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OSC Urges the Federal Circuit to Protect Whistleblower Due Process Rights

FOR IMMEDIATE RELEASE

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WASHINGTON, D.C./August 14, 2014 –

Today, the U.S. Office of Special Counsel (OSC) filed an *amicus curiae* brief with the Court of Appeals for the Federal Circuit in *Colin Clarke v. Department of Veterans Affairs*. In the brief, OSC asks the court to reverse a decision by the Merit Systems Protection Board (MSPB or Board) that creates significant procedural hurdles for federal employees alleging whistleblower retaliation.

Federal workers who believe they have experienced retaliation by their employers may appeal directly to the MSPB, provided they first file a complaint with OSC and OSC closes the case or does not act on it within 120 days. This process is known as exhaustion of administrative remedies. Congress created this due process right to provide whistleblowers access to the Board regardless of whether OSC chooses to prosecute the case.

In its brief, OSC argues that its determination not to pursue a case cannot be deemed a decision on the merits of the case. As with any independent investigative and prosecutorial authority with limited resources, OSC exercises discretion in deciding which cases to pursue, weighing a variety of factors. In the Whistleblower Protection Act of 1989 (WPA), Congress gave employees an “independent right of action,” or appeal to the MSPB, to help ensure that allegations of whistleblower retaliation are carefully reviewed by the MSPB even if OSC decides not to pursue the retaliation claim. For this reason, the WPA and longstanding Board precedent forbid the MSPB from relying on OSC’s closure of a case in deciding an employee’s appeal.

In *Clarke*, the MSPB disregarded the straight-forward requirements in the WPA and made it more difficult for federal workers to prove exhaustion. Instead, the Board improperly focused its inquiry on OSC’s discretionary determination to close a case. According to OSC’s brief, the Board’s decision “contradicts established case law, results in prejudice to whistleblowers, and constitutes an unwarranted infringement on OSC’s independent authority.”

OSC’s *amicus curiae* brief can be found at: www.osc.gov/Resources/amicus-clarke-v-va-2014-08-14.pdf

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, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.