Description of document:	Office of Special Counsel (OSC) Transition Briefing for the Incoming Biden Administration, 2020
Requested date:	01-January-2021
Release date:	07-January-2021
Posted date:	01-February-2021
Source of document:	FOIA Officer U.S. Office of Special Counsel 1730 M St., NW Washington, DC 20036-4505 Email: FOIArequest@osc.gov OSC FOIA Online Submission Website FOIA.gov

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U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, DC 20036-4505
(202) 804-7000

January 7, 2021

Via Email

Re: Freedom of Information Act Request (#FOIA-2021-034)

Please be advised that this is a final response to your request dated January 1, 2021, in which you asked the U.S. Office of Special Counsel (OSC) to provide you with a copy of the transition briefing documents prepared by OSC for the incoming Biden Administration. Your request has been processed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a.

OSC identified 135 responsive pages. We are releasing 134 pages to you in full and one (1) page in part pursuant to FOIA Exemptions (b)(6) and (b)(7)(C).

- FOIA Exemption 6 protects information if disclosure would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6).
- FOIA Exemption 7(C) protects law enforcement information if disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(7)(C).

You have the right to appeal this determination under the FOIA. An appeal must be made in writing and sent to OSC's General Counsel at the address shown at the top of this letter or by email to FOIAappeal@osc.gov. The appeal must be received by the Office of General Counsel within ninety (90) days of the date of this letter.

If you have any questions or you require dispute resolution services, please feel free to contact Mahala Dar, OSC's Chief FOIA Officer and acting FOIA Public Liaison, at mdar@osc.gov or (202) 804-7000. Please reference the above tracking number when you call or write. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer.[1]

Thank you,

/s/
Mahala Dar, Esq.
Clerk

[1] Office of Governmental Information Services (OGIS), National Archives and Records Administration 8601 Adelphi Road, Room 2510, College Park, MD 20740-6001; ogis@nara.gov (Email) 202-741-5770 (Office) 1-877-684-6448 (Toll Free) 202-741-5769 (Fax)

United States
Office of Special Counsel

Briefing Book

December 2020

OSC Briefing Book
December 2020

Office of Special Counsel	1
Case Review Division	4
Investigation and Prosecution Division	5
Retaliation and Disclosure Unit	11
Alternative Dispute Resolution Unit	13
Hatch Act Unit	16
USERRA Unit	22
Disclosure Unit	24
Office of General Counsel	28
Office of the Chief Operating Officer	
• *Administrative Services/Human Capital*	30
• *Office of the Clerk*	32
• *Information Technology Branch*	34
• *Finance and Budget*	36
Diversity, Outreach, and Training Unit	53
Amicus Working Group	55
Strategic Plan	99
OSC Organizational Chart	122
Recent Press Releases	123

U.S. OFFICE OF SPECIAL COUNSEL

Background

OSC is an independent federal investigative and prosecutorial agency. Its basic enforcement authorities come from several federal statutes: the Civil Service Reform Act (CSRA), as amended by the Whistleblower Protection Act (WPA); the Hatch Act; and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

OSC's roots lie in the reform efforts of Gilded Age America. In 1883, Congress passed the Pendleton Act, creating the Civil Service Commission, which was intended to help ensure a stable, highly qualified federal workforce free from partisan political pressure. Nearly a century later, in the wake of the Watergate scandal and well-publicized allegations of retaliation by agencies against employees who had blown the whistle on wasteful defense spending and revelations of partisan political coercion in the federal government, Congress enacted sweeping reform of the civil service system in 1978. As a result, the CSRA replaced the Civil Service Commission with the Office of Personnel Management (OPM), the Federal Labor Relations Authority, and the Merit Systems Protection Board (MSPB), with OSC serving as the investigative and prosecutorial arm of the MSPB for the next decade.

In 1989, Congress passed the WPA, making OSC an independent agency within the federal executive branch. The WPA also strengthened protections against retaliation for employees who disclose government wrongdoing and enhanced OSC's ability to enforce those protections. Ensuing legislation such as the WPEA and HAMA—both passed in 2012—has significantly affected the agency's enforcement responsibilities.

Mission and Responsibilities

OSC's mission is to safeguard employee rights and hold the government accountable. To achieve this mission and promote good government in the federal executive branch, OSC's obligations are, broadly speaking: (1) to uphold the merit system by protecting federal employees, applicants, and former employees from prohibited personnel practices, curbing prohibited political activities in the workplace, and preserving the civilian jobs of federal employees who are reservists and National Guardsmen; and (2) to provide a safe channel for federal employees, applicants, and former employees to disclose wrongdoing at their agencies. These two responsibilities work in tandem to maintain the integrity and fairness of the federal workplace and to make the government more accountable.

CSRA – Prohibited Personnel Practices

The federal merit system refers to laws and regulations designed to ensure that personnel decisions are made based on merit. Prohibited personnel practices (PPPs) are employment-related activities that are banned because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles. OSC has the authority to investigate and prosecute violations of the 13 PPPs in the CSRA, as amended.

CSRA – Whistleblower Disclosures

In addition to protecting whistleblowers from retaliation, the CSRA created OSC as a safe channel for most federal workers to disclose information about violations of laws, gross mismanagement or waste of funds, abuse of authority, and substantial and specific dangers to public health and safety. Through its oversight of government investigations of these whistleblower disclosures, OSC regularly reins in waste, fraud, abuse, illegality, and threats to public health and safety that pose the risk of catastrophic harm to the public and large remedial and liability costs for the government.

Hatch Act

The Hatch Act, passed in 1939, limits certain political activities of federal employees, as well as some state, DC, and local government employees who work in connection with federally-funded programs. The law was intended to protect federal employees from political coercion, to ensure that federal employees are advanced based on merit rather than political affiliation, and to make certain that federal programs are administered in a non-partisan fashion. OSC has the authority to investigate and prosecute violations of, and to issue advisory opinions under, the Hatch Act.

USERRA

USERRA, passed in 1994, protects military service members and veterans from employment discrimination on the basis of their service, and allows them to regain their civilian jobs following a period of uniformed service. OSC has the authority to litigate and otherwise resolve USERRA claims by federal employees referred from the Department of Labor.

Organizational Structure

OSC is headquartered in Washington, DC. It has three field offices located in Dallas, Texas; Detroit, Michigan; and Oakland, California. The agency includes the following components:

- *Immediate Office of Special Counsel (IOSC).* The Special Counsel and IOSC are responsible for policy-making and overall management of OSC. This responsibility encompasses supervision of the agency's congressional liaison and public affairs activities.

- *Case Review Division (CRD).* CRD began operating on October 1, 2018, and serves as the initial intake point for all PPP and disclosure allegations. This unit screens all new allegations to ensure that PPPs and disclosures, respectively, are directed to the appropriate unit. CRD also performs the function of closing out PPP allegations under the new authorities OSC received in the FY 2018 NDAA: those which are duplicative, , filed with the MSPB, outside of OSC's jurisdiction, or more than three years old.

- *Investigation and Prosecution Division (IPD).* This division is comprised of the headquarters office and three field offices, and is primarily responsible for investigating and prosecuting PPPs. IPD determines whether the evidence is sufficient to establish that a violation has occurred and, if so, whether the matter warrants corrective action, disciplinary action, or both. If a meritorious case cannot be resolved informally, IPD may bring an enforcement action before the MSPB.

- *Hatch Act Unit (HAU).* This unit investigates and resolves complaints of unlawful political activity under the Hatch Act, and may seek corrective and disciplinary action informally as well as before the MSPB. HAU also provides advisory opinions under the Hatch Act.

- *USERRA Unit.* This unit reviews and resolves USERRA complaints by federal employees referred by the Department of Labor. The unit also may represent service members in USERRA appeals before the MSPB.

- *Alternative Dispute Resolution (ADR) Unit.* This unit supports OSC's other program units by providing mediation and other forms of ADR services to resolve appropriate cases. Where the parties agree to mediation, the unit conducts mediation sessions seeking creative and effective resolutions.

- *Disclosure Unit (DU).* This unit reviews whistleblower disclosures of government wrongdoing. DU may refer a whistleblower disclosure to the agency to investigate and report its findings to OSC. For referred whistleblower disclosures, DU reviews each agency report for sufficiency and reasonableness, and then OSC sends the determination, the agency report, and any comments by the whistleblower to the President and responsible congressional oversight committees.

- *Retaliation and Disclosure Unit (RDU).* This unit handles hybrid cases in which a single complainant alleges both whistleblower disclosures and retaliation. OSC created RDU to streamline its processes and provide a single point of contact for complainants with multiple claims. RDU performs the full range of action in these cases, including the referral of whistleblower disclosures to agencies and the investigation and prosecution of related retaliation claims, where appropriate.

- *Diversity, Outreach, and Training Unit.* This unit facilitates coordination with and assistance to agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c), which requires that agencies inform their workforces about whistleblower rights and remedies. The unit also provides external education and outreach sessions for the laws that OSC enforces, as well as develops and implements internal Equal Employment Opportunity and other skill-based training programs for OSC's staff.

- *Office of General Counsel.* This office provides legal advice regarding management, policy, and administrative matters, including the Freedom of Information Act, the Privacy Act, and the ethics programs. The office also defends OSC's interests in litigation filed against the agency.

- *Administrative Services Division.* This division manages OSC's budget and financial operations, and accomplishes the technical, analytical, and administrative needs of the agency. Component units include the Finance Branch, the Human Capital Office, the Administrative Services Office, and the Information Technology (IT) Branch.

Case Review Division

The Case Review Division (CRD), which commenced operations on October 1, 2018, serves as the initial point of intake for all prohibited personnel practice (PPP) and disclosure allegations submitted pursuant to 5 U.S.C. § 1214 and 5 U.S.C. § 1213, respectively. CRD also serves as the point of intake for third-party referrals of PPPs (e.g., CIGIE and agency OIGs) and referrals from the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) for disciplinary action investigations (e.g., 5 U.S.C. § 1221(f)(3)). CRD screens all new allegations to ensure that PPPs and disclosures that are within OSC's jurisdiction are directed to the appropriate program units for further action, specifically the Investigation and Prosecution Division, the Retaliation and Disclosure Unit, or the Disclosure Unit. CRD does not transfer PPP or disclosure complaints to the Alternative Dispute Resolution Unit.

CRD also closes out certain categories of PPP allegations within 30 days of receipt under the authorities that OSC received in the Reauthorization Act of 2017: (1) allegations that are duplicative of complaints previously filed by the same complainant that OSC already reviewed and investigated (5 U.S.C. § 1214(a)(6)(A)(i)(I)); (2) allegations that have already been filed with the MSPB and that are within the MSPB's jurisdiction because the MSPB's decisions are binding upon OSC (5 U.S.C. § 1214(a)(6)(A)(i)(II)); (3) allegations that are outside of OSC's jurisdiction, such as complaints filed by contract employees or non-retaliation claims filed by TSA employees (5 U.S.C. § 1214(a)(6)(A)(ii)); or (4) allegations that are more than three years old before the date that OSC receives the allegation and that the complainant knew or should have known was an alleged PPP (5 U.S.C. § 1214(a)(6)(A)(iii)). Similarly, CRD closes out disclosure allegations that are outside of OSC's jurisdiction or that are misfiled by the complainant because the allegation is actually a PPP claim.

In some circumstances, CRD will close a PPP complaint that is otherwise within OSC's jurisdiction because: (1) the only allegation is equal employment opportunity (EEO) discrimination or retaliation (PPPs under 5 U.S.C. § 2302(b)(1), (b)(9)(A)(ii)) and OSC generally defers such allegations to the established and comprehensive EEOC complaint-resolution process (5 C.F.R. 1810.1); (2) the personnel action involved is the suspension or revocation of a security clearance (or eligibility for access to classified information), or an indefinite suspension or removal based on the suspension or revocation of the security clearance, because the suspension or revocation of a security clearance is not considered a covered personnel action under 5 U.S.C. § 2302(a)(2)(A) and any otherwise covered personnel action taken because of the security clearance decision cannot be substantively reviewed to determine if the security clearance decision itself was proper; (3) the complainant does not allege that any covered personnel action was taken, not taken, or objectively threatened to be taken or not taken; or (4) the personnel action occurred so long ago that the equitable defense of laches applies (e.g., a complaint filed in 2020 that alleges a suspension or removal in 2012).

INVESTIGATION AND PROSECUTION DIVISION

I. Purpose and Functions

The Investigation and Prosecution Division (IPD) is primarily responsible for investigating and prosecuting 13 prohibited personnel practices (PPPs) under the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989, and the Whistleblower Protection Enhancement Act of 2012.[1] PPPs are employment-related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, whistleblower retaliation, improper hiring practices, or failure to adhere to civil service laws, rules, or regulations. OSC has authority to investigate and prosecute violations of the 13 PPPs before the Merit Systems Protection Board (MSPB or Board).

II. Structure and Staffing

IPD is comprised of IPD-HQ in Washington, DC, and three field offices in Dallas, Texas, Detroit, Michigan, and Oakland, California. IPD-HQ is headed by an Associate Special Counsel and three team Chiefs. The IPD field offices are headed by an Associate Special Counsel and three field office Chiefs. Staff include attorneys, investigators, and administrative staff who work collaboratively to process, investigate, litigate, and resolve PPPs.

III. Relevant Processes

Cases usually enter IPD after an individual's complaint is referred from the Complaints Examining Unit (CEU) and reviewed by the Alternative Dispute Resolution (ADR) Unit. IPD also receives investigation referrals from the Office of Personnel Management (OPM), Inspector General offices, or through the Council on Inspectors General on Integrity and Efficiency. IPD receives disciplinary referrals from the Board if it has found a retaliation violation, and from the Equal Employment Opportunity Commission in accordance with a memorandum of understanding.

OSC draws its investigative authority from our enabling statute and from Title 5 of the U.S. Code, Title 5 of the Code of Federal Regulations and Rule 5.4. Rule 5.4 gives OSC broad investigative authority. Federal employees must cooperate and provide testimony, information, and documents during OSC's investigations. Federal agencies must make employees available to testify, on official time, and provide relevant records. Information may only be withheld if its disclosure is prohibited by law.

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[1] The 13 PPPs include: (1) discrimination based on race, color, religion, sex, national origin, age, disability (or handicapping condition), marital status, or political affiliation; (2) consideration of a recommendation based on political connections or influence; (3) coercion of political activity or taking action for refusal to engage in political activity; (4) willful obstruction of competition for employment; (5) influence on withdrawal from competition; (6) grant of an unauthorized advantage or preference to improve or injure employment prospects; (7) nepotism; (8) whistleblower retaliation; (9) retaliation for other activity including filing a complaint or cooperating in certain investigations; (10) discrimination based on conduct that does not adversely affect performance; (11) veterans preference; (12) violation of rules that implement merit system principles; or (13) imposition of a nondisclosure agreement that doesn't allow whistleblowing. *See* 5 U.S.C. § 2302(b)(1)-(13).

IPD reviews the case file and CEU's investigation recommendation and then contact the Complainant to understand the sequence of events (chronology), clarify issues, obtain additional information, explore potential avenues of inquiry, identify witnesses, and obtain documents. The next step is to contact the agency liaison (an employee designated by the agency to provide assistance and coordination on OSC matters) to generally discuss the complaint and the scope of assistance we are asking for from the agency. If the Complainant is requesting a stay of a personnel action, i.e., to place an employment action on hold while OSC investigates PPP allegations, and we have grounds to believe it is merited, we will discuss the possibility of an informal arrangement at this time.[2] We will also notify the liaison of our intention to send a formal information request—referred commonly to as a Rule 5.4 Request—that contains requests for documents, interrogatory-style questions, and specific instructions outlining how the materials are to be gathered and by whom. We invite liaisons to share their concerns about any aspect of our information requests (the most common objection relates to email searches) and we encourage staff to work proactively with agencies to address issues while preserving OSC's ability to conduct efficient and thorough PPP investigations.

OSC may begin interviewing fact witnesses (generally not recorded or conducted under oath) before we send the information request, during its pendency, or after an agency fulfills a request. We may also interview subject officials (recorded and under oath) at any time on a case-by-case basis. Most often, however, we first review responses to our information request before interviewing subjects.

OSC's policy is to allow subject officials and witnesses to have counsel present at interviews, although witnesses typically opt to remain unrepresented. Agency liaisons or lawyers may attend an interview only at the request of the interviewee and with the explicit understanding that for the purposes of the case, the agency lawyer represents the person being interviewed, not the agency.

As the evidence develops through interviews and document review, staff continually apprise IPD chiefs and we make decisions about the direction of the investigation accordingly. In cases where we find that the evidence does not support the PPP allegations, we will issue a preliminary determination (or 13-day) letter outlining the basis for our decision. Complainants may then respond and produce any evidence that materially affects our preliminary determination. In the event the Complainant provides persuasive information, we may resume our investigation; if not, OSC will close its case file and inform the Complainant of any additional rights to pursue the PPP claim.

In cases where OSC concludes there is evidentiary support for PPP allegations, we generally aim to resolve cases informally by discussing our findings and recommendations for appropriate action (e.g., corrective, disciplinary, systemic) with the agency liaisons or designated attorney.[3] This informal process continues until there is resolution or it is clear informal resolution is not possible. In the latter scenario, OSC may send a formal PPP report containing our findings and recommendations to the head of the involved agency, OPM, and the MSPB. The agency must then

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[2] OSC may file a request for a stay of a personnel action with the MSPB at any time following receipt of a PPP complaint.

[3] IPD may attempt settlement informally—or by referring the case to the ADR Unit—at any time after receiving a file from CEU depending on the circumstances of the case and the willingness of the parties to entertain possible settlement.

respond to OSC and indicate whether it intends to implement OSC's recommendations. The statute requires a formal PPP report as a prerequisite to filing a corrective action complaint with the MSPB, which would be the next step if an agency declines to implement OSC's recommendations.

Where OSC finds evidence that a particular agency official or officials committed egregious PPPs that we believe merits disciplinary action, we follow many of the same processes outlined above with one exception: the statute does not require that we send a PPP report before filing a disciplinary complaint before the MSPB. Therefore, in cases involving disciplinary action (as opposed to corrective action), we may proceed directly to filing a complaint with the MSPB rather than first sending a PPP report to the agency.

In terms of the available relief in PPP cases, individual corrective action typically means that OSC seeks to place an employee or applicant in the position he or she would have occupied if no wrongdoing occurred. For example, an employee suspended for prohibited reasons would receive his or her back pay and related benefits, with interest, and a clean record. Corrective action can also include attorneys' fees, as well as other reasonable and foreseeable costs. Systemic corrective action includes training or modifications to agency policies or practices. Disciplinary action could include removal, reduction in grade (demotion), debarment from federal employment for up to five years, suspension, reprimand, a fine of up to $1,000, or some combination of these penalties. Federal officials accused of committing a PPP in a disciplinary case have certain rights which can be found at 5 C.F.R. Part 1201, Subpart D. Occasionally, while PPP cases are under investigation, federal agencies may seek to discipline the federal official(s) believed to be responsible for the PPP. If federal officials are under OSC investigation, federal agencies may not discipline them without OSC's approval. *See* 5 U.S.C. § 1214(f).

The MSPB has original jurisdiction over OSC's cases. Actions proceed according to the MSPB rules set out at 5 C.F.R. § 1201. The Federal Rules of Evidence guide, but do not bind, MSPB proceedings. After a complaint is filed with the MSPB, an Administrative Law Judge (ALJ) is assigned. The ALJ sends an acknowledgement order to the parties and generally schedules a prehearing conference call to set discovery timelines. As the case progresses, the ALJ may issue notices and orders regarding pleadings to be filed. The parties may engage in settlement discussions at any time leading up to or during the hearing. Parties usually file post-hearing briefs. After the record is closed, the ALJ issues an initial decision. Either party may file a petition for review of the initial decision with the MSPB. The MSPB then issues a final decision in the case. If neither party appeals, the initial decision will become final 35 days after issuance.

IV. Recent Case Activity and Resolutions

Litigation Cases

- OSC filed an opposition to a petition for review with the MSPB in a case that it had settled earlier. OSC and Respondent, a then-human resources manager, had entered into a settlement agreement whereby Respondent accepted a demotion to a lower graded nonsupervisory position. OSC and Respondent submitted the settlement agreement to the MSPB for enforcement. The MSPB issued an initial decision, which later became final, accepting the terms of the settlement agreement. More than a year after the MSPB's initial

decision became final, Respondent filed a petition for review. OSC filed an opposition. The MSPB ruled in OSC's favor and dismissed Respondent's petition for review.

Stays

- Complainants, two deputy assistant directors, alleged that agency officials asked if they would withdraw from competition for two assistant director positions. After Complainants did not withdraw, the agency re-announced the vacancies with new qualification requirements that Complainants did not possess. OSC sought a formal stay from the MSPB to prevent the agency from moving forward with the hiring actions pending OSC's investigation. The MSPB granted both the initial stay request and the request to extend the stay.

- Complainant, a utility systems operator and union steward, alleged that his tour of duty was changed in retaliation for assisting a coworker with filing claims and complaints with, among others, the Occupational Safety and Health Administration, the Department of Labor, and the Office of Inspector General. OSC filed a formal stay with the MSBP to stay the change in Complainant's tour of duty. The MSPB granted both the initial stay request and the request to extend the stay.

- Complainant, chief of a biosurety clinic, alleged the agency reassigned her and proposed her removal in retaliation for providing information to the Office of Inspector General that reflected poorly on her supervisor and also led to an investigation of a close associate of her supervisor. The proposed removal is based on harassment claims that materialized following Complainant's protected activities. OSC received an indefinite informal stay of the proposed removal.

- Complainant, an assistant chief of human resources, alleged the agency proposed her removal in retaliation for disclosing that the chief financial officer and other high-level officials repeatedly pressured her to qualify the chief financial officer's husband for a position. OSC obtained a 120-day informal stay of the proposed removal and a new supervisor for Complainant.

Retaliation Cases

- Complainant, chief of a viral diagnostic laboratory, alleged that the agency reassigned him to a non-supervisory position in retaliation for his disclosures about the relative sensitivities of certain Zika diagnostic tests, including those recommended by the agency. Upon OSC's recommendation, the agency agreed to place Complainant back into his chief position. OSC also provided PPP training to management personnel at the agency.

- Complainant, an agent, alleged that he received a lowered appraisal and was placed on administrative duties after reporting administratively uncontrollable overtime abuse to OSC. OSC sent a detailed letter, akin to a PPP report, requesting that the agency take corrective and disciplinary action. As a result, the parties signed a corrective action settlement whereby Complainant withdrew his corrective action case with OSC in exchange for $60,000 in compensatory damages, approximately $21,000 in back pay, $10,000 in attorney's fees, a

two-year detail, rescission of three letters of counseling, an increased appraisal rating, and a new chain of command upon return to his home office. The agency is also considering potential disciplinary action against two subject officials.

- Complainant, a former director of finance and accounting, alleged that she was removed from employment in retaliation for disclosures she made about the agency's board members' travel reimbursement documentation and contacts with foreign citizens. With OSC's assistance, the parties entered into a settlement agreement. The agency agreed to rescind Complainant's removal, change her personnel record to reflect that she resigned, provide her a neutral reference, and pay her a lump sum of $68,557.68 (which includes around $6,000 in back pay, $27,000 in attorney fees and $35,000 in compensatory damages). In return, Complainant withdrew her OSC and equal employment opportunity claims, and agreed not to seek reemployment with the agency before it closes in 2018.

- Complainant, a Freedom of Information Act (FOIA)/Privacy Act officer, alleged that the agency proposed her removal in retaliation for her association with a known whistleblower. Complainant had previously processed numerous FOIA requests by that whistleblower who used information obtained through FOIA requests to make disclosures to the press and Congress. With OSC's assistance, the parties reached a settlement for full corrective action plus a parking pass, new office, a three-step pay increase, performance awards, attorney's fees, and $70,000 in compensatory damages. OSC is considering potential disciplinary action against the subject officials.

- Complainant, a senior policy advisor, alleged that in response to disclosures about the agency's treatment of detainees, the agency lowered her performance appraisals and changed her job duties so she would no longer have access to materials relevant to her disclosure. In exchange for Complainant withdrawing her complaint, the agency agreed to pay $15,000 in lump sum damages and $5,000 in attorney's fees. Complainant also received a one-year detail, a raised appraisal, and restored annual and sick leave.

- Complainant, an information system security officer, alleged that the agency changed her job duties, issued her a letter of reprimand, and threatened her with a poor appraisal and placement on a performance improvement plan for her disclosures about a cybersecurity incident and improper hiring practices. Complainant also alleged that she did not receive performance appraisals in 2014 and 2015. With OSC's assistance, the parties entered into a settlement agreement whereby the agency agreed to provide Complainant with favorable appraisals for 2014, 2015, and 2016; award $3,000 in performance awards; reassign Complainant to a new supervisor; rescind the letter of reprimand; and provide PPP training by OSC.

Willfully Obstructing a Right to Compete for Employment

- OSC received a referral involving allegations of several possible recruitment violations at an agency. Before the case was referred to OSC, an audit revealed that the agency attempted to use improper criteria to hire only attorneys for six separate non-attorney positions. As agency leadership expressed confusion about how their actions were improper and questions remained about the guidance they received, OSC issued a PPP report to clarify OSC's views

on this particular type of manipulation for this agency and others. The agency accepted OSC's findings and agreed to training. OSC published the PPP report in this case.

Influencing a Person to Withdraw from Competition

- Complainant, a signal intelligence/electronic warfare branch head, alleged that his former supervisor influenced him to withdraw his application for a different position in exchange for his current position being upgraded to GS-14. Complainant withdrew his application, but his position was never upgraded. OSC submitted a PPP report to the agency requesting corrective action. The agency agreed to promote Complainant and provide him with back pay.

Nepotism

- Complainant, an ethics officer, alleged that an agency official engaged in nepotism by participating in the hiring of her son and niece. The subject official was the selecting official for the position to which her son applied. Around the same time, the agency became aware that the subject official was involved in the reassignment of her niece. The agency took action to stop the subject official's involvement in both personnel actions. OSC, the agency, and the subject official have agreed in principle to a demotion to a GS-14 nonsupervisory position for the subject official. OSC is currently reviewing the settlement agreement.

Recommending or Approving a Personnel Action that Violates a Veterans' Preference Requirement

- In the course of investigating allegations that the agency asked two Complainants to withdraw from competition, OSC found that the agency recommended selected a non-veteran for one of the positions in violation of a veterans' preference requirement. OSC also found additional violations concerning attempting to influence the candidates to withdraw from competition. OSC sent a PPP report to the agency seeking corrective and disciplinary actions. The agency reprimanded an official and issued a letter of counseling to another official. OSC also provided training to the agency. OSC published the PPP report in this case.

Non-Disclosure Agreements

- Complainant, a senior policy advisor, resigned from employment and signed a settlement agreement with the agency. One of the provisions of the settlement agreement prohibited Complainant from releasing or disseminating information following his resignation. OSC believed this particular provision violated 5 U.S.C. § 2302(b)(13). We contacted the agency and requested that it add section 2302(b)(13) compliant language to its website. The agency agreed and added the language to its website.

RETALIATION AND DISCLOSURE UNIT

I. Purpose and Functions

The Retaliation and Disclosure Unit (RDU) is a new program unit at OSC, based at Headquarters and established in April 2016. RDU handles cases in which a single complainant files both a prohibited personnel practice (PPP) complaint of whistleblower retaliation and a whistleblower disclosure of wrongdoing, around the same time. RDU was created to streamline its processes and provide a single point of contact for complainants with multiple claims. RDU reviews or investigates, analyzes, and resolves cases informally or through litigation. RDU may take the full range of action in a hybrid case, including referral of disclosures to the agency head as well as pursuing appropriate corrective and/or disciplinary action in the PPP case.

II. Structure and Staffing

RDU is comprised of two Chiefs and six attorneys and shares administrative assistants with IPD-HQ. Although each attorney is assigned to a specific supervisor for administrative purposes such as leave approval and performance management, individual attorneys may work closely under the supervision of either Chief on particular cases. Both Chiefs review and approve most written work. RDU also employs school-year externs and summer interns, who are paired with attorneys and supervised by the Chiefs. RDU reports to the Associate Special Counsel (ASC) for the Investigation and Prosecution Division-Headquarters (IPD-HQ).

III. Significant Processes

RDU generally receives cases alleging PPPs for investigation following a coordinated process involving the Chiefs of RDU, the Complaints Examining Unit (CEU), and the Disclosure Unit (DU). Once a case comes into DU, the DU Chief assesses whether a corresponding PPP case has also been filed close in time to the disclosure filing. The DU Chief flags the case for the CEU and RDU Chiefs. The CEU Chief assesses whether the PPP case meets screening criteria for RDU, i.e., whether the PPP allegations include allegations of retaliation for protected whistleblowing ((b)(8)) or protected activity ((b)(9)). If so, the CEU and DU Chiefs send the PPP and DU (hybrid) cases to the RDU Chiefs. Thereafter, administrative staff enter appropriate coding to reflect the transfer of the cases to RDU (350).

RDU reviews the case files and then contact the Complainant to understand the allegations and sequence of events (chronology), clarify issues, obtain additional information, explore potential avenues of inquiry, identify witnesses, and obtain documents.

In PPP cases, an initial review is conducted to determine whether the complaint contains evidence of a prohibited personnel practice or other prohibited activity warranting further investigation by OSC. This process mirrors the CEU process. After this initial review, RDU staff recommends that the case either (1) proceed to further investigation and legal review; or (2) be closed. The staff's recommendation is subject to the review and approval of the RDU Chiefs, and in some cases, the ASC for IPD-HQ. When RDU staff recommends that the case proceed to further investigation on the PPP allegations, the next steps in the case mirror the steps taken in cases referred from CEU to IPD.

In disclosure cases, an initial review is conducted consistent with DU's standard operating procedures. RDU staff's actions in disclosure cases are subject to the review and approval of the RDU Chiefs, and in some cases, the ASC for IPD.

When hybrid cases proceed at the same pace and RDU is prepared to close the PPP and the disclosure cases, RDU prepares a letter to the Complainant notifying the Complainant of the final determination on the disclosure, and the preliminary determination on the PPP. Although the letters address both cases and for that reason are distinct from other letters sent in individual disclosure and PPP cases, the language of the letters generally conforms to the standard language conventions of DU, CEU, and IPD, as appropriate.

IV. Recent Case Activity and Resolutions

- RDU referred a whistleblower's disclosure of a substantial and specific danger to public health or safety for investigation by an agency. The whistleblower also alleged that the agency retaliated against him by proposing his removal. RDU worked cooperatively with the agency involved regarding OSC's investigation of the whistleblower's prohibited personnel practice complaint and the agency's investigation of the disclosure. Both investigations occurred concurrently. Having one OSC employee handling both the disclosure and prohibited personnel practice complaint allowed for a cohesive and efficient approach to the hybrid case.

- A whistleblower disclosed evidence to OSC that the Department of Commerce (DOC) failed to act on proposed adverse actions for several employees in a reasonable amount of time. Instead, DOC allowed the proposals in question to linger for lengthy periods. After OSC reviewed the whistleblower's information and presented its concerns to the DOC, the agency acted on the pending disciplinary actions and took steps to avoid similar delays in the future. The senior executive responsible for the actions was counseled and the department took corrective action to prevent similar failures in the future. In addition, the DOC issued a revised policy to require review and justification for any use of administrative leave in disciplinary or investigative situations, and to limit administrative leave to 30 days. Any decision to extend administrative leave would require additional review and approval, with extensions in increments of no more than 30 days.

- OSC obtained a formal stay of the termination of a VA physician who alleges that that the VA retaliated against him for making disclosures to management and the Office of Inspector General (OIG) about patient safety and controlled substances.

- A United States Marshals Service employee alleged that he was subjected to a retaliatory investigation and detailed to another position for making protected disclosures. OSC helped to facilitate a corrective action settlement, which included an end to the investigation

ALTERNATIVE DISPUTE RESOLUTION UNIT

Mission

The Office of Special Counsel's (OSC's) Alternative Dispute Resolution (ADR) Unit offers voluntary mediation to parties in selected cases in which a complainant alleges one or more prohibited personnel practices (PPPs) or a violation of Uniformed Services Employment and Reemployment Rights Act (USERRA). The parties in such instances are the complainant (a federal employee or applicant) and a federal employing agency. Mediation is conducted pursuant to the Administrative Dispute Resolution (ADR) Act of 1996, which contains strict requirements of confidentiality. 5 U.S.C. § 571, *et seq*.

The ADR Unit also serves as an expert in negotiation and mediation theory and skills for the agency. The ADR Unit conducts skills trainings for agency staff and consults on individual cases when requested. Finally, the ADR Unit Chief arranges for an outside mediator when ADR is requested under OSC's EEO policy. See U.S. Office of Special Counsel Directive 51, *Equal Employment Opportunity, Non-Discrimination* (2013).

Mediation Program for PPP Complaints

Case Selection

OSC offers voluntary mediation to parties in selected cases in which a complainant alleges one or more PPPs. Cases that are referred from CEU to IPD for further investigation are sent to the ADR Unit for review unless they fall into one of the agreed-upon exceptions: a formal stay is required, disciplinary action will likely be sought, the case is a companion case to others already in IPD, or the complaint is a direct referral.

IPD and RDU may also send a PPP case to ADR for mediation at any time. Upon receipt, the Chief of the ADR Unit reviews the case and determines whether it is appropriate for mediation. Among the factors considered are the nature of the dispute, remedy sought, relationship of the parties, need for a quick resolution or confidentiality.

Offers to Mediate

If the Chief decides to offer mediation, an ADR staff member contacts the complainant to provide him or her with information about the ADR Program and offer mediation. The parties are advised that if they choose not to mediate or if the mediation does not result in a settlement, the complaint will be forwarded to IPD for investigation. All discussions in which OSC ADR Unit staff offer, conduct or follow up to a mediation are *confidential* dispute resolution communications under the ADR Act of 1996. OSC segregates dispute resolution communications and limits permissions to neutrals as defined by the Act. If the complainant agrees to mediation, the ADR specialist contacts the appropriate agency representative to offer mediation.

Once the employee and the agency have agreed to mediation, the Chief assigns the case to an OSC mediator or two co-mediators. The mediators help each party understand OSC's mediation process, and works with them to form realistic expectations and well-defined mediation goals.

Mediation Process

The ADR Unit has three FTEs—the Chief and two Attorney/ADR Specialists. During FY 2017, the ADR Unit has had about ¾ additional FTE in the form of an attorney-mediator on the staff of IOSC. In addition to these primary mediators, OSC has a roster of attorneys, investigators and examiners who mediate as a collateral duty. All mediators have taken a week-long mediation training approved by the ADR Unit Chief. OSC uses a co-mediation model, although highly experienced mediators may mediate cases on their own.

Resolutions through ADR

Over the past several fiscal years, the ADR Unit has mediated between 25-40 cases per year. The resolution rate for the cases mediated by OSC varies from about 60-80%. Monetary mediation settlement terms include damages and attorneys' fees, bonuses, cash awards, retroactive promotions, and reversal of suspensions and removals. Nonmonetary terms have included training, sit-down discussions with high level agency officials, change of supervisors, transfers, reassignments an details, revised performance appraisals, and letters of recommendation. The mediators work toward a solution that maximizes both parties' goals and sets the stage for moving forward. Many employees who file PPP complaints also file EEO complaints and have cases pending in their agency's formal mediation process or at the EEOC/Federal court. OSC mediation encompasses these cases and allows for "global" resolutions.

OSC's mediation program for PPP complaints is highly valued by employment lawyers on both sides (attorneys who represent employees and agency counsel). Given the complicated nature of many whistleblowers' employment record, mediation is often the most practical and positive way forward.

Mediation Program for USERRA

During FY 2012-2014, OSC participated in a Demonstration Project and was assigned to investigate approximately half of all filed USERRA complaints. The ADR Unit conducted a dispute systems design process, meeting with stakeholders which resulted in a mediation program for USERRA cases. The program was enormously successful. Twenty three USERRA cases were mediated and the settlement rate was 91%. Now that the Demonstration Project has been completed, OSC only receives referrals of cases that the Department of Labor is unable to resolve. If OSC is reasonably satisfied

that a claimant is entitled to relief, OSC may act as attorney for the claimant. Mediation is available for these cases.

ADR for Internal EEO Complaints

As required by 29 CFR § 1614.102(b)(2) OSC offers ADR at the informal, pre-complaint, and formal complaint stages of the EEO process. Because of OSC's small size and to ensure that there are no conflicts of interest (either actual or perceived), all internal OSC mediation sessions are conducted by external mediators.

After an OSC employee contacts an EEO counselor to discuss his or her concerns, the counselor advises him or her of the EEO complaint process, including the ADR option. If the employee chooses ADR, the counselor refers the dispute to the ADR Chief, who checks with management and offers mediation of the dispute. If management agrees to mediator, the ADR Chief arranges for an external mediator to conduct a session within 30 days. U.S. Office of Special Counsel Director 15, *Equal Employment Opportunity, Non-Discrimination.*

HATCH ACT UNIT

I. Purpose and Functions

The Hatch Act, passed in 1939, limits certain political activities of federal employees, as well as some state, DC, and local government employees who work in connection with federally-funded programs.[1] The law is intended to protect federal employees from political coercion, ensure that federal employees are advanced based on merit rather than political affiliation, and make certain that federal programs are administered in a nonpartisan fashion. The Hatch Act Unit (HAU) investigates and prosecutes violations of, and issue advisory opinions under, the Hatch Act.

II. Structure and Staffing

HAU is staffed by a Chief, a Deputy Chief, and one attorney—and shares administrative support with Investigation and Prosecution Division-Headquarters (IPD-HQ). HAU also employs law clerks. HAU reports to the Associate Special Counsel (ASC) for IPD-HQ. The Chief or Deputy Chief reviews all complaints and requests for advisory opinions as they come into the office and assigns matters for investigation. All work completed by HAU is reviewed by the Chief and/or Deputy Chief. The ASC for IPD-HQ reviews all recommendations for disciplinary action and some case determinations and advisory opinions that involve complex or novel issues.

III. Significant Processes

HAU investigates Hatch Act complaints to determine whether the evidence supports corrective or disciplinary action. After determining that a violation has occurred, HAU will either issue a warning letter to the subject, attempt to informally correct the violation, negotiate a settlement for disciplinary action, or seek disciplinary action by filing a complaint with the Merit Systems Protection Board (MSPB).

Federal employees found by the MSPB to have violated the Hatch Act are subject to removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000. State and local employees found by the MSPB to have violated the Hatch Act are subject to removal and an 18-month debarment from other state and local government employment.\

HAU also is responsible for a nationwide program that provides federal, DC, state and local employees, as well as the public at large, with legal advice on the Hatch Act, enabling individuals to

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[1] Specifically, the Hatch Act prohibits federal employees from: using their official authority or influence for the purpose of interfering with or affecting the result of an election; knowingly soliciting, accepting, or receiving political contributions from any person; being candidates for partisan political office; and knowingly soliciting or discouraging the political activity of any individual with business before their agency. *See* 5 U.S.C. § 7323(a)(1)-(4). The Hatch Act also prohibits federal employees from engaging in political activity while on duty, in a federal room or building, while wearing an official uniform or insignia, or using a government vehicle. *See* 5 U.S.C. § 7324. Finally, the Hatch Act prohibits some state, DC, and local government employees from: using their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office; coercing, attempting to coerce, commanding, or advising a state or local officer or employee to pay, lend, or contribute anything of value for political purposes; and being candidates for partisan political office. *See* 5 U.S.C. § 1502(a)(1)-(3).

determine whether they are covered by the Act and whether their contemplated activities are permitted under the Act. Specifically, HAU has the unique responsibility of providing Hatch Act information and legal advice to White House and Congressional staff, the media, cabinet members, and other senior management officials throughout the federal government, and state and local government officials. And recognizing the increasing role social media was playing in how employees communicate, in 2012 and 2015 HAU issued comprehensive guidance on how the Hatch Act affects employees' use of social media for political activity.

To further its advisory and enforcement role, HAU is very active in OSC's outreach program. For example, in FY 2016, HAU conducted approximately 64 outreach presentations to various federal agencies and employee groups concerning federal employees' rights and responsibilities under the Hatch Act. Many of these programs involved high-level agency officials, and a couple were conducted as roundtable discussions with PAS employees and other political appointees in attendance. In February 2017, HAU Chief and Deputy Chief—along with the ASC for IPD-HQ and Front Office staff—also met with officials from the White House Counsel's Office to advise on Hatch Act issues pertaining to political appointees. Additionally, HAU conducts in-house Hatch Act training for OSC staff. As part of OSC's outreach efforts, Hatch Act publications are available upon request or on OSC's website and distributed during programs and in correspondence related to Hatch Act matters and advisories.

Finally, in 2013, HAU undertook an effort to update the Hatch Act regulations, which have not been updated since 1995, to reflect the digital age and its impact on how federal employees communicate and participate in political campaigns. OSC provided a proposal to the Office of Personnel Management (OPM), which has authority to promulgate Hatch Act regulations. The proposal included numerous illustrations of employees using email and social media to engage in political activity and added many examples to clarify, among other things, the use of official authority and solicitation prohibitions. In addition to organizational edits, there were proposed changes to the definitions section of the regulations to assist in clarifying terms and making them easier to understand and apply. And all of the proposed changes are supported by a justification statement. While OSC's proposal was well-received by OPM's General Counsel, OPM did not act upon the recommendations. Thus, working with OPM to revise the Hatch Act regulations is one of the goals of OSC's Strategic Plan (2017-2022).

IV. Recent Case Activity and Resolutions

HAU generates considerable investigative and litigation activity at OSC, with many of its cases resulting in significant public and media interest.

MSPB Litigation (Completed)

- OSC filed a complaint for disciplinary action alleging that a U.S. Army Corps of Engineers (USACE) employee violated the Hatch Act by being a candidate in a partisan election for sheriff, despite being advised by both USACE regional counsel and OSC that he was prohibited from running. After a hearing, the MSPB administrative law judge issued a decision ordering USACE to remove the employee. The employee filed a petition for review with the MSPB and OSC filed an opposition. The MSPB denied the petition and affirmed the removal. *Special Counsel v. Murry, MSPB Docket No. CB-1216-15-0002-T-1 (Nov. 13, 2015).*

- OSC filed a complaint for disciplinary action alleging that an employee at the Department of Commerce sent several emails in support of the Montgomery County (Maryland) Republican Party (MCGOP) and to assist candidates running for local and state office while on duty. He sent these emails in his role as an official of the MCGOP. He also invited more than 100 individuals to attend an annual "Lincoln and Reagan" Republican Party fundraiser and asked them to send him a check if they wanted to attend. OSC and the employee reached a settlement agreement, whereby the employee admitted to violating the Hatch Act and agreed to accept a 50-day suspension without pay. The MSPB administrative law judge approved the settlement agreement. *Special Counsel v. Botwin, MSPB Docket No. CB-1216-16-0025-T-1 (Sept. 21, 2016).*

- In the first complaint filed after the Hatch Act Modernization Act, OSC alleged that a USPS employee twice ran in partisan elections for the U.S. House of Representatives and solicited political contributions for his campaigns. Despite repeated warnings by OSC and USPS, the employee refused to comply with the law. The MSPB ordered the employee removed from his employment. *Special Counsel v. Lewis*, 121 MSPR 109 (2014).

- OSC filed a complaint for disciplinary action against an IRS customer service representative, alleging that when he fielded taxpayers' questions on an IRS customer service help line, he repeatedly urged taxpayers to reelect President Obama in 2012 by delivering a chant based on the spelling of the employee's last name. OSC successfully resolved the case through settlement negotiations, and the employee agreed to accept a 100-day suspension without pay as disciplinary action for his violation. *Special Counsel v. Eason, MSPB Docket No. CB-1216-14-0009-T-1 (June 13, 2014).*

MSPB Litigation (Pending)

- OSC filed a complaint for disciplinary action alleging that an employee with the National Oceanic and Atmospheric Administration (NOAA) in Washington State unlawfully ran as a candidate in the 2014 and 2016 partisan elections for the U.S. House of Representatives despite repeated warnings from NOAA and OSC. After a hearing, the MSPB administrative law judge concluded that the employee's violations of the Hatch Act warranted his removal from federal employment. The employee appealed the decision and the matter is still pending. *Special Counsel v. Arnold, MSPB Docket No. CB-1216-16-0017-T-1 (January 10, 2017).*

- OSC filed a complaint for disciplinary action with the MSPB alleging that an employee of the U.S. Postal Service (USPS) violated the Hatch Act by being a candidate in a 2014 partisan election for county commissioner in Tennessee despite OSC and the USPS's warnings against doing so. OSC and the employee reached a settlement agreement, whereby the employee admitted to violating the Hatch Act and agreed to accept a 180-day suspension without pay. The MSPB administrative law judge, however, did not approve the agreement but certified his ruling for interlocutory review by the MSPB. The matter is pending. *Special Counsel v. Cowan, MSPB Docket No. 1216-16-0018-T-1 (June 16, 2016).*

Investigations of High-Level Presidential Appointees

- On July 18, 2016, OSC sent a report to the President, finding that Secretary of Housing and Urban Development Julián Castro violated the Hatch Act during a Yahoo News interview. In the report, OSC concluded that Secretary Castro's statements during the interview impermissibly mixed his personal political views with official agency business. The final step in an OSC Hatch Act investigation of an official who is appointed by the President and confirmed by the Senate is to send the report to the President, together with a response from the official.

- OSC investigated a complaint alleging that a White House official violated the Hatch Act by engaging in political activity while acting in his official capacity. OSC investigated and found that, during press briefings, the individual made statements critical of one of the 2016 Presidential candidates. Because the statements against a Presidential candidate were made during the performance of the individual's official duties, the statements constituted unlawful political activity proscribed by the Hatch Act. OSC issued a warning letter.

- OSC received complaints alleging that a Senate-confirmed Presidential appointee violated the Hatch Act by making public statements concerning an investigation the appointee's agency was conducting into one of the 2016 Presidential candidates. OSC's investigation into these allegations was nearly complete when the appointee's federal employment was terminated. In conformance with OSC's policy not to continue investigations once an employee leaves government service, the case was closed.

Negotiated Settlements

- OSC entered into a settlement agreement with a Secret Service employee who, during a three-month period while on duty and in the federal workplace, tweeted at least 12 messages from her personal Twitter account that were directed at the failure of Hillary Clinton's 2016 candidacy for President. The employee engaged in this prohibited political activity despite the fact that the Secret Service had provided her with policies that discussed the Hatch Act and its application to social media use. Also, the employee twice certified that she had read those policies and understood that she was expected to comply with them. As part of the settlement agreement, the employee admitted to violating the Hatch Act and agreed to accept a 10-day suspension without pay.

- OSC entered into a settlement agreement with a USPS letter carrier who displayed a congressional candidate's campaign sign in his USPS vehicle while delivering the mail in the district the candidate was seeking to represent. As part of the settlement, the employee admitted that he violated the Hatch Act's prohibitions by using his official authority or influence to affect the result of an election and engaging in political activity while on duty, in a government vehicle, and while wearing his official uniform. As a penalty, the employee was suspended for five days without pay.

- OSC reached a settlement with an IRS operations manager for her Hatch Act violations. OSC's investigation confirmed allegations that the employee, while on official travel to perform site visits with her subordinates, canceled a site visit and asked a subordinate to drop her off at the location of a Presidential candidate's campaign rally. The employee did not return to her place of duty for over four hours and did not request leave. OSC concluded that the employee attended the campaign rally and thus violated the Hatch Act by engaging in political activity while on duty. OSC, the IRS, and the employee entered into a global settlement, which resolved both the Hatch Act violation as well as her violations of the IRS code of conduct. The employee agreed to serve an unpaid 14-day suspension.

- OSC investigated allegations involving a GS-15 FEMA employee who hosted a partisan political fundraiser and used his personal email account to invite others to attend and make a contribution. The employee also forwarded fundraising invitations for other candidates, sometimes while he was at work. He also recruited campaign volunteers, planned candidate events, and posted partisan messages to Facebook while at work. In addition to the Hatch Act information his agency provided him, his supervisor specifically warned him about engaging in prohibited political activity. Despite this warning, the employee continued to engage in activity that violated the Hatch Act. As disciplinary action for his admitted violations, the employee agreed to accept a 112-day suspension without pay.

- OSC investigated allegations that, while at work, an FAA employee sent an email to four employees, one of whom was his immediate subordinate and three of whom were second-level subordinates, in which he endorsed a candidate for US Senate. He also included two links to the candidate's campaign website. Shortly after sending it, he followed up with one of the second-level subordinates to advise that he had sent the email and the subordinate should take a look at it. As disciplinary action for his violation he agreed to accept a 15-day suspension without pay.

- OSC investigated allegations that an FEC employee posted to Twitter dozens of partisan political tweets, including many soliciting campaign contributions to President Obama's 2012 reelection campaign and other political campaigns. The employee also participated in a Huffington Post Live internet broadcast via webcam from an FEC facility, criticizing the Republican Party and then-Presidential candidate Mitt Romney. Following a joint investigation between OSC and the FEC Office of Inspector General, the employee admitted to violating the Hatch Act and agreed to resign and accept a two-year debarment from employment within the federal executive branch.

- OSC investigated allegations that a U.S. Air Force civilian employee sent numerous partisan political e-mails using a government account to a list of as many as 60 federal employees. The employee sent each e-mail while on duty in the months leading up to the 2012 election. The employee admitted knowing about the Hatch Act's restrictions, and even after receiving warnings from his supervisors, persisted in sending more e-mails. All of the e-mails were in opposition to then-candidate President Barack Obama and the Democratic Party. As disciplinary action for his admitted violations, the employee agreed to accept a 40-day suspension without pay.

V. FY12 - FY19 Hatch Act Metrics

TABLE 6 – Summary of Hatch Act Complaint and Advisory Opinion Activity									
		FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Formal written advisory opinion requests received		257	107	64	64	45	26	52	46
Formal written advisory opinions issued		262	129	60	60	43	24	46	52
Total advisory opinions issued[13]		3,448	1,767	1,382	1,023	1,641	1,325	1,155	1,111
New complaints received[14]		503	277	151	106	197	253	263	281
Complaints processed and closed		449	465	182	131	98	234	286	245
Warning letters issued		142	150	44	28	21	37	49	49
Corrective actions taken by cure letter recipients	Withdrawal from partisan races	5	5	7	8	4	6	5	4
	Resignation from covered employment	2	2	0	3	1	2	2	2
	Other	4	4	1	0	5	2	3	5
	Total	11	11	8	11	10	10	10	11
Disciplinary action complaints filed with MSPB		0	2	1	2	3	0	2	0
Disciplinary actions obtained (by negotiation or ordered by MSPB)		4	7	15	9	5	4	6	5
Complaints pending at end of fiscal year		286	96	65	40	139	156	133	132

USERRA UNIT

I. Purpose and Functions

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is intended to ensure that those who serve in our armed forces: (1) are not disadvantaged in their civilian careers because of their military service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. Congress intended that the Federal government be a "model employer" under USERRA. The USERRA Unit reviews and resolves USERRA complaints by federal employees, and may represent service members in USERRA appeals before the Merit Systems Protection Board (MSPB)

II. Structure and Staffing

The USERRA Unit is comprised of one attorney, designated the USERRA Unit Chief, who reports to the Associate Special Counsel for IPD-HQ. Other attorneys in IPD-HQ may provide assistance on cases, as appropriate. The administrative assistant for IPD-HQ provides support for the USERRA Unit.

III. Significant Processes

Since USERRA became law in 1994, OSC has enforced it on behalf of veterans, Reservists, and National Guard members employed (or seeking employment) by federal agencies. USERRA complaints against federal agencies must first be filed with the Department of Labor (DOL), which investigates and attempts to resolve the complaint. If DOL is unable to resolve the complaint, the service member may request that it be referred to OSC for legal review (regardless of merit). If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the service member is entitled to the rights and benefits he or she seeks under USERRA, OSC may represent the person in an action for relief before the MSPB.[1] Typically, however, OSC informally resolves meritorious cases without MSPB litigation.[2]

In addition to reviewing and resolving individual USERRA cases, the USERRA Unit also provides training and technical assistance to help federal agencies better comply with USERRA. For example, it has assisted both the Department of Defense and the Peace Corps in modifying regulations to ensure consistency with USERRA, potentially affecting thousands of service members.

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[1] Under two USERRA Demonstration Projects established by Congress, the first from 2005-2007 and the second from 2011-2014, OSC received and investigated approximately half of all federal-sector USERRA complaints, bypassing DOL and the referral process. During those projects, OSC outperformed DOL in both the quantity and quality of relief obtained on behalf of service members. However, while Congress considered giving OSC investigative authority over all federal-sector USERRA complaints after both Demonstration Projects concluded, that change did not become law.

[2] Under USERRA, OSC is required to make its representation decision within 60 days of receiving a complaint referred from DOL, unless the service member grants an extension.

IV. Recent Case Activity and Resolutions

Examples of recent case activity and resolutions include the following:

- During a Reservist's 13-month deployment, the Air Force eliminated his job as a civilian maintenance supervisor at a large domestic Air Force base. When he returned, the Air Force refused to reemploy him. After the Reservist filed a USERRA complaint, OSC explained to the Air Force that it was obligated to reemploy him for at least one year, regardless of what happened to his original position. Because he eventually found other employment and did not wish to return to the Air Force, the Reservist accepted compensation of one years' worth of salary and benefits to settle his claim.

- After the Department of Homeland Security (DHS) hired a Marine Corps Reservist as a federal agent and he began his onboarding process, the Marine Corps recalled him to active duty for one year. When the Reservist returned, DHS re-started the process, but did not hire him for several more years. Because of his delayed hiring and lower seniority, he had to commute a long distance from his home and work less desirable shifts. Citing USERRA's goal of minimizing disadvantages to service members' civilian careers, OSC convinced DHS to provide him with a retroactive hiring date for seniority purposes, improving his chances of getting a better duty location and shift assignments.

- A U.S. Postal Service (USPS) postmaster recalled to active duty as a Navy Reservist for three months did not receive a performance award like her peers. OSC intervened on the Reservist's behalf and persuaded the USPS to issue her a retroactive award in the same amount she would have received had she not been absent for military duty.

V. FY 2012 to FY 2019 Statistics

Below are USERRA case statistics for Fiscal Years 2012-2019.

TABLE 7 – Summary of USERRA Referral and Litigation Activity[15]

	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Pending referrals carried over from prior fiscal year	17	11	6	7	4	5	3	6
New referrals received from VETS during fiscal year	24	7	14	18	16	17	25	21
Referrals closed	30	12	13	21	15	19	22	22
Referrals closed with corrective action	4	2	2	2	0	3	2	2
Referrals closed with no corrective action	26	10	11	19	15	16	20	20
Referrals pending at end of fiscal year	11	6	7	4	5	3	6	5
Litigation cases carried over from prior fiscal year	0	0	0	0	0	0	0	1
Litigation cases closed	0	0	0	0	0	0	0	0
Litigation closed with corrective action	0	0	0	0	0	0	0	0
Litigation closed with no corrective action	0	0	0	0	0	0	0	0
Litigation pending at end of fiscal year	0	02	0	0	0	0	1	1

DISCLOSURE UNIT

Whistleblower Disclosures

OSC's Disclosure Unit (DU)[1] provides a safe channel through which federal employees, former federal employees, and applicants for federal employment may disclose information they reasonably believe evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a).[2] DU attorneys evaluate disclosures of information (disclosures) to determine whether or not there is sufficient information to conclude with a substantial likelihood that one of the above-listed statutory conditions has been disclosed. 5 U.S.C. § 1213(b). If the information is sufficient, there is a positive substantial likelihood determination, and the allegations are referred to the agency head pursuant to the provisions of 5 U.S.C. § 1213(c). If the information does not meet the substantial likelihood standard the case is closed. 5 U.S.C. § 1213(g)(3). In some cases, a third procedure is followed, an informal referral to the agency. Informal referrals are transmitted only to those agencies that have agreed to accept referrals under this informal process.

Disclosures are reviewed according to a priority system. Disclosures involving public health or safety allegations that appear to meet the substantial likelihood standard for referral receive the highest priority and are reviewed first. Disclosures of violations of law, rule or regulation, gross mismanagement, gross waste of funds, and abuse of authority that appear to meet the substantial likelihood standard for referral to the head of the agency are reviewed next. Finally, disclosures that have been identified as probable closures are reviewed last.

As public awareness of DU's work has grown, so has its caseload. In recent years, DU has handled several high-profile cases that have received widespread national press attention, in particular, disclosures involving public health and safety matters from whistleblowers at the Department of Veterans Affairs (VA). In 2014, DU received a large number of disclosures from VA employees, totaling 485 disclosures. Between Fiscal Years 2014 and 2016, DU referred approximately 103 matters to the Secretary of Veteran Affairs for investigation.

The subject matter of disclosures received by DU ranges from allegations that unqualified employees held positions with the Veterans Crisis Line to the failure of the VA to comply with VA guidelines for random drug testing of patients. Other disclosures referred for investigation and substantiated include deficiencies in the Department of Health and Human Service's background checks of adults serving as sponsors for unaccompanied children; widespread sanitation issued in the main food preparation area in the Washington, D.C. VA medical center; the failure of the Department of Navy installation to properly test aircraft refueling equipment

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[1]The DU staff consists of the Chief, Deputy Chief, thirteen attorneys, two investigators, one paralegal, and one administrative assistant. Four of the attorneys are part-time employees who work a minimum of 20 hours per week, up to a maximum of 35 hours per week.

[2]Filing a whistleblower disclosure with OSC's Disclosure Unit is often confused with filing a complaint for reprisal for whistleblowing, a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). Allegations of reprisal for whistleblowing are handled by OSC's Complaints Examining Unit.

and jet fuel resulting in approximately $71,000 annually of wasted fuel; security vulnerabilities at the Navy Yard; flight safety risks by the Federal Aviation Administration; and abuse of administratively uncontrollable overtime at the Department of Homeland Security resulting in $100 million of savings. A summary of recent DU cases presented later in this section provides examples of the array of disclosure topics received by OSC.

In December 2014, OSC awarded its Public Servant of the Year Award to Drs. Katherine Mitchell, Phyllis Hollenback and Charles Sherwood. Dr. Mitchell disclosed critical understaffing and inadequate triage training in the Phoenix VA medical center's emergency room; Dr. Hollenbeck alleged chronic understaffing at the Jackson medical center and problems with the supervision of nurse practitioners; and Dr. Sherwood disclosed concerns about improper practices at the Jackson VA medical center's radiology department.

Referral Process Under 5 U.S.C. § 1213(c)

If DU determines that there is a substantial likelihood the information discloses the kind of wrongdoing described in the statute, DU recommends to the Special Counsel that, pursuant to 5 U.S.C. § 1213(c), the information be referred to the head of the agency.[3] The agency head is then required to conduct an investigation and submit a report to the Special Counsel on the findings of its investigation within 60 days. 5 U.S.C. § 1213(c)(1). OSC does not have authority to investigate the disclosures that it receives, unlike the Investigation and Prosecution, Hatch Act and Uniformed Services Employment and Reemployment Rights Act divisions.

The identity of the whistleblower is confidential, and therefore, OSC identifies the whistleblower in its referral to the agency only when the whistleblower consents to the disclosure of his or her name. However, the Special Counsel does have the authority to disclose the whistleblower's identity if such disclosure is necessary because of an imminent danger to public health or safety, or imminent violation of law.
5 U.S.C. § 1213(h).

Upon receipt, the agency report is reviewed by the DU case attorney to determine whether it contains the information required by the statute and whether the report's findings appear reasonable. 5 U.S.C. § 1213(e)(2). The whistleblower also has the right to review and comment on the agency report. 5 U.S.C. § 1213(e)(1). The DU attorney reviews the report in light of any comments submitted by the whistleblower. If the report meets the statutory requirements, DU recommends that the Special Counsel transmit the report, the whistleblower's comments, and any recommendations the Special Counsel wishes to make to the President and the Congressional committees with oversight responsibility for the agency involved. 5 U.S.C. § 1213(e)(3). The Special Counsel also sends a closure letter and the whistleblower's comments to the head of the agency. Finally, OSC is required to maintain agency reports in a public file. 5 U.S.C. § 1219. Agency reports, the Special Counsel's closure letter, and the whistleblowers' comments from FY2009 forward are available online at www.osc.gov.

[3] For the purposes of 5 U.S.C. § 1213, OSC has construed the term "agency head" to mean the head of the principal agency, not the head of any subsidiary department within the agency.

When a determination is made that the agency report does not meet the statutory requirements, the general practice is to contact the agency officials to discuss the deficiency and how it can be resolved. In most cases, deficiencies are cured when the agency provides a supplemental report addressing the matter at issue. When a deficiency is not cured, the transmittal to the President and Congressional oversight committees notes that the agency head is deficient and the nature of the deficiency.

Additional Referral Processes

DU also refers whistleblower disclosures to the agency under an informal process when it is unclear whether the disclosure meets the substantial likelihood threshold required by the statute or it is a matter that may be easily resolved. Generally, the agency, through its Office of General Counsel, reviews the allegations and may conduct an investigation that allows DU to resolve the case without a referral to the head of the agency. If the agency does not accept referrals under this informal process, the allegations may be referred to the head of the agency under 5 U.S.C. § 1213(c).

In some cases, the whistleblower has already disclosed the same allegations to the IG. If the IG, or another entity of the agency is investigating or has already investigated the allegations, OSC's policy is to defer to the investigation already conducted by the agency and close the case. On occasion, however, the Special Counsel may determine that a referral to the head of the agency pursuant to 5 U.S.C. § 1213(c) is still warranted.

Upon recommendation from DU, the Special Counsel may determine that the information disclosed does not meet the substantial likelihood standard, but nonetheless merits attention by the agency head. In such cases, the Special Counsel may, under § 1213(g)(2), with the consent of the whistleblower, require the agency head to review the matter and inform the Special Counsel of what action has been or is being taken and when that action will be completed. OSC then notifies the whistleblower of the agency's response. Under the referral process outlined in this subsection, the whistleblower does not have a right to comment on the report if one is produced, the agency is not required to investigate or write a report, and there is no requirement to maintain an agency report submitted in the public file. For these reasons, this statutory procedure is used infrequently.

The DU statute also includes a provision for cases involving counterintelligence and foreign intelligence information. 5 U.S.C. § 1213(j). This subsection provides that, in the case of a disclosure "which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive Order, the Special Counsel shall transmit the information to the National Security Advisor, the Permanent Select Committee on Intelligence in the House of Representatives, and the Select Committee on Intelligence of the Senate." The transmittal to the Congressional intelligence committees ends the Special Counsel's involvement with the disclosure. Thereafter, the National Security Advisor and the Congressional intelligence committees decide how to proceed with the information. The disclosure is not referred to the head of the agency for an investigation under 5 U.S.C. § 1213(c) unless additional non-1213(j) disclosures are present. This provision has been used approximately five time, most recently in 2015.

Closure Process

As noted previously, if the information disclosed by the whistleblower does not meet the substantial likelihood standard required by the statute and none of the other referral processes are appropriate, the case is closed. The attorney assigned to the case drafts a letter advising the whistleblower of OSC's determination to close the case. The letter includes the reason the case was closed and information on other offices the whistleblower may contact regarding the allegations. Most of DU's cases are resolved in this manner. Disclosures received anonymously are transmitted to the Inspector General of the relevant agency, and the DU file is closed. Disclosures received from whistleblowers over whom OSC does not have jurisdiction are closed by letter to the whistleblower.

The length of time required to complete a disclosure case varies widely. Some cases that are determined to be closures may be completed within the statutory period of 15 days. Referrals to the head of the agency are more labor intensive and can take a few weeks or months to complete as development of the case necessitates multiple conversations with the whistleblower and the review of relevant documentation. Once the matter is referred, the case file remains open pending receipt and review of the agency report, whistleblower comments, and transmittal to the President and Congress. Because of extensions requested by agencies investigating whistleblower disclosures, some case files may remain open 12 months or longer.

OFFICE OF GENERAL COUNSEL

Organization

Three permanent attorney positions are allocated to the Office of General Counsel (OGC) -- a General Counsel (Susan Ullman), a Senior Litigation Counsel (Amy Beckett), and an Attorney-Advisor (Heidi Morrison).

Responsibilities

A brief description of the Office of General Counsel's significant, recurring responsibilities follows:

Legal Counsel

OGC provides legal advice and support to agency management and staff. This includes:

1. providing legal advice and guidance on issues arising out of agency management, administrative, and program operations, as well as appropriations;
2. analyzing and advising on bills, legislation, executive orders, Office of Management and Budget and other memoranda and guidance affecting OSC or federal agencies generally;
3. assisting the Clerk of OSC in drafting regulations and notices relating to OSC programs and administrative operations, and coordinating required clearances, reports, and publication of the same in the Federal Register;
4. developing or reviewing other proposed agency policies, guidelines, and procedures, including directives;
5. providing legal advice and assistance in connection with personnel matters (*e.g.*, proposed disciplinary actions, EEO complaints, and employee claims such as worker's compensation, torts, or debt waivers);
6. advising OSC's Chief Financial Officer on contingent liabilities, claims, and assessments for OSC's annual financial statement, and preparing required General Counsel assurance letter for OSC's annual financial audit; and
7. reviewing FOIA determinations; handling FOIA and Privacy Act appeals; responding to information requests, including *Touhy* requests, law enforcement requests, and background checks.

Litigation

OGC is responsible for the legal defense of OSC and interests in litigation-related matters and claims filed against the agency or its staff in courts or administrative tribunals. Duties include: (1) working with the Department of Justice and U.S. Attorneys' offices on lawsuits filed in court against OSC, including preparation of litigation reports, answers, motions, and briefs, and conducting discovery, as needed; (2) defending OSC in adverse

action appeals, EEO complaints, and claims or other proceedings filed by current or former employees, or applicants for employment with OSC; and (3) responding to formal and informal discovery requests received by OSC as a non-party in other judicial or administrative proceedings. OGC also provides advice and support when requested in connection with litigation matters filed by OSC program units in connection with their prohibited personnel practice, Hatch Act and USERRA enforcement functions. OSC is currently involved in litigation before the D.C. Circuit (two cases), the Federal Circuit (one case), the U.S. District Court for the District of Columbia (two cases), the MSPB (six cases) and the EEOC (five cases at different stages).

Ethics Program

OGC manages OSC's ethics program pursuant to laws and regulations administered by the U.S. Office of Government Ethics (OGE). The General Counsel serves as the Designated Agency Ethics Official, supported by the Alternate Designated Agency Ethics Official, and a Deputy Ethics Official in each of OSC's three field offices. Ethics program responsibilities carried out by the DAEO and ADEAO include:

1. providing required ethics training to new employees, and annual training for financial disclosure report filers;
2. reviewing and approving required financial disclosure reports, and implementing remedies for potential and actual conflicts of interest;
3. providing ethics advice and guidance to prospective, current, and former OSC employees, including on standards governing impartiality, conflicts of interest, outside employment, gifts, travel, fundraising, seeking employment, and post-employment;
4. making required determinations of agency interest before OSC's acceptance of travel-related payments offered by non-federal sources;
5. preparing recurring and special reports required by OGE; and
6. overseeing the performance of ethics program responsibilities by deputy ethics officials in OSC field offices.

Administrative Services Office

Mission Statement

ASO's mission is to provide professional, exceptional, efficient, and effective support services to OSC headquarters, field offices, and external customers.

Vision Statement

"Excellence is our standard, perfection is our goal in providing customer service."

Our Team

Derrick McDuffie

Chief, Administrative Services Officer

Enrique Wooten

Support Specialist

Maxie Sellers

Staff Assistant

Our Services

Visitor Center	Property Accountability	Physical Security
Small Procurements	Facility Management	Logistics/Space Management
Transit Benefits	Emergency Preparedness	Mail Services
Parking Permits	Vending Services	Notary Services

Human Capital Office

Mission Statement

The Human Capital Office (HCO) is committed to building a best in class agency. We are dedicated to public service, and driven to develop and inspire leadership. Our mission is to serve as a strategic partner with all agency stakeholders to effectively and fairly safeguard the merit system. We accomplish this by proactively providing superior human capital services that are transparent, consistent, and people-focused. The HCO team values our relationships with every employee, and recognizes the need for timeliness, responsiveness, flexibility, and innovation as each situation demands.

Our Team

Lonnie Davis, Chief Human Capital Officer

Katherine King, Senior Human Capital Officer

Contract shared services provider – until end of FY 2021

Our Services

Audits / Quality Control

Details (Internal and External)

Employee Assistance Program (EAP)

Employee Grievances

Employee Separations / Exit Clearances

Employment Verification

Electronic Official Personnel Folder (eOPF)

Executive Resources

Fellows, Interns, and Graduates

Forms

Health Benefits

Leave Administration

Workers Compensation

Performance Management

Personnel Action (SF-50) Processing

Personnel Security Program

Position Management

Reasonable Accommodations

Retirement Counseling

Staffing and Recruitment

Standard Operating Procedures

Telework, Alternative Work Schedules

Thrift Savings Plan

Time and Attendance (PayCheck 8)

New Employee Orientation

Clerk of the U.S. Office of Special Counsel

As of January 2017, the Clerk of the U.S. Office of Special Counsel (COSC) is responsible for OSC's Freedom of Information Act (FOIA), Privacy, Controlled Unclassified Information (CUI), and Records Management programs. The Clerk serves as the Chief FOIA Officer, the Senior Agency Official for Privacy, the Chief of the CUI Program, and the Senior Agency Official for Records Management. COSC is comprised of the Clerk, five (5) staff members and one (1) part-time detailee.

FOIA

Three (3) COSC staff members presently spend most of their time on FOIA duties. This work includes responding to requests for information under the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. These employees also perform requester service functions, and other tasks related to various FOIA and Privacy Act reporting obligations.

In June 2018, the FOIA backlog was 256 requests and OSC streamlined its FOIA program by utilizing a uniform system to process all incoming FOIA/Privacy Act Requests. In FY 2019, OSC reduced the FOIA back log by approximately 69% for a total of 72 requests. We further reduced the backlog to 15 requests by the end of FY 2020. In addition, the FOIA team received only 8 appeals on their FOIA cases in FY 2018 and FY 2019, which is a 61% reduction prior to 2018.

Privacy

In addition to responding to Privacy Act requests, COSC is designing agency processes to comply with other privacy requirements (for example, privacy impact assessments, system of records modifications, and other OMB policies). The Privacy Team published OSC’s complaint Form 14’s Notice and received approval from OMB for agency and public use. This information collection approval is vital to the function and mission of OSC. Currently, OSC is working on updating its 2007 Regulations with OMB.

CUI

The CUI requirements are new to OSC, and across the government. They require OSC to identify sensitive unclassified information for protection. We are developing internal policies pursuant to Executive Order 13556 and regulations of the National Archives and Records Administration (NARA). To date, OSC submits annual reports to NARA.

Records Management

COSC restructured OSC's records management program to ensure compliance with the Federal Records Act, 44 U.S.C. § 3101, and NARA regulations. Two (2) COSC staff members primarily maintain OSC' s file room. In 2019, OSC hired a Records Manager

who successfully transferred approximately 33,000 cases to the National Archives and Records Administration (NARA) for the preservation and documentation of government records. This is particularly important because OSC was able to preserve its history and legacy by retiring records to NARA that dated back to 1979. Additionally, OSC approved case records that were due for destruction since 2000.

OSC developed a formal training program that will be launched through OSC's Inspired eLearning Solutions Portal in January 2021 to support our transition to electronic record keeping.

INFORMATION TECHNOLOGY OFFICE (ITO)

WHO WE ARE:

ITO is a team of eight FTEs, currently with four vacant positions. The IT team specializes in key areas that include IT customer service, operation management, infrastructure, networking, IT portfolio/program management, cloud applications-services, cybersecurity, information security and assurance, and business processes optimization.

Smita Patel is the Chief Information Officer and manages the entire IT portfolio. She is the principal liaison between ITO and OSC's leadership. Her Deputy CIO, Information Systems Director and Acting Chief Information Security Officer, is Dan Wallerstein.

WHAT WE DO:

IT supports OSC's mission and requires constant modernization to enable the agency to function. In IT, we support computers, printers, applications, phones, cybersecurity, mobility, cloud computing, IT regulatory compliance, helpdesk, data protection/recovery/business continuity, and digitalization.

OUR KEY SUCCESSES:

- In August of 2019, OSC launched its new **electronic case management system** (eCMS). This was an enormous undertaking, as the OSC website, along with the new process for filing complaints using Form 14, were all implemented on the same day. The modernized electronic case management system replaced a 20-year-old platform, and it is this infrastructure that will allow OSC to go completely paperless during this fiscal year. In leveraging a cloud service, OSC can continuously modernize the system and add features as the needs of the agency evolve.
- OSC moved to a cloud based **unified communication platform** allowing the entire agency to telework without any loss of phone support.
- **Cloud Computing** – OSC moved the core mission-required applications and systems to the cloud. This allows a small IT team to leverage support from cloud service providers. We continue to assess moving additional functions to the cloud, thereby reducing OSC's on-premises footprint.
- **Leverage tools we already have** – OSC maximizes our current licensing to utilize tools the agency already owns. This allows for lower costs and streamlines central management of users over multiple systems.

OUR KEY CHALLENGES:

- **Customer Experience** -We always strive to ensure 100% adoption and consumption of modern IT tools and services. We survey customer needs and drill down into their challenges so that we can provide support through technology innovations.
- **Cybersecurity Risks & Digital Transformation** – OSC implemented security tools to protect and monitor OSC's risk posture. However, as a small team it is difficult to ensure all tools and platforms are being monitored. The IT field is changing rapidly, and the team has to balance a

full workload and learn new skills to stay relevant and respond quickly to new and advanced cybersecurity threats.

- **Resource Constraints & Regulatory Compliance** -We must ensure OSC follows the many Federal regulations, policies, and standards. This includes NIST security and risk management frameworks, Federal Information Security Modernization Act of 2014 (FISMA 2014), OMB memos, DHS directives, US-CERT calls, and other inter-agency security measures.

Office of Special Counsel (OSC): Finance and Budget Overview

17 Dec 2020

Our Team

- Karl Kammann: Branch Chief/CFO, 202-340-(b)(6); (b)(7)(C), (b)(6); (b)(7)(C) **@osc.gov**
- Jonnel Dawson: Accounting Technician, 202-804-(b)(6); (b)(7)(C), (b)(6); (b)(7)(C) **@osc.gov**
- Anthony Eleftherion: Senior Budget Analyst, 202-804-(b)(6); (b)(7)(C), (b)(6); (b)(7)(C) **@osc.gov**
- Jacob Simmons: Budget Analyst, 202-804-(b)(6); (b)(7)(C), (b)(6); (b)(7)(C) **@osc.gov**
- **OSC also utilizes various supporting partners, contractors, and shared service providers**

Karl- Background

- 11 years with OSC
- 20 years of federal financial management and contracting experience
- Extensive experience working with OSC's shared services providers
- 10 years in private sector
- Project management professional (PMP)
- Master of Business Administration, GMU
- Veteran - US Army, Quartermaster Corp

Anthony & Jake- Background

- Anthony:
  - 1.5 years with OSC Finance;
  - Previously, 4 years spent at OMB, and the House of Representatives; detailed knowledge of budget formulation/execution and appropriations processes, and shared services, financial management, and procurement issues.
  - Masters of Public Administration from American University

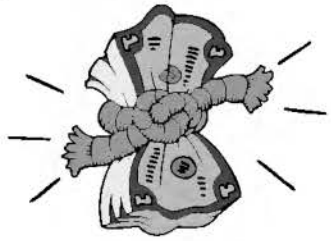
- Jake:
  - 2 years with OSC Finance
  - Currently in the PMF Program; gaining comprehensive knowledge of budget formulation/execution, financial management, performance reporting, and working with shared service providers.
  - Masters of Public Administration from George Mason University

Primary Activities

- Budget Formulation
- Budget Execution
- Financial Audits and Internal Controls
- Procurement Lead and Oversight
- Reporting
- Travel
- Charge Card
- Leasing
- Training requests

Finance Branch

- Leads and manages the financial, budgetary, financial reporting, travel and procurement activities of the Office of Special Counsel (OSC)
- Develops and executes the budget in a manner that supports the agency's priorities, strategic plans, objectives and performance goals with an emphasis on results
- Oversees OSC's financial interests to ensure proper and efficient usage of appropriated funds.



OSC's Leverages Federal Shared Service Providers

Department of Health and Human Services - Program Support Center	Department of Interior Interior Business Center (IBC)	Department of Treasury Administrative Resource Center, HR Connect	Department of Agriculture National Finance Center	General Services Administration	US Office of Pesonnel Managment
Transit Subsidy, Medical Services, Employee Assistance Program	*Budget, Procurement and Contracts, Finance and Accounting, and Other General Administrative Services*	*Overarching Fiscal Support*	*Payroll and T&A Support Resources Management Functions*	*Travel Service Contracts, Space Management, IT Acquisitions, Leasing and Construction Contracts*	*Classification Services, Vacancy Announcements, USA Jobs posting, Background, Investigations, Credit Monitoring, Flexible Spending Accounts*

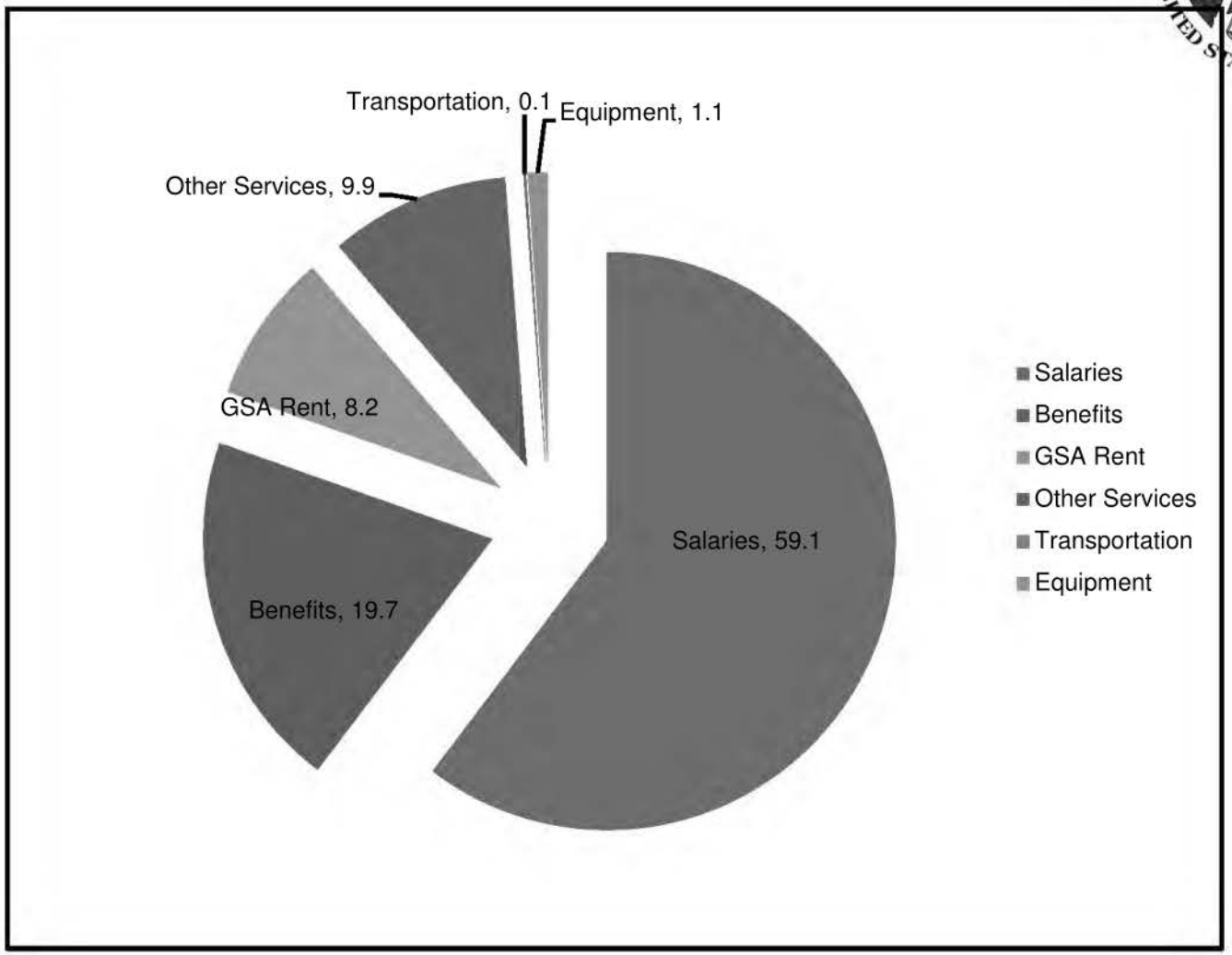
Required Financial Compliance

- FMFIA - Requires agencies to establish internal control over their programs, financial reporting, and financial management systems
- OMB A11 - Preparation, execution and submission of the budget
- OMB A123 - Management's responsibilities for internal controls and risk management
- OMB A136 - Financial reporting requirements
- OMB A127 - Policies and standards for financial systems
- Data Act - Promotes transparency of spending

OSC's Budget

- FY 2020 Appropriation: $27.5M
- FY 2021 President's Budget: $27.435M; $30.5M is OSC's actual request level, however.
- FY 2021: Continuing Resolution (CR) until December 18.
- FY 2021 House Mark: $30.5M; Senate Mark $27.435
- These marks are prior to the Omnibus passage
- FY 2022 President's Budget: $27.984M;
  - Represents OSC's initial budget request to OMB.
  - However, this number is not final - OMB has not passed back a proposed budget level, or settled on a final budget level, yet.

OSC's Typical Budget Breakout



Reporting

- GPRA reporting
- Financial Reporting- Treasury, OMB, Congress
- Budget Reporting
- Travel Reporting
- Procurement Reporting
- Lease Reporting
- FTE Reporting
- Major Deliverables: Budget Request, Performance and Accountability Report (PAR), Congressional Budget Justification, Annual Report

OSC's Leases

- OSC coordinates with GSA for leasing needs – GSA has leasing authority, OSC does not.
- OSC has a HQ building in DC, and a significant field office presence in Oakland, Detroit, and Dallas.
- OSC previously occupied physical office space in Oakland, Detroit, and Dallas. However, following an internal efficiency review in FY 2020, OSC chose to downsize the Oakland office, and transition Detroit and Dallas to full-time virtual field offices.
- Annual lease costs now of approximately $1.6M, including lease, operating costs, GSA fees and real estate taxes.
- The HQ lease lasts until Oct. 2029, and provides two floors for OSC staff.

Budget Process

- September - Agency request to OMB
  - Follows guidance to agencies- scenarios
  - Presents the need/business case
- Nov/Dec - "Passback"
  - how much $ OMB thinks we should get
  - Guidance for use of funds
  - Appeal process available
- February - President's Budget completed
  - Delivered to Congress, along with agency Cong. budget just. (CBJ)
    - OSC typically utilizes its bypass authority, allowing it to request a higher budget level directly from the Congress.
  - Starting point for negotiations with Congress
- Appropriations process
  - Determines final amount for coming year
  - Since usually not completed on time, the fiscal year usually starts with a continuing resolution (CR)

Financial Audit

- OSC required to do an annual Financial Audit by the Accountability Tax Dollars Act (ATDA)
- Certified Public Accountant firm required to perform the audit
- Hundreds of transactions sampled by the auditors- payroll, purchase orders, invoices, travel orders, etc.
- Government required to issue financial statements within 45 days of year end
- OSC has received a "clean" audit opinion for the past 16 of the past 17 years it has done an audit, since inception
- Audit begins in March, with a final opinion issued by Nov 15th ; published in the annual Performance and Accountability Report (PAR).

OSC Procurements

- Approach relies on shared service provider – alternatively, could hire contracting staff and maintain program
- 25 Interagency agreements each year
- Approx. 100 contract actions in FY 2020 (new contracts, modifications, closeouts, etc.)
- Almost 1,500 Charge card and Travel card transactions annually

Contracting Process

Government Contracting Principles

- Promote competition as much as possible
- Equal information/opportunity for all potential bidders
- Awarding contract based on unbiased assessment of factors listed in the requirement
- Documentation of all contract decisions in case award protest is made

Diversity, Outreach, and Training Unit

Mission

The Diversity, Outreach and Training (DOT) Unit has three primary functions. First, DOT is responsible for managing the government-wide *2302(c) Certification Program*, which was developed to help federal agencies meet the requirements of 5 U.S.C. § 2302(c), i.e., ensuring that agency employees are informed of the rights and remedies available to them under chapters 12 and 23 of Title 5.

Second, DOT is also responsible for running OSC's Equal Employment Opportunity Program. DOT is charged with meeting all of the EEO Program requirements and ensuring that all employees and supervisors are aware of the various protections provided by the statutes prohibiting discrimination and encouraging inclusion. Third, DOT is responsible for a nation-wide program that provides training to federal and nonfederal entities on all the statutes over which OSC has jurisdiction.

2302(c) Certification Program

Congress enacted 5 U.S.C. § 2302(c) in response to reports of limited understanding in the federal workforce concerning employees' right to be free from prohibited personnel practices (PPPs), especially retaliation for whistleblowing. Section 2302(c) requires agency heads to ensure, in consultation with OSC, that employees are informed of their rights and remedies under the Civil Service Reform Act (CSRA), the Whistleblower Protection Act (WPA), the Whistleblower Protection Enhancement Act (WPEA), and related civil service laws. In 2002, OSC initially established the 2302(c) Certification Program to provide agencies with a process for meeting this statutory requirement. The 2302(c) Certification Program was reinvigorated in 2014 primarily based on the new obligation included in the 2nd Open Government National Action Plan, which required all federal agencies to develop a plan for completing OSC's 2302(c) Certification Program.

In FY 2016, 42 federal agencies and agency components completed OSC's 2302(c) Certification Program as compared to 30 in FY 2015. Based on these figures, certifications increased by 40% from FY 2015 to FY 2016.

Equal Employment Opportunity Program

OSC's EEO Program is devoted to identifying and eliminating discriminatory practices and policies and ensuring that employees and applicants are not subjected to unlawful discrimination or harassment. The EEO Program also works with the Human Capital Office and managers to

encourage diversity and inclusion in all employment decisions and practices. The program is administered by OSC's EEO Director and Training Specialist with the assistance of OSC employees serving on an as-needed, collateral-duty basis. Personnel working in the EEO Program are responsible for:

- Providing EEO counseling, investigating EEO complaints or assigning out such investigations, and drafting final agency decisions;
- Drafting and updating EEO policies, directives, and guidance;
- Completing various required reports about OSC's EEO program and practices;
- Offering guidance and support to agency managers in recruiting and retaining diverse candidates; and
- Providing notice to employees about EEO policies and directives, and education and training assistance to OSC employees and managers on EEO-related issues.

Outreach and Training Program

DOT offers training to federal agencies and nonfederal organizations in each of the areas within OSC's jurisdiction. Specifically, OSC offers training on:

- PPPs, including reprisal for whistleblowing;
- Whistleblower disclosures filed with OSC's Disclosure Unit (DU) or the Retaliation Disclosure Unit;
- The Hatch Act and its application to federal, state, and local employees;
- The Uniformed Services Employment and Reemployment Rights Act; and
- Supervisory PPP/DU training as required by OSC's 2302(c) Certification Program

OSC conducted a total of 190 trainings during FY 2016, 124 of which covered the topics of PPPs and whistleblower disclosures. OSC's trainings increased by 64% in FY 2016 as compared to FY 2015 when OSC conducted a total of 116 trainings.

DOT develops relevant education and training material that is used by OSC and other federal agencies. In addition, DOT assists other federal agencies in their efforts to develop their own training programs. DOT also provides tailored training for federal entities as well as legal and nonfederal organizations and conducts in-depth "train the trainer" programs for offices of inspector general and other investigative entities.

AMICUS WORKING GROUP

In 2015, Associate Special Counsel Louis Lopez assembled the Amicus Working Group (AWG) to make more effective use of OSC's authority to file *amicus curiae* briefs before the MSPB and in federal courts. The AWG also would look at utilizing intervention as a more strategic tool, where appropriate. Since its inception, the AWG has identified several priority areas and issues where OSC's views may be useful to develop or clarify the law at the MSPB and federal court levels. The AWG also has established mechanisms to identify and track cases for potential participation as *amicus curiae* or intervention.

OSC employees from IPD (HQ and field offices), RDU, and CEU serve on rotations on the AWG.

Attached are two memoranda prepared by the AWG: (1) regarding OSC's *amicus curiae* and intervention authority before the MSBP and the federal courts; and (2) priority areas for OSC's *amicus curiae* participation. The AWG is in the process of revising and updating those areas for further consideration by OSC.

Currently, we have filed six *amicus curiae* briefs in which we are awaiting a decision:

- *Abernathy v. Army* (MSPB), filed 2/9/2016, awaiting decision
- *Benton-Flores v. DoD* (MSPB), filed 4/12/2016, awaiting decision
- *Salazar v. VA* (MSPB), filed 8/3/2016, awaiting decision
- *Johnen v. Army* (9th Circuit), filed 4/14/2017, awaiting decision
- *Ryan v. DOD* (MSPB), filed 4/17/2017, awaiting decision
- *Chambers v. DHS* (MSPB), filed 6/6/2017, awaiting decision

U.S. OFFICE OF SPECIAL COUNSEL

MEMORANDUM

TO: Louis Lopez
Associate Special Counsel
Investigation and Prosecution Division

FROM: Emilee Collier & Christine Roark
General Attorneys
Investigation and Prosecution Division

DATE: April 14, 2015

SUBJECT: OSC Intervention and Amicus Curiae Authority

This memorandum summarizes the authority of the U.S. Office of Special Counsel (OSC) to intervene and file amicus briefs in cases pending at the Merit Systems Protection Board (MSPB or Board) and in the federal courts.

I. OSC's Authority at the MSPB

A. Intervention

Intervenors are organizations or persons who want to participate in a case because they believe the case, or its outcome, may affect their rights or duties. Intervenors as a "matter of right" are those parties who have a statutory right to participate. "Permissive" intervenors are those parties who may be permitted to participate if the case will affect them directly and if intervention is otherwise appropriate under law. *See* 5 C.F.R. § 1201.34(a).

OSC is an intervenor as a matter of right in cases pending before the Board. *See* 5 U.S.C. § 1212(c); 5 C.F.R. § 1201.34(b). However, OSC will often need permission from the affected individual, as it may not intervene in either an Individual Right of Action (IRA) appeal or appeals brought under 5 U.S.C. §§ 7701 and 7702, without the individual's consent. *See* 5 U.S.C. § 1212(c)(2); *MSPB Judge's Handbook*, Ch. 3, Sec. 5(a). The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed. *See* 5 C.F.R. § 1201.34(b)(2)(ii); *see also Kern v. Dep't of Agric.*, 48 M.S.P.R. 137, 138 n.3 (1991) (granting OSC request to intervene upon showing that required consent had been obtained).

Though OSC has statutory authority to intervene, it may be useful to consider the MSPB's treatment of permissive intervenors in deciding how to participate in a given case. Broadly speaking, the Board has evinced a decided preference for participation through amicus briefs rather than intervention, even when an interested party can show that their interests will be directly affected by the outcome of the case. *See, e.g., Special Counsel v. Filiberti,*

23 M.S.P.R. 371, 373 (1984); *Hatten v. U.S. Postal Serv.*, 97 M.S.P.R. 295, 300 (2004). When a petition for permissive intervention is denied, the Board has often allowed the interested party to file an amicus brief instead. *See, e.g., Clerman v. I.C.C.*, 35 M.S.P.R. 190, 191 n.1 (1987); *Moriarty v. Rhode Island Air Nat. Guard*, 46 M.S.P.R. 38, 38 n.1 (1990); *Sanford v. Connecticut Nat. Guard*, 45 M.S.P.R. 576, 577 n.2 (1990); *Azdell v. Office of Pers. Mgmt.*, 88 M.S.P.R. 319, 330 (2001) (all permitting participation by amicus brief rather than requested intervention); *see also MSPB Judge's Handbook, Ch. 3, Sec. 5(c).* Thus, even when it appears that both options for participation are available, OSC may wish to consider whether its objectives could be achieved with an amicus brief instead.

Procedural Guidance

- In deciding whether intervention is appropriate, OSC may ask the MSPB to review a case file. If OSC has consent from the individual, or if no consent is required, such a request must be granted. *See MSPB Judge's Handbook, Ch. 3, Sec. 5(a)(1).*
- Prospective intervenors must file a motion to do so "at the earliest practicable time." 5 C.F.R. § 1201.34. Intervenors filing untimely motions to intervene may be denied. *See Acting Special Counsel v. Dep't of State*, 6 M.S.P.R. 398, 399 (1981) (concluding that addition of intervenor after discovery would unduly delay adjudication of the case).
- In the context of petitions for review, the MSPB provides more specific guidance for timely filing of motions to intervene. In those cases, a motion to intervene is timely if it is received by the Board within 45 days from the date that the petition for review is filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. *See* 5 C.F.R. § 1201.114(i)(2).
- Intervenors have the same rights and duties as parties to a case, except that (1) they do not have an independent right to a hearing; and (2) permissive intervenors may participate only on the issues affecting them. *See* 5 C.F.R. § 1201.34(d).

B. Amicus Briefs

An amicus curiae is a person or organization who, although not a party to a case, gives advice or suggestions by filing a brief with the administrative judge or the MSPB regarding a case. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The administrative judge or Board may grant these requests if (1) the filer has a legitimate interest in the case; (2) their brief may contribute materially to the proper disposition of the case; and (3) their participation will not unduly delay the outcome. The Board may also solicit amicus briefs. 5 C.F.R. § 1201.34(e). In these cases, an announcement inviting interested parties to file is typically published in the Federal Register.[1]

[1] The MSPB may take into account the relative significance of a case in deciding whether to solicit amicus briefs. *See Special Counsel v. E.P.A.*, 79 M.S.P.R. 542, 555 n.8 (1998) *aff'd sub nom. Hubbard v. Merit Sys. Prot. Bd.*, 205 F.3d 1315 (Fed. Cir. 2000) (denying intervenor's request for solicitation of amicus briefs because the case had limited precedential value).

The MSPB rarely, if ever, rejects a request from OSC to file an amicus brief.[2] *See, e.g., Day v. Dep't of Homeland Sec.*, 119 M.S.P.R. 589, 592 (2013) (concerning the retroactivity of key provisions of the Whistleblower Protection Enhancement Act (WPEA)); *Schott v. Dep't of Homeland Sec.*, 97 M.S.P.R. 35, 38 (2004) *overruled by Walker v. Dep't of the Army*, 104 M.S.P.R. 96 (2006) (concerning Board jurisdiction over TSA screener IRA appeals); *Roach v. Dep't of the Army*, 82 M.S.P.R. 464, 468 (1999) (concerning Board authority to adjudicate whistleblower retaliation claims involving revocation or suspension of a security clearance). In one case, an administrative judge denied OSC's motion to file an amicus brief but, on petition for review, the full Board noted OSC's interest and invited all interested parties to file amicus briefs. *See Wilcox v. Int'l Boundary & Water Comm.*, 103 M.S.P.R. 73, 75-76 (2006).

In addition, though in many cases OSC must get permission from an individual to intervene, there is no such requirement for filing an amicus brief. *See Frederick v. Dep't of Justice*, 65 M.S.P.R. 517, 534 n.1 (1994) *rev'd on other grounds*, 73 F.3d 349 (Fed. Cir. 1996) (rejecting argument that 5 U.S.C. § 1212(c) requires the Special Counsel to obtain individual's consent before filing an amicus brief). Thus, if OSC is unable to obtain consent to intervene in a given case, it may choose to participate as amicus curiae instead.

Unlike in federal courts, OSC is not limited to filing amicus briefs on issues relating to 5 U.S.C. §§ 2302(b)(8) and (b)(9) at the Board. Indeed, the MSPB has solicited amicus briefs on a variety of non-retaliation topics. *See, e.g., Merritt v. Dep't of Justice*, 6 M.S.P.R. 585, 587 (1981) *abrogated by Kruger v. Dep't of Justice*, 32 M.S.P.R. 71 (1987) (determining nexus requirement between off-duty misconduct and the efficiency of the service); *Dean v. Office of Pers. Mgmt.*, 115 M.S.P.R. 157, 161-162 (2010) (defining appropriate use of the Federal Career Intern Program); *Sturdy v. Dep't of the Army*, 88 M.S.P.R. 502, 505 (2001) (examining Board jurisdiction over appeals concerning reemployment priority rights). Because OSC has typically been permitted to file amicus briefs on a wide range of issues, the Board is a valuable forum for us to shape, define, and comment on legal questions affecting our mission.

Procedural Guidance

- A request to file an amicus brief must include a statement of the filer's interest in the case and how the brief will be relevant to the issues involved in the case. 5 C.F.R. § 1201.34(e)(2).
- Electronic filing may not be used to file a request to participate as an amicus curiae or to file an amicus brief. *See* 5 C.F.R. § 1201.14(c).

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[2] Indeed, the Board is quite liberal in allowing amicus briefs from a variety of individuals and organizations, from easily recognizable stakeholders to those with no prior connection to Board proceedings. *See, e.g., Czarkowski v. Dep't of the Navy*, 93 M.S.P.R. 514, 516 (2003) *rev'd sub nom. Czarkowski v. Merit Sys. Prot. Bd.*, 390 F.3d 1347 (Fed. Cir. 2004) (allowing amicus brief from the Government Accountability Project); *Pletten v. Dep't of Army*, 7 M.S.P.R. 13, 15 (1981) *aff'd sub nom. Pletten v. Dep't of the Army*, 23 M.S.P.R. 682 (1984) (accepting amicus brief from Action on Smoking and Health); *Singleton v. Dep't of Agric.*, 39 M.S.P.R. 232, 233-234 (1988) (permitting amicus brief from National Association of Federal Veterinarians).

- Unlike intervenors, amici are not parties and typically do not participate in hearings, although the Board may invite them to participate in oral arguments at its discretion. *See* 5 C.F.R. § 1201.34(e)(5). In addition, because of OSC's unique enforcement role, we may request oral argument in select cases.
- The Board will allow amicus briefs (and intervention) in expedited reviews of Department of Veterans Affairs Senior Executive Service removals and transfers. Motions to file amicus briefs or intervene must be filed at the earliest possible time, generally before the initial status conference. *See Appeal of Removal or Transfer of Senior Executive Service Employees of the Department of Veterans Affairs*, 79 Fed. Reg. 48,945 (August 19, 2014) (to be codified at 5 C.F.R. § 1210.16).

II. OSC's Authority in Federal Courts

A. Intervention

While OSC may intervene before the Board as described above, OSC's authority to intervene in the federal courts is limited. The statutes applicable to OSC do not specifically permit OSC to intervene in the courts. The Department of Justice (DOJ), which represents federal agencies in most matters, has recognized OSC's right to intervene in the courts only under limited circumstances:

> [DOJ] has recognized OSC's right to appear as an intervenor only in those few cases where OSC was a party before the Board and the case reaches the court of appeals on another party's petition for review. These cases usually involve agency officials' efforts to reverse Board decisions that have granted a petition by OSC to impose discipline for retaliating against a whistleblower. Because OSC lacks independent litigating authority, it must be represented by the Justice Department, rather than its own attorneys in such cases.

28 U.S.C. § 518(a); S. REP. 108-392, 10-11. Congress considered amending the Whistleblower Protection Act to grant OSC the authority to litigate in the courts and to obtain review of Board decisions at the Federal Circuit. *See* 149 Cong. Rec. S8729-01, 149 Cong. Rec. S8729-01, 2003 WL 21485410. However, versions of the bill containing this language were not adopted. Thus, DOJ will likely continue to permit OSC to intervene in courts only under the limited circumstances where OSC was a party before the Board and the case reaches the court on another party's petition for review.

B. Amicus Briefs

The WPEA granted OSC the authority to "appear as amicus curiae in any action brought in a court of the United States related to section 2302(b)(8) or (9) . . . to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h). It is clear from the plain language of the statute and the legislative history that OSC may file amicus briefs in cases brought in the federal courts related to section

2302(b)(8) or (9). OSC, however, does not have the authority to appear as amicus curiae in the courts related to prohibited personnel practices other than those described in section 2302(b)(8) or (9).

The legislative history of the WPEA demonstrates Congress's intent to allow OSC to appear as amicus curiae before the federal courts of appeals:

> As a result of the current structure, the OSC is blocked from participating in the forum in which the law is largely shaped: the U.S. Court of Appeals for the Federal Circuit (and, if this legislation is enacted, the other circuits). This limitation undermines both the OSC's ability to protect whistleblowers and the integrity of the whistleblower law. The Committee believes that the OSC should play a role in whistleblower cases before the courts of appeals. Therefore, section 113 of S. 743 provides the Special Counsel with authority to file its own amicus curiae (or, "friend of the court") briefs with the federal courts in whistleblower cases, represented by its own attorneys, not by DOJ, thereby presenting the OSC's unfiltered views on the law.

S. REP. 112-155, 14, 2012 U.S.C.C.A.N. 589, 602. Historically, the Federal Circuit maintained exclusive jurisdiction over appeals of Board decisions in retaliation cases. Consequently, most cases in which OSC would have an interest in appearing as amicus curiae would arise in the Federal Circuit. However, the WPEA provided for a two-year pilot program allowing for all-circuit review of appeals from decisions in Board retaliation cases (i.e., sections 2302(b)(8) and (b)(9)(A)(i), (B), (C), and (D)). *See* PL 112-199, November 27, 2012, 126 Stat 1465; 5 U.S.C. § 7703(b)(1)(B). During the program, individuals have the option of appealing a Board decision in a retaliation case to any court of appeals of competent jurisdiction. *Id.* The All Circuit Review Extension Act was signed in September 2014 extending the pilot program for another three years. *See* PL 113-170, September 26, 2014, 128 Stat 1894. Therefore, cases may arise in courts of appeals other than the Federal Circuit in which OSC may have an interest in appearing as amicus curiae.

The Federal Rules of Appellate Procedure provide that the "United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a). As a federal agency, OSC may file an amicus brief in the federal courts of appeals without the consent of the parties. OSC has successfully and without objection exercised its amicus curiae authority before the courts of appeals in several instances. *See Clarke v. Dep't of Veterans Affairs*, Docket No. 2014-3103 (filed Aug. 14, 2014); *Berry v. Conyers & Northover*, Docket No. 2011-3207 (filed Mar. 14, 2013); *Kerr v. Salazar*, No. 12-35084 (9th Cir. 2013) (filed May 13, 2013).

OSC has taken the position that the plain language of the WPEA granted OSC the authority to appear as amicus curiae before the U.S. Supreme Court, which is "a court of the United States." 5 U.S.C. § 1212(h). Procedurally before the Supreme Court, "[n]o motion for leave to file an amicus curiae brief is necessary if the brief is presented . . . on behalf of any agency of the United States allowed by law to appear before this Court when submitted by

the agency's authorized legal representative." U.S. Sup. Ct. R. 37(4). Debatably, OSC is allowed by law to appear before the Supreme Court as amicus curiae without filing a motion for leave to file. OSC successfully submitted an amicus brief in a case before the Supreme Court, however, it requested and obtained consent from the Solicitor General and the respondent before doing so. *See Dep't of Homeland Sec. v. MacLean*, No. 13-894 (U.S. 2015) (filed Sept. 30, 2014).

III. Conclusion

OSC has been given significant authority to participate in cases before the Board. OSC may intervene as a matter of right in cases before the MSPB, although it will often need the individual's consent. Based on past practice, requests from OSC to file an amicus brief are very likely to be granted. Moreover, OSC has the ability to comment on wide variety of legal issues at the Board, rather than being limited to those concerning retaliation.

OSC's authority to participate in the federal courts is limited compared to its authority at the Board. DOJ only recognizes OSC's right to intervene in the courts where OSC was a party before the Board and the case reaches the court on another party's petition for review. Finally, while OSC has broad authority to appear as amicus curiae before the courts of appeals in retaliation matters, OSC does not have authority to file amicus briefs in cases related to other prohibited personnel practices.

U.S. OFFICE OF SPECIAL COUNSEL
Amicus Working Group
December 2019

Priority Issues[1]

I.	Jurisdictional Issues		
	A.	Administrative Exhaustion of Remedies	Priority 1
	B.	Former Federal Employees	Priority 2
	C.	Intelligence Employees	Priority 2
	D.	Security-Sensitive Positions	Priority 2
II.	Personnel Actions		
	A.	Constructive Suspension or Discharge	Priority 1
	B.	Highly Discretionary Personnel Action	Priority 1
	C.	Hostile Work Environment	Priority 1
	D.	Retaliatory Investigation	Priority 1
III.	Standards of Proof and Theories of Liability		
	A.	Section 2302(b)(8) Claims of Protected Disclosures Made in "Normal Course of Duties"	Priority 1
	B.	Section 2302(b)(8) and (b)(12) Claims Asserting U.S. Constitution as a "Law"	Priority 1
	C.	Section 2302(b)(9)(D) Claims Alleging Refusal to Obey an Order to Violate a Law, Rule, or Regulation	Priority 1
	D.	Section 2302(b)(8) Claims of Protected Disclosures Made Prior to Federal Employment	Priority 2
	E.	Section 2302(b)(8) Claims of Protected Disclosures About Non-Governmental Entities	Priority 2
	F.	Section 2302(b)(9) Claims of Protected Activity for Participation in Fact-Finding Investigations	Priority 2
	G.	Section 2302(b)(10) Claims Asserting Discrimination not Related to Performance	Priority 2
	H.	Section 2302(b)(8), (b)(9), and (b)(10) Claims Asserting "Cat's Paw" Theory	Priority 2
	I.	Mandatory Proposed Discipline for Retaliators	Priority 2

[1] AWG designated the identified priority issues as either "Priority 1" or "Priority 2" categories based primarily on the frequency with which the issue might arise in a potential *amicus* context, *i.e.*, an IRA appeal or an affirmative defense in an otherwise appealable action. Thus, the designations are not intended to indicate that one issue is less important than another; but rather, that Priority 1 issues would typically arise more frequently than Priority 2 issues.

I. JURISDICTIONAL ISSUES

A. Whether IRA appellants have exhausted administrative remedies with OSC.

Relevant Statutory Provisions

- 5 U.S.C. § 1214(a)(3) provides: Except in a case in which an employee, former employee, or applicant has the right to appeal directly to MSPB under any law, rule, or regulation, any such individual shall seek corrective action from the Special Counsel before seeking corrective action from the Board.
- An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such individual seeks corrective action for a PPP described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and—(A) (i) the Special Counsel notifies such individual that an investigation concerning such individual has been terminated; and (ii) no more than 60 days have elapsed since notification was provided to such individual that such investigation was terminated; or (B) 120 days after seeking corrective action from the Special Counsel, such individual has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such individual.

Relevant Background

The Board historically has taken a restrictive approach in interpreting administrative exhaustion in IRA cases. Two recent circuit court decisions have disagreed with MSPB's approach and are consistent with OSC's position on this issue. As a result, the Board may be open to modifying its stance.

In *Delgado v. Merit Systems Protection Board*, the Seventh Circuit examined whether the appellant exhausted administrative remedies by providing MSPB with a sworn declaration detailing the allegations that he made to OSC. 880 F.3d 913, 923, 927 (7th Cir. 2018). The court found that the Board's dismissal of the IRA appeal for failure to include a copy of the original OSC complaint and refusal to accept the appellant's sworn declaration was "arbitrary, capricious, and an abuse of discretion." *Id.* at 920-21. It additionally found that the appellant had satisfied the exhaustion requirement "by presenting OSC with sufficient information to permit a legally sophisticated reader to understand his charge of retaliation and to investigate it further." *Id.* at 927.

In *Johnen v. Department of the Army*, the appellant alleged in his OSC complaint that the Army terminated him from civilian employment in retaliation for his disclosures about nepotism. SF-1221-14-0338-W-2, 2016 WL 4586252 (M.S.P.B. Sept. 2, 2016). Although the appellant attributed the retaliation to an OIG complaint, his OSC complaint also expressly states that he "repeatedly complained" of nepotism to three named Army officials. The appellant subsequently filed an IRA appeal, after more than 120 days had elapsed from filing his OSC complaint. MSPB refused to consider the appellant's disclosures to Army officials, concluding that because he had not informed OSC of the "precise" details of these disclosures, including exact dates and all recipients, he did not exhaust administrative remedies for these disclosures. OSC filed an *amicus* brief in this case and participated in oral argument before the Ninth Circuit. After the Seventh Circuit decided *Delgado*, OSC filed a Fed. R. App. P. 28(j) letter noting that the Seventh Circuit's approach to exhaustion was consistent with the statute and congressional intent. In an unpublished decision, the Ninth Circuit agreed with OSC, concluding that the appellant's OSC complaint gave OSC "sufficiently detailed and clear notice" of his claim, and the court remanded to the Board for further proceedings. *Johnen*

v. Merit Sys. Prot. Bd., 713 F. App'x 678, 679 (9th Cir. Feb. 26, 2018).[2]

OSC has filed three other *amicus* briefs on the administrative exhaustion issue:

- In *Clarke v. Department of Veterans Affairs*, 121 M.S.P.R. 154 (2014), *aff'd* 623 F. App'x 1016 (Fed. Cir. 2015), the Federal Circuit affirmed MSPB's decision that the appellant failed to exhaust administrative remedies at OSC. According to the Board, OSC's preliminary determination letter provided the appellant with another opportunity "to describe these disclosures, *in detail*." Because the appellant failed to do so, the Board concluded that he did not "inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action." OSC filed an *amicus* brief with the Federal Circuit. Notably, although the Federal Circuit issued a Rule 36 summary affirmance that did not address OSC's *amicus* brief, the Seventh Circuit relied on OSC's *amicus* brief in its *Delgado* decision. 880 F.3d at 924.

- In *Chambers v. Department of Homeland Security*, PH-1221-17-0161-W-1 (Apr. 13, 2017), the appellant alleged whistleblower retaliation for protected disclosures and activities. The AJ held that because the appellant did not respond to OSC's preliminary determination letter, the appellant "failed to respond to OSC's request for additional information," and thus did not exhaust administrative remedies. OSC filed an *amicus* brief with MSPB in support of the appellant's petition for review, arguing that complainants need not respond to preliminary determination letters to exhaust remedies. The petition for review remains pending.

- In *Karl v. Department of the Navy*, SF-1221-17-0269-W-1, 2017 WL 1374881 (Apr. 14, 2017), the appellant alleged to OSC that the agency retaliated against him for protected disclosures and activities. The AJ held that the appellant failed to exhaust because the content of the disclosure that he made was "vague" and lacked "further details." The AJ additionally found that the appellant failed to exhaust because he did not demonstrate that his protected activity, filing with OSC, was made "in accordance with applicable provisions of law." OSC filed an *amicus* brief with the Federal Circuit arguing that the Board incorrectly analyzed exhaustion as to both the protected disclosure and activity. After the Seventh Circuit decided *Delgado*, OSC filed a Fed. R. App. P. 28(j) letter noting that the Seventh Circuit's approach to exhaustion was consistent with the statute and congressional intent. Days before oral argument, the Board moved to vacate its final decision and remand the case to the AJ for further adjudication. In its motion, the Board acknowledged that the AJ required too high a degree of specificity for exhaustion purposes, and that the appellant had provided a sufficient basis for OSC to investigate his disclosure. The Board's motion did not address OSC's arguments concerning the AJ's findings about the appellant's prior OSC complaint. The court granted the Board's unopposed motion and remanded the case.

In addition to disagreeing with the Board's substantive administrative exhaustion standard, the AWG has identified other decisions that contain errors even if that standard were appropriate, which generally fall into the following categories: (1) decisions that have required truly precise details, such as *Johnen*; (2) decisions that conflate the exhaustion determination with a merits decision, such as *Karl*; (3) decisions that improperly rely on OSC's findings or procedures, such as

[2] On remand, the AJ dismissed the case as settled. *See Johnen v. Dep't of the Army*, No. SF-1221-14-0338-M-1, 2018 WL 4077084 (Aug. 22, 2018).

Chambers; and (4) cases that impose "protected disclosure" standards on claims based on "protected activity."[3]

Although there are broad trends, the administrative exhaustion issue continues to come up in unexpected ways. For example, in *Harrison v. Small Business Administration*, DC-1221-18-0302-W-1, 2018 WL 1377013 (Mar. 12, 2018), the AJ found that the appellant failed to exhaust with OSC because he received official notice of his non-selections through USAJobs after OSC evaluated and closed the case on the merits as to those same non-selections. The AJ held that OSC did not have a "full and complete opportunity" to investigate because his OSC complaint was "prematurely filed," and he informed the appellant that he may return to OSC to pursue this issue and may file another IRA appeal after exhausting his claims. But OSC already reviewed and decided this claim on the merits. The USAJobs notices add nothing to OSC's analysis and determination.

In another pair of initial decisions, the AJs found that the appellants failed to exhaust allegations that were the subject of addenda to their OSC complaints. *See Chacon v. Dep't of Health & Human Servs.*, 2018 WL 4282662 (Sept. 5, 2018); *Donovan v. Dep't of Def.*, 2018 WL 3212543 (June 25, 2018). Specifically, each appellant had filed IRA appeals under 5 U.S.C. § 1214(a)(3)(B), which permits complainants to seek corrective action with the Board 120 days after filing an OSC complaint. Although 120 days had passed since the appellants had filed their initial OSC complaints, 120 days had not passed since amending their complaints to allege additional retaliatory personnel actions. The Board has not yet taken a position on this issue, so we continue to monitor cases in which these circumstances arise.

Finally, a recent U.S. Supreme Court decision calls into question the Board's and the Federal Circuit's practice of using the administrative exhaustion requirement as a means to dismiss appeals on jurisdictional grounds. *See Fort Bend County v. Davis*, No. 18-525 slip op. (June 3, 2019). Specifically, the Court found that Title VII's requirement that aggrieved employees must file a charge with EEOC before using their right-to-sue letter to file a complaint in federal district court was not jurisdictional, but rather a procedural prerequisite. By making this distinction, the Court found that the employer had forfeited its argument that the employee failed to raise a particular charge with EEOC before going to federal court because it did not raise the issue at the outset of the case. Subject matter jurisdiction, on the other hand, may be raised at any time or by a court *sua sponte*. And the Seventh Circuit in *Delgado* noted the same question, without deciding it, with respect to section 1214's exhaustion requirement. *See Delgado*, 880 F.3d at 925 n.3. In light of the Court's efforts to "'ward off profligate use of the term [jurisdictional],'" *Fort Bend County* at *1-2 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)), OSC should consider whether, in an appropriate case, we should seek to apply the Court's reasoning to the administrative exhaustion requirement in section 1214.

To address the administrative exhaustion issue in a holistic manner, AWG members met with then-Acting Chairman Robbins and other Board employees on April 18, 2018. The meeting was a promising first step in addressing these issues more broadly and creating an ongoing dialogue.

<u>OSC's Recommended Position</u>

[3] For more details about each of these categories, please see AWG memorandum on administrative exhaustion dated March 27, 2018.

OSC should continue engaging the Board in discussions on administrative exhaustion. OSC should also continue to make the arguments it made in its *amicus* briefs in favor of reversing MSPB's decisions that it lacked jurisdiction over appellants' IRA appeals based on a finding of a failure to exhaust with OSC in the circumstances identified here. OSC should utilize the recent favorable decisions in the Seventh and Ninth Circuits, as well as the opening provided by the Board in *Karl*, in support of its arguments. Finally, OSC should consider whether to argue that the exhaustion requirement is not, in fact, jurisdictional, but rather a procedural prerequisite that must be raised by an agency early in a Board appeal in order to preserve the argument.

Pending Cases

- *Chambers v. Dep't of Homeland Sec.*, PH-1221-17-0161-W-1 (MSPB, *amicus* brief filed).
- Numerous additional AJ decisions are being tracked.

B. To what extent does the WPA cover post-termination actions taken against former federal employees.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a) provides civil service protections "with respect to an employee in, or applicant for, a covered position in an agency."

Relevant Background

In *Special Counsel ex rel. Kunert v. Department of the Army*, OSC asked MSPB to stay a federal employee from providing negative references (and/or statements to state licensing boards) for six whistleblowers, including two who had left federal employment. The Board declined as to the former employees, despite the deferential standard of a stay request, because "[e]xtending the Order to individuals who are not employed by an 'agency' 'would not be appropriate' because such individuals are not protected from allegedly retaliatory acts taken after they leave government employment." *Special Counsel ex rel. Kunert v. Dep't of the Army*, No. CB-1208-12-0025-U-1, 2012 WL 11891931, at *5 (M.S.P.B. Sept. 6, 2012). MSPB likewise rejected OSC's petition for an extension of the stay as to the two former employees because the statute "on its face indicates that an action taken against an individual who is neither a federal employee nor an applicant at the time of the action is not a 'personnel action' under section 2302(a)(2)(A)(2)." *Special Counsel ex rel. Kunert v. Dep't of the Army*, No. CB-1208-12-0025-U-2, 2012 WL 11893476, at *3 (M.S.P.B. Oct. 22, 2012).

In *Kerrigan v. Merit Systems Protection Board*, 833 F.3d 1349 (Fed. Cir. 2016), the Federal Circuit considered the appellant's whistleblower claim that DOL terminated his worker's compensation benefits in retaliation for his disclosure about its employees. The appellant, a former Navy employee, had never worked for DOL. The Federal Circuit overruled MSPB's determination that the Federal Employee's Compensation Act blocked MSPB from reviewing OWCP compensation determinations. Instead, the Federal Circuit dismissed the case on other jurisdictional grounds, finding that the appellant failed to nonfrivolously allege that relevant DOL officials knew about appellant's disclosure. Although the *Kerrigan* decision did not directly address whether a covered personnel action can be committed against a non-employee or a former employee, the court's approach—analyzing whether the appellant had nonfrivolously alleged a prima facie case—suggests that the court did not consider the appellant's current employment status to be a threshold jurisdictional issue. That said, the court's analysis is void of any discussion of the requirements of section 2302(b)(8), so *Kerrigan* should be cited with caution. While OSC may advocate that there can

be circumstances where, for purposes of the WPA, a non-employing agency takes a personnel action against an employee of a different agency (*see Weed v. Social Sec. Admin.*, 113 M.S.P.R. 221 (2010)) or against a former employee of a different agency (i.e., on a cat's paw theory), OSC should be clear that such an approach would only apply to non-employing agencies that have some direct personnel action authority, such as making compensation or benefit determinations. Such an approach should distinguish other non-employing agencies, like OSC or EEOC, that make investigatory determinations, which are not personnel actions. *See, e.g., Wine v. Office of Special Counsel*, 2019 WL 3083280 (MSPB, July 12, 2019) (concluding that OSC's investigatory determinations are not personnel actions).

The following cases are also instructive on this issue:

- *Special Counsel ex rel. John Does 1-4 v. Dep't of Commerce*, No. CB-1208-13-0011-U-1, 2012 WL 11893806, at *5 (M.S.P.B. Nov. 29, 2012) (nonprecedential) (following *Kunert*, granting a stay for former employees who moved to another agency but not for former employees who left federal employment).
- *Weed v. Social Sec. Admin.*, 113 M.S.P.R. 221, 229 (2010) (limiting scope of section 2302 to "actions taken while [appellants] were in the status of being an employee or applicant for employment").
- *Nasuti v. Merit Sys. Prot. Bd.*, 376 F. App'x 29 (Fed. Cir. 2010) (stating "it is difficult to stretch the statutory language to cover a claim brought by a former employee complaining of agency action taken after the termination of employment in response to a disclosure that was also made after the termination of his employment").
- *Pasley v. Dep't of the Treas.*, 109 M.S.P.R. 105, 110-11 (2008) (employee's termination from private bank does not meet the definition of "personnel action" since it was not taken with respect to an employee in a covered position in an agency or a governmental corporation).
- *Guzman v. Office of Pers. Mgmt.*, 53 F. App'x 927, 930 (Fed. Cir. 2002) (refusing to extend coverage under WPA to retired Air Force employee because "both the alleged violation of law, rule, or regulation and the alleged disclosure of that violation occurred subsequent to [employee's] employment").
- *Schlosser v. Dep't of the Interior*, 75 M.S.P.R. 15, 22 (1997) (post-employment defamation is not personnel action).

OSC's Recommended Position

OSC should argue that the WPA protects former federal employees against post-employment retaliatory actions, such as blacklisting, negative references, claw back of salary and benefits, and retaliatory complaints filed with non-federal entities such as state licensing boards for policy-related reasons.

Title VII case law bolsters this argument. In *Robinson v. Shell Oil Company*, the Supreme Court considered whether the prohibition against an employer retaliating against "employees or applicants for employment" under Title VII includes former employees. 519 U.S. 337, 341 (1997). The Court first found that the phrase "employees or applicants for employment" was ambiguous with respect to whether the term "employee" included current or former employees. In resolving this ambiguity, the Court relied in part on an EEOC *amicus* brief that reasoned that "exclusion of former employees from the protection of section 704(a) of Title VII would undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to EEOC, and would provide a perverse incentive for employers to fire employees who

might bring Title VII claims." *Id.* at 346. The Court found this reasoning consistent with the purpose of anti-retaliation law (*i.e.*, to provide unfettered access to remedial mechanisms). The identical logic applies to the WPA, which contains the functionally identical language of "employee or applicant for employment" in the context of prohibiting retaliation for engaging in protected activity. *Cf. Robinson*, 519 U.S. at 346.

We should be prepared to rebut two central counterarguments. First, a potential rationale for excluding former employees from coverage under the WPA may be that Congress sought to limit the power of MSPB and OSC to interfere with non-federal entities, whereas EEOC has jurisdiction over such entities. We address this concern by limiting the scope of corrective actions to reverse actions taken by federal agencies, not to require action by a private or non-federal public employer. Second, MSPB has interpreted personnel actions to apply only to current employees or applicants because the statute limits personnel actions to:

> an employee in, or applicant for, a covered position in an agency, and in the case of an alleged PPP described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31

5 U.S.C. § 2302(a)(2)(A)(xii); *Nasuti v. Merit Sys. Prot. Bd.*, 376 F. App'x 29, 33-34 (Fed. Cir. 2010). Where possible, we should assert that an agency's post-employment actions are damages that flow from a PPP that occurred during federal employment (e.g., a negative reference after a coerced resignation). Where that argument is unavailable, we should counter that for section 2302(b)(8), "employee" should be read separate from "applicant for employment" and be interpreted under *Robinson*.

Additionally, where a former federal employee faces retaliation as an applicant for federal employment, OSC should argue that the WPA protects the individual as an applicant for federal employment. *See, e.g., Mattil v. Dep't of State*, 118 M.S.P.R. 662, ¶ 23 (2012) (blacklisting employee could constitute personnel action of failure to appoint); *Gomez v. Dep't of Agric.*, No. DE-1221-13-0021-W-1, 2014 WL 5338830, at *6 (M.S.P.B. July 14, 2014) (Wagner, dissenting) (providing false information for suitability investigation of former employee should be covered because it interfered with federal appointment). In cases where a federal agency files retaliatory claims with non-federal entities (such as a state licensing board), OSC may argue that this is a threat of a personnel action that impacts the whistleblower's chances of finding employment in both federal and non-federal entities.

Where there is a retaliatory personnel action and post-employment retaliation (*e.g.*, termination followed by a negative reference), OSC should argue that the whistleblower is entitled to have all the harms flowing from the personnel action (termination) remedied, including the associated negative reference. Thus, the post-employment action may be addressed as a matter of holistic corrective action or damages rather than as a separate personnel action *per se* when there is a preceding, covered personnel action.

In certain circumstances involving post-termination harassment, OSC may also petition MSPB for an anti-harassment order under 5 U.S.C. § 1204(e)(1)(B)(i) ("Board may, during an investigation by OSC or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment ...."). This statutory provision specifically permits OSC to petition for a stay of "harassment" and not a "personnel action."

Pending Cases

- None known.

C. Whether certain intelligence agency employees are covered by the WPA.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a)(2)(C)(ii) excludes from the WPA and other PPP protections specified intelligence agencies, detailed below, plus "as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action."
- 50 U.S.C. § 3234(a)(2)(A)(ii) provides limited whistleblower protections to the intelligence agencies excluded by section 2302.
- Several statutory provisions exempt intelligence agencies, defined slightly differently, from MSPB appeal rights under Chapter 75. These include 5 U.S.C. § 7511(b)(8) and 10 U.S.C. §§ 1601(a) & 1612. These provisions do not address IRA rights under the WPA.

Relevant Background

There are seven intelligence agencies that are explicitly exempt from the WPA under 5 U.S.C. § 2302(a)(2)(C)(ii)(I) (FBI, CIA, DIA, NGA, NSA, ODNI, and NRO). The statute allows the President to exempt other agencies or subcomponents that have foreign intelligence or counterintelligence as their principal function. OSC is not aware of any Presidential exemptions, but various intelligence subcomponents of DOD, DHS, DOE, and other agencies may seek to assert this jurisdictional defense.

In *Czarkowski v. Merit Systems Protection Board*, 390 F.3d 1347 (Fed. Cir. 2004), the Federal Circuit held that "documents that suggest to [MSPB] that a Presidential determination should or could have been made cannot stand as a proxy for an actual Presidential determination that references the statute. The burden is on the agency to show that the President, or his delegate, has explicitly exempted an agency or unit thereof under section 2302(a)(2)(C)(ii)." Section 105 of the WPEA clarified that the President's determination must be made prior to the personnel action at issue. The Federal Circuit later noted—in dicta in a case concerning Chapter 75 appeal rights—that the *Czarkowski* court "did not hold that an express Presidential determination [that is required for exemption under section 2302(a)(2)(C)(ii)] would be invalid absent an explicit reference to section 2302." *Rice v. Merit Sys. Prot. Bd.*, 522 F.3d 1311, 1316 (Fed. Cir. 2008).

Notwithstanding *Czarkowski*, AJs in several unpublished decisions, none of which appear to have been appealed, have held that DOD's designation of an entity as an intelligence component functioned as an implicit delegated Presidential designation exempting the component from the WPA. *See Thompson v. Dep't of the Navy*, DC-1221-11-0665-S-1, 2011 WL 5866519 (M.S.P.B. June 13, 2011) (Marine Corps Intelligence); *Harris v. Dep't of the Navy*, DC-1221-11-0285-W-1, 2011 WL 4579426 (M.S.P.B. Mar. 3, 2011) (Naval Intelligence); *Myrick v. Dep't of the Army*, DC-1221-05-0587-S-1, 2005 WL 1943945 (M.S.P.B. July 11, 2005) (Army Intelligence). However, an AJ rejected a similar argument that DHS's Office of Intelligence and Analysis was exempt from the WPA under section 2302(a)(2)(C)(ii), despite OSC closing its investigation on that basis. *See Skonovd v. Dep't of Homeland Sec.*, SF-1221-12-0572-W-1, 2012 WL 4830170 (M.S.P.B. Aug. 3, 2012); *see also Conley v. Dep't of Def.*, SF-1221-15-0580-W-1, 2017 WL 889115 (Feb. 28, 2017) (holding that DOD's Defense

Security Service is not exempt because it is not named in the statute and no Presidential exemption was identified).

OSC's Recommended Position

OSC should oppose arguments by agencies for an intelligence exemption unless the President, or his delegate, has explicitly exempted an agency, or unit thereof, prior to the personnel action at issue. OSC also should hold agencies to the burden of providing clear notice to employees about the level of protection they have when making the decision to disclose wrongdoing.

Pending Cases

- None known.

D. To what extent may OSC investigate and prosecute personnel actions taken on the basis of the employee's eligibility to maintain a security clearance.

Relevant Statutory and Regulatory Provisions

- 5 U.S.C. §§ 7511-7514 discuss suspensions and removals based upon efficiency of the service.
- 5 U.S.C. §§ 7531-7533 discuss suspensions and removals based upon national security concerns.
- 50 U.S.C. § 3341(j) provides an alternative remedial scheme for employees facing a security clearance action based on retaliation for whistleblowing (instituted as part of the Intelligence Authorization Act for Fiscal Year 2015, PL 113-293 (December 19, 2014)).
- 5 C.F.R. § 1400.101-302 sets limits on how agencies can designate certain positions as "national security positions" covered by *Egan/Conyers* even if the positions do not require formal security clearances.
- 5 U.S.C. § 1214(i) authorizes OSC to seek corrective action for retaliatory investigations. This provision may be relevant if OSC argues for an exception to *Egan* in cases where agency officials report information that they know to be false to a clearance review.

Relevant Background

The following cases are instructive on this priority issue:

- *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), held that MSPB does not have authority to review the substance of a security clearance determination through an adverse action appeal.
- *Romero v. Dep't of Def.*, 527 F.3d 1324, 1329-30 (Fed. Cir. 2008), held that MSPB may review security clearance determinations for compliance with agency procedural rules and regulations and section 7513.
- *Kaplan v. Conyers*, 733 F.3d 1148, 1166 n.16 (Fed. Cir. 2013), held that *Egan* prohibited MSPB from reviewing an agency's determinations concerning eligibility of employee to occupy "sensitive" positions, regardless of whether a position required access to classified information, but noted that "[w]hether Congress intended to limit the authority of the Executive in making employment decisions when passing the WPA is not before us" because no whistleblower claims were at issue in the case.

- *Foote v. Moniz*, 751 F.3d 656, 658 (D.C. Cir. 2014), held that DOE's decision not to certify an applicant under the Human Reliability Program, which required extensive security vetting, is the kind of security judgment covered by *Egan.*
- *Gargiulo v. Dep't of Homeland Sec.*, 727 F.3d 1181, 1186 (Fed. Cir. 2013), overruled MSPB's prior decision that employees have a constitutional guarantee of due process in security clearance decisions. Instead, "all the Board and this court may do in the context of an adverse action stemming from a security clearance suspension is to determine whether a security clearance was denied, whether the security clearance was a requirement of appellant's position, and whether the procedures of section 7513 were followed." *Id.*
- *Rogers v. Dep't of Def*, 122 M.S.P.R. 671 (2015), held, post-*Gargiulo*, MSPB has statutory authority to "review whether an agency taking an adverse action [based on a security clearance determination] complied with required procedural protections for security clearance determinations, including those set forth in its own regulations."
- *Hornseth v. Dep't of the Navy*, 916 F.3d 1369, 1374-75 (Fed. Cir. 2019), held MSPB may review an adverse action based on a security clearance determination only to determine "(1) whether a security clearance was denied; (2) whether the security clearance was a requirement for appellant's position; and (3) whether the procedures set forth in [5 U.S.C. §] 7513 were followed." The *Hornseth* court suggested that section 7513's requirements may be unmet when (1) the agency's deciding official lacks authority to act for the agency; or (2) the agency violates regulations that implement section 7513. *Id.* at 1374-75. *See also Schnedar v. Dep't of the Air Force*, 119 M.S.P.R. 246, 250 (2013) (holding MSPB can consider whether the agency complied with its own procedures in taking an adverse action based upon a security clearance action). The court clarified, however, that the deciding official need not have an available alternative penalty for an indefinite suspension to comport with due process or section 7513. *Id.* at 1374.[4]

The D.C. Circuit carved a narrow exception to *Egan.* If an employee can show agency officials acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false to a clearance review, then the employee may proceed with a Title VII claim. *See Rattigan v. Holder*, 689 F.3d 764, 771 (D.C. Cir. 2012); *see also Chien v. Sullivan*, 313 F.Supp.3d 1, 14 (D.D.C. Apr. 25, 2018) (declining to dismiss allegations that plaintiff received extra security scrutiny in retaliation for EEO activity under *Rattigan*); *Clark v. Johnson*, 206 F.Supp.3d 645, 654 (D.D.C. 2016) (dismissing plaintiff's challenge of suspension and revocation of security clearance but declining to dismiss allegations that plaintiff received disparate treatment during allegedly retaliatory investigation); *Burns-Ramirez v. Napolitano*, 962 F.Supp.2d 253, 256 (D.D.C. 2013) (dismissing plaintiff's challenge to revocation of security clearance but declining to dismiss allegations of knowingly false reports to security); *but see Ames v. Nielsen*, 286 F.Supp.3d 70, 81-82 (D.D.C. 2017) (declining to apply *Rattigan* to challenge to decision to suspend plaintiff from adjudicating security clearances); *Njang v. Whitestone Group, Inc.*, 187 F.Supp.3d 172, 185 (D.D.C. 2016) (declining to apply *Rattigan* where plaintiff challenged termination rather than referral of allegations that initiated security clearance review).

The Federal Circuit declined to follow *Rattigan.* In *Wilson v. Department of the Navy*, the Federal Circuit held that MSPB lacked jurisdiction to review a security clearance determination where the appellant alleged that the process was initiated based on false information as retaliation for his military service in violation of USERRA. 843 F.3d 931, 935 (Fed. Cir. 2016). Despite observing that it was not bound by *Rattigan*, the court found that *Rattigan*'s "knowingly false"

[4] The *Hornseth* court separately considered whether *ex parte* communications between the deciding official and HR officials violated the employee's due process rights, concluding that they did not. *Id.*

requirement was not met in that case. An MSPB initial decision followed *Wilson*. *See Wood v. Dep't of the Air Force*, DA-1221-17-0344-W-1, 2018 WL 322141 (M.S.P.B. 2018). Responding to the appellant's argument that MSPB should look behind the agency's decision regarding her access to classified information, the AJ noted that the appellant failed to meet *Rattigan*'s "knowingly false" requirement and, even if she did, MSPB is not bound by *Rattigan*. *Id.* (citing *Wilson*). Courts in other circuits have also declined to follow *Rattigan*. *See Hambrick v. Esper*, 290 F.Supp.3d 1271 (N.D. Ala. 2018) (holding Eleventh Circuit precedent precludes review of security clearance determinations even though plaintiff's "allegations are on all-fours with the *Rattigan* decision"); *White v. Fed. Emergency Mgmt. Agency*, 2018 WL 692946, at *6 (W.D. Va. Feb. 2, 2018) (citing *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996), holding *Egan* prohibits judicial review of referral stage of security clearance investigation because it would require examination of reasons underlying suspension decision); *Kruise v. Fanning*, 214 F.Supp.3d 520, 526 (E.D. Va. 2016) (same); *Spencer v. Carter*, No. PX 16–161, 2016 WL 4240376, at *3 (D. Md. Aug. 11, 2016) ("*Rattigan* stands alone in providing narrow judicial review of Executive Branch security clearance decisions").

OSC's Recommended Position

Given the breadth of *Egan* and *Kaplan*, and courts' general reluctance to create exceptions to their reasoning, OSC should proceed with caution in making any decision to weigh in on this issue.

If OSC were to weigh in, as *Kaplan*'s footnote 16 recognizes, the above-mentioned cases interpret chapter 75 or Title VII, not section 2302 of the WPA. Therefore, OSC could argue the WPA provides us authority to investigate and prosecute PPPs involving security clearance determinations and personnel actions based thereon. Even though 50 U.S.C. § 3341(j) provides whistleblowers with protections for actions taken based on their clearances, it does not permit retaliatory acts independent of the clearances, and Congress did not make section 3341 the sole remedy to affected whistleblowing employees. We may also argue the constitutional separation of powers doctrine should require some opportunity for review by an Article III court, a remedy not available under section 3341, but that is available under section 2302.

Regarding OSC's investigative authority, OSC should be able to obtain evidence from a security clearance investigation to prove retaliation (or another PPP) unrelated to the security clearance determination itself. For example, if the subject official provides direct evidence of animus to a disclosure in an investigatory interview related to a security clearance, that evidence is admissible for other personnel actions (*e.g.*, an appraisal independent of a security clearance review).

Finally, regarding OSC's prosecution authority, OSC could argue that security clearance reviews motivated by retaliatory animus and based on knowingly false information deserve an exception similar to the one in *Rattigan*, analogizing to the retaliatory investigations in *Russell v. Department of Justice,* 76 M.S.P.R. 317, 326 (1997) and *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, 656 (2012), especially given OSC's new authority under 5 U.S.C. § 1214(i). Given other courts' reluctance to embrace *Rattigan*, this argument would be most likely to succeed in the D.C. Circuit.

Pending Cases

- None known.

II. PERSONNEL ACTIONS

A. Determining when a constructive suspension or discharge may constitute a personnel action, and how to assess appropriate remedies for related claims.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a)(2)(A) lists covered personnel actions and includes "an action under chapter 75 of this title or other disciplinary or corrective action."
- 5 U.S.C. § 2302(b)(12) makes it unlawful for an agency official "to take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title."

Relevant Background

In general, employee-initiated personnel actions, such as retirements, resignations, and leaves of absence, are presumed to be voluntary. The presumption of voluntariness can be overcome if the employee can demonstrate that the action was obtained through duress or coercion, or that the person was misled into taking the action by the agency. *See Covington v. Dep't of Health & Human Servs.*, 750 F.2d 937, 941-42 (Fed. Cir. 1984). The Board has, at times, imposed a high standard on establishing coercion: whether, under an objective standard, the employee was effectively deprived of a free choice in the matter. *See Bravo v. Dep't of Veterans Affairs*, 83 M.S.P.R. 653, 658 (1999). Other cases analyze the voluntariness by assessing whether the agency deprived the employee of a "meaningful choice." *Bean v. U.S. Postal Serv.*, 120 M.S.P.R. 397, 401 (2013).

Thus, in cases where a complainant alleges a constructive discharge (or other constructive adverse action), the Board has focused initially on whether the retirement, resignation, or leave was involuntary. This threshold focus on voluntariness makes sense in Chapter 75 actions and certain section 2302(b)(12) cases, where, absent the constructive adverse action, the Board would have no jurisdiction over the case because there is no other personnel action at issue. The preeminent focus on voluntariness, however, makes less sense in retaliation cases and some section 2302(b)(12) cases, when the Board has independent jurisdiction over the alleged PPP because an otherwise challengeable personnel action precipitates the resignation, retirement, or leave (*e.g.*, a proposed removal, a proposed suspension, a geographic reassignment, or a substantial change in working conditions, etc.).

Some MSPB cases seem to recognize that voluntariness should not be the only focus of the Board's threshold inquiry; rather, the focus should be on whether the agency engaged in an improper act and whether the resignation, retirement, or leave was a foreseeable consequence of the agency's improper act. The Board recognized this in *Bean,* explaining that "the Board and the Federal Circuit often emphasize the involuntariness aspect of constructive adverse action claims to the detriment of the improper agency action aspect. Because the focus is usually on the issue of voluntariness, it is easy to make the mistake of treating that as the only issue in the appeal and of examining all facets of a cause under that lens—even the ones that relate only to agency culpability." 120 M.S.P.R. at 403 (internal citations omitted). In *Bean*, the Board noted that the standard was whether the employee (1) lacked a meaningful choice in the matter; and (2) it was the agency's improper action that "deprived the employee of that choice." *Id.* at 401. To give a recent example, in *Ware v. United States Postal Service*, AT-0752-19-0153-I-1, 2019 WL 1596468 (MSPB Apr. 11, 2019), the AJ noted that the improper denial of a request for a reasonable accommodation could cause that

employee's workplace absence to be a constructive suspension (though the AJ did not find that the appellant established that he had made a request for a reasonable accommodation in that case). Similarly, in *Zygmunt v. Department of Health & Human Services*, 61 M.S.P.R. 379 (1994), which also involved a whistleblower's resignation, the Board stated: "The central inquiry in this appeal is whether the agency's threat to terminate the appellant constituted reprisal for whistleblowing, *not whether the agency constructively discharged her*." *Id.* at 384 (emphasis added).

OSC's Recommended Position

Although the *Bean* approach is an improvement over a threshold focus on voluntariness, OSC should advocate, in appropriate cases, for a slightly different articulation that focuses on whether the constructive personnel action—resignation, retirement, or leave—was a reasonably foreseeable consequence of the PPP. The advantage of this approach is that it shifts the initial emphasis away from the complainant's state of mind, and places it on whether the agency engaged in a bad act, *i.e.*, did the agency take a retaliatory personnel action. To the extent the complainant's actions come into play, it is to determine whether the resulting resignation, retirement, or leave was a reasonably foreseeable consequence of the PPP.

A similar approach has been applied by the Board in an analogous context. In cases where an employee is removed from service for failing to accept a retaliatory geographic reassignment, the Board has ignored the employee's intervening act—being AWOL—because the failure to show up to work was the reasonably foreseeable consequence of the retaliatory reassignment. *See Special Counsel v. Dep't of Transp.*, 71 M.S.P.R. 661 (1996). Similar logic should apply to constructive adverse action cases—the complainant's intervening action of resignation, retirement, or leave does not absolve the agency of its misconduct if the resignation, retirement, or leave was a foreseeable consequence of those misdeeds.

One way of implementing this approach is to have the resignation, retirement, or leave be considered as part of the complainant's consequential damages or remedy. If a complainant can otherwise make out a prima facie case of whistleblower retaliation—(1) protected disclosure or activity; (2) personnel action taken or threatened; and (3) causal nexus—then the issue of the resulting resignation or retirement is really a question of their damages, not whether they suffered a PPP in the first instance. The inquiry should be whether their resignation, retirement, or leave was a reasonably foreseeable consequence of the PPP and, therefore, part of the consequential damages suffered. If so, the remedy includes back pay, reinstatement, etc. This would be consistent with the approach taken in *Special Counsel v. Department of Transportation*, cited above.

With respect to section 2302(b)(12) cases, the same foreseeability standard could apply in cases where the PPP is comprised of a personnel action apart from the constructive suspension or discharge claim. However, because section 2302(b)(12) does not cover threatened personnel actions, in cases where the only personnel action comprising the section 2302(b)(12) is the constructive suspension or discharge, then the voluntariness standard is required. Such section 2302(b)(12) cases are more similar to a Chapter 75 constructive suspension or discharge case because, absent the constructive personnel action, there would be no personnel action establishing the PPP.

Pending Cases

- *Carvalho v. Dep't of Justice*: OSC is currently engaged in litigation as an intervenor where the AJ, *sua sponte*, identified the voluntariness of the complainant's resignation as the sole

relevant legal issue for establishing jurisdiction, despite that the complainant was subjected to a retaliatory PIP, proposed removal, removal (that was stayed), and took a job that constituted a two-grade demotion. The initial decision did not address constructive discharge, but this issue merits monitoring since the case remains ongoing.

B. Determining when a highly-discretionary personnel action, such as a geographical reassignment, may not justify a related removal.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a)(2)(A) lists covered personnel actions, including "a detail, transfer, or reassignment" and "an action under chapter 75 of this title or other disciplinary or corrective action."

Relevant Background

In general, agencies have the authority to reassign their employees. *See* 5 C.F.R. § 335.102. Additionally, some agencies require employees in certain positions, such as some law enforcement positions, to sign mobility agreements as a condition of their employment.[5] To lessen the burden of justifying a termination—whether in a Chapter 75 appeal, a whistleblower claim, or otherwise—agencies may take personnel actions for which they have wide discretion to provide a basis for a termination or to force a resignation. For example, an agency may geographically reassign an individual with the expectation that the person will not accept the reassignment.

In direct appeals, the Board and Federal Circuit use a two-step framework to analyze removals following a refusal to accept geographic reassignment.[6] *See Cobert v. Miller*, 800 F.3d 1340, 1349 (Fed. Cir. 2015); *Frey v. Dep't of Labor*, 359 F.3d 1355, 1357-58 (Fed. Cir. 2004); *Umshler v. Dep't of the Interior*, 44 M.S.P.R. 628, 630 (1990); *Ketterer v. Dep't of Agric.*, 2 M.S.P.R. 294, 298 (1980). First, the agency must show a legitimate management reason for the reassignment (and that the employee, given adequate notice of the reassignment, refused to accept it). *See Frey*, 359 F.3d at 1360 (endorsing *Umshler* and *Ketterer*). The employee may then rebut the agency's prima facie case through evidence that casts doubt on the legitimate management basis for the reassignment. The agency must successfully overcome this rebuttal evidence and demonstrate that the reassignment was for the efficiency of the service. *Id.* If the employee can demonstrate that the reassignment had no solid or substantial basis, the Board may conclude that it was not a valid discretionary management determination, but was instead either an improper effort to pressure the employee to retire, or was at least an arbitrary and capricious adverse action. *Id.*

Three recent cases examine whistleblower retaliation affirmative defenses to a removal for failure to accept a geographic reassignment. In a recent decision, *Draughn v. Department of the Army*, DC-0752-17-0527-I-1, 2018 WL 939962 (MSPB Feb. 12, 2018), the AJ affirmed such a removal, finding that the reassignment was for legitimate reasons pursuant to a management decision to move all employees in a specific classification and that the appellant failed to rebut the agency's legitimate reasons. She also found that the appellant's whistleblowing affirmative defense failed because the appellant's disclosure was not protected; even if the disclosure was protected, it did not occur until after the agency ordered her reassignment and proposed her removal; and the agency demonstrated

[5] *See, e.g.*, *Gallegos v. Dep't of the Air Force*, 121 M.S.P.R. 349, ¶¶ 5-11 (2014) (upholding removal based on charge of failure to fulfill condition of employment when employee subject to mobility agreement refused a geographic reassignment).
[6] If the employee resigns, the analysis should be in line with the constructive removal analysis in Section II.A. above.

by clear and convincing evidence that it would have taken the same action absent the disclosure. In another recent decision, *Bailey v. Department of the Treasury*, NY-0752-17-0162-I-1, 2018 WL 3608635 (MSPB July 25, 2018), the AJ affirmed such a removal again, finding that the reassignment was based on legitimate management considerations and that the appellant failed to prove his affirmative defenses—that the reassignment was due to discrimination and/or retaliation—by a preponderance of the evidence. In *Collica v. Department of the Army*, 651 F. App'x 981 (Fed. Cir. 2016), the Federal Circuit affirmed the Board's decision holding that the agency met its burden by showing by clear and convincing evidence that it would have removed the appellant for failure to accept a geographic reassignment despite the appellant's whistleblowing. The court held that the AJ and the Board properly examined the three factors established in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), to make that determination. This case appears to apply *Carr* appropriately, without giving undue deference to the agency's discretion in making the assignment and focusing appropriately on the motive to retaliate and other *Carr* factors.

However, in a notable section 1214 enforcement action, the Board upheld the AJ's finding that a geographic reassignment was in retaliation for an employee's protected activity under section 2302(b)(9)(C), and ordered the reversal of a later removal action, which was based on absences related to the appellant's *acceptance* of the geographic reassignment. *See Special Counsel v. Dep't of Transp.*, 71 M.S.P.R. at 664-651. The Board concluded that the employee's retaliatory geographic reassignment was the proximate cause of the removal. *Id.* at 664.

OSC's Recommended Position

Retaliation in the context of geographic reassignments is a highly fact-specific inquiry. Because of the potential for abuse, OSC should rigorously examine whether the agency has clear and convincing evidence that it acted for its purported legitimate business reason where there is a prima facie case of whistleblower retaliation. OSC should pay particular attention to whether geographic reassignments are commonly used within the agency, in what situations, for what purpose, and any other relevant history of their use. OSC should also consider the particular circumstances leading to the geographic reassignment at issue, including any evidence suggesting that the agency's use of a geographic reassignment was for the purpose of forcing a resignation or leading to a removal.

Where the geographic reassignment leading to the removal was a part of a broader reorganization or restructuring, there will be an additional challenge of distinguishing the complainant's particular reassignment—and attendant circumstances—from the reorganization as a whole or demonstrating that the reorganization or restructuring was retaliatory. *See, e.g.*, *Collica*, 651 F. App'x at 984 (affirming Board's decision that agency had legitimate reason to direct appellant's reassignment pursuant to agency-wide restructuring directive); *Umshler v. Dep't of the Interior*, 55 M.S.P.R. 593, 598 (1992) (finding "ample evidence" supporting decision to abolish appellant's position and reassign him pursuant to agency reorganization), *aff'd*, 6 F.3d 788 (Fed. Cir. 1993); *Draughn*, 2018 WL 939962. A similar challenge applies to cases in which the complainant is subject to a mobility agreement or is a member of the SES. In these situations, in addition to closely examining the agency's reasons for the reassignment, OSC should pay particular attention to agency processes, policies, and other relevant information to ascertain whether there is a deviation from the norm or what other circumstances particular to the complainant may exist that evince retaliatory motive.

Pending Cases

- None known.

C. Determining when a hostile work environment may constitute a personnel action, and how to assess appropriate remedies for related claims.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a)(2)(A) lists covered personnel actions and does not include hostile work environment, but includes a "significant change in duties, responsibilities, or working conditions."

Relevant Background

While the WPA does not list a hostile work environment as a covered personnel action, the Board concluded in *Savage v. Department of the Army* that it could constitute a "significant changes in duties, responsibilities, or working conditions" under section 2302(a)(2)(A). 122 M.S.P.R. 612, 627 (2015). Indeed, the legislative history of the 1994 amendment to the WPA indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *Roach v. Dep't of the Army,* 82 M.S.P.R. 464, ¶ 24 (1999) (quoting 140 Cong. Rec. H11, 421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey)).

A review of recent initial, nonprecedential Board decisions indicates that AJs are consistently utilizing Title VII cases in evaluating hostile work environment claims, generally referring to these as "analogous standards." *See, e.g., Solomon v. Dep't of Veterans Affairs*, 2018 WL 4914157 (M.S.P.B. Oct. 2, 2018) (nonprecedential); *Cerulli v. Dep't of Def.*, 2019 WL 1242563 (M.S.P.B. Mar. 14, 2019) (nonprecedential). In general, these initial decisions and other relevant case law suggest that there is a high bar for establishing that a hostile work environment is a personnel action. For instance, they provide the following insights and limitations:

- Allegedly hostile behavior must "alter the conditions of the victim's employment and create an abusive working environment," as in the case where the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult.'" *Richards v. Dep't of Homeland Sec.*, 2018 WL 5115995 (M.S.P.B. Oct. 16, 2018) (nonprecedential) (citing *Sabio v. Dep't of Veterans Affairs*, 124 M.S.P.R. 161 (2017)); *Banowetz v. Dep't of the Interior*, 2019 WL 1047549 (M.S.P.B. Feb. 28, 2019) (nonprecedential).
- Law does not "impose a general workplace civility code, and … [does] not prohibit all workplace harassment." *Floyd v. Dep't of Homeland Sec.*, 2018 WL 3015481 (M.S.P.B. June 14, 2018) (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).
- Isolated incidents do not amount to an impermissible change in employment except when "very serious." *Frazier v. Dep't of Veteran Affairs*, 2018 WL 6682307 (M.S.P.B. Dec. 10, 2018) (nonprecedential) (citing *Salazar v. Dep't of Energy*, 88 M.S.P.R. 161 (2001)).
- Generalized allegations of harassment and a combination of miscellaneous de minimis actions do not constitute a hostile work environment. *See Stern v. Dep't of Veterans Affairs*, 2019 WL 2121480 (M.S.P.B. May 7, 2019) (nonprecedential); *Chacon v. Dep't of Health & Human Servs.*, 2019 WL 2017638 (M.S.P.B. Apr. 29, 2019) (nonprecedential) (over 100

alleged retaliatory acts but generalized and vague); *Melendez, Marcos v. Dep't of Def.*, 2018 WL 4282694 (M.S.P.B. Sept. 7, 2018) (nonprecedential) (must provide dates or other specifics).[7]

Indeed, it is somewhat rare to find a case finding a hostile work environment rising to the level of a personnel action. In one such case, there was testimony regarding cliques, hostility, and in-fighting within the department, including substantiated violations of the agency's workplace violence policy. *See Aiu v. Dep't of the Army*, 2019 WL 2176452 (M.S.P.B. May 16, 2019) (nonprecedential). The AJ considered the incidents collectively and from an objective standpoint in finding that a "pattern of hostility … permeated the department, including hostility directed toward the appellant" and that these events represented a significant change in duties, before ultimately concluding that the agency could prove that the hostile environment was unrelated to the appellant's whistleblowing. *Id.*

OSC's Recommended Position

Where appropriate, OSC should argue that a hostile work environment constitutes a "significant change in duties, responsibilities, and working conditions" under the WPA, especially in cases where the it may have had a chilling effect on whistleblowing. *See Stern. v. Dep't of Veterans Affairs*, 2019 WL 2121480 (M.S.P.B. May 7, 2019) (nonprecedential) (citing *Shivaee v. Dep't of the Navy,* 74 M.S.P.R. 383, 388 (1997)). By specifically including "any other *significant change* in duties, responsibilities, or *working conditions*" within the definition of "personnel action" under section 2302(a), Congress provided the statutory tools for employing an applicable framework consistent with the Title VII standard for harassment claims. 5 U.S.C. § 2302(a)(2)(A)(xii) (emphasis added). While Title VII cases may provide valuable insight, however, OSC should be careful about how best to incorporate those standards, such that it does not create unnecessary hurdles for complainants—for example, applicable defenses.

Pending Cases

- None known.

D. Determining when a retaliatory investigation may constitute a personnel action, and how to assess appropriate remedies for related claims.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(a)(2)(A) lists covered personnel actions and does not include retaliatory investigations, but includes a "significant change in duties, responsibilities, or working conditions."
- 5 U.S.C. § 1214(h) provides that any corrective action ordered to correct a PPP may include "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action."
- 5 U.S.C. § 1214(i) provides that OSC may seek "corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an

[7] Although the above analyses apply to the majority of PPP claims involving a hostile work environment, claims under section 2302(b)(1) or (b)(10) do not require the commission of a "personnel action," only the presence of discrimination. *See Special Counsel v. Russell*, 28 M.S.P.R. 162, 169 (1985). Because the actor must be an individual with "the authority to take, recommend, or approve a personnel action," any action that constitutes "an abuse of the supervisor-subordinate relationship" may be sufficient to prove a section 2302(b)(1) or (b)(10) claim. *Id.* at 168-69.

agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described in section 2302(b)(8) or 2302(b)(9)A(i), (B), (C), or (D) without regard to whether a personnel action, as defined in section 2302(a)(2)(A), is taken."

Relevant Background

A provision of the OSC Reauthorization Act of 2017,[8] codified at 5 U.S.C. § 1214(i), opens the door for OSC to pursue corrective action and remedies where an agency conducts a retaliatory investigation of an employee, regardless of whether a personnel action results from the underlying investigation. According to OSC's memorandum dated December 13, 2017, regarding the retroactivity of the Reauthorization Act, OSC does not consider this new provision to apply to retaliatory investigations that occurred prior to enactment because the new provision creates a substantive change in law, as opposed to a clarification of existing law.[9]

A retaliatory investigation is not, in and of itself, a separately-identified personnel action under the WPA, as amended by the WPEA. *Sistek v. Dep't of Veterans Affairs*, No. 2019-1168, 2020 WL 1696315, at *3-*4 (Fed. Cir. April 8, 2020). Nevertheless, a retaliatory investigation, either on its own in appropriate circumstances or in contribution to a broader hostile work environment, may qualify as a significant change in working conditions, which is the catch-all personnel action listed in section 2302(a). *Id.* at *4. This is, of course, a fact-specific analysis. *E.g., id.* at *5 (finding that Sistek's allegations—being interviewed once by an AIB with the associated fear or stigma of an investigation—only presented facts that would apply to almost any routine agency investigation). Still, even before the recent legislative update, the MSPB would consider evidence of an agency's investigation when it was so closely related to a personnel action that it could have been pretext for gathering evidence to use to retaliate against an employee. *See Rhee v. Dep't of the Treasury*, 117 M.S.P.R. 640, 657 (2012); *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 325 (1997). The Federal Circuit expressly agreed with *Russell's* holding. *Sistek*, 2020 WL 1696315, at *6. Where an investigation may have been pretext for retaliation, corrective action is merited unless the agency can show by clear and convincing evidence that the evidence supporting the personnel action would have been gathered absent the protected disclosure or activity. *See Russell*, 76 M.S.P.R. at 325. This is so even if the investigation was conducted in a fair and impartial manner, or if misconduct was discovered during the investigation. *See id.* These cases, expressly adopted by the Federal Circuit, are not in conflict with the new statutory provisions, so they may be relied upon in similar circumstances.

Likewise, the WPEA already provided for remedies, under section 1214(h), for a retaliatory investigation tied to a personnel action for which the complainant obtained corrective action. The Reauthorization Act further empowers OSC, under 1214(i), to seek corrective action even where no personnel action results from the retaliatory investigation. Presently, there is no guidance or case law to assist OSC or complainants in determining how to assess "fees, costs, or damages reasonably incurred" due to an agency's retaliatory investigation.

OSC's Recommended Position

[8] The Reauthorization Act was enacted as section 1097 of the FY 2018 National Defense Authorization Act, Pub. L. No. 115-91, on December 12, 2017.

[9] OSC should apply section 1214(i) to all retaliatory investigations that were commenced, expanded, or extended after its enactment, even if the underlying protected disclosures or activity occurred before that date. Where the retaliation occurs after enactment of the provision, agencies are on notice of their obligations and potential liabilities.

In appropriate cases where an agency commenced, expanded, or extended an investigation prior to enactment of section 1214(i), OSC should continue to argue that such a retaliatory investigation, if it qualifies as significant enough on its own or contributes to a broader, actionable hostile work environment, constitutes a significant change in working conditions and thus is a covered personnel action under the statute. The WPEA's legislative history, and the Federal Circuit's *Sistek* precedent, provides support for this position. The Senate Committee Report accompanying the WPEA expressly recognizes that retaliatory investigations may be personnel actions "if they result in a significant change in job duties, responsibilities, or working conditions or have effects that otherwise fit within one of the items listed under the statutory definition of 'personnel action.'" S. Rep. No. 112-155 (2012) at 20. Because *Sistek* included a comment about retaliatory investigations as personnel actions in "extreme circumstances," it is possible that future decisions may overly restrict when an investigation, by itself, amounts to a significant change in working conditions. OSC should take the position that the Federal Circuit's reference to "extreme circumstances" was not a holding, but an acknowledgment that even the government concedes that a retaliatory investigation could be a personnel action. We should also look for other circuits where we can press our point.

Additionally, where corrective action is warranted for actions that took place prior to the enactment of section 1214(i), OSC should continue to explore damages related to any retaliatory investigations under section 1214(h). Such remedies may include attorney's fees, purging the investigative report and related information, and compensatory damages. "Because retaliatory investigations are not explicitly referenced as a 'personnel action,'" the WPEA added section 1214(h) to fill the gap where "an investigation was undertaken in retaliation for a protected disclosure but [whistleblowers] nevertheless have no remedy under the WPA if the investigation did not result in a significant change in job duties, responsibilities, or working conditions. *Id.* at 21. The Committee Report further quoted at length from previous legislative history stating that personnel actions should be "broadly construed" and may include "retaliatory investigations" even without "formal changes in duties, responsibilities, or working conditions." *Id.* at 20-21, *quoting* 140 Cong. Rec. 29,353 (1994); *see also* H. Rep. No. 103–769 (1994), at 15. *But see Sistek*, 2020 WL 1696315, at *4 (noting that the Senate Report for the WPEA amendments expressly acknowledged that investigations would qualify as personnel actions if they resulted in *significant* changes).

In cases where an agency commenced, expanded, or extended an investigation on or after the enactment of section 1214(i), OSC should pursue this as an independent basis for corrective action, applying the same burdens and standards used for section 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D) claims, *e.g.*, the contributing factor standard and the evidentiary burden of a preponderance. Additionally, where there are cases in which an agency commenced an investigation prior to enactment of section 1214(i), but later expands or extends that investigation after the enactment of section 1214(i), OSC should apply section 1214(i) to that expansion or extension. The statutory language distinguishes between these three possible phases of an investigation (commencement, expansion, and extension), as opposed to treating it as a single event. The enactment of the Reauthorization Act provides agencies with a warning that expanding or extending a retaliatory investigation is impermissible even if no personnel action results. Accordingly, where a protected disclosure or activity prompts the expansion or extension of an existing investigation after the enactment of section 1214(i), OSC should take the position that the subsequent expansion or extension is a new and distinct basis for corrective action.

Defining the various phases of a retaliatory investigation may present challenges. While an "expansion" may be less ambiguous—for example, if an agency adds charges or increases the scope of inquiry—there may be less certainty as to what constitutes an "extension" versus a mere

continuation of an investigation already commenced. OSC should look at the circumstances on a case-by-case basis to ascertain whether an agency maintains an open investigation with the hope of gathering negative information even though it appears the investigation has run its course and there is no reasonable basis to maintain the open inquiry. Such scenarios may occur where investigators have already interviewed material witnesses and exhausted review of pertinent records. To the extent that an "expansion" is also not entirely clear, OSC should look to the circumstances on a case-by-case basis as well to ascertain whether the agency altered its investigation as a form of retaliation.

OSC should also approach cases where an agency commences an investigation of the employee, the employee subsequently makes a protected disclosure or engages in protected activity, and the agency next expands or extends its investigation. Though more difficult given the existence of an investigation pre-whistleblowing, there could be scenarios where an agency purposefully augments its efforts to investigate the employee in retaliation for an interim protected disclosure or activity that would otherwise not have occurred absent the disclosure or activity.

Both provisions—sections 1214(h) and 1214(i)—may provide opportunities for OSC to affect what MSPB considers to be "reasonably incurred" fees, costs, or damages for investigations.

Pending Cases

- *Missal v. Dep't of the Interior*, MA-16-1931, involves a retaliatory investigation, but because it resulted in a termination, it likely would be considered in line with *Russell* without raising the legal issues discussed in this section.

III. STANDARDS OF PROOF AND THEORIES OF LIABILITY

A. Determining the appropriate use and standard of proof required in section 2302(b)(8) claims of protected disclosures made in "normal course of duties."

Relevant Statutory Provisions

- 5 U.S.C. § 2302(f)(2) provides:

> If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the 'disclosing employee'), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

Relevant Background

In the WPEA, Congress clarified its intended broad definition of a protected disclosure. For example, Congress clarified that disclosures made in the normal course of duties are protected, overturning *Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). Congress, however, added a heightened evidentiary burden for proving that a personnel action was taken in retaliation for such disclosures, requiring that the employee (or OSC) establish as part of the prima

facie case that the agency took a personnel action against the whistleblower "in reprisal for the disclosure." The OSC Reauthorization Act of 2017 amended 5 U.S.C. § 2302(f)(2) to clarify that the "extra proof" requirement applies only to disclosures made by employees whose "principal job function [] is to regularly investigate and disclose wrongdoing." This provision corrects an erroneous Board decision, *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428 (2014), in which the Board applied the extra requirement more broadly.

OSC's Recommended Position

OSC has made and should continue to press three arguments regarding this priority issue:

(1) First, the Reauthorization Act amendments apply retroactively to pending cases, as the provision clarified existing law. OSC has argued in *amicus* briefs and congressional testimony that a broader application of the higher burden in section 2302(f)(2), as it previously existed, contravened congressional intent under the WPEA. The Senate Report accompanying the WPEA described section 2302(f)(2)'s "extra proof requirement" as "intended to facilitate adequate supervision of employees, such as auditors and investigators, *whose job is to regularly report wrongdoing*." S. Rep. No. 112-155 at 5 (emphasis added).

Generally, when as here legislation lacks explicit statutory language proscribing its reach, legislative provisions that clarify existing law apply to pre-enactment conduct. *See Day v. Dep't of Homeland Sec.*, 119 M.S.P.R. 589, 596 (2013). In making this determination, "courts have deemed significant any declaration by the enacting body of intent to clarify." *Id.* at 596. Courts also examine the extent to which the legislation resolves any ambiguity and comports with the prior statute. *Id.* The Senate Committee Report for the stand-alone version of the Reauthorization Act (S. 582) describes the provision as a clarification. *See* S. Rep. No. 115-74, at 8. More specifically, the Report states that the amendment to section 2302(f)(2) further "clarifies that an employee with a principal job function of investigating and disclosing wrongdoing" must meet the higher burden. S. Rep. No. 115-74, at 8.

OSC submitted an additional pleading in *Salazar v. Department of Veterans Affairs,* SF-1221-15-0660-W-1 (2016), whose Petition for Review was submitted before the Reauthorization Act's enactment, arguing that, because the amendment was intended to clarify existing law, section 2302(f)(2) as amended should be applied in all pending cases. Thus, all disclosures that were made in the normal course of an employee's duties, *regardless of when they occurred*, would be subject to the higher burden only if the employee's "principal job function [] is to regularly investigate and disclose wrongdoing." In a recent nonprecedential initial decision, an AJ found that this provision is "a clarification to the WPA and […] applies retroactively." *Malgeri v. Dep't of Housing & Urban Development*, DC-1221-18-0468-W-1, 2018 WL 7138798 (M.S.P.B. Dec. 19, 2018) (nonprecedential).

(2) Additionally, OSC should argue that section 2302(f)(2)'s heightened evidentiary burden on disclosures made in the "normal course of duties" applies in very narrow circumstances. The extra proof burden applies only to employees "the principal job function of whom is to regularly investigate and disclose wrongdoing." This provision should only apply in those particular circumstances where both investigating and making disclosures of wrongdoing are a core part of an employee's routine job duties. The plain language of this provision clearly precludes imposing a higher burden on all disclosures that concern a whistleblower's duties or are learned while performing those duties. OSC should be prepared to articulate standards for determining whether a particular job function is a "principal" job function, what constitutes investigating and disclosing wrongdoing, and how frequent such activity must be to be performed "regularly." One factor OSC

could point to is whether an investigatory function is listed in the whistleblower's position description or is a major element in their annual performance appraisal. OSC should take the position that an investigatory function requires more than a job duty to ensure regulatory or statutory compliance, given that a broad range of federal employees routinely engage in compliance work.

Even if the amendments to section 2302(f)(2) were ruled to apply prospectively only, OSC should continue to argue, as it has in its past *amicus* briefs, that the legislative history of the WPEA demonstrates that Congress intended a narrow application of that provision. *See* S. Rep. No. 112-155 at 5 (emphasis added). In *Benton-Flores v. Department of Defense*, 121 M.S.P.R. 428 (2014), the complainant, a teacher at a DOD-dependent school, made disclosures concerning threats to the health and safety of students. The Board instructed the AJ to consider on remand whether a heightened evidentiary burden was required under the WPEA because it appeared that the complainant may have made her disclosures in the normal course of her job duties. OSC submitted an *amicus* brief to the AJ arguing that Congress did not intend to sweep in reports of wrongdoing by individuals (like the complainant) who do not regularly report wrongdoing. On remand, the AJ concluded that the complainant's disclosures were not protected, and so did not reach the "normal course of duties" issue. *See Benton-Flores v. Dep't of Def.*, No. DC-1221-13-0522-B-2, 2017 WL 1573499 (Apr. 25, 2017).

(3) Finally, as far as satisfying the heightened burden standard where it applies, OSC should argue that the burden should not be onerous. The WPEA's legislative history explains this is only meant to be a "slightly higher burden." S. Rep. No. 112-155 at 6. The intent was that the "employee can show not only that the agency took the personnel action 'because of' the disclosure, but also that the agency took the action with an improper, retaliatory motive." *Id.* at 5. In an *amicus* brief in *Salazar*, discussed more below, OSC advocated for a "contributing factor plus" approach that only requires some minimal showing of circumstantial evidence of a retaliatory motive and provides a non-exhaustive list of factors that may be used to meet that burden, such as whether the disclosure implicated the subject official in wrongdoing; whether the disclosure was serious or embarrassing for the agency; whether a particularly close timing nexus existed between the disclosure and the personnel action; and whether the employee made the disclosure outside his or her ordinary work channels.

Pending Cases

- In *Salazar v. Department of Veterans Affairs,* SF-1221-15-0660-W-1 (2016), the complainant was terminated after he reported wrongdoing to his supervisors. In its *amicus* brief, OSC argued that the AJ erred in imposing an unduly onerous burden under section 2302(f)(2) that upended the burden-shifting paradigm in the statute. OSC proffered an alternate approach to analyze these cases that better comports with the purpose and language of the WPEA, is consistent with Board precedent, and is fair, reasonable, and workable in practice. After passage of the Reauthorization Act, OSC submitted an additional pleading to the Board and argued that the amendment to section 2302(f)(2) should apply retroactively; and (2) section 2302(f), as amended, makes it clear that the higher evidentiary burden should not apply in this case as Salazar's "principal job function" was not to regularly investigate and disclose wrongdoing.

B. Asserting that the U.S. Constitution is a "law" giving rise to liability in section 2302(b)(8) and (b)(12) claims.

Relevant Statutory Provisions

- 5 U.S.C. § 2301(b)(2) provides in pertinent part as follows: Federal personnel management should be implemented consistent with the following merit system principles: All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management … with proper regard for their privacy and constitutional rights.
- 5 U.S.C. § 2302(b)(8) provides in pertinent part as follows: Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority … take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation.
- 5 U.S.C. § 2302(b)(12) provides as follows: Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority … take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Relevant Background

Numerous federal courts of appeals have held that the U.S. Constitution is a law under section 2302(b)(12). As a consequence, these courts deny applicants and employees a forum in federal court to challenge personnel actions on constitutional grounds (except some courts have permitted claims for injunctive relief) and instead steer these individuals to pursue their claims as PPPs, *i.e.*, to file complaints with OSC. *See Spagnola v. Mathis*, 859 F.2d 223, 225 & n.3 (D.C. Cir. 1988) (en banc) (finding that First Amendment challenges to personnel actions are cognizable as PPPs; rejecting *Bivens* damages claims); *accord Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1432 (D.C. Cir. 1996) (explaining it is a PPP to take a personnel action that "unconstitutionally burdens an employee's speech"). Other Circuits have also held that violating an employee's constitutional rights is a PPP. *See Saul v. United States*, 928 F.2d 829, 833-34 (9th Cir. 1991); *McIntosh v. Turner*, 861 F.2d 524, 526-27 (8th Cir. 1988); *Robbins v. Bentsen*, 41 F.3d 1195, 1202 (7th Cir. 1994). In vacating and remanding a case for failure to exhaust administrative remedies, the Eleventh Circuit suggested the same in dicta. *See Ferry v. Hayden*, 954 F.2d 658, 661 (11th Cir. 1992).

Notwithstanding the weight of authority from these federal circuits, the MSPB law on the section 2302(b)(12) issue is unsettled. In 2014, two Board members split on the question. *See Special Counsel ex rel. Cefalu v. Dep't of Justice*, MSPB Docket No. CB-1214-13-0187-T-1, 2014 WL 5410672 (Sept. 8, 2014). OSC extensively briefed the issue to the AJ and before the Board, arguing that the Constitution is a "law" within meaning of section 2302(b)(12). The AJ agreed with OSC that the First Amendment is a law implementing and directly concerning the merit system principles and that this law may be enforced under section 2302(b)(12). Then-Chairman Grundmann agreed with the AJ, while then-Member Robbins issued a separate opinion to the contrary. Then-Vice Chair Wagner recused herself, leaving the Board with no majority decision on the issue. In the past, the Board has more squarely suggested that a constitutional provision is not a law within the meaning of section 2302(b)(12), albeit in cases that primarily focused on whether the merit system principles involved were self-executing. *See Radford v. Office of Pers. Mgmt.*, 69 M.S.P.R. 250 (1995); *Pollard v. Office of Pers. Mgmt.*, 52 M.S.P.R. 566 (1992).

In *Linder v. Department of Justice*, MSPB noted in dicta that it had never decided whether a violation the U.S. Constitution is a "law" giving rise to liability under section 2302(b)(8), but it declined to address the issue because the appellant's disclosure constituted a non-frivolous allegation of an abuse of authority. 122 M.S.P.R. 14, 22 (2014).

OSC accepts complaints alleging a violation of constitutional rights under sections 2302(b)(8) and (b)(12). For example,

- In *Frink* MA-13-4058, OSC published a PPP report and obtained corrective action where complainant alleged that he was terminated shortly after contacting Congress in violation of section 2302(b)(12). OSC concluded that the agency interfered with his statutory and constitutional rights by retaliating against him for that communication.
- In *Bereznay*, MA-14-1484, the complainant alleged that during an investigation of potential work-related misconduct, the agency conducted an unreasonable search of his personal cell phone. OSC determined that there were reasonable grounds to believe that the forced search of the complainant's cell phone violated his Fourth Amendment rights and constituted a significant change in working conditions in violation of section 2302(b)(12). OSC obtained systemic corrective action to include affirmative notification to the responsible management officials of the applicable legal requirements for searches of employees' personal property.
- In *Coulter*, MA-17-2873, agency officials issued the complainant a reprimand for the position he took in a public comment that he submitted during a formal rule making period at another agency. OSC determined that the reprimand violated the complainant's First Amendment rights and obtained informal corrective action to include rescission of the reprimand and payment of attorney's fees.
- In *Cekauskas*, MA-18-1986, DOD terminated the complainant, a reemployed annuitant, for making derogatory remarks about the President during an overheard, off-duty conversation with her husband. OSC determined that DOD had violated the complainant's First Amendment rights and obtained systemic and individual corrective action.

<u>OSC's Recommended Position</u>

In appropriate cases, OSC should continue to take the position it took in *Cefalu* that the U.S. Constitution is a "law" giving rise to liability under section 2302(b)(12), and should extend the same reasoning to section 2302(b)(8). Because the Constitution is "the supreme law of the land" (Article VI), it must apply in every personnel action or matter that OSC has been authorized to investigate and that MSPB has been authorized to adjudicate—regardless of the text of any particular statute such as 5 U.S.C. § 2302. Accordingly, the Board should not sustain an agency action or decision if the agency action or decision was effected by violating the employee's constitutional rights (under section 2302(b)(12)), or if it was retaliation for a disclosure of a violation of constitutional rights (under section 2302(b)(8)).

We note that the Board may be more amenable to treating the Constitution as a "law" for purposes of section 2302(b)(8) because a complainant need only have a "reasonable belief" that a law was violated, as opposed to the requirement of an actual violation of law for purposes of section 2302(b)(12). This possibility may be reinforced by legislative history making clear Congress's intent to provide broad protection of whistleblower disclosures under section 2302(b)(8).

<u>Pending Cases</u>

- None known.

C. Determining the appropriate use and standard of proof required for section 2302(b)(9)(D) claims of refusal to obey an order that would violate law, rule, or regulation.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(b)(9)(D) provides as follows: "any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority … take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of … refusing to obey an order that would require the individual to violate a law, rule, or regulation."

Relevant Background

The Follow the Rules Act (FRA), which became law on June 14, 2017, amended section 2303(b)(9)(D) to include protections for employees who refuse to follow an order that would require that employee to violate a "rule, or regulation" in addition to a law.[10] It appears that Congress intended the FRA to apply retroactively. *See* House Report 115-67 at 3 (Explanation of Amendments) (March 29, 2017). OSC filed an amicus brief in *Coleman v. Dep't of Homeland Sec.*, Docket No. DA-1221-17-0500-W-1, arguing that the FRA applies retroactively and citing Congress's clear intent to that effect.

Section 2302(b)(9)(D) appears to be modeled after the tort of wrongful discharge in violation of public policy. *See, e.g.*, *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 610, 561 A.2d 179, 182 (1989) (tort of wrongful discharge in violation of public policy will lie where employee is terminated for refusing to commit an unlawful act) (collecting cases). Thus, one might expect that analogous issues will arise with the interpretation and application of section 2302(b)(9)(D). Some issues that may arise in the wrongful discharge tort context are as follows:

- What is the source of the law, rule, or regulation: federal, state, local?
- What is a law, rule, or regulation: constitutional provision, statute, regulation, rule, professional code of conduct, administrative guidance, case law, court order?
- Is it enough for the employee to simply not follow the order? Or must employees inform their employers why they did not comply? What if the employee objects but complies with the order under threat of discipline?
- What if the order would not actually require the employee to violate a law, rule, or regulation? Is it sufficient if the employee reasonably believes that obeying the order would violate the law, rule, or regulation?

The most relevant recent cases raising this priority issue are summarized below:

- *Rainey v. Merit Sys. Prot. Bd.*, 824 F.3d 1359 (2016): The Federal Circuit affirmed the Board's holding that section 2302(b)(9)(D) only protects those who refuse to obey an order that would require an individual to violate a statute, and the meaning of "law" does not include a rule or regulation. The IRA appellant had argued that the section protected his refusal to

[10] For more details on the Follow the Rules Act, please see AWG memorandum dated October 6, 2017.

obey his supervisor's order regarding the rehiring of a sub-contractor, which he argued would violate the Federal Acquisition Regulation (FAR). The Follow the Rules Act was prompted by and overturns *Rainey*.

- *Rebstock Consol. v. Dep't of Homeland Sec.*, 122 M.S.P.R. 661 (September 29, 2015): The Board affirmed the AJ's decision where the appellants alleged that they were ordered to refrain from placing certain individuals who were unlawfully present in the United States into removal proceedings and to facilitate the granting of deferred action to such individuals. The Board ruled that the appellants failed to make a non-frivolous allegation that they actually refused to obey an order from their supervisors because they complied with the orders, nor did they non-frivolously allege a threatened personnel action because they could not point to any specific threat made for refusal to obey.
- *Mullen v. Dep't of Veterans Affairs*, CH-1221-16-0083-W-1, 2016 WL 3386734 (M.S.P.B. June 15, 2016) (nonprecedential): The appellant argued that the VA retaliated against him for refusing to bill a patient for the full time of an appointment even though the veteran left early. The appellant indicated that he was "strongly encouraged" to bill the patient in an improper manner and that subsequent retaliation was in violation of section 2302(b)(9)(D). The Board disagreed for a number of reasons, holding that "'strongly encouraged' is not the same as 'ordered.'"
- *Hickey v. Dep't of Homeland Sec.*, PH-1221-15-0013-W-2, 2017 WL 1848111 (M.S.P.B. May 4, 2017) (nonprecedential): The appellant refused to enter classified information into a database that was not properly secured. The AJ found that although the appellant *reasonably believed* entering the classified information would violate the law, the AJ did "not find that [the appellant] proved by preponderant evidence that the order he was given *actually* would have required him to violate a statute." *Id.* n.11 (emphasis added). Thus, the AJ found the appellant's "refusal to obey orders … was not protected under 5 U.S.C. § 2302(b)(9)(D)." *See also Jackson v. Dep't of Def.*, DC-1221-18-0241-W-1, 2018 WL 6308908 (M.S.P.B. Nov. 20, 2018) (nonprecedential) ("The statutory construction of [section 2302(b)(9)(D)] does not include the caveat found in Section (b)(8) that the appellant need only have a reasonable belief of such a violation.").

OSC's Recommended Position

OSC should take the position that the FRA should be applied retroactively because this interpretation accords with congressional intent and provides greater protection to complainants, as it did in its *amicus* brief in *Coleman*.

Regarding the scope of "rule" and "regulation," the latter is relatively easy to define: regulations are promulgated under the notice-and-comment process under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-553, generally to clarify and implement statutes. "Rule" is more difficult to define, because the Board and OSC interpret "rule" under section 2302(b)(8) more expansively than the APA definition under 5 U.S.C. § 551(4). The Board has held that a "rule ... includes established or authoritative standards for conduct or behavior." *See Chavez v. Dep't of Veterans Affairs*, 120 M.S.P.R. 285, ¶ 25, *citing Rusin v. Dep't of the Treas.*, 92 M.S.P.R. 298, ¶ 15-20. These include such things as a document providing instructions on the use of government credit cards, *Rusin*, and an agency rule proven by witness testimony rather than a written document against borrowing money from agency patients, *Chavez*. OSC should take the position that "rule" should be defined consistently under section 2302. Generally, the same words used in the same statute are presumed to have the same meaning, and there does not appear to be any indication of congressional intent to adopt a different meaning here. This is also the interpretation that affords broader statutory protection.

What constitutes an order is likely to be fairly context specific. Internally, in line with *Mullen* and *Rebstock*, OSC should interpret "order" to include only concrete, nondiscretionary instructions to take a particular action. In similar fashion, OSC should interpret protection under section 2302(b)(9)(D) to require actual refusal to comply with the order. If an individual complies with an order under threat of discipline, we would need to look closely at the factual context of the case to determine whether section 2302(b)(9)(D) protection applies, possibly for a threatened personnel action prior to compliance. For *amicus* purposes, OSC would need to carefully consider the circumstances before deciding to weigh in on this issue.

What if an employee reasonably but mistakenly believes complying with an order would violate a law, rule, or regulation? Internally, OSC should take the position that a mistaken, reasonable belief is not protected as a straightforward matter of statutory interpretation. The phrase "reasonably believes" appears five times in section 2302, in each instance protecting disclosures that are reasonably believed to evidence violations of law, rule, or regulation. In contrast, the phrase "law, rule, or regulation" appears without the text "reasonably believes" in section 2302(b)(6) regarding unauthorized preferences; section 2302(b)(12) regarding laws, rules, and regulations implementing merit system principles; and section 2302(b)(9)(D) regarding refusal to obey an order. The plain language of the statute, which consistently provides a reasonable belief standard *only* in the disclosure context, counsels against importing the reasonable belief standard here. As above, for *amicus* purposes, OSC would need to carefully consider the circumstances before deciding to weigh in on this issue.

Pending Cases

- *Hodge v. Dep't of Veterans Affairs*, 2018 WL 1146134 (March 2, 2018) (nonprecedential): AWG tracking but appears unlikely to appeal.
- *Hickey v. Dep't of Homeland Sec.*, 2017 WL 1848111 (M.S.P.B. May 4, 2017) (nonprecedential): The appellant ultimately obtained partial corrective action in a 2018 decision, 2018 WL 702264, and he has appealed the amount of attorney's fees to the Federal Circuit. It does not appear that the priority issue is implicated in the appeal.

D. Whether disclosures made prior to federal employment are protected under section 2302(b)(8).

Relevant Statutory Provisions

- 5 U.S.C. § 2302(f)(1)(F) provides: A disclosure shall not be excluded from subsection (b)(8) because the disclosure was made before the date on which the individual was appointed or applied for appointment to a position.

Relevant Background

With the passage of the OSC Reauthorization Act of 2017, Congress clarified that disclosures made before an individual became an employee or applicant are protected by the WPA. Prior to that clarification, the statute did not directly address this issue, but MSPB had ruled that such disclosures were protected. The following cases are instructive on this priority issue:

- *Cahill v. Dep't of Health & Human Servs.*, 2015 WL 1477814 (M.S.P.B. 2015), assumed that an appellant's disclosure made while he was a contractor was protected.
- *Weed v. Soc. Sec. Admin.*, 113 M.S.P.R. 221 (2010), held that "a whistleblower does not need to be an employee, an applicant for employment or a former employee at the time he made his protected disclosures."
- *Greenup v. Dep't of Agric.*, 106 M.S.P.R. 202 (2007), held that the "statute does not specify that the disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment. In the case of applicants for employment who were not federal employees at any time prior to their application, such a limitation would severely restrict any recourse they might otherwise have, since the disclosure would necessarily have to be made while their application was pending. We do not believe that Congress intended to grant such a limited right of review, when it determined to protect applicants for employment."

OSC's Recommended Position

OSC should argue, as it has in an *amicus* brief, that the WPA prohibits retaliation against whistleblowers who were not yet applicants or employees at the time they made disclosures. The opposite interpretation would severely limit the ability of applicants to obtain relief under the WPA. This position is supported by Board precedent and the Reauthorization Act. OSC should also argue, as it did in a supplemental letter to its *amicus* brief, that this provision of the Reauthorization Act applies to pending cases because it is a clarification of existing law.[11]

Pending Cases

- *Abernathy v. Dep't of the Army*, DC-1221-14-0364-W-1 (MSPB, *amicus* brief filed).

E. Asserting that disclosures about wrongdoing by non-federal government entities are protected under section 2302(b)(8).

Relevant Statutory Provisions

- 5 U.S.C. § 2302(b)(8) provides in pertinent part: This section prohibits taking a personnel action "because of any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences [] any violation of any law, rule, or regulation, or [] gross mismanagement, a gross waste of funds, and abuse of authority, or a substantial and specific danger to public health or safety."

Relevant Background

[11] OSC revised its memorandum on the retroactivity of the Reauthorization Act dated December 13, 2017, to be consistent with the recommended position here.

Section 2302(b)(8) broadly protects "any" disclosure of specified types of wrongdoing. In contrast to the clause that follows, which limits protection to federal employees or applicants who make disclosures, the description of the disclosure contains no limitation related to the actor committing the disclosed wrongdoing. Although the plain language of the statute does not include such a limitation, the legislative history of the Civil Service Reform Act, the WPA, and the WPEA reference protections for disclosures of *government* wrongdoing specifically. *See* S. Rep. No. 112-155 (2012), at 2 (referencing disclosures of "government illegality, waste, fraud, and abuse"); S. Rep. No. 100-413 (1988), at 1 ("government mismanagement or fraud"), 2 ("government wrongdoing or fraud"); S. Rep. No. 95-969, at 8 (1978) ("government illegality, waste, and corruption"). This has led to uncertainty regarding if, and under what circumstances, disclosures of wrongdoing by third parties are protected.

In *Arauz v. Department of Justice*, the Board held that disclosures of wrongdoing by private parties are protected "[w]hen the [federal] government's interests and good name are implicated." 89 M.S.P.R. 529, 533 (2001). In that case, the Board held that disclosures of alleged violations of state law by a private organization were protected because the organization performed functions within the federal agency's overall responsibilities and within its oversight. *Id.; see also Miller v. Dep't of Homeland Sec.*, 99 M.S.P.R. 175, 182-83 (2005) (disclosures that state agency personnel used excessive force during joint execution of search warrant with ICE are protected); *Johnson v. Dep't of Health & Human Servs.*, 93 M.S.P.R. 38, 43-44 (2002) (disclosures that agency official ignored private contractors' contract violations and illegal activity are protected); *Czarkowski v. Dep't of the Navy*, 87 M.S.P.R. 107 (2000) (disclosures that federal contractor failed to account for work it was being paid for and that agency officials ignored the issues are protected); *Voorhis v. Dep't of Homeland Sec.*, 116 M.S.P.R. 538 (2011) (disclosures regarding Denver DA's practices were not protected under *Arauz* standard); *Kennington v. Merit Sys. Prot. Bd.*, No. 2011-3192, 2011 WL 6157355 (Fed. Cir. Dec. 13, 2011) (disclosures about private companies' misconduct were not protected per *Arauz* standard); *Quinlan v. Dep't of Def.*, 2018 WL 494997 (M.S.P.B. Jan. 18, 2018) (nonprecedential) (disclosures that private companies overcharged agency and that agency ignored those improprieties are protected).

More recently, however, in *Aviles v. Merit Systems Protection Board*, the Fifth Circuit held that the WPA did not protect the appellant's disclosures of corporate tax fraud because that was "purely private wrongdoing," and his allegations that his supervisors had allowed or facilitated the wrongdoing were too vague and conclusory to constitute non-frivolous allegations of government wrongdoing. 799 F.3d 457, 464-67 (5th Cir. 2015). Although the court purported to affirm the Board's decision below, which distinguished *Arauz*, the Fifth Circuit did not address *Arauz* and created a narrower standard for protected disclosures. More specifically, the court held that only disclosures indicating "government complicity in private wrongdoing" are protected and that the appellant's disclosures did not meet that standard despite his allegations that his supervisors ignored his disclosures, directed him not to further divulge the information, and covered up the tax fraud. *Id.* While the Fifth Circuit narrowed the scope of protected disclosures, at the Board level, then-Vice Chair Wagner dissented, arguing for broader protection of disclosures of private wrongdoing without regard to the government interests and good name.

Since the Fifth Circuit did not address or overturn *Arauz*, it remains good law, but *Aviles* creates uncertainty about the circumstances in which disclosures of third-party wrongdoing are protected. A recent AJ decision held that disclosures about a federal government contractor not meeting its obligations *alone* are not protected but that overlapping disclosures criticizing the government oversight of the contractor are protected under *Arauz*. *See Brunson v. Dep't of Energy,* 2017 WL 1573507 (April 25, 2017).

Most recently, in *Considine v. Department of the Treasury*, PH-1221-17-0279-W-1 (Aug. 30, 2018), the appellant alleged that she was terminated in retaliation for disclosing improper private banking practices she reviewed as part of her job, as well as other wrongdoing by agency officials. Though the AJ ordered corrective action based on some of the appellant's protected disclosures and activity, the AJ held that certain disclosures about non-governmental wrongdoing were not protected. The agency filed a petition for review with MSPB and the appellant filed a cross-petition contesting the AJ's exclusion of her disclosures concerning non-governmental wrongdoing. The agency filed a brief in opposition to the appellant's cross-petition. OSC filed an *amicus* brief with MSPB in support of the appellant's cross-petition, arguing that the WPA protects a whistleblower's disclosure without any limitation based on the entity alleged to have committed the wrongdoing, particularly where the wrongdoing is uncovered as part of the whistleblower's federal employment. The petition for review remains pending.

OSC's Recommended Position

OSC should take the position most favorable to strong whistleblower protections. More specifically, the statute protects "any" disclosures of certain types of wrongdoing, and there is no statutory basis for limiting protection to wrongdoing committed by a federal government actor. Congress has repeatedly made clear its intent to provide broad protections for federal employees who disclose wrongdoing. Given the clear statutory language and intent to provide broad protections, passing references to "government" wrongdoing in legislative history should be taken as descriptive of typical claims, not intending to limit statutory protections. This position is easier to justify than *Arauz*, and it has the benefit of making *Arauz* the moderate position between OSC's view and the Fifth Circuit should the Board or relevant court be unwilling to adopt OSC's position.

Pending Cases

- *Brunson v. Dep't of Energy,* 2017 WL 1573507 (April 25, 2017), if Petition for Review was filed.
- *Considine v. Dep't of the Treas.*, PH-1221-17-0279-W-1 (MSPB, *amicus* brief filed).

F. Asserting that participation in fact-finding investigations is protected activity under section 2302(b)(9).

Relevant Statutory Provisions

- 5 U.S.C. § 2302(b)(9)(A) prohibits retaliation because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation."
- 5 U.S.C. § 2302(b)(9)(B) prohibits retaliation because of "testifying for or otherwise lawfully assisting any individual" in the exercise of any appeal, complaint, or grievance right.
- 5 U.S.C. § 2302(b)(9)(C) prohibits retaliation because of "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law" (as amended by the OSC Reauthorization Act of 2017).[12]

Relevant Background

[12] OSC's legislative analysis of this provision concluded that it should apply only to personnel actions that occur after December 12, 2017, the date of enactment of the Reauthorization Act.

The Reauthorization Act amended section 2302(b)(9)(C) by inserting "(or any other component responsible for internal investigation or review)" after the phrase "Inspector General" in the previous language of section 2302(b)(9)(C). On its face, this new language protects complainants who allege retaliation for any kind of cooperation with an agency investigation. The "cooperation" protected could take the form of "disclosing information" to the agency investigators, but appears to be broader. As with protected activity with OIGs, any individual who participates in any way in an internal investigation could be said to be "cooperating."

(1) Section 2302(b)(9)(C) covers participation in agency fact-finding investigations. This language in section 2302(b)(9)(C) was added after the decision in *Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434 (2016), exposed a significant gap in protection under the WPA. Specifically, the prior version of the statute failed to protect employees who participate in an administrative investigation board (AIB) or other similar agency inquiry despite the obvious similarities between that activity and others covered in section 2302(b)(9). In *Graves,* the Board concluded that participation in an AIB is not a protected activity under section 2302(b)(9)(B) "because it does not constitute an initial step toward taking legal action against the agency for a perceived violation of employment rights" and there is no indication "that the AIB is empowered to grant relief for any personnel action related to the investigation." 123 M.S.P.R. at 441-42 (2016).[13] Although the Board naturally addressed the VA's AIB process, most agencies have some mechanism for administrative investigations, which would have presumably also be excluded from protection based on the *Graves* decision, if not for the recent amendment to section 2302(b)(9)(C). Going forward, such activity will fit the definition of "cooperating with or disclosing information to … [a] component responsible for internal investigation or review," and therefore should be protected activity under the current language of section 2302(b)(9)(C).

(2) Section 2302(b)(8) continues to protect disclosures made in agency fact-finding investigations. Where a challenged personnel action predates the enactment of the Reauthorization Act, OSC may consider other theories for protecting employees who participated in an internal investigation. Where that participation amounted to actual or perceived whistleblowing, a straightforward application of section 2302(b)(8) may be the best option. That appears to be exactly the analysis employed in *McDonald v. Department of Veterans Affairs*, DE-0714-17-0409-I-1, 2018 WL 494983 (Jan. 16, 2018). The personnel actions in that case occurred before the Reauthorization Act, but the AJ found the appellant's "participation in the fact finding … amounted to a protected disclosure." *McDonald*, 2018 WL 494983. Under the AJ's analysis, the appellant was also implicitly a perceived whistleblower under section 2302(b)(8) as well.

OSC's Recommended Position

OSC should consider filing an *amicus* brief if the Board fails to expansively apply the revised language in section 2302(b)(9)(C) to find that any form of participation in or assistance to an AIB or similar investigative body is "cooperation," and therefore protected activity. We should similarly consider filing in a case if the Board seeks to limit or restrictively define what "component responsible for internal investigation or review" means under section 2302(b)(9)(C). In appropriate cases, we should also argue that an appellant's disclosures to an internal investigation or review should be protected under section 2302(b)(8), or that cooperation with an internal investigation

[13] The Reauthorization Act did not directly overrule *Graves*, in that it amended section 2302(b)(9)(C) while *Graves* analyzed section 2302(b)(9)(B).

resulted in perceived whistleblowing even absent any protected disclosures, consistent with the decision in *McDonald*.

Similarly, if the straightforward application of the revised section 2302(b)(9)(C) and of section 2302(b)(8) do not ensure that cooperation with internal investigations is protected, we should continue to advance our argument that participation in an internal investigation is covered under section 2302(b)(10), which prohibits discrimination based on conduct that does not adversely affect performance. In *Merritt v. Department of Justice*, 6 M.S.P.R. 585 (1981), *abrogated on other grounds by Kruger v. Department of Justice*, 31 M.S.P.R. 71 (1987), the Board concluded that, to demonstrate an adverse effect on performance, there must be a nexus between the conduct and the efficiency of the service. Assuming an employee's AIB testimony is truthful, participation in a fact-finding effort would *advance* the efficiency of the service, not impede it.[14] Because agencies are unlikely to demonstrate that participation in a fact-finding investigation adversely affects performance, OSC should seek to protect employees from retaliation for participation in an AIB, if necessary, under section 2302(b)(10).

Pending Cases

- In *Mohler v. Department of Homeland Security*, Docket No. CH-1221-18-0119-W-2, 2019 WL 1242609 (March 13, 2019), the AJ decided that the agency's Computer Security Incident Response Center (CSIRC) is not a "component responsible for internal investigation or review" because "[t]he CSIRC does not investigate the agency; it investigates internal complaints and issues." OSC is drafting an *amicus* brief to argue that the phrase "component responsible for internal investigation or review" should be interpreted broadly to include units responsible for investigation of internal complaints and issues.

G. Determining the appropriate use and standard of proof required for section 2302(b)(10) claims and asserting that coverage is not limited to off-duty conduct.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(b)(10) prohibits discrimination "on the basis of conduct which does not adversely affect the performance of the employee … or the performance of others[.]"

Relevant Background

The scope of section 2302(b)(10) is wide, prohibiting discrimination on the basis of any and all conduct not adversely affecting employee work performance, or the performance of other employees. There are two open questions for OSC to consider in the context of this PPP. First, which legal framework should be used to assess a section 2302(b)(10) claim? And second, does section 2302(b)(10) protect on-duty conduct that does not affect performance?

(1) First, though the Board has not determined how it will analyze section 2302(b)(10) allegations, it has set forth two possibilities for use in future cases. In *MacLean v. Department of*

[14] This analysis may present an opportunity to revisit *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569 (1991), a Board decision that restricts the scope of section 2302(b)(10) to off-duty conduct. An AIB retaliation case could be a good vehicle to seek clarification on this point. It is on-duty conduct that promotes the efficiency of the service, which is a more compelling narrative than the misconduct-based section 2302(b)(10) claims that OSC occasionally receives (*e.g.*, arguments and arrests).

Homeland Security, it noted that to prove a violation of section 2302(b)(10), the complainant must show by "preponderant evidence that he engaged in conduct that did not adversely affect his performance and that the agency intentionally discriminated against him for that conduct." 116 M.S.P.R. 562, 575 (2011). Depending on the facts and circumstances in a case, a section 2302(b)(10) claim may follow one of two legal proof routes: (1) the prohibition against retaliation for exercising appeal rights and filing grievances found at section 2302(b)(9); or (2) a traditional claim of discrimination under Title VII. *See id.* at 574.

Though it predates *MacLean*, the Board's decision in *Beam v. Office of Personnel Management*, 66 M.S.P.R. 469 (1995), suggests that the Board may be inclined to apply a Title VII framework to section 2302(b)(10) claims. *Beam* did not specifically involve section 2302(b)(10), but it arose under a similar OPM regulation prohibiting discrimination on the basis of a non-merit factor under 5 C.F.R. § 300.103(c). In determining whether an employee suffered discrimination under this regulation, the Board expressly applied the burden of proof used for Title VII discrimination cases. The Board may also be more likely to adopt the Title VII approach to ensure consistency with EEOC, which has concluded that sexual orientation discrimination is always sex discrimination.[15] *See, e.g.*, *CP v. Foxx, Sec'y, Dep't of Transp. (FAA)*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015) (concluding that "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.").

OSC published a PPP report in *Lusardi v. Department of the Army*, MA-11-3846, finding that the facts and circumstances in that gender-identity discrimination case were more analogous to a traditional Title VII claim than to a section 2302(b)(9) claim. OSC thus consulted relevant EEO law to establish the proper legal framework for analyzing the complainant's discrimination claim under section 2302(b)(10).

(2) As to the question regarding on-duty conduct, the Board has been somewhat inconsistent. In *Special Counsel ex rel. Mullin v. Department of Housing & Urban Development*, 11 M.S.P.R. 382 (1982), the Board found reasonable grounds to believe reassignments were based on conduct that did not adversely affect performance, namely employees' on-duty participation in foreclosures on properties once managed by their regional director. However, the Board subsequently held, without addressing *Mullin*, that the prohibitions of section 2302(b)(10) apply only to "off-duty non-job related conduct." *Thompson v. Farm Credit Admin.*, 51 M.S.P.R. 569, 585 (1991). The Board reached this result based on a single statement in a legislative mark-up session related to section 2302(b)(10), and dicta in a D.C. Circuit decision. *Id.* at 585 (quoting legislative history); *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cir. 1988) (holding that section 2302(b)(10) does not create a protected property interest in a federal job). Neither of these comments were squarely on point, however, and there is no logical reason for concluding that conduct not adverse to performance occurs only off-duty. Moreover, in *Thompson* it appears that the relevant conduct was squarely-related to the performance of the appellant's job, so the holding as to "off-duty" conduct is arguably dicta in that case as well.

OSC's PPP report in *Lusardi* suggests that conduct that occurs on duty but does not affect job performance is protected. The discrimination that OSC found included the employer's restriction of the employee's access to the women's restroom at work and her supervisor's use of male pronouns and her birth name in reference to her. Failure to protect on-duty conduct could

[15] In October 2019, the Supreme Court heard oral argument in three cases addressing whether Title VII's prohibition on sex discrimination protects against discrimination based on sexual orientation and gender identity. *See Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018 *en banc*); *Bostock v. Clayton Cty, GA*, 723 F. App'x 965 (11th Cir. 2018); *R.G.&G.R. Harris Funeral Home, Inc. v. EEOC*, 884 F.3d 560 (6th Cir. 2018). We expect a decision next year.

render sexual orientation and gender identity protections largely meaningless, for example by exposing employees to discrimination for displaying photographs of a same-sex spouse or asking coworkers to use the gender pronoun appropriate to their identity.

OSC's Recommended Position

On a case-by-case basis, OSC should evaluate which framework—Title VII or section 2302(b)(9)—is appropriate for a section 2302(b)(10) claim based on factual circumstances. In addition, OSC should argue that section 2302(b)(10) applies to non-performance related conduct regardless of whether the conduct occurred "on duty" or "off duty." In other words, we should look for opportunities to repudiate or clarify *Thompson*.

Pending Cases

- None known.

H. Asserting that the "cat's paw" theory of liability is available in section 2302(b)(8), (b)(9), and (b)(10) claims.

Relevant Statutory Provisions

- 5 U.S.C. § 2302(b)(8) prohibits retaliation for whistleblowing (making protected disclosures).
- 5 U.S.C. § 2302(b)(9) prohibits retaliation for engaging in protected activity.
- 5 U.S.C. § 2302(b)(10) prohibits discrimination based on conduct not adversely affecting job performance.

Relevant Background

In 2011, the Supreme Court applied the cat's paw theory to a USERRA case, *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). In *Staub*, the Court found liability where a management official acted with improper animus and influenced another agency official who was unaware of the protected activity when taking a personnel action. Specifically, the Court determined that if a supervisor performs an act motivated by discriminatory animus that is intended to cause an adverse employment action, and if that act is the proximate cause of the employment action, then the employer will be liable under USERRA.

About a year later, the Board applied the cat's paw theory to a section 2302(b)(8) corrective action case, citing *Staub*. In *Dorney v. Department of the Army*, 117 M.S.P.R. 480 (2012), the Board held that an appellant can establish constructive knowledge by demonstrating that an agency official with actual knowledge influenced the individual accused of taking the retaliatory action. The Board also noted that the Supreme Court used the term "cat's paw" to describe a situation where a management official acts with improper animus and influences another agency official who is unaware of the protected activity when implementing the personnel action. In *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35 (2014), the Board held that the cat's paw theory can be used to demonstrate that animus toward a whistleblower was a contributing factor in a personnel action. Specifically, the appellant can show by preponderant evidence that an individual with knowledge of the appellant's protected disclosure influenced the deciding official accused of taking the personnel action. Expanding on those decisions, an AJ recently concluded that the cat's paw theory applies where a proposing or deciding official knew or should have known that he was acting based on information

from a retaliating individual. *See McDonald v. Dep't of Veterans Affairs*, DE-0714-17-0409-I-1, 2018 WL 494983 (Jan. 16, 2018). *See also Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 273-74 (1st Cir. 2014) (holding that employer would be liable if co-worker committed discriminatory act that influenced ultimate employment decision); *Vasquez v. Empress Ambulance Serv. Inc.*, 835 F.3d 272, 274-75 (2d Cir. 2016) (same, citing *Velazquez-Perez*); *Haire v. Bd. of Supervisors*, 719 F.3d 356, n.11 (5th Cir. 2013) (same holding).

The Federal Circuit also reversed and remanded a whistleblower retaliation claim for errors in analyzing the *Carr* factors in a case involving a possible cat's paw issue. *See Miller v. Dep't of Justice*, 842 F.3d 1252 (2016). Although the court did not cite to the cat's paw theory, Circuit Judge Reyna, concurring, explained that the Board erred in failing to consider the appellant's theory that OIG influenced his supervisor to reassign him because of his protected disclosures. Judge Reyna noted that although the court had not before addressed the cat's paw theory, the Supreme Court had applied it in *Staub*.

OSC's Recommended Position

OSC should argue that the cat's paw theory should be applied in appropriate cases, including circumstances where non-supervisory coworkers or external third parties (*e.g.*, customers, contractors, tribes, non-governmental entities) with knowledge of the complainant's protected activity influence a supervisor to take an adverse personnel action. *See* 2015 PPP report in *Eckiwaudah v. Dep't of the Interior*, MA-13-1212.

Pending Cases

- None known.

I. Mandatory proposed discipline for supervisors who retaliate.

Relevant Statutory Provisions

- 5 U.S.C. § 7515, a new section of title 5,[16] requires that if an agency head, a judge or ALJ, OSC, the Board, or an IG finds that a supervisor takes or fails to take an action that violates section 2302(b)(8), (b)(9), or (b)(14), the agency must propose at least a three-day suspension as discipline for the first violation and must propose removal for any subsequent violation.
- 5 U.S.C. § 1214(f) provides that agencies may not discipline employees for any alleged prohibited activity related to an OSC investigation without OSC's approval.
- 5 U.S.C § 1215 provides that disciplinary actions under the WPA require that whistleblowing activity under section 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D) be a significant motivating factor in the retaliation leading to discipline.

[16] Section 104 of the Dr. Chris Kirkpatrick Act of 2017 amended Subchapter II of chapter 75 of title 5 to include section 7515. Section 1097(e) of the OSC Reauthorization Act of 2017 superseded section 104 of the Kirkpatrick Act. Because section 7515 is a substantive change to prior law, OSC should apply this provision prospectively to personnel actions occurring after the date of enactment of the Kirkpatrick Act.

- 5 U.S.C. §§ 7503, 7513, and 7543 discuss the procedural due process for suspensions less than 15 days, for adverse actions, and for disciplinary actions taken against SES employees, respectively.

Relevant Background

Prior to the recent enactment of section 7515, agencies were authorized to discipline supervisors who engage in whistleblower retaliation, but there was no authority mandating that discipline be proposed. This substantive change to the law carries with it procedural changes to the due process rights of employees subject to disciplinary and other adverse actions. Section 7515(b)(2) removes the requirement for agencies to provide 30 days advance notice of the action; specifies that supervisors have 14 days, exactly, to respond to the proposed action; and limits other procedural rights, for example removing the right to request a hearing in lieu of or in addition to furnishing a written response.

Although this new provision in some ways enhances disciplinary action authority, it is narrower than section 1215 in some respects. It does not contemplate discipline for supervisors who threaten personnel actions, and it does not apply to all PPPs. Rather, section 7515 defines prohibited personnel action as "taking or failing to take" an action in violation of section 2302(b)(8), (b)(9), or (b)(14). The inclusion of the new PPP for unauthorized access to medical records is notable as other PPPs not based on protected disclosures or actions are excluded.[17]

OSC's Recommended Position

Because section 7515 is new, it is unclear what types of legal questions will arise and in what context. Should procedural questions arise, OSC should take the position that normal procedures under section 7503, 7513, or 7543, as relevant, apply except where expressly abrogated by section 7515.

Questions may arise regarding the interplay of section 1215 and section 7515. Where OSC seeks discipline for a violation of section 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D) under section 1215, it must demonstrate that the whistleblowing activity was a significant motivating factor in the retaliation, but the plain language of section 7515 suggests that OSC's finding that a supervisor violated section 2302(b)(8), (b)(9), or (b)(14) triggers application of section 7515, without regard to whether the whistleblowing was a significant motivating factor in the personnel action. If the applicability of the significant motivating factor arises, OSC should argue that these are distinct statutory disciplinary authorities and each should be read and applied according to its terms under the relevant section—*i.e.*, that the requirement does not apply under section 7515 but nonetheless continues to apply if OSC seeks discipline under section 1215.

There may be questions about what constitutes a finding triggering the application of section 7515. With respect to OSC, we should take the position that a formal PPP report includes OSC's findings. Whether or not actions less than a formal PPP report—such as a draft PPP report to the agency, a letter or memorandum to the agency, or oral briefing to the agency—constitute a finding

[17] Since retaliation for contacting Congress is likely to be addressed under section 2302(b)(12), it appears this new mandatory discipline provision would not encompass such an action.

will be less clear. However, based on the statutory language, it appears that an agency head is permitted to make a finding of a prohibited personnel action based on OSC's analysis in an informal memorandum or draft PPP report. OSC will need to carefully consider the specific facts of an individual case in deciding whether and how to weigh in on particular cases.

Regarding to whom section 7515 applies, there are several questions, including: (1) what if a PPP report finds a violation of section 2302(b)(8), (b)(9), or (b)(14), but does not attribute the prohibited personnel action to a specific supervisor, particularly where responsibility for the action is diffuse or culpability is otherwise difficult to ascertain; and (2) that if there are several wrongdoers involved—should they all be disciplined? This provision applies to Board findings as well, but the Board similarly may find a violation of section 2302(b)(8) or (b)(9) without allocating fault. Here too, OSC will need to carefully consider the specific facts of an individual case in deciding whether and how to weigh in on particular cases.

Additionally, while section 7515 requires agencies to propose discipline for supervisors who are determined to have engaged in whistleblower retaliation, an agency could presumably mitigate the proposed suspension or removal to shield a high-ranking supervisor from discipline. However, section 7515 is expressly subject to section 1214(f), so OSC should take the position that agencies may propose discipline under section 7515 but not impose or mitigate it without OSC's approval under section 1214(f). The requirement for agencies to report to Congress on unacceptable performance in the protection of whistleblowers may further encourage agencies to take appropriate action rather than risk a congressional inquiry.

Pending Cases

- None known.

OSC STRATEGIC PLAN (2017-2022)

Mission: *Safeguarding employee rights, holding government accountable.*
Vision: *Fair and effective government inspiring public confidence.*

Strategic Goals

1. ***Protect and promote the integrity and fairness of the federal workplace.***
   Objective 1: Fairly and promptly investigate and prosecute cases.
   Objective 2: Obtain timely and effective relief in cases.
   Objective 3: Enhance strategic use of enforcement authority.
   Objective 4: Provide time and quality Hatch Act advisory opinions and guidance.
   Objective 5: Expand training and outreach efforts nationwide.
   Objective 6: Effectively and innovatively communicate with stakeholders and the public.

2. ***Ensure government accountability.***
   Objective 1: Provide employees with an effective and efficient safe channel to report government wrongdoing.
   Objective 2: Ensure agencies provide timely and appropriate outcomes for referred whistleblower disclosures.
   Objective 3: Enhance awareness of outcomes of referred whistleblower disclosures.

3. ***Achieve organizational excellence.***
   Objective 1: Recruit, develop, and retain a highly talented, engaged, and diverse workforce.
   Objective 2: Improve the use of existing technology and deploy new IT systems to enhance organizational operations.
   Objective 3: Monitor, evaluate, and improve efficiency and effectiveness of programs and processes.

Core Values

Commitment
We are dedicated to seeking justice through the enforcement of laws that OSC is charged with prosecuting and to being a safe channel for whistleblowers.

Excellence
We foster a model workplace with respect for employees and stakeholders, and provide clear, high-quality, and timely work product in our programs and services.

Independence
We conduct our work free from outside influence. We act fairly and without bias to honor the merit system.

Integrity
We adhere to the highest legal, professional, and ethical standards to earn and maintain the public's trust.

Vigilance
We aim for proactive and constant improvement of both our own processes and of the merit system. We strive to identify innovative and effective ways to address and prevent government wrongdoing.

STRATEGIC PLAN
(FY 2017-2022)

U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036-4505

Table of Contents

Message from the Special Counsel.....3

Introduction.....4

About OSC.....5
Background
Mission and Responsibilities
Organizational Structure

Strategic Planning Process.....8

Mission, Vision, Strategic Goals, and Core Values.....11

Strategic Goals, Objectives, Strategies, Data Points, and Metrics.....12
1. *Protect and promote the integrity and fairness of the federal workplace.*
2. *Ensure government accountability.*
3. *Achieve organizational excellence.*

Factors Affecting Achievement of Strategic Plan.....21

Appendices.....23
Appendix A – OSC Organizational Chart
Appendix B – OSC Strategic Planning Team

Message from the Special Counsel

I am pleased to release the U.S. Office of Special Counsel's Strategic Plan for Fiscal Years 2017-2022. This Strategic Plan—the result of considerable introspection and invaluable external feedback—deploys a new set of strategies for carrying out OSC's statutory mandate.

Five core values shape our agency culture, guide our daily work, and undergird this new plan: Commitment, Excellence, Independence, Integrity, and Vigilance. In keeping with these values and aided by this new plan, my OSC colleagues and I stand ready to do our part to help foster a government that treats its employees fairly and inspires public confidence.

This Strategic Plan departs from our previous plan in some significant ways. For example, because we have made gains in recent years in obtaining important relief for victims of whistleblower retaliation and other prohibited activities, there is less emphasis now on restoring the federal community's trust in OSC. Instead, with this plan, we now place greater focus on using our limited resources in innovative, targeted, and strategic ways to enhance effective enforcement and increase communication with stakeholders.

This Strategic Plan employs a more holistic approach to proactive enforcement of the laws under our jurisdiction. It also prioritizes the importance of organizational excellence and customer service. For instance, it stresses improving ways to recruit and retain a talented and diverse workforce, an asset indispensable to our efforts to safeguard employee rights and hold the government accountable.

In short, this Strategic Plan builds on OSC's past successes and challenges us to do more. Of course, the plan's success will depend largely on how we implement it. In this regard, OSC will rely on the efforts of approximately 140 dedicated personnel, located at headquarters in Washington, DC, as well as in three field offices in Oakland, Dallas, and Detroit. OSC staff and I look forward to working with our stakeholders and partners as we transform this plan into tangible results for the American people.

Carolyn Lerner

Carolyn N. Lerner
Special Counsel

Introduction

Over the past five years, the U.S. Office of Special Counsel (OSC) has vigorously enforced its mandate to protect federal employees, applicants, and former employees from various unlawful employment practices, including retaliation for whistleblowing, and to hold the government accountable by providing a safe and secure channel for whistleblower disclosures. OSC has worked to restore confidence in OSC within the federal community and among stakeholders. The success stories and statistics paint a clear picture: the positive outcomes and impact that OSC has obtained far surpass the agency's performance in past periods.

As the federal workforce's trust in OSC's ability to obtain corrective action has grown, the demand for OSC's services has hit record levels. Since 2010, the agency's workload has risen 58 percent with significant increases across all program areas, especially prohibited personnel practice complaints. Accordingly, OSC has had to be strategic in addressing the burgeoning workload. OSC has met these challenges, achieving a record number of favorable results. For example, in direct response to a dramatic surge in cases involving risks to the health and safety of patients at medical facilities in the Department of Veterans Affairs, OSC initiated a holistic approach that resulted in quicker and better resolutions. These cases have shed light on and helped correct systemic challenges at medical facilities across the country. They have also provided much-needed corrective action for victims of whistleblower retaliation. Moreover, OSC has augmented government accountability by securing disciplinary action against scores of officials at various agencies for violations of civil service laws.

In addition, OSC has boosted efforts to increase education and outreach to the federal community with the goal of preventing and deterring violations of civil service laws in the first instance. Most significantly, OSC recently reinvigorated the 2302(c) Certification Program, which agencies may use to provide statutorily-mandated training on whistleblower rights and remedies to their employees. OSC also has started to publish reports of its investigatory findings (in redacted format) when doing so may serve an educational purpose. For example, in 2014, the agency published a report on a case of first impression, finding that an agency violated civil service laws when it unlawfully discriminated against a transgender employee. Equally important, OSC has improved communication with all of its federal stakeholders through its revamped website and enhanced use of social media.

Finally, OSC has worked with partners in Congress to modernize the laws it enforces, allowing OSC to be more effective in its role as a watchdog and guardian of employee rights. For example, in 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA), which overturned several legal precedents that had narrowed protections for federal whistleblowers, provided whistleblower protections to employees who were not previously covered, and restored OSC's ability to seek disciplinary actions against agency officials who retaliate against whistleblowers. That same year, Congress passed the Hatch Act Modernization Act (HAMA), which modified the law to provide a range of possible disciplinary actions for federal employees, permitted state and local government employees to run for partisan political office unless the employee's salary is entirely funded by the federal government, and changed the status of DC government employees from federal employees to state and local government employees.

While OSC's recent achievements are significant, broad challenges remain and new ones have developed. Building on the successes already obtained over the last five years, OSC stands ready to meet these challenges.

About OSC

Background

OSC is an independent federal investigative and prosecutorial agency. Its basic enforcement authorities come from several federal statutes: the Civil Service Reform Act (CSRA), as amended by the Whistleblower Protection Act (WPA); the Hatch Act; and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

OSC's roots lie in the reform efforts of Gilded Age America. In 1883, Congress passed the Pendleton Act, creating the Civil Service Commission, which was intended to help ensure a stable, highly qualified federal workforce free from partisan political pressure. Nearly a century later, in the wake of the Watergate scandal and well-publicized allegations of retaliation by agencies against employees who had blown the whistle on wasteful defense spending and revelations of partisan political coercion in the federal government, Congress enacted sweeping reform of the civil service system in 1978. As a result, the CSRA replaced the Civil Service Commission with the Office of Personnel Management (OPM), the Federal Labor Relations Authority, and the Merit Systems Protection Board (MSPB), with OSC serving as the investigative and prosecutorial arm of the MSPB for the next decade.

In 1989, Congress passed the WPA, making OSC an independent agency within the federal executive branch. The WPA also strengthened protections against retaliation for employees who disclose government wrongdoing and enhanced OSC's ability to enforce those protections. Ensuing legislation such as the WPEA and HAMA—both passed in 2012—has significantly affected the agency's enforcement responsibilities.

Mission and Responsibilities

OSC's mission is to safeguard employee rights and hold the government accountable. To achieve this mission and promote good government in the federal executive branch, OSC's obligations are, broadly speaking: (1) to uphold the merit system by protecting federal employees, applicants, and former employees from prohibited personnel practices, curbing prohibited political activities in the workplace, and preserving the civilian jobs of federal employees who are reservists and National Guardsmen; and (2) to provide a safe channel for federal employees, applicants, and former employees to disclose wrongdoing at their agencies. These two responsibilities work in tandem to maintain the integrity and fairness of the federal workplace and to make the government more accountable.

CSRA – Prohibited Personnel Practices

The federal merit system refers to laws and regulations designed to ensure that personnel decisions are made based on merit. Prohibited personnel practices (PPPs) are employment-related activities that are banned because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles. OSC has the authority to investigate and prosecute violations of the 13 PPPs in the CSRA, as amended.

CSRA – Whistleblower Disclosures

In addition to protecting whistleblowers from retaliation, the CSRA created OSC as a safe channel for most federal workers to disclose information about violations of laws, gross mismanagement or waste of funds, abuse of authority, and substantial and specific dangers to public health and safety. Through its oversight of government investigations of these whistleblower disclosures, OSC regularly reins in waste, fraud, abuse, illegality, and threats to public health and safety that pose the risk of catastrophic harm to the public and large remedial and liability costs for the government.

Hatch Act

The Hatch Act, passed in 1939, limits certain political activities of federal employees, as well as some state, DC, and local government employees who work in connection with federally-funded programs. The law was intended to protect federal employees from political coercion, to ensure that federal employees are advanced based on merit rather than political affiliation, and to make certain that federal programs are administered in a non-partisan fashion. OSC has the authority to investigate and prosecute violations of, and to issue advisory opinions under, the Hatch Act.

USERRA

USERRA, passed in 1994, protects military service members and veterans from employment discrimination on the basis of their service, and allows them to regain their civilian jobs following a period of uniformed service. OSC has the authority to litigate and otherwise resolve USERRA claims by federal employees referred from the Department of Labor.

Organizational Structure

OSC is headquartered in Washington, DC. It has three field offices located in Dallas, Texas; Detroit, Michigan; and Oakland, California. The agency includes the following components:

- *Immediate Office of Special Counsel (IOSC).* The Special Counsel and IOSC are responsible for policy-making and overall management of OSC. This responsibility encompasses supervision of the agency's congressional liaison and public affairs activities.

- *Complaints Examining Unit (CEU).* This unit receives complaints alleging PPPs. CEU reviews and examines each PPP complaint to determine if it is within OSC's jurisdiction and, if so, whether the matter can be resolved at that stage or should be referred for mediation, further investigation, or prosecution.

- *Investigation and Prosecution Division (IPD).* This division is comprised of the headquarters office and three field offices, and is primarily responsible for investigating and prosecuting PPPs. IPD determines whether the evidence is sufficient to establish that a violation has occurred and, if so, whether the matter warrants corrective action, disciplinary action, or both. If a meritorious case cannot be resolved informally, IPD may bring an enforcement action before the MSPB.

- *Hatch Act Unit (HAU).* This unit investigates and resolves complaints of unlawful political activity under the Hatch Act, and may seek corrective and disciplinary action informally as well as before the MSPB. HAU also provides advisory opinions under the Hatch Act.

- *USERRA Unit.* This unit reviews and resolves USERRA complaints by federal employees referred by the Department of Labor. The unit also may represent service members in USERRA appeals before the MSPB.

- *Alternative Dispute Resolution (ADR) Unit.* This unit supports OSC's other program units by providing mediation and other forms of ADR services to resolve appropriate cases. Where the parties agree to mediation, the unit conducts mediation sessions seeking creative and effective resolutions.

- *Disclosure Unit (DU).* This unit reviews whistleblower disclosures of government wrongdoing. DU may refer a whistleblower disclosure to the agency to investigate and report its findings to OSC. For referred whistleblower disclosures, DU reviews each agency report for sufficiency and reasonableness, and then OSC sends the determination, the agency report, and any comments by the whistleblower to the President and responsible congressional oversight committees.

- *Retaliation and Disclosure Unit (RDU).* This unit handles hybrid cases in which a single complainant alleges both whistleblower disclosures and retaliation. OSC created RDU to streamline its processes and provide a single point of contact for complainants with multiple claims. RDU performs the full range of action in these cases, including the referral of whistleblower disclosures to agencies and the investigation and prosecution of related retaliation claims, where appropriate.

- *Diversity, Outreach, and Training Unit*. This unit facilitates coordination with and assistance to agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c), which requires that agencies inform their workforces about whistleblower rights and remedies. The unit also provides external education and outreach sessions for the laws that OSC enforces, as well as develops and implements internal Equal Employment Opportunity and other skill-based training programs for OSC's staff.

- *Office of General Counsel*. This office provides legal advice regarding management, policy, and administrative matters, including the Freedom of Information Act, the Privacy Act, and the ethics programs. The office also defends OSC's interests in litigation filed against the agency.

- *Administrative Services Division*. This division manages OSC's budget and financial operations, and accomplishes the technical, analytical, and administrative needs of the agency. Component units include the Finance Branch, the Human Capital Office, the Administrative Services Office, and the Information Technology (IT) Branch.

An organizational chart for OSC may be found in Appendix A.

Strategic Planning Process

Congress requires that Executive Branch agencies develop and post strategic plans on their public websites. The strategic planning process offers an opportunity for an agency to reflect on its statutory mission and mandates, reassess prior goals and objectives, and identify new goals and objectives that will enable the agency to fulfill its mission and vision. This process—and the resulting strategic plan—also serves to notify Congress and stakeholders of major factors that may affect the agency's ability to meet its statutory obligations.

In April 2016, Special Counsel Carolyn N. Lerner launched the strategic planning process for OSC. To be successful, this strategic planning effort sought input from OSC employees as well as key stakeholders from outside the agency. Accordingly, Ms. Lerner assembled a Strategic Planning Team that is diverse and representative of the entire agency to work on this project. She also tasked Associate Special Counsel Louis Lopez with leading the agency's efforts to develop the new strategic plan. A full list of participants may be found in Appendix B.

This Strategic Planning Team met regularly over six-months to conduct an organizational review of OSC's programs and services, and then identify new strategic goals, objectives, strategies, and metrics for the strategic plan. OSC also set up a page on its intranet to provide all agency personnel with information and to solicit feedback during the strategic planning process.

In August 2016, OSC posted a draft of the strategic plan on OSC's intranet and external website for public comment by employees and stakeholders. The agency also delivered the draft strategic plan to OSC's oversight and appropriations committees in Congress. OSC held meetings

regarding the draft strategic plan with its employees, the Office of Management and Budget, staff from the agency's congressional oversight and appropriations committees, and stakeholders.

OSC received 12 substantive comments from internal and external stakeholders in writing as well as during the scheduled meetings: five submissions from employees, and seven submissions from good government groups, a federal management association, a public sector union, and a private citizen. Comments that went beyond the scope of the draft strategic plan were reviewed and considered generally.

OSC received several comments regarding its investigation and prosecution functions. Some comments lauded OSC's efforts to apply consistent standards of review and investigative procedure to our cases involving PPPs, the Hatch Act, and USERRA. Of course, OSC utilizes a different statutory scheme for agency investigations and reports of referred whistleblower disclosures. Generally, comments expressed support for OSC's proposed working group charged with improving the efficiency of case handling procedures, including looking for ways to be more responsive to complainants and agency representatives during OSC's investigation process. OSC has already undertaken some efforts in this area. For example, OSC currently obtains early resolution in appropriate cases without a formal referral from CEU to IPD and without a formal written settlement agreement (instead opting to memorialize these resolutions in letters to the parties). In its press releases, annual reports, and performance and accountability reports, OSC also provides case narratives showcasing the qualitative results in successful resolutions. OSC will engage stakeholders on how the agency can share more data and related case information in the future to provide a better context within which to evaluate its performance.

Some comments suggested OSC provide more information regarding its use of ADR and litigation to resolve cases. The agency currently provides mediation information on its website, during training and outreach presentations, and in meetings with parties interested in early dispute resolution of their cases. OSC also will soon release a video explaining how mediation fits into its overall case processing system. In the same vein, OSC—like most parties to legal disputes—seeks to resolve meritorious cases without resorting unnecessarily to lengthy, expensive, and protracted litigation. To balance its roles of effective enforcer of the merit system and efficient steward of taxpayer dollars, OSC will continue to look for strategic ways to enhance public enforcement and development of the law through publicized PPP reports, *amicus curiae* briefs filed with the MSPB and the federal courts, and litigation in cases that do not achieve voluntary resolution by the parties.

Some comments applauded OSC's efforts to expand training and outreach efforts nationwide, and offered specific suggestions for OSC's 2302(c) Certification Program. In response to the comments, OSC notes that it currently posts a list of 2302(c)-certified agencies on its website, which provides an incentive for agencies to provide the mandated training on whistleblower rights, including those related to scientific integrity. However, OSC has no authority to penalize agencies for non-compliance. OSC's current training and outreach programs also emphasize the important role that federal employees can play in reporting government waste, fraud, and abuse. If there are developments in the federal employee whistleblower laws, OSC will consider appropriate changes to its 2302(c) Certification Program. Finally, while OSC's training and outreach programs offer in-depth and interactive exercises to agencies, OSC looks forward to receiving ongoing feedback from stakeholders to evaluate and improve these efforts.

OSC also received several comments regarding its role of providing a safe channel to report government wrongdoing, primarily with respect to the timeliness of the process. OSC is striving to reduce the amount of time it takes between referral of whistleblower disclosures to an agency for investigation and the publication of the results of that investigation. Timeliness is difficult to assess in a standardized way because it depends on a variety of factors. For example, many whistleblower disclosures are complex and technical in nature and, by statute, whistleblowers may review and comment on the agency's report. Throughout the process, OSC communicates with the whistleblower and the agency and thoroughly analyzes the agency's report and the whistleblower's comments to ensure the agency's findings are reasonable and contain all of the required information. OSC will seek to continue to streamline the process without sacrificing quality and complete reports on referred whistleblower disclosures.

Finally, OSC received a limited number of comments regarding its internal operations and efforts at achieving organizational excellence. In response to these comments, the agency expanded its strategy to identify best practices from all agency programs, as opposed to only from certain ones. One submission suggested OSC consider having an ombudsperson to handle internal and external stakeholder disputes. In recent years, OSC has implemented several mechanisms to communicate better with employees, keep staff engaged, and resolve workplace disputes. These efforts have been well-received. In addition, OSC has been successful in working closely with external governmental and non-governmental stakeholders on the agency's work, including promptly responding to concerns brought to OSC's attention. Nevertheless, the agency will consider this recommendation as it moves forward with the implementation of the strategic plan.

On September 27, 2016, OSC's final strategic plan was approved by the Special Counsel. Implementation of the new strategic plan will begin October 1, 2016.

Mission, Vision, Strategic Goals, and Core Values

Mission: *Safeguarding employee rights, holding government accountable.*

Vision: *Fair and effective government inspiring public confidence.*

Strategic Goals:

1. ***Protect and promote the integrity and fairness of the federal workplace.***
2. ***Ensure government accountability.***
3. ***Achieve organizational excellence.***

OSC's Mission states: "Safeguarding Employee Rights, Holding Government Accountable." Strategic Goals 1 and 2, which focus on the agency's substantive program areas, work closely together to achieve a more responsible and merit-based federal government. Strategic Goal 3, which focuses on OSC's efforts to achieve organizational excellence, has the building blocks to make the agency a more agile, better-functioning organization. Collectively, all three Strategic Goals will help OSC to realize its Vision, which is "Fair and Effective Government Inspiring Public Confidence."

Core Values:

Commitment: *We are dedicated to seeking justice through the enforcement of laws that OSC is charged with prosecuting and to being a safe channel for whistleblowers.*

Excellence: *We foster a model workplace with respect for employees and stakeholders, and provide clear, high-quality, and timely work product in our programs and services.*

Independence: *We conduct our work free from outside influence. We act fairly and without bias to honor the merit system.*

Integrity: *We adhere to the highest legal, professional, and ethical standards to earn and maintain the public's trust.*

Vigilance: *We aim for proactive and constant improvement of both our own processes and of the merit system. We strive to identify innovative and effective ways to address and prevent government wrongdoing.*

Strategic Goals, Objectives, Strategies, and Metrics

Strategic Goal 1 – Protect and promote the integrity and fairness of the federal workplace.

Objective 1: Fairly and promptly investigate and prosecute cases.
Objective 2: Obtain timely and effective relief in cases.

OSC faces an increasing number of cases each year, particularly from federal employees alleging whistleblower retaliation. To effectively remedy wrongs and hold agencies accountable, OSC will apply consistent standards of review and investigative procedure to each matter. Some cases will demand more time and resources than others, and will require a variety of investigative strategies and techniques to resolve. Applying broadly uniform procedures but handling each matter as the facts demand will allow OSC to remain efficient, fair, and effective. OSC will continue to use ADR and other dispute resolution methods to increase case-processing efficiency and better serve its stakeholders.

Strategies:

- Handle cases in a fair and unbiased manner.
- Form working group to improve efficiency of case handling procedures.
- Maximize effective use of ADR and other resolution methods in cases.

Data Points and Metrics:

General

- Formation of working group to improve efficiency of case handling procedures in FY 2017, and reassess regularly.

PPP Enforcement

- Number of complaints received.
- Number/percent of whistleblower retaliation complaints received.
- Number/percent of whistleblower retaliation complaints closed within 240 days.
- Average age of complaints at closure.
- Number of complaints filed with MSPB.
- Number of successful prosecutions before MSPB.
- Number of informal stays obtained.
- Number of formal stays obtained.
- Number of complaints mediated.
- Number of complaints mediated resulting in settlement.
- Number of individual corrective actions obtained.
- Number of systemic corrective actions obtained.
- Number of disciplinary actions obtained.

Hatch Act Enforcement

- Number of complaints received.
- Number/percent of complaints closed within 240 days.
- Number of complaints filed with MSPB.
- Number of successful prosecutions before MSPB.
- Number of warning letters issued.
- Number of corrective actions obtained.
- Number of disciplinary actions obtained.

USERRA Enforcement

- Number of referrals received.
  - Number of merit referrals.
  - Number of non-merit referrals.
- Number/percent of referrals closed within 60 days.
- Number of offers of representation before MSPB.
- Number of corrective actions obtained (formally and informally).

Objective 3: Enhance strategic use of enforcement authority.

As a small agency responsible for safeguarding the merit system in a broad sector of the federal community, OSC strives to maximize the impact of its enforcement actions and deter future violations. In addition to seeking corrective and/or disciplinary action for PPPs, Hatch Act, and USERRA complaints, OSC may issue PPP reports and provide technical assistance for policy and legislative changes affecting the laws it enforces. The WPEA also authorized OSC to file amicus curiae briefs in cases involving whistleblower rights and intervene in cases before the MSPB. OSC will use these authorities to advance its mission of safeguarding employee rights by educating the federal community, working for systemic changes, and helping shape and clarify the law.

Strategies:

- Publish more PPP reports that serve educational purposes, as appropriate.
- Furnish expert technical assistance to aid governmental bodies with formulating policy and precedent.
- Collaborate and strategize with other agencies to make systemic improvements to the federal workplace.

Data Points and Metrics:

- Number of PPP reports published on website.
- Number of *amicus curiae* briefs and interventions filed.
- Number of inter-agency efforts involving systemic improvements to the federal workplace.

Objective 4: Provide timely and quality Hatch Act advisory opinions and guidance.

OSC is in a unique position to provide Hatch Act advice to federal, DC, state, and local employees and officials, as well as the general public. It is important for OSC to provide consistent, well-reasoned opinions in a timely fashion so that individuals can make appropriate decisions about their political activities. OSC recognizes the importance of revising and updating the Hatch Act regulations and will continue to pursue its efforts to partner with OPM, the agency responsible for promulgating the regulations, to achieve this goal.

Strategies:

- Provide timely and appropriate Hatch Act advice and information.
- Work closely with OPM to revise the Hatch Act regulations.

Data Points and Metrics:

- Number/percent of informal telephonic advisory opinions issued within 3 days of inquiry.
- Number/percent of informal email advisory opinions issued within 5 days of inquiry.
- Number/percent of formal written advisory opinions issued within 60 days of inquiry.
- Revised Hatch Act regulations by FY 2018.

Objective 5: Expand training and outreach efforts nationwide.

OSC is well-suited to safeguard employee rights by educating the federal community and others about PPPs, whistleblower disclosures, the Hatch Act, and USERRA through its training and outreach programs. Since 2002, OSC has had a formal program to ensure compliance with 5 U.S.C. § 2302(c), which requires federal agencies to inform employees about their rights and remedies under the whistleblower protections and related laws. In 2014, the White House mandated that federal agencies become section 2302(c)-certified. OSC also has longstanding training programs on the Hatch Act and USERRA, as well as resources available through its website. While many agencies in the Washington, DC area have received OSC training and certification, OSC will endeavor to expand its efforts nationwide to better reach agencies and components that may have less familiarity with the whistleblower protections and other laws that OSC enforces. OSC will also monitor, evaluate, and reassess the effectiveness of its training and outreach activities.

Strategies:

- Increase awareness of, and provide expert technical assistance to agencies/components on, the 2302(c) Certification Program and other OSC-related training needs.
- Develop procedures to facilitate registration, certification, and recertification rates of agencies/components under the 2302(c) Certification Program.
- Certify and recertify more agencies/components through the 2302(c) Certification Program.
- Create training and outreach plan to reach agencies beyond the Washington, DC area.
- Collaborate with agencies to develop OSC-related web-based and other training, e.g., advanced training quiz, topical videos, etc.
- Improve methods to survey effectiveness of training and outreach activities.

Data Points and Metrics:

- Number of agencies/components contacted regarding the 2302(c) Certification Program.
- Number of agencies/components registered for the 2302(c) Certification Program.
- Number of agencies/components certified and recertified for the 2302(c) Certification Program.
- Average time for agencies/components to complete the certification after registration for the 2302(c) Certification Program.
- Number of training and outreach activities, broken down by program area and geographic location.
- Methods to survey effectiveness of training and outreach activities by FY 2017, and reassess regularly.

Objective 6: Effectively and innovatively communicate with stakeholders and the public.

OSC understands the necessity of effectively communicating with stakeholders and the general public about its efforts to safeguard employee rights and hold the government accountable. By appropriately publicizing enforcement outcomes through traditional and non-traditional media, OSC can help to educate the federal workforce about their rights and responsibilities and deter future wrongdoing. OSC will use a wide variety of communication methods to disseminate timely, accurate information and will provide regular opportunities for input, feedback, and collaboration from stakeholders.

Strategies:

- Issue press releases on major activities and key developments.
- Increase use of digital media as appropriate (e.g., website, social media, listserves, infographics, webinars, etc.).
- Enhance coordination with governmental and non-governmental stakeholder groups.
- Develop proposal for the establishment of a regularly-held conference on whistleblowing in the federal workplace.

Data Points and Metrics:

- Number of press releases issued.
- Types and frequency of digital media used to share information.
- Number of meetings with stakeholder groups.
- Proposal for the establishment of a regularly-held conference on whistleblowing in the federal workplace by FY 2017, and reassess regularly.

Strategic Goal 2 – Ensure government accountability.

Objective 1: Provide employees with an effective and efficient safe channel to report government wrongdoing.

OSC promotes government accountability, integrity, and efficiency by providing a safe channel for federal employees to come forward with evidence of waste, fraud, abuse, law-breaking, or threats to public health or safety. With an overall increasing trend in the number of whistleblower disclosures for the last five years, OSC must continue to ensure that this safe channel remains confidential, secure, and effective in promoting change and accountability. OSC is currently developing a new and dynamic combined form for reporting government wrongdoing, whistleblower retaliation and other PPPs, and Hatch Act violations. The form is designed to be confidential, secure, and convenient for the user. It can be downloaded and completed privately. It may be submitted electronically and immediately routed and processed. And the user need not establish an account. OSC will work vigorously to review and assess the whistleblower reporting experience to ensure that, by providing a safe channel for whistleblowers and their disclosures, OSC can better ensure government accountability.

Strategies:

- Implement new electronic complaint/disclosure form.
- Form working group aimed at developing actionable methods to assess and improve whistleblower reporting experiences.

Data Points and Metrics:

- New electronic complaint/disclosure form by FY 2017, and refine as appropriate.
- Number of whistleblower disclosures.
- Number/percent of whistleblower disclosures that also allege related retaliation.
- Number/percent of whistleblower disclosures referred to agencies for investigation.
- Working group for assessment and improvement of whistleblower reporting experiences (including use of new electronic form) by FY 2017, and reassess regularly.

Objective 2: Ensure agencies provide timely and appropriate outcomes for referred whistleblower disclosures.

OSC returns substantial sums to the federal government by pressing for appropriate action to remedy waste and fraud disclosed by whistleblowers. Through its oversight of agency reports on referred whistleblower disclosures, OSC uncovers individual and systemic violations of federal law and evaluates the reasonableness of agency responses, encourages cost savings occasioned by the identification and cessation of government waste, and resolves serious health and safety threats. A key objective is to improve the timeliness and outcomes of agency reports. OSC will improve communication with agencies concerning their statutorily-mandated reports, including their content and timeliness, as well as seek alternative resolutions of whistleblower disclosures.

Strategies:

- Engage agencies in the development of effective investigation plans of referred whistleblower disclosures.

- Maintain communications with agencies before, during, and after agencies' investigations of referred whistleblower disclosures, as appropriate.
- Provide alternate means to achieve resolutions of whistleblower disclosures.
- Expand efforts to capture scope of benefits to government resulting from outcomes of whistleblower disclosures.
- Monitor all whistleblower disclosures and referrals to agencies to identify trends or systemic challenges.

Data Points and Metrics:

- Percentage of referred whistleblower disclosures that are substantiated by agencies.
- Number of favorable outcomes—both corrective and disciplinary actions—achieved through formal and informal resolution of whistleblower disclosures.
- Timeliness of OSC's communication to the President and Congress after receiving an agency investigation report and whistleblower's comments.
- Implementation of measurement to capture scope of benefits to government resulting from outcomes of whistleblower disclosures, such as significant changes to agency operations to promote safety or security and/or tax dollars saved or recovered, by FY 2017, and reassess regularly.

Objective 3: Enhance awareness of outcomes of referred whistleblower disclosures.

For OSC's work to have the greatest impact on federal government operations, particularly in cases involving systemic abuses or practices likely to occur across government agencies, it must have a robust and continuous presence within the federal community and before the general public. OSC's public reporting requirements for investigated whistleblower disclosures make it even more imperative that federal employees, taxpayers, and other stakeholders have prompt, accurate, and easy access to information about referred whistleblower disclosures. The implementation of a variety of new technologies offers the agency the opportunity to more effectively disseminate information about the financial and other qualitative benefits to the government from the outcomes of referred whistleblower disclosures, thus ensuring accountability broadly throughout the government.

Strategies:

- Revamp online public file of whistleblower disclosures on website.
- Increase dissemination of favorable outcomes of whistleblower disclosures via press releases, social media, etc.
- Enhance training and outreach aimed at increasing awareness and deterrence of underlying government wrongdoing.
- Develop plan to enhance the profile of OSC's Public Servant Award.

Data Points and Metrics:

- Revamped online public file of whistleblower disclosure cases on website by FY 2017, and reassess regularly.
- Number of times that favorable outcomes of whistleblower disclosures are disseminated via press releases, social media, etc.

- Number of training and outreach events that address whistleblower disclosures.
- Plan to enhance the profile of OSC's Public Servant Award by FY 2017, and reassess regularly.

Strategic Goal 3 – Achieve organizational excellence.

Objective 1: Recruit, develop, and retain a highly talented, engaged, and diverse workforce.

To accomplish its mission with excellence, OSC must use targeted recruitment methods that attract talented employees who believe in the work of the agency. A diverse workforce from various backgrounds will help OSC tackle problems from different perspectives and find optimal solutions. OSC is committed to retaining this skilled and diverse workforce through work-life balance strategies, career and skills development, cross-training, recognition of strong performance, and other initiatives that will keep employees engaged and equip them to achieve the mission.

Strategies:

- Create and maintain a Human Capital Plan that includes effective recruitment strategies for attracting talent from diverse sources and appropriate succession planning.
- Establish an Honors Program for hiring attorneys from law schools or clerkships.
- Improve and standardize new employee initial onboarding processes, as appropriate.
- Create and maintain a staff training plan for all employees that regularly assesses training needs and delivers training programs.
- Implement a voluntary mentorship program.
- Continue to facilitate internal cross-training opportunities through details, rotations, reassignments, and other tools aimed at ensuring that the agency remains agile and responsive to changing organizational needs, and that staff develop professionally within the agency.
- Continue to increase employee engagement efforts through Employee Engagement Working Group, Federal Employee Viewpoint Survey participation and analysis, consistent communication, and effective recognition of staff performance.
- Continue to emphasize work/life balance and other related benefits.

Data Points and Metrics:

- Human Capital Plan by FY 2017, and reassess regularly.
- Honors Program by FY 2017, and reassess regularly.
- Improved and standardized onboarding process by FY 2017, and reassess regularly.
- Staff training plan by FY 2017, and reassess regularly.
- Mentorship program by FY 2017, and reassess regularly.
- Ongoing internal cross-training opportunities, and reassess regularly.
- Ongoing employee engagement efforts, and reassess regularly.
- Ongoing work/life balance and other related benefits, and reassess regularly.

Objective 2: Improve the use of existing technology and deploy new IT systems to enhance organizational operations.

OSC will be a good steward of tax-payer dollars through the strategic use of IT systems to help the agency better accomplish its mission. OSC will regularly assess the needs of its stakeholders and employees, and in response will employ cutting-edge information technology solutions to improve efficiency and the stakeholder experience. OSC will deploy mobile access to network programs in compliance with directives that move the government toward a virtual work environment, while ensuring continuity of operations in times of work interruption and providing greater flexibility to employees. OSC will also employ IT security solutions to safeguard its information systems with the purpose of protecting the privacy of employees and those seeking assistance from OSC.

Strategies:

- Identify, procure, and deploy commercial off-the-shelf IT solutions to meet the agency's needs.
- Assess and address on a continual basis the IT needs of staff and customers.
- Recruit and retain highly-skilled IT experts.
- Provide excellent IT customer service.
- Assess effectiveness of IT services and respond to stakeholder needs.

Data Points and Metrics:

- Transition to electronic case management system by FY 2017, and reassess regularly.
- 100% deployment of mobile access to network program resources by FY 2017, and reassess regularly.
- 100% data encryption by FY 2017, and reassess regularly.
- Ongoing semi-annual assessment of IT needs, and reassess regularly.
- Ongoing semi-annual assessment of the effectiveness of IT services, and reassess regularly.
- Ongoing maintenance of IT staff of 5% of agency work force, and reassess regularly.

Objective 3: Monitor, evaluate, and improve efficiency and effectiveness of programs and processes.

While OSC is a small agency, it takes complaints from throughout the federal government; it handles cases from all over the country; and its authority to act derives from several different federal statutes. OSC will undertake a comprehensive and transparent evaluation of the most efficient approach for safeguarding employee rights and holding the government accountable. The evaluation will identify best practices and areas of improvement. This will be part of a vigilant process of continual evaluation of OSC's existing program areas and new programs to ensure the most effective delivery of services. To accomplish these goals, OSC will give federal employees and other stakeholders a greater opportunity to provide input into shaping its work.

Strategies:

- Create and execute an institutional approach to evaluate OSC's programs and processes, including special projects and initiatives, to identify best practices and areas of improvement.

- Implement best practices and address areas of improvement identified in evaluations of OSC's programs and processes.
- Initiate an enhanced method for determining customer satisfaction with OSC's programs and processes, and evaluate data to improve efficiency and effectiveness.

Data Points and Metrics:

- Creation and implementation of institutional approach to evaluate programs and processes by FY 2017, and reassess regularly.
- Completion of first evaluation of program(s) or process(es) to identify best practices and areas of improvement by FY 2018, and proceed with evaluation of additional programs and processes regularly thereafter.
- Implementation of best practices and responses to areas of improvement identified in first evaluation of program(s) or process(es) by FY 2019, and reassess regularly.
- Enhanced method for determining customer satisfaction with programs and processes by FY 2017, and reassess regularly.
- Evaluation and use of customer satisfaction data to improve efficiency and effectiveness of programs and processes by FY 2018, and reassess regularly.

Factors Affecting Achievement of Strategic Plan

While OSC is committed to achieving its mission and vision, there are internal and external factors that will likely affect the agency's ability to achieve all of the goals and objectives in this strategic plan. The primary issues of concern revolve around persistent budget uncertainty, a steadily increasing workload, and significant technological challenges. For a small-sized, resource-constrained agency with a substantial mandate to safeguard employee rights and hold government accountable, these factors can present serious challenges to fulfilling OSC's important statutory obligations.

Historically, OSC has had limited funding to effectively execute its mission and support functions. The agency has had to make difficult choices to ensure that it balances its investigative and prosecution responsibilities with the training and outreach efforts critical to deterring whistleblower retaliation and other unlawful practices. In FY 2015, OSC's caseload hit an all-time high, surpassing 6,000 new matters for the first time in agency history. The dramatic rise was driven by restored confidence in OSC's ability to safeguard the merit system. OSC's continuing success in achieving favorable results through mediation and negotiation, particularly in high-priority matters, also contributed to the increased number of complaints filed. With an expected surge in Hatch Act complaints driven by the 2016 presidential election, OSC anticipates continued growth in its caseload. Budget uncertainty remains a significant challenge to OSC's ability to carry out its myriad responsibilities.

In response to these funding challenges and rising caseloads, OSC must carefully prioritize and allocate resources to remain efficient, fair, and effective in maintaining the high levels of success it has achieved in recent years. Accordingly, the agency is putting into place long-term plans to improve the efficiency of case handling procedures; is being proactive, seeking early resolution of cases through stepped up ADR and settlement efforts; is implementing innovative approaches to achieve efficiencies in cases involving both whistleblower disclosures and related retaliation claims; and is improving cross-training of staff. A better funded and more efficient OSC will result in greater cost-saving and more effective accountability throughout government.

Additionally, OSC has had limited ability to invest in, but increased need for, long-term improvements in technology. OSC will be called upon to ensure that the technological environment in which it conducts its work is modern and secure. By proactively assessing the information security needs and the technological requirements of employees and stakeholders, OSC plans to improve efficiency, security, and the customer experience. Continuous assessment of information technology requisites against available resources will help ensure that OSC achieves organizational excellence despite these challenges.

While OSC's establishment as an independent government oversight agency insulates it from political influences on its work, transitions in administration and leadership throughout the federal government will necessarily impact OSC's ability to safeguard employee rights and hold the government accountable. Specifically, staffing changes at all levels in the agencies over which OSC has jurisdiction will require that OSC remain agile and focused on honoring the merit system fairly and without bias. These challenges will require that OSC continue to prioritize education and outreach, and to highlight cases with significant educational value or that promote accountability.

Through these efforts, OSC can improve the culture within the federal government and remain a steady accountability and transparency presence that can withstand administration and leadership changes.

OSC's strategic plan contemplates confronting all of these challenges directly over the next few years to ensure its success. And when OSC succeeds, good government and the general public are the real winners.

Special Counsel
Henry Kerner

EEO Director
Shirine Moazed

General Counsel
Susan Ullman

Principal Deputy
Special Counsel
Ellen Chubin Epstein

Immediate Office of the Special Counsel (IOSC)

Associate Special Counsel
Anne Wagner

Associate Special Counsel
Louis Lopez

Associate Special Counsel
Bruce Fong

Chief Operating Officer
Bruce Gipe

Disclosure Unit (DU)

Case Review Division

Alternative Dispute Resolution Unit (ADR)

Diversity, Outreach, and Training (DOT) Unit

Retaliation and Disclosure Unit (RDU)

Hatch Act Unit (HAU)

USERRA Unit

IPD HQ

Oakland Field Office (OFO)

Midwest Field Office (MWFO)

Dallas Field Office (DFO)

Administrative Services Office (ASO)

Human Capital Office (HCO)

Finance

Information Technology Branch (ITB)

Office of the Clerk

ACTIVE THREAT POLICE DRILLS PUT VETERANS, OFFICERS, AND VA EMPLOYEES IN DANGER AT PA HEALTHCARE CENTER

10/13/2020

DISCLOSURE OF WRONGDOING

The U.S. Office of Special Counsel (OSC) today sent **letters** to the President and Congress after a whistleblower disclosed to OSC that Police Service leadership in Butler, Pennsylvania, conducted dangerous, active-threat training drills at a U.S. Department of Veterans Affairs (VA) healthcare center. The trainings were conducted without providing police officers advance notice, while the responding officers were on-duty and carrying loaded weapons. The agency **substantiated** the allegations, finding that the drills violated firearms safety protocols and put VA employees, police officers, and veterans in danger. In response, the Butler Healthcare Center Police Service suspended all trainings pending the revision of relevant procedures and subsequently implemented corrective measures.

"When police officers are asked to respond to an active threat while carrying loaded weapons, there is no room for error," said **Special Counsel Henry J. Kerner**. "These types of exercises should be conducted in a safe training environment. I thank the whistleblower for bringing this important issue to our attention and thank the VA for implementing corrective measures in the training program that will ensure the safety of all participants."

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NAVY EMPLOYEE FINED, DEBARRED FROM FEDERAL SERVICE FOR NUMEROUS HATCH ACT VIOLATIONS

10/1/2020

HATCH ACT

The U.S. Office of Special Counsel (OSC) today announced a settlement agreement reached with a former civilian Navy employee in Hawaii who admitted to numerous Hatch Act violations. The employee retired after OSC filed a complaint for disciplinary action with the Merit Systems Protection Board.

The Hatch Act prohibits federal employees from knowingly soliciting, accepting, or receiving political contributions. While serving as Chairman of the Honolulu County Republican Party (HCRP), the employee created and used HCRP social media pages to solicit political contributions. He also sent dozens of emails using an online marketing platform to solicit contributions for the Hawaii Republican Party (HRP), HCRP, and candidates for partisan political office.

An investigation conducted by OSC found that the employee also had over 1,000 HRP- and HRCP-related documents on his Navy desktop computer. While in his Navy workplace, the employee used that computer to download, draft, edit, and publish partisan political materials, including updating the HCRP Facebook page. The Hatch Act prohibits federal employees from engaging in political activity while on duty or in a federal room or office building.

In a settlement agreement, the employee agreed to pay a civil fine of $1,000, and to accept a three-year debarment from federal employment.

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CATTLE PRODUCERS RECOUP A HALF-MILLION DOLLARS FOR CROP LOSSES AFTER BEING IMPROPERLY DENIED BY USDA

8/21/2020

DISCLOSURE OF WRONGDOING

The U.S. Office of Special Counsel (OSC) has sent **letters** to the President and Congress outlining how a U.S. Department of Agriculture (USDA) whistleblower worked with OSC to ensure 37 cattle producers in New Mexico were compensated more than a half-million dollars for crop losses after being improperly denied by the agency. The whistleblower disclosed to OSC that the USDA's New Mexico Farm Service Agency (FSA) wrongly denied payments to the farmers in three counties under the Noninsured Crop Disaster Assistance Program (NAP). After OSC **referred** the matter, USDA's Office of Inspector General conducted an investigation and **substantiated** the whistleblower's allegations.

The investigation identified several factors—including FSA's inconsistent acceptance of crop loss assessments, vague NAP requirements, and "problematic unofficial practices" by FSA in the crop loss assessment process—that may have caused the agency to wrongly deny the producers compensation for their crop losses. The investigation also found evidence that USDA retaliated against the whistleblower and one other employee by improperly disciplining them after they raised concerns about this wrongdoing.

In response to these findings, USDA has paid $534,800 to the cattle producers and has committed to take appropriate steps to correct retaliatory actions, including potential disciplinary action against the responsible manager. The agency has also conducted trainings on crop loss compensation and is reviewing its procedures under the NAP to address problems moving forward.

"I commend the whistleblower for coming forward to identify this mismanagement and violation of NAP regulations," said **Special Counsel Henry J. Kerner**. "I am also encouraged by USDA's swift and comprehensive response to this report and am hopeful the agency will continue to take steps to ensure these problems do not recur."

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OSC Files Amicus Curiae Brief Reaffirming Federal Employees' Right to Engage in Protected Activities

8/11/2020

PROHIBITED PERSONNEL PRACTICES

The U.S. Office of Special Counsel (OSC) today filed an ***amicus curiae*** (friend of the court) brief with the U.S. Court of Appeals for the Federal Circuit in support of protections for federal employees who engage in protected activities.

Since passing the Civil Service Reform Act (CSRA) in the late 1970s, Congress has sought to protect federal employees from retaliation for engaging in certain activities—specifically, exercising appeal, complaint, and grievance rights. Over the years, Congress has strengthened those protections. Federal employees, who first administratively exhaust their retaliation claims at OSC, may seek corrective action for such retaliation before the Merit Systems Protection Board (MSPB).

In *Tao v. MSPB*, the appellant, a pharmacist at the U.S. Department of Veterans Affairs (VA), alleged that the VA took personnel actions against her in retaliation for making protected disclosures and for engaging in certain protected activities, including disclosing information to OSC, filing a complaint with VA's Office of Accountability and Whistleblower Protection, filing a claim of an unfair labor practice with the Federal Labor Relations Authority, and testifying in coworkers' MSPB and Equal Employment Opportunity proceedings. In the initial decision, the MSPB administrative judge dismissed Tao's appeal for failure to make protected disclosures without addressing her allegation that she was retaliated against for engaging in protected activities. The parties appealed the initial decision to the U.S. Court of Appeals for the Federal Circuit.

In its ***amicus curiae* brief**, OSC argues that the plain language and legislative history of the CSRA and its subsequent amendments, indicate that the protection against retaliation for employees who make whistleblower disclosures is separate and distinct from the protection against retaliation for employees who engage in protected activities. By ignoring Tao's allegation of retaliation for engaging in protected activities, MSPB erred. Perhaps more important, if not corrected, MSPB's approach here leaves federal employees uncertain about their rights under civil service laws and vulnerable to retaliation explicitly prohibited by the statute.

FDA Employee Suspended 120 Days for Violating the Hatch Act's Prohibition against Political Fundraising

7/21/2020

HATCH ACT

The U.S. Office of Special Counsel (OSC) today announced a settlement agreement reached with a federal employee at the U.S. Food and Drug Administration (FDA) who admitted to violating the Hatch Act's prohibition against political fundraising. The Hatch Act prohibits federal employees from soliciting, accepting, or receiving political contributions at any time, even when off duty and away from the federal workplace.

In this case, the FDA employee first contacted OSC to ask about serving in a leadership position within a political party, which was permissible under the Hatch Act. However, the employee then authorized the creation of a social media page featuring his name and image that was used several times to solicit political contributions, including at least one that the employee admitted he posted personally. The employee also co-hosted a fundraiser for a candidate for partisan political office and allowed his name to be used in connection with two other political fundraising events, all in violation of the Hatch Act.

The employee had knowledge of the Hatch Act and admitted that he should have known about the fundraising restrictions when he engaged in the prohibited activity. In a settlement agreement, the employee agreed to a 120-day suspension without pay.

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Flawed U.S. Treasury Software Led to Nearly $92 Million in Uncollected Debts Owed to OSHA

6/5/2020

DISCLOSURE OF WRONGDOING

The U.S. Office of Special Counsel (OSC) today **alerted** the President and Congress to a software flaw at the U.S. Treasury Department that resulted in nearly $92 million in uncollected debts owed to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). The debts, comprising nearly 11,000 delinquent fines owed by employers for workplace safety violations, were referred by OSHA to Treasury for collection on behalf of OSHA. An anonymous whistleblower alerted OSC to the software problem, alleging it resulted in Treasury's failure to collect the debts. OSC referred the matter for investigation by the U.S. Treasury and Labor Departments, and both substantiated the allegations [**Treasury report**, **Labor report**]. The investigations also revealed that the software problem impacted debt collections by Treasury for 12 additional federal agencies, unrelated to OSHA.

The investigative reports recommended substantial corrective actions in response to their findings. Treasury's Bureau of the Fiscal Service has already corrected the software issue and is now actively collecting all OSHA debts and any other agency debts affected by the error. Both Labor and OSHA also updated their debt-collection procedures for monitoring and transferring debts. In addition, Treasury has committed to provide OSC with a follow-up report once it has completed an audit to determine the monetary value of the remaining uncollected debts owed to other agencies.

“I commend the whistleblower for bringing these serious allegations forward," said **Special Counsel Henry J. Kerner**. “I am encouraged to see that both agencies appear to have taken prompt corrective action, including a commitment by Treasury to begin collecting the millions of dollars in safety fines owed to OSHA and to assess the outstanding debts owed to 12 additional agencies. OSC will continue to monitor the results of Treasury's supplemental audit and stands ready to work with these agencies to ensure that the money they are owed is collected for the full benefit of American taxpayers."

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VA Social Workers Pressured to Discharge Vulnerable Patients from Community Living to Private Care

4/24/2020

DISCLOSURE OF WRONGDOING

The U.S. Office of Special Counsel (OSC) has **alerted** the President and Congress to **investigative findings** showing that management at a U.S. Department of Veterans Affairs (VA) medical center in Coatesville, Pennsylvania (Coatesville VAMC) pressured social workers to inappropriately discharge patients from VA Community Living Centers (CLC) into private nursing facilities. The findings demonstrated that discharged patients were not advised of their right to appeal these removals, and that patients with skilled nursing care needs were discharged when it was medically improper.

“I commend the whistleblower for alerting OSC to these serious allegations," said **Special Counsel Henry J. Kerner**. “The investigation found social workers were pressured to make discharge decisions that were not in the best interest of the patients. Moreover, discharged patients were not advised of appeal rights afforded to them under agency policy. I was disappointed by the VA's failure to hold management officials accountable for their actions. That is a disservice to the vulnerable veterans they were charged with helping."

The investigation confirmed that in December 2017, Coatesville VAMC initiated a “Difficult to Discharge" (DTD) process at the CLC and established a list of designated patients at the direction of management. Social workers repeatedly objected, noting that patients included on the DTD list were still eligible for CLC admission and were not clinically appropriate for discharge.

During interviews, numerous social workers expressed concerns that due to leadership pressure, patients had been discharged from the CLC inappropriately. The investigation found several examples. In one case, a patient was told he needed to pick a medical foster home for discharge, over his objections and in violation of three different VA policies. In another case, managers requested repeated examinations of a patient by different doctors in an apparent effort to obtain an evaluation that could justify the patient's discharge.

In his letter to the President, Special Counsel Kerner found that the VA's investigation did not appear reasonable and urged the VA to revisit accountability actions for senior leadership who endorsed and facilitated this conduct. He did, however, commend corrective actions taken by the agency and statements by the whistleblower that discharges are now being handled more appropriately at the facility.

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ICE Agents Ambushed by Mexican Cartel Received Insufficient Support for Dangerous Mission, Investigation Finds

4/23/2020

DISCLOSURE OF WRONGDOING

The U.S. Office of Special Counsel (OSC) today released **investigative findings** that shed new light on a 2011 tragedy involving two Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI) agents who were ambushed along a dangerous stretch of highway in Mexico by the Los Zetas drug cartel. Special Agent Victor Avila was severely wounded but survived the ambush, while his partner, Special Agent Jaime Zapata, lost his life. Agent Avila later disclosed to OSC that ICE failed to provide adequate training or the necessary equipment for such a dangerous mission. Agent Avila alleged that officials at the ICE Office of the Attaché in Mexico City engaged in gross mismanagement when they sent him and Agent Zapata on assignment, without suitable support or training, through areas controlled or monitored by the drug cartel.

“Having met personally with Agent Avila, I am honored to provide more clarity to the missteps and 'managerial complacency' immediately preceding this deadly confrontation," said **Special Counsel Henry J. Kerner**. “Agents Avila and Zapata were put in harm's way while serving their country, without adequate support. We owe it to those who continue to put their lives on the line to ensure our agents have the resources they need when assigned to dangerous missions."

The investigation, conducted by the ICE Office of Professional Responsibility, substantiated that ICE officials failed to provide the agents additional support for their mission from either U.S. personnel or Mexican law enforcement. The agency also failed to properly brief and prepare the agents in advance of the assignment to discuss the cargo, security measures, and any other relevant information. The report confirmed that there was “a known lack of diligence with regard to the maintenance of the ICE armored vehicles." For example, it was known prior to the incident that the agents' armored vehicle did not have properly functioning tracking equipment.

The investigation revealed that, at the time of the attack, management lacked specific policies and procedures for the execution of the agency mission in Mexico. For example, the agency lacked formalized policies with respect to travel; did not provide counter threat training to those stationed in Mexico; and did not provide armored vehicle training to employees in Mexico. Additionally, the Mexico City office suffered from weak operational security, which was evident in the lack of planning and execution for the trip taken by Agent Avila and Agent Zapata.

In the aftermath of the tragedy, ICE took strong steps to address this mismanagement by:

- Establishing a Personnel Recovery Unit to “provid[e] ICE employees and their families with the knowledge and capabilities to prepare for, prevent, respond to, and survive an isolating event while deployed overseas";
- Implementing restrictions on driving in Mexico, “to include no self-driving outside of city limits" and requiring “a minimum of two people and 24-hour notice to the [Regional Security Officer]";
- Increasing training for all personnel assigned to Mexico, including Foreign Affairs Counter Threat training;
- Mandating that all personnel complete High Threat Security Overseas prior to deployment to Mexico on [temporary duty];
- Mandating armored vehicle training for all personnel in Mexico; and
- Disabling the automatic unlocking mechanism in (HSI) armored vehicles.

The findings were **provided** to the President and Congress and forwarded to HSI Executive Leadership to consider disciplinary action.

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OSC Obtains $90K in Damages for Whistleblower Retaliated Against after Disclosing Unqualified Flight Safety Inspectors

2/24/2020

PROHIBITED PERSONNEL PRACTICES

The U.S. Office of Special Counsel (OSC) today announced a recent settlement agreement reached with the Federal Aviation Administration (FAA), including $90,000 in compensatory damages, for an Aviation Safety Inspector who was retaliated against for blowing the whistle on unqualified flight safety inspectors.

The whistleblower **disclosed** that flight inspectors were certifying pilots and conducting safety "check rides" even though they lacked the necessary formal training and certifications required to perform that oversight.

The FAA Office of Audit & Evaluation (AAE) substantiated the whistleblower's allegations, calling into question the operational review of several aircraft, including the Boeing 737 MAX and the Gulfstream VII.

AAE also found that after disclosing the problem, the whistleblower faced retaliation. The whistleblower decided to take a new position in another city in order to escape what he believed was pervasive harassment. After he made the disclosures, his managers also allegedly removed his duties and denied training requests, flight certifications, and job training opportunities.

With OSC's assistance, the parties were able to settle the case and FAA agreed to pay consequential and compensatory damages in the amount of $90,000. During the investigation, the whistleblower's then-manager retired, so OSC did not seek disciplinary action.

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OSC Obtains Corrective Action for Whistleblower Retaliated Against After Raising Concerns with Environmental Studies

2/4/2020

PROHIBITED PERSONNEL PRACTICES

The U.S. Office of Special Counsel (OSC) today announced it has resolved through a settlement agreement with the U.S. Department of Interior (DOI) a case before the Merit Systems Protection Board (MSPB) involving an employee who was retaliated against after he complained about insufficient environmental impact studies of Alaska drilling sites.

After disclosing to his agency's Inspector General that DOI employed an abnormal process for the environmental review, the employee was subjected to an internal investigation. The investigation uncovered violations of department policies by the employee that were used as a basis for his removal. The employee filed a whistleblower complaint with OSC alleging that the investigation and his removal were conducted in retaliation for his protected disclosure and OSC, in turn, took his case to the MSPB. The hearing judge approved a settlement with DOI returning the employee to his prior position and restoring his benefits to where they would be had the wrongful removal never taken place.

“I am very pleased that OSC was able to negotiate a favorable settlement to return this employee to his previous position," said **Special Counsel Henry J. Kerner**. “Retaliation can take many forms and is rarely straightforward. After closely reviewing the facts in this case, it became clear that the investigation was launched in retaliation for the employee's prior whistleblowing activities. I also acknowledge the Department's willingness to settle this case before the hearing, a result that conserves valuable taxpayer resources to reach a mutually agreeable outcome."

The settlement provides the whistleblower with reinstatement to his environmental protection specialist position at DOI, backpay with benefits, a retroactive promotion, placement in a modified chain-of-command, restored annual and sick leave, a time-off award, increases in past performance ratings, two-year priority consideration for any qualified vacancy at DOI, $180,000 in compensatory damages, and attorney's fees.

OSC's redacted *Report of Prohibited Personnel Practices* can be **found here**.

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