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OSC Files Third Amicus Brief Opposing Higher Burdens in Whistleblower Retaliation Cases

FOR IMMEDIATE RELEASE

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Yesterday, the U.S. Office of Special Counsel (OSC) filed an amicus curiae (“friend of the court”) [brief](#) in *Anthony Salazar v. Department of Veterans Affairs*, a whistleblower retaliation case on appeal before the Merit Systems Protection Board (MSPB). In its brief, OSC argues that 1) Mr. Salazar should not face a higher evidentiary burden to prove that he was fired for whistleblowing; and 2) even if the application of a higher burden was justified, in the decision being appealed, an administrative judge improperly elevated the burden far beyond what the Whistleblower Protection Enhancement Act (WPEA) requires and what Congress intended.

Mr. Salazar worked as a motor vehicle operator supervisor for the Department of Veterans Affairs (VA) in its Greater Los Angeles Healthcare System’s engineering service. In 2013, he disclosed to his managers problems with agency vehicle and fleet card usage, including unaccounted for vehicles and keys, lax recordkeeping, delinquent maintenance, and irregular purchases with fleet cards. A subsequent VA investigation concluded that poor management contributed to the theft of VA vehicles, and, as a result, one of Mr. Salazar’s managers received a letter of reprimand. Afterwards, that manager changed Mr. Salazar’s performance standards and later recommended his termination. He was fired in 2015.

Mr. Salazar filed with the MSPB claiming that the VA retaliated against him for blowing the whistle. The MSPB administrative judge determined that a section of the WPEA placing a higher evidentiary burden on employees who report wrongdoing during their normal course of duties applied in Mr. Salazar’s case and that he did not meet this burden. This higher burden, as OSC has argued in [previous amicus briefs](#), should only apply to a very narrow group of federal employees who are expected to regularly report wrongdoing such as investigators and auditors. It should not apply to employees such as Mr. Salazar, who only had a general obligation to report wrongdoing as all federal employees do.

Even if this section of the WPEA applies, OSC argues that the administrative judge went too far in increasing the burden on Mr. Salazar. Despite clear congressional intent that this section of the WPEA “places only a ‘slightly higher burden’ on an employee whose disclosure is made in the normal course of duties, the Administrative Judge upended the WPEA’s carefully crafted burdens of proof in whistleblower retaliation cases and imposed an unduly onerous burden on Mr. Salazar,” according to OSC’s brief.

In its brief, OSC presents an alternative that is based on the WPEA’s language and purpose, prior MSPB decisions, and past experience. This approach effectively balances the WPEA’s goal of strengthening whistleblower protections with an agency’s legitimate need to manage and evaluate a certain category of federal employees whose jobs regularly require investigating and reporting wrongdoing.

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.