

**Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel**

**U.S. House of Representatives
Committee on Oversight and Government Reform**

“Whistleblower Reprisal and Management Failures at the Chemical Safety Board”

June 19, 2014, 10:00 A.M.

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our recent investigations of retaliation at the Chemical Safety Board. This is the third time I have had the opportunity to testify before the Oversight Committee. Most recently, in November 2013, I discussed our findings on widespread misuse of certain overtime payments at the Department of Homeland Security. Our work with whistleblowers helped to identify and address over \$37 million in annual misuse of overtime pay, and provided momentum for bipartisan legislation that may further address these concerns. I appreciate the ongoing partnership with the Chairman and Members of this Committee in rooting out waste in government operations and protecting whistleblowers. I also thank you and Ranking Member Cummings for your successful efforts to modernize and improve the Hatch Act.

OSC is an independent investigative and prosecutorial federal agency. We protect the merit system for over 2.1 million civilian federal employees in four distinct mission areas. OSC protects federal workers from “prohibited personnel practices,” especially retaliation for whistleblowing. We provide a safe and secure channel for whistleblowers to report waste, fraud, abuse, and health and safety issues. We enforce the Hatch Act, keeping the federal workplace free from improper partisan politics. Finally, OSC enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We fulfill these important roles with a staff of approximately 120 employees – and the smallest budget of any federal law enforcement agency. I am pleased to report that our dedicated staff is performing more efficiently and effectively than at any point in OSC’s 35-year history.

The last two fiscal years (FY2012 and FY2013) have been a record-setting period for OSC. By nearly every statistical measure, OSC achieved the most positive results in its history. To illustrate, cases increased by 50% in five years, with the sharpest increase over the last two. During this period, funding levels actually decreased in real terms, considering inflation, automatic pay adjustments, and other mandatory expenses.

In addition to receiving more cases, OSC is processing them more efficiently and effectively. For example, in FY2008, OSC completed a total of 2,875 cases. In FY2013, just five years later, OSC resolved 4,808 cases, nearly doubling our productivity. OSC’s increased efficiency helps us manage the growing caseload and translates into real savings. OSC’s cost to resolve a case

dropped by 40% in the last 5 years, a decrease of over \$2,640 per case. Stated simply, we're making every dollar count.

Our increased efficiency has not compromised OSC's effectiveness. In fact, when evaluating the most important statistic for OSC – the number of favorable actions on behalf of whistleblowers and the merit system – we are again setting records. We're not just closing cases, we're getting more relief than ever before for whistleblowers. Favorable actions include the relief that OSC secures for employees who are the victims of retaliation, such as back pay, reinstatement, or reassignment to a non-retaliatory environment. They also include disciplinary actions taken against employees who engage in retaliation or other prohibited conduct.

In FY2012, the first full year of my tenure, our staff achieved an 89% increase in favorable actions from the prior fiscal year. This was a 175% increase from five years ago. FY2012's total of 159 favorable actions, or "victories" for whistleblowers and the merit system, exceeded any previous year in the agency's history. We set an extremely high bar in FY2012, and then surpassed it in FY2013. The total number of favorable actions rose again in FY2013 – to 175. This is a remarkable total, considering only 29 favorable actions were achieved in 2007.

Recently, OSC received interim relief for three Department of Veterans Affairs' employees who blew the whistle on improper scheduling procedures and other possible threats to patient care at the VA. OSC is working to expeditiously resolve over 40 additional reprisal claims by VA employees, as well as more than 50 disclosures of health and safety concerns at the VA.

These successes are a testament to the hard work of our dedicated career staff, who have endured furloughs and increased caseloads while managing to improve productivity and outcomes in all measures.

Chemical Safety Board Cases

With that backdrop, I would like to now discuss OSC's cases involving the Chemical Safety Board (CSB). First, I will describe OSC's process for investigating retaliation cases.

After an initial review by our intake office, the Complaints Examining Unit, some complaints are referred for further investigation to the Investigation and Prosecution Division (IPD). The majority of cases referred to the IPD are then screened for possible mediation by OSC's Alternative Dispute Resolution Unit (ADR). Participation in OSC's ADR is voluntary and requires the agreement of both the employee and the agency. If a case is not considered appropriate for ADR, or if ADR is unsuccessful, the case is sent to the IPD.

IPD investigations routinely involve: interviewing complainants, issuing document requests, and interviewing witnesses and subject officials. After an OSC investigation, agencies frequently agree to informally resolve complaints at OSC's request. In cases where there is sufficient evidence for OSC to conclude that a violation has occurred, and where the involved agency has not agreed to provide relief to the complainant, the assigned attorney makes a recommendation on whether OSC should file a "Prohibited Personnel Practice" report with the head of the involved agency. In such cases, if an agency fails to act on OSC's Prohibited Personnel Practice

report, the staff makes a recommendation to me on petitioning the Merit Systems Protection Board for corrective action. Once I make the final decision, OSC drafts a petition for corrective action.

In cases where there is insufficient evidence to prove a violation or OSC lacks jurisdiction over the claim, OSC sends the employee a preliminary determination letter, which provides the employee an opportunity to respond to OSC's assessment of the case. Additionally, in our letters closing out retaliation complaints, we notify employees of their right to individually seek corrective action from the Merit Systems Protection Board by filing an "Individual Right of Action."

The Committee has requested information on OSC's investigations into retaliation complaints at the CSB. Of course, OSC cannot comment on the details of pending investigations. Any comments I make today may impact the ability of our office to resolve the pending reprisal claims brought by CSB employees. I am the final decision-maker in these cases, and do not want to prejudice any future action by OSC, or influence the parties' willingness to settle, with my statements today. Finally, discussing the content of the allegations in a public forum, including the merits of the claims, could constitute an unwarranted invasion of personal privacy interests and negatively impact OSC's ability to receive information from whistleblowers and witnesses in future cases.

Accordingly, I am severely limited in the type of information I can provide in a public setting at this time. I acknowledge and appreciate the efforts of Committee staff, who I understand have communicated these limitations to the Members of the Committee. With that understanding, and with those concerns in mind, I have attempted to provide as much information as possible to assist the Committee's review of CSB operations. Below is a factual summary of the significant investigative steps OSC has taken to date to resolve claims of whistleblower reprisal at the CSB.

Several CSB employees filed whistleblower retaliation complaints with OSC in October 2012. The CSB employees alleged that personnel actions were taken in retaliation for protected whistleblowing and protected activity. The protected activity included the filing of an earlier OSC complaint in 2011. The 2011 complaint, also filed by several CSB employees, alleged that CSB management engaged in improper hiring practices.

After receiving the retaliation complaints in October 2012, OSC assigned the cases to an investigator. (Because OSC had already initiated an investigation into the 2011 complaints, the initial review stage with the Complaints Examining Unit was bypassed and the cases were immediately referred for further investigation to IPD). The investigator reviewed the submissions and scheduled interviews with the complainants, beginning on October 25, 2012.

After these interviews, OSC requested documents from CSB on December 28, 2012. OSC requested that the information be provided by January 7, 2013. CSB provided a disk with most of the responsive information in May 2013. CSB withheld some information based on claims of attorney-client privilege, and has not provided this information to OSC to date. CSB also has not provided a privilege log, or an explanation of the individual documents that were withheld from OSC's review.

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After reviewing the last set of pre-interview documents, OSC attempted to schedule interviews of the subject officials in September 2013. OSC interviewed the first subject official on December 18, 2013, and the final subject official on January 14, 2014. OSC issued a subpoena to the primary CSB management subject official to ensure that the interview dates would not continue to slip and OSC could complete its investigation.

OSC's investigation provided the foundation for resolving one of the retaliation complaints, which settled in April 2014. OSC closed this retaliation complaint pursuant to the terms of the settlement. The other cases remain pending in OSC's Investigation and Prosecution Division. OSC is actively working to settle these cases.

I thank you again for the opportunity to testify today. With the limitations cited above in mind, I would be happy to answer the Committee's questions.

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.