WHISTLING I

A government whistleblower has been fully vindicated yet a chill persists in the whistleblower community. Pleasure was carefully measured after Environmental Protection Agency (EPA) whistleblower William Marcus was finally reinstated in June after the Secretary of Labor's February 7 affirmation of a December 3, 1992 administrative law judge ruling. Marcus is more the exception that proves the rule: those who lay careers on the line to expose dangers to public health and safety are in for a rough ride, often to nowhere. He is a qualified exemption, whose ride was rough enough and long enough to give pause to other potential whistleblowers. Moreover, those who wronged him continue to escape penalty despite Administrative Law Judge (ALJ) David A. Clarke, Jr.'s findings that "the reasons given for Dr. Marcus' firing were a pretext and that his employment was terminated because he publicly questioned and opposed EPA's fluoride policy."

Marcus authored a memo on potential health threats of fluoride which got a lot of play in the press and "created some chaos and turmoil," according to a memo written at the time by another EPA staffer. An EPA Senior Science Adviser and Branch Chief in the Office of Drinking Water, Marcus held the highest non-supervisoty position the agency offers. One of a small number of board-certified, internationally renowned toxicologists, Marcus had agency permission to engage in non-conflicting side jobs as an expert witness for plaintiffs suffering harm from toxics. Court outcomes have cost chemical companies millions of dollars.

The reason EPA gave for firing Marcus was that he was testifying privately while on the EPA clock. The investigation of Marcus by the EPA Inspector General's office began in 1989, with the EPA looking for the disclosure of trade secrets and confidential agency information. Within two months the Inspector General (IG) knew such allegations were untrue and that all the information Marcus used was public source information. Then EPA poured over every one of Marcus' time cards. In November of 1991, over twenty separate allegations of misconduct were brought by the IG.

Marcus' attorney, Steve Kohn of Kohn and Colapinto of Washington says, "The agency rubberstamped it, and Marcus was fired."

In fact, Marcus was clearly charging his hours away from the agency against a large backlog of accumulated annual leave, yet this was ignored. Kohn says there is evidence that someone, not Marcus, falsified some of the time cards.

The incensed ALJ found that the IG's office "shredded all investigation notes made contemporaneously during interviews," despite pending congressional, administrative and Freedom of Information Act investigations into the case— a serious and criminal violation of the law.

How far did EPA go to get Marcus? It was clear that in 1991 the IG had gotten Marcus' ethics officer to change his 1989 statement that Marcus had received permission to testify. When the Justice Department refused to pursue Marcus because of obvious conflicts in statements, the IG simply dumped the first statement as well as the record of Justice's advice.

Moreover, says Marcus, "They had my frontline supervisor write a defamatory note that I made a threat to kill her and was a threat to staff, and she circulated it throughout the agency. On the stand, under examination by the Administrative Law Judge, this supervisor admitted I hadn't threatened her and said her fear was based on what she was told by others. Nobody ever came forward to say they told her that. She admitted that she know the allegations were false. Judge Clarke asked her if, after she herself knew the allegations to be false she had attempted to correct the error? "No, was her answer. She did nothing.

In an unusually strong victory for a government whistleblower, Clarke ordered the EPA to lay out back pay, fringe benefits and interest; reinstate Marcus as a senior science advisor; pay attorney's fees, and kick in an unheard of $50,000 in compensatory damages. That was over a year and a half ago, and EPA kept him in limbo, without pay, while appealing the case to the Office of Appeals for the Secretary of Labor. Such cases can sit for years waiting for an outcome, underscoring the adage of justice delaying what justice denied. Attorneys who practice in the area have taken notes that suing for a timely decision through the District court via a writ of mandamus is a virtual guarantee of a negative decision regardless of what the ALJ had decided. Marcus might still be waiting if the office of Maryland Democratic Senator Barbara Mikulski, which had been lobbied by constituent Marcus, had not sought the attention of the Secretary of Labor in the matter.

What wasn't dealt with in the case or reported in the press was another motive for the EPA targeting of Marcus that is equally dark. In one of his free-lance cases, Marcus testified that the pesticide chlordane causes severe health effects in humans. Kohn charges that the law firm for Velsicol Company, which manufactures chlordane, began in 1988 to use inside contacts within the EPA to urge an investigation to discredit Marcus. Kohn further charges that as an apparent favor to the industry, the IG initiated an investigation, obtaining transcripts of every time Marcus testified in a search to find disclosures of trade secrets and confidential information. When that failed, the time card strategy was initiated.

Word of Marcus' time card fate came via a curious route. An attorney he was testifying for informed him that an attorney for Dow Chemical had mentioned Marcus would be canned in a couple of weeks, and cited the exact date and action. "How did Dow Chemical know I was about to be fired, before I or any one else at EPA outside the people behind it knew?" asked Marcus. The chemical company community appears to be clairvoyant as to actions by the IG.

All notes from meetings with Velsicol were shredded in violation of the law, says Kohn. EPA never looked into it, as that is the role of the IG, which is not inclined to look into itself. EPA would not comment on the case.

There's no need to leap aside from the heads one assumes will roll after a fiasco like this. "My supervisor has since gotten a promotion and an increase in pay, and is a division director," says Marcus. "I can't sue her, because the government stands in. How can individuals be protected or clearly malicious actions beyond the scope of legitimate duties? Before my trial, the word went out that if anyone showed up to say something on my behalf, measures would be taken against me. How could this be considered public service?" Marcus doesn't fault the agency, but "the EPA lawyers who are between me and upper management. The IG was shown to have shredded numerous documents, felonious conduct in violation of the FOIA and the Poindexter Act, and nothing has happened to them."

The first and second line supervisors who were implicated in the illegal firing are still in position, and Mareus still reports to the same second line supervisor who made the termination decision.

Indeed, the EPA IG, John Martin, is still in office, though he is a Republican appointee and easily replaced as a presidential appointee. This lack of accountability for truly grievous behavior raises disturbing questions about the speed with which the Clinton Administration is countering those placed in office by Reagan and Bush to reform agency missions in their image.

Under federal law, the Labor Department has jurisdiction over employees, private and public, who suffer reprisals as whistleblowers working under the Atomic Energy Act, Toxic Substance Control Act, Safe Drinking

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Water Act, Clean Air Act, Superfund, Resource Conservation and Recovery Act and Water Pollution Control Act.

However, most employees are not informed of their rights or of the required procedures (in the nuclear field, the laws are posted). With the exception of those operating under the Atomic Energy Act, who have 180 days to take action, the statute limitations is only 30 days. A month isn't much time to figure out what's going on, get a lawyer, research the case and make decisions on taking action in an often intimidating situation.

As a whole, Congress shows little propensity to really beef up protections for whistleblowers. Until 1978, whistleblowers could get jury trials in court. This ended with the Supreme Court's interpretation of the Civil Service Reform Act, in Bush v. Lucas, that Congress intended the Act to preclude access by Federal employees to Federal Court. This was not mentioned in the statute and Congress claims not to have intended it, but Congress hasn't done anything about it. A cynic might say that ultimately, Congress is management. A cynic might also conclude that regardless of what administration is in power, bureaucracies first and foremost look after themselves and their friends. Whistleblowing is often an inherently disruptive act against prevailing political powers.

Kohn, who has written extensively on whistleblower laws, recommends increasing the statute of limitations to 180 days and requiring posting of the laws. In some cases, it is hard to quantify the value of blowing a whistle, which can make rewards problematic. Still, there is a need for greater damages, such as double or triple back pay, as Kohn points out that in reality a specialized career is usually shot and everybody knows it. Governmental immunity makes it almost impossible to sue individual managers for their acts, and making it easier to sue in cases with deliberate malfeasance would be a big step in the right direction.

Occasionally someone in Congress saddles up the white horse and makes an attempt to improve the situation, but the measures usually fall short of the heart of the matter, if they pass at all. Consider a report by the Merit Systems Protection Board — an independent, quasi-judicial federal agency which rules on some personnel cases— that concluded that over a third of federal worker who point out waste, fraud, or abuse are threatened by their supervisors with reprisals, an increase of over 50% of reported threats in a survey a decade ago. This increase took place despite the 1989 Whistleblower Protection Act, as the safeguards it initiated can be thwarted by subtle punishments such as negative performance evaluations or placing a whistleblower on a shelf of obscurity.

Cases in the Office of Administrative Appeals under the Secretary of Labor are starting to move along a little faster, though there is still a major backlog and many cases coming out now are five or so years old.

Two whistleblower cases pending before the Dept. of Labor should be watched closely to see how serious government is about policing abuse of the public trust by protecting whistleblowers. The first is that of Leonard Trimmer, a senior level technician at the Los Alamos National Laboratory, a Dept. of Defense nuclear weapons design site. Working at the lab under contract with the University of California since 1962, Trimmer was fired in August of 1993, (after being told he'd be fired in December of 1992) because the job could not accommodate the restrictions of a back disability. Trimmer says he was really fired for insisting that the 55-gallon drums of radioactive waste he inspected — transuranic, intermediate level waste targeted for the Waste Isolation Pilot Plant (WIPP) in Carlsbad New Mexico — were not reliably inspected because of faulty x-ray and sonar equipment.

Some waste which includes plutonium, may be far hotter than WIPP is designed for, so Trimmer refused to certify the contents of 1,000 barrels that were previously inspected and ready for shipment to WIPP. Moreover, he found 20 or so drums leaking radioactive waste because water not fully absorbed by cement in the barrels was corrosive. Waste had leaked into the atmosphere and endangered workers. Trimmer is a hot potato for the Dept. of Energy.

Another hot potato is Allen Mosbaugh, the highest ranking corporate whistleblower in the atomic energy field. In 1989, Mosbaugh, assistant general manager at Plant Vogtle, warned the NRC that personnel at the nuclear power plant were deliberately ignoring important technical specifications the nuclear power plant's license requires. In 1990 a major screw-up at the plant, which is run by Georgia Power and the Southern Company, took place that could have gone the way of a major disaster. All three independent power systems, required by law, were down. This was rapidly demonstrated when a fuel truck hit a power line and knocked out the primary source. It was an odds-defying nightmare scenario where succeeding disasters might pile on and move the situation out of control. Luck and angels prevailed and the truck didn't explode, which might have damaged the back-up diesel generators or delayed getting them going, possibly leading to a meltdown of the reactor core, the coolant of which was rapidly heating up during the 36 minute blackout. Moreover, the containment vessel was breached because the huge lid was off for repairs. If the coolant had started boiling off into steam, it could have been more than another rainy night in Georgia.

Disaster was averted when a generator was repaired and started. Then the economic pressure was on to get the plant up and running as soon as possible. This meant assuring the NRC that all three back-upon systems were fully tested and proved reliable. Mosbaugh know the test results weren't nearly as rosy as reported. He picked up a pocket tape recorder and recorded discussions in which he informed executives of the problems and their reply was to "just deny" after a document claiming proper compliance was signed and submitted to the NRC. According to sources, the NRC considers this its most serious criminal investigation ever, and the chairman has been heard to comment that Mosbaugh was an American hero.

Meanwhile, Mosbaugh was canned by the power plant in September, 1990 and has been unemployed ever since, with a wife and four children. He was fired for taping. There was no rule against it, but the company claimed it had no prohibition because taping was such an outrageous act that prohibition was implicit. This position was put forth despite an in-house legal memo, on a different matter, that said one-party taping was just fine.

The NRC Office of Investigation issued a report and vindicated Mosbaugh in December of 1993, though the report was kept confidential until last month. Kohn, who also represents Mosbaugh and Trimmer, charges that internal reports show that the NRC isn't pleased with the findings and is trying to water them down, trying to point to lower level managers instead of the higher level of management implicated in the report by the Office of Investigation. "What the Commission has allowed to go on is outrageous," says Kohn. "It's more concerned with the PR image of the nuclear industry than with strict enforcement."

Hot potato, hot potato. How the toss will affect two whistleblowers in limbo and the messages to be sent, remains to be seen. Meanwhile, the tunes they whistle should give the public the willies.

Skip Kaltenhauser
writer and lawyer
Washington, D.C.