

LEARNING FROM WHISTLEBLOWERS AT THE
DEPARTMENT OF VETERANS AFFAIRS,
PART 2

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
OF THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

TUESDAY, JULY 23, 2019

Serial No. 116-26

Printed for the use of the Committee on Veterans' Affairs



Available via <http://www.govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2022

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LEARNING FROM WHISTLEBLOWERS AT THE DEPARTMENT OF VETERANS AFFAIRS, PART 2

TUESDAY, JULY 23, 2019

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
Washington, D.C.

The Subcommittee met, pursuant to notice, at 5:02 p.m., in Room HVC-210, Capitol Visitor Center, Hon. Chris Pappas [Chairman of the Subcommittee] presiding.

Present: Representatives Pappas, Rice, Rose, Cisneros, Peterson, Bergman, Radewagen, and Bost.

OPENING STATEMENT OF CHRIS PAPPAS, CHAIRMAN

Mr. PAPPAS. The hearing will come to order.

Without objection, the chair is authorized to declare a recess at any time.

Today is the third panel. Today's hearing of the Oversight and Investigation Subcommittee hearing is entitled "Learning From VA Whistleblowers." Our Committee is constantly exploring ways to improve the accessibility, quality, and safety of veterans' health care, create a more timely and accurate review of benefit applications, and reduce instances of waste, fraud, and abuse in the department.

On June 25th, the Subcommittee began this hearing to discuss the importance of VA whistleblowers. We heard testimony from people inside the VA who raised major questions and concerns about critical problems that affect the health and well-being of veterans. These witnesses were willing to blow the whistle, even when it risked their livelihood and their careers.

Unfortunately, we learned that the VA continues to struggle with the culture of retaliation against whistleblowers. In too many instances, VA leadership and supervisors have turned a blind eye to those in VA's workforce that have pointed out serious problems or attempted to expose bad actors who have abused their positions or broken laws, and, even worse, the whistleblowers are often the target of active retaliation.

One striking example came from Dr. Katherine Mitchell's testimony. In 2014, she was one of a group of people working at the Phoenix VA medical center that exposed the existence of a secret waiting list of veterans in need of medical care. Instead of addressing this issue, the Phoenix VA leadership actively worked to hide

the exorbitant wait times. It turned out that such practices were occurring at VA facilities nationwide. The coverup was extensive and deliberate, and the health and well-being of veterans was put at risk.

Congress responded to the allegations with hearings that confirmed the whistleblowers' revelations of long and difficult wait times for appointments. Of course, the VA still has a lot of work to do to ensure that veterans get access to health care in a timely and transparent manner. In fact, the Committee on Veterans' Affairs will hold a hearing on this very topic tomorrow.

The Phoenix VA employees, including Dr. Mitchell, who blew the whistle in 2014, raised incredibly important concerns regarding veterans' health care. Instead of being thanked for raising these issues, however, they have experienced retaliation. Their jobs were threatened. Unfortunately, their experience is not uncommon.

Our two other witnesses during the June hearing also testified about retaliation they are experiencing, all while continuing to work at the VA. And they have sought protection as whistleblowers. The June witnesses described many shortcomings within the VA for protecting the rights of whistleblowers. Each of these three individuals who testified described ongoing retaliation that they were experiencing, despite current laws and institutions designed for their protection as they try to speak truth to power. For example, Dr. Mitchell testified that retaliation is ongoing, even after she secured a settlement agreement with the VA to continue her work serving veterans. Clearly, the VA must do better.

Make no mistake. This Committee believes the importance of having people who are brave enough to stand up and blow the whistle on the missteps and misdeeds within the Department. These are people who are trying to do the best they can for veterans, and we should be committed to their protection.

At the beginning of the June 25th hearing, Ranking Member Bergman requested that we invite before this Subcommittee. I agree that the Government agency perspective is essential. In fact, the Subcommittee will hold an additional hearing with Government witnesses in September. It has been 2 years since Congress and VA established the Office of Accountability and Whistleblower Protection. Our September hearing will focus on the results of an inspector general's investigation of this particular office.

Today's panel is an early opportunity to hear from VA's Office of Accountability and Whistleblower Protection. In addition, the top officials from the Office of Inspector General, the Office of Special Counsel, and the Merit Systems Protection Board are present. Each represents a key agency charged with protecting whistleblowers. I have also invited two of the whistleblower advocates who appeared on the June 25th panel to ensure a strong and important dialogue with today's government officials.

As I have said before, and it needs to be repeated again, whistleblowers are an important source of information, and they should not be ignored. Their rights must be protected so that future whistleblowers will have confidence that their stories will be heard and assurance that their allegations will be investigated without reprisal. I look forward to the testimony of today's witnesses.

With that, I would like to recognize Ranking Member Bergman for 5 minutes for opening remarks.

OPENING STATEMENT OF JACK BERGMAN, RANKING MEMBER

Mr. BERGMAN. Thank you, Mr. Chairman.

I appreciate your holding the hearing open to allow us to employees receive testimony from government witnesses who administer the whistleblower programs. Scheduling a hearing this quickly is difficult, and I appreciate you following through on your commitment to hold this hearing as soon as possible.

The first witness panel recounted case-specific complaints, but we had little discussion about the whistleblower process. The discussion bounced back and forth between complaints with VA's Office of Accountability and Whistleblower Protection, or OAWP; the Office of Special Counsel, or OSC; and the VA inspector general. Witnesses also raised concerns that the current lack of Merit Systems Protection Board members clouded its operations. It is critical that we understand the division of labor and the whistleblower protection system if we are going to diagnose the problems and craft appropriate solutions.

Let me give you an analogy in my pilot background. There are four forces that affect an airplane's ability to fly: thrust, weight, drag, and lift. When a problem arises, that pilot must understand which force is being affected because the response will differ depending on the nature of the problem. The whistleblower process is no different. The remedy for a disclosure problem may be vastly different than a retaliation problem. I want to make sure that we have the right framework and identify the appropriate accountable parties to address whistleblower concerns.

Behind me is a diagram of what I understand to be the whistleblower reporting process for VA employees. When we discuss whistleblowers, we must distinguish disclosures and retaliation because when an employee is alleging—what an employee is alleging and where they go for help depends on whether they are making a disclosure or a retaliation claim. The disclosure is the initial blowing of the whistle. It is when an employee brings the attention to the \$600 hammer, secret wait lists, or potential criminal activity.

Retaliation, on the other hand, is what happens after a whistleblower makes a disclosure and experiences an adverse impact on their work or career because of their disclosure. Retaliation may occur when management proposes to remove the employee or move them to an isolated office without heat or air conditioning. It might manifest in the form of multiple investigations or a threat.

A whistleblower can make a disclosure to their supervisor, OAWP, the VAIG, or the OSC. In fact, a whistleblower may make the same disclosure to all of these offices, and it is unclear what type of communication exists between the parallel routes for investigation.

Similarly, a whistleblower may raise a retaliation complaint to OAWP, OSC, or the MSPB. Again, a whistleblower can raise his or her claim in multiple forums, and it could lead to multiple investigations.

Mr. Dettbarn described the process of seeking whistleblower assistance as confounding, and the other witnesses echoed that senti-

ment. In the Marines, we implore the KISS principle, just keep it simple.

The whistleblower process depicted in this diagram runs afoul of that principle. This is another example of Bureaucracy 101, a government program with multiple governing offices and diffused responsibility which, together, create confusion and a lack of accountability.

Our witnesses are undoubtedly the experts on what works and what needs to be improved in the whistleblower protection system. I would like each of you to explain your office's role as it relates to disclosure or a retaliation claim.

A common grievance is the lack of communication between the investigating officer and the whistleblower following a disclosure or retaliation claim. I would like the witnesses to explain what an employee should expect from the investigator in your office, what barriers exist to timely and thorough communication, and what steps you are taking to improve this communication.

Mr. Chairman, before I yield, I want to reiterate that whistleblowers provide an invaluable service to our country. They must believe that the whistleblowing systems take their concerns seriously and investigate their complaints appropriately and efficiently. More importantly, or most importantly, whistleblowers must feel safe to make a disclosure.

It is evident that the witnesses on the first panel do not have faith in the system, but I was surprised to learn in the written testimony submitted for today that, in fiscal year 2018, the VAIG received 35,000 hotline complaints, that whistleblowers contacted OAWP 1,965 times, and the OSC received roughly 2,100 VA-related disclosure and retaliation complaints. This data suggests that many employees are not afraid to raise concerns, but this is not cause to celebrate just yet because, as the prior testimony made clear, problems remain, and there is a lack of faith by many in the system.

I hope that, with a multifaceted understanding of the process, we can identify the root causes of the problems and make a whistleblower system that works better for everyone.

Again, Mr. Chairman, I appreciate your reconvening this important hearing.

I yield back.

Mr. PAPPAS. Well, thank you, Ranking Member Bergman. I very much appreciate your recommendation to hold this session today.

Appearing before us today are four witnesses selected by Ranking Member Bergman to offer testimony, and I would like to recognize them, first, starting with Dr. Tamara Bonzanto. She is the Assistant Secretary for the Office of Accountability and Whistleblower Protection.

The Subcommittee thanks you for appearing today, Dr. Bonzanto. And you have 5 minutes for your testimony.

STATEMENT OF TAMARA BONZANTO

Ms. BONZANTO. Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee, thank you for the opportunity to testify today regarding whistleblower protection at the Department of Veterans Affairs.

Protecting whistleblowers from retaliation is a priority for the VA and the Office of Accountability. To protect whistleblowers, OAWP directly investigates all whistleblower retaliation allegations made by employees and applicants for employments against VA supervisors. This mitigates the possibility that whistleblowers may face retaliation for making a lawful disclosure.

Since my confirmation as the first Assistant Secretary, OAWP has engaged with other Federal agencies, including the Office of Special Counsel, the Department of Defense, the Department of Justice, the Department of Labor, and the Department of Homeland Security, to obtain best practices to investigate disclosures and protect whistleblowers.

OAWP has also developed a process to regularly update whistleblowers who make a disclosure to OAWP about the status of their investigation into the allegations. The Secretary and I recognized the need for improvements to whistleblower protection within the VA. OAWP is actively working to implement several initiatives that will better protect whistleblowers, and I appreciate the opportunity today to address a few of them.

We are currently working on standardizing investigator training to ensure that all investigators understand the law, including whistleblower protections, and can apply it in the investigations consistently. We are finalizing written policy and how OAWP investigates, the disclosures it receives. The policy is undergoing concurrence within VA, and I anticipate it will be issued before October 1st, 2019. We are also engaged and collaborating with VA's Office of Inspector General and OSC to finalize training for all VA employees as required by the Accountability Act. The training addresses methods for making a whistleblower disclosure, prohibitions against taking action against an employee for making a lawful disclosure, and penalties for whistleblower retaliation. The training should be available later in the fall.

In addition to continuously improving whistleblower protection, OAWP is actively working on complying with other requirements, also authorizing statute, including standing up a division to fulfill our requirement to record, track, review, and confirm VA's implementation of recommendations from audits and investigations conducted by the Government Accountability Office, the Office of Inspector General, VA's Office of Medical Inspector, and the Office of Special Counsel.

Since my appointment, I have met with several internal and external stakeholders, including VA's HR staff, supervisors, VA leaders, Veterans service organizations, and nonprofits, such as Whistleblowers of America. I value the input I receive and look forward to continuing to discuss ways to improve whistleblower protection with all stakeholders.

As a Veteran, a registered nurse, former investigator on this Subcommittee, and now the Assistant Secretary for OAWP, I understand that whistleblowers have a critical role in stopping misconduct within the organization. The Secretary and I value all VA employees and whistleblowers and their commitment to improving care and services for our Veterans. I want the VA to be a place where an employee can trust that his or her management will take allegations of retaliation or wrongdoing seriously, encourage staff

to raise concerns and not retaliate against staff who raise those concerns.

Mr. Chairman, we look forward to working with this Committee and our internal and external stakeholders to identify opportunities and best practices to enhance VA's ability to protect whistleblowers.

This concludes my testimony, and I am prepared to respond to any questions you may have.

[THE PREPARED STATEMENT OF TAMARA BONZANTO APPEARS IN THE APPENDIX]

Mr. PAPPAS. Thank you very much, Dr. Bonzanto.

I would now like to recognize the Inspector General at the Department of Veterans Affairs, Mr. Michael Missal.

STATEMENT OF MICHAEL MISSAL

Mr. MISSAL. Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee, I appreciate the opportunity to discuss the importance of whistleblowers to the Office of Inspector General. We treat all complainants as whistleblowers. That is, we provide the same protections, respond with respect, carefully evaluate their concerns, and safeguard confidentiality. The OIG relies heavily on allegations, complaints, and information from VA employees, veterans, and their families, Congress, and the public when deciding where to focus our resources. There are countless examples of how whistleblowers and other complainants have driven change, not only for the matter under review but frequently at the system's level through changes in policies, practices, and personnel.

An individual's decision to bring allegations forward should not have to be weighed against possible adverse actions. The Whistleblower Protection Act prohibits reprisal against public employees, former employees, or applicants for employment for reporting a violation of law, rule, or regulation. That prohibition extends to reports of gross mismanagement, a waste of funds, abuse of authority, or the substantial and specific danger to public health or safety.

The OIG operates a hotline that is staffed by a dedicated team to receive whistleblower complaints and other information. Our hotline received over 35,000 contacts in fiscal year 2018 and over 15,000 contacts for the first 6 months of fiscal year 2019. Every contact is reviewed, processed, and acknowledged by an analyst upon receipt. We receive information via telephone, fax, regular mail, and through a web submission form on our website. In addition, there are also posters in VA facilities on how to contact the OIG. As a result of our site visits and other engagements with stakeholders, OIG staff may also be contacted by individuals directly with information or allegations of wrongdoing.

The OIG interacts with other oversight entities to ensure that all available resources and protections are available to complainants. There are many agencies that complainants can go to for redress.

The OIG's website includes frequently asked questions related to hotline inquiries that outline the types of complaints that are addressed by the OIG and other offices. It also provides contact infor-

mation for those entities. This information is further provided to individuals who call or write the OIG hotline. Although the OIG advises individuals contacting our hotline how to reach many agencies with the authority to provide relief, we have formalized the exchange of information, particularly for allegations of retaliation. The OIG directs those complainants to the VA Office of Accountability and Whistleblower Protection and to the Office of Special Counsel.

As part of our continuous efforts to improve our responses and further our relationship with whistleblowers, I will be delivering the keynote address at the annual Hotline Worldwide Outreach conference, which honors whistleblowers on National Whistleblower Appreciation Day this July 30th. This conference, sponsored by the Department of Defense OIG, analyzes best practices, discussing lessons learned, and provides examples of the challenges facing the hotline oversight community.

In addition, we recognize that some VA employees and contractors may be confused about when it is appropriate to contact the OIG about fraud, waste, and abuse in VA's programs and operations. To that end, we have requested that VA share with all employees an email on National Whistleblower Appreciation Day that has information on how and when to contact the OIG. We are also working with VA to offer more formal training on the OIG and the various avenues for redress available to those with complaints.

The OIG values whistleblowers and the information they provide as we explore areas for potential oversight of VA. It is incumbent upon VA stakeholders to protect whistleblowers from retaliation and foster an environment where no one fears the consequences of reporting problems or ideas for potential improvement.

I encourage all whistleblowers to contact us with their concerns, and we will treat them with respect, dignity, and in confidence to the greatest extent possible.

Mr. Chairman, this concludes my statement. I would be happy to answer any questions that you or other Members of the Subcommittee may have.

[THE PREPARED STATEMENT OF MICHAEL MISSAL APPEARS IN THE APPENDIX]

Mr. PAPPAS. Thank you, Mr. Missal.

I will now recognize our third witness, Mr. Henry Kerner. He is the special counsel.

Mr. Kerner, you are recognized for 5 minutes.

STATEMENT OF HENRY KERNER

Mr. KERNER. Thank you, Mr. Chairman.

Good evening, Chairman Pappas, Ranking Member Bergman, esteemed Members of the Committee. Thank you for holding this important hearing.

OSC is deeply committed to veterans, and I am honored to be here to discuss the ways in which OSC can assist the VA in providing the best possible service to veterans.

Whistleblowers are vital to ensuring that problems within an organization are identified and fixed. OSC's contribution in this process is twofold. First, OSC provides a safe channel for VA employ-

ees, applicants for employment, and former employees to make disclosures of wrongdoing. OSC has the authority to demand a full investigation of any disclosures that warrant one.

Second, OSC works to ensure that VA whistleblowers do not face retaliation. We seek corrective and disciplinary action where we can establish retaliation, and we work with VA leadership to train VA management employees on prohibited personnel practices. We are committed to helping the VA by ensuring that those patriotic employees who have devoted their professional lives to serving veterans, some being veterans themselves, can do their jobs without fear of reprisal.

Like you, I watched with significant concern as brave whistleblowers came forward at your hearing last month to describe their ordeals at the hands of VA management. I have submitted a longer statement, laying out OSC's processes and procedures in detail, but I thought I would focus my brief oral remarks on chronicling some of the efforts I have undertaken in support of our veterans and whistleblowers.

Our commitment to whistleblowers is manifested in our external outreach to VA leadership and through internal process enhancements. I met with the leadership of the VA as soon as I became the head of OSC, first with then-Secretary Shulkin in November 2017 and later with Secretary Wilkie in August 2018, a short time after his confirmation. I have also had several constructive discussions with the general counsel and now Acting Deputy Secretary, Mr. Jim Byrne, who is also an OSC alumnus, and with Dr. Bonzanto at OAWP. I have also met Mr. Missal.

In all these meetings, I explained my fierce commitment to supporting whistleblowers and preventing retaliation. I found each and every one of these VA leaders supportive. While it is clear that more needs to be done to stem whistleblower reprisals at the VA, I take these leaders at their word and count on them to assist us by improving the culture at their Department.

Internally, the cornerstone of my leadership at OSC involves what I call old-style customer service. That means providing whistleblowers accurate information as quickly as possible, even or perhaps especially if it turns out we are unable to assist them. I am keenly aware of the criticism that OSC can take too long to process cases, which is why one of my very first managerial decisions was the creation of an efficiency and effectiveness working group. Following its recommendations, I undertook a major reorganization of OSC by merging two of our units into one.

As a result of these new internal processes, OSC has been much more efficient at assigning cases to attorneys and closing casing where OSC may not have jurisdiction. OSC staff attorneys are forwarding me emails from complainants grateful to have received introductory email within the first week of filing with us.

Of course, we still face a nearly 2,600-case backlog and it will come at no surprise to you to learn that we do need more funding to be able to reduce this backlog and provide faster processing times to whistleblowers, but despite this backlog, we strive to be as responsive as possible:

OSC is part of a mosaic of whistleblower resources available to VA employees, which includes the Office of Accountability and

Whistleblower Protection, OAWP; the VA inspector general; and the MSPB. As an independent agency, OSC offers a distinct advantage and delivers benefits that only we can provide. Part of that advantage lies in the world of disclosing wrongdoing where the whistleblowers are afforded the opportunity to directly participate in OSC's assessment of the agency's investigation of the allegations by providing comments to OSC, and those comments and the report itself are then made public. This is a feature unique to OSC, and whistleblower comments are crucial to my final evaluation of the sufficiency and reasonableness of the agency's investigation.

On the retaliation side, OSC offers unique enforcement authority with our ability to litigate corrective and disciplinary actions before the MSPB, taking the decision of whether to correct a retaliation out of the hands of agency management. Together, these OSC-specific features allow OSC to stand out in the field of whistleblower-related entities.

Thank you for holding these hearings. I look forward to answering your questions.

[THE PREPARED STATEMENT OF HENRY KERNER APPEARS IN THE APPENDIX]

Mr. PAPPAS. Thank you, Mr. Kerner.

Next, I would like to recognize our fourth witness, Mr. Tristan Leavitt. He is the general counsel of the Merit Systems Protection Board. Mr. Leavitt is the most senior official currently serving the board as Acting Chief Executive and Administrative Officer.

Mr. Leavitt, you are recognized for 5 minutes.

STATEMENT OF TRISTAN LEAVITT

Mr. LEAVITT. Good evening, Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee.

My name is Tristan Leavitt, and I am the general counsel of the Merit Systems Protection Board. Because there are no Senate-confirmed members of the board, I am also serving as the Acting Chief Executive and Administrative Officer of the agency, as the Chairman said.

Thank you very much for this opportunity to testify. As requested, my testimony will focus broadly on the process by which whistleblower cases are brought before the MSPB and adjudicated.

This year happens to mark the 40th year of the MSPB opening its doors following the passage of the Civil Service Reform Act of 1978. This law was the first statute prohibiting retaliation for employees of the Federal Government. It opened with a series of findings, stating: It is the policy of the United States that Merit System principles should be expressly stated to furnish guidance to Federal agencies, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the Merit System principles and the integrity of the merit system.

(sic) in The Civil Service Reform Act explicitly recognized the value of whistleblowers. The ninth Merit System principle states employees should be protected against reprisal for lawful disclosures.

The MSPB was established to fill an adjudicatory role that had previously been filled by the Civil Service Commission. Its role in whistleblower cases is to provide a full and fair opportunity for both parties to develop a record on the issues and then to hear and decide the matters appealed based on the evidence submitted and in accordance with applicable statutes and case law.

As someone who previously received many allegations of Executive Branch whistleblower retaliation when I worked on Capitol Hill, I recognized that this mission as established by Congress is critical in helping distinguish which reprisal claims are meritorious.

The prohibited personnel practices related to retaliation prohibit reprisal based on different types of protected activity. Under the statute, in order to receive corrective action in a whistleblower retaliation claim, the appellant must demonstrate that he or she made a protected disclosure, the agency has taken or threatened to take a personnel action against him or her, and his or her protected disclosure was a contributing factor in the personnel action.

Even after a finding that a protected disclosure was a contributing factor in the personnel action, corrective action is not granted under the law if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

The MSPB is the forum before which OSC litigates if they believe a prohibited personnel practice like whistleblower retaliation occurred. Outside of cases brought by OSC, the MSPB hears two types of whistleblower cases. The first type of case is called an otherwise appealable action. This involves an adverse personnel action that is directly appealable to the board, such as a removal, reduction in grade or pay, or suspension of more than 14 days. In such as an appeal, both the appealable matter and the claim of reprisal for whistleblowing will be reviewed by the MSPB.

The claim of whistleblower retaliation is termed an affirmative defense. That is, if the agency proves that it has met the evidentiary standard for taking the action, the appellant may attempt to prove that the agency nevertheless took the action in reprisal for his or her protected whistleblowing activity.

The second type of whistleblower case is those cases in which the individual has filed a complaint with OSC but OSC has not sought corrective action on the individual's behalf. This is called an Individual Right of Action, or IRA, appeal. Most of those cases surround personnel actions that are not directly appealable to the board, for example, the suspension under 14 days or a reassignment with no reduction in pay or grade. In such circumstances, the appellant is required to exhaust the administrative remedy of first filing a complaint with OSC. In an IRA appeal, the board will not decide any aspect of the challenged personnel action other than its connection with the claim of reprisal for whistleblowing.

In both types of cases, an administrative judge may grant a stay of the personnel action at issue under appropriate circumstances. Similarly, OSC may under appropriate circumstances may request that any member of the board order a stay. Needless to say, this authority has been significantly complicated by the lack of any current sitting board members.

That said, despite the lack of a board quorum since January 2017, the 60 or so administrative judges at the MSPB continue to hear and adjudicate cases. Of the 5,447 cases administrative judges decided in fiscal year 2018, approximately one fifth were from VA employees. The MSPB has decided an average about 180 IRA claims from VA employees for each of the past 3 fiscal years and is on track to decide approximately the same number in fiscal year 2019.

In closing, one general trend I do want to note that is not specific to the VA is the increasing complexity of both whistleblower complaints and their adjudication. It is increasingly rare to see a case in which the appellant asserts that he or she made a single disclosure in retaliation for which the agency allegedly just took one personnel action. As OSC can attest, the typical case often involves multiple allegations of several instances of alleged whistleblowing and several alleged retaliatory personnel actions.

Because of the multipart test for jurisdiction over and proof of the claims must be applied to each protected disclosure, whistleblower appeals are often difficult, and time consuming to hear and decide. Nevertheless, I believe the MSPB understands that Congress, the executive branch, and the American public are counting on it to be the front lines of sorting through these issues. Accordingly, I know the MSPB aspires to give full and fair consideration to each appeal in accordance with applicable statutes and case law.

Again, thank you for the opportunity to appear before you. I am happy to answer any questions you may have.

[THE PREPARED STATEMENT OF TRISTAN LEAVITT APPEARS IN THE APPENDIX]

Mr. PAPPAS. Thank you very much, Mr. Leavitt.

We do have to additional witnesses on the panel today. Mr. Tom Devine, he is the Legal Director of the Government Accountability Project. Also, we have Ms. Jacqueline Garrick. She is the founder of Whistleblowers of America. They both offered testimony at our June 25th session on the earlier panel, and we brought them back here to allow a more full discussion today, but since they already gave testimony at that time, they won't give additional testimony today.

With that, I want to thank each of our witnesses for their testimony. We will now begin the questioning portion of this hearing, and I will begin by recognizing myself for 5 minutes of questioning.

Dr. Bonzanto, if I could start with you, I appreciate your comments here today, and I think it was made very clear to us by some of the witnesses we heard from earlier, by folks who have reached out to my office, that we have a culture problem at the VA, and I believe you recognized this during the nomination process.

After our hearing last month, we heard from whistleblowers about retaliation that is ongoing. It's clear to me that there still needs to be culture change underway at the VA. You are 6 months into your job. I am wondering how you can assess that transition that you said needed to happen and how you will continue to address that as you move forward.

Ms. BONZANTO. Thank you so much for your question.

I do have to say, coming from the Subcommittee as an investigator and now being on the other side of VA, there has definitely been a change in the culture where there is more support from leadership about engaging staff and having conversations regarding retaliation or regarding the importance of engaging staff in addressing concerns.

For the first 6 months I have been there, I have seen Secretary Wilkie lead this in conversations with leadership, the importance of customer service, the importance of engaging—we engage our Veterans and we listen to our Veterans but also engaging our staff and listening to them and the internal customer service, breaking the silos and having conversations across the administration to improve staff engagement, and I think that is definitely a positive thing.

I do have to say, when I came onboard, too, the Partnership for Public Services, which assesses best places to work in Federal Government, from 2017 to 2018, VA moved from the bottom third best places to work in government to the top third. I think that is a positive sign from 2017 to 2018. I think that is a good sign we are heading in the right direction. Now, there is room for improvement, and I admit to that, and I think the Office of Accountability is a part of that change in culture as engaging with stakeholders to improve our processes.

Mr. PAPPAS. Well, thank you for that.

I am wondering if I could ask the other government witnesses who are here the same question. How would you assess the culture that exists at the VA in terms of being hospitable to whistleblowers? What needs to be done? What steps need to be taken by the VA to ensure that whistleblowers are listened to, that they are protected?

Mr. KERNER. Sure, I will take a stab at that.

I think it is very important that it obviously starts at the top. We need good leadership. I think when you have good leadership with people—as I indicated, I have met with Dr. Bonzanto. I have also met with the GC and, of course, the Secretary. I have their commitment that they are committed to trying to make—to improve the culture. I take them at their word.

We at OSC have a very extensive relationship with the VA. The VA has the most cases with us. We obviously have a lot of communication with them. It starts at the head, but also my team meets with—we have monthly meetings with them. We also have bi-monthly meetings on the 714 process, which involves discipline.

In addition to leadership, you also have to have education. You have to have people know what the whistleblower laws are. Obviously, once you have the commitment, to then abide by the laws. Then finally you also need accountable. You have to have discipline. You have to have accountability. This is where OSC comes in as well, to try to assist with this culture change at the VA.

Mr. MISSAL. It certainly takes time to change culture. I think that culture was in place for a number of years. A little more than a year ago, we were dealing with the Office of Accountability and Whistleblower Protection by fighting with them about access to documents. Certainly, we have come a long way from that time. I think with Dr. Bonzanto's leadership, they are headed in the right

direction. It is going to take time. With whistleblowers, they have to prove to them that it is a place where they feel comfortable coming forward and there would not be adverse actions against them.

Mr. LEAVITT. I would just add, along with IG Missal, it does take time and in the same way that culture can be really nebulous to define, right, looking at an agency, it can also be very difficult to change. There are a lot of layers in the VA, right. You know, my experience from on the Hill was when you had a culture problem at a place, it took a very long time, a sustained effort, along with just commitment from individuals, but to help people really have the confidence that things can work out for the best.

Mr. PAPPAS. Well, thank you.

Dr. Bonzanto, you know, I am specifically concerned about whistleblower protection. That is a charge of your office. I understand that new policies are underway, and you have alluded to those. I just want to get some higher degree of confidence today that the steps are underway for you to improve the protection of these individuals who are so valuable to the process.

Could you highlight those steps again for us to make sure that we are going to have greater confidence coming out of this hearing that things are headed in the right direction?

M. BONZANTO. Of course, sir. I do have to say one of the things I was listening through in the hearings and also engaging with stakeholders, some of the things that I have learned in our process and meeting with other Departments within the executive branch is to improve anonymity and communication with whistleblowers' rights so they understand where they are in the process. That customer service, like Mr. Kerner said, that is that soft skill. Understand that this is—understand that there might be a fear of retaliation and giving them confidence in the system and understanding that they're putting their jobs on the line, coming forward, and that is something we are working on improving internally to OAWP.

The other thing is empathy, empathizing with whistleblower and understanding their perspective, and that is something that those skills have to be developed with my staff, and I am working on that.

As I am working on rolling out these policies, it is also improving training with my staff to understand the importance of this and engaging with leadership throughout the VA, and taking this from the top, you know, and working with the Secretary to improve communication and engage the staff. The importance of staff engagement, I think, is where we are at.

You have my commitment to that, and that is something that I will continue to have these conversations about.

Mr. PAPPAS. Well, thank you. I appreciate your response.

I am not satisfied with where things stand today, but I look forward to continuing to work with you on this and certainly others will have questions as well.

With that, I would like to turn it over to the Ranking Member, General Bergman, for 5 minutes of questioning.

Ms. BONZANTO. Thank you, Mr. Chairman.

As we put up our chart here on the, you know, on the front end, it does violate the KISS principle a little bit from the confusing of the most important people I think to understand that how it works

are the people who would be your whistleblowers. Whether they understand—they may not understand on the front end how protected they are, but if they have confidence, and they can see how the system is designed to work for them initially, that will build their confidence to come forward.

Having said that, communications being key, now this is Dr. Bonzanto and Mr. Missal and Mr. Kerner. I would like a quick response from each of you on the following.

One of the major grievances we hear is that whistleblowers believe that organizations investigating their disclosures do not communicate interoffice, if you will, effectively. What level of communication should a whistleblower expect from your offices and what barriers exist to meeting the whistleblowers' expectations today with respect to that communication?

Ms. BONZANTO. Sir, I can tell you a barrier that exists in my office is that I can't disclose who the individuals are to the OIG or the OSC without their permission. If they choose not to, that makes it difficult. If they already reported that they shared information with anyone of these entities, that makes it very complicated. We continue investigating, but we might be investigating the same thing without knowing.

Mr. MISSAL. When a complainant contacts our office, their contact is acknowledged. If they do it through a web submission, a fax, other than a phone call, we send out an acknowledgment that we got it. We also then while we are—and if the case is accepted, we let them know that the case has been accepted. At that point forward until we are done, due to confidentiality and other reasons, it is really difficult to give an update on where we are, but when the case is closed, meaning either we don't have an allegation or we have finding, we will publish a report. The complainant will then be able to see the results of their complaint.

Mr. KERNER. When I talked about the customer service at OSC, what we are basically talking about is three pillars. One is we want to give accurate information in a timely manner, in a polite way. It is really important that we provide that customer service to people. When we get contacted, we try to get to people as soon as possible.

We have under the statute, for example, on what you have described as the retaliation section, we have 15 days to get back to people that file with us. We try to do it under 5 days to make sure that we get back to them right away, that we tell them that we have their case, that they have an assigned investigator or attorney who they can contact to make sure that they are heard, that we get to their cases with some dispatch, and that we handle the cases in a timely manner.

When you ask about barriers, we have not insufficient staff for the cases we have. We have 6,000 new filings roughly every year. We have a small office of over about 140 full-time employees including some in field offices. The barrier is we try to get to their case as soon as possible, but sometimes we just have a lag and a backlog that takes a while to get to.

Mr. BERGMAN. Okay. Thank you.

Dr. Bonzanto, OAWP seems to perform functions that are similar to those of OIG and OSC. To what extent can OAWP create a syn-

ergy among the organizations in order to best address the whistleblower cases that arise?

Ms. BONZANTO. one of the things that is different with the OAWP is that we are within the Department. I report directly to the Secretary. Part of the law requires us to review, receive, track, and confirm implementation of recommendations from the investigative entities. That is something that is unique.

It is also within the Department we have one area where we are receiving disclosures. It is getting the data where we can now have the whistleblower disclosures recommendations from the IG, OSC, GAO, and the Office of Medical Inspector and pulling that data together to identify opportunities for improvement within the Department and that is something that is very unique in what we are doing in OAWP, and I think that is different than what the other entities do. They give their recommendation, but within VA, we now have the responsibility of ensuring those recommendations are implemented.

Mr. BERGMAN. Thank you.

Mr. Chairman, I yield back.

Mr. PAPPAS. Thank you.

I would now like to recognize Miss Rice for 5 minutes of questioning.

Miss RICE. Thank you, Mr. Chairman.

Dr. Bonzanto, although the VA has procedures for investigating whistleblower complaints, these procedures have allowed the program office or facility where a whistleblower reported misconduct to conduct the investigation. GAO even found instances in which managers investigated themselves for misconduct. How do you plan on addressing this issue going forward to ensure independence in the investigation and things are done in an unbiased way?

Ms. BONZANTO. That, for OAWP, we investigate all allegations related to retaliation. We also investigate the allegations into senior leadership poor performance and management. We do have the authority similar to OSC[PAC(1)] to refer cases back to the administration. Part of improving our processes internally is we develop a questionnaire. We are working on a questionnaire to basically triage these cases to ensure that we are not referring cases back to the program office where a manager who is involved in the case is going to be part of that investigation.

It is improving my internal training for my staff and also creating these templates where they can have a checklist of standard questions to go through to, again, improve anonymity and improve communication and ensure that people who are involved in the allegation are not part of the investigation.

Miss RICE. I mean, that is good because I know we have heard before about a level of frustration on the part of whistleblowers that it is hard to have an unbiased approach when the person heading the investigation is involved.

One of the other—what we heard—and it was really disturbing in the last hearing—how actions taken by the VA against whistleblowers follow them for the rest of their careers and impact their future employment opportunities if they were to leave, but it doesn't seem to be the case for the more senior-level employees who retaliate against them.

One issue that I would be interested to hear yours and anyone else's feedback on that I think speaks to addressing the cultural issue and holding senior-level employees accountable is how relevant information or documentation on instances of whistleblower retaliation or a substantiated misconduct is shared across the VA at the leadership and facility levels. If a senior-level employee had been implicated in a whistleblower retaliation disclosure, but no official action had been taken against them for misconduct, is this type of information shared across the VA? If not, do you think it should be?

Ms. BONZANTO. Are you—to clarify, you are speaking about if an individual, there is a claim against retaliation that would substantiate --

Miss RICE. Yeah.

Ms. BONZANTO. If there is a recommendation regarding that, we have to report back. If the recommendation coming out for disciplinary action regarding retaliation is not followed, we actually have to share that information back. I report directly to the Secretary. So, leadership is aware of that doesn't happen.

Miss RICE. I mean, it just seems that there are more negative—there is a much more—much greater negative impact on the whistleblowers obviously --

Ms. BONZANTO. Right.

Miss RICE.—than the people who retaliate against them. There doesn't seem to be that much accountability at the higher levels in the VA for actions they may take against a whistleblower versus the sometimes career-ending impact it has on the whistleblowers themselves. How can we make that a more consistent across-the-board? I mean, the whole culture of the VA starts at the top. If people in higher positions are not being held accountable when whistleblowers are actually having, you know, a much larger impact, professional and personal impact, how do we address that inconsistency there?

Ms. BONZANTO. Part of our office, when we are talking about disciplinary action, is to actually track those. That is part of the data analysis we have to do. We will be able to identify those areas where a leader is refusing to take action against someone who is, you know, claiming, who has an allegation, substantiated allegation of retaliation.

Miss RICE. Is this something you are just starting to try to get information on?

Ms. BONZANTO. Right. This is something—so I have been in the office for 6 months. This is something that is important and critical, and the Committee has also said that we want to know where these data points are.

Miss RICE. How are you going about compiling that information?

Ms. BONZANTO. It is through recommendations for disciplinary action. When we give a recommendation for disciplinary action, if those actions are not taken, that is something we have to track within our office.

Miss RICE. Can we—you will obviously be sharing those results with us, too.

Ms. BONZANTO. Yes.

Miss RICE. Okay. Thank you very much.

Thank you, Mr. Chairman. I yield back.

Mr. PAPPAS. Thank you.

I would like to recognize Mr. Bost for 5 minutes.

Mr. BOST. Thank you, Mr. Chairman.

Dr. Bonzanto, as you know, we had issues in my district in the Marion VA of the alleged whistleblower retaliation. One of the main concerns that the staff has heard about and communicated several times is individual VA employees so—is the communication between your office and individual employees.

In your opinion, what is a reasonable expectation of communication time from your office to disclosure and retaliation complaints? Obviously, not everything reported is going to have the evidence to back it up on the initial claim. When this happens and the claim cannot be confirmed, does your office let the VA employee who sent the disclosure or retaliation know so that they know the actions are being taken?

Ms. BONZANTO. That is something that we are working internally to improve. As Mr. Kerner said, they are at 5 days, I think, for something. That is a goal for us to strive to get to. I would say my expectation is that each employee has about within 7 working days that we give a response that we received your allegation. One of the things we are also working on is understanding where in that journey, you know, from blowing the whistle to getting to the investigative phase, looking at those touch points; and we also have communicating to my staff in the OAWP the importance of informing both the whistleblower, the person that is being investigated, of where they are in the process.

One thing that I do want to recognize here and say is that a lot of times employees want to know whether or not disciplinary action was taken, and employees do have a right to privacy, and that is something that we inform them how to go about getting information regarding the case, the person that we are investigating. I can't—as an entity, we don't disclose to the whistleblower whether or not disciplinary action was taken against the person that they alleged something.

Mr. BOST. That is because they are both employees. Therefore, they are both --

Ms. BONZANTO. Right. They both have the right to privacy in the process.

Mr. BOST. Right. Right.

The next question I have is actually for all the government witnesses. Sometimes during these processes, obviously, whenever they want anonymity, sometimes that doesn't happen. Or sometimes you find that the person who has had the whistle blown on them all of a sudden finds out who it was that did that. How do you handle those situations? Each one of you, if I can, or if it doesn't happen, tell me.

Mr. LEAVITT. For MSPB, it is just somewhat inapplicable because we don't conduct investigations in the way the other three entities do. If it is known, someone files before us who the parties are, the agency will know.

Mr. MISSAL. We work very hard to make sure it doesn't happen. Sometimes, though, if it is an office which has a very small number of people, it sometimes is fairly obvious. We always balance the in-

dividual's right to privacy when they do report it to us with the need to go further. We may talk to the individual as well who provided us the information and explain to that person, "For us to go forward, these are the steps we are going to have to take," just to make sure the person is aware of it.

We try very, very hard to protect the confidentiality of anyone who comes to us who asks to remain confidential, and I believe we do accomplish that.

Mr. KERNER. No, we don't disclose the identities of the person making the claim unless they want us to. Obviously, if there is a need for them, for example, by getting a stay of their personnel action against them, et cetera, sometimes they will volunteer. For the most part, we protect people's identities as well.

Ms. BONZANTO. OAWP, we are committed. We are also protecting whistleblowers. I do have to say, in retaliatory cases, if you choose to remain anonymous, it is very difficult to ask questions regarding retaliation if you are choosing to remain anonymous in disclosing that information. But employees, we do not disclose employees' information unless they choose to.

Mr. BOST. One last question because I have only got less than a minute here and this is going to be for all three of you.

Individual VA employees understand the process of bringing forward a disclosure and retaliation complaint. Or do the employees think that—all of your why offices can handle a complaint. Do they know the process? General Bergman was very clear about the KISS process which, as a nonofficer, we understood very clearly. Do you think these new—these employees under this process now understand how to file and truly file the claims?

Ms. BONZANTO. I am not confident that is happening. With that being said, we are working, OAWP is working with the OIG and the OSC to develop training regarding whistleblower cases like whistleblower reporting when you want to make a disclosure.

Mr. MISSAL. I don't think they do. That is why I frequently ask VA employees what do they know about the OIG. Where would they go for a complaint? It is all levels at VA. It is some of the more senior people don't really understand the relationship between OAWP, OSC, OIG, and that is why we feel so strongly that VA ought to put out a training that we have prepared on when to come to the OIG, when to come to some of the other avenues, and we hope that training gets implemented.

Mr. KERNER. Yes, we work very hard to try to get whistleblowers to know about us. We try to raise our profile. We do press releases. We also count on the agency, the VA, to notify them. We have an agreement with the General Counsel's Office at the VA that, if there are significant personnel actions, to let them know that OSC exists as a channel. We also do trainings. There are some mandatory training for supervisors and others about PPPs, prohibited personnel practices.

We are hoping that employees do know about OSC. As I said, as we have press releases and other ways to make ourselves known, I think they do. We get a lot of cases from the VA. We do think a lot of them know about us.

Mr. BOST. Thank you.

Thank you, Mr. Chairman. I apologize for going over time.

I yield back.

Mr. PAPPAS. Thank you.

Mr. ROSE, you are recognized for 5 minutes.

Mr. ROSE. Thank you, Mr. Chairman.

I want to follow up with what you all were just saying about these trainings because I do feel like we can do this in a bit more of a deliberative and quantitative manner.

First of all, Mr. Missal, you had mentioned that there are trainings that you hope could be happening. Is that—am I correct in saying that?

Mr. MISSAL. Correct.

Mr. ROSE. What is going on? Who is saying no to you?

Mr. MISSAL. Nobody has said no. We are working through the process. It is a long process. We put together a training program. VA has a pretty extensive training program for a lot of different areas, including the maintaining confidentiality of documents, protected information, et cetera.

Mr. ROSE. No one is saying no. What is the timeline for when this happens?

Mr. MISSAL. We hope it is sooner than later, but it has been months in the works, and we keep telling another step needs to happen, another step needs to happen.

Mr. ROSE. Do you feel like it could go faster?

Mr. MISSAL. Yes, absolutely.

Mr. ROSE. Who do we have to talk to for it to go faster?

Mr. MISSAL. Senior leadership at VA.

Mr. ROSE. Can you give us a name? Talk to all of them?

Mr. MISSAL. Secretary Wilkie.

Mr. ROSE. We should talk to Secretary Wilkie to urge him for this training to go faster so people understand who to go to, when to go to them.

Mr. MISSAL. That is correct.

Mr. ROSE. Okay. You can count that we will do that.

What about staffing? Whether it is OIG or any of the other offices you all represent, you know, the VA is the second largest Department, hundreds of thousands of employees, billions of dollars in budget. Do you all feel like you are adequately staffed to both respond to whistleblowers as well as protect them thereafter?

We will start with you, Dr. Bonzanto.

Ms. BONZANTO. Currently, sir, I am adequately staffed for what I am doing.

Mr. MISSAL. I don't think we are adequately staffed for what our requirements, obligations, and responsibilities are. As VA has grown in tremendous size over the last five to 10 years, our office for a long time remained relatively flat.

Mr. ROSE. Okay.

Mr. MISSAL. We appreciate the increases Congress has recently given us, and we are getting to a better level, but I don't believe we are adequate now.

Mr. ROSE. Let's try to go into the details a little bit there. What do you think you do need in order to adequately fulfill the expectations that we all associate with your, the OIG or its other respective responsibilities?

Mr. MISSAL. For the next fiscal year, the House has appropriated \$222 million for us which would be an increase from the previous year. Just given we want to grow in a measured, controlled way, we think that would be adequate, but we hope that would be just a series of increases going forward.

Mr. ROSE. Okay.

Sir?

Mr. KERNER. Yes, thank you. We are also understaffed, as I alluded to a couple of times. We have had a tremendous growth in cases. Because of that, we have a significant backlog. We have about 2,600 cases that are backlogged.

Mr. ROSE. You have a 2,600-case backlog.

Mr. KERNER. Yeah.

Mr. ROSE. How long is it going to take you to get through that?

Mr. KERNER. It depends on our staffing level, right.

Mr. ROSE. If your staffing level is maintained.

Mr. KERNER. Well, then every year we get about 6,000 new cases. We resolve about 6,000 new cases. We have a backlog of 2,600 every year.

Mr. ROSE. You are telling me that is relatively a 6-month backlog?

Mr. KERNER. Yes, that sounds right.

Mr. ROSE. Walk me through, then, from an individual's perspective, right?

Mr. KERNER. Yes.

Mr. ROSE. Whistleblower comes forth, gets—becomes a part of the backlog.

Mr. KERNER. Correct.

Mr. ROSE. 6 months.

Mr. KERNER. Well, I don't know if it takes 6 months because not all cases are the same, right? Some are more fact-specific. Some are more intense.

Mr. ROSE. Yeah, but in the aggregate, 6,000 cases in a year, roughly 3,000 backlogs. That is 6 months. What are some of the consequences we have seen of that backlog?

Mr. KERNER. Well, so the consequences are we just don't get to someone's case, which means you might have a very meritorious case of whistleblower retaliation. Unfortunately, by the time our examiner gets to that, weeks or months have gone by, and their frustration level goes up.

Mr. ROSE. Can you give us a specific example?

Mr. KERNER. Well, I mean, there is just—I mean, I don't --

Mr. ROSE. You can pick out of the hat. What has happened where there has been a consequence of that backlog?

Mr. KERNER. The consequence of that backlog would be that a whistleblower had their case sitting with us and doesn't—we don't get to it for a while and the case—I thought you had testimony at the last hearing where one of the witnesses talked about how a case took a couple of years. Now why does this case take a couple of years? It takes a couple of years sometimes because of the discovery, right. You are waiting for documents. Sometimes there is also either changes in staffing or people don't get their cases --

Mr. ROSE. What do you need to address this backlog?

Mr. KERNER. More staffing.

Mr. ROSE. How many more?

Mr. KERNER. We currently, as Mr. Missal said, in the House bill we are at 28 million, which is a million and a half more than we have now. That would certainly be a big help.

Mr. ROSE. Okay. Thank you very much.

Mr. KERNER. Thank you.

Mr. PAPPAS. I will recognize Mrs. Radewagen for 5 minutes.

Mrs. RADEWAGEN. Thank you, Mr. Chairman.

Mr. Missal, the IG received 35,000 hotline contacts in fiscal year 2018. What percentage of hotline cases are closed without investigation? What percentage are investigated? Could you please explain how your office decides whether a complaint merits further investigation or should just simply be closed without action?

Mr. MISSAL. Of the 35,000 contacts, as I testified, we analyze and evaluate each and every one of those. The number that turn into an OIG investigation is a relatively small percentage. Again, it is a resource issue. We take the matters that we believe are the most significant, most impactful, have the greatest risk to veterans or tax dollars, and so we can only take a relatively small number.

A number of the other contacts we get we may refer over to VA and ask them to take a take a look at it and report back to us or just refer to them. Or a number of the others we may send to another agency such as OSC, which is more capable of handling it if it is a retaliation case since Mr. Kerner's office has more authority over retaliation than we do.

Mrs. RADEWAGEN. Mr. Kerner, of the approximately 2,100 VA cases OSC received last year, how many were disclosure cases? What percentage of disclosure cases did OSC close without investigation? How does OSC determine whether a disclosure warrants further investigation?

Mr. KERNER. Yes. What happens is we—in terms of determination, we have to meet a legal standard. The legal standard is called substantial likelihood. When we get a case from someone who files a disclosure, we have 45 days by statute to make the substantial likelihood determination.

If it does rise in the opinion of the investigator or the lawyer to the standard, then we refer to the agency. The agency then assigns it for investigation. We don't actually do the investigation. If it doesn't reach that level, then we close that case.

I think in terms of the last cases—let's see. One second.

We have approximately 2,100 VA cases. The disclosure cases at VA were about 431. I don't have the—so it is about 39 percent. I don't have the exact number of how many we closed. We almost certainly dealt with all 431. We refer --

Mrs. RADEWAGEN. They were closed without investigation?

Mr. KERNER. Some of them—yes. Some of them, if they do not rise to the level of a substantial likelihood, then those cases would be closed, yes. Almost all of them were addressed certainly by last—by this—sorry—for fiscal year 2019, we had 431. For fiscal year 2018, we had 642 VA disclosure cases, and they would definitely be addressed, certainly at this point, within the 45-day statutory requirement.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. PAPPAS. Thank you very much.

I now would like to recognize Mr. Cisneros for 5 minutes of questioning.

Mr. CISNEROS. Thank you, Mr. Chairman.

Dr. Bonzanto, you had said earlier that, you know, the VA definitely needed a culture change and that really needed to happen at the top, in which I wholeheartedly agree at that.

How is that change, you know—the Secretary is dedicated to this. How are we getting that down to the VA facilities so that they know that a culture change is happening? How is your office making sure that those individuals, the supervisors at the facilities, know that retaliation against whistleblowers is no longer going to be tolerated?

Ms. BONZANTO. Sir, thanks so much for that question. That is something, when we speak about internal customer service and the conversations, I can give you the example in my office also that we are doing is having—the Secretary does have townhalls with employees. He is leading from the top. Then promoting that, the importance of staff engagement throughout the organization.

Something even internal to OAWP, having the division calls with my staff, having all-hands calls with my staff. Those are things, as an example, that we are doing internally to promote the importance of staff engagement, and listening to employees when they have --

Mr. CISNEROS. Yes. But he is talking he is talking to your staff.

Ms. BONZANTO. I am giving you an example—he is taking the leadership, and I am also doing that in my staff as an example of what we are doing.

The other part of it is also the training that we are developing regarding the whistleblower retaliation and why it shouldn't be happening and what each one of our offices is doing to protect whistleblowers.

Mr. CISNEROS. Is this training for supervisors or is it for every employee?

Ms. BONZANTO. Every employee, sir. By the --

Mr. CISNEROS. What specifically are we doing regarding supervisors to let them know that this treatment is no longer going to be tolerated? I mean, is there anything being done specifically for them, or are they just getting the same training that everybody else is getting?

Ms. BONZANTO. All employees have the same training. But also, supervisors—our office investigates retaliation. That is what we are charged to do in OAWP, and we will start—those cases, there is accountability --

Mr. CISNEROS. I get that, but how are we changing the culture, right? I get that you are putting things out to employees and you are letting them know that it is okay to come out and to report the whistleblowers. How are we letting them know—how are we letting supervisors know that this isn't going to be tolerated anymore? That retaliation—the way that used to be done is going to change?

I mean, what is being done different to address supervisors that they need to change the way they are doing business—business has been done in the past.

Ms. BONZANTO. That is through training and promoting the offices that we do have here is --

Mr. CISNEROS. I know. You are saying the training is for everybody. It is—pretty much it is probably a general training that is given to all employees.

Ms. BONZANTO. Right.

Mr. CISNEROS. But is there a specific training that is dedicated to supervisors to let them know that when you are a supervisor, you know, like just last week I had to go to a training that was meant for Members of Congress and how I treat my staff. It wasn't an overall, you know, all Members, everybody who is employed by the House of Representatives training.

What are we doing specifically for supervisors to let them know that business is changing, the way that things used to be done in tolerating—we are not going to tolerate the way that we treated whistleblowers in the past?

Ms. BONZANTO. I could find out exactly, and I could take that—the exact training that is happening for the supervisors regarding retaliation. I know we have the all-employee training for every employee. Specifically, for supervisors I could take that for the record get back to you.

Mr. CISNEROS. Mr. Missal, you are chomping at the bit there.

Mr. MISSAL. In 2017, Congress passed the Chris Kirkpatrick law which requires retaliation and whistleblower training for all supervisors. Our office does that training for all supervisors. We do that on an annual basis.

Mr. CISNEROS. Has that been effective?

Mr. MISSAL. I think it is very effective. It is a very good training program. I recently took it, and so I can personally say I found it very helpful.

Mr. CISNEROS. All right.

Ms. GARRICK. Mr. Cisneros, if I could answer some of this?

Mr. CISNEROS. I was just going to let you, Mr. Devine and Ms. Garrick,—I wanted to give you a chance, right? I know it has been like 6 months, but I would love to hear your thoughts and really what you are hearing from those that you represent.

Ms. GARRICK. I think the real issue here, what you are really asking is about accountability. When we talk about training, we have talked about training for years and years and years. That is a paper tiger answer, and it is so infuriating because there is no fear at training. There has been all kinds of whistleblower training. Mr. Devine does a lot of training. It is online. There is lots of training.

The fact that we can show from so many of the people who contact us that—they never get responses to their emails. There is no policy in place that explains any of this.

The VA put out a report, a 14-page report with a mnemonic we too care instead of a policy statement. That is just so unprofessional. I am at a loss for words. The fact that we don't have a good bargaining agreement with the union, we don't have a mentor program that we started that got disbanded. There is a lot of things that the VA was doing, could be doing. We have tried to get regular accountability meetings, scheduled quarterly meetings with the VSOs to go over some of the disclosure issues.

The fact that not a single Senior Executive Service (SES) or a single manager who has wasted government money has put veterans and their care at risk has not been held accountable, that should be something that this Committee should be furious about.

Mr. DEVINE. Congressman, we certainly welcome the cause for improved culture and attitude. We welcome Dr. Bonzanto's appointment, and the whistleblower community pledges full support for her.

Better attitudes at the top aren't a substitute for results, and the results aren't getting better from our experience, sir. Before the hearing last month, a day before the hearing, one of the key witnesses was fired by the VA. That is intended to send a message.

GAP has been working with Office of Special Counsel mediators and attorneys for the last year in trying to resolve six whistleblower cases. Despite beyond-the-call-of-duty efforts by the Office of Special Counsel, the VA hasn't been willing to resolve any of those cases in a civilized manner.

I think if there was any issue that is a good weathervane for whether or not this talk is making it into reality, it is the secret waiting list issue.

Five years ago that scandal broke, and it horrified the Nation. The VA promised to do much, much better. At last month's hearing, all three whistleblowers were disclosing ongoing problems with secret waiting lists. Three out of the five GAP clients I talked about in my testimony were on secret waiting lists. The problem isn't going away, and it is not surprising why it is not going away.

The VA had a very effective corrective action program that was doing outstanding work with hands-on efforts in the medical centers to correct the problem of secret waiting lists. That was canceled and replaced with a pork bureau contract, a kind of buddy system contractor scheme. If you look at the transition, which happened within the last 2 years, it is impossible to be optimistic what is happening at the VA.

Mr. PAPPAS. Mr. Devine, I apologize. We are a little bit over on his time for questioning.

Mr. DEVINE. Yes, sir.

Mr. PAPPAS. A couple of us will ask additional questions, and we might get --

Mr. DEVINE. Yes, sir.

Mr. PAPPAS.—to allow you to expand upon that a bit. I appreciate your response.

With that, I would like to recognize Mr. Peterson for 5 minutes. No.

Okay. Well, maybe we will pick up there, then, Mr. Devine.

You know, we were asking, you know, our government witnesses to gauge a little bit the culture change that needs to happen and the steps that they have outlined. You are not satisfied with that.

Would you like to continue or offer anymore comments in that vein?

Mr. DEVINE. Well, yes, sir. It is the secret waiting list issue that is just eating at us. The VA had a very effective unit, VERC was its acronym, that was going in and working with the hospitals and cleaning up this mess.

However, it was replaced, and the congressionally chartered commission on care applauded their work, recommended giving them more resources and authority so that they could better pursue their mandate. The VA responded to that recommendation by canceling the work of the VERC merging it into another unit which laid off all 127 career employees who were seasoned veteran professionals at solving these problems and replaced them with an outside contractor under the sleaziest of conditions.

The outside contractor had access to inside budget information in order to customize their proposal. The reorganization that brought them into power was instituted without prior congressional authorization as required by law. The outside contractors were benefiting from Federal spending for a study on how to replace Federal employees with contractors, which is illegal. The outside contractors were violating Federal acquisition regulations by supervising Federal employees.

What has happened with this? Well, now, instead of having hands-on work at the hospitals, it is a paperwork review where the medical centers certify themselves on an honor system to the outside contractors, that they have solved the problems. They have canceled the site visits. They have stopped making progress. The cost of this has increased from \$45 million to \$150 million.

We have replaced effective corrective action with a buddy system pork barrel scam, Mr. Chairman. That doesn't leave me feeling very encouraged about the progress at the Veterans Administration.

Ms. GARRICK. When we have—and we have the wrongdoers investigating themselves. We have government money that doesn't get properly spent. The OIG—one of the reports that I cite all the time is this \$11.7 million that went to Calibre while O'Rourke was head of the OAWP. There was no resolve to that. The money doesn't get called back. None of the Veteran Benefits Administration (VBA) people that were responsible for that contract—there was no accountability for that. There was—they recommended more training.

That is why I get so frustrated when—and then we have caps on arbitration. Why are caps at \$5,000? Who is going to go through that process when that is the resolve? We have VA employees experiencing cyber bullying.

There is no one at the VA that will investigate threats, threats of stalking and actual physical harm to VA employees who are whistleblowers. The OIG doesn't do it. The VA police doesn't do it. Who does it? There is no accountability for that kind of cyber stalking.

Then why do these things take years? I have filed an OIG complaint on the waste, fraud, and abuse with suicide prevention money at the VA, something this Committee has said is its number one priority. That case has sat open since 2016 while veterans are dying by suicide. Why aren't we asking OIG—no the GAO, I am sorry, said that \$6 million wasn't spent. Well, what happened to unspent money? Who is being held accountable for that?

Mr. PAPPAS. Well, I appreciate your perspective. It is valuable. I just want to get one more question in before my time is up here, and then I defer to General Bergman for a final question.

Dr. Bonzanto, I want to go back to you, because in the report that your office issued most recently, there is a section called on the horizon. I am very concerned and eager to learn more about what is just over the horizon for your agency. Included, there are some very fundamental steps issuing a policy on whistleblower disclosures and OAWP investigations, communicating with whistleblowers, developing standardized training for OAWP investigators, developing specialized investigatory teams including those trained in whistleblower retaliation matters.

Not included in there are very specific timelines. I heard you mention a date earlier with respect to the training program. I am very interested in understanding and learning more about the specifics of these things, the timelines for these, so that we can follow the progress and look to hold your agency accountable in the future.

Can you provide any of those for us today or follow up with us with those details?

Ms. BONZANTO. Yes, sir. I could speak for the timeline as the policy is rolling out. We expect by October 1 to actually have our investigative—the directives involving investigations and what we do, how we do it by October 1. As for the rest of the requirements in here, by the end the calendar year, I expect to have actually all of these implemented.

Hopefully we can start measuring some progress in developing the metrics to really give you some type of idea where we are and what our challenges are by the end of this calendar year.

Mr. PAPPAS. Okay. That is vital. I appreciate that.

Ms. BONZANTO. Yeah. I will keep --

Mr. PAPPAS. I would like to follow up and continue that conversation on those issues. We need to know that information.

General Bergman, I would like to turn it over to you for any final questions.

Mr. BERGMAN. Thank you, Mr. Chairman.

I want to set the record straight here just to make sure I understand it. Dr. Bonzanto, Mr. Devine just said that Dr. Aghevli was fired the day before the last hearing. I sent a letter asking VA to review under the 714 hold procedures and was advised that she was put on a hold.

Can you confirm—do you have the ability to confirm where we are on that on this one? Or if you can't, if you could take it for the record, I will just --

Ms. BONZANTO. I will take that one for the record, sir.

Mr. BERGMAN. Okay. Yeah. Because I just wanted to make sure that we understand where we are in the process for --

Ms. BONZANTO. OAWP does have the ability to place holds on actions taken under 714, and that is something we do have in our statute to protect whistleblowers.

Mr. BERGMAN. Okay. Mr. Kerner, I mean, is there a chance you might know that?

Mr. KERNER. Yes, I believe we have a hold on it.

Mr. BERGMAN. Okay. Okay. Well, let's just double check here, because we didn't—again, this is—all of this is recorded, and we want to make sure that we didn't misstate.

Mr. KERNER. Yeah. I checked with the person who does this in our office, and she informs me that we do have a hold.

Mr. BERGMAN. We do have a hold.

Mr. KERNER. Yes.

Mr. BERGMAN. Okay. Well, anyway, my question is, again, Mr. Kerner, when we talk about training programs and getting people up to speed on the same sheet of music, what is the 2302(c) certification program? Has VA completed the certification? What does the certification convey?

Mr. KERNER. Yeah. VA and, actually, the VA IG as well are currently in the process of recertifying. They had previously been certified under the program, but we are recertifying them now. The 2303(c) program is a program where OSC has taken on the responsibility to voluntarily have an active role by teaching and educating supervisors and making sure that everybody complies with the retaliation and other legal requirements.

Specifically we have—we act as a certifying entity for agencies. As part of that role, we work closely with them to ensure that they are meeting all the standards outlined in 2302(c) to educate and protect whistleblowers and other Federal employees.

There are roughly 170 agencies, and we have fairly limited resources. For a lot of them we don't actually do the training, but we do provide a lot of the slides or other materials for the training. Then we certify when they come back to us and comply with the training program.

That is what we do with that.

Mr. BERGMAN. Thank you.

Mr. Chairman, I yield back.

Mr. PAPPAS. Well, thank you.

Do any of the Members have any additional questions before we close?

Well, seeing none, I just want to highlight a couple of points here before we close the hearing.

First, the Subcommittee takes these issues very seriously. We are going to continue to track the disclosures and the needs of VA whistleblowers.

Let's be clear on one fact. Whistleblowers are performing a public service. They are a critical resource, and they need to be protected. The inspector general will be issuing a report about VA's Office of Accountability and whistleblower protection, and a September hearing of this Subcommittee will focus on that review, and we await those details, Mr. Missal.

We are also awaiting further information from the Office of Accountability Whistleblower Protection. As I asked for today, we are very much interested in further details, further policies and procedures and timelines of how we can best track that progress moving forward.

Frankly, the testimony today left me wanting more, and so I think further discussions and further hearings are warranted to ensure that things are moving in the right direction. I remain concerned. Concerned after a hearing at the end of June where we had three witnesses describe some pretty harrowing circumstances that unfolded over many years, individuals who stepped forward just wanting to try to do the right thing.

We have more work to do. We look forward to talking with you all in that process. I want to express my appreciation for each of those who appeared here before us today for offering your testimony, your thoughts, your views. We heard a lot of important thoughts from our government witnesses and from the whistleblower advocates. We thank you for being a part of this again today.

There wasn't always agreement, certainly. The dialogue is important, and it must continue. Ultimately, we are all working toward the same goal, and that is ensuring that the VA serves our veterans as best it can. There are certainly ways we all understand that that process can be improved, and whistleblowers are part of that process.

I look forward to working with all of you. Dr. Bonzanto, clearly you have, you know, an important job ahead of you. You all do as you move ahead and make sure that things are headed in the right direction, and we stand ready to work with you every step of the way.

It is pivotal that we all come together to improve the protections that exist for whistleblowers and, in turn, improve services for our veterans.

With that, I would like to turn it over to Ranking Member Bergman for any closing comments he may have.

Mr. BERGMAN. Thank you, Mr. Chairman. Very briefly, to echo what the Chairman said, we all have a responsibility to protect the whistleblowers to create a culture in which everyone is held accountable, and we will do our part as the elected oversight part of this. We are counting on all of you to do the same.

Thank you very much for holding the hearing, Mr. Chairman. I really appreciate it.

Mr. PAPPAS. Well, thank you.

Members will have 5 legislative days to revise and extend their remarks and include any extraneous material.

Without objection, the Subcommittee stands adjourned.

[Whereupon, at 6:25 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Prepared Statement of Dr. Tamara Bonzanto

Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee, thank you for the opportunity to testify today regarding whistleblower protection at the Department of Veterans Affairs (VA).

Background

VA's Office of Accountability and Whistleblower Protection (OAWP) was established by the President of the United States on April 27, 2017, under Executive Order 13793. OAWP was statutorily established by the VA Accountability and Whistleblower Protection Act of 2017, Public Law 115-41, and its functions are codified under section 323 of title 38 of the United States Code (U.S.C.). OAWP is committed to ensuring accountability within VA and protecting whistleblowers from retaliation. I was confirmed as OAWP's first Assistant Secretary in January 2019.

Protecting Whistleblowers

The Secretary and I recognize the need for improvements to whistleblower protection within the Department. OAWP:

- (1) directly investigates all whistleblower retaliation allegations made by VA employees and applicants for employment against VA supervisors. This mitigates the possibility that whistleblowers may face retaliation for making a lawful disclosure;
- (2) has engaged with other Federal agencies, including the Office of Special Counsel (OSC), the Department of Defense, the Department of Justice, the Department of Labor, and the Department of Homeland Security, to obtain best practices to develop training to protect whistleblowers; and
- (3) has developed a process to regularly update whistleblowers who make a disclosure to OAWP about the status of the investigation into their allegations.

The Secretary and I understand the sense of urgency to improve operations and my team is actively working to implement the following to better protect whistleblowers by:

- (1) providing standardized training for all OAWP investigators. This ensures that all OAWP investigators understand the law and can apply it in their matters in a consistent manner;
- (2) issuing written VA policy on how OAWP investigates whistleblower disclosures that it receives;
- (3) working with VA's Office of Inspector General (OIG) and OSC to finalize training for all VA employees as required under 38 U.S.C. § 733, which addresses, among other things, methods for making a whistleblower disclosure, prohibitions against taking an action against an employee for making a lawful disclosure, and penalties for whistleblower retaliation; and
- (4) refining the investigative processes to ensure that investigations are done in a timely manner.

Complying with the Law

In addition to continuously improving whistleblower protection at VA, OAWP is actively working on complying with the other requirements of 38 U.S.C. § 323, including:

- (1) standing up a team to record, track, review, and confirm VA's implementation of recommendations from audits and investigations conducted by the Government Accountability Office, OIG, VA's Office of the Medical Inspector, and OSC;
- (2) developing written policies to implement the above statutory requirement; and

(3) ensuring that VA is compliant with the reporting requirement in 38 U.S.C. § 323(f)(2), specifically, that it report to Congress when VA “does not take or initiate” disciplinary action that I have recommended.

Engagement with Whistleblowers

The Secretary and I value all VA employees and whistleblowers and their commitment to improving care and services for Veterans. The Secretary and I want VA to be a place where employees are encouraged to raise concerns about our operations and can trust that management will take allegations of wrongdoing seriously and that they will not face retaliation for raising those concerns. Since my appointment, we have met with several internal and external stakeholders, including Veterans Service Organizations and non-profits, such as the Whistleblowers of America. We value the input received during these engagements and look forward to continuing to discuss ways to improve whistleblower protection.

Conclusion

Mr. Chairman, Ranking Member Bergman, I look forward to working with this Committee and continuing to engage with our internal and external stakeholders to identify opportunities to enhance VA’s ability to protect whistleblowers. This concludes my testimony. I look forward to answering your questions.

Prepared Statement of Inspector General Michael J. Missal

Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee, thank you for the opportunity to discuss the role of the Office of the Inspector General (OIG) in receiving complaints; evaluating them; and protecting those who report allegations of waste, fraud, abuse, and other wrongdoing regarding the programs and operations of the Department of Veterans Affairs (VA).

The OIG is committed to serving veterans and the public by conducting oversight of VA programs and operations through independent audits, inspections, reviews, and investigations. We rely heavily on allegations, complaints, and information from VA employees, veterans and their families, Congress, and the public when deciding where to focus our resources. The OIG treats all complainants as whistleblowers as we respond with respect, safeguard confidentiality, and diligently evaluate their concerns.

An individual’s decision to bring allegations forward should not have to be weighed against possible adverse actions. The Whistleblower Protection Act prohibits reprisal against public employees, former employees, or applicants for employment for reporting a violation of law, rule, or regulation. That prohibition extends to reports of gross mismanagement and waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.¹

BACKGROUND

VA is the second-largest Federal agency with a budget for fiscal year (FY) 2019 of over \$200 billion and more than 395,000 employees and contractors. In contrast, the OIG has a staff of approximately 950 employees and a budget for FY 2019 of \$192 million.² The size of the OIG relative to VA presents significant challenges for conducting oversight. The OIG operates a hotline to receive whistleblower complaints and other complaints that is staffed by a dedicated team. The hotline received more than 35,000 contacts in FY 2018 and over 15,000 contacts for the first six months of FY 2019. Every contact is reviewed and processed by an analyst upon receipt. We receive information via telephone, fax, regular mail, and through a web submission form on the OIG’s internet site. In addition to the OIG’s many outreach efforts, a link to the submission form is prominently displayed on the OIG’s website. There are also posters in VA facilities on how to contact the OIG. As the result of site visits and other engagements with stakeholders, OIG staff may also be contacted by individuals directly with information or allegations of wrongdoing. These contacts are also routed through the hotline for tracking and potential follow-up.

The OIG does not investigate complaints that are unrelated to VA programs and operations or issues and may forward such complaints to other Offices of Inspector General or to other investigative agencies. We also typically do not accept complaints that are more appropriately addressed through other legal or administrative forums, including claims of whistleblower retaliation.

¹ P.L. 101–12, April 10, 1989.

² The OIG is actively hiring to further expand our oversight activities.

The OIG does not generally investigate claims of whistleblower retaliation. We will investigate the underlying complaint but not whether the individual was reprisal against for making a protected disclosure. The Whistleblower Protection Act vests the authority to provide relief for violations in other specific entities. The OIG does not investigate allegations of whistleblower reprisal made by VA employees or applicants because the OIG cannot provide direct relief to those individuals. It has been our longstanding policy to refer complainants alleging whistleblower retaliation to the Office of Special Counsel (OSC) or directly to the Merit System Protection Board (MSPB), if appropriate. OSC not only has the authority to investigate, it also has the authority to seek corrective action through the MSPB on behalf of an employee or former employee. We now also have the option of referring VA employees to VA's Office of Accountability and Whistleblower Protection (OAWP), which has statutory authority to investigate allegations of retaliation and make recommendations to the Secretary for disciplinary action.³

There is an exception to this general rule, the OIG will investigate appropriate complaints alleging retaliation against employees of VA contractors for engaging in protected activity. VA contractors are also protected against whistleblower retaliation but, because they are not VA or government employees, do not have recourse through the OSC or MSPB.

INTERACTION WITH COMPLAINANTS

The OIG hotline staff work with personnel from within the OIG's oversight directorates with the relevant expertise to engage in an extensive triage process. Together they determine the best course for disposition and identify the most critical and impactful issues for priority attention, particularly individuals at imminent risk of harm.⁴ Allegations become cases based on a variety of factors, including issues having the most potential risk to veterans, VA programs and operations, and for which the OIG may be the only avenue of redress. Specifically, the hotline accepts information and complaints that result in reviews of the following types of misconduct:

- VA-related criminal activity
- Systematic or other patient safety issues
- Gross mismanagement or waste of VA programs and resources
- Misconduct by senior VA officials

Allegations that are not selected by an OIG directorate for review may be referred by the OIG hotline to VA for additional information or action. When we do refer a complaint to VA, we may do so either as a case referral or a non-case referral. A case referral requires that the VA office or facility to which the matter is referred review the matter and respond back to the OIG about its findings and any actions taken. The appropriate OIG directorate reviews that information and determines if it is responsive and appropriate. If so, the OIG will close the referral. If not, the OIG may ask for additional information and clarification or may decide to open our own review of the matter. This practice acts as a force multiplier and allows the OIG to provide oversight of significantly more issues than if it relied solely on its own resources for all review activity. A non-case referral is for matters that we believe need to be brought to VA management's attention but do not rise to the level of requiring additional OIG oversight of the response.

Examples of OIG Work

There are countless examples of how whistleblowers and other complainants have driven change, not only for the matter under review, but oftentimes at the systems level through changes in policies, practices, and personnel. The following are three such examples:

- Washington DC VA Medical Center - The OIG received allegations from a whistleblower describing medical supply shortages at the Washington DC VA Medical Center. In response OIG staff went on site and confirmed serious deficiencies. The OIG staff further determined a more extensive review was warranted. As the OIG's involvement became evident, additional complainants came forward with other allegations. The hotline staff continued to monitor all allegations relating to the facility and helped inform the scope of a comprehensive review. This work highlighted deficient conditions that required VA to take

³P.L. 115-41, June 23, 2017.

⁴The OIG has five directorates that carry out oversight activity - Office of Investigations, Office of Audits and Evaluations, Office of Healthcare Inspections, Office of Contract Reviews, and Office of Special Reviews.

actions that resulted in reductions in cancelled surgeries, improvements in the facility's cleanliness and in sterile processing of surgical instruments, advancements in supply availability, better financial management, and increases in the consistency of patient safety event reporting and follow-up. This review, while narrow at its start, expanded due to additional information received from whistleblowers. The information obtained was the basis for a published report on how to ensure core hospital systems function effectively to support quality patient care and protect government resources. The report and its 40 recommendations, which were the subject of several congressional hearings, provide a roadmap for the more than 140 VA medical centers nationwide.⁵

- Veterans Crisis Line (VCL) - The OIG conducted an inspection of the VCL in 2016 and again in 2017, the latter in part because of additional allegations received regarding care provided to a specific veteran and VHA's inability to implement the OIG's 2016 recommendations. Those inspection findings prompted changes to the leadership structure and to VCL operations that improve the services offered to veterans.⁶
- Millions of dollars were identified in an audit that was sparked by allegations made by a VA employee to our hotline that artificial limb and device orders were being improperly billed, resulting in VA overspending by more than \$7 million over three years.⁷ As a result of that audit, VA agreed to put controls in place to prevent waste and ensure that taxpayer dollars are being properly spent.

Communication with Complainants

Because complainants can contact the OIG through various methods, the way in which the OIG communicates back to them will vary. If they call, the OIG hotline analyst listens carefully and asks probing questions to ascertain as much relevant information as possible. The information is then forwarded to the OIG personnel who can determine next steps. OIG staff also advise the caller of the other agencies that should be contacted if there is an allegation of retaliation or other matter not within our jurisdiction. This will be annotated in the electronic file for that contact. If they contact the OIG hotline through mail or fax they will, at minimum, receive either a standard response or a semi-custom response.⁸ A web submission will generate a screen explaining the process, including advising that it generally takes six weeks for a response if we take action, and providing information on the types of complaints that the OIG is not authorized or best situated to address. For example, the form advises complainants that whistleblower retaliation complaints should be addressed to OSC. The OIG's website also identifies other offices that complainants may contact regarding personnel issues (including retaliation), such as MSPB, OAWP, VA's Office of Resolution Management, and the Equal Employment Opportunity Commission.

The OIG treats all whistleblowers and others who provide information to the OIG with the utmost respect and dignity, including protecting to the fullest extent possible the identities of individuals who wish to remain confidential or anonymous sources. When a case is opened, the OIG notifies the complainant, if known, in writing or via email. For a number of reasons, including privacy issues, the OIG cannot provide updates to requests from complainants for the status of cases. The complainant is notified when the case is closed. The OIG does not provide complainants the complete results of cases when they are closed. However, complainants are provided with specific information on how to request the results of their case under the Freedom of Information Act. Complainants generally will not be entitled to receive information on disciplinary or adverse action taken against subjects of their complaints because of privacy rules that limit disclosure of that type of information.

Whistleblower Protection Coordinator

The OIG also plays an important role in helping whistleblowers access other potential avenues for redress. Under the Whistleblower Protection Coordination Act, the OIG must designate a Whistleblower Protection Coordinator.⁹ The coordinator

⁵ Critical Deficiencies at the Washington, DC VA Medical Center, March 7, 2018.

⁶ Health Care Inspection - Evaluation of the Veterans Health Administration Veterans Crisis Line, March 20, 2017.

⁷ Use of Not Otherwise Classified Codes for Prosthetic Limb Components, August 27, 2018.

⁸ A semi-custom response provides general information as well as specific information related to the issue that the complainant brought forward. The OIG is in the process of making further improvements to this procedure.

⁹ The Whistleblower Protection Coordination Act, P. L. 115-92 (June 25, 2018), applies to all Federal OIGs.

cannot represent or advocate for the whistleblower, but educates employees on the following:

- Prohibitions against retaliation for protected disclosures
- Rights and remedies against retaliation for protected disclosures
- Roles of various entities to include the OIG, the OSC, the MSPB, and other relevant offices such as VA's OAWP
- Timeliness and availability of alternative dispute mechanisms and avenues for potential relief

INTERACTION WITH OTHER AGENCIES

The OIG interacts with other oversight entities to ensure that all available resources and protections are available to complainants. As previously discussed, there are many agencies that complainants can go to for redress. The OIG's website includes Frequently Asked Questions related to hotline inquiries that outline the types of complaints that are addressed by the OIG as well as other offices and provides contact information for those entities. This information is also provided to individuals who call or write to the OIG hotline when applicable. Although the OIG refers individuals contacting our hotline to many agencies, we have formalized the exchange of information particularly for allegations of retaliation, for which the OIG refers complainants to OAWP and OSC.

Office of Accountability and Whistleblower Protection Coordination

Among OAWP's responsibilities under the Accountability and Whistleblower Protection Act of 2017, is the receipt, review, and investigation of allegations of misconduct, retaliation, or poor performance involving senior leaders; employees in a confidential, policy-making position; or supervisors accused of whistleblower retaliation. The OIG is conducting a review of VA's implementation of the Act, which also includes OAWP's first two years of operations and expects to publish a report in September.

OIG hotline staff may refer complainants to OAWP who are seeking assistance. Similarly, OAWP staff refer complaints that are more appropriately addressed by the OIG, such as allegations of serious criminal misconduct, to the OIG's hotline.

Office of Special Counsel

OSC is a Federal agency with authority to review allegations of prohibited personnel practices, including reprisal for whistleblowing. The OIG has designated our Counselor's office as the liaison to OSC. That office coordinates any action the OIG may take on the underlying allegations from the whistleblower and provides information to OSC.

CONCLUSION

The OIG values whistleblowers and the information they provide as it helps explore areas for potential oversight of VA. It is incumbent upon VA stakeholders to protect whistleblowers from retaliation and foster an environment where no one fears the consequences of reporting any concern, problem, or ideas for potential improvement. The OIG encourages all whistleblowers to contact us with their concerns and will treat them with respect, dignity, and in confidence to the greatest extent possible.

Mr. Chairman, this concludes my statement, and I would be pleased to answer any questions you or other Members of the Subcommittee may have.

Prepared Statement of Henry J. Kerner

Good evening Chairman Pappas, Ranking Member Bergman, and esteemed Members of the Committee. Thank you for holding today's hearing on the importance of whistleblowers and how Federal agencies, such as mine, work to protect them.

The Office of Special Counsel (or OSC) was created as part of the Federal civil service reforms of the late 1970s with the principal purpose of upholding the Federal merit system by protecting Federal workers from prohibited personnel practices (or PPPs) and providing a secure channel to receive disclosures of wrongdoing within the Federal government. Because of this important mission, in 1989 Congress further established OSC as a unique, independent agency, detached from partisan pressures. OSC's independence is essential to our work defending the Federal merit system and protecting whistleblowers from retaliation. And I am proud that OSC's successes in protecting whistleblowers continues to encourage individuals to come forward and expose waste, fraud, and abuse in the government.

To quote Senator Chuck Grassley, Chairman of the Senate Whistleblower Caucus, “Whistleblowers are our first line of defense against problems in government. They bravely shine the light on fraud, waste and abuse so government can function better for the people it serves.” But without strong protections from the retaliation too many whistleblowers face, that first line of defense fails. OSC serves as a shield for Federal whistleblowers, holding agencies accountable and protecting whistleblowers from retaliatory actions. Our work enables future whistleblowers to feel secure when disclosing wrongdoing.

It is important to prevent retaliation from occurring in the first place by creating a culture that recognizes the value of whistleblowers. OSC provides robust outreach and training to agencies to help them understand the importance of whistleblowers and to attempt to prevent retaliation before it begins. We view the agencies that we interact with as partners, not adversaries, and our goal is to work with agencies like the Department of Veterans Affairs (VA) to address the issues that arise between whistleblowers and the agencies they work for.

As we heard in the Committee’s June 25th hearing, unfortunately, retaliation does occur. And when it does, OSC works to make the whistleblower whole again. Not only does our intervention on behalf of individuals subjected to retaliation provide relief to those individuals, it helps to restore confidence in the merit system.

OSC is a primary channel for individuals to file disclosures and complaints of retaliation. For the past few years, OSC has received nearly 6,000 new filings per year from Federal employees either identifying wrongdoing or seeking relief from retaliation and other PPPs. VA employees have accounted for a significant portion of the roughly 6,000 new cases filed with OSC each year—comprising approximately 35 percent of all matters filed. Because OSC provides both a secure channel for whistleblowers to disclose government wrongdoing and protects individuals against retaliation and other PPPs, there are two distinct processes that VA employees can utilize when working with OSC. In both of these processes, OSC does not represent the whistleblower or complainant. Instead, OSC is acting to protect the merit system and hold Federal agencies accountable for any wrongdoing.

I am going to start by describing OSC’s process for disclosures of government wrongdoing. Similar to an Inspector General’s office, OSC provides a safe channel for VA employees to disclose information that the person reasonably believes evidences one or more categories of wrongdoing. OSC is authorized to receive disclosures of wrongdoing that describe a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Once OSC receives a disclosure, it is assigned to an attorney. OSC does not itself investigate the disclosure, but instead reviews the whistleblower’s filing to determine if there is a substantial likelihood of its veracity. By statute, OSC has 45 days to either refer the disclosure for investigation to the head of the subject agency or close the case, during which time the assigned attorney speaks with the whistleblower and reviews any documents or information the whistleblower provides.

To refer the disclosure, OSC must determine there is a substantial likelihood that the information provided is evidence of one of the statutory categories of wrongdoing mentioned earlier. Disclosures that do not meet the substantial likelihood standard are closed, and the whistleblower receives a letter, and often a phone call, from the assigned attorney explaining OSC’s rationale.

If the disclosure meets the substantial likelihood threshold, it is referred to the head of the subject agency, who is required by statute to initiate and complete an investigation within 60 days. Generally, agencies request additional time to complete the investigation, which are granted on a case-by-case basis.

Once the agency’s investigative report has been completed, OSC acts as a quality control check, ensuring that the whistleblower’s disclosure was actually investigated and that the problems identified are being addressed. Equally important, at this stage OSC provides the whistleblower an opportunity to review the report and provide comments. The Special Counsel determines whether the report meets all the statutory requirements and whether the findings appear reasonable. The report, the whistleblower’s comments, and a cover letter by OSC stating OSC’s determination are then sent to the President and appropriate Congressional Committees.

OSC’s processing of PPP complaints is quite different, more extensive, but equally important to creating a strong culture of protecting whistleblowers. When a VA employee files a complaint of a PPP such as retaliation for whistleblowing, OSC conducts an initial review for jurisdiction. If it is determined that OSC has jurisdiction, the complainant is assigned an attorney or investigator who will work with him or her throughout the process. Importantly, OSC works hard to make that initial introduction as soon as possible, so that the complainant has an immediate point of contact for the case. OSC then begins reviewing the complaint, along with any addi-

tional evidence provided by the complainant. Because these reviews are time intensive, OSC maintains regular communication about its progress of the case with the complainant.

As with any investigation, there are triggering points to determine if further work is appropriate or if the investigation should be closed. For OSC's PPP investigations, one of those initial triggering points is determining whether the complainant has alleged a PPP as defined by the statute and whether investigation beyond what is contained in the complaint would yield a prosecutable PPP. If OSC determines that there is nothing more that we can do for the complainant, we send a predetermination letter explaining to the complainant that, based on the information received so far, OSC is unable to proceed and intends to close the case. Importantly, OSC's letter provides the complainant with time to respond with additional information that will be reviewed before a final decision is made. We work hard to make sure that even if we are unable to help a complainant, he or she is fully heard and feels respected while going through our process.

If the case is not closed after the initial review, OSC conducts a more intensive, neutral, fact-finding investigation into the PPP claims. Throughout this process, as OSC works with the complainant or the complainant's counsel, there may be opportunities to settle their claims with the agency or refer the case to OSC's own Alternative Dispute Resolution (ADR) program to mediate a resolution for the complainant. In certain cases, where the personnel action is particularly harmful, such as a removal, OSC may seek to stay the action to prevent it from taking effect. OSC typically attempts to obtain an informal stay from the subject agency, and if unsuccessful, OSC may seek a formal stay from the Merit Systems Protection Board (MSPB), when-unlike now-there is at least one board member serving.

Upon conclusion of the investigation, if OSC is unable to resolve the complaint through settlement or ADR, OSC may pursue corrective or disciplinary action, or both, against parties responsible for the retaliation through litigation before the MSPB, or, if no further action is warranted, close the case.

Much of OSC's work overlaps with that of the agencies represented by the other witnesses on the panel today, particularly the Inspector General and the VA's Office of Accountability and Whistleblower Protection. OSC does, however, provide distinct benefits to both individuals disclosing wrongdoing and those who have been subjected to retaliation or other PPPs. For example, when a whistleblower discloses wrongdoing to OSC, if their disclosure is referred, the VA is statutorily required to investigate. In addition, OSC's process provides the whistleblower an opportunity to comment on and review the agency's report. On the PPP side, OSC's independent nature provides an additional layer of protection to complainants who may be afraid that the information or documents provided by the whistleblower will be shared with their agency. In addition, as the agency charged with conducting PPP investigations, OSC has its own enforcement authority and ability to prosecute cases before the MSPB.

No matter which process at OSC an individual uses, OSC focuses on protecting these brave whistleblowers and the merit system. This is especially true in regard to our veterans. We do our part by allowing the employees who care for these veterans to perform their jobs to the best of their abilities-and without fear of retaliation. The VA is our number one customer, and the most recent former VA secretary was the first department head that I met with upon taking office.

OSC and the VA continue to maintain a positive working relationship. Together, we have made significant strides in producing favorable outcomes for whistleblowers. But difficulties persist. We continue to see a very high level of cases (about one-third of our workload) just from VA employees. We also strive to improve our collaboration on matters involving appropriate VA liaison designations, timely document productions, and efforts to more efficiently resolve meritorious cases. OSC is committed to working through these issues with the VA and is intent on maintaining our ongoing productive dialogue with various levels of VA leadership, all the way down from the secretary, the General Counsel, and their staffs.

Whistleblowers play a fundamental role in the effective and efficient use of taxpayer resources, protecting the health and safety of our veterans, and ensuring a positive work environment for employees-especially in agencies as large as the VA. We look forward to continuing our constructive conversations with the VA to ensure that whistleblowers are protected so that the VA can best serve our Nation's veterans.

Thank you for holding this important hearing, and I look forward to answering any questions you may have.



Prepared Statement of Tristan Leavitt

Good afternoon, Chairman Pappas, Ranking Member Bergman and Members of the Subcommittee. My name is Tristan Leavitt and I am the General Counsel of the U.S. Merit Systems Protection Board. Because there are no Senate-confirmed Members of the Board, I am also serving as the acting chief executive and administrative officer of the agency in accordance with the MSPB's Continuity of Operations Plan.

Thank you for this opportunity to discuss the role of the MSPB in safeguarding the Federal merit principles, including the agency's role in the adjudication of whistleblower retaliation cases. As requested, my testimony will focus broadly on the process by which whistleblower cases are brought before the MSPB and the process for adjudicating these cases. I have attached two appendices to my written statement: Appendix A is a flow chart which provides a visual overview of the adjudication process for whistleblower appeals. Appendix B provides data charts which show the numbers of Department of Veterans Affairs appeals decided or dismissed for fiscal years 2015–2018 and the first half of 2019.

This year marks the fortieth anniversary of the MSPB opening its doors following the passage of the Civil Service Reform Act of 1978. The Civil Service Reform Act was the first statute prohibiting retaliation for employees of the Federal government. The law opened with a series of findings, stating:

It is the policy of the United States that . . . the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system[.]

The Civil Service Reform Act explicitly recognized the value of whistleblowers. The ninth merit system principle it codified states: "Employees should be protected against reprisal for the lawful disclosure" of waste, fraud, abuse and gross mismanagement.

Although the Civil Service Reform Act was the first statute expressly protecting whistleblowers from reprisal in the Federal government, the concept of avoiding personnel actions for any reason other than merit had evolved from the passage of the Pendleton Act of 1883 and the development of a civil service system. In that sense the merit principles were not necessarily new, although previously not codified.

The MSPB was established to fill an adjudicatory role that had previously been filled by the Civil Service Commission. Its role in whistleblower cases, as in other personnel matters it adjudicates, is to provide a full and fair opportunity for both parties to develop a full record on the issues, and then to hear and decide the matters appealed based on the evidence submitted and in accordance with applicable statutes and case law. As someone who previously received many allegations of Executive Branch whistleblower retaliation when I worked on Capitol Hill, I recognize that this mission established by Congress is critical in helping distinguish which reprisal claims are meritorious. The MSPB's responsibility is to spend the time and resources carefully considering the allegations and the evidence to reach as complete a conclusion as possible.

This year also marks the thirtieth anniversary of the Whistleblower Protection Act of 1989, which changed the Special Counsel from an investigatory and prosecutorial office inside the MSPB to an independent agency in its own right, the Office of Special Counsel. OSC investigates claims of prohibited personnel practices in the Executive Branch, such as whistleblower retaliation. The MSPB plays the same role for OSC today as it did when the Special Counsel was part of the MSPB, and is the forum before which OSC litigates if they believe a prohibited personnel practice occurred.

Those particular prohibited personnel practices are found in 5 U.S.C. § 2302(b)(8) and (b)(9), and prohibit reprisal against an employee or applicant for employment based on different types of protected activity. Under the statute, in order to receive corrective action in a reprisal claim, the appellant must demonstrate that: (1) he or she made a protected disclosure; (2) the agency has taken or threatened to take a personnel action against him or her; and (3) his or her protected disclosure was a contributing factor in the personnel action. However, even after a finding that a protected disclosure was a contributing factor in the personnel action, corrective action is not granted under the law if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

Outside of cases brought by OSC, which are relatively few due to OSC's ability to informally obtain corrective action, the MSPB hears two types of whistleblower cases. The first type of whistleblower case is called an "otherwise appealable action." An otherwise appealable action appeal involves an adverse personnel action that is directly appealable to the Board, such as a removal, reduction in grade or pay, or suspension of more than 14 days. In such an appeal, both the appealable matter and the claim of reprisal for whistleblowing will be reviewed by the MSPB. The claim of whistleblower retaliation is termed an "affirmative defense"—that is, if that agency proves that it has met the evidentiary standard for taking the action, the appellant may attempt to prove that the agency took the action in reprisal for his or her protected whistleblowing activity.

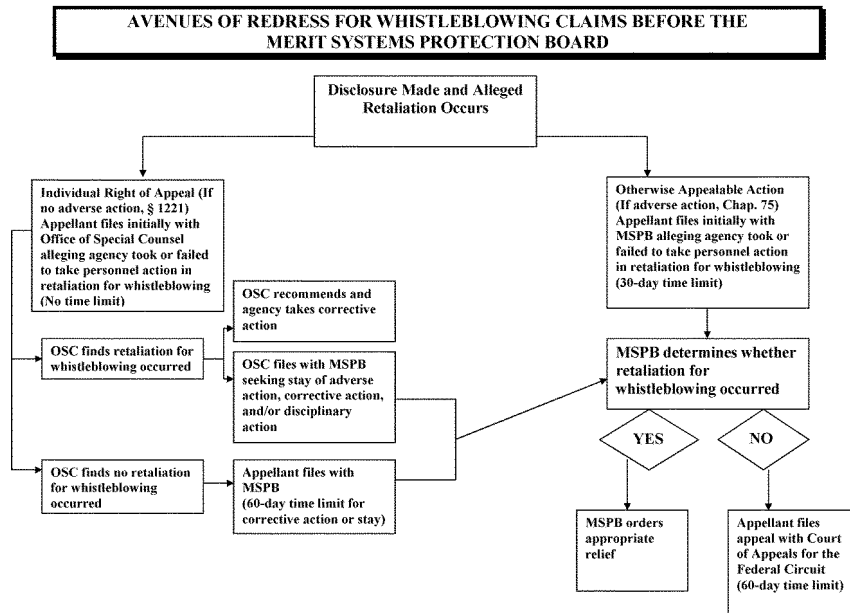
The second type of whistleblower case is those cases in which the individual has filed a complaint with OSC but OSC has not sought corrective action on the individual's behalf. This is called an "individual right of action," or "IRA," appeal. Most of those cases surround personnel actions that are not directly appealable to the Board—for example, a suspension under 14 days or a reassignment with no reduction in pay or grade. In such circumstances, the appellant is required to exhaust the administrative remedy of first filing a complaint with OSC. In an IRA appeal, the Board will not decide any aspect of the challenged personnel action other than its connection with the claim of reprisal for whistleblowing.

In both IRAs and otherwise appealable actions the proof required is the same, but in an otherwise appealable action the MSPB's jurisdiction over the matter arises from the personnel action itself and not directly from the claim of whistleblower reprisal. In connection with both forms of appeal, an administrative judge may grant a stay of the personnel action at issue under appropriate circumstances. Similarly, if OSC finds that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice, the Special Counsel may request that any member of the Board order a 45-day stay. Such a stay may also be renewed upon application. Needless to say, this authority has been significantly complicated by the lack of any current sitting Board members.

That said, despite the lack of a Board quorum since January 2017, the 60 or so MSPB administrative judges continue to hear and adjudicate cases. Of the 5,447 cases administrative judges decided in FY 2018, approximately one-fifth were from VA employees. The MSPB has decided an average of about 180 IRA claims from VA employees for the past three fiscal years, and is on track to decide approximately the same number in FY 2019.

In closing, one general trend I do want to note that is not specific to the VA is the increasing complexity of both whistleblower complaints and their adjudication. This is the result of a combination of many factors, including decisions issued by the Federal Circuit Court of Appeals and recently-enacted legislation, such as the Whistleblower Protection Enhancement Act of 2012. It is also increasingly rare to see a case in which the appellant asserts that he or she made a single disclosure, in retaliation for which the agency allegedly took just one personnel action. Rather, the typical case involves multiple allegations of several instances of alleged whistleblowing and several alleged retaliatory personnel actions. Because the multi-part test for jurisdiction over and proof of the claims must be applied to each alleged protected disclosure, whistleblower appeals are often difficult and time-consuming to hear and decide. Nevertheless, I believe the MSPB understands that Congress, the Executive Branch, and the American public are counting on it to be the front lines of sorting through these issues. Accordingly, I know the MSPB aspires to give full and fair consideration to each appeal in accordance with applicable statutes and case law.

Again, thank you for the opportunity to appear before you today. I am happy to address any questions you may have.



APPENDIX B

	FY 15	FY 16	FY 17	FY 18	FY 19 ¹
VA Appeals Decided ²	755	962	896	1080	403
VA Appeals Dismissed ³	487	548	577	632	258

	FY 15	FY 16	FY 17	FY 18	FY 19
VA IRAs Decided	110	178	181	179	86
VA OAAs with Whistleblowing Claims Decided	61	57	62	77	40

VA IRA APPEAL OUTCOMES	FY 15	FY 16	FY 17	FY 18	FY 19
VA IRAs-Dismissed Without Prejudice ⁴	19	40	39	38	20
VA IRAs-Settled ⁵	23	39	36	16	14
VA IRAs-Withdrawn	10	7	14	7	6
VA IRAs-Dismissed, Failure to Exhaust ⁶	4	16	19	31	9
VA IRAs-Dismissed, Other	36	42	49	44	25
VA IRAs-Adjudicated on the Merits	18	34	27	40	12

VA IRA CLAIM OUTCOMES ⁷	FY 15	FY 16	FY 17	FY 18	FY 19
Corrective Action Ordered	3	7	3	2	0
Corrective Action Not Ordered	15	27	24	38	12

¹ All data reported for FY 2019 reflects appeals closed during the first half of FY 2019, i.e., between October 1, 2018, and March 31, 2019.

² Appeals Decided is the number of appeals closed by MSPB's regional and field offices involving the VA as reported in MSPB's Annual Reports.

³ Appeals Dismissed is the number of appeals dismissed, of those decided, as reported in MSPB's Annual Reports, i.e., in MSPB's Annual Reports, the number of appeals Decided is then broken into appeals Dismissed or Not Dismissed.

⁴ Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal.

⁵ Cases are settled at the discretion of both parties. Settlement agreements consist of terms acceptable to both parties; thus, the agreement resolves the dispute in a way that both parties achieve some positive result.

⁶ If an IRA appeal is dismissed for "failure to exhaust," i.e., because the appellant failed to first seek corrective action from OSC, the appellant can file a new IRA appeal after fulfilling the administrative exhaustion requirement.

⁷ References data regarding outcomes of the IRA appeals that were adjudicated on the merits.

VA OAA APPEAL OUTCOMES	FY 15	FY 16	FY 17	FY 18	FY 19
VA OAAs-Dismissed Without Prejudice	4	2	6	8	2
VA OAAs-Settled	12	13	12	14	3
VA OAAs-Withdrawn	8	5	5	5	2
VA OAAs-Dismissed, Other	29	22	22	22	14
VA OAAs-Adjudicated on the Merits	8	15	17	28	19

VA OAA CLAIM OUTCOMES ⁸	FY 15	FY 16	FY 17	FY 18	FY 19
Corrective Action Ordered	0	3	0	3	0
Corrective Action Not Ordered ⁹	8	12	17	25	19

VA-RELATED OSC STAYS	FY 15	FY 16	FY 17	FY 18	FY 19
Initial Stay Requests ¹⁰	1	1	2	1	1
Initial Stays Granted by MSPB	1	1	1 ¹¹	1	1

⁸ References data regarding outcomes of the OAA appeals that were adjudicated on the merits.

⁹ The outcome of an OAA appeal is not necessarily synonymous with the outcome of a reprisal claim; therefore, the fact that corrective action is not ordered in an OAA appeal does not necessarily mean that the appellant obtained no relief. For example, in a removal appeal in which the appellant alleges reprisal, the Board could reverse the removal action because the agency failed to prove that the appellant committed the charged misconduct, or it could mitigate the removal penalty, while also finding that the appellant failed to establish reprisal.

¹⁰ References data on initial stay requests by OSC and does not include data regarding any subsequently filed requests by OSC for extension of an initial stay.

¹¹ In Fiscal Year 2017, an OSC initial request for stay was denied without prejudice to filing a request for an extension of a previously granted stay involving the same individual.

