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OSC URGES FEDERAL CIRCUIT TO UPHOLD WHISTLEBLOWER PROTECTIONS

FOR IMMEDIATE RELEASE

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The U.S. Office of Special Counsel (OSC) filed an **amicus brief** today with the U.S. Court of Appeals for the Federal Circuit in the case of *Berry v. Conyers*. OSC argues that the court should not give federal agencies the authority to circumvent whistleblower protection laws by revoking an employee's eligibility to hold a "sensitive" position. If enabled by the courts, this authority would undermine Congress' repeated efforts to strengthen whistleblower and other good government protections for federal workers. It could also limit OSC's jurisdiction to investigate allegations of whistleblower reprisal for hundreds of thousands of federal employees.

The case concerns two civilian employees who held low level jobs at the Defense Department (DoD). DoD designated their positions as "non-critical sensitive," asserting that the occupants of these positions could bring about "a material adverse effect on the national security." One of the employees worked at a DoD commissary and was responsible for maintaining inventory such as shampoo and other sundry goods. The other employee was a GS-5 accounting technician, a position with starting pay of \$27,431. The jobs were not sensitive enough to require access to classified information. The Defense Department took adverse employment actions against the two employees – not because of their performance or conduct – but because they were deemed no longer eligible to hold a "non-critical sensitive" position. One of the employees was demoted and the other was indefinitely suspended.

Both employees appealed the adverse actions to the Merit Systems Protection Board (MSPB). Since its creation in 1978, the MSPB has had jurisdiction to hear appeals brought by Federal employees to contest adverse actions as improper or unjustified. In 1988, in *Navy v. Egan*, the Supreme Court recognized a narrow exception to a federal employee's right to appeal in cases involving security clearances.

In a sweeping August 2012 decision, a divided 3-judge panel of the Federal Circuit significantly expanded the scope of *Egan*, ruling that the MSPB was prohibited from reviewing appeals of employees who are deemed ineligible to hold a "non-critical sensitive" position. The panel stated that national security required deference to agencies in such cases. It reasoned that the commissary employee's ability to observe stock levels of sunglasses and sports drinks could hint at future deployments of troops and impact national security. Accordingly, review of eligibility determinations to hold such positions should be limited to the agency involved.

The ruling eliminates independent due process hearings at the MSPB for employees who lose their eligibility to hold a sensitive position. Approximately 500,000 employees at DoD alone occupy positions designated as sensitive. Tens of thousands of others across the government are similarly designated.

The dissenting judge in the August 2012 ruling noted that the impact of the decision could extend to employees who allege their eligibility to hold a sensitive position was revoked in retaliation for whistleblowing. If so, the decision would also strip OSC of its jurisdiction to investigate whistleblower cases involving sensitivity determinations.

On January 24, 2013, in response to a petition filed by the MSPB and the employees, the Federal Circuit agreed to vacate the August 2012 decision and hear the case en banc. The entire 15-judge Federal Circuit is now reviewing the decision.

In 2012, the U.S. Congress passed landmark whistleblower protection legislation. The Whistleblower Protection Enhancement Act of 2012 (WPEA) provided OSC with the authority to file amicus briefs in U.S. Courts in cases that will significantly impact OSC's ability to enforce the Whistleblower Protection Act. This is the first case in which OSC is exercising its authority to file an amicus brief. OSC is filing the brief to guard against the potential detrimental impact the panel decision would have on the rights of government whistleblowers. OSC cautions in its brief that upholding the panel decision could undermine decades of congressional efforts to strengthen whistleblower protections, including the recently-passed WPEA.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. For more information, please visit our website at www.osc.gov.