News

Federal News

Whistleblowers

Whistleblowers Urge Imposing Prison Time On Ex-Special Counsel for Contempt Charge

Although the Justice Department has indicated that it will not oppose probation as a sentence for contempt of Congress, a group of whistleblowers advocates July 15 urged a federal district court to impose a tougher sentence on former Special Counsel Scott Bloch.

''Mr. Bloch engaged in serious abuses of power in his role as Special Counsel, retaliated against federal employees who sought to prevent or expose his abuses, and then obstructed the ongoing investigation by deleting information from his computer,'' according to the letter signed by attorneys Debra S. Katz and Avi Kumin of Katz, Marshall & Banks in Washington.

The victim impact statement was submitted July 15 to Magistrate Judge Deborah A. Robinson of the U.S. District Court for the District of Columbia on behalf of the Government Accountability Project, Public Employees for Environmental Responsibility, the Human Rights Campaign, the Project on Government Oversight, and several former Office of Special Counsel employees. At a July 23 hearing, Robinson delayed sentencing until Sept. 8 and asked attorneys for both sides to provide more information.

Bloch pled guilty to criminal contempt of Congress April 27 after coming under fire for hiring Geeks on Call to erase files on his and his top deputies' government computers (48 GERR 522, 5/4/10). He was forced to resign as special counsel in October 2008 (46 GERR 1208, 10/28/08).

Max Sentence Not Recommended. According to a July 13 DOJ memorandum submitted to the court, Bloch admitted to withholding information from Congress about the erasure of computer files after an investigation was launched following a *Wall Street Journal* article (45 GERR 1361, 12/4/07).

''While the seriousness of the defendant's offense cannot be overlooked, certain factors weigh in favor of him not receiving the high end of the recommended sentencing range,'' up to six months in prison and a fine of $250 to $5,000, Assistant U.S. Attorney Glenn S. Leon wrote in the memo. These factors include Bloch's admission to the crime, his lack of a criminal history, and the likelihood of noncriminal discipline.

Leon recommended a sentence of a $5,000 fine and 200 hours of community service.

''On behalf of the victims of Mr. Bloch's unlawful conduct, we would oppose such a light sentence,'' Katz and Kumin wrote.

Controversy During Tenure. The letter noted that Bloch's tenure began in January 2004 with the removal from OSC's website of information on sexual orientation discrimination against federal employees, drawing protests from the National Treasury Employees Union (42 GERR 170, 2/24/04). It added that he dismissed several hundred complaints by federal employee whistleblowers without investigation, ''effectively leaving those federal employees without any remedy for the retaliation they had experienced.''

In addition, Bloch issued a ''gag order'' requiring OSC employees to obtain pre-approval before speaking to anyone outside the agency, and allegedly retaliated against 12 career attorneys by transferring them involuntarily, the letter said (43 GERR 75, 1/25/05). Two of those employees were openly gay, while another three had worked for NTEU.

The issues were referred to the Office of Personnel Management's inspector general (43 GERR 1035, 10/25/05), which during its investigation faced a lack of cooperation from Bloch, including claims of attorney-client privilege, attempts to control witness interviews, and public shaming of a complainant, the letter said.

That investigation has been on hold since the criminal investigation began against Bloch, according to the letter.

Katz told BNA July 20 that she believes OPM will issue a decision following Bloch's sentencing, although it may not be immediate because the IG likely will want to review grand jury testimony from the criminal case. She said she is hopeful that appropriate action will be taken, including providing back pay and/or reinstatement to the affected OSC employees.

'Tremendous Negative Impact.' ''Mr. Bloch's misconduct had a tremendous negative impact on a variety of different parties. First, his retaliatory actions caused a considerable toll on the lives and careers of the OSC employees who he terminated or forced into involuntarily transferring,'' Katz and Kumin said in the letter.

''Second, Mr. Bloch's misconduct has had a very negative impact on hundreds of whistleblowers and on the entire federal workforce,'' the letter said, referencing the dismissal of whistleblower complaints.

''Finally, Mr. Bloch's destruction of documents in the midst of a federal investigation and subsequent deliberate withholding of information from Congress have damaged the entire federal investigatory system,'' the letter added. ''Were Mr. Bloch to be given a 'slap on the wrist' sentence, it would signal not only to Mr. Bloch, but to every federal official that their best way out of a serious federal investigation is to destroy documents in order to cover up evidence of their misconduct.''

''Why is DOJ going easy on Bloch, but prosecuting national security whistleblowers so aggressively? There have been athletes who have received stiffer penalties for lying about steroids use,'' POGO Executive Director Danielle Brian said in a July 19 statement.

Katz told BNA that she and Kumin wrote the letter because they believe it is important ''for the court to know the impact of his unlawful behavior.'' ''It's just a very bad precedent'' to allow a high-ranking government official to receive only a light sentence even though he ''stonewalled the investigation,'' she said.

''Bloch did a lot of damage to the credibility of that agency,'' including dismissing cases, terminating valuable career employees, and discontinuing a successful mediation program, Katz said. ''He's done a real disservice to this agency.''

No Improvement for Whistleblowers. PEER asserted in a July 14 statement that the Obama administration does not appear to have taken a different stance on federal employee whistleblower rights from Bloch and the Bush administration, and ''has yet to even nominate a Special Counsel, a key position that is supposed to defend and advocate for whistleblowers.''

''Protection of whistleblowers does not appear on the Obama administration's radar,'' PEER Executive Director Jeff Ruch said in the statement. ''The White House has taken the time to name National Endowment for the Arts advisory committee members but has not found time in 18 months to select a Special Counsel.''

A White House spokesman, however, told BNA July 20 that Obama currently is working to find the best candidate possible for the position.

PEER noted that as of 2008, the most recent year for which statistics are available, federal employees prevailed in an average of one in 50 whistleblower cases before the Merit Systems Protection Board, and in the past 15 years have won only one in 200 cases appealed to the U.S. Court of Appeals for the Federal Circuit.

''While new Obama appointees to the MSPB show signs of reversing dismal trends for whistleblowers, the cadre of administrative judges remains unchanged,'' PEER added.

'Sea Change' at MSPB. ''I think that we're hopeful that there's been a sea change in that agency,'' Katz told BNA, noting that Obama made ''good appointments to the MSPB, and hopefully the MSPB will really change itself around.''

She said that previously practitioners advised whistleblower clients not to take their claims to MSPB, saying ''it's a waste of money.'' But now, Katz said, attorneys are trying to speed through the OSC process to get to the board because of OSC's lack of resources.

Katz said that she still supports a change in the Whistleblower Protection Act ''to allow employees to have a vehicle to go to court'' after exhaustion of administrative remedies, as is the case under Title VII of the 1964 Civil Rights Act. Currently, federal employee whistleblowers only can appeal from OSC to MSPB, and then to the Federal Circuit.

Unlike PEER, Katz said she believed that Obama's failure to appoint a permanent special counsel is due to inability to find a good candidate.

''I think that President Obama has his work cut out for him'' not only in finding an effective special counsel, but also in restoring OSC, Katz said. The Bush administration appointed a special counsel—Bloch—''who really had a mission to dismantle this agency,'' she said.

By Laura D. Francis

Full text of the letter is available at http://op.bna.com/gr.nsf/r?Open=lfrs-87jras.

Alternative Dispute Resolution

FLRA Final Rule on Arbitration Awards Says Joint Requests on Expedited Rulings Unnecessary

Parties to arbitration cases before the Federal Labor Relations Authority will not be required to jointly request expedited, abbreviated decisions as specified in a proposed FLRA rule issued in April, FLRA said in a final rule published in the July 21 *Federal Register* (75 Fed. Reg. 42283, 7/21/10).

FLRA said that the change in the final rule, which, like the proposed rule, is intended to improve and expedite the authority's review of arbitration awards, was in response to a comment received following issuance of the proposed regulations April 29 (48 GERR 516, 5/4/10).

''Specifically, based on a comment that parties should not be required to jointly request an expedited, abbreviated decision under § 2425.7, the final rule deletes the requirement of a separate joint request. Instead, the final rule allows an excepting party to request, in its exceptions, such a decision, and an opposing party to state, in its opposition, whether the opposing party supports or opposes such a request. Under the final rule, the Authority may issue an expedited, abbreviated decision even absent an excepting party's request and without regard to whether an excepting party's request is opposed,'' FLRA said.

Time Limits on Exceptions. FLRA also agreed, in response to comments on the proposed rule's time limits for filing exceptions to awards, that if there is no legible postmark or deposit date on an envelope containing an arbitration award sent by regular mail or through a commercial delivery service, the date of service will be the date of the award.

However, the authority did not agree to similar changes for arbitration awards sent via e-mail or fax, or for extra time to respond to arbitration awards sent overseas through the mail.

''With regard to these comments, the Authority purposely drafted the proposed rule to leave to the parties (or, absent agreement by the parties, to the arbitrator) decisions regarding how arbitration awards will be served. If parties have concerns similar to those set forth by the commenters, then the parties can agree to a method of service that does not present such concerns,'' FLRA wrote.

Purposes of Rule. Like the proposed regulations, the final rule is intended to:

- change the authority's existing practice for calculating the date for filing timely exceptions so that the 30-day period begins on the day after, not the day of, service of the arbitration award;
- clarify how the date of service of an arbitrator's award is determined;
- clarify the information and documents that must be filed with exceptions and oppositions;
- clarify the existing grounds for review of an arbitration award and the consequences of failing to raise an existing ground;
- add an option to request an expedited decision from the authority in certain arbitration cases that do not involve unfair labor practices;

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