



U.S. OFFICE OF SPECIAL COUNSEL
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Washington, D.C. 20036-4505

The Special Counsel

January 22, 2024

The Honorable Denis R. McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: OSC File No. DI-24-000289
Request for Investigation—5 U.S.C. § 1213(c)

Dear Secretary McDonough:

I am referring to you for investigation a whistleblower disclosure alleging employees at the Department of Veterans Affairs (VA), Office of the Assistant Secretary for Human Resources Management, Washington, District of Columbia may have engaged in a violation of law, rule, or regulation and gross mismanagement. A report of your investigation on these allegations and any related matters is due to the Office of Special Counsel (OSC) on March 22, 2024.

The whistleblower, [REDACTED], a Supervisory EEO Specialist, who consented to the release of her name, disclosed that the VA has failed to complete the realignment of EEO Program Managers mandated by the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 (the Cummings Act)¹ and the Appropriations Act of 2023 (the Appropriations Act).² The allegations to be investigated include:

- The failure to realign 41 of the 57 Veterans Benefit Administration (VBA) Office's EEO Program Managers under the Office of Resolution Management and Diversity and Inclusion (ORMDI) as required by the Cummings Act and the Appropriations Act; and
- Any additional or related allegations of wrongdoing discovered during the investigation of the foregoing allegation.

¹ Elijah E. Cummings Federal Employee Anti-Discrimination Act of 2020, 5 C.F.R. 724 at p. 736-745.

² 5 Pub. L. No. 117-328, div. U, tit. IV, § 402(a).

In 2015, the Equal Employment Opportunity Commission (EEOC) surveyed VBA's EEO structure, positions, and overall function to ensure that the operation protected the integrity of the EEO process. As a result, the EEOC recommended that the EEO Program Managers be realigned so that they report up through ORMDI rather than VBA.³ In 2022 and 2023, the Cummings Act and the Appropriations Act, respectively, turned the EEOC's realignment recommendation into a federal mandate. According to these two statutes and the EEOC, failure to realign these EEO functions could compromise the integrity of the VA EEO program and expose certain EEO-related information (such as EEO complaints, reasonable accommodation requests, etc.) to non-EEO individuals who should not have access to it. Further, the whistleblower reported that the failure to realign has caused a systemic chilling effect within the organization, which has deterred employees from reporting EEO complaints and engaging in the EEO process. The Appropriations Act required that the realignment of the EEO Director be completed within 90 days, and the realignment of the EEO Program Managers be completed one year, from the date of the enactment of the Joseph Maxwell Cleland and Robert Joseph Dole Memorial Veterans Benefits and Health Care Improvement Act of 2022 (the Cleland-Dole Act), which was a subsection of the Appropriations Act and was signed into law in December 2022.⁴ While the EEO Director and some Program Managers have been realigned in accordance with the statutes, there has been no realignment since 2022 and, to date, only 16 of the 57 EEO Program Managers throughout VBA's Regional Offices in the field have been realigned.

The U.S. Government Accountability Office (GAO) added the EEOC's original recommendation to its list of priority open items in 2021, where it remains to date.⁵ In its most recent report to Congress in September 2023, GAO stated that increased attention was needed to improve the VA EEO program effectiveness. In this report, GAO notes that the "VA has not taken any action to address [GAO's] 2020 recommendation to realign its EEO Director position" but that GAO will continue to monitor the VA's efforts in this regard.⁶

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, and gross mismanagement. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report, along with the whistleblower's comments and any

³ EEOC, EEO Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110) (Washington, D.C.: Aug. 5, 2015).

⁴ 5 Pub. L. No. 117-328, div. U, tit. IV, § 402(a)(2) at p. 1026.

⁵ GAO, Priority Open Recommendations: Department of Veterans Affairs, GAO-23-106465 (Washington, D.C.: May 23, 2023).

⁶ GAO, VA Equal Employment Opportunity: Increased Attention Needed to Improve Program Effectiveness, GAO-23-105429 (Washington, D.C.: September 2023).

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comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. § 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read "Karen Gorman", with a long horizontal flourish extending to the right.

Karen Gorman
Acting Special Counsel

Enclosure

cc: The Honorable Michael J. Missal, Inspector General

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).