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BEFORE THE HOUSE COMMITTEE ON VETERANS AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

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 additional 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.