

Deliverable from the House Committee on Veterans' Affairs  
Subcommittee on Economic Opportunity

***Legislative Hearing***

March 4, 2009

1. Why is representation before the Merit System Protection Board critical?

OSC representation of USERRA claims before the Merit Systems Protection Board (MSPB) is critical for several reasons.

First and foremost, it is the exclusive means of enforcing USERRA rights against federal executive agencies. Because the Federal Government has not waived sovereign immunity for USERRA, claims against federal executive agencies cannot be brought in U.S. District Courts. Thus, filing an action with the MSPB is the sole remedy for those seeking to compel federal agencies to comply with USERRA and obtain the relief to which they are entitled. Only the MSPB can issue an order against a federal executive agency to comply with USERRA, provide claimants with relief, and sanction a federal agency for failing to do so.

Second, like OSC, the MSPB is uniquely suited to handle employment claims involving the Federal Government. The MSPB was established by the Civil Service Reform Act of 1978 to protect the merit system of federal employment by adjudicating individual employee appeals and conducting studies of the merit system. The MSPB is far more familiar with the intricacies of the federal personnel system and federal personnel law than other adjudicative bodies. As a result, it can expeditiously adjudicate employment disputes between federal agencies and federal employees and applicants in a manner consistent with the letter and spirit of federal employment laws, including USERRA.

Moreover, having one adjudicative body handle all federal employee USERRA claims ensures that the law is applied consistently. When federal district courts adjudicate USERRA claims, it is inevitable that different courts will apply USERRA dissimilarly and sometimes in a conflicting manner. By having the MSPB hear all federal employee USERRA complaints, however, a consistent body of law is developed. This allows employees and agencies to better understand USERRA's requirements, and leads to fairer and more expeditious outcomes. Finally, appeals from the MSPB are adjudicated by the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit has expertise in USERRA and other federal personnel laws that other federal appellate courts do not. Therefore, decisions on appeal by federal employees or agencies will also be more consistent and more likely to correctly interpret USERRA than if such appeals were decided by different appellate courts.

Third, it is unlikely that many claimants would or could successfully enforce their USERRA rights before the MSPB without OSC representation. Not only is such representation free of cost to the claimant, but OSC has particular expertise in prosecuting cases, including USERRA cases,

before the MSPB that no other government agency or private attorney can offer. Without the option of seeking OSC representation, many potentially meritorious claims would likely not be pursued due to the time and cost associated with litigation, especially if claimants must retain private counsel. And even if federal employees pursue their claims without OSC representation, it is more likely that these lawsuits will be unsuccessful due to a lack of knowledge and expertise by claimants and private counsel.

Moreover, OSC has demonstrated a willingness and ability to successfully "push the envelope" by pursuing and obtaining relief in cases considered unwinnable by others or where the law is ambiguous. In short, it would be difficult, if not impossible, to fulfill Congress's goal that the Federal Government serve as a "model employer" under USERRA without OSC representation before the MSPB.

Fourth, OSC believes its credible threat of litigation before the MSPB is essential to its success in enforcing USERRA. Because litigation is costly, time-consuming, uncertain, and can generate negative publicity, it provides agencies with a strong incentive to settle cases before an action is filed with the MSPB. In OSC's experience, once educated about USERRA's requirements and presented with evidence of a violation, most federal agencies agree to take the appropriate corrective action on behalf of the claimant. However, it is unlikely that such a high rate of voluntary compliance would occur without the threat of MSPB litigation. Moreover, in cases where an agency refuses to take the requested action, OSC has the means of obtaining compliance with the law through its authority to file cases before the MSPB. This authority must be contrasted with the Department of Labor (DOL)'s limited authority to attempt to resolve cases without a credible threat of adjudicative action. DOL cannot compel compliance with USERRA because it cannot file claims before the MSPB - only OSC has this authority.

H.R. 1089, which proposes to give OSC authority to prosecute *and* investigate federal USERRA complaints, would likely increase and expedite voluntary compliance with USERRA by federal agencies because it eliminates the need for such complaints to first go through DOL. Under the current system, there is no threat of MSPB litigation when complaints are before DOL, giving agencies less incentive to settle. In addition, claimants with meritorious claims may decide not to request referral of their complaints to OSC after DOL investigation and attempted resolution, either because they become discouraged, are not aware of their right to referral, etc. Thus, agencies can "take a chance" that a complaint will be settled for less than the claimant is entitled to or will not be forwarded to OSC for possible prosecution.

In contrast, if OSC directly received all federal USERRA complaints, the threat of litigation would be imminent, encouraging federal agencies to voluntarily resolve meritorious claims, and do so more quickly (as they often did under the USERRA Demonstration Project). In addition, OSC would not need to re-investigate complaints that DOL has tried to resolve to determine whether to provide representation before the MSPB, as is often required under existing law. Finally, claimants would not have pressure to accept less than the full relief to which they are entitled because they wish to resolve the matter without drawing out the process any further. Thus, under H.R. 1089, federal USERRA claimants would be able to obtain appropriate relief more quickly, as evidenced during the USERRA Demonstration Project, where OSC achieved an exceptionally high 25% corrective action rate for all complaints it directly received.

In summary, the MSPB is the exclusive means of enforcing USERRA claims against federal executive agencies, and is uniquely suited to adjudicating such claims in a consistent manner. Similarly, OSC is uniquely suited to prosecuting USERRA claims before the MSPB. Unlike private counsel, OSC is focused on presenting cases before the MSPB, and has the requisite expertise to do so. Further, OSC is willing and able to “push the envelope” to ensure that the Federal Government serve as a “model employer” under USERRA. In fact, OSC often obtains settlements from federal executive agencies that DOL cannot, simply because the threat of litigation becomes imminent *only* when OSC becomes involved. Under H.R. 1089, federal USERRA claimants would receive the benefit of having OSC involved in their claims at the earliest possible time, thereby making the promise of corrective action quicker and more certain.

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Second, like OSC, the MSPB is uniquely suited to handle employment claims involving the Federal Government. The MSPB was established by the Civil Service Reform Act of 1978 to help protect the merit system of federal employment by adjudicating individual employee appeals and conducting studies of the merit system. The MSPB is familiar with the intricacies and goals of the federal personnel system and federal personnel law. As a result, it can expeditiously adjudicate employment disputes between federal agencies and federal employees and applicants in a manner consistent with the letter and spirit of federal employment laws, including USERRA.

Third, it is unlikely that many claimants would or could successfully enforce their USERRA rights before the MSPB without OSC representation. Not only is such representation free of cost to the claimant, but OSC has particular expertise in prosecuting cases before the MSPB that no other government agency or private attorney can offer. Without the option of seeking OSC representation, many potentially meritorious claims would probably never be pursued, due in part to the time and cost associated with litigation, especially the cost of retaining private counsel. Similarly, other meritorious claims would not be successful due to a lack of knowledge and expertise by claimants and private counsel. Moreover, OSC has demonstrated a willingness and ability to "push the envelope" by pursuing and obtaining relief in cases considered unwinnable by others or where the law is unclear. In short, fulfilling Congress's goal that the Federal Government serve as a "model employer" under USERRA would be difficult, if not impossible, without OSC representation before the MSPB.

Fourth, OSC believes a credible threat of litigation before the MSPB is essential to its success in enforcing USERRA. Because litigation is costly, time-consuming, uncertain, and can generate

negative publicity, it provides agencies with a strong incentive to settle cases before an action is filed with the MSPB. In OSC's experience, once educated about USERRA's requirements and presented with evidence of a violation, most federal agencies agree to take the appropriate corrective action on behalf of the claimant. However, it is unlikely that a high rate of voluntary compliance would occur without the threat of MSPB litigation. Moreover, in cases where an agency refuses to take the requested action, there must be a means of forcing them to do so.

H.R. 1089, which proposes to give OSC authority to not just prosecute, but also investigate, federal USERRA complaints, would likely increase and expedite voluntary compliance by eliminating the need for such complaints to first go through the Department of Labor (DOL). Under the current system, there is no threat of MSPB litigation when complaints are before DOL, giving agencies much less incentive to settle. In addition, claimants may not even request referral of their complaints to OSC after DOL investigation and attempted resolution (because they become discouraged, are not aware of their right to referral, etc.). Thus, agencies can "take a chance" that a complaint will not be forwarded to OSC.

In contrast, if OSC received USERRA complaints from the beginning, the threat of litigation would be more imminent, making federal agencies more willing to quickly resolve meritorious claims (as they often did under the USERRA Demonstration Project). In addition, there would be no need for OSC to re-investigate complaints to determine whether to provide representation before the MSPB, as is often required under the existing system. Last, claimants would not be as willing to accept less relief than what they are entitled to because they are trying to resolve the matter and not draw the process out any further. For these reasons, under H.R. 1089, federal USERRA claimants would be able to obtain better relief more quickly, as evidenced during the USERRA Demonstration Project, when OSC achieved an exceptionally high 25% corrective action rate for all complaints it directly received.

**Senator Daniel K. Akaka**  
**Additional Questions for the Record**  
**Confirmation Hearing of Carolyn N. Lerner**  
**March 10, 2011**

1. Merit Systems Protection Board has a statutory duty to conduct studies to determine whether the public interest in a civil service free of prohibited personnel practices is being protected. 5 U.S.C. § 1204(a)(3). How can the Office of Special Counsel work in conjunction with the Merit Systems Protection Board to help it fulfill this statutory duty and also be responsive to its reports on this issue?

The Merit Systems Protection Board (MSPB) has recently published two studies that are directly relevant to the Office of Special Counsel's (OSC's) work in guarding against prohibited personnel practices, a June 2010 Report, *Prohibited Personnel Practices – a Study Retrospective*, and a September 2010 Report, *Whistleblower Protections for Federal Employees*. As explained in these reports, one of the MSPB's missions is to report to the President and Congress on whether the public's interest in a Government free from prohibited personnel practices is being adequately protected. The June 2010 Report also notes that the MSPB intends to begin issuing a series of reports that will explore protections for whistleblowers, as well as fair and equitable treatment in the Federal Government.

The Office of Special Counsel does not have a similar statutory duty to conduct studies. However, the OSC can work collaboratively with the MSPB by providing information to the MSPB when it conducts studies. For example, the OSC can provide both statistical and anecdotal evidence regarding the whistleblower disclosures and prohibited personnel practices complaints that it receives. The OSC can also suggest study topics for consideration by the MSPB.

The OSC can be responsive to the MSPB's reports by reviewing any relevant findings and recommendations and implementing them to the extent possible. The OSC can also work with the MSPB to disseminate the findings and assist the agencies in complying with recommendations. For example, the MSPB's June 2010 Report on prohibited personnel practices found that there is a continuing gap between minority and non-minority employees' perceptions of the fairness of personnel policies and decisions, and the prevalence of discrimination and other prohibited personnel practices. The same Report found that the percentage of employees who engage in protected activity mirrors the percentage who report retaliation for having engaged in that activity. Educating agencies about these perceptions is vital. The OSC's Outreach/Training functions, including its 2302(c) Certification Program, and other efforts can potentially play a role in doing so.

**Post-Hearing Questions for the Record**  
**Sen. Tom A. Coburn**

**Carolyn Lerner, Special Counsel**  
**U.S. Office of Special Counsel**

**Examining the use and abuse of Administratively Uncontrollable Overtime at  
the Department of Homeland Security**  
**Subcommittee on the Efficiency and Effectiveness of the Federal Workforce**  
**January 28, 2014**

**The U.S. Office of Special Counsel (OSC) October 2013 Administratively Uncontrollable Overtime (AUO) report:**

- 1) The OSC investigated six Department of Homeland Security (DHS) offices and found nearly \$9 million of fraudulent AUO claims:
  - a. Would the OSC describe their report of AUO fraud as an isolated occurrence or a problem that permeates throughout DHS?

The cases described in OSC's report are not isolated. In my October 31, 2013, letter to the President, I outlined allegations of AUO abuse at six separate DHS offices. These cases included disclosures from employees at several DHS components, including Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). In addition, as public and congressional scrutiny of AUO misuse grew in response to our October letter, more whistleblowers stepped forward to report concerns. Since the fall, OSC referred six additional AUO abuse cases to DHS for further investigation, bringing the total to 12 separate offices, and raising further concerns about the broad scope of AUO misuse, especially within CBP.

The cost of abuse at these 12 offices, which includes CBP headquarters, is estimated to be in the tens of millions of dollars annually.

- b. The OSC reported that some DHS managers "authorize and abet" the fraudulent use of AUO. At this time, does the OSC know if these DHS managers have been held accountable for their actions?

OSC is not aware if any managers have been held accountable for confirmed misuse of AUO. OSC requested and is awaiting additional information from DHS concerning any efforts to discipline managers within the CBP Office of Training and Development for failing to respond to disclosures of AUO abuse made directly to them.

- c. Does the OSC have confidence that DHS will hold accountable all DHS employees who are found to have abused AUO?

Over the course of several decades, many thousands of DHS employees misused AUO. Accordingly, it is not likely that all DHS employees

who abused AUO will be held accountable through disciplinary proceedings.

As discussed above, OSC is seeking additional information about disciplinary action against certain managers that received disclosures about AUO misuse and did not act. In addition, the DHS Office of Inspector General is investigating discrete allegations of AUO abuse at an ICE facility that may result in disciplinary actions.

- d. Is DHS taking appropriate and timely actions to combat and root out this AUO fraud?

In response to OSC's initial findings, DHS announced a department-wide review of AUO practices. This review is ongoing. In addition, AUO reportedly has been suspended at DHS Headquarters and within USCIS. At CBP, the agency stated it will "determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified." At the January 28 hearing, DHS also announced that approximately 900 positions were no longer eligible to receive AUO. If these positions are permanently decertified, that would translate into a savings of up to \$18 million annually.

These are long-overdue, but important steps. DHS should complete its departmental-level review without delay, make these preliminary steps permanent, and issue department-wide rules to end abuse of AUO.

2) The OSC's AUO findings were due to whistleblowers within DHS:

- a. Please describe the actions taken by the OSC to protect these whistleblowers.

OSC is currently investigating allegations of reprisal by five DHS whistleblowers who disclosed evidence of AUO abuse. OSC negotiated a stay of a pending personnel action in one case, is engaged in settlement discussions with DHS in a second case, and three cases are in a preliminary review stage. OSC will keep the Committee updated on the status of these pending claims.

- b. Is the OSC concerned of potential whistleblower retaliation? If so, what actions can the OSC take to ensure retaliation does not occur?

OSC provides a safe channel for federal workers to disclose evidence of waste, fraud, abuse, or other misconduct. It is critical that any employee who exercises their right to contact OSC not face retaliation or threats of retaliation. As stated, OSC is actively investigating five allegations of prohibited personnel practices, and has negotiated a stay of a pending personnel action in one case. If OSC finds evidence of retaliation, OSC can seek corrective and/or disciplinary action from DHS or the Merit Systems Protection Board.

- c. Please describe why these whistleblowers came to the OSC and not to the DHS Office of Inspector General?

At least two of the whistleblowers who came to OSC first contacted the DHS

Office of Inspector General. All of the individuals who reported violations to OSC first reported their concerns internally.

- d. The OSC submitted the report to the president in October 2013. Has the Obama Administration responded to the report?

The White House did not respond to OSC, and typically does not in these cases. Communications with OSC are largely handled by the agency involved.

- e. What action(s) should DHS take to ensure whistleblowers' rights are protected?

DHS should consider instructing its components to complete OSC's whistleblower certification program under 5 U.S.C. § 2302(c). Section 2302(c) requires agency heads to ensure, in consultation with the Office of Special Counsel, that employees are informed of the rights and remedies available to them under the Whistleblower Protection Act. Under the 2302(c) Certification Program, OSC will certify an agency's compliance with 5 U.S.C. §2302(c) if the agency meets the following five requirements:

1. Placing informational posters at agency facilities;
2. Providing information to new employees about the Whistleblower Protection Act (WPA) [including the 13 prohibited personnel practices] and the Whistleblower Protection Enhancement Act (WPEA) as part of the orientation process;
3. Providing information to current employees about the WPA/WPEA;
4. Training supervisors on the WPA/WPEA; and
5. Displaying a link to OSC's website on the agency's website or intranet.

**Post-Hearing Questions for the Record**  
**Submitted to Adam Miles**  
**From Senator Tom A. Coburn, M.D.**

**"Border Security: Examining the Implications of S.1691,  
The Border Patrol Agent Pay Reform Act of 2013"**

**June 9, 2014**

1. You testified in front of the Committee on June 9, 2014, that the Office of Special Counsel (OSC) has received sixteen allegations of Administratively Uncontrollable Overtime (AUO) at U.S. Customs and Border Protection (CBP) at sixteen different locations.
  - a. Please provide a detailed status of each case, including the following if applicable: the general allegations of each case, including whether there are allegations of work not being performed; when OSC referred the case; what agency currently is investigating the case; when a report is due; whether a report has been issued; the findings of the report.

**OSC has received sixteen allegations of AUO misuse across the Department of Homeland Security, including ten at CBP. Six of the sixteen disclosures were from employees at other DHS components, including Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services.**

**The CBP cases include:**

1. **Washington, D.C., Customs and Border Protection, Commissioner's Situation Room – The whistleblower alleged that employees regularly abuse AUO and that the CSR director and assistant director authorized and abetted the improper use of AUO and abused it themselves. The whistleblower also alleged that employees surfed the internet and engaged in other non-work related conduct during claimed AUO periods. OSC referred the allegations on January 13, 2013. The agency substantiated the allegations of AUO abuse on April 19, 2013. The report did not sufficiently address the allegations concerning non-work related activities during claimed AUO periods. OSC closed the case on October 31, 2013. CBP Office of Internal Affairs (OIA) conducted the investigation.**
2. **San Ysidro, CA, Office of Border Patrol – The whistleblowers alleged that Border Patrol agents (BPAs) working at the Asset Forfeiture Office routinely claim AUO each day, but fail to perform duties that qualify for AUO. The whistleblowers also alleged that employees work on administrative matters during the claimed AUO periods, that employees leave early, and that they are not always present for AUO time they claim. CBP OIA investigated the case. OSC received the initial report on January 23, 2014. The report**

substantiated the core allegations of AUO misuse, but did not find that employees were absent for claimed AUO periods. OSC received supplemental reports on February 20, 2014, June 23, 2014, and July 9, 2014. Additional information on the supplemental reports is provided below in response to question 1.b3.

**3. Glynco, GA, CBP Office of Training and Development (OTD) –** The whistleblower alleged that agents routinely abused AUO by claiming AUO on a daily basis but failing to perform duties consistent with the use of AUO. CBP OIA investigated the case. OSC received the initial report on January 23, 2014. The report substantiated the core allegations of AUO misuse. OSC requested supplemental reports and received a series of supplemental communications from DHS (see response to question 1.b3 below).

**4. Laredo, TX, Laredo North Station –** A whistleblower at the CBP facility in Laredo, TX, alleged that BPAs at the Laredo North Station improperly claim AUO for routine shift-change activities. The whistleblower also alleged that supervisors told agents they could exercise during the last half-hour of the two-hour period claimed as AUO. OSC referred the case to DHS and received an initial report on November 26, 2012, and a supplemental report on January 23, 2014. The supplemental report and investigation, conducted by CBP OIA, confirmed that “BPAs are regularly remaining at their duty stations two hours beyond the end of their shift in order to earn AUO pay.” The report concludes, “The evidence supports the allegation that BPAs are not performing duties that justify the receipt of AUO pay.” CPB noted, “[I]t is clear that AUO is being inadequately documented and/or utilized improperly for work that is not compensable under AUO.”

The report did not substantiate the allegation that supervisors told BPAs that they could exercise during the last half-hour of the two-hour period claimed as AUO. According to the report, there is a current program that allows BPAs to exercise on duty, but BPAs all know that AUO cannot be claimed for working out.

The investigation substantiated the allegation that BPAs are not performing duties that justify the receipt of AUO pay, but noted that the majority of the duties performed by agents claiming AUO are routine post-shift activities. The agents interviewed indicate that the work cannot be completed in an eight-hour shift. The report contains an extensive discussion of the cost and benefits of continued misuse of AUO versus the alternative of transitioning to four shifts per day without AUO. According to senior BPA managers, a deliberate choice was made to continue using three, ten-hour shifts per day utilizing AUO to facilitate the shift changes. The managers insist that employing three, ten-hour shifts is a more cost-effective approach to securing the border, even if AUO may not properly be used for routine activities.

- 5. Washington, D.C., Customs and Border Protection, Office of Internal Affairs** – The whistleblower alleged that employees improperly and with full knowledge of OIA's senior leaders claim AUO on a daily basis at the 25% rate. Additional details of this referral have been omitted to protect the confidentiality of the employee.
- 6. Customs and Border Protection, Office of Border Patrol Headquarters** – The whistleblower alleged that all Border Patrol agents at headquarters claim AUO on a daily basis and fail to perform any duties that justify AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.
- 7. El Centro, CA, Customs and Border Protection** – The whistleblower alleged that five Border Patrol agents detailed to work as CrossFit instructors at the El Centro Sector Headquarters are improperly receiving AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.
- 8. Herndon and Reston, VA, Customs and Border Protection, National Targeting Centers** – The whistleblower alleged that employees are improperly claiming AUO. This includes at least 27 NTC chiefs and watch commanders, who claim AUO on a daily basis at the 25% rate and do not perform duties warranting this type of overtime. Additional details of this referral have been omitted to protect the confidentiality of the employee.
- 9. El Paso, TX, Customs and Border Protection** – The whistleblower alleged that Border Patrol supervisors and agents at the Ysleta Station have been improperly claiming AUO. The whistleblower further alleged that supervisors allow agents who are injured or assigned to administrative duties to continue to receive AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.
- 10. Washington, D.C., Customs and Border Protection** – The whistleblower alleged that employees claim AUO while performing pre-planned and/or administratively controllable work, such as conducting polygraph examinations, travelling to examination areas, prepping for examinations, and writing reports, at management's instruction. Additional details of this referral have been omitted to protect the confidentiality of the employee.

The cases from other DHS components include:

- 11. Houston, TX, Immigration and Customs Enforcement** – A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not

time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO. OSC received an initial report on September 11, 2013. OSC requested and received a supplemental report on January 27, 2014. The subsequent ICE Office of Professional Responsibility (OPR) investigation determined that 54% of the AUO justifications were noncompliant with AUO rules, and another 33% were found to be “undetermined,” because they were vague, and it was unclear whether the justifications supported the AUO claim. OPR further noted that the lack of ICE policy and guidance on AUO contributed, at least in part, to employees providing justifications for overtime that are inconsistent with the purpose of AUO.

**12. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO)** – The whistleblower alleged that employees claim between ninety minutes and three hours of AUO daily but usually leave early and fail to work the additional claimed hours. The whistleblower also alleged that one supervisor claimed AUO daily but usually left early or failed to work the additional claimed hours, and alleged all other employees earned AUO for duties that did not justify its receipt. Additional details of this referral have been omitted to protect the confidentiality of the employee.

**13. Washington, D.C., U.S. Citizenship and Immigration Services** – The whistleblower alleged that employees in the Office of Security and Integrity claimed ten hours of AUO every week, but the work was not lawfully claimed as AUO because it was routine or administrative. The whistleblower asked to be decertified from receiving AUO, but supervisors initially declined the request because it would draw negative attention to the office. The whistleblower claimed to have suffered reprisal as a result of the request. The agency report is due August 12, 2014. DHS OIG is conducting the investigation.

**14. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO)** – The whistleblower alleged that all employees in the office claim one to four hours of AUO daily. These employees claim AUO while performing pre-planned and/or administratively controllable work. The whistleblower also alleged that employees take one-hour breaks at breakfast, lunch, and midday. As a result, even on days when there is sufficient work during AUO hours, the work could have been completed during an eight-hour shift. Additional details of this referral have been omitted to protect the confidentiality of the employee.

**15. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO)** – The whistleblower alleged that all employees in the office claim one to four hours of AUO daily. Because of the low number of detainee cases and arrests made, employees claim AUO while performing pre-planned and/or administratively controllable work. The whistleblower

**also alleged that management has advised employees to vary the amount of daily AUO on their timesheets in order to avoid suspicion of illegitimate use. Additional details of this referral have been omitted to protect the confidentiality of the employee.**

**16. Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO) –** The whistleblowers alleged that all employees within the whistleblower's section regularly claim two hours of AUO daily. Because of the low number of detainee cases and arrests made, employees claim AUO while performing pre-planned and/or administratively controllable work. Employees allegedly announce that they are staying late because they are "low on AUO." Management told employees that they can "Google for AUO," meaning they can freely spend time online in order to claim AUO. Additional details of this referral have been omitted to protect the confidentiality of the employee.

- b. For any case in which you requested a supplemental report after the investigation had been completed, please explain what you requested and why, and when you expect to receive the information.

**In the case concerning the Asset Forfeiture Office (AFO) in San Ysidro, California, we requested supplemental information on the allegation that Border Patrol agents were not working at all during the hours claimed as AUO. In the initial report, CBP OIA stated it did not substantiate this allegation, without providing additional detail. We requested a detailed summary of the evidence relied upon in reaching that conclusion. In the event of conflicting evidence on the issue, we requested an explanation of how conflicting evidence was reconciled to reach the conclusion that the allegation was not substantiated. OSC received additional information on this issue on July 9, 2014, and it is under review by OSC.**

**In the case involving the Office of Training and Development (OTD), OSC requested supplemental information to determine whether the supervisors responsible for the AUO abuse substantiated in the report would be disciplined or otherwise held accountable. We also requested information to determine how the whistleblower's previous attempts to report AUO abuse within DHS were addressed. The agency responded in a series of emails over the course of several months. OSC is reviewing this information.**

2. To your knowledge, did border patrol agents in each of the cases OSC referred have reason to know their location was being investigated prior to CBP Internal Affairs' investigations?

**Border Patrol agents are on notice that AUO practices are being scrutinized. But, OSC does not have any specific evidence of Border Patrol agents knowing their location was being investigated prior to CBP OIA**

**investigations.**

3. You discussed in your testimony in front of the Committee on June 9, 2014, two cases, one involving instructors at training facilities (OTD) and one involving paralegals at San Ysidro, California, where agents were found to perform the same duties as officers or civilians but did so in ten hours as opposed to eight.

- a. Were those facts substantiated by CBP Internal Affairs?

**Yes, CBP IA substantiated that Border Patrol agents working in OTD headquarters and OTD facilities and at the Asset Forfeiture Office (AFO) in San Ysidro, California, were performing the same duties as officers and civilians, and were generally working ten hours a day in order to continue receiving AUO. CBP OIA also substantiated that the duties being performed were routine, administrative, and controllable, and therefore, did not justify the receipt of AUO. It was found that Border Patrol agents were completing work during the hours claimed for AUO that could be completed during their scheduled eight-hour tour of duty. In the San Ysidro case, the investigation further determined that the operational circumstances and work pace at the AFO did not dictate the use of AUO to accomplish the mission of the office.**

- b. To your knowledge, was anyone disciplined as a result of these two cases?

**To our knowledge, no one has been disciplined as a result of these cases; however, the matters remain under review.**

- c. To your knowledge, did CBP ever perform a review to determine why agents are permitted to work ten hours in those locations when they can complete their duties in eight?

**In the response to the investigative findings in both the OTD and the AFO cases, AUO was de-authorized for Border Patrol agents working as instructors and as Asset Forfeiture specialists. However, whistleblowers subsequently informed OSC that all Border Patrol agents working at the AFO in San Ysidro, California, were given the option to return to a field assignment in order to continue receiving AUO.**

- d. Does OSC have a position on whether such a review should be performed?

**In response to an OSC referral, CBP committed “to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified.” In prior testimony, OSC stated that this is a positive step. CBP has committed to decertifying certain positions, such as instructor and Asset Forfeiture specialist. However, OSC has not seen the results of the position-by-position review.**

4. I understand OSC has received whistleblower complaints about the leadership and investigators at CBP Internal Affairs.
  - a. Do you believe any of the whistleblower complaints suggest conduct which would call into question the integrity of the AUO investigations conducted by Internal Affairs?

**As noted in prior testimony, OIA investigated and substantiated the previous AUO abuse cases referred by OSC. Although OIA conducted thorough investigations in each of these cases, the allegations concerning misuse of AUO within OIA raise questions about its ongoing ability to review OSC referrals. Accordingly, in consultation with OSC, the DHS Office of General Counsel determined that OIA will complete the pending CBP cases previously submitted to that office. However, the DHS Office of Inspector General will receive and investigate any new OSC referrals of AUO abuse, including those listed above.**

**Questions for The Honorable Carolyn Lerner**

Special Counsel

U.S. Office of Special Counsel

**Questions from Chairman Mark Meadows**

Subcommittee on Government Operations

Hearing: "Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization"

**1. What criteria do you believe are best to measure OSC's success over time and to continue to identify areas of improvement?**

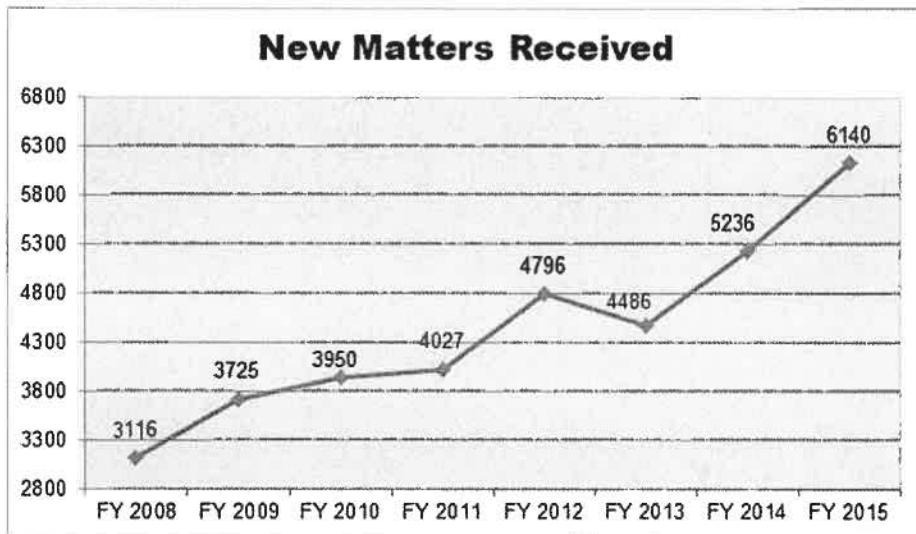
We have identified six criteria that best measure OSC's success over time. The trends in these data sets also help us to identify areas for improvement. For each area, we explain why the category is significant in evaluating OSC's work and accomplishments. For context, we provide information for the last eight fiscal years—a period that covers the last year of the prior Special Counsel (FY2008), an interim period with no Senate-confirmed Special Counsel (FY2009–FY2011), and my current term (FY2012–FY2015).

**1) Total Cases Received**

The total number of cases OSC receives in a year allows us to measure the federal workforce's confidence in OSC and whether our efforts to increase visibility are effective. If employees are confident in our ability to produce results and are aware that OSC is an option for seeking relief or reporting a concern, then this number should steadily increase over time.<sup>1</sup>

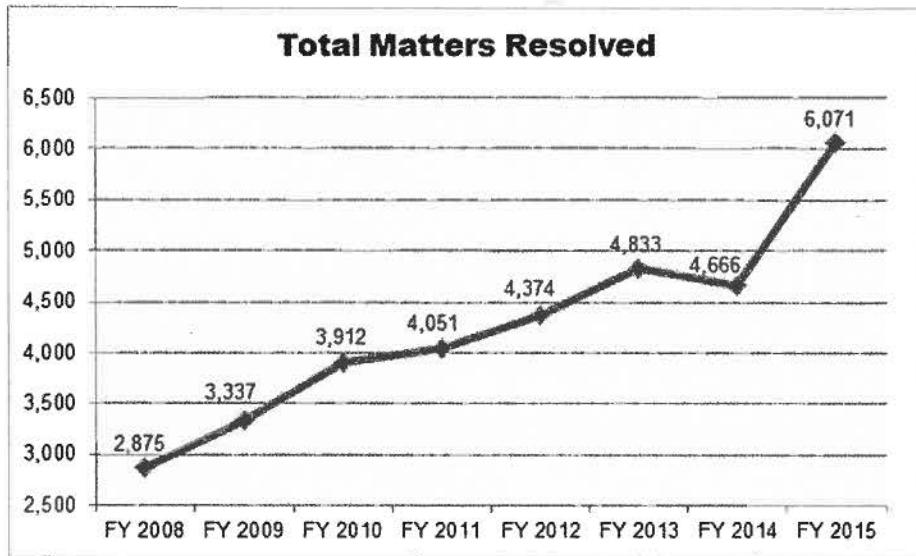
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<sup>1</sup>Each year, OSC receives a number of cases that are inadvertently filed by federal employees as disclosures of wrongdoing, and properly should have been filed as prohibited personnel practice complaints. In order to process these cases, OSC must open a disclosure file, read the information provided, and determine that the individual is only seeking relief to address a possible prohibited personnel practice, and not separately making a disclosure of wrongdoing. After making a determination that the case was improperly filed as a disclosure, OSC's Disclosure Unit forwards the case to OSC's Complaints Examining Unit, which reviews the claim as a prohibited personnel practice complaint. In 2014, the number of these misfiled disclosure cases increased by an estimated 9 percent over the historical average because of changes in OSC's online complaint filing system. OSC is in the process of modernizing its online complaint filing system to make it more user-friendly and intuitive. OSC anticipates that the changes to the online system will be completed by the middle of FY 2016. The changes will address not only the current, elevated number of misfiled disclosure cases, but, with the smarter, more user-friendly interface for federal employees, should greatly diminish the historical problem of wrongly-filed disclosure forms. By diminishing the number of wrongly filed disclosure cases, the new system should also provide a more accurate, but likely lower number of actual disclosure cases received in FY 2016 and beyond.



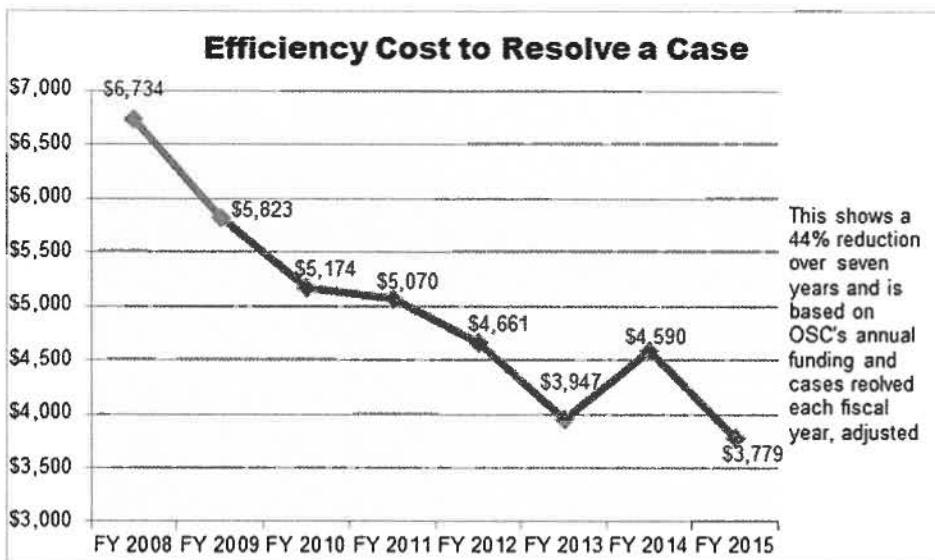
## 2) Cases Resolved

The number of cases resolved in a year allows us to measure our productivity. If the number of cases received is increasing, our organization must increase productivity by increasing the number of cases resolved over time to keep up with demand.



## 3) Cost Per Case

OSC's cost to resolve a case allows us to measure our efficiency. To resolve more cases with limited resources, we must find innovative and more efficient ways to deploy our staff and resolve cases quickly without compromising results. In reducing the cost per case, we are finding new ways to limit overhead expenses and putting more of our fixed appropriation toward core mission work and the resolution of cases.



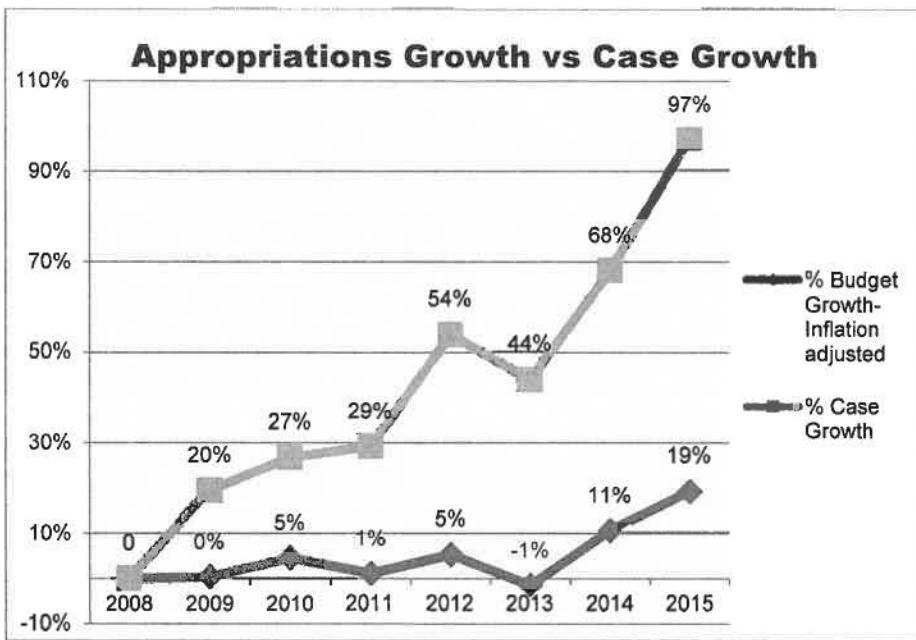
#### 4) Backlog of cases

OSC's case backlog allows us to measure whether our resources are keeping pace with demand for our services. If OSC's efficiency and productivity indicators are positive, but the case backlog continues to increase, then OSC's resources are not sufficient to keep pace with the demand in terms of case volume. OSC needs adequate resources to control spiraling backlogs. A growing backlog is likely to undermine confidence gains in OSC, as employees will inevitably have to wait longer for OSC to process their case, even if OSC is operating more efficiently and effectively.

#### Total Number of Cases Pending at End of Fiscal Year

FY2008	FY2009	FY2010	FY2011	FY2012	FY2013	FY2014	FY2015
937	1324	1361	1331	1729	1397	1969	2129

Another method for evaluating whether resources are consistent with demand is to compare OSC's growth in cases with our budget. As the chart below demonstrates, cases have increased by 97 percent since 2008 while resources (in real values) have increased by 19 percent.



### 5) Number and Rate of Favorable Actions

The total number of favorable actions for whistleblowers and other employees is a key indicator of OSC's effectiveness. While it is important to be efficient, opening and closing an increased number of cases, even at a reduced cost, does little to promote merit system values and advance OSC's mission if we do not secure relief for whistleblowers and other employees in the process.

This metric measures the quality of OSC investigations and our ability to have an impact. Favorable actions for whistleblowers and other employees include reinstatement, back pay, stays of improper removals or reassignments, disciplinary actions against those who retaliate, and systemic corrective actions, such as changes in agency policies that allow for prohibited practices to occur. If OSC is operating effectively, then both the number and rate of favorable actions we achieve for complainants should steadily increase over time.

**Percentage of OSC prohibited personnel practice (PPP) cases that resulted in favorable actions for the employee, and the total number of favorable actions OSC secured<sup>2</sup>:**

**FY2008—33 favorable case outcomes, 58 favorable actions overall, 1.6% of cases**

**FY2009—53 favorable case outcomes, 62 favorable actions overall, 2.2% of cases**

**FY2010—76 favorable case outcomes, 96 favorable actions overall, 3.1% of**

<sup>2</sup> Some cases may include multiple favorable actions, such as 1) a stay of a personnel action followed by 2) a settlement that permanently resolves the retaliatory personnel action, and 3) a disciplinary action against the manager who engaged in retaliation.

**1) What are the most frequent common law privileges that have been invoked to prevent OSC from getting the information it needs?**

The most frequent common law privilege OSC encounters is the attorney-client privilege, by a large margin. OSC sometimes will encounter the deliberative process privilege and the criminal law enforcement privilege. The latter can be particularly troublesome because it means OSC cannot access information that another entity has obtained until that investigation has been completed. In one case, we waited four years for the investigation to be completed without indication that the agency had made any progress.

**2) Which agencies invoked them?**

We do not maintain statistics on this, but our staff reports that the following agencies have recently invoked privileges in response to OSC requests for information: Department of Justice, Department of Defense, Department of Homeland Security, Environmental Protection Agency, and the Federal Mediation and Conciliation Service. In addition, I testified last year before this Committee and expressed concerns about blanket assertions of attorney-client privilege by the Chemical Safety Board.

**3) Have you had success in educating agencies to the fact that such privileges are inapplicable?**

Our success has been mixed. First, agencies generally believe they can invoke the attorney-client privilege to protect communications between management officials and counsel in personnel disputes. Agencies do not uniformly agree that rule 5.4 requires them to provide privileged material. Indeed, agencies commonly argue that production is not required because of rule 5.4's exception, which permits agencies to withhold information prohibited by law or regulation from disclosure, claiming that a common law privilege falls within the term "law."

Likewise, agencies fear that production to OSC will waive the privilege for the future, when they are litigating against the individual challenging the personnel action. OSC's proposal would clarify that the production of potentially privileged material to OSC would not constitute a waiver of the privilege by the agency in any other context or forum. This would obviate the need in most circumstances for OSC to spend significant time and resources negotiating with agencies prior to document productions.

Second, OSC lacks independent authority to enforce rule 5.4. The only mechanism to compel disclosure derives from our statutory authority to subpoena. 5 U.S.C. § 1212. That authority, however, requires OSC to apply to the Merit Systems Protection Board (MSPB) each time it seeks to enforce a subpoena. The MSPB, not OSC, ultimately decides whether to enforce an OSC subpoena in district court under 5 U.S.C. § 1212(b)(3). This process is indirect and cumbersome, while a statutory right to access the information is direct and clear.

**cases**

**FY2011—65 favorable case outcomes, 84 favorable actions overall, 2.5% of cases**

**FY2012—128 favorable case outcomes, 159 favorable actions overall, 4.3% of cases**

**FY2013—124 favorable case outcomes, 173 favorable actions overall, 4.2% of cases**

**FY2014—165 favorable case outcomes, 201 favorable actions overall, 4.9% of cases**

**FY2015—212 favorable case outcomes, 278 favorable actions overall, 5.2% of cases<sup>3</sup>**

## **6) Outreach and Training Sessions**

The number of outreach and training sessions OSC conducts measures our efforts to promote awareness of the agency and to prevent future violations of merit systems laws by educating managers about their responsibilities. OSC's whistleblower and PPP certification program provides an important avenue for raising awareness about these rights and preventing violations. In 2015, I reassigned a senior OSC attorney to the newly created position of Director of Training and Outreach. This is the first time OSC has had a full-time employee dedicated to these duties. The Director of Training and Outreach is responsible for increasing outreach as part of our efforts to prevent retaliation and increase awareness of whistleblower protections.

### **Total number of outreach and training sessions:**

<b>FY2008</b>	<b>FY2009</b>	<b>FY2010</b>	<b>FY2011</b>	<b>FY2012</b>	<b>FY2013</b>	<b>FY2014</b>	<b>FY2015</b>
60	60	57	33	121	64	104	118

## **2. What obstacles have you seen to OSC obtaining access to agency information with the current OPM regulatory authority which directs agencies to comply?**

OSC historically has faced a range of obstacles in accessing agency information under OPM's civil service rule 5.4. Rule 5.4 is not specific to OSC and has no enforcement mechanism. The obstacles include nonresponses, untimely responses, incomplete responses, and, in limited instances, unambiguous refusals to comply.

## **3. Common law privileges**

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<sup>3</sup> Approximately 15 percent of PPP claims each year involve allegations of discrimination under 5 U.S.C. § 2302(b)(1), matters that OSC generally closes after initial review, to not duplicate the well-established processes for addressing claims of discrimination through the EEOC. In addition, the same employee may file multiple cases that are resolved through one favorable action. When these and other factors are considered, the percentage of favorable actions may increase.

By law, agencies share an interest in protecting the merit system and preventing prohibited personnel practices. 5 U.S.C. § 2302(c). This interest includes protecting the merit system through fair and impartial investigations that weigh all the facts in a timely manner. On this important principle, OSC's interests should align with the interests of any agency it investigates. OSC has and will continue to educate the agencies on their statutory responsibilities, but given a lack of clarity surrounding the attorney-client privilege, room to disagree will persist. Congressional action would clarify the law, promote merit system principles, and better protect employees from retaliation.

#### **4. Agency responses to disclosures**

**1) How closely do agencies stick to the 60-day timeframe required by 5 U.S.C. § 1213(c)(1)(B) for providing a written response to OSC?**

When the Special Counsel refers a disclosure of information to an agency head for investigation under 5 U.S.C. § 1213(c), the agency is required investigate the allegations and submit a written report within 60 days of the referral. However, this 60-day time frame is typically insufficient for agencies to conduct a thorough investigation and prepare a report that meets the statutory requirements. Agencies adhere to the statutory 60-day time frame in less than 1 percent of cases.

**2) Which agencies are the more delinquent in responding?**

The agency most delinquent in responding is the Department of Veterans Affairs (VA) followed by the Department of Homeland Security. It is worth noting that the majority of OSC's referrals have been to these two Departments.

**3) What is the average timeframe for such responses government-wide?**

The average time frame for agency responses to § 1213(c) referrals government-wide is 387 days.

**4) Do agencies ever completely fail to conduct investigation of the disclosures that OSC transmits? If so, how often?**

It is extremely rare that an agency fails altogether to conduct an investigation or to submit a report to OSC. Since OSC was established, OSC has transmitted only two cases to the President pursuant to § 1213(e)(4), reporting that the agency head failed to submit the required report. OSC strives to work with agencies to ensure that allegations are fully investigated and resolved, as we believe this better serves the government and public interests.

**5. Follow-up action on agency response to disclosures**

**1) How often do agencies substantiate the allegations that OSC transmits, but then nevertheless fail to take any follow-up action, such as changing their practices, restoring employees who have been wronged, or disciplining employees who commit misconduct?**

In most cases where an agency investigation has substantiated some or all of the allegations, the investigative component recommends that the agency take some form of corrective action. Pursuant to § 1213(d)(5), the agency report must include a description of any action taken or planned as a result of the investigation. However, there have been numerous instances in which an agency report fails to clearly explain the basis for failing to take sufficient follow up action after substantiating the whistleblower's concerns. For instance, in a recent case at the Carl T. Hayden VA Medical Center in Phoenix, Arizona, the VA confirmed gross mismanagement of the Medical Center's emergency room. For a period of several years, the ER had no nurses on staff who were properly trained to conduct triage of incoming patients. This created a threat to patient safety, yet no VA officials were held responsible for the misconduct, as required by § 1213.

**2) Does OSC have any ability to compel action in such a situation?**

OSC does not have authority to compel agencies to take corrective action. OSC's current authority is limited to reporting a deficient finding if the agency fails to take adequate action to address problems or issues substantiated by the investigation. In these cases, OSC conducts follow-up with the agency, through a request for supplemental information, to determine whether the recommended and any other corrective action has been taken. OSC seeks to ensure that the necessary action is taken, or is in the process of being taken, before transmitting the agency reports and whistleblower comments to the President and Congress and closing the matter.

**3) Currently, if an agency says it is going to take a certain action, what does OSC do to follow up and ensure the promised action gets taken?**

In a limited number of cases, typically where the corrective action may require a significant period of time for completion, OSC will close the matter under the condition that the agency report back to OSC upon completion of the corrective action. In those cases, OSC will conduct additional follow-up with the agency to ensure that the action is completed and forward a final closure letter and any supplemental reports submitted by the agency to the President and Congress.

## **6. Statute of Limitations**

### **1) How often does OSC receive prohibited personnel practice allegations where the facts and circumstances involved are more than three years old?**

Approximately three percent of PPP allegations involve allegations where the disclosure and all of the personnel actions are more than three years old.

### **2) What limitations does OSC experience in investigating such allegations?**

It is often difficult to obtain evidence in these cases. We are faced with the following obstacles: 1) witnesses are more difficult to locate; 2) memories fade; and 3) agency records and physical evidence are often lost or destroyed.

### **3) How did OSC arrive at the proposal of a 3-year limitation?**

The proposal for a 3-year limitation is consistent with the statute of limitation that was recently passed for employees of government contractors. See 10 U.S.C. §2409 and 41 U.S.C. § 4712.

### **4) What if an individual doesn't learn about a prohibited personnel practice until after the time when the underlying conduct has occurred?**

Under OSC's proposal, we would have the discretion to review a PPP allegation after the statute of limitations has passed. If an employee makes a strong case that OSC should review the claim, we will initiate an investigation, notwithstanding the proposed statute of limitations.

### **5) Would you be open to OSC having discretion to investigate older cases if OSC determines there is good cause to review the allegation?**

Yes, we believe it is important to have the authority to review any strong claim presented to OSC even if the allegations are older.

## **7. Previous action by MSPB**

- 1) How does OSC typically learn whether a matter has already been previously filed with the MSPB or adjudicated by them?**

This information is obtained in one of three ways: 1) filers are asked on OSC complaint forms whether they have filed an appeal with the MSPB; 2) the assigned examiner obtains this information during an initial interview with the filer; or 3) the assigned examiner may obtain this information directly from the MSPB.

- 2) How often does OSC receive such complaints that have already been filed with the MSPB?**

Approximately five percent of the PPPs complaints we receive have already been filed with the MSPB.

- 3) How often does OSC receive such complaints that have already been adjudicated by the MSPB?**

Approximately one percent of the PPP complaints we receive have already been adjudicated by the MSPB.

## **8. Previous action by OSC**

- 1) How often does OSC receive repeat complaints whereby OSC has already investigated a set of facts and circumstances but gets a second complaint on the matter?**

Approximately six percent of the PPP complaints we receive are considered “repeat complaints.”

- 2) What are OSC’s current practices with regard to these circumstances?**

OSC’s current practice is to issue a letter explaining that we are closing the complaint because the facts and circumstances have previously been addressed. If the filer submits additional information in support of the same facts and circumstances, we may review it as a request for reconsideration.

## **9. Per 5 U.S.C. § 1214(b)(2)(A), OSC is required to make a final determination on prohibited personnel practice complaints within 240 days, unless the complainant agrees to extend the period. Although being thorough in order to obtain proper outcome is critical, it is also important that individuals who have filed with OSC don’t have to wait an unreasonable period of time for an ultimate determination.**

- 1) How closely does OSC track the progress on staying within these required timeframes?**

OSC tracks individual case age and average case age for both existing and closed matters. This allows us to monitor the agency’s overall success rate regarding the statutory

timeframes. We track individual case progress within ten days of receipt, after 90 days, and every 60 days thereafter, and notify the complainant of case progress. If a matter is not resolved within 240 days, OSC's case tracking system sends the assigned examiner a notice to contact the complainant consistent with section 1214(b)(2)(A) to request permission to continue the investigation.

**2) What is the best way to quantify how closely OSC is sticking to its statutorily mandated timeframes?**

Monitoring the average age of open cases and average age of cases at time of closure shows how closely OSC is sticking to its statutorily mandated timeframe for resolution of PPP complaints.

**3) What is within OSC's control to trend in a positive direction there, versus what is outside OSC's control?**

We are continually working to improve efficiencies in case processing to reduce the time for case completion. For example, we have initiated cross-training across program units. This has allowed OSC's Investigation and Prosecution Division (IPD) to assist our Complainants Examining Unit in screening PPP complaints. OSC also looks for cases that are appropriate for early settlement without a full investigation. Early settlement uses fewer agency resources and takes less time than full investigation. When appropriate, IPD refers cases to OSC's Alternative Dispute Resolution Unit, where they may be settled more quickly.

Case examiners also receive reminders from our case tracking system when a case has been open for 90 days and every 60 days thereafter, as well as when the 240-day timeframe has been reached. This encourages case examiners to focus on resolving those cases that are reaching the 240-day deadline. Examiners also receive reminders to speak to their supervisors about cases that are reaching the statutory timeframes.

Other factors, however, are outside our control.

- Our growing caseload, and the corresponding increase in each examiner's docket, makes it increasingly difficult to meet the 240-day timeframe.
- Under section 1214(a)(1)(D), before OSC closes a PPP case, it must send the complainant a report with its factual findings and legal conclusions, and give the complainant an opportunity to provide written comments. The time it takes to prepare the report, receive comments, and address those comments, adds significant time to the process, making it more difficult to complete all cases within the statutory timeframes.
- Complex retaliation or discrimination investigations often will go well beyond the 240-day statutory requirement because, for example, complex allegations require extensive investigations; after investigation, OSC is engaged in protracted settlement negotiations, or OSC is preparing to file a formal complaint for disciplinary or corrective action. Successful advocacy and enforcement efforts sometime require

investigations significantly longer than 240 days.

- Agency delays in responding to OSC's requests for information under rule 5.4 frequently contribute to matters extending beyond the 240-day timeframe. Delays can extend for months and can severely hamper investigation and prosecution efforts. These delays are often due to claims of insufficient resources. For example, agencies assert that they lack sufficient IT resources to timely perform requested email searches. Agencies send encrypted e-discovery, sometimes asserting they are unable to decrypt their own documents. Claims of privilege over agency information lead to additional disputes and delays. Because OSC lacks a meaningful enforcement mechanism for failures to comply with our rule 5.4 requests, we have little recourse when agencies fail to fully and timely respond. These barriers to obtaining information are among the greatest challenges OSC faces in meeting statutory timeframes for investigations.

While OSC constantly searches for ways to increase efficiency, factors outside our control prevent us from consistently resolving cases within 240 days.

**10. Have there been significant problems from the experiment in “all circuit” judicial review of whistleblower rulings? Do you oppose making that reform permanent?**

No, there have been no problems from the experiment in “all circuit” judicial review from OSC’s perspective. OSC supports making that reform permanent.

**11. Please describe the impact to date of having whistleblower ombudspersons at every inspector general office, as mandated by the Whistleblower Protection Enhancement Act of 2012.**

From OSC’s perspective, the whistleblower ombudsperson program has been extremely positive. In many agencies, the OIG whistleblower ombudsperson has taken the lead in educating employees about their rights and responsibilities under the whistleblower law. In addition, the ombudsperson program has led to more collaboration and information sharing among the various OIGs and with OSC. Increased cooperation allows our related offices to share best practices for investigation techniques and training, and to identify and resolve issues quickly and effectively.

**12. OSC certification program**

**1) How many agencies out of what total universe have been certified as completing merit systems training in the OSC certification program?**

There are approximately 172 agencies or entities that employ federal workers. This number includes OIGs. To date, 50 agencies or components have completed OSC’s 2302(c) Certification Program (program), including 40 separate agencies and 10 agency components. An additional 17 agencies and components have registered to complete the OSC program. OSC keeps an updated list of certified agencies and pending certifications

on its web site. On February 4, 2016, I sent a reminder to all non-certified federal agencies and entities reminding them of their obligation to participate in OSC's program.

**2) What impediments have you seen to all agencies becoming certified?**

The very large agencies appear to have more difficulty coordinating the supervisory training requirement. One of the impediments is the coordination of the program among a large number of components or sub-agencies. Another impediment includes training large numbers of supervisors, sometimes located across the country and overseas. OSC has attempted to address these obstacles by providing expert trainers to train agency supervisors, including providing web-based training. Very recently, OSC developed a training quiz that will alleviate some of the issues that the larger agencies face in training all supervisors. (Nevertheless, OSC still recommends in person training for supervisors whenever possible.)

As to smaller agencies, there are still some that appear to lack awareness of the requirement to participate in OSC's program. As noted above, to address this challenge, I recently sent correspondence to remind all non-certified federal agencies and/or entities of their obligation to participate in OSC's program.

**3) What is the realistic schedule for all government agencies and corporations to be trained in the WPA and merit system principles?**

On OSC's website, we note, "It is our expectation that agencies will be able to complete the certification process within six months of registering with OSC and we are committed to assisting all federal agencies with meeting the requirements of 5 U.S.C. § 2302(c)." Accordingly, after an agency registers to complete the process, six months is a realistic schedule for completion. We expect to see an increase in registrations in response to our February 4, 2016 letter.

**4) Do OSC staff, including administrative judges, complete certifiable training in the WPA and merit system principles? If not, should they?**

OSC follows the relevant steps under the certification program, including providing information on civil service and whistleblower protection laws to all incoming staff in their written orientation materials. Additionally, OSC follows the supervisory training requirements of the program by ensuring that all supervisors are trained every three years on the civil service and whistleblower protection laws over which OSC has jurisdiction. OSC's program staff is comprised primarily of investigators, attorneys, and human resource professionals. We do not employ administrative judges.

**13. Please detail how OSC has used its WPEA authority to file *amicus* briefs, including the number of times this authority has been exercised, the issue and apparent impact.**

Since the WPEA was enacted in 2012, OSC has filed the following *amicus curiae* briefs in the following cases in federal court:

- *Department of Homeland Security v. MacLean* (Supreme Court), filed September 30, 2014. The case involved a former federal air marshal who blew the whistle on the Transportation Security Administration's decision to stop its air marshal coverage of long distance flights, even though there were heightened intelligence warnings that terrorists were targeting those flights. OSC argued that Robert MacLean's disclosures should be covered by the Whistleblower Protection Act.
- *Clarke v. Department of Veterans Affairs* (Federal Circuit), filed August 14, 2014. OSC argued that the MSPB's decision was erroneous because the MSPB's analysis of the exhaustion of administrative remedies requirement disregarded the plain language of the statute, conflicted with precedent barring the MSPB from relying on OSC's determinations in analyzing the exhaustion requirement, and encroached upon OSC's independence, thereby threatening future whistleblower claims.
- *Kerr v. Salazar* (Ninth Circuit), filed May 13, 2013. OSC argued that the WPEA should be applied to cases pending before the law's enactment. Specifically, OSC urged the Ninth Circuit to apply the WPEA to the case because: 1) it clarified existing law by overturning prior decisions that unduly limited whistleblower protections; 2) Congress expressly intended the WPEA to apply to pending cases; and 3) applying the WPEA to pending cases promotes government efficiency and accountability.
- *Berry v. Conyers & Northover* (Federal Circuit), filed March 14, 2013. OSC urged the court to respect the due process rights of federal employees by allowing the MSPB and OSC to review adverse personnel actions based on sensitivity determinations, especially in whistleblower cases.
- *Day v. Department of Homeland Security* (Federal Circuit), filed February 21, 2013. The case concerned whether restrictive decisions by the Federal Circuit that barred certain recurring whistleblower claims from review should be applied to pending cases or only to cases filed after the WPEA's enactment. OSC urged that the statute should be applied retroactively to pending cases.

**14. What has been the effect of the U.S. Court of Appeals for the Federal Circuit decision in *Kaplan v. Conyers* since 2013?**

In *Kaplan v. Conyers*, the Federal Circuit Court of Appeals held that the MSPB could no longer review the merits of an agency decision to remove or significantly suspend federal employees when the asserted basis for the personnel action is the employee's alleged ineligibility to occupy "sensitive" positions. In so holding, the Court of Appeals unnecessarily expanded a decades-old Supreme Court holding in *Department of Navy v.*

*Egan*, 484 U.S. 518. *Egan* held that the MSPB could not review agency security clearance determinations. The expansion of the *Egan* decision was unnecessary because 1) the government unequivocally conceded that positions at issue in *Kaplan* did not require security clearances or involve access to classified information; and, 2) in enacting the Civil Service Reform Act, Congress already established a mechanism for removing or suspending employees when doing so is in the interest of national security. Thus, the *Kaplan* decision essentially sanctioned an agency's overreach into an area that Congress had explicitly addressed. The federal government has designated tens of thousands of positions as noncritical sensitive. The effect of *Kaplan* has been to deprive these individuals of guaranteed due process or judicial review when facing removal, even in cases involving discrimination and whistleblowing.

**15. What is OSC's track record for each year of the Kaplan, Bloch, and Lerner administrations for litigating in a hearing to obtain corrective action for:**

- 1) Whistleblowers.**
- 2) Any federal employee who has suffered from any other prohibited personnel practice. Please provide any necessary explanation of the results.**

From 1998–2003, under Special Counsel Elaine D. Kaplan's tenure, OSC filed one petition for corrective action, in 2003. OSC argued for MSPB jurisdiction under the whistleblower law for employees of the International Boundary and Water Commission.

From 2004–2008, under the tenure of Special Counsel Scott J. Bloch, OSC filed one corrective action petition in each year except for 2008. Two of the four petitions involved whistleblower retaliation. In the two whistleblower cases, the agency settled the case after OSC filed the petition.

From 2011–2015, under my tenure, OSC has filed two corrective action petitions, one in 2011 and one in 2015. The 2011 filing involved whistleblower retaliation, and the 2015 petition involved a Bureau of Alcohol, Tobacco, and Firearms (ATF) whistleblower who OSC argued was protected by the First Amendment for testimony he gave in Federal Court. After OSC prevailed on the decision on the scope of First Amendment protections for federal employees under the Civil Service Reform Act, the agency settled the claim.

OSC has not historically brought many cases to the MSPB. The main reason is that agencies typically settle when strong cases are presented, precluding the need for formal litigation. Because so many cases settle prior to litigation, OSC is publicizing more PPP reports, even after the agency has accepted OSC's corrective action request. We believe these reports deter future misconduct and educate agencies on the scope of the whistleblower law.

- 16. What is OSC's track record for seeking stays of prohibited personnel practices? Please provide the record for both formal and informal stays for each year of the Kaplan, Bloch and Lerner administrations, with any explanation for the results.**

**Elaine D. Kaplan**

*Served: April 1998–June 2003*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 1998	10	2
FY 1999	12	3
FY 2000	7	2
FY 2001	13	1
FY 2002	7	1
FY 2003	6	1

**Scott J. Bloch**

*Served: December 2003–November 2008*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 2004	11	1
FY 2005	3	1
FY 2006	8	1
FY 2007	7	3
FY 2008	4	0

**Carolyn N. Lerner**

*Served: April 2011–present*

	<b>Informal Stays</b>	<b>Formal Stays</b>
FY 2011	12	4
FY 2012	27	8
FY 2013	28	5
FY 2014	23	2
FY 2015	62	3

Under my tenure, OSC has more aggressively sought stays, especially informal stays. In fiscal year 2015, OSC obtained a large spike in the number of informal stays because of the influx of cases from the VA. In addition, I have instructed employees in our Complaints Examining Unit (CEU), which conducts the initial review of cases, to seek early resolution of complaints, including stays where appropriate. We are identifying cases that are appropriate for stays more quickly and preventing employees from suffering harm as OSC continues its review of their cases.

- 17. What is OSC's track record for litigating in a hearing to seek disciplinary action for prohibited personnel practices? What is the OSC's track record of obtaining discipline informally through persuading agencies to act?**

**Elaine D. Kaplan***Served: April 1998–June 2003*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 1998	0	0
FY 1999	4	0
FY 2000	1	0
FY 2001	4	0
FY 2002	13	1
FY 2003	12	2

**Scott J. Bloch***Served: December 2003–November 2008*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 2004	11	0
FY 2005	3	1
FY 2006	4	0
FY 2007	5	0
FY 2008	3	3

**Carolyn N. Lerner***Served: April 2011–present*

	<b>Disciplinary Actions Negotiated</b>	<b>Disciplinary Action Petitions Filed</b>
FY 2011	6	0
FY 2012	19	0
FY 2013	27	0
FY 2014	23	3
FY 2015	9	0

During my tenure, OSC has significantly increased the number of disciplinary actions obtained for whistleblower retaliation and other PPPs, and particularly violations of merit rules in the hiring process. We have active investigations in multiple VA facilities that may lead to further formal disciplinary action petitions with the MSPB.

**18. The 1994 WPA amendments required MSPB administrative judges to forward any case to the OSC to consider disciplinary action if the employee established a *prima facie* case of whistleblower retaliation.**

- 1) How many referrals has the OSC received during the Kaplan, Bloch and Lerner administrations?

**Elaine D. Kaplan**

*Served: April 1998–June 2003*

**Referrals from MSPB**

FY 1998	4
FY 1999	4
FY 2000	4
FY 2001	3
FY 2002	1
FY 2003	3

**Scott J. Bloch**

*Served: December 2003–November 2008*

**Referrals from MSPB**

FY 2004	0
FY 2005	1
FY 2006	0
FY 2007	1
FY 2008	4

**Carolyn N. Lerner**

*Served: April 2011–present*

**Referrals from MSPB**

FY 2011	6
FY 2012	8
FY 2013	4
FY 2014	2
FY 2015	11

- 2) How many have led to disciplinary action?

Based on a review of data in OSC's case tracking system, it appears that no referrals from MSPB led to disciplinary action from FY 1998 through FY 2009. In FY 2010, one referral led to discipline; in FY 2012, three referrals led to discipline; in FY 2013, one referral led to systemic corrective action (agency training); and, in FY 2014, one referral led to discipline. Many of the cases referred in FY 2015 are still active.

**19. Please describe changes the OSC has made to its § 1213 whistleblowing disclosure program to make it more accessible and effective for whistleblowers. As part of this response, please describe and summarize the track record to date for the OSC's new unit combining action on disclosures and alleged prohibited personnel practices.**

In the last two years, OSC has implemented the following measures to improve access and help whistleblowers who file disclosures with OSC.

- OSC has clarified that disclosures must be made based on credible information, such as first-hand observation or documents, and may be supported by sworn affidavits from witnesses. Previously, OSC required that referrals be based exclusively on first-hand knowledge.
- When OSC has jurisdiction over a whistleblower disclosure, OSC now calls each person who files a disclosure to ensure we understand their allegations and to explain our process for making a substantial likelihood determination.
- OSC now affords the whistleblower the opportunity to review the information OSC plans to refer to an agency for investigation to ensure accuracy in the referral and issues presented for investigation.
- OSC referral letters to agencies strongly recommend that the agency begin its investigation by interviewing the whistleblower, unless the whistleblower has requested that OSC keep their name confidential.
- In the absence of a substantial likelihood finding, OSC now makes discretionary referrals to agencies under § 1213(g), where a disclosure is of such danger or gravity that it warrants notification of the agency head, or where the information available to OSC is inadequate to make or decline to make a substantial likelihood determination.
- OSC's referral letters now detail the criteria that an agency's investigative report must address to be deemed complete under § 1213(e)(2)(B).
- In appropriate cases, OSC now exercises its discretion to post to its online public file agency findings, whistleblower comments, and the Special Counsel's determination in § 1213(g) matters.
- OSC is preparing to issue a new “smart” complaint form to help whistleblowers file disclosures that satisfy statutory requirements and standards.

In 2015, I established a pilot project called the Retaliation Disclosure Team (RDT). The purpose of the RDT is to evaluate the efficacy of having one attorney handle both the disclosure claim and a whistleblower retaliation complaint filed by one person. Currently, up to four staff members may work on the disclosure and PPP claim filed by one individual. The RDT model generates efficiencies because it allows one attorney to serve as 1) the intake examiner, 2) the formal investigation and prosecution attorney, 3) the disclosure attorney and 4) the mediator.

Another benefit of this model is that the RDT attorney has easier access to the full range of information available. For example, the attorney gains information from the disclosure review that informs the whistleblower retaliation complaint, and evidence from the retaliation complaint helps give a fuller picture of the disclosure. The RDT model also develops a team of cross-trained attorneys whose flexible skill-set allows OSC to meet its needs as they evolve. Finally, whistleblowers have praised the benefit of having one OSC point of contact, which helps improve OSC's customer service.

## **20. Classified disclosures**

- 1) Please describe OSC's process with regard to accepting classified disclosures.**
- 2) Does OSC have the facilities and staff it needs to continue to make the most use out of this authority?**
- 3) How many times has OSC used this authority since receiving it?**

OSC is authorized to receive classified disclosures of information and currently has the staff and facility resources to safeguard classified material. OSC has followed GSA guidelines for procuring appropriate storage units for this information. However, OSC does not have a Sensitive Compartmented Information Facility (SCIF). OSC has received very few cases, approximately two, that include documents classified at the Secret level. In the most recent case, OSC used a facility at another agency to conduct an interview. The low number of disclosures involving classified information does not support the purchase of a SCIF for the agency. Instead, OSC will arrange for the use of another agency's SCIF on an as-needed basis to accommodate the review of classified documents.

## **21. In terms of volume and results, please describe the track record of the OSC's Alternative Dispute Resolution (ADR) Program in obtaining resolutions, as well as the MSPB's mediation program.**

The table below shows that the number of cases OSC has mediated increased from an average of nine per year in FY 2008–2011 to about 35 per year from FY2012–2014. OSC does not have data on the MSPB's ADR program

	<b>FY 2008</b>	<b>FY 2009</b>	<b>FY 2010</b>	<b>FY 2011</b>	<b>FY 2012</b>	<b>FY 2013</b>	<b>FY 2014</b>	<b>FY 2015</b>
Number of completed mediations	7	11	6	13	30	47	38	26
Number of completed mediations that yielded settlement	4	4	3	10	18	29	30	21
Percentage of completed mediations that resulted in settlement	57%	36%	50%	77%	60%	62%	79%	81%

**Questions for The Honorable Carolyn Lerner**

Special Counsel

U.S. Office of Special Counsel

**Questions from Ranking Member Gerald E. Connolly**

Subcommittee on Government Operations

Hearing: “Merit Systems Protection Board, Office of Government Ethics, and Office of Special Counsel Reauthorization”

- 1. Based on the Office of Special Counsel’s (OSC) experience in investigating and prosecuting cases involving prohibited personnel practices, do you believe agencies need more tools and authorities to discipline employees for misconduct, or do you think the current authorities are sufficient.**

Based on our review of dozens of whistleblower retaliation and disclosure cases, my concern is not that agencies are unable to take disciplinary actions. Rather, too often agencies may be motivated to take action for the wrong reason – to punish a whistleblower instead of holding poor performing employees or bad actors accountable.

On September 17, 2015, I wrote to the President and cited my concerns about disciplinary actions taken against whistleblowers at the Department of Veterans Affairs (VA). In that letter, I specifically noted:

The VA has attempted to fire or suspend whistleblowers for minor indiscretions, and, often, for activity directly related to the employee’s whistleblowing. While OSC has worked with VA headquarters to rescind the disciplinary actions in these cases, the severity of the initial punishments chills other employees from stepping forward to report concerns.

As an example, I referenced a VA food services manager who blew the whistle on VA sanitation and safety practices. He was reassigned to clean a morgue and issued a proposed termination after being accused of eating four expired sandwiches worth a total of \$5.00 instead of throwing them away.

In my letter, I contrasted the disciplinary action in this and other whistleblower cases with the lack of accountability for VA officials who have engaged in confirmed wrongdoing that threatened the health and safety of veterans.

- 2. The numerous VA retaliation cases for which you helped whistleblowers obtain settlements seem to suggest that when an agency wants to dismiss someone, it has the ability to do so fairly quickly.**

- a. Special Counsel Lerner, do you agree? If so, please explain.**

See response to Question 1 above.

- b. **Based on your examination of the VA and other federal agencies, would it be fair to say that a delay in or failure to take appropriate disciplinary action against an employee for misconduct can be characterized as more of a management problem rather than a lack of sufficient tools or authority?**

Based on our review of VA and other whistleblower cases, we have seen instances in which the delay or failure to take appropriate disciplinary action can be characterized as a management problem. For instance, a whistleblower disclosed to OSC that an agency had placed a high level manager on paid administrative leave for over two years to delay acting on a proposed removal. This misuse of taxpayer dollars is evidence of a management failure, and was eventually corrected because of the whistleblower.

- c. **Could lack of training for managers also be a factor in any delay or failure to take appropriate disciplinary action?**

Yes, additional training for managers, particularly on documenting instances of poor performance, and how to promptly address performance issues with employees, could assist in agency efforts to take appropriate disciplinary action.

- d. **Are there ways that agencies can streamline their disciplinary process under existing law?**

The VA established an Office of Accountability Review (OAR) to centralize and streamline the disciplinary action process for high level officials. We believe this approach can be an effective model for streamlining the disciplinary action process, if staffed and resourced appropriately.

3. **The following questions relate to OSC's proposal to modify the procedural requirements for certain prohibited personnel practice cases:**

- a. **How many cases and what percentage of OSC's caseload do you anticipate this proposal would affect?**

OSC's proposal would remove unique procedural requirements imposed on OSC that prolong the process for closing a non-meritorious case. Our proposal would only apply to certain types of cases. These include: 1) cases that are older than 3 years, which account for approximately 3% of OSC cases; 2) cases which had previously been filed with OSC, which comprise approximately 6% of OSC cases; 3) cases that had previously been filed with the MSPB or another adjudicative body, which account for approximately 5% of OSC cases; and 4) cases in which OSC does not have jurisdiction, which account for approximately 12% of OSC cases.

In considering OSC's proposal, it is important to note that the proposal does not impact the ultimate decision by OSC in any of these cases. With or without the

burdensome procedural steps, OSC would rarely take action to assist the complainant in these categories of cases, and OSC would still have the discretion to do so. The proposal simply streamlines the process without changing the end result.

**b. Would this proposal apply to cases where the Merit Systems Protection Board or another adjudicating body has issued a decision?**

Yes. OSC is bound by MSPB decisions, so allowing OSC to process cases in which an MSPB decision has been reached will allow us to dedicate more of our limited resources to meritorious claims.

**c. Would this proposal apply to cases that are pending with the MSPB or another adjudicating body?**

Yes. Employees are already required by statute and MSPB rules to elect a remedy. If an employee chooses to bring their case to the MSPB, our current practice in most scenarios is to close the case based on the employee's election.

**d. Under what circumstances would there be cases pending with both OSC and MSPB or other adjudicating body?**

In almost all cases, under the election of remedy rules cited above, the same case should not be pending before OSC and the MSPB. In select cases, however, OSC may opt to keep a case open that is also pending at the Board if OSC determines systemic corrective action and/or discipline is necessary in addition to the individual corrective action the complainant may seek at the Board.

**e. What other adjudicating bodies could be covered by this provision?**

The provision applies primarily to the MSPB, but could also apply to the federal courts in "mixed" cases under Title VII and the whistleblower law, or other entities that hear federal employee appeals such as the Foreign Service Grievance Board.

**f. What effect would this proposal have on an employee's rights?**

The proposal will not impact the adjudication of any employee's rights. It will simply streamline the process for issuing decisions, allowing OSC to dedicate more of our limited resources to meritorious claims.

**g. Would this proposal prevent an employee from pursuing a remedy in more than one forum?**

The proposal does not impact existing law, which already prevents employees from pursuing a remedy in more than one forum under most circumstances.

- 4. As the head of an employing agency, do you believe OSC has sufficient tools and authorities to discipline employees for misconduct or performance issues when necessary?**

Yes. With our drastically increasing case levels, OSC's staff is working at full capacity, often going above and beyond to ensure timely and fair review of whistleblower and other claims. There is simply no room for underperforming individuals. To the extent individual employees have needed to improve their performance, I have instructed managers to give prompt feedback on areas that need improvement and provide the employee an opportunity to appropriately respond. Fortunately, OSC is staffed with dedicated public servants who care deeply about the agency's mission.

- 5. Based on your agency's experience, do you think statutory change is needed to streamline the federal employee disciplinary process?**

OSC's experience is generally reflected in the examples and responses above. I do not have a position on whether statutory change in this area is needed, but hope the examples are instructive as Congress considers these important issues.

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**Post-Hearing Questions for the Record**

**Submitted to Carolyn Lerner**

**From Senator Claire McCaskill**

**Nomination Hearing to Consider**

**Michael J. Missal to be Inspector General, Department of Veterans Affairs  
and**

**Carolyn N. Lerner to be Special Counsel, U.S. Office of Special Counsel  
January 12, 2015**

In your prepared statement, you talk about the efficiencies that you have achieved by improving and streamlining some of OSC's internal policies and procedures. However, I'm concerned that the gains and benefits for whistleblowers by having a faster process may be offset by moving too quickly to dismiss potentially meritorious cases. The number of favorable actions for whistleblowers has gone up dramatically during your tenure, and you should be proud of that. But the number of cases has also gone up dramatically.

1. Please provide the following information for the past 5 years, broken down by year:

- a. The total number of cases that have been received;

**OSC Prohibited Personnel Practice (PPP) Cases:**

**FY2008 – 2089  
FY2009 – 2453  
FY2010 – 2415  
FY2011 – 2580  
FY2012 – 2960  
FY2013 – 2930  
FY2014 – 3356  
FY2015 – 4051**

- b. The percentage of cases that have resulted in favorable outcomes for the employee;

**FY2008 – 1.6% (33 favorable case outcomes / 58 favorable actions overall)<sup>1</sup>  
FY2009 – 2.2% (53 favorable case outcomes / 62 favorable actions overall)  
FY2010 – 3.1% (76 favorable case outcomes / 96 favorable actions overall)  
FY2011 – 2.5% (65 favorable case outcomes / 84 favorable actions overall)  
FY2012 – 4.3% (128 favorable case outcomes / 159 favorable actions overall)<sup>2</sup>  
FY2013 – 4.2% (124 favorable case outcomes / 173 favorable actions overall)  
FY2014 – 4.9% (165 favorable case outcomes / 201 favorable actions overall)  
FY2015 – 5.2% (212 favorable case outcomes / 278 favorable actions overall)**

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<sup>1</sup> Some cases may include multiple favorable actions, such as 1) a stay of a personnel action followed by 2) a settlement that permanently resolves the retaliatory personnel action, and 3) a disciplinary action against the manager who engaged in retaliation.

<sup>2</sup> FY2012 was the first full fiscal year for Special Counsel Carolyn Lerner.

**Please note, approximately 15 percent of PPP claims each year involve allegations of discrimination under 5 U.S.C. § 2302(b)(1), matters that OSC generally closes after initial review, to not duplicate the well-established processes for addressing claims of discrimination through the EEOC. In addition, the same employee may file multiple cases that are resolved through one favorable action. When these and other factors are considered, the percentage of favorable actions may increase.**

- c. The percentage of cases that have resulted in successful mediation over the past 5 years;

**FY2008 – 4 cases resulted in settlement, 57% of those cases mediated.**

**FY2009 – 4 cases resulted in settlement, 36% of those cases mediated.**

**FY2010 – 3 cases resulted in settlement, 50% of those cases mediated.**

**FY2011 – 10 cases resulted in settlement, 77% of those cases mediated.**

**FY2012 – 18 cases resulted in settlement, 60% of those cases mediated.**

**FY2013 – 29 cases resulted in settlement, 62% of those cases mediated.**

**FY2014 – 30 cases resulted in settlement, 79% of those cases mediated.**

**FY2015 – 21 cases resulted in settlement, 81% of those cases mediated.**

- d. The percentage of cases that result in a negative preliminary determination.

**By statute, OSC issues a negative preliminary determination letter in cases where we cannot seek a favorable action or have not secured a mediated resolution.**

You state that you have achieved a 45 percent reduction in OSC's cost to resolve a case.

- 2. In addition to the increase in the pursuit of mediation, what are the other primary drivers of that reduction?

**My efforts to promote greater efficiencies have been large and small. I have focused on being a careful steward of taxpayer dollars and found better ways to manage our cases. For example, to avoid increased rent payments, we converted our library, which was largely underutilized, into workspaces for interns and new employees. I also discontinued or modified inefficient contracts. I switched our legal research provider and generated savings of nearly \$50,000 annually. I discontinued outdated and unnecessary subscription services and saved an additional \$32,000 annually. These types of savings add up in an agency of our size, allow us to use more of our limited resources for program work, and lead to the efficiencies cited in the question.**

**I have also implemented several policy initiatives to better manage our caseload. First, as referenced, I reinvigorated our alternative dispute resolution program. Mediation saves OSC, the employee, and the agency time and resources, while often resulting in better solutions for complainants and agencies alike. Advocates for**

whistleblowers and agency counsel have praised OSC's mediation program and its ability to bring about effective results. In recent testimony before this Committee, Government Accountability Project (GAP) Legal Director Tom Devine praised "[OSC's] re-birth of an Alternative Dispute Resolution (ADR) system that has set the global gold standard for effective results constructively resolving whistleblower disputes."

Consistent with our approach to mediation, I have also instructed and empowered employees in our Complaints Examining Unit (CEU) to pursue stays and corrective actions on behalf of employees. We are increasingly achieving positive resolution of cases at the intake level, securing relief for whistleblowers without the need for a formal referral to our investigation division, and the time associated with that process. In FY 2015, CEU secured 81 corrective actions, including numerous cases in which intervention by CEU required an agency to repeal an unlawful non-disclosure agreement issued to a whistleblower.

In addition, I recently established a new project, the Retaliation and Disclosure Team (RDT), which implements a common sense and more efficient model for handling whistleblower cases. OSC's historical practice has been to assign several attorneys to review the same set of facts in cases in which an employee files both a whistleblower disclosure and a retaliation complaint. From an agency resources perspective, this is inefficient. The RDT model consolidates four OSC positions: intake examiner, disclosure attorney, investigative attorney, and mediator. It collapses the process while producing better results, as one attorney has full access to the universe of case-related material, as opposed to having to track down another attorney's case file and piece together relevant information. The model also develops a highly skilled and cross-trained team of attorneys who are flexible to meet agency needs.

These and other efforts have all contributed to a 45 percent reduction in OSC's cost to resolve a case since I've been in office. We have managed to generate the efficiencies described above without compromising the quality or effectiveness of OSC's work. As noted above, both the number and percentage of favorable outcomes have increased during my tenure.

I am concerned that the changes you have made at OSC, while commendable, are covering up a considerable lack of adequate resources. You said in your written statement that OSC's caseload has gone up 50 percent since you first took office in 2011.

3. How much has OSC's budget increased since that time?

In 2011, OSC received 4,027 cases across all program areas. In 2015, OSC received 6,140 cases, a 52.4 percent increase.

In 2011, OSC's budget was \$18.592 million. In 2015, OSC's budget was \$22.939 million, an increase of 23.3 percent. When adjusted for inflation, the increase is 15.8 percent.

The OSC website indicates that 80 percent of complainants hear from an examiner within 60 to 90 days.

4. Does that mean that after someone submits information to OSC, the first time that person is contacted is 2-3 months later?

**Within 15 days of receiving a complaint, OSC strives to send a written acknowledgement letter to the complainant that contains the name of the assigned examiner, a contact number, and general information on how a PPP complaint is processed. We are able to meet this goal in about 96 percent of cases.**

5. What is the average length of time it takes for OSC to reach a preliminary determination in a case that is not resolved through mediation?

**If OSC's Complaints Examining Unit (CEU) determines that there are reasonable grounds to believe that a PPP occurred, CEU may seek corrective action at the intake level, refer the complaint for mediation, or refer the complaint for further investigation. Our goal is to make a determination on a PPP complaint within 90 days or less. For FY2015, we resolved 3,643 PPP complaints. The average length of time it took to reach a final determination was approximately 119 days.**

6. What would it take to get this time frame down to 1 month?

**CEU currently has a staff of 16 full-time examiners. To reduce the resolution time frame to 30 days would require a staff of at least 25 examiners.**

7. What do you think is an ideal size for OSC to be able to adequately handle the caseload you're seeing?

**If current trends continue, OSC projects annual case growth of 14 percent through FY2018. To simply keep pace with this increase and to keep our backlog at its current level of approximately 2,200 cases, we would need to grow our staff from its current level of 140 employees to approximately 182 employees by 2018.**

**However, significantly more resources would be required to make meaningful reductions to the backlog, take on more disciplinary action cases and litigation, reduce our FOIA response time, and enhance information security and technology capabilities, among other competing priorities.**

In your prepared statement, you indicate that OSC received and resolved over 6,000 cases in 2015, a 50% increase from 2011.

8. What do you think is driving this increase?

**When I was first nominated as Special Counsel, I often remarked that OSC was the best kept secret in the federal government. If the number of cases filed is any indication of the federal community's awareness of OSC, then I believe we have been very successful in publicizing OSC's good work and expanding participation. As you note, in**

**2015, for the first time in the agency's history, we will exceed 6,000 cases filed across all program areas. This is a 50 percent increase from 2011, when I took office.**

**Perhaps more importantly, the increase in filings indicates that whistleblowers and other employees believe they will be able to make a difference by bringing a claim to us. There is renewed confidence in OSC.**

**In response to surveys over the years, employees have indicated that the number one reason they choose to look the other way when they see waste, fraud, or abuse is not because they fear retaliation. It's because they don't believe any good will come from their risk. If the number of whistleblower disclosures is any indication of employees' willingness to raise concerns—and I think it is—then we are definitely moving in the right direction.**

**I believe our work on a number of significant cases, involving the Air Force, the Federal Aviation Administration, the Food and Drug Administration, and the Department of Homeland Security, among others, helped to demonstrate the ability of OSC to promote better and more accountable government. More recently, OSC has worked with Department of Veterans Affairs whistleblowers from across the country to improve the care provided to veterans. With each positive outcome, we signal to another employee that they can blow the whistle without fear of retaliation, and their efforts and risk will make a difference.**

I want to get a better understanding of where the core of the problem lies because I think our civil service system is badly in need of reform on several fronts. The increase in OSC complaints is clearly a symptom of larger issues.

**9. Do you have a breakdown of the types of employees that are the subjects of the complaints – what percentage are political appointees versus career managers or SES?**

**OSC is currently upgrading and modernizing its case management system. Our current system does not allow us to breakdown the types of employees who are subjects of complaints by the criteria listed above. However, we would be happy to provide anecdotal evidence to Sen. McCaskill and the Committee. We share your concerns about diagnosing the problem, and are committed to working with you and the Committee on any reforms that will prevent further retaliation against federal employees.**

Over the past 10 years, OSC and Congressional stakeholders have supported federal Inspectors General in their efforts to conduct whistleblower reprisal investigations. However, recently, there has been a string of complaints about IG offices themselves. Sources tell my staff that the Defense Department Office of Inspector General alone has ten reprisal complaints about senior leadership, investigative staff, and security officials in the IG's office.

**10. What is your view on how the IG community is handling reprisal complaints within their own offices?**

**OSC has received numerous whistleblower disclosures and retaliation complaints from employees of Offices of Inspectors General (OIGs), including the Defense Department OIG. Fortunately, the string of complaints from OIG employees appears to be decreasing. One factor in the decreased number of complaints may be that OIGs have taken the lead in completing OSC's whistleblower certification program under 5 U.S.C. § 2302(c). To date, 18 OIGs have completed the certification process, and five additional OIGs are registered to complete the program. OSC has also conducted training and outreach sessions with the IG community and is an active participant in the OIG Whistleblower Ombuds Working Group.**

**11. Do you have a sense of when these DOD IG reprisal investigations might be resolved?**

**The DOD IG reprisal and disclosure cases are a priority for OSC, are under active investigation and review, and will be resolved as soon as possible. We will continue to keep your staff updated on our progress as the cases proceed.**

**Post-Hearing Questions for the Record**  
**Submitted to Carolyn Lerner**  
**From Senator Ron Johnson**

**Nomination Hearing to Consider**  
**Michael J. Missal to be Inspector General, Department of Veterans Affairs**  
**and**  
**Carolyn N. Lerner to be Special Counsel, U.S. Office of Special Counsel**  
**January 12, 2015**

1. The Committee's analysis of Federal Employee Viewpoint Surveys from 2012 to 2015 has shown a consistently downward trend in OSC employees' faith in leadership, morale, and belief that they can report wrongdoing. How do you plan to address this issue?

**OSC takes the Federal Employee Viewpoint Survey (FEVS) results seriously. Each year since 2012—the first year that OSC participated in the viewpoint survey—I have taken steps to address issues identified in survey results. These steps include:** (1) increased promotional opportunities for employees; (2) an interagency agreement with the National Science Foundation Inspector General, which provides OSC employees an outside, independent channel through which they can make disclosures or report prohibited personnel practices (PPPs); (3) ongoing efforts to inform employees of their right to make disclosures and report PPPs; (4) increased professional development training opportunities; (5) more frequent communication to employees from the Immediate Office of the Special Counsel; and (6) my personal outreach to employees, both through meetings with organizational units and individual employees.

This year, we are engaged in a more intensive effort to obtain input from every OSC employee. I convened an employee engagement working group, which is currently developing an action plan based on employee feedback. I would be pleased to update the Committee on additional steps taken when completed.

Further, based on the feedback received this year, we believe morale has been impacted by external factors, most notably, the extraordinary increase in OSC's caseload. Many OSC employees now carry a docket that is more than double, and in some cases, triple the historic norm. Also, our participation rate in FEVS dropped significantly in 2015, down from 90 percent participation in 2012 to 61 percent in 2015. Next year, we will focus on increasing the level of participation to make sure that the results reflect the views of the entire workforce. Together with the steps described above, we believe we will reverse the trend you described.

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