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October 22, 2010

Mr. Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

**Re: Pantex Guard Union/B&W Pantex Nuclear Weapons Facility, Amarillo, Texas
Military Leave Issues**

Dear Mr. President:

My name is Tim Pridmore and for the past three (3) years I have had the honor of serving as counsel for the Pantex Guard Union, a union comprised of the security police officers who are charged with the responsibility of safeguarding our nation's nuclear weapons stockpile at the United States Department of Energy's B&W Pantex Facility located near Amarillo, Texas ("Pantex Facility"). Many of the men and women of the Pantex Guard Union are veterans of the United States Armed Forces/National Guard, many of whom have served with distinction in our nation's continuing War on Terror. It is on behalf of these veterans, and in particular those who have returned from overseas deployment in Iraq and Afghanistan, that I write to you today. In short, these veterans are having their rights trampled on by the management of the Pantex Facility.

The Pantex Facility is currently managed under contract with the Department of Energy by Babcock & Wilcox Technical Services Pantex, LLC (hereinafter "B&W Pantex"), which is a limited liability company owned by a consortium of companies consisting of Honeywell International, Inc., Bechtel National, Inc., and Babcock & Wilcox Technical Services Group, Inc. In that regard, to say that B&W Pantex has a less than stellar track record in complying with federal employment law would be an understatement. Indeed, only last year, the United States District Court for the Northern District of Texas held that B&W Pantex had engaged in **willful** violations of the Fair Labor Standards Act for certain employees. *See Bullard v. Babcock & Wilcox Technical Services Pantex, LLC*, 2009 WL 1704251, *20-26 (N.D. Tex., June 17, 2009). In addition, in the wake of this finding, the Department of Labor has mounted a comprehensive investigation of certain labor practices at the Pantex Facility.

While these examples certainly portray an employer who is at best, apathetic towards federal employment laws, it is my duty to call your attention to another pattern and practice of violations by B&W Pantex of a more egregious and offensive nature, the deliberate failure to afford returning veterans their rights under the Uniformed Services Employment & Reemployment Rights Act, 38 U.S.C. § 4301 *et. seq.* (referred to hereinafter as "USERRA").

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The subject of federal employment law evokes differing reactions depending on one's political affiliation, yet one area which has always enjoyed broad bipartisan support is that of the employment rights of veterans returning home from service to our country. USERRA is the direct descendant of legislation that was enacted in 1940, and which has been continually strengthened and reaffirmed, seemingly in response to each successive overseas engagement of our Armed Forces. *See Rogers v. City of San Antonio*, 392 F.3d 758, 764-769 (5th Cir 2005) (recounting legislative history). USERRA and its predecessor statutes crystalize our society's belief that returning veterans should not be penalized upon returning to civilian work life, but should rather be restored to the same position they would have enjoyed had they not given honorable service to our country. To this end, one of the stated purposes of USERRA is to ensure that the returning veteran employees receive the same non-seniority benefits that he or she would have otherwise been entitled to had it not been for his or her service.

Approximately two (2) years ago, members of the Pantex Guard Union discovered that B&W Pantex was refusing to provide returning veteran employees the same benefits afforded to non-military employees. Specifically, B&W Pantex permits certain non-military employees on extended leave to continue to accrue paid vacation days for a period of up to one year, but amazingly refuses to permit returning veteran military employees whom were deployed overseas, often in combat zones such as Iraq and Afghanistan, the same luxury. It is no secret that returning veterans, particularly those who have seen combat, face difficult challenges in acclimating themselves to civilian life. Moreover, every moment that they can spend re-connecting with family and friends following a lengthy tour of duty makes the adjustment process that much easier. B&W Pantex's refusal to permit returning veterans to accrue these additional days in the same manner as non-military employees is a slap in the face to their service. When the Pantex Guard Union discovered that B&W Pantex was violating USERRA in this fashion, it decided to take immediate action for the benefit of its members and for those affected employees at the Pantex Facility.

To this end, the Pantex Guard Union requested a legal opinion from B&W Pantex's legal department. Surprisingly, in a memorandum dated September 18, 2008, the Company's own legal department agreed with the Pantex Guard Union's position relating to the returning veteran employees mistreatment. For your benefit, we have attached a copy of this memorandum to this letter. Thereafter, the Pantex Guard Union attempted good faith negotiations with B&W Pantex to address the violation of federal law. Unfortunately, rather than negotiate in good faith with the Pantex Guard Union to rectify its violations of federal law, B&W Pantex engaged in a series of alleged negotiations and dilatory maneuvers. Ultimately, B&W Pantex informed the Pantex Guard Union that it would do nothing to rectify the situation after nearly two (2) years of negotiations.

I will not elaborate on the nature and extent to which B&W Pantex has systematically violated the law, as this is explained in some detail by the Company's own lawyer in the attached memoranda. I would however note that the constituents of the consortium comprising B&W


Pantex, i.e. Bechtel, Honeywell and Babcock & Wilcox, reap the majority of their profits from lucrative contracts with the various branches of the United States Armed Forces and/or the Department of Defense. While it may be forgivable to misinterpret nebulous Fair Labor Standards Act regulations, it is simply *inexcusable* for a Defense contractor to *knowingly* deprive returning veterans of their rights under Federal Law. The Department of Energy should require B&W Pantex to treat the returning veteran employees the same as other similarly situated employees at the Pantex Facility, but to date has refused to do the same.

In conclusion, our returning veteran employees do not ask to be treated better than their fellow employees, but rather to be treated the same. We respectfully ask for your help in this matter. We would ask that you please contact the Department of Energy and have them reverse the actions taken by B&W Pantex, which they have ratified, against our returning veterans. This country has learned from the sins of its past in how it treats its veterans - - but B&W Pantex and certain persons at the Department of Energy have not.

If you have any questions, please do not hesitate to call. Your assistance to this matter is greatly appreciated.

With kindest personal regards,

MCWHORTER, COBB & JOHNSON, LLP

By: 
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TTP:lhs

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Date: September 18, 2008
From: Dennis N. Cook Location: 12-72
To: Leo Salazar Location: 12-75
Subject: Legal Opinion, Vacation and Sick Leave Accrual for B&W Pantex Employees While on Active Military Service

Question: You requested an opinion of the Legal Office concerning accrual of vacation and sick leave for employees, and particularly PGU members, while on Active Military Service.

Opinion: I have reviewed USERRA, Supreme Court case law, DOL/USERRA/VETS information and materials, the Prime Contract, Appendix A - Personnel Appendix, and *Woodall v. American Airlines, Inc (U.S. Dist. Ct. for the N. District of Texas, October 6, 2006)*. Based on this review, I offer the following opinion. Please note that this opinion is consistent with a previous opinion I offered to PXSO in September 2007. PXSO did not concur with that opinion.

The company provides up to one year of vacation accrual during sick leave (App. A, I.B.k.(2)(c)). Also, we provide pay for employees during active duty military service, at least for some number of months; the current PGU collective bargaining agreement contemplates a maximum of two (2) months for any active service. This is different than current (or previous) practice based on direction from the DOE. Pertinent sections of USERRA are printed below. I have highlighted those portions I see as relevant to this discussion.

Subpart D--Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

Furlough and Leave of Absence

Sec. 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

Sec. 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

Sec. 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

In *Foster v. Dravo Corp.*, 420 U.S. 92; 95 S. Ct. 879, the U.S. Supreme Court stated the following:

Through the Military Selective Service Act, Congress has sought to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces. [HN1] Section 9 of the Act, 62 Stat. 614, as amended, 50 U. S. C. App. § 459, ensures a returning serviceman the right to be restored to his job with the same levels of seniority, status, and pay that he would have enjoyed if he had held the job throughout the time he was in the military. n1 This case presents the question whether the statute entitles a veteran to vacation benefits when, because of his departure for military service, he has failed [*94] to satisfy a substantial work requirement upon which the vacation benefits are conditioned.

nl [HN2] Section 9 (b) provides a right to re-employment for any serviceman who "has left or leaves a position . . . and . . . makes application for reemployment within ninety days after he is relieved from such training and service." Section 9 (b)(B)(i) adds that if the serviceman is "still qualified to perform the duties of such position, [he shall] be restored by such employer . . . to such position or to a position of like seniority, status, and pay." [HN3] Section 9 (c), which governs the rights of those restored to positions after return from the service, provides in relevant part:

"(1) Any person who is restored to a position in accordance with the provisions of . . . this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of . . . this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The U. S. Supreme Court has provided an interpretation of USERRA that provides:

Non-seniority rights and benefits generally provided by the employer to other employees that are on furlough or leave of absence; and

If the benefits vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services.

Comparability of a leave program is to be determined based on several factors:

Duration of the leave may be the most significant factor;

Purpose of the leave; and

Ability of the employee to choose when to take the leave.

Therefore, any decision concerning non-seniority rights should be interpreted in a light most favorable to the veteran.

Having reviewed *Woodall v. American Airlines, Inc (U.S. Dist. Ct. for the N. District of Texas, October 6, 2006)* as you requested, I opine that it only serves to reinforce my previous opinion. Therefore, I will forgo any additional analysis based upon my reading of that case.

A perfectly good argument could be made to limit the accrual to that same 12-month period as is our policy for sick leave. Also, the accrual could be figured on the basis of the term of months authorized by DOE for payment of salary/wages for the active duty military service (as evidenced by the letters of authorization received by the company under the Prime Contract). VETS and DOL might see this issue differently. It might be either's position that the accrual should be for the full term of active duty. In order to be the most consistent with a "comparable leave of absence" in Appendix A, I feel the 12-month accrual period is the most defensible.

In 2007, I was tasked by Alan Jones, Chief Counsel, to review this matter with Darrell Riekenberg, PXSO Site Counsel. The opinion was also transmitted formally as a white paper from B&W Pantex Contracts Department to the PXSO Contracting Officer. The response from PXSO was that the use of the Appendix A long term sick leave comparison, resulting in a one-year accrual of vacation as proposed was not the appropriate choice for comparison. PXSO looked at the 30-day accrual of vacation under the unpaid leave of absence category of Appendix A as the appropriate comparison.

As the matter of sick leave accrual is appropriately spelled out in Appendix A of the Prime Contract for leaves of absence, I will only state that the 30-day accrual for sick leave is consistent with my reading of all of the references I state above.