

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

<b>JOSEPH P. CARSON,</b>	)	
<b>Appellant</b>	)	
	)	<b>Docket No: 08-5219</b>
v.	)	
<b>U.S. OFFICE OF SPECIAL COUNSEL,</b>	)	
<b>Appellee</b>	)	
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**APPELLANT’S OPPOSITION TO APPELLEE’S MOTION FOR  
SUMMARY AFFIRMANCE OF TRIAL COURT DECISION**

The Court should deny the appellee’s motion for summary affirmance because the underlying trial court decision clearly does not warrant summary affirmance, it clearly warrants a published decision, by Circuit Rule 36 criteria.

Circuit Rule 36(a)(2) proves seven criteria, any of which are sufficient, for this Court to issue a published decision. Applying these criteria to this case yields the following:

1 Are the substantial issues of the appeal ones first impression or the first case to present the issue in this court?

Ans. Yes. No Court has previously addressed whether what is now §1214(e) applies to the laws, rules or regulations under OSC’s investigatory jurisdiction. This Court has not previously addressed the scope of what is now §1216(a)(4) and no Court has addressed the scope of what is now §1216(a)(4) since it was significantly altered by the Federal Whistleblower

Protection Act of 1989.

- 2 Could this case alter, modify, or significantly clarify a rule of law previously announced by the Court?

Ans. Yes. By Weber v. USA, 209 F.3d 756, 758 (CADDC 2000) this Court found that (emphasis added):

If the OSC determines that a prohibited personal practice has occurred, it **must report** its findings to the Merit Systems Protection Board (MSPB)[and involved agency and OPM],....

The court improperly abbreviated §1214(b)(2)(B) in making this determination and did not take account of §1214(e). The proper application of §1214(e) and §1214(b)(2)(B) to an OSC determination that a PPP occurred is:

Whenever the OSC determines that a prohibited personal practice has occurred it must report its findings to the involved agency. If it additionally determines the PPP is one which requires corrective action, then it must report its findings to the Merit Systems Protection Board (MSPB), the involved agency and OPM,....

- 3 Does this case call attention to an existing rule of law that appears to have been generally overlooked?

Ans. Yes. No only is there no case law about the scope of §1214(e) to the laws, rules, or regulations under OSC's investigatory jurisdiction, OSC has yet to issue a single §1214(e) report. By §1219(a)(3), these reports and the agency

head certified response are permanent public records. Appellant's Spring 2006 personal review of OSC's permanent, public records maintained by §1219(a) demonstrated that it had not made a single such record - not for the approximately 30,000 complaints OSC had investigated since 1989 (these complaints alleged about 50,000 specific violations) of the laws, rules or regulations under its investigatory jurisdiction.

4 Does it warrant publication in light of other factors that give it general public interest?

Ans. Yes. OSC interpretation of and compliance with §1214(e) and §1216(a)(4) are essential to its fulfillment of its mission to protect federal employees from agency violations of the merit system principles of the federal civil service (i.e. PPP's) and other agency violations of civil service law, rule, or regulation. OSC's compliance with these duties is an essential part of the "immune system" of the federal government. If it fails to execute its nondiscretionary duties, it enables much dysfunction and corruption to take root and flourish in other federal agencies, particularly including the Department of Justice, as recent events and reports have demonstrated.

**OSC file no. MA-05-0820 was not a Prohibited Personnel Practice Complaint and OSC Did Not Investigate It by §1214. Instead, OSC Improperly "Investigated" It by §1215, Instead of By §1216**

At no point in its processing of MA-05-0820 did OSC claim that MA-05-0820 was an investigation of a prohibited personnel practice complaint, under its investigatory jurisdiction by §1212(a)(1) and §1214(a)(1). *See* R.12 #4 Exhibit 39 and R.12 #16 Exhibit 51,<sup>1</sup> OSC’s only correspondence to Mr. Carson about MA-05-0820 - neither of which contain words or phrases as “prohibited personnel practice” or “§1214.”

Instead, it improperly investigated it by §1215, just as it initially investigated MA-03-1288, even though §1215 does not authorize OSC investigations and does not even contain word “investigate,” a claim it does not contest, *see* R.80 page 4. The violations alleged in MA-05-0820 are not PPP’s. They are allegations of agency “activities prohibited by any civil service law, rule or regulation” under OSC’s investigatory jurisdiction by §§1212(a)(5) and 1216(a)(4). But OSC improperly failed to realize this when “investigating” MA-05-0820. In fact, OSC denied to the trial court that it investigated MA-05-0820 by §1216, *see* R.78 pages 4-6.

In filings for Carson v. OSC, docket no. 04-315 (D.D.C), OSC openly claimed to have initially investigated MA-03-1288 per §1215 and the trial court

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<sup>1</sup> “R.” followed by a number refers to the document identified at that number in the District Court’s docket report.

decision reflected OSC's claim, see Carson v. OSC, Not reported in F.Supp.2d, 2006 WL 785292 D.D.C. March 27, 2006, \*4 "2. OSC File no. MA-03-1288," for a fairly lengthy discussion.

OSC repeated this same argument to this Court in footnote 2 on page 3 of its motion for summary affirmance. However, on page 6 of its motion for summary affirmance, OSC makes a claim it knows is inaccurate:

"In MA-05-0820, Appellant claimed that his employer, DOE, committed a PPP when it purportedly failed to comply with an order of the MSPB,"

OSC appears to place this statement in the mouth of the trial court, but on closer examination, OSC is only misquoting its own carefully parsed argument to the Judge, *see* R.71, page 3, repeated in the trial court decision, R.83 page 7. The trial judge simply made no such determination.

(Note: OSC now agrees it should have investigated MA-05-0820 by §1216. It recently opened a field investigation, MA-08-1844, after agreeing that the agency's failure to comply with the same February 2000 Board Order of corrective action, the bases of both MA-03-1288 and MA-05-0820, is an "activity prohibited by any civil service law, rule or regulation" and, therefore, under its investigatory jurisdiction by §1216(a)(4). Mr. Carson has filed a motion to allow the record for this case to be supplemented with the July 24, 2008 OSC determination.)

**Mr. Carson, in December 2004, clearly alleged agency activities under OSC's investigatory jurisdiction by §1216(a)(4) and, in April 2005, clearly requested these allegations be added to the scope of MA-05-0820. OSC Improperly Failed to Do So.**

On December 1, 2004 Mr. Carson wrote a letter to Melissa Ehlinger, OSC's Associate Deputy Special Counsel, requesting OSC investigate agency activities against him and make a report of them per §1214(e). From that letter, see R.12 #6 Exhibit 41:

Specifically, as it relates to OSC file no. MA-04-1886, OSC failed to determine if the baseless defamation I suffered from other agency employees, including David Rohrer and Bill Cooper, established "reasonable grounds to believe" a violation of agency rule occurred and, if so, to refer it to the agency per 1214(e), prior to closing the complaint....

Per 1214(e), I now formally request OSC to determine if the baseless defamation I suffered in the workplace, as cited in a now final MSPB decision which I provided OSC as part of the PPP complaint that became OSC file no. MA-04-1886, and as supplemented with deposition and hearing testimony I am providing with this letter, provides a basis for OSC to determine "there are reasonable grounds to believe" the following agency rule was violated by one or more agency officials and, if so, to refer its determinations to DOE:

- 1) DOE Order 3750.1, "Workforce Discipline," Attachment 1, page 8A, cause 21: "Making false, unfounded, or highly irresponsible statements against other employees, supervisors, other officials, or subordinates with the intent to destroy or damage the reputation, authority, or official standing of those concerned."

OSC did not respond to this request, so on April 11, 2005 Mr. Carson wrote to Michael Lipinski, the investigator for MA-05-0820, and requested

he add these allegations to the scope of MA-05-0820. From that letter, *see*

R.12 #5 Exhibit 40 (emphasis added):

...that you comply with your lawful duty at 5 USC 1214(e) to report to DOE “reasonable cause to believe” several agency employees either defamed me as a “threat of workplace violence” or attempted to subvert DOE’s personnel security program by getting my security clearance revoked for spurious reasons, in order to drive me from my employment in DOE and moot the “fault determining provision” of the 1994 settlement agreement - you will break the law in failing to do so....

I initially brought this to OSC’s attention last year, it became OSC file no. MA-04-1886. It was closed based on an OSC determination that defamation of an employee is not “a significant change in working conditions.” However, OSC did not deny the defamation occurred, which should have been enough to trigger a 1214(e) referral. On December 1, 2004, I requested OSC to make a 5 USC 1214(e) referral based on violation of agency regulation in the defamation I suffered. It has yet to receive a response, I suppose OSC can use fact MA-04-1886 is closed as a pretext to ignore my request. However, MA-05-0820 is open, and **even if it is not a PPP complaint being investigated per 1214**, 1214(e) applies to all OSC investigations.

As OSC’s closure letter for MA-05-0820 clearly indicates, see R.12 #16

Exhibit 51, OSC did not evaluate whether these allegations were under its investigatory jurisdiction per §1§16(a)(4) for being “activities prohibited by any civil service law, rule or regulation.”

**It Is Res Judicta, by the Initial Decision in Carson V. OSC, Docket No. 05-537, That the Scope of §1214 (e) Included the Laws, Rules and Regulations under OSC’s Investigatory Jurisdiction. Despite That, the Trial Court Reversed Its Initial Decision about the Scope of §1214 (e) in Its Remand Decision.**

The case record for the remand decision contains extensive, unopposed, arguments that this question of law - whether the reporting requirements of §1214(e) applied to the laws, rules, or regulations within OSC's jurisdiction - was considered and adjudicated in the initial trial decision, was not appealed by OSC, and was left intact by appellate review of the initial decision, barring its reconsideration in the remand decision by the legal doctrine of *res judicata*. See Mr. Carson response/cross motion for mandamus, *see* R.76, pages 4 and 5 and Mr. Carson's reply, R.80, pages 1-3. The trial court remand decision did not address the *res judicata* issue.

The petitioner argued that §1214(e) applied to the laws, rules, or regulations under OSC's investigatory jurisdiction to the trial court during the motion hearing on June 20, 2006 and, at that hearing, OSC told the Magistrate Judge it agreed with the petitioner's legal argument about the interplay of 1214(e) and 1214(b)(2)(B) in OSC's reporting of positive PPP determinations, *see* R.65, exhibit 2, pages 19-20 and 28-29).

More importantly, the Magistrate Judge adopted petitioner's argument - that §1214 (e) applies to any law, rule, or regulation, including those under OSC's investigatory jurisdiction - in her report and recommendation, *see* R.58, pages 11-

12, which the Judge adopted it in his memorandum opinion and order, *see* R.67, page 2, *see also Carson v. Office of Special Counsel*, slip copy, 2006 WL 5085253 (D.D.C.) \*1 and \*7. OSC did not appeal this aspect of the trial court decision and the appeals court left it intact in *Carson v. OSC*, docket no. 06-5264, November 28, 2007, making it a decided issue by the legal doctrine of *res judicata*.

However, the trial court, on remand, allowed this issue to be relitigated, despite the arguments of Mr. Carson that it was precluded by *res judicata* and reversed its first determination - that §1214(e) applies to “any law, rule or regulation” - including those under OSC’s enforcement jurisdiction - and found that §1214(e) does not apply to the civil service laws, rules, and/or regulations under OSC’s enforcement jurisdiction, *see* R.83 pages 6-9, without considering Mr. Carson’s *res judicata* arguments.

### **Reconciling the reporting requirements of §1214(e) and §1214(b)(2)(B)**

The issue at the heart of this case and Mr. Carson’s other litigation with OSC is a simple “either/or” question of law - either §1214(e) applies to the civil service laws, rules and/or regulations under OSC’s investigatory jurisdiction by Title 5 of the United States Code, Part II, chapter 12, subchapter II<sup>2</sup> or it does not.

In summary, Mr. Carson contends OSC **must** formally report, per

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<sup>2</sup> Specifically stated at §§1212(a)(1), (a)(5), 1214(a)(1), and 1216(a)

§1214(e) and/or §1214(b)(2)(B) all its determinations that a violation of a law, rule, or regulation under its investigatory jurisdiction occurred.

OSC, on the other hand, claims that §1214(e) **never** applies to its determinations violations of the civil service laws, rules, and/or regulations under its investigatory jurisdiction occurred.<sup>3</sup> OSC claims that such determinations can only be reported by §1214(b)(2)(B) and only when it makes the additional discretionary determination the violation is one “which requires corrective action.”

In summary, OSC’s position is that it never has an unqualified nondiscretionary duty to formally report its determination of a violation of a law, rule, or regulation under its jurisdiction.

However, in its motion for summary affirmance, OSC did not make argument in support of this determination of the trial judge. Instead, it only repeated the uncontested point that the reporting requirements of §1214(e) do not authorize OSC to conduct investigations of laws, rules, or regulations not under its investigatory jurisdiction.

This is the plainly stated, novel question of law at the heart of this case - does §1214(e) apply to the laws, rules and/or regulations under OSC’s investigatory jurisdiction or not? Must OSC always report its determinations of

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<sup>3</sup> See particularly R.78, footnote 3, page 3

their violation?

§1214(b)(2)(B) states, in relevant part (emphasis added):

If...the Special Counsel determines that there are reasonable grounds to believe that a **prohibited personnel practice [PPP] has occurred...which requires corrective action**, the Special Counsel shall report *the determination*...to the Board, the agency involved and to the Office of Personnel Management...

The indefinite pronoun “*the determination*” above has as its antecedent (emphasis added) “that there are reasonable grounds to believe that a prohibited personnel practice (PPP) has occurred...**which requires corrective action**,” but the trial court misapprehended it to be: “that there are reasonable grounds to believe that a prohibited personnel practice (PPP) has occurred”

§1214(e) states, in relevant part (emphasis added):

If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred **other than one referred to in subsection (b) or (d)**, the Special Counsel shall report the violation to the head of the agency involved.”

The trial court decision, in its key finding at the top of page 8, wrongly restated its key phrase, “other than one referred to in subsection (b) or (d)” as “other than [a PPP or a criminal violation],” based on its misapprehension of the antecedent of the indefinite pronoun “the determination” in §1214(b)(2)(B).

When correctly restated it becomes (emphasis added), “other than [a PPP **which**

**requires corrective action** or a criminal violation].”

This correct understanding of that key qualifying phase of §1214(e) reconciles how the **nondiscretionary** reporting requirements of §1214(e) can be alternatively fulfilled by §1214(b)(2)(B) when OSC makes a formal report of its nondiscretionary determination that a violation occurred together with its additional, **discretionary**, determination that a violation is one **which requires corrective action**.

The statutory construction used in the trial court decision did not receive much analysis in the trial court decision, but it is incorrect, based on the legislative history, principles of statutory construction, and relevant case law.

The legislative history of what is now §1214(e) is found at 1978 U.S.C.C.A.N. 2723, 2755-2756, starting at bottom of 2755(emphasis and *comments (in italics)* added):

Subsection (e) (*Note: what the Senate Report describes here as “subsection (e),” became §1206(c)(3) in the CSRA and is now §1214(e)*) sets forth procedures to be followed if, during the course of investigation authorized by the bill or transferred to the Board or Special Counsel by Reorganization Plan No. 2 of 1978, the Special Counsel determines that there is reasonable cause to believe a law has been violated....(*Note: subsection (e) establishes the general rule, it is not “ancillary.”*)

If the Special Counsel determines that there is reason to believe a **violation of a civil statute, or a rule or regulation has occurred, the Special Counsel must report that determination to the head of the agency**

involved (*Note: no exceptions for laws within OSC's jurisdiction, no allowance to only report the PPP's that OSC additionally determines are ones "which require corrective action"*).

...Subsection (e) differs from subsection (d) (*Note: what the Senate Report describes here as "subsection (d)" became §1206(c)(1) in the CSRA and is now §1214(b)(2)(B)*) in that reports made under subsection (d) involve only personnel matters (*Note: More specifically, only PPP's "which require corrective action"*). Reports made under subsection (e) may involve violations of **any** criminal or **civil law**. ..(*Note: no limitations on its scope to exclude the civil laws within OSC's jurisdiction, particularly PPP's for which OSC did not make the additional discretionary determination "which require corrective action"*).

The improper statutory construction of the trial court in further evidenced by its need to add the word "other" in quoting §1214(e) on page 8, to reconcile it with its improper restatement of §1214(b)(2)(B):

...the Special Counsel determines that there is a reasonable cause to believe that any [other] violation of any law, rule or regulation has occurred....

But this restatement does not make sense when the next phrase of the sentence is added:

...the Special Counsel determines that there is a reasonable cause to believe that any [other] violation of any law, rule or regulation has occurred other than one referred to in subsection (b) or (d),

According to OSC and the trial court decision, §1214(e) should be worded:

...the Special Counsel determines that there is a reasonable cause to believe that any violation of any law, rule or regulation has occurred other than one [under its jurisdiction or criminal],

Horner at 674 states “it is well-established rule of statutory interpretation that a statute should not be interpreted so as to render one part inoperative (further citing Supreme Court precedent). OSC has not made a single §1214(e) report since 1989, if not 1978. Clearly, OSC’s improper interpretation has made §1214(e) “inoperative!”

This same statutory construction principle applies to the entirety of section 1216 - if section 1214(e) does not apply to the laws, rules, or regulations under OSC’s jurisdiction, then there is no law that requires OSC’s determinations of their violation to be reported, making that section of law “inoperative,” meaning the statutory interpretation leading to that result must be incorrect.

Weber v. United States, 209 F.3d 756, 758 (D.C. Cir. 2000) states (emphasis added):

An employee who believes he has been the victim of a prohibited personnel practice first complained to the OSC, which is required to investigate the complaint “to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred.” §1214(a)(1)(A). **If the OSC determines that a prohibited personal practice has occurred, it must** report its findings to the Merit Systems Protection Board (MSPB)[and to involved agency and OPM],...

Appellant respectively disagrees with this (bolded) specific finding. He contends it should be qualified as follows:

If the OSC determines that a prohibited personal practice has occurred

[which requires corrective action], it must...

More importantly, OSC disagrees with Weber too - it has made hundreds of positive PPP determinations since Weber, without reporting it to the MSPB, the involved agency, and OPM, because it did not make the additional determination that the PPP was one “which requires corrective action.”

If OSC complied with Weber, there would be no issue about the relevance of §1214(e) in this case, because the reporting requirements of §1214(e) would always be fulfilled by the §1214(b)(2)(B) report.

**Department of Energy (DOE) Order 3750.1, “Work Force Discipline” is a “civil service rule,” its Cause 21 describes “prohibited activities, therefore OSC must investigate a complaint alleging its violation per §1216(a)(4), something OSC failed to do in MA-05-0820.**

Whether Department of Energy (DOE) Order 3750.1, “Work Force Discipline” is a “civil service rule,” is crucial question of law that was extensively briefed to the trial court, despite its not being addressed in the trial court decision, nor OSC’s motion for summary affirmance. *See* OSC’s motion to dismiss, R.71, pages 7 and 8; Mr. Carson’s opposition and cross motion for mandamus, R76, pages 9-16; OSC’s reply/response, R.78, pages 4-5; and Mr. Carson’s reply, R.80, pages 14-20.

To summarize the arguments, it is incontestable, by law and Supreme Court

precedent, that an agency disciplinary procedures such as DOE Order 3750.1, is a civil service “rule.”

Specifically, by §7701(c)(2)(A), the Merit Systems Protection Board (MSPB) is required to overturn an agency disciplinary action if the employee “shows harmful error in the application of the agency’s procedures in arriving at such decision.” More particularly, per §7703(c)(2), the US Court of Appeals for the Federal Circuit, in reviewing MSPB decisions shall (emphasis added):

“set aside any agency action found to be obtained without procedures required by law, **rule**, or regulation having been followed.”

Both the Federal Circuit and Supreme Court have established precedent that agency disciplinary procedures are “rules” by §7703(c)(2), *see Doyle, v. VA*, 229 S.Ct. Cl. 261 (1982), *following Brewer v. USPS*, 647 F.2d 1093 (Ct. Cl. 1981) and *Mercer v. DHHS*, 772 F.2d 856, 859-860 (Fed. Cir. 1985). Clearly, DOE Order 3750.1, “Work Force Discipline,” is a civil service rule.

It is also incontestable that its “Cause 21” describes “prohibited activities” - the Order actually describes them as “breaches.” Cause 21 prohibits:

Making false, unfounded, or highly irresponsible statement against other employees, supervisors, other officials, or subordinates with the intent to destroy or damage the reputation, authority or official standing of those concerned.

Therefore, a complaint alleging a violation of Cause 21 of DOE Order

3750.1 is under the investigatory jurisdiction of the Office of Special Counsel (OSC), per §1216(a)(4), which states:

In addition to the authority otherwise provided in this chapter, the Special Counsel shall ... conduct an investigation of any allegation concerning activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decision-making.

However, the trial court decision did not address whether MA-05-0820 was properly investigated by OSC, per §1216(a)(4).

**Additional Relevant Case Law, Statutory History, and Changes to the Law by the WPA of 1989 To the Scope of §1216(a)(4)**

OSC's claim to the trial court "...[civil service]' rule' as used in §1216(a)(4), is not defined in the statute or case law," which it made in its motion to dismiss, R.71, page 7, is wrong. There is extensive relevant case law, legislative history, and Congressional action about the broad scope of civil service laws, rules, and regulations encompassed by §1216(a)(4). This includes Special Counsel v. Russell, 28 MSPR 162, 165-66 (1985):

The Board has interpreted section 1206(e)(1)(D) (Note: now section 1216(a)(4)) in accordance with the plain and unambiguous meaning of the language, finding that the Special Counsel is granted "broad authority to investigate violations civil service laws, rules and regulations and to bring disciplinary action for such violations." *citing* Special Counsel v. Williams, 27 MSPR 97, 103 (1985).

In some part, this Board precedent was set aside by the Federal Circuit

based on its lengthy analysis in Horner v Merit Systems Protection Board, 815 F.2d 668, 672-676 (Fed. Cir. 1987).

However, Horner precedent actually affirms OSC having investigatory jurisdiction in this matter. Additionally, its reasoning in limiting OSC investigatory jurisdiction was largely set aside by the legislative history and/or revised statutory arrangement and language of the Whistleblower Protection Act of 1989.

In this case, the appellant, in MA-05-0820, clearly sought relief from agency “personnel activities” prohibited by civil service rule. Horner, on the other hand, did not involve any agency “personnel activities” but Richard Williams taking unlawful gifts, *see* Horner page 670.

The Whistleblower Protection Act of 1989 legislatively overturned Horner in at least the following ways:

- 1) It separated what had initially been wholly in §1206 into §§1214 and 1216 and made clear, by §1212(a)(1) and (a)(5), that OSC had equal investigatory jurisdiction over both sections, thereby setting aside the Horner reasoning at page 674 about the limitations the introductory section of the previous §1206 placed on the interpretation of the scope of what is now §1216(a)(4).
- 2) It eliminated §1216(a)(4) from the qualifying limitation of §1216(b), unlike

the arrangement present in the CSRA of 1978, *see* Horner page 672.<sup>4</sup>

- 3) It authorized OSC to investigate complaints alleging violations of §1216(a)(4) by §1214(a), to seek corrective action by §1214(b)(2), (b)(3), and (b)(4), and disciplinary action per §1215.

In summary, Congress, in the Federal Whistleblower Protection Act of 1989, acted to resolve the inconsistencies noted by the Court *see* Horner page 676 “it would be preferable for Congress to resolve such inconsistencies...,” and in ways consistent with the Board’s previous decision about the broad scope of OSC’s investigatory jurisdiction in what is now §1216(a)(4) in Williams.

Despite all this relevant case law, which it helped create, OSC improperly investigated Mr. Carson December 1, 2004 complaint, R.12 #6 Exhibit 41, per his request of April 11, 2005, R.12 #5 Exhibit 40, per MA-05-0820, which alleged a violation DOE Order 3750, Cause 21 (at end of complaint), by §1215 (which does not even contain word “investigate”), instead of by §1216 (which, by §1216(c), authorizes OSC to investigate by §1214). OSC’s improper investigation resulted in an investigation closure letter, R.12 #16 Exhibit 51, which did not mention a basis of his complaint - violations of DOE Order 3750.1, “Work Force

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<sup>4</sup> See House Rpt 100-274, August 5, 1987 page 37, attachment #1 to appellant’s reply of April 23, 2008, docket item 80

Discipline,” Cause 21.

This issue was briefed on remand to the trial court, which did not rule on it. *See* OSC’s motion to dismiss, R.71, page 3-4; Mr. Carson opposition and cross motion for mandamus, R.76, pages 14-16,; OSC’s reply/response, R.78 page 2 and footnote 1; and Mr. Carson’s reply, R.80, pages 13-16.

### **Summary and Relief Requested**

That the Court deny appellee’s motion for summary affirmance and issue a published decision that fully addresses the novel questions of law posed in this case.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I certify that the following documents for this case, Carson v. Office of Special Counsel, docket no. 08-5219

1. Opposition to Motion for Summary Affirmance

were served by first-class mail on:

### **Office of Special Counsel:**

R. Craig Lawrence  
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Joseph Carson

October 7, 2008