

**Testimony of Eric Bachman, Deputy Special Counsel
U.S. Office of Special Counsel**

**U.S. House of Representatives
Committee on Veterans' Affairs**

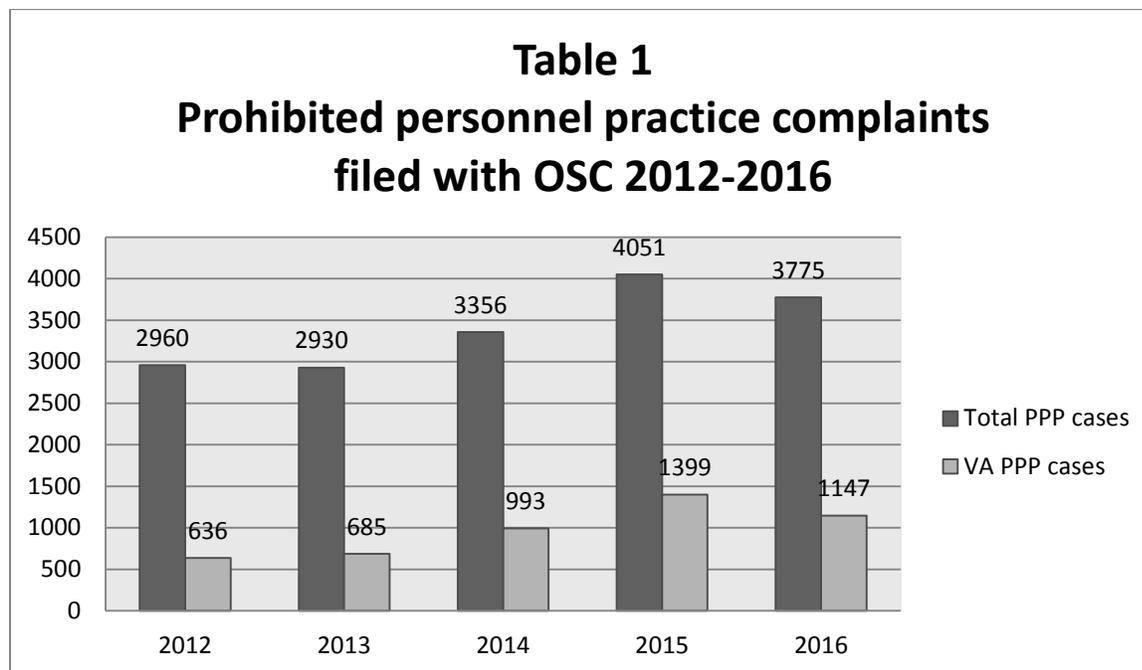
“An Examination of VA’s Misuse of Employee Settlement Agreements”

September 14, 2016, 10:30 A.M.

Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC) and our work with whistleblowers at the Department of Veterans Affairs (VA).

VA complaints by the numbers

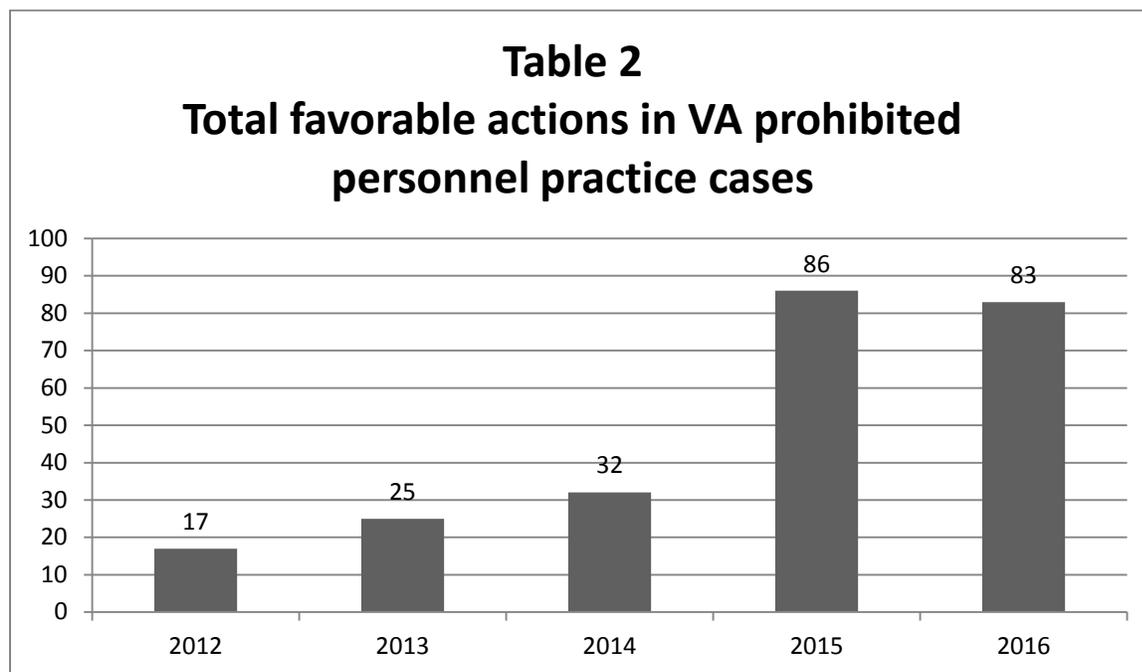
Since 2014, OSC has seen a dramatic increase in the number of whistleblower retaliation claims filed by VA employees. In response, our office has helped to secure a record level of favorable actions for VA whistleblowers. These favorable actions help courageous employees restore successful careers at the VA. The following tables highlight our current and historical caseloads for prohibited personnel practice complaints, which include whistleblower retaliation cases, filed by VA employees.



As Table 1 demonstrates, prohibited personnel practice complaints filed by VA employees constituted 30-35% of all prohibited personnel practice cases OSC received government-wide during 2014-2016. While the number of complaints by VA employees decreased somewhat in

2016, our VA caseload remains at a historically high level, with nearly double the number of cases received prior to the national media coverage of the patient wait list scandal in summer 2014. OSC currently has 300 active VA whistleblower retaliation cases in locations across the country. In addition, OSC is reviewing the retaliatory conduct of more than a half-dozen VA managers in several facilities for possible disciplinary action.

Although OSC is a small agency, with limited resources, we have taken a number of steps to maximize our response to this tremendous surge in VA complaints. We prioritized the intake and initial review of all VA health and safety-related whistleblower complaints and have streamlined procedures to handle these cases. The Special Counsel assigned senior leadership staff to supervise and coordinate investigations of VA cases. We reallocated additional program staff to work on VA cases and established a regular coordinating meeting on VA complaints. And finally, we opened and have maintained an ongoing dialogue with VA leadership to help identify and resolve meritorious cases as quickly as possible and to discuss certain trends and areas of concern related to VA whistleblower cases filed with OSC.



As our docket of VA cases has grown, so too has our rate of securing relief for VA employees. As shown in Tables 1 and 2 above, between 2015 and 2016 to date, OSC obtained either full or partial relief 169 times for VA employees who filed whistleblower retaliation or other prohibited personnel practice complaints. Since 2013, the number of VA prohibited personnel practice complaints filed with our office has increased by 67%, while the number of favorable actions we have obtained in these cases during this timeframe has increased by 232%.

Settlements between the whistleblower and the agency are the most efficient way to help get whistleblowers back on their feet quickly

OSC routinely conducts investigations of whistleblower retaliation complaints. An investigation typically involves requests for documents and information, including electronically stored information, sworn witness interviews, and, as necessary, travel to VA or other facilities. Whistleblower investigations are fact-intensive, complex, and may involve thousands of pages of competing evidence provided by the whistleblower and the agency involved. Once OSC completes its investigation and concludes that retaliation has taken place, it issues a prohibited personnel practice report to the agency with recommendations. If the agency does not accept OSC's recommendations, OSC files a complaint with the Merit Systems Protection Board (MSPB), litigates the complaint in an administrative hearing, and potentially on appeal to the MSPB and federal court. The investigation and prosecution of a whistleblower investigation is expensive and time-consuming, and a case may take years to wend its way through the system.

OSC operates under one of the smallest law enforcement budgets in the federal government, and it would not be possible to fully investigate and litigate each meritorious complaint we receive. The settlement process is therefore a critical component of OSC's toolkit in handling whistleblower retaliation complaints filed with our agency. Settlement may occur at any stage of our process. OSC staff assigned to a particular case may facilitate settlement discussions between the whistleblower and the agency, or the parties may agree to participate in OSC's robust Alternative Dispute Resolution (ADR) program.

Through settlement, whistleblowers obtain relief far more quickly than through a completed investigation and prosecution. Where OSC's investigation shows that retaliation may have occurred, our first priority is to try to help the whistleblower as quickly as possible. On a litigation track, it could take years for a whistleblower to get corrective action, and of course, the whistleblower may ultimately lose and receive no relief at all. For these reasons, all but a very small percentage of complaints settle rather than going to trial. This is true for VA employees as well as employees throughout the government.

Examples of the relief available to a whistleblower through settlement include reinstatement to his or her job, rescinding a suspension, and/or providing back pay relief or compensatory damages. But settlement negotiations also allow the whistleblower and the agency to be more creative in the relief provided. For example, the parties may agree to place the whistleblower in a new, mutually agreeable position, even though that relief would be more difficult to obtain through litigation. Likewise, the agency may agree to provide training to its managers regarding whistleblower protections or to change the whistleblower's reporting structure. Ultimately, settlements can allow the parties to move forward in a productive work environment and reduce the likelihood of future complaints/litigation.

To illustrate, OSC's recent efforts to mediate resulted in a settlement between the VA and Brandon Coleman, a high-profile whistleblower at the Phoenix VAMC. The settlement included a new position for Mr. Coleman as an addiction therapist in Anthem, a Phoenix suburb, and moved him away from his previous chain of command. This was a positive outcome for Mr.

Coleman and the veterans he now serves, and would not have been possible without OSC's ADR program mediating a voluntary settlement between the VA and Mr. Coleman.

OSC's role in settlement negotiations between the whistleblower and the agency

When a whistleblower and agency express an interest in settlement, OSC encourages them to engage in settlement negotiations. This is true not just for the VA, but for all agencies we investigate. It is important, however, to clarify OSC's role in any settlement negotiations between a whistleblower and his or her employing agency. OSC is an independent federal agency, does not personally represent any OSC whistleblower, and cannot give a whistleblower legal advice. Indeed, whistleblowers are often represented by their own private counsel, who advise them throughout the settlement negotiations. With rare exception, OSC is not a party to the settlement agreement between the whistleblower and the agency. Rather, if the parties—the whistleblower and the agency—wish to engage in settlement negotiations, OSC will often facilitate these discussions by relaying the various offers and counter-proposals between the two parties and/or by acting as a mediator through our ADR program. OSC may also assist in the process by discussing the strengths and weaknesses of the case, and by providing information about both sides' liabilities should the case proceed. But OSC itself does not make any settlement offer nor does it accept or reject a settlement offer made by the agency. Rather, the decision to accept a particular offer from an agency remains solely with the whistleblower.

A settlement between the whistleblower and the agency does not preclude further investigation by OSC

When a whistleblower and the VA settle a case for corrective action, such as rescinding a suspension, that settlement does not necessarily end OSC's role in the case. OSC recognizes that disciplining managers who retaliate against employees is an important tool to promote accountability and deter future violations of the whistleblower laws. Accordingly, even where a whistleblower settles his or her claim, OSC assesses the need for further investigation for potential discipline against alleged retaliators. For example:

- In a Maryland VA facility, OSC determined that the VA had retaliated against an employee (who is also a disabled veteran) because he contacted a member of Congress for assistance with his own VA benefits. About one month after the employee's congressional contact, the VA terminated his employment, even though the VA had not previously raised performance concerns prior to his congressional contact. OSC investigated and found that the VA's bases for termination were pretextual, the VA's charges lacked evidentiary support, and termination was an excessive penalty for the alleged conduct. The VA ultimately settled and provided full corrective action to the employee, including, among other things, reemployment with the VA, back pay, and compensatory damages. In addition, as a result of our investigation, OSC further sought and obtained disciplinary action against two supervisors, both of whom received 10-day suspensions.
- In whistleblower retaliation cases at the VA's Puerto Rico facility, OSC has investigated and obtained corrective actions for several whistleblowers. Two whistleblowers resolved

their claims through settlement agreements with the VA that included, among other things, the repeal of a suspension, a return to their former positions, and compensatory damages. A third whistleblower is currently in settlement negotiations with the VA. Given the severity of the allegations in these cases, OSC also has an active, ongoing investigation of several high-level officials at the Puerto Rico VA for potential disciplinary action.

- A whistleblower in the Cincinnati, Ohio VA facility settled his retaliation claim with the VA. OSC has continued its investigation for potential disciplinary action against the subject official, and the VA has indicated it will propose discipline.
- A whistleblower in a Wisconsin VA facility settled her retaliation claim with the VA for relief including a clean personnel record and back pay and compensatory damages. OSC has continued its investigation and is actively reviewing two subject officials for potential discipline.

We will keep the Committee updated on the resolution of these important disciplinary action cases.

As these and other cases demonstrate, even where the whistleblower and the VA agree to settle their claim for corrective action, OSC will, in appropriate cases, continue to investigate and seek discipline against officials who may have retaliated against the whistleblower. Although it takes significantly more time and resources to complete disciplinary investigations, in the first four full years of Special Counsel Carolyn Lerner's tenure (2012 – 2015), OSC more than doubled the number of disciplinary actions taken as compared to 2008-2011. From 2012 to 2015, OSC generated 78 disciplinary actions government-wide against retaliators and other violators.

Conclusion

We appreciate the Committee's attention to the issues we have raised and your interest in our efforts to protect and promote VA whistleblowers. I thank you for the opportunity to testify, and am happy to answer your questions.

Deputy Special Counsel for Litigation and Legal Affairs Eric Bachman

Eric Bachman joined the U.S. Office of Special Counsel in 2014. He served as a special litigation counsel in the Justice Department's Civil Rights Division from 2012 to 2014, and was a senior trial attorney from 2009 to 2012. Before joining the Justice Department, he was in private practice, as an associate and then as a partner, in a Washington, DC civil rights law firm. Mr. Bachman began his legal career as a public defender in Louisville, Kentucky. He received a J.D. from Georgetown University Law Center.