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Mary L. Kendall  
Deputy Inspector General  
Office of Inspector General/ Department of Interior  
Washington, D.C. 20240

Dear Ms. Kendall:

I am writing to reply to your letter of February 27, 2013 which you wrote in response to my letter of January 14, 2013.

In my letter I was filing a complaint against the Department of Interior and the Office of the Inspector General for not complying with the letter and intent of the No-Fear Act (the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002), the "Disciplinary Best Practices and Advisory Guidelines Under the No-Fear Act" which were developed and mandated by the No-Fear Act, the Whistleblower Protection Act, and parts of the Civil Rights Act. Specifically, the DOI and its bureaus and offices are not doing enough to discipline and punish the violators of these laws.

In your response, your underlying thesis was that the DOI and its many bureaus and offices (including the OIG) "have no authority to punish or discipline DOI employees and it properly exercises its authority by referring whistleblower reprisal complaints to the OSC." And I presume this means the Department of Interior and its many agencies have no authority---nor any responsibility ---for disciplining or punishing any of its employees who violate certain laws e.g. those who violate the Whistleblower Protection Act by committing prohibited personnel practices or those who violate sections of the Civil Rights Act. You seem to be suggesting that in cases like ours your own legal or statutory option is to leave any and all recommendations for discipline and punishment to the OSC, and that you have complied with the letter and intent of the above mentioned laws and guidelines by doing nothing more than advising victims of their options.

Simply stated, I disagree with your basic thesis and underlying assumptions.

I think the DOI and OIG have a much greater responsibility to be proactive in disciplining and punishing violators of any federal laws and regulations; I believe there are guidelines and regulations in place to discipline and punish DOI employees who violate federal laws including the WPA; I consider what the Associate Inspector General (AIG) for the WBPP did in our case was not in keeping with the description of the "Whistleblower Protection and Ombudsman Program" described on the DOI website or with the responsibilities of any federal agency assigned to protecting those who have suffered illegal reprisal and recommending discipline and punishment for those who are guilty of prohibited personnel practices; and I'm disappointed because your response to my letter indicates that you or someone in your office didn't research our case very well.

The federal laws and guidelines I have mentioned all mandate that victims of retaliation and discrimination should be protected.... and that violators should be disciplined and punished. You outlined what your Office did to help victims of retaliation and discrimination but you skirted the question of whether the DOI or any of its bureaus and offices should be disciplining and punishing those

who violate whistleblower laws and regulations. And the lack of any administrative discipline and punishment of violators within the DOI and the unwillingness of your Office and the NPS to investigate violators administratively *without intervention by the OSC* are why you and I disagree on what the intent and letter of what the NO-Fear Act requires, what OPM recommends, and what is possible but not being practiced by the DOI and the National Park Service.

The underlying presuppositions of my complaint are based on the following:

- **Section 101 of the No-Fear act** made the following finding: “Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination.”

*How can the DOI argue that it is complying with the intent of this section... if in practice it tolerates discrimination or retaliation? And in essence, it is tolerating discrimination and retaliation if it does nothing within the agency to discipline and punish those who violate the applicable laws quickly, appropriately, and without hesitation...or if it puts the onus of instituting any discipline on another agency like the OSC?*

- **Section 203 of the No-Fear Act** requires: “an annual report stating the agency's policy on disciplinary actions against Federal employees who discriminate or retaliate, and the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken. “

*Does the DOI have a policy on disciplinary actions against its employees who discriminate or retaliate or who violate federal laws like the WPA or Civil Rights Act? Are you suggesting that by passing on any and all WPA complaints to the OSC that you have complied with the intent and letter of this part of the No-Fear Act? Or, is the DOI's “policy on disciplinary action” to do nothing...or to do nothing until a case is investigated by the OSC and the OSC recommends disciplinary action?*

*Quite frankly, my wife and I did feel again and again that the DOI's official policy was to do nothing. We contacted your office and your AIG essentially did nothing other than giving us the phone number to call to initiate the CADR/CORE process. Later, we spoke twice with Matt Wheeler from the DOI's Solicitor's Office and he did nothing: he didn't report a suspected violation of federal law; and he didn't notify anyone or any agency that a violation of law may have occurred. And we contacted John Wessel, the Regional Director of the NPS Intermountain Region, and I don't think he did anything. Simply stated, no one in your agency did anything. And if they did anything, it appears what they did was to begin “circling the wagons” and preparing a defense. And everyone seems to have been hoping that we'd just go away, get frustrated, and give up.*

*Consequently, the question remains: does the DOI have any kind of viable and meaningful policy for disciplining employees who discriminate and retaliate? Should the responsibility for doing something about WPA violations be left solely to the victims of retaliation or to the OSC? And in your opinion by doing nothing before an OSC investigation, do you really believe the DOI and OIG are complying with the intent and letter of these laws and regulations?*

- **On the DOI's own website**, on the page on "Equal Opportunity Data Required to Be Posted on the No Fear Act", it says "The *intent* of the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2002, "No FEAR Act" is that federal agencies will pay more attention to their EEO and whistleblower complaint activity and act more expeditiously to resolve complaints at the administrative level when it is appropriate to do so."

*Were there any attempts by Laurie Larson-Jackson (your AIG), or by John Wessel (Cliff Spencer's supervisor--the Regional Director of the Intermountain NPS Regional Office), or by Matt Wheeler (the DOI Solicitor), or anyone at DOI to "act more expeditiously to resolve our complaints at an administrative level"? Were there any attempts by any of these people or anyone in the DOI to react to the knowledge that someone within their agency probably violated at least two federal laws and not a few regulations?*

- **The No-Fear Act** mandated that the OPM "conduct a study of best practices in the executive branch for taking disciplinary action against employees for conduct that is inconsistent with employment discrimination and whistleblower protection laws. OPM did this and developed the "Disciplinary Best Practices and Advisory Guidelines Under the No Fear Act" (September 2008). Among the best practices and advisory guidelines developed by the OPM were "six advisory guidelines agencies may follow to ensure appropriate disciplinary actions are taken for conduct inconsistent with Antidiscrimination Laws and Whistleblower Protection Laws. These guidelines address the development and communication of disciplinary policies, procedures for ensuring improper conduct is addressed, the necessary ingredients for taking appropriate discipline, the importance of agency officials working together to take action, the importance of good communications in dealing with inappropriate conduct, and the need to prepare staff to provide good advice to supervisors and managers. Agencies are required under the No FEAR Act and OPM's regulations to report to Congress and others within 30 working days of this report on the extent to which they will follow the advisory guidelines."

*Did the DOI adopt these guidelines or any corresponding version of these guidelines? And if so, how were they used to discipline or punish the Mesa Verde NP Superintendent, Cliff Spencer, who knowingly and in front of two witnesses---and despite being warned beforehand by our supervisor that his orders would be interpreted as WPA violations---decided to retaliate and discriminate against not one but two people? Or, has DOI simply chosen not to comply with these guidelines and not to have procedures for ensuring improper conduct is addressed? Is your official "procedure" simply to pass any and all complaints onto the OSC and then wait to see what happens?*

- **The DOI does have a handbook on charges and penalty selection.** (see <http://www.doi.gov/hrm/guidance/attpb1-4.htm>) In your letter, you seem to question whether existing laws allow for disciplining and punishing violators of federal laws like the Whistleblower Protection Act or Title VII of the Civil Rights Act (applicable in my wife, Sara's, case). I disagree. Simply stated, the disciplining and punishment of federal employees who are guilty of waste, fraud, and abuse, and of those guilty of violating federal laws and regulations is part of the federal code and administrative procedures, and part of your own departmental guidelines.

*So why does your Office and/or the DOI feel they can't discipline or recommend discipline for anyone who has violated the Whistleblower Protection Act or Title VII of the Civil Rights Act? If there are rules and procedure already developed for certain disciplinary actions and adverse actions against DOI employees, why are they not being used in Whistleblower cases?*

- Contrary to your letter, **5 USC Sec 1214 (f)** clearly states that “During any investigation initiated **under this subchapter, no disciplinary action shall be taken against any employee for any alleged** prohibited activity under investigation or for any related activity without approval of the Special Counsel.”

Furthermore, “Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws, up to and including removal. If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the Special Counsel to discipline employees for, among other activities, engaging in prohibited retaliation.” (from OSC Form 53)

*In other words, the DOI and its OIG, and/or the National Park Service can investigate cases of discrimination and/or retaliation, it can investigate WPA violations, and it can develop appropriate recommendations for discipline and punishment for any employee who has violated the WPA or the WPEA, or the Civil Rights Act...and it could present recommendations for discipline or punishment to the OSC for approval. The law simply says “no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without approval of the Special Counsel---if a case has already been initiated with the OSC.”*

*So why are you arguing that you cannot do anything, or that any action---including formal and/or informal investigations by the DOI or OIG--would be inappropriate or beyond your authority if a case has been initiated with the OSC?*

*If anyone in the DOI reacted quickly and effectively to WPA complaints, most cases wouldn't get to the OSC's office. And if the DOI and your Office paid “more attention to their EEO and whistleblower complaint activity and acted more expeditiously to resolve complaints at the administrative level”, the OSC wouldn't get involved and the restrictions of **5 USC Sec 1214 (f)** wouldn't even apply.*

When I contacted the OIG's Office in October, 2009, disclosing what I thought were instances of waste, fraud, and abuse, your Office responded quickly and efficiently, and I was impressed. Someone was violating federal laws and regulations, and you investigated, and eventually you sent the file to the U.S.

attorney's office. You were doing your job and fulfilling your mission. And as part of its mission, your Office regularly investigates and recommends discipline when DOI employees are guilty of violating federal laws and regulations.

Unfortunately, it appears whistleblower cases are treated very differently. The Associate Inspector General for the WBPP seemed uncertain about how to deal with "seasonal employees"; she could have but chose not to conduct an informal or informal investigation of any kind nor to inform anyone at the NPS that a WPA violation may have occurred; both you and your AIG believed there were impediments to our case instead of viewing them as prima facie violations of both the WPA and Title VII of the Civil Rights Act (in Sara's case); and almost everyone involved within the DOI has seemed more concerned with protecting a Superintendent who violated the law and with preventing any public acknowledgment that laws had been violated...than in doing what is necessary to discourage DOI employees from engaging in retaliation and discrimination. For example:

1. When we first contacted Laurie Larson-Jackson, she questioned whether seasonal employees were covered by the WPA....even though there is absolutely nothing in the law which would exclude them and the wording of the law is fairly specific by what it means by "**covered employees.**" And even after I sent her specific case law to confirm that seasonal Park Rangers were "covered employees" she continued to argue that seasonal employees may not be covered.
2. Both you and Laurie Larson-Jackson seem to have gotten side-tracked by whether what I did would have qualified as a "**protected disclosure.**" Simply stated, I did make a FOIA request asking for some specific information about the budget and expenditures at Mesa Verde National Park, and I did chronicle and disclose this process on my website ([www.schundler.net](http://www.schundler.net)), and the former superintendent at Mesa Verde NP did retire suddenly and unexpectedly ten days later. But more importantly in terms of our standing to claim that I had made a "protected disclosure", I also wrote your office and made a "disclosure to the Special Counsel or to the Inspector General of an agency" disclosing what I felt were obvious instances of gross mismanagement, a waste of funds, an abuse of authority. Specifically, on October 1, 2009, I wrote a letter to the Office of the Inspector General, disclosing what I believed were instances of waste, fraud and abuse, and shortly thereafter an investigation was conducted at Mesa Verde National Park (PI-PI-10-0044-I). Eventually, a summary of your report was forwarded to the Colorado Office of the United States Attorney for review and prosecutorial consideration.

In our initial contact with your AIG, I shared all of this information and I summarized the events pertinent to our case in an email sent on February 8, 2011, and in that email I attached two documents: a "Chronology of Events" and the "Basis of our Complaints". That information was available to your AIG, and to you, and a copy of that email and those documents are on my website at <http://schundler.net/Whistleblower.htm>.

Did you or any of your assistants check any of the information there? If you had, you would have known that our complaint was not based solely on my FOIA request or on the disclosures made on my web site, but on my disclosures to your Office, the DOI's OIG. To be sure, every document and every email regarding our case is on my website.

*Did you or any of your assistants check that website? Did you review the information Laurie Larson-Jackson had been sent?*

3. You seem to suggest that a **“harmful personnel action”** may not have occurred since we were able to get rehired at the Statue of Liberty and Ellis Island where we had worked the year before. Quite frankly, that's a very interesting argument...and one which I believe is just legally wrong. To be sure, it's like saying if someone robs me of \$100, and then someone else gives me \$100...that no crime has occurred. Legally I think the issue is very simple--- the Superintendent at Mesa Verde NP ordered our supervisor not to rehire us because of disclosures I had made to the Office of Inspector General. And the fact that we were able to be rehired at another park where we had worked has no bearing on our case. Legally, the question is ....Did the Superintendent at Mesa Verde NP order a “prohibited personnel practice” because of a “protected disclosure” to the Office of the Inspector General by a “covered employee”? And did he retaliate and discriminate against the wife of someone who made that “protected disclosure” in violation of Title VII of the Civil Rights Act? (Note the Supreme Court's decision on January 24, 2011 in the Thompson v North American Stainless, LP)
  
4. You wrote that the OIG “properly exercises its authority by referring whistleblower complaints to the OSC. The OIG could be deemed in violation of the law if a referral was not made.” Quite frankly, I don't know if your office did make a separate referral to the OSC. In fact, your AIG wasn't recommending it, and a formal complaint was filed only because we decided it should be filed. Your AIG, Laurie Larson-Jackson, recommended the CADR/CORE process and only begrudgingly said “it wouldn't hurt” if we also filed a complaint with the OSC. Did the OIG file a separate referral to the OSC? Did your Office make any kind of referral to the OSC concerning our case? Or was it in “violation of the law” because a referral wasn't made by your office?

In the final analysis, I believe what you are doing is not in conformance with the laws, regulations, and guidelines pertaining to whistleblower protection....and specifically with those sections of the laws, regulations, and guidelines pertaining to the disciplining and punishing of employees who are guilty of discrimination and retaliation.

As you may know, the OSC finished its investigation of our cases in January 2013, and it has been in negotiations with “the agency” (the NPS/DOI) to discuss both corrective action and disciplinary action since then. Without being able to read their draft report, I don't know exactly what was determined, but

I surmised that it's been determined that a "prohibited personnel practice" did occur---and that corrective action and some kind of discipline are appropriate.

In keeping with everything I have argued in this letter, it will be interesting to see how the NPS and the DOI respond to the OSC's findings and recommendations. Will they do something meaningful and significant to discipline and punish someone who knowingly violated the WPA not once, but twice....and in front to two witnesses with the clear knowledge that he might be violating the Whistleblower Protection Act? Will the DOI and NPS accept some discipline as little as a 14 day suspension per violation which is all OSC can request without going before the MSPB, or will the DOI and NPS come back with their own recommendations which could signal others in the DOI that both the letter and intent of the WPA is being enforced?

We don't know....and six months later, there still has been no resolution of our cases. To be sure, isn't this just another example of how inefficient and ineffective the Department of Interior and its various departments can be in resolving legitimate cases quickly? And doesn't this kind of response just confirm again and again that the letter and spirit of the Whistleblower Protection Act simply isn't being enforced by the Department of Interior?

I look forward to your response and to your recommendation of what I should do now....and should I pursue this complaint with your Office, or with some other agency or section of the government? Can you investigate your own agency to determine if it's in compliance with the laws and regulations pertaining to whistleblower protection, or does that have to be done by the Office of the Attorney General?

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