GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW, Suite #1100
Washington, DC 20006
(202) 457-0034 | info@whistleblower.org

April 6, 2016

Honorable Carolyn Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, #300
Washington DC 20036

Re: Darrell Whitman Amended Disclosure and Whistleblower Protection Act Complaint

Dear Ms. Lerner:

The Government Accountability Project (GAP) represents Mr. Darrell Whitman (Attachment 1) (Att.) in this filing to amend his January 16, 2015 whistleblowing disclosure pursuant to 5 USC 1213, as well as to file a Whistleblower Protection Act complaint under 5 USC 1212 challenging his May 5, 2015 termination and an associated, illegal gag order. As part of this action he seeks a stay to provide interim relief, and disciplinary action. Until his termination, Mr. Whitman was a GS-12 Regional Investigator for the Office of Whistleblower Protection Programs (OWWP), U.S. Department of Labor (DOL) Occupational Safety and Health Administration (OSHA). This action is supported by Mr. Whitman's 215 page affidavit and supporting exhibits. (Attachment 2) With respect to final resolution of the prohibited personnel practices, Mr. Whitman requests an effort to resolve the case through the Office of Special Counsel's Alternate Disputes Resolution (ADR) unit.

As context, Mr. Whitman is a former practicing attorney and university professor who in 2010 became an OWPP investigator, because he was impressed with and wanted to contribute to its mission of protecting responsible whistleblowers. His resume is enclosed as Attachment 3. By 2011, however, he and all the other investigators in San Francisco's Region 9 OWPP office began challenging systematic illegality, abuses of power, mismanagement and corresponding public health and safety threats. They made disclosures challenging misconduct by the Regional Supervisory Investigator (RSI) Joshua Paul that betrayed the OWPP's mission of enforcing whistleblowers' anti-retaliation rights. They charged that Mr. Paul routinely took illegal actions that delayed resolution of whistleblower cases and arbitrarily reversed investigators' merit findings. The bottom line? The investigators consistently recommended within three to four months that some 30% of whistleblowers prevail. But after Mr. Paul's interventions, three to five year delays ensued and only some three percent of whistleblowers received merit findings that they won and were entitled to receive a whistleblower remedy, subject to appeal. As a rule, these arbitrary reversals were not based on new evidence from fact-finding. Rather, they reflected Mr. Paul's regular, ex parte dialogues with corporate defendants that occurred without the

investigators' timely knowledge or participation, at the same time he was ordering investigators not to communicate with complainants about their rights, remedies or the evidence.

At first, the investigators acted primarily through grievances and advocacy sponsored by their American Federation of Government Employees local union. While management such as Regional Administrator Ken Atha initially listened and promised to act, Mr. Paul's abuses continued unabated. When the whistleblowers continued to make disclosures, management began reacting defensively and shielding Mr. Paul. This included engaging in serial retaliatory investigations and disciplinary actions against Mr. Whitman and the others. Between July 2011 and his termination, the agency retaliated against him through 78 threatened or actual personnel actions traced below against Mr. Whitman alone.[1] Until Mr. Whitman's May 2015 termination, all disciplinary actions were withdrawn after his rebuttals. Today Region 9 has terminated or forced out four of the five the original whistleblowers who protested.

When internal regional disclosures were ineffective, in 2013 and 2014 Mr. Whitman began raising the investigators' concerns to the national office, including the OWPP Director and then Secretary of Labor Thomas Perez, and finally the DOL Office of Inspector General. Unfortunately, these disclosures did not spark good faith corrective action. Rather, they led to investigations of Mr. Whitman that eventually formed the basis for his termination. As a result, in late 2014 and 2015 Mr. Whitman actively began making disclosures to Congress, and interviewed with media outlets that in 2015 led to widespread coverage, including the John Stewart Daily Show, http://www.cc.com/video-clips/pvcjoh/the-daily-show-with-jon-stewart-blazing-tattles. On May 5 the agency responded by terminating him, almost exclusively on stale charges that had been proposed and withdrawn during the prior three years.

AMENDED WHISTLEBLOWING DISCLOSURE

Mr. Whitman requests that the OSC order an investigation of Mr. Joshua Paul and any other relevant DOL officials for the issues below. This list amends his January 2015 filing:

Illegality,[2] abuse of authority, gross mismanagement, and contributing to a substantial and specific danger to public health or safety through –

1) Assigning enforcement of whistleblower laws to unqualified staff without necessary training,

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[1] .Nearly all the personnel actions prior to Mr. Whitman's termination are not part of this action, because they were pursued through union grievances. The prior personnel actions are relevant, however, because they track a pattern of sustained harassment for protected activity. Mr. Whitman's declaration also chronicles pending, parallel EEOC claims. He does not seek relief for those claims in this action, but like the union activity has included them in the record as examples of activity protected by 5 USC 2302(b)(9). Union grievances to protest collective bargaining agreement violations also are not detailed but cited in overview, because they are protected activity under section 2302(b)(9).

[2] In some instances, Mr. Whitman's disclosure demonstrates violation of statutory provisions. In most cases, however, the illegality can be traced to violation of agency rules in its Whistleblower Investigations Manual (WIM). Relevant citations are in Mr. Whitman's statement, as referenced in the chronology of protected activity below.

Qualification, subject matter expertise or experience. This misconduct ranged from interns assigned to conduct initial legal screening whether complaints justified investigation, to OSHA management "second opinions" at Mr. Paul's request that overruled investigative merits findings despite managers' lack of subjective matter expertise or experience in whistleblower cases.[3]

2) Inexcusable delays in resolving cases. After investigators finished Reports of Investigation (ROI), often with merit findings against ongoing retaliation, final approval was postponed for up to five years of delay. Investigators had to wait up to a year for feedback on completed ROI's.

3) Obstruction of investigations: Mr. Paul and other supervisors ordered investigators to rewrite reports up to three to four times after initial merit recommendations; arbitrarily reversed merit findings without explanation or analysis; rewrote ROI's without having engaged in fact-finding; submitted merit recommendations for authoritative review to managers who were not only unqualified, but did not participate in fact-finding; without knowledge of the investigator, re-interviewed witnesses seeking to change their testimony by diluting support for the whistleblower ; and again without knowledge of investigators intervening to communicate with parties.

4) Violation of whistleblowers' rights. This ranged from orders to close cases without Interviewing complainants who had properly filed their lawsuits; orders that investigators not communicate with complainants about their rights, remedies or relevant evidence; reversal of merit findings after the whistleblower complained about delays; and breaches of confidentiality for whistleblowers who complained about delays, in one instance where physical danger was at issue.

5) Favoritism to corporate defendants. Mr. Paul and other Region 9 supervisors, and the Office of the Solicitor acted to protect and/or limit companies from accountability for violations of whistleblower law. This included giving corporate defendants permission to delay responses up to a year while whistleblowers were without relief, without investigators' knowledge actively communicated with corporate counsel, without the investigators' knowledge arranged for meetings between corporate counsel and regional management, and then reversed merit findings without consulting the investigators.

6) Falsification and censorship of record in final Reports of Investigation. Mr. Paul repeatedly removed evidence from ROI's that would support merit findings, or ordered investigators to include text that was contradicted by the facts from their investigation. In one instance when Mr. Whitman protested that would be violating the law, Mr. Paul responded that he understood and would do it himself.

7) Abuse of settlement process: Mr. Paul repeatedly took over settlement negotiations behind the backs of investigators, without their knowledge until the whistleblowers complained. Often his interventions were after *ex parte* communications with corporate counsel, and included

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[3] In most instances, support citations for Mr. Whitman's allegations are in the chronology of protected activity below as illustrated by mishandling of individual cases. Further support for this generic concern is in Att. 2, Exh. 5, at 9-10; and Att. 2, Exh. 17, at 4) .

threats to reverse merit findings if the complainant did not accept a nuisance settlement or other relief significantly lower than proposed by the investigator. By pressuring for settlements instead of merit findings, Mr. Paul also prevented referrals to regulatory agencies to address issues raised by the whistleblowers. Those notifications do not occur after a settlement. This exacerbated substantial and specific dangers to public health and safety by preventing referrals to enforcement agencies such as the Nuclear Regulatory commission (NRC), Environmental Protection Agency (EPA), and Federal Aviation Administration. (FAA)

8) Rewriting whistleblower statutes to deny protection. Mr. Paul personally assumed the role that Congress rejected for the Federal Circuit when it enacted the Whistleblower Protection Enhancement Act. For individual cases he personally added prerequisites not in the statute to qualify for protection, as well as loopholes to cancel eligibility for statutory rights. See, e.g.: *FedEx v. Forrand*, where Mr. Paul dismissed an otherwise merit complaint by arguing an award to the whistleblower acted as an "intervening event" cutting off company liability for retaliation."

9) Rewriting statutory burdens of proof: Mr. Paul did not consistently permit cases to be determined by the Whistleblower Protection Act (WPA) legal burdens of proof that have governed all DOL-administered whistleblower laws wince 1992. Instead of the "contributing factor" test for a *prima facie* case, he imposed the far more difficult "primary motivating factor" test. Instead of requiring employers to prove an independent justification by "clear and convincing evidence," he permitted them to prevail if they met the far easier "preponderance of the evidence" standard. These most commonly appeared in cases under statutes requiring preliminary reinstatement, such as: *Copper Basin Railroad v. Lawson*, *FedEx v. Forrand*, *Lockheed-Martin v. Stookey* and *Hawaii Air Ambulance v. Stone.* which then precluded the reinstatement of the whistleblower as a statutory remedy.

10) Failure to issue final orders: Although the whistleblower statutes require final orders for relief after a merits finding, OSHA has substituted preliminary "due process" letters that did not constitute final resolution. Rather they announce findings of illegality but postpone action. This violation of plain statutory language enabled misconduct summarized above, such as delays and pressure to accept inadequate relief, and vetoes of merit findings by solicitor staff who did not work on the investigations, and the dismissal of cases negotiated with corporate defendants without the knowledge or participation of the investigator.

In review, the significance of these disclosures cannot be underestimated for cases where whistleblowers challenged substantial and specific threats to public health and safety. As Mr. Whitman explained in an August 2014 disclosure to Senator Grassley:

> Presently, the WBPP has responsibility to worker/public protection under more than twenty statutes that range for basic workplace issues to Sarbanes-Oxley and Dodd-Frank financial regulation, to all transportation sectors, the nuclear industry, food safety, and now the Affordable Care Act. Few if any investigators and senior WBPP managers are qualified to conduct or review credible investigations covering these statutes. This lack of competence allows cronyism and corruption to dominate management of the program, which if anyone takes a close look has already contributed to preventable deaths, injuries

and property damage. To allow OSHA and it management to continue to supervise whistleblower protection is to put the nation at risk in unacceptable ways. At some point, there will be a catastrophic event that will bring all of this to light, but too late for those who become its victims. (Att. 2, at 125)

An OSC order for an independent investigation is necessary in this case, because Mr. Whitman already has exhausted all internal DOL channels. He has made disclosures through the chain of command, to the national OWPP office, Secretary Perez and to the DOL Office of Inspector General. The only substantive responses were retaliatory OSHA management investigations of Mr. Whitman that established the record for his removal.

PROHIBITED PERSONNEL PRACTICE COMPLAINT

(Remainder of filing is retaliation complaint, and must be kept off the record during review and investigation by the U.S. Office of Special Counsel)