. Conrad had reported many of the same allegations to the Federal Aviation Administration (FAA), prior to disclosing them to OSC. The FAA then notified NADEP, NI of the allegations, and NADEP, NI initiated an audit of the GCU Shop in October 2005. The audit substantiated Mr. Conrad's allegations, and NADEP, NI immediately began taking action to correct the deficiencies. Consequently, NADEP, NI was already in the process of correcting many of the issues raised by Mr. Conrad at the time of the OIG investigation. The agency report enumerates several of the corrective actions that the Navy has taken or plans to take in response to both the October 2005 audit and the instant investigation, including the following:

1) In November 2005, the GCU Shop issued calibrated torque tools to the artisans, and, since then, the artisans have continually used these tools in compliance with the Technical Manual.

2) The agency trained and qualified all GCU Shop artisans on the use of specialty tools to properly set the torque value for GCU screws. The agency also recertified the artisans to perform QA checks on GCUs, and verified that their Individual Qualification Records properly documented their qualification to certify their own work as being in compliance with the Manual.

3) QA issued a QCL for mandatory verification of torque values on GCUs, which was later replaced by a QCL requiring random verification of these torque values.

The investigators also recommended that the agency take several follow-up actions in response to the investigative findings. Among other actions, the investigators recommended that NADEP NI:

(1) Procure and stock at least two spare sets of required torque tools in the central tool crib to allow rapid replacement in the event a tool is broken or needs to be recalibrated.

(2) Require new artisans and new supervisors to acquaint themselves with the specialty requirements for accomplishing tasks in their assigned shop.

(3) Update the artisan workbench toolbox inventory list and/or the Individual Material Requirement List to reflect the need for torque tools.

(4) Educate the artisans, supervisors, and QA Specialists regarding the findings of the report, and use this incident to illustrate the importance of adhering strictly to specified procedures.

On March 2, 2007, the OIG informed OSC that NADEP NI has successfully implemented all of the investigators' recommendations listed in the agency report.

Disciplinary Action

According to the agency report, NADEP, NI has refrained from pursuing disciplinary action against any of the managers or employees associated with the torque violation. The report explains that NADEP, NI arrived at this decision for the following reasons: 1) none of the personnel involved have a record of prior misconduct or poor performance, 2) disciplinary action would not serve any purpose or promote the efficiency of the service, and 3) the decision is consistent with the Table of Penalties. In addition, the agency decided that it was inappropriate to discipline recent and current supervisors for the torque violation, as the problem appears to have existed since the inception of the GCU Shop in 1981. The investigators surmised that the original artisans who opened the GCU Shop in 1981 did not use proper torque tools, and passed along their faulty methodology and practices to their successors. The investigators also concluded that the GCU Shop managers were not aware that the Manual required special torque tools for assembling GCUs, until the artisans brought this issue to their attention in early to mid-2004. The investigators attributed the managers' subsequent delay in obtaining torque tools to sloppiness and negligence resulting from "longtime practices in the GCU Shop, from its inception in 1981, and the lack of Quality Deficiency Reports," among other reasons.

On October 18, 2006, OSC requested further information from the agency regarding its decision not to pursue disciplinary action against any managers. In particular, OSC asked whether, in making this decision, the agency had taken into consideration the fact that Mr. Weddle and Mr. Statham appear to have misled investigators with false information. On November 8, 2006, the agency responded that the investigators believe that Mr. Weddle's and Mr. Statham's inaccurate statements "were indicative of their lack of knowledge of the requirement for specialty tools and torque values, not necessarily an attempt to deceive."

The Whistleblower's Comments

Mr. Conrad commented on the agency report. He expressed relief that the Navy has determined that, to date, no aircraft have been lost due to GCU failure. However, he stated that he is still concerned that the unrepaired GCUs remaining in the Fleet may pose an ongoing safety risk. Mr. Conrad reiterated his recommendation that the Navy remedy this situation by initiating a product recall to re-torque the screws on all GCUs. He claimed that, without a recall, "it will take several years for all of the affected GCU units to work their way through the system to the point in which a meaningful reliability baseline can be set."

Mr. Conrad disagreed with the Navy's conclusion that improperly torqued screws on GCUs do not pose a "safety of flight" issue due to the aircraft's redundant back-up systems. Mr. Conrad pointed out that, in the event of the failure of one of the aircraft's GCUs, the aircraft must derive all electrical power from the remaining GCU, which is itself an unreliable source, as it is subject to the same mechanical weaknesses as the first GCU. Mr. Conrad noted that the F/A-18's second back-up option, the emergency battery, only supplies approximately 20 minutes of electrical power – allowing only a short window of time for the pilot to complete an emergency landing. Thus, Mr. Conrad argued, "[i]t is inherently unreasonable to conclude that there is no potential safety problem when one unreliable component is backed up by another unreliable system."

Lastly, Mr. Conrad criticized the Navy's decision not to hold GCU Shop managers accountable "for their misstatements during the investigation and for years of negligence and mismanagement of the GCU program." He maintained that it was inexcusable for the supervisors to delay approximately two years before ordering the necessary torque tools, while the GCU artisans repeatedly requested torque tools in order to comply with the Technical Manual. Mr. Conrad also contended that the agency should have disciplined Mr. Weddle and Mr. Statham for providing "false testimony" to the investigators, as the investigators found that their testimony claiming that the GCU Shop always had torque tools was not credible.

The Special Counsel's Comments and Recommendations

I have reviewed the information presented by both the agency and the whistleblower in this case. Based on the information provided, I find that the agency's decision to refrain from taking disciplinary action against any GCU Shop managers is unreasonable. The agency concluded that the GCU managers did not enforce the torque requirements because they were unaware of them. However, the torque tool requirement and the accompanying torque values are clearly set forth in the Technical Manual, which all GCU supervisors and artisans are obligated to read and follow. Furthermore, several artisans testified that they repeatedly notified their supervisors that the Technical Manual required them to use torque tools to tighten GCU screws. Nevertheless, the investigation revealed that the managers stubbornly ignored the artisans' requests for torque tools for at least one year after learning of the requirement, before any attempt was made to order the tools. None of the testimony provided by any of the managers offers a convincing or satisfactory explanation for their failure to act.

In particular, I recommend that the agency reconsider its decision not to pursue disciplinary action against GCU Shop managers Mr. Weddle and Mr. Statham. According to the agency report, the investigators found that aspects of Mr. Weddle's and Mr. Statham's testimony were not credible. Specifically, the investigators did not believe Mr. Weddle's testimony that the GCU Shop was always stocked with torque tools or Mr. Statham's testimony that the artisans never used electric screwdrivers to torque screws. When OSC asked the OIG about these misstatements, the investigators expressed their opinion that Mr. Weddle and Mr. Statham did not intend to deceive investigators, rather, Mr. Weddle's and Mr. Statham's misstatements merely reflected their lack of knowledge on the subject of GCU Shop tools. Either way, it appears that Mr. Weddle and Mr. Statham should be disciplined. Either they purposefully misled investigators in an attempt to cover up the fact that the artisans did not have the proper tools, or, if they truly believed their own misstatements, they have demonstrated a lack of knowledge critical to their supervisory roles. Consequently, Mr. Weddle's and Mr. Statham's misstatements to investigators, coupled with their refusal to order torque tools in a timely fashion after learning that these tools were necessary, lead me to believe that, at a minimum, these two supervisors should be disciplined.

In light of the concerns Mr. Conrad has expressed for the safety of all F/A-18s in the Fleet, I have carefully reviewed and questioned the Navy's decision to refrain from ordering a product recall. Based on the information contained in the report, it appears that the Navy consulted several engineering experts and conducted a thorough engineering analysis before arriving at this conclusion. Mr. Conrad astutely observed that the back up systems for the GCUs are themselves somewhat problematic; nevertheless, the Navy determined that it is highly unlikely that both GCUs on an F/A-18 aircraft would ever fail simultaneously. Furthermore, the Navy has determined that, to date, no F/A-18s have been lost due to GCU failure. Based on the foregoing, I have decided that the agency's decision to forgo a product recall, while debatable, is not unreasonable.

Lastly, I am disturbed that the Navy report criticizes Mr. Conrad for disclosing his allegations to OSC, rather than reporting them internally through his chain of command. The agency report repeats the opinion expressed by Sean Brennan, CDR, USN (Retired), that "when the Complainant failed to utilize the chain of command to report the issues, he demonstrated a disregard for known, established process and willingness to violate procedures raising questions as to his reliability and therefore questions as to the legitimacy of his claims." Pursuant to 5 U.S.C. § 1213, federal employees have a statutory right to use OSC as a safe channel for making whistleblower disclosures. The law does not require federal employees to first report allegations within their own agency before reporting them to OSC. On the contrary, Congress enacted 5 U.S.C. § 1213 for the specific purpose of providing federal employees with the opportunity to report agency wrongdoing to an outside entity, separate and independent from their own agency. Furthermore, Mr. Conrad had already complained to his immediate supervisors and to the FAA, and he had reason to believe his immediate supervisors would continue to ignore his request and that a more objective oversight outlet was called for. Therefore, it is unacceptable for the Navy to chastise Mr. Conrad, or any other agency employee, for exercising his statutory right to submit a whistleblower disclosure to OSC.

Attachment 2

Adam Miles

From: gabriel_bruno@bellsouth.net
Sent: Friday, June 29, 2007 1:45 PM
To: SBloch@osc.gov
Cc: whistle47@aol.com; Adam Miles; bmyers@dcexaminer.com; rich_rutecky@irco.com
Subject: OSC case No. DI-02-1869

Dear Mr. Bloch:

On June 14, 2005, in closing my whistleblower case, you issued a press release headlining, "U.S. OFFICE OF SPECIAL COUNSEL TRANSMITS REPORT THAT FAA IMPROPERLY HALTED RE-EXAMINATIONS OF AVIATION MECHANICS WITH SUSPECT CERTIFICATES". You went on to state, "Nothing could be more central to the nation's overall security and the well-being of our citizenry than aviation safety of which the aviation mechanics and inspectors form a critical link. Thanks to the efforts of the whistleblowers, a problem was identified and is being corrected. OSC takes these and all disclosures very seriously."

To this date, you have not responded to any of my letters to you outlining the serious deficiencies in your investigation. Throughout your agency's investigation and in response to each of the FAA's excuse-making responses I responded to you with concrete evidence.

On December 19, 2005, just six months after your closure of my case, and your press release, a Chalk's Ocean Airways regularly scheduled passenger flight to Bimini, Bahamas experienced an in-flight separation of its right wing from the fuselage and crashed into the shipping channel adjacent to the Port of Miami shortly after takeoff. All twenty people on board, eighteen passengers and two pilots were killed.

On May 30, 2007, a year and a half after this fatal accident, the National Transportation Safety Board (NTSB) issued their press release headlining, "FAULTY MAINTENANCE, INADEQUATE FAA OVERSIGHT CITED IN MIAMI SEAPLANE CRASH".

Although the NTSB once again cites the frequently heard accident causal factor of "faulty maintenance and inadequate FAA oversight", their investigation stops well short of examining the relevant information that I provided to you. My disclosures to you of the St. George Aviation criminal activity and resultant multitude of fraudulently issued mechanic certificates, that the FAA allowed to remain active in the aviation industry, is directly relevant to an investigation into faulty aircraft maintenance and inadequate FAA oversight.

The NTSB, in its rush to close this fatal accident investigation, in which a wing actually fell off the airplane, surprisingly did not report any interviews with mechanics employed by Chalk's Ocean Airways. Also, the NTSB did not report if any of those mechanics held certificates fraudulently obtained from the St. George criminal enterprise. This shortcoming raises the question as to whether Chalk's was relying on unqualified mechanics to recognize and repair maintenance deficiencies of its aging aircraft. The NTSB release cited "the failure and separation of the right wing, which resulted from (1) the failure of Chalk's Ocean Airways' maintenance program to identify and properly repair fatigue cracks in the wing, and (2) the failure of the Federal Aviation Administration (FAA) to detect and correct deficiencies in the company's maintenance program." Additionally, this would lead an investigator to question the safety impact of the FAA's willful obstruction of the St. George Retesting Program.

Just how "seriously" do you take these disclosures and loss of the lives of these twenty victims? Please advise me whether or not you intend to open an inquiry into this subject that will be a true measure of your job performance and commitment to public safety.

Sincerely,

Gabriel D. Bruno
Gabriel_bruno@bellsouth.net