

Secretary of Labor, Acosta  
 DOL Inspector General, Dahl  
 DOL Solicitor, O'Scannlain  
 OWCP Director, Hearthway  
 US Attorney General Sessions

July 27, 2018

RE: **Fraudulent procedures** by Doug Pennington for Rachel Leiton;  
**Omission of material facts** by Doug Pennington for Rachel Leiton;  
**Using interpretive rules as binding law, and disguise legislative rules as interpretive rules;**  
**Failure to follow DEEOIC's own regulations or the EEOICP Act;**

Case ID #76825; Case ID #32597; Case ID#20001803.....under the EEOICP Act, decided by the OWCP's Division of Energy Employees Occupational Illness Compensation Program (DEEOICP).

This request is based on the mission statement of the Department of Justice, The Department of Labor's solicitor, the Department of Labor's Inspector General and Department of Labor's Office of Workman Compensation.

**Department of Justice's mission statement.....**

**To enforce the law** and defend the interests of the United States according to the law; .....to seek just punishment for those guilty of unlawful behavior; **and to ensure fair and impartial administration of justice for all Americans.**

**Department of Labor's solicitor's mission statement.....**

The Office of the Solicitor's mission is to meet the legal service demands of the entire Department of Labor. As the Secretary of Labor and other Department officials seek to accomplish the Department's overall mission and to further specific priorities, the Office of the Solicitor (SOL) provides legal advice regarding how to achieve those goals. .... SOL fulfills its mission by representing the Secretary and the client agencies .....**by assisting in the development of regulations, standards and legislative proposals; and by providing legal opinions and advice concerning all the Department's activities.**

**Department of DOL Inspector General's mission statement.....**

The Office of Inspector General (OIG) at the U.S. Department of Labor (DOL) conducts audits to **review the effectiveness, efficiency, economy, and integrity of all DOL programs and operations, including those performed by its contractors and grantees.** This work is conducted in order **to determine whether: the programs and operations are in compliance with the applicable laws and regulations; DOL resources are efficiently and economically being utilized; and DOL programs achieve their intended results. The OIG also conducts criminal, civil, and administrative investigations into alleged violations of federal laws relating to DOL programs, operations, and personnel.**

### **DOL's OWCP mission statement.....**

The Mission of the Office of Workers' Compensation Programs is to **protect the interests of workers who are injured or become ill on the job, their families and their employers by making timely, appropriate, and accurate decisions on claims, providing prompt payment of benefits** and helping injured workers return to gainful work as early as is feasible.

Since the DEEOICP is under the OWCP, the goals for OWCP should also be the goals of the DEEOICP. However, the Director Rachel Leiton has issued policy that has made it more difficult for the public and claimants to obtain information, to discuss the case with the case examiners, to obtain a hearing, and for the claimants to have equal application of the law.

### **Goals of OWCP.....**

1. **“Improve claims review, adjudication, issue resolution and payment: *Provide timely and high quality review and adjudication of claims, early resolution of claims issues, and timely and accurate payment of benefits.*”** AS of today's date,.....
  - (a)... the phone may be answered by a different district office than the district office where the claim is in, making the claimant wait for the information several days; ex. Buffalo NY resource center answered the phone for Jacksonville, had to send an e-mail request for Jacksonville to call me or Denver will answer the call for Jacksonville, again had to leave message to call me.
  - (b)the Final Adjudication Branch,(FAB), has now been given to different FAB district offices rather than the district office where the claim is in; Upon having waived the rights to object to a Recommended Decision to accept the illness(es), the FAB waits the 30 days to remand the accepted illness(es) back to the district office for further development which again delays the “early resolution of the claims issue”.
  - (c) the FAB previously had Case Examiners “2” ( which were independent of the district office), that would continue developing the issues that were not before FAB, but Rachel Leiton has voided all CE2 positions, which not only delays the resolution, but has denied a quality review of the issue .

### **“3.Promote collaboration and outreach with stakeholders and customer groups: Foster understanding and awareness of OWCP priorities, initiatives, and results through effective external outreach and data sharing. “**

(a) Congress passed the law for the DEEOICP to have an Advisory Board. **(42 USC 7384o)** OWCP and DEEOICP have refused to follow up on the Board which has now been disbanded due to the delay of OWCP. The DOL Secretary Acosta approved another year for the Board yet OWCP refused to allow the board members to stay.

(b)The DEEOIC also refused to implement the highly qualified suggestions that the Board discussed and was required by the statute to report on. *It should also be noted that the OWCP and the DEEOIC told the Board several fraudulent statements. One that the Site Exposure Matrices, (SEM), was not mandated by law, and that the claimant must provide specific toxin to the claimed illness. The law requires that the Secretary of DOL*

develop site profiles of toxic substances at the DOE facilities, see 42 USC 7384w-1 and 42 USC 7385s-4 only requires that exposure to a toxic substance be a factor in aggravating, contributing to or causing the claimed illness and that the exposure be work related. The implementing regulations also define toxic substance to mean any material that has the potential, not a definitive causation.

(c)The stakeholders have requested several times to meet with the OWCP Director and/or to communicate when the new Board will be again holding meetings. The OWCP Director will not even respond to the stakeholders request.

**“5. Improve agency-wide operations, governance and infrastructure:** Support the activities of our programs, managers, and staff **by improving the administrative management,** information technology, financial, and physical infrastructure of OWCP”. Rachel Leiton has directly implemented the exact opposite of this goal.

- (a) As the Director of the DEEOIC, Leiton has micro-managed the entire division and will not allow the staff to follow the law, but insist that the staff follow the procedure manual as well as the telephone conference manual. Rachel Letion has changed the procedure manual since 2009 over 5 times. It should be noted that Rachel Letion was the chief policy director in 2002 when this program first was started. The law has note changed since 2006, yet when Leiton became the Director in August 2009, Leiton implemented several changes in policy that the public was unaware of until late 2010.
- (b) Rachel Letion has increased the cost of the DEEOIC to adjudicate claims by having every claim go to an Industrial hygienist for determination of exposure; for every claim to go to the Contract Medical Consultant for a “well-rationalized report”; and for the district nurse to determine health benefits.

#### 1.Fraudulent procedure .. case 76825...Denial of reopening

(a). A reopening is based on new evidence or a change in the law. The Director of DEEOIC has the “sole” authority to reopen the claim. The Director also has a duty to follow the law, even when reviewing a reopening of a case. If the Director finds that the issue is material to the case, then the case will be reopened. 20 CFR 30.230

**“If the Director concludes that the evidence submitted or matter identified in support of the claimant’s request is material to the claim, the Director will reopen the claim** and return it to the district office for such further development as may be necessary, to be followed by a new recommended decision.”

**“The decision whether or not to reopen a claim under this section is solely within the discretion of the Director for Energy Employees Occupational Illness Compensation and is not reviewable.** If the Director reopens a claim pursuant to paragraphs (a) or (b) of this section and returns it to the district office, the resulting new recommended decision will be subject to the adjudicatory process described in this subpart. However, **neither the district office nor the FAB can consider any objection concerning the Director’s decision to reopen a claim under this section.**”

(c) **In the case #76825**, the “material issue” for the reopening was the federal court’s ruling in NORMAN case as well as the beryllium test showing a borderline abnormal result,(filed 3/3/2018). The DEEOIC then reviewed the entire file before issuing the decision not to reopen. The review of the file was done by a case examiner, Rodney Alston, from 5/30/2018 until 7/19/2018, when Doug Pennington denied the reopening.

- (i) The case was regarding Chronic Beryllium disease, (CBD), which has been determined to be a legal diagnosis and not a medical diagnosis. **42 USC 7384I (8),(13).**
- (ii) The evidence in the file confirms that the claimant was a DOE contractor employee, was exposed to beryllium, had a respiratory illness before 1993,(bronchitis) had a borderline BeLPT test, ( blood reaction to beryllium, 8/31/2016); had been on prednisone while taking the BeLPT test, which is known to give a false reading; has a pulmonary function test showing obstruction; has been accepted under Part E with COPD, that is a clinical course consistent with a respiratory disease; and has a chest x-ray showing scarring which is consistent with CBD. **This was established by evidence submitted on 12/16/2012; 11/8/2013; 8/14/2014; 9/19/2017;3/1/2018 all ignored and denied based on policy**
- (iii) This denial was based on the procedure manual which is inconsistent with the previous determinations used by the DEEOICP for pre-1993 determination. On page 3 of the Denial, Leiton wrote “*the use of pre-post 1993 CBD criteria is decided based on when the employee was initially diagnosed or received medical treatment for a chronic respiratory disorder.*” However, since 2002, the decision to use the pre-1993 was based on whether the employee **was tested for, treated for, or diagnosed with a chronic respiratory disorder. Rachel Leiton is making legislative rules disguised as interpretative rules and is more restrictive than the previous policy that she herself determined in 2002.**
- (iv) **“Immunologic tests showing beryllium sensitivity..”** On page 5 of the Denial, Rachel Letion states that **“the statute requires an abnormal test”, which is a false statement.** The statute requires that a immunologic tests to show beryllium sensitivity. An abnormal test is the establishment of beryllium sensitivity,” **(A) Beryllium sensitivity as established by an abnormal beryllium lymphocyte proliferation test performed on either blood”.**

National Jewish physician stated that the only substance that is added to the blood in a BeLPT test is beryllium. If there is a reaction,(lymphocytes proliferation), then it is a reaction to the beryllium. The NORMAN case issued an interpretation of the law to mean that any proliferation was a reaction and that a certain percentage was not required.

The EEOICPA simply requires a showing of a lymphocytic process,..... "an agency's failure to follow its own regulations and

procedures is arbitrary and capricious." *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1368 (11th Cir. 2008).

The disjunctive "or" in the EEOICPA makes either showing sufficient to establish CBD.

- (v) The procedure manual discusses the issue of borderline and a history of steroid use which may give false negative test results. The procedure manual also requires certain steps to be followed before accepting the claim for CBD with steroid use or borderline test results. POLICY CANNOT MANDATE, guidelines cannot mandate.
  - (vi) **On page 6/7 of the DENIAL, Rachel Leiton states that" it is not clear how this (federal court rulings, NORMAN) relates to the claim. The EEOICPA provides that statutory requirements for establishment of CBD, which are not satisfied in your case".**  
**Rachel Leiton has stated in a response to a FOIA request that she nor the DEEOIC is required to follow the federal court rulings nor the memorandum issued by Attorney Sessions regarding interpretative rules, policy, and implying that the policy is mandated.**
- (d) Case 32597, another Chronic Beryllium Disease.....**This case was sent in an e-mail to you on 7/22/2018**
- (i) Claimant filed for CBD by submitting an abnormal beryllium test and a pulmonary function test showing mild restrictive airway,1/30/2018. Under the post-1993 criteria in the statute, the claimant met that criteria but the Case Examiner Powell was told that the file had to go to a Contract Medical Consultant to determine if the pulmonary function test was consistent with CBD, **(phone conversation 3/29/2018, file sent to CMC on 3/28/2018)**. The pulmonary function test was from the former worker screening exam, yet the DEEOIC refused to accept the test results.
  - (ii) The DEEOIC has issued several final decisions with the full knowledge that restrictive or obstruction is consistent with CBD. The procedure manual also lists that restrictive pulmonary function tests are consistent with CBD. **It is a waste of money and time for the Case Examiner to send the case to a Contract Medial Consultant, when DEEOIC has already established that restrictive pulmonary test is consistent with CBD. This is a violation of the Administrative Procedure Act, the EEOICP Act, and constitutional rights of unequal application of the law.**
  - (iii) The Recommended Decision was then issued to accept on 6/18/2018, and the waiver of rights was faxed to DEEOIC on 6/21/2018. The Final Adjudication Branch should issue the Final Decision to accept no longer than 30 days after receiving the waiver. The FAB Hearing Officer Warren, issued a REMAND because the CMC confirmed that the pulmonary function test showed mild obstruction (11/29/2017), but that the criteria for poat-1993 had not been met, only beryllium sensitivity. The REMAND went on to state that the treating physician, Dr. Mittal's letter was not

well rationalized when Dr. Mittal stated that the pulmonary function test of April 18, 2018, was consistent with CBD.

(iv) AS stated by the federal judge in the STONE case.....

An agency's decision is considered to be arbitrary and capricious if **the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.**

*Ky. Waterways All*, 540 F.3d at 474 (quoting *Nat'l Ass'n of Home Builders*, 551 U.S. at 127).

(v) In this case, the FAB hearing Officer Warren was well aware that pulmonary function tests that show either obstruction or restriction is consistent with CBD, (*The DOJ Attorney representing the DEEOIC in the Stone case informed the Court that the pulmonary function test can be obstructive or restrictive.*) The FAB Hearing officer Warren, ( who is an attorney) is well aware that policy does not have the effect of law, the force of law, nor the weight of law, and to remand this case because the Procedure Manual "requires a "well-rationalized" explanation of the pulmonary function test is a **violation of the APA, the EEOICPA, and equal application of the law.**

(vi) ***We have requested that the Director vacate the REMAND and issue a Director's Order to accept the CBD claim.*** *Rachel Leiton has issued Director's Order to vacate other REMANDs after the Asst Deputy Director Miller protested that the REMAND should not accept the 2 breast cancers. This was done against the Authorized Representative Donna Hand, 2 different times, when the FAB was going to accept the illness but David Miller insisted that the claim stay denied.*

( e) CASE 20001803, Paul Berry... this case was brought to your attention several times. We are requesting that the IG Dahl issue an investigation of why in the DEEOIC program, that only the procedures are used as "conclusions of law"; that the Director Leiton refuses to follow federal court rulings and will only listen to the Asst deputy solicitor Truly. ( Yet when a FIOA or a privacy act request , Turley's opinion which is used post-deliberative will not be given to the requester).

**Program fraud investigations typically result from allegations or suspicions of wrongdoing involving DOL programs, operations or personnel. They may also be the result of broad initiatives arising out of prior OIG activities, or as part of broad interagency initiatives,** normally in consultation with the appropriate U.S. Attorneys.

**The OIG also may issue an Investigative Memorandum to agency management when investigative findings may warrant an administrative action or when systemic weaknesses or vulnerabilities are identified in agency programs or operations.**

- (i) The DEEOIC refuses to accept the expert report from David Manuta regarding the chemical toxicity of eye toxins as well as radiation to the eye. The DEEOIC refuses to accept the treating physician's opinion that based on the work history and the expert opinion the diagnosed condition of ischemic optic neuropathy is at least as likely as not related to exposure to toxins, specifically plutonium radiation and nitric acid.
- (ii) This case, Berry, is another example of the FAB hearing officer Warren using policy/procedures to remand a case back to the District office when the Recommended Decision accepted the case. **The DEEOIC has also been doctor shopping in this case 2 times, once for the colon and again for the eye. The file shows that the Industrial Hygienist confirmed exposure to nitric acid, the DEEOIC's Health physicist confirmed radiation directly to the eye, the work records confirm that the exposure was work related, and the peer reviewed scientific articles confirm that nitric acid/radiation would be a factor in aggravating or contributing to or causing the eye disease. YET THE EYE WAS DENIED in a RECOMMENDED DECISION AND WE ARE HAVING ANOTHER HEARING.**

Please investigate the procedural fraud that is being done with the approval of Rachel Leiton. We request for a hearing before the Administrative Division of DOL that over sees the DEEOIC in order to challenge the reconsideration process and the reopening process.

In the cases mentioned above, the DEEOIC has omitted material facts and have denied claims based on opinions directly opposite of the evidence in the file. When a claimant has a hearing, all of the evidence that is submitted is ignored by DEEOIC. The FAB is not independent as the trier of fact, yet must answer to the FAB Chief O'Hare, who has admitted that he did not know the law.

We have the right to petition the government, we have a right to challenge an agency action, and more important we have a right to have equal application of the law.

Respectfully submitted,

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