



Public Employees for Environmental Responsibility

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*National Weather Service
Employees Organization*

Special Counsel Carolyn Lerner
U.S. Office of Special Counsel
1730 M Street, NW
Suite 218
Washington, DC 20036-4505

October 8, 2015

RE: Illegal Nondisclosure (“Gag”) Orders

Dear Special Counsel Lerner:

We are writing on behalf of the National Weather Service Employees Organization (NWSEO) and Public Employees for Environmental Responsibility (PEER) to advise you about violations of a key provision of the Whistleblower Protection Enhancement Act of 2012 by the National Weather Service and its parent agencies, the National Oceanic & Atmospheric Administration (NOAA) and the Department of Commerce. We seek your office’s assistance in curing these prohibited personnel practices and, if appropriate, seeking disciplinary action against responsible officials.

As you know, the WPEA placed statutory language into Title 5 limiting federal agencies’ use of nondisclosure policies, forms or agreements, commonly referred to as “gag orders.” As a result, agencies are enjoined to include the following stipulation into any such policy, form or order:

“These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection.” (5 U.S.C. § 2302(b) (13))

Further, agencies employing nondisclosure policies are required to “also post the statement required under paragraph (1) on the agency website, accompanied by the specific list of controlling Executive orders and statutory provisions.” The statute further provides that “Any nondisclosure policy, form, or agreement described under paragraph (1) that does not contain the statement required under paragraph (1) may not be implemented or enforced to the extent such policy, form, or agreement is inconsistent with that statement.”

Implementation or enforcement of a nondisclosure policy or order not meeting the above stipulations is a “prohibited personnel practice” contravening fundamental tenets of our merit system.

Despite these very specific statutory requirements, the National Weather Service, NOAA and Commerce are presently implementing and enforcing nondisclosure agreements which violate the law. We point to three recent examples which postdate the enactment of the WPEA:

1. Organization Workforce Analysis (OWA)

This summer, the National Weather Service began requiring a signed confidentiality agreement (Exhibit I) from NWSEO participants along with all participants on the OWA teams. These agreements purport to bind NWSEO representatives from communicating with its members, members of Congress or any other person regarding agency plans and how they are determined. These agreements also do not contain terms allowing reports of actual or impending law or rule violations, gross mismanagement, waste or abuse.

Ironically, the nondisclosure agreement even forbids NWSEO from sharing the results of an employee survey conducted by a consultant firm hired by NWS with its members who participated in that survey.

The nondisclosure agreement contains none of the protective stipulations required by the WPEA and thus appears to be illegal.

2. Grievance Settlements

In July 2015, the General Counsel of the Department of Commerce instituted a new policy demanding that any settlement of unresolved grievances include a nondisclosure clause (Exhibit II). While this policy has an exception for “whistleblower cases” that exception comes nowhere close to meeting the requirements of the WPEA.

Many of these grievances revolve around actions by agency management which violate law, rule or regulation. NWSEO and its members have both a statutory and a constitutional right to disclose these matters –including how they were resolved – to Congress, the Inspector General and your office, among others.

While NWSEO has assented to and maintained confidentiality when settling disciplinary cases in order to protect the employee’s privacy, this gag order goes far beyond those narrow confines. In addition, this Department of Commerce policy is a direct violation of Department of Justice regulations that prohibit confidentiality clauses in settlement agreements except in the most extraordinary cases. Title 28 C.F.R. section 50.23(a) reads:

“It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department’s policies regarding openness in judicial proceedings.”

Commerce’s policy even conflicts with the policy of the NOAA Office of General Counsel prohibiting non-disclosure clauses in settlement agreements.

It is particularly disturbing that this violation of the WPEA is the product of Commerce’s top lawyers.

3. Collective Bargaining

The National Weather Service has just added a confidentiality clause to its ground rules for Collective Bargaining Agreement (CBA) negotiations which requires that all information about the CBA bargaining process must be held

“confidential” (Exhibit III). Again, this nondisclosure agreement does not comport with the requirements of the WPEA.

In addition, the agency wishes to treat CBA information as if it were part of official budget formulation – which is an entirely separate process. The fact that this nondisclosure rule has never previously been imposed underlines the unprecedented nature of this step.

Remonstrations with these agencies on the above matters by NWSEO has not altered their posture. Distressingly, the number and scope of these illegal gag orders is spreading. Consequently, we seek the intervention of your office.

We also believe that this recalcitrance is reinforced by these agencies’ either lack of knowledge about, or interest in, compliance with merit system principles. We believe it is indicative that neither the National Weather Service nor NOAA nor the Department of Commerce has been certified as required under 5 U.S.C. § 2302(c) for ensuring that their employees –including their senior managers – are informed of the rights and remedies available under the Whistleblower Protection Act. We would urge that your office require these three agencies obtain and maintain such certificate as part of any resolution of this matter.

We thank you for your attention to this request.

Sincerely,

Richard Hirn
NWSEO General Counsel

Jeff Ruch
PEER Executive Director