

Written Testimony of Dr. Katherine Mitchell

for submission to the
U.S. House of Representatives Committee on Veterans' Affairs
Subcommittee on Oversight & Investigations
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Summary: *Beginning almost immediately after I testified in the June 2019 HVAC hearing about ongoing VA whistleblower retaliation, VA Central Office (VACO) has leveraged its participation in my still-open whistleblower retaliation case to engage in an overt pattern of ongoing reprisal against me during Office of Special Counsel (OSC) negotiations. The most devastating aspect of this reprisal stems from VACO's self-described "best and final" whistleblower settlement offer which requires me to not only remain in my psychologically unsafe VISN workplace but also accept a new VISN position there with duties requiring me to collaborate with one of my previous retaliators.*

As detailed in the body of my testimony, multiple VA actions during the OSC process and its proposed settlement terms are simultaneously in clear violation of federal whistleblower protections, MSPB case law, VA ICARE values, the VA's High Reliability Organization initiative, various VA policy/directives, professional ethics, and basic human decency. VACO-level employees even used their knowledge of my confidential medical documentation to craft 1 proposed term so egregious that my only viable options are to resign prematurely or experience inevitable severe psychological decompensation and greatly elevated risk of suicide in the near future.

As illustrated by VACO-level actions in my case, the VA's persistently skewed approach to resolving substantiated whistleblower retaliation is essentially invalidating every commitment and intervention the Agency has made to protect whistleblowers, improve quality, and regain the trust of Congress and the public since the 2014 scandal. Unless Congress intervenes now, the ability of the VA to so easily corrupt the OSC process will have a profound and chilling effect on every VA employee's ability in the future to report unsafe conditions or illegal/improper conduct in VA facilities. Without whistleblowers to serve as a vital safety net, the healthcare of every Veteran is in jeopardy.*

* Disturbing, well-documented irregularities in OSC staff conduct during my case have allowed VACO reprisal to flourish against me throughout the OSC process. I have already made a detailed whistleblower disclosure to the House Committee on Oversight and Government Reform to address OSC's failure to uphold basic federal whistleblower protections. Unfortunately, until Congressional inquiry can be completed, there are essentially no viable avenues for federal employees to seek relief from whistleblower retaliation.

My name is Dr. Katherine L. Mitchell. I am a board-certified internist who is currently employed at the Veterans Integrated Service Network (VISN) 22 office in Arizona as a Specialty Care Medicine consultant. My VA professional career has spanned 23 years in various roles including staff nurse, emergency department staff physician, emergency department director, and post-deployment clinic medical director.

By virtue of federal employment within the VA, every VA staff member is obligated by codified government-wide and VA-specific ethical standards to report health/safety concerns and other specific problems through appropriate internal VA chain-of-commands and/or oversight agencies. If the employee reports such concerns, he or she technically meets the federal definition of whistleblower. However, for practical purposes, these VA employees are only labelled "whistleblowers" when VA leadership retaliates against them for reporting VA problems which leadership is not willing to openly acknowledge or correct.

I became a nationally prominent VA whistleblower about 7 years ago when the 2014 VA scandal initially erupted. I subsequently testified in the July 2014 House Committee on Veterans' Affairs (HVAC) hearing which revealed a dangerous pattern of severe, systemic VA whistleblower retaliation. I had hoped my July 2014 HVAC testimony would help jumpstart a fundamental shift in VA culture wherein all employees would be enabled to identify problems without fear of whistleblower retaliation. Initially, VA Central Office (VACO) leadership responded appropriately and subsequently rolled out new initiatives to prevent retaliation and encourage more employees to speak up about VA problems.

Unfortunately, the momentum did not last after VA senior administration changed. In 2017, I filed a whistleblower retaliation complaint with the Office of Special Counsel (OSC) to address numerous episodes of overt retaliation against me in my workplace. I also included details of the VA's continuous, material breach of my 2014 settlement agreement whereby the VA refused to provide mentorship or allow me to perform the job duties of the Specialty Care Medicine position. In October 2018, after the OSC's preliminary investigation quickly substantiated my allegations, I voluntarily entered into mediation with the VA via the OSC alternative dispute resolution (ADR) process otherwise known as "mediation".

In June 2019, I appeared in front of the HVAC to provide testimony and strong, objective evidence that whistleblower retaliation was still being used as a frequent weapon against VA employees. Using my experiences/case as an example, I discussed VA whistleblower retaliation against me which had continued for almost 5 years despite signing a September 2014 settlement agreement intended to resolve such unjust treatment. I discussed my multiple direct and indirect attempts to fight the retaliation which had proved unsuccessful. I explained that available avenues to formally address VA whistleblower retaliation were exceptionally slow and unable to provide any prompt relief. I also proposed potential remedies for assisting VA whistleblowers, positively influencing VA culture, and strengthening federal whistleblower safety-nets. Throughout the entire hearing, VA officials were in the audience.

At time of that June 2019 hearing, the VA and I were still engaged in formal OSC mediation to resolve my undisputed OSC complaint involving whistleblower retaliation and VA breach of my settlement agreement. In the months prior to that June hearing, the VA's conduct was mainly marred by its extremely delayed requests/responses for information. However, shortly after I testified, the VA's conduct during mediation discussions became progressively hostile and retaliatory.

After the OSC staff inexplicably took no action to address VA's questionable actions, the VA indicated it would withdraw from mediation if I failed to consider its unreasonable terms. Unfortunately, in approximately November 2019, the VA staff involved in a mediation made a patently false statement to justify VA's absolute refusal to provide adequate compensation for compensatory damages consistent with MSPB case rulings. In the face of such overt retaliation, I believed the VA's attempt to perpetrate such deception indicated that VA was also being insincere during negotiations when it promised there

would be no further workplace retaliation against me after I agreed to sign a new settlement agreement.

Before I provide examples of retaliatory VA misconduct during/after my OSC mediation, I must make the reader aware of the OSC "Agreement to Mediate" which I signed in 2019 as OSC's mandatory prerequisite to participate in OSC ADR mediation. As per the terms of that document, unless both the VA & OSC give consent for me to share details, the OSC specifically prohibits me from sharing my OSC complaint or any discussion/documentation surrounding my OSC ADR mediation process with any member of Congress or his/her staff. However, there is a caveat later in the document which states such information may be shared "to prevent reasonably certain death or substantial bodily harm...or...to address complaints of reprisal for participation in an OSC mediation under 5 U.S.C. 2302(b)(9)".

This caveat is applicable in my case. VACO officials (or VACO-level employees acting on their behalf) retaliated against me for participating in the OSC mediation by refusing to consider several reasonable, legally-available remedies which should routinely be available to all whistleblowers as part of any mediation, proposing starkly inequitable terms contrary to whistleblower rights/federal protections, and threatening withdrawal if I refused to accept unfavorable VA terms. Using the medical information I confidently shared during the mediation process, VACO also deliberately created one particularly egregious proposed term which is not only in conspicuous violation of federal whistleblower protection statutes but also would logically and significantly increase my risk of suicide whether or not I accepted VACO's self-described "best and final" offer of settlement.

In Appendix A, I have listed some of the VA misconduct in the OSC process involving mediation and the post-ADR timeframe of my still-open OSC case. The most egregious action is embodied by the VA's dogged insistence that I remain in the same retaliatory environment in which I have experienced 6+ years of ongoing retaliation including the entire time I have been involved in the OSC process with the VA. Both proposed positions created for me in that workplace were also flawed because the jobs' duties required me to collaborate with 1 or more executives who have retaliated against me.

VA's demand that I remain in the same retaliatory workplace against my will is in violation of MSPB case rulings and federal whistleblower protections. The VA Office of General Counsel (OGC) staff involved in OSC negotiations are expert in whistleblower protections and negotiations. OGC should be aware of the MSPB ruling which stated forcing a whistleblower to remain in a retaliatory environment and interact with retaliators causes a special and severe harm to whistleblowers.

This skewed VA approach to OSC negotiations in my case should be sufficient cause for Congress and the public to seriously question VACO's ability/willingness to justly resolve valid whistleblower complaints and end whistleblower retaliation.

Unfortunately, there is also another alarming detail in the context of my case which not only illustrates the egregiousness of VACO misconduct during OSC negotiations but also demonstrates VACO officials' severe contempt for whistleblowers and willingness to purge whistleblowers by any means necessary.

Simply put, the alarming detail involves the fact that VACO officials and VA attorneys involved in negotiations were acutely aware of my medical documentation which stated remaining in a retaliatory/psychologically unsafe workplace would pose a serious threat to my health and physical safety. Specifically, the then-acting DUSHOM and VA attorney involved in negotiations both stated in June 2019 that they had read a letter from my medical provider which detailed the significant mental

health consequences I had experienced which were attributed to prolonged, unrelenting VA workplace retaliation during the last 11+ years. In that letter the provider clearly indicated I would suffer inevitable severe psychological decompensation and elevated risk of suicide if I remained in a retaliatory environment or in a psychologically unsafe environment in which I feared retaliation.

Indifferent to my medical provider's prediction of inevitable harms I would experience if I remained in my current workplace, the VA declined to mitigate my risk of future workplace retaliation. VACO has the ability to create a new position within any VA facility or office with the exception of the VA Office of Inspector General. However, after an obviously insincere job search to find a suitable position for me outside of my current workplace, the VA declined to provide/create a viable alternative job outside my VISN even though VA employees involved in my OSC negotiations had read that medical letter. Instead, the VA was only willing to create new positions for me within my current workplace in which I had experienced recurrent retaliation by my supervisor even during OSC negotiations. The VA even structured the duties of those new positions so that I would be required to be supervised and/or collaborate with 1 or more executives who had retaliated against me.

After I ended formal OSC mediation, the VA did make some changes to the proposed settlement terms in the post-ADR timeframe. However, as detailed in confidential documents already submitted to the HVAC, VA's self-described "best and final" offer remains so ethically disturbing, starkly inequitable, and legally unsound that the entire VA proposal can only be accurately labeled as "malignant".

As listed in Appendices B & C, the proposed final offer's phrasing appears innocuous until the terms are viewed in the full context of my case and other factors pertinent to VA's obligations to observe federal whistleblower protections and codified ethical standards. Several of the VA's proposed terms simultaneously violate the VA Code of Ethics, basic tenets of the VA High Reliability Organization initiative, ICARE values, federal statutes protecting whistleblowers, MSPB legal precedents, long-standing administrative case law, and the American Bar Association's Model Professional Code of Ethics.

For inexplicable reasons, the OSC declined to address VA misconduct at various points during the OSC process. Disturbing, well-documented irregularities in OSC conduct in my case have allowed VACO reprisal to flourish against me throughout the OSC process. For example, in the post-ADR timeframe the OSC specifically refused to ask the VA to search for an alternative job offer outside of my VISN even though the OSC was aware the VA proposal would force me to remain in the same retaliatory environment and collaborate with my known retaliators. Even after reading my provider's medical letter as well as being informed of the VA's discrete ongoing episodes of retaliation against me in my workplace, OSC still maintained the job offer was appropriate. The OSC's illogical written justification for its stance included 1) the new position only required me to work directly with one retaliator, 2) OSC believed the VA was being truthful when the VA stated it diligently conducted an agency-wide job search and concluded there were no other positions the VA could offer, and 3) OSC believed the VA would fully support me in the new position if I agreed to the position.

(Note: Earlier this year, I made a whistleblower disclosure to the House Committee on Oversight and Government Reform regarding several instances when the OSC failed to uphold basic federal whistleblower protections in my case. I am awaiting follow-up.)

When the VA provided its self-described "best and final" offer of settlement, I was facing a no-win situation. I have already experienced well-documented substantial negative consequences (professional & personal) due to my exposure to ongoing VA retaliation for the last 11+ years, of which 6+ years of

retaliation occurred in my current VISN office. As described in my health provider's detailed medical letter, remaining in such an undesirable workplace working with my previous retaliators or in any workplace wherein I feared retaliation will inevitably cause me to experience severe psychological decompensation & a high risk of suicide. Unfortunately, without an MSPB quorum to address VA misconduct or OSC willingness to otherwise enforce my whistleblower rights/protections, the OSC had already informed me that OSC would close my case if I rejected the VA offer. The OSC closure would occur even though the OSC's preliminary investigation had already substantiated the VA retaliation against me and the VA's proposed terms are in direct violation of whistleblower protections.

At that point, there appeared to be only two untenable options for me:

- 1) Refuse the grossly inequitable VA settlement offer, have the OSC close my case, and enter into the prolonged MSPB process. This option would force me to spend years in my current VISN workplace which is not psychologically safe, allow the Agency to freely retaliate against me without any foreseeable consequence until the MSPB administrative law judge hearing, perpetuate further stagnation of my career, and require me to incur substantial private legal fees to ensure my retaliation case is adequately presented against ruthless, tax-payer funded VA attorneys. Because I will be forced to remain in my psychologically unsafe workplace for years while I am waiting for the MSPB/administrative law judge hearing, I would logically experience the inevitable psychological decompensation and elevated suicide risk described by my mental health provider.

OR

- 2) Accept the VA's grossly inequitable settlement offer and avoid the costly & lengthy MSPB process. This option would still force me to remain in the same negative VISN workplace until the end of my career, assume a position that is not aligned with my professional interests, permanently derail my VA career goals of being a medical investigator, expose me to the risk of further retaliation because my new duties would collaborate with a previous retaliator, discard any opportunity to reinstate substantial sick leave hours which are medically documented as being related to a retaliatory event in 2020, and accept grossly inadequate compensation for damages/harms already sustained. Because I will be agreeing to a permanent assignment in my psychologically unsafe workplace, I would logically experience the inevitable severe psychological decompensation/high risk of suicide described by my mental health provider.

My last remaining hope was that the incoming VA Secretary would be willing to objectively review my case and my allegations of VA misconduct/retaliation during the OSC process. I reached out to the HVAC for assistance in addressing my situation. While I was awaiting Senate confirmation of the incoming VA Secretary, the VA issued a deadline to receive my response to its "best and final" offer of settlement. Because there was a chance the new VA senior administration would reverse the egregious VA conduct against me, I rejected the VA's malignant offer.

Unfortunately, the VA Secretary failed to timely respond to the HVAC's February 2021 letter regarding my case and similar egregious VA conduct toward other whistleblowers.

A few days prior to the 3/26/21 HVAC hearing in which the VA Secretary appeared, I was informed by the OSC that the VA had officially withdrawn/ended its involvement in my case because I had rejected the final VA offer. The OSC stated my case of OSC-substantiated whistleblower retaliation would be closed and I would be referred to the MSPB process.

I was devastated. Because the MSPB process is incredibly slow, I knew it would take a minimum of 1.5-2 years before I would have a hearing in front of an administrative law judge. I did not take any comfort in the knowledge that I would win that initial hearing based on the strength of my irrefutable evidence of retaliation against me. Because I was informed by legal professionals that VA lawyers are appealing every case that VA loses, I knew my victory would still require another extensive wait until the VA's appeal was adjudicated in a final hearing in front of the Merit Systems Protection Board (MSPB). Because the MSPB is already backlogged 3,100+ cases, I fully anticipated it will be an additional 5-7 years before I can obtain justice in front of the MSPB and finally resolve the undisputed VA retaliation against me.

When VA Secretary McDonough appeared in the 3/26/2021 HVAC hearing, he acknowledged reading, but not yet responding to, the February 2021 HVAC letter regarding egregious conduct against me and other whistleblowers. The Secretary publicly promised to provide a response to the HVAC letter. The OSC then agreed to leave my case open only until the VA Secretary provided that official response.

I was very alarmed by the new Secretary's statement that he had read the HVAC letter. Because the VA had just withdrawn from my OSC case prior to the 3/26/21 hearing, I immediately feared the incoming senior VA administration had prematurely dismissed the HVAC letter of inquiry and/or failed to fully investigate HVAC's report of conspicuous whistleblower retaliation against me and other whistleblowers.

However, despite my initial fear, I was also aware there might be other explanations for VA withdrawal under the supervision of the newly appointed VA Secretary: sprawling size of VA bureaucracy, multiple competing priorities for new senior management, and presumed difficulty in establishing reliable communication chains among the many VACO departments.

I realized the VA withdrawal from my OSC case could have occurred without Secretary McDonough's direct knowledge. Even if he had given permission for VA withdrawal, I sincerely doubted Secretary McDonough would approve of the VA's unscrupulous retaliation during the OSC process. Based on his reputation for efficiency and honesty, I hoped that his delay in addressing the HVAC letter merely reflected his reliance on faulty reassurances provided by VACO staff who have a vested interest in suppressing the extent of VA corruption of the OSC process.

VACO's current reprisal/retaliation against me during the OSC process is in obvious violation of federal whistleblower protection statutes, MSPB case law, VA ICARE values, various VA policy/directives, professional ethics, OSC "Agreement to Mediate" terms which require the mediation in "good faith", and the VA High Reliability Organization initiative emphasizing a culture of safety/lack of whistleblower reprisal. Even without knowledge of the basic facts listed Appendix D or federal whistleblower protections, it seems obvious to me that anyone with the ethical capacity to understand the difference between right and wrong would reasonably conclude the VA's approach to OSC negotiations is extremely disturbing, especially in view of the context of my OSC case.

I was greatly relieved to learn the HVAC was planning a new hearing in May to address pressing issues regarding whistleblower retaliation and the VA's approach to preventing/resolving such retaliation.

Overall, based on my knowledge of VA institutional culture and understanding of bureaucratic delays inherent to any large federal agency, VACO-level multi-system process failures might serve as a valid explanation for the majority of the "Swiss-cheese" events which cumulated in the VA's self-described "best & final offer" position offer to me which is objectively malignant.

I believe widespread faulty decision-making algorithms and other VACO-level process failures could negatively affect the manner by which VA evaluates whistleblower complaints, engages in the OSC process, and determines corrective action. Close congressional oversight and public attention would encourage the VA to promptly evaluate and aggressively correct such high-level process failures.

However, based on my personal experiences with VA conduct during the entire OSC process, I also believe VA's "good faith efforts" to resolve valid whistleblower retaliation complaints are also heavily contaminated by the following factors:

- 1) Deeply ingrained, VACO-level malice toward VA whistleblowers in general and me in particular.
- 2) Widespread perception that such whistleblowers can (and should be) purged by any means necessary, including making working conditions so unbearable that a reasonable person would quit and/or manufacturing "evidence" to support an employee's unjust termination.
- 3) Strong bureaucratic privilege held by some key VA decision-makers who are so sufficiently shielded by opaque VACO-level operations that they do not fear repercussions for conspicuously violating federal whistleblower protections or ethical standards. Without an MSPB quorum, those VACO staff have learned the OSC will overlook VA misconduct. The mandatory OSC "Agreement to Mediate" effectively gags whistleblowers from reporting VA misconduct/abuse of power in the OSC process unless there is a rarely-encountered significant threat of bodily harm/serious injury. VACO staff are essentially free to corrupt the OSC process without fear of being admonished by the OSC or being discovered by Congress or the American public.

Based on my observations of VA conduct during the OSC process, I firmly believe such toxic contamination exists in view of the following:

- At multiple points, VACO-level employees in the OSC negotiations were aware of the medically-documented, severe psychological consequences to me if I remained in a psychological unsafe environment. Those VACO staff were also aware of my reports of ongoing VISN-level retaliation against me during the OSC process and my strong desire not to remain in my current workplace.
- No doubt aware of the prolonged, expensive wait for whistleblowers referred to the MSPB process, those VACO staff took advantage of the lack of MSPB quorum by threatening to withdraw from the OSC process if I refused to accept the VA's starkly inequitable terms. In the absence of complete moral bankruptcy coupled with gross

incompetency, this means the VACO staff involved were either 1) afraid to raise the alarm within their chain of command about how the job offer would cause inevitable psychological decompensation/elevated risk of suicide for me or 2) couldn't get their VACO-level chain of command to listen to them when they sounded the alarm. Either option indicates deep-seated VACO-level malice against me specifically and likely whistleblowers in general.

- I have continued to experience retaliatory events in my VISN workplace which appear to originate from VACO. For example, I am not allowed to assist VISN QMO staff in any capacity despite severe QMO division overload/staffing shortages since the beginning of the pandemic. Because QMO division overload jeopardizes quality oversight for 8 VISN 22 facilities, only a VACO-level executive would have the political power to direct this level of retaliation without fear of negative consequences.
- Although not discussed in detail in this congressional testimony, several other proposed remedies in the VA's "best and final" offer of settlement actually deny me basic relief/remedies which I would be normally be eligible to receive as per MSPB case law. *(See Appendix C)*
- The primary VA staff involved in the OSC process are members of the VA Office of General Counsel's (OGC) Personnel Law Group which has extensive expertise in whistleblower protections and negotiation. Therefore, the legal staff involved in my OSC negotiations should have full knowledge of legal protections and case law regarding whistleblowers. Unless those OGC staff had approval/directives from OGC leadership, I assume it would be extremely unlikely for any lower level, experienced OGC attorney to readily propose settlement terms for me which are contrary to prevailing legal standards, ICARE values, and American Bar Association's Model Code of Professional Ethics. As a result, I believe the malignant nature of the VA's final offer indicates the presence OGC malice against whistleblowers and some degree of OGC bureaucratic privilege. Unless OGC is acting in a rogue capacity within VACO, OGC leadership would be unlikely to display such inappropriate/unethical conduct unless there was a significant degree of support for whistleblower retaliation among VACO senior leaders.

VACO's multiple-system process failures, malice/disdain for whistleblowers, and bureaucratic privilege are severely blunting VA's overall sensitivity to operations, creating devastating employee-level consequences, and jeopardizing the Agency's mission and integrity.

I have personally spoken with several VA whistleblowers whose professional reputations and VA careers have been destroyed by persistent VA whistleblower retaliation occurring after the 2014 VA scandal erupted. Although racism was not an added element of whistleblower retaliation against me, it has been encountered by other VA whistleblowers and must also be rapidly addressed by the VA and Congress.

For example, I am aware of racist retaliatory tactics in one Indiana VA facility which were directed at Dr. Alice Buckley, an honorably discharged African-American female Army Veteran and well-respected physician who had a 20-year unblemished medical career prior to joining the Indiana VA facility in 2014. As part of her routine oversight duties as a medical manager for an Indiana VA primary care clinic, she notified her chain-of-command in 2015 that there were inappropriate prescribing patterns, poor medical follow-up of Veterans taking such dangerous prescription combinations, and unreasonable denial of Veteran access to specialty care services in the outpatient VA clinic. At the time she reported these problems and requested leadership's assistance to resolve these problems, she did not realize her supervisory chain would label her as a whistleblower and subsequently orchestrate a pattern of racist whistleblower retaliation against her. As a result of this racist retaliation, Dr. Buckley was not only unjustly terminated but also subjected to a completely unfounded report of professional misconduct which has prevented her from obtaining subsequent private sector employment as a physician. In the process of manufacturing evidence to support a fabricated allegation of professional misconduct against her, that Indiana VA facility even ignored written documentation from the facility's Assistant Human Resource Officer who stated the allegations of stalking and patient abuse against Dr. Buckley were not factual but rather the result of speculation and innuendo from one employee with questionable motives and erratic behavior.

Dr. Buckley has already waited 3 years for an MSPB review of a significantly flawed administrative law judge ruling which clearly mischaracterized the objective evidence proving retaliation against Dr. Buckley as well as effectively refuting VA's unfounded claims of professional misconduct. Unfortunately, the MSPB backlog is so large that she will be forced to wait many additional years in the MSPB queue before her MSPB hearing is scheduled and she can obtain justice. In the meantime, Dr. Buckley and her young child are subsisting on unemployment compensation, relying on Medicaid, and facing imminent foreclosure and bankruptcy. Consistent with VA's notorious reputation for neglect of female Veterans and people of color, the VA continues to let Dr. Buckley's case languish even though the objective evidence proves the VA's allegations are patently false and the consequences of VA retaliation against her are particularly heinous.

VACO's fatally skewed approach to resolving whistleblower retaliation complaints must be corrected immediately. If not, such VA actions will continue to harm whistleblowers, discourage employees from reporting health & safety concerns, and doom VA's High Reliability Organization (HRO) initiative. In addition, VA's well-known reputation for retaliating against employees is preventing robust recruitment and retention of vitally needed personnel. Persistent VACO-level retaliation is essentially invalidating every commitment and intervention the Agency has made to protect whistleblowers, improve quality, and regain the trust of Congress and the public since the 2014 scandal.

Whistleblowers serve as a vital safety net for Veterans within the imperfect VA system. As a result, VA's persistent attacks on whistleblowers are, by extension, also jeopardizing the healthcare and personal safety of every Veteran.

APPENDIX A: Summary of retaliatory VA conduct during the OSC process

Shortly after I testified in the June 2019 HVAC hearing about ongoing VA whistleblower retaliation, VACO officials (or VACO-level employees acting on their behalf) retaliated against me for participating in the OSC mediation by refusing to consider several reasonable, legally-available remedies which should routinely be available to all whistleblowers as part of any mediation, proposing starkly inequitable terms contrary to whistleblower rights/federal protections, and threatening withdrawal if I refused to accept unfavorable VA terms.

Using the medical information I confidently shared during the mediation process, VACO also deliberately created one particularly egregious term which is not only in conspicuous violation of federal whistleblower protection statutes but also will logically and significantly increase my risk of suicide whether or not I accepted VACO's self-described "best and final" offer of settlement.

When viewed in the context of my case details, a partial list of such inappropriate VACO-level actions include:

- Failing to fulfill the then-acting DUSHOM's promised "tailored" job search for me. Although the VA DUSHOM stated VA would diligently conduct a job search specifically tailored for me, the job search results yielded a list of approximately 23 positions, almost all of which either I am not medically trained to do (e.g., chest surgeon) or did not have the healthcare management experience/master's degree necessary to be successful (e.g., "Assistant Deputy Undersecretary")
- Withdrawing a potentially compatible position on the DUSHOM's job search list in which I expressed interest during mediation.
- Imposing senseless limitations on its own ability to create positions across the entire VA enterprise. Despite my stated requests to be removed from my currently retaliatory workplace, the VA was only willing to create 2 entirely new positions for me within my current VISN workplace while simultaneously declining to create any new positions for me outside of my VISN workplace.
- Declining to provide any rationale for its decision to exclude me from any viable position outside my current retaliatory workplace such as offering me a position in the Office of Medical Inspector which would allow me to resume my career trajectory/achieve my career goals which had been derailed by prolonged retaliation.
- Subsequently insisting the only suitable/available VA positions for me required me to remain in my psychologically unsafe workplace and collaborate with the same administrators which I had testified were involved in retaliation against me.
- Creating positions with functional statements/duties requiring me to interact with my prior retaliators. In fact, the supervisory chain structure proposed in the first position's functional statement even required me to report to the same supervisor whose retaliatory actions I had discussed publicly in my 2019 HVAC testimony in front of VA executives.

- Doggedly refusing to create any position for me outside of my psychologically unsafe workplace despite after the then-acting DUSHOM and the VA negotiator both stated they had read my medical provider's letter which described the severe mental & physical consequences of long-standing retaliation. In lay terms, as a result of mental health diagnoses linked to ongoing retaliation, my provider's letter included statements that remaining in a retaliatory environment or other psychologically unsafe workplace would cause me to suffer inevitable severe psychological decompensation and elevated risk of suicide.
- Insisting my VA workplace would be supportive if I signed the settlement agreement while simultaneously ignoring my ongoing reports of significant retaliatory events against me within my workplace throughout the OSC process of negotiations.
- Declining to approve any mechanism to temporary remove me from a retaliatory environment/quickly investigate retaliation against me in the future in the event that I alleged recurrent VA retaliation in any new role I accept. VA staff involved in OSC negotiations dismissed my valid concerns of future retaliation by callously stating I could easily address future retaliation by simply filing a new retaliation complaint with the OSC. At the time of the statement, it was obvious to me that the VA comment was incredibly sarcastic because the VA staff member was keenly aware I had spent the last 4 years unsuccessfully trying to obtain a just resolution of my 2017 OSC complaint.
- Declining to provide reasonable compensatory damages commensurate with the severe level of harms I had experienced which were medically documented to be the direct result of 5+ years VA retaliation. The VA representative involved in OSC negotiations incorrectly stated the VA only provided compensation for physical injury, not psychological harms, which were directly caused by VA whistleblower retaliation. This patently untrue statement was made in an attempt to justify the incredibly low offer of monetary compensation. The VACO senior official present at the time of the statement did not make any attempt to correct the VA representative. At the time, both of these VACO-level employees had also previously stated they had read my provider's medical letter detailing severe psychological consequences I suffered because of 5 years of relentless VA retaliation against me. They were also in the position to be aware of the existence of multiple previous VA compensatory awards to whistleblowers who had experienced significant psychological harms from retaliation.
- Flatly rejecting my individual reasonable requests for commonly accepted remedies including reasonable compensation for foreseeable future medical expenses, restoration of sick leave used in 2020 which was medically documented as related to a discrete retaliatory act against me in my workplace, and appropriate compensation for retaliatory denial of bonuses/salary increases.

APPENDIX B: Revealing the malignancy of the VA's proposed job offer

The VA's job offer in its self-described "best and final" offer is deceptively innocuous until the offer's merits are analyzed in the context of my case details, VA conduct during OSC negotiations, federal whistleblower protections, and pertinent ethical standards governing all VA employees. VA staff's ability to fully detect the job offer's truly malignant nature is entirely dependent on VA staff's knowledge of my whistleblower retaliation case details.

For example:

If unaware of my case details, experienced VA staff would conclude there is nothing unusual about the job description or training provision.

If aware of a few case details, experienced VA staff would note the job position requires me to remain in the same work environment wherein I experienced retaliation. However, they may not view this as unusual. Many whistleblowers prefer remaining in the same workplace but request a different position or placement within in a different supervisory chain.

If possessing a few more case details, experienced VA staff would consider the job offer extremely unusual because I have experienced 6.5+ years of ongoing retaliation in the same workplace which included reporting multiple retaliatory acts during the entire 2+ years I have been actively engaged with the VA in the OSC process. Most whistleblowers who have experienced extensive retaliation in the same workplace would choose to leave.

If those VA staff had reviewed the proposed job description, they would also consider the offer concerning because my new job duties require me to collaborate with one of my long-standing retaliators. Even when whistleblowers opt to stay in the same workplace, it is exceptionally rare for these whistleblowers to agree to actively collaborate with their retaliators in the future.

If possessing a knowledge of my medical provider's letter* describing the severe mental & physical consequences of long-standing retaliation against me as well as an awareness of my repeated request to be removed from my workplace and my perception the workplace will remain psychologically unsafe for me, VA staff would immediately recognize the job offer seriously endangers my safety and wellbeing and recommend it be retracted.

**My provider's letter included statements that if I remained in a retaliatory environment or other psychologically unsafe workplace, I will suffer inevitable severe psychological decompensation and elevated risk of suicide.*

If **ANY** VA staff had only knowledge of 5 key events listed below which occurred during mediation between me and the VA, they would be horrified by not only job offer but also the label "best & final".

Those 5 key events from OSC ADR mediation between me and the VA are as follows:

- In the OSC mediation, I requested repeatedly to be moved out of my workplace because the retaliation was ongoing, even while actively engaged with the VA.
- In an attempt to convey to the VA how important placement outside my current workplace was to my health and safety, I provided my provider's letter which described the devastating consequences of prolonged VA retaliation against me. The VA staff involved in OSC negotiations stated they had read the letter. Within that letter, my mental health provider indicated I would suffer inevitable severe psychological decompensation and elevated risk of suicide if remained in a retaliatory environment or other psychologically unsafe workplace.
- The tailored job search specifically promised by the then-acting DUSHOM was so poorly done that almost none of the positions matched my internal medicine training. Some of the inappropriately proposed positions included positions for a chest surgeon, neurologist, and a psychiatrist. Despite awareness of the content of my medical letter and its grossly inadequate attempt at an Agency-wide job search tailored for me, VA staunchly remained unwilling to create/offer any other positions outside my retaliatory work environment.
- Because VACO has the ability to create a new position within any VA facility or office with the exception of the VA Office of Inspector General, I asked the VA to explain the rationale for its refusal to create any position outside my workplace as well as its refusal to create an OMI medical investigator position for me so I could achieve my career goal derailed by 6.5+ years of VA retaliation. In response, VA informed me it did not have to give me any reasons for its decisions. (Note: I took the 2014 Specialty Care Medicine position to place me on a career trajectory to become a medical inspector/investigator.)
- During mediation, the VA indicated it would withdraw immediately from negotiations if I would not accept a position in my current workplace even though it was aware of the medical letter, the ongoing retaliation, & proposed duties which would require me to work with one of my retaliators. Without a quorum, VA withdrawal will sentence me to a prolonged wait of 2-7 years in the severely backlogged MSPB process. While waiting for my hearing, I will still be exposed to ongoing VA retaliation, continue with my current unfulfilling duties which overwhelmingly do not require a medical degree or even a college degree, and incur significant legal fees to ensure I can defend myself against taxpayer-funded VA lawyers. Such a retaliatory workplace would lead me to experience the inevitable severe psychological decompensation & elevated suicide risk predicted by my mental health provider.

Depending upon their job title, any VA staff member reasonably would conclude the proposed position for me violates 1 or more of the following: VA Code of Ethics, ICARE values, basic tenets of the VA High Reliability Organization initiative, federal whistleblower protection statutes, MSPB case law, and the American Bar Association's Model Professional Code of Ethics.

They also would recognize the offer's political optics and institutional repercussions would at least threaten, if not sabotage, almost every positive stride the VA had taken since 2014 to improve patient care quality, protect whistleblowers, and rebuild trust within the public & Congress. In addition, those VA staff would logically anticipate the VA's proposed offer will have a chilling effect on retention/recruitment as well as on any VA employee's future willingness to report health and safety hazards within the VA system.

The already dismal optics of the proposed job offer are exponentially worsened in view of the following:

Since 2014, the ongoing VA retaliation against me is well-documented. My OSC complaint/addendum was substantiated by a preliminary OSC investigation. There is indisputable evidence of the VA's ongoing material breach of my 2014 settlement agreement as well as its refusal to correct the breach since 2017. There have never been any accusations of wrong-doing against me.

If the VA were negotiating in good faith in any clear-cut retaliation case e.g., proof of retaliation, harms, & absence of extenuating factors, the VA would easily grant any whistleblower's reasonable request for reassignment to an appropriate position outside a retaliatory workplace. However, it is illogical, unethical, and extremely alarming for the VA to refuse to grant me a reasonable request for an appropriate position outside of my retaliatory workplace. It is even more ominous the VA also used veiled threats to withdraw from mediation unless I agreed to accept a psychologically unsafe position which will potentially lead to my suicide.

With any knowledge of the my testimony in the 7/2014 and 6/2019 HVAC hearings on VA whistleblower retaliation, it would be evident to any VA employee, member of the public, or politician that the VA still has deep-seated, rampant institutional malice toward whistleblowers in general and me specifically.

APPENDIX C: Other starkly inequitable aspects of the VA's self-described "best and final" settlement offer

In addition to the malignant job offer described in Appendix B, other proposed terms within the VA's self-described "best and final" settlement offer also appear innocuous upon cursory review. However, when analyzed in the context of my case details, these proposed terms and notable omissions are starkly inequitable, have devastating personal and professional consequences for me, and are noncompliant with even the most basic of whistleblower rights.

Examples of such inequitable terms/omissions within the VA's proposal include:

- Rejection of my request to restore 300 hours of emergency sick leave/FMLA used in 2020 which were medically documented as necessary to manage severe psychological consequences from new discrete retaliatory actions. Although the VA agreed to restore some sick leave used prior to 2020, the VA flatly rejected my request for restoration of leave used in 2020 by simply declaring that the sick leave was not related to retaliation. The VA made this sudden declaration without conducting any investigation, interviewing me, or reviewing my contemporaneous medical evidence surrounding the event/subsequent leave usage.
- Refusal to provide compensation commensurate with the extensive psychological harms and physical consequences I have experienced as the result of ongoing, unrelenting VA retaliation in my workplace. Based on medical documentation I have submitted to the OSC, the documented harms I have experienced are on par with, or exceed, the harms documented in EEOC cases with much higher compensation than the VA proposed. Applicable case law include a pertinent ruling wherein an administrative judge determined that use of EEOC-level compensation awards is appropriate because the case law regarding whistleblower compensatory damages for extensive damages is still relatively sparse.
- Rejection (without explanation) of my proposed mechanism to rapidly investigate/address any future VA breach of a new settlement agreement and reduce any psychological harms I may suffer while waiting for the resolution of the breach. Despite the VA's failure to correct its long-standing material breach of my 2014 settlement agreement and its knowledge of my medical provider's letter, the VA did not propose any alternative mechanism to mitigate severe psychological consequences for me in the event of another VA breach or recurrent VA retaliation.
- Rejection (without explanation) of my request to specify that any new settlement agreement remains in force until I resign or retire. *Of note, I will reach social security minimum retirement age in ~ 12 years, a timeframe roughly equivalent to the 12 years from 2009-2021 during which I have experienced well-documented, continuous retaliation which the VA remains unwilling to stop.*

APPENDIX D: Important facts which further indicate the egregious nature of VA conduct during my OSC case negotiations.

The VA is has an enterprise-wide ability to create a viable position in any VA department/office other than the VA Office of Inspector General.

As described in the body of my written testimony, the VA's proposed job offer needlessly forces me to remain in a retaliatory/psychologically unsafe work environment, forces me to collaborate with at least one retaliator, and has been medically predicted to cause me to experience inevitable severe psychological decompensation with an elevated risk of suicide.

Even without specific knowledge of federal whistleblower protections, VA ICARE values, or ethical standards which otherwise govern VA employees, anyone with the ethical capacity to understand the difference between right and wrong could easily conclude the VA's job offer/refusal to provide a suitable alternative is extremely inappropriate and disturbing.

However, with knowledge of the facts listed below, such individuals would also understand the truly egregious nature of VA conduct during OSC negotiations, the depth of VACO malice toward whistleblowers, and significant degree of VACO-level bureaucratic privilege which negates its obligations to follow federal law.

- **All federal employees including those within the VA/VACO/OGC are expected to uphold ethical standards identified in 5 CFR § 2635.101 which requires those employees “to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.”**

As per 5 CFR § 2635.101 - Basic obligation of public service, “**Employees** shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable **person** with knowledge of the relevant facts.”

- **I CARE Core Values and Characteristics are codified in VA regulations at 38 C.F.R. Part 0 and define the standards of ethical conduct and related responsibilities of all VA employees, including VACO senior officials and OGC staff.**

As per the VA's website, “VA Core Values describe how VA will accomplish its mission and inform every interaction with our customers. These Core Values are: Integrity, Commitment, Advocacy, Respect, and Excellence — better known as “I CARE.” VA's Core Values will continue to serve as the right guide for all our interactions and remind us and others that “I CARE.”...I care about those who have served...I care about my fellow VA employees...I care about choosing “the harder right instead of the easier wrong...I care about performing my duties to the very best of my abilities.”

(<https://www.va.gov/ICARE/>)

As per 38 C.F.R. Part 0, §0.601 Core Values, “VA's Core Values define VA employees. They describe the organization's culture and character, and serve as the foundation for the way VA employees should interact with each other, as well as with people outside the organization. They also serve as a common bond between all employees regardless of their grade, specialty area, or location. These Core Values are Integrity, Commitment, Advocacy, Respect, and Excellence...VA employees should adopt this motto and these Core Values in their day-to-day operations.”

“(a) *Integrity*. VA employees will act with high moral principle, adhere to the highest professional standards, and maintain the trust and confidence of all with whom they engage.”

“(b) *Commitment*. VA employees will work diligently to serve veterans and other beneficiaries, be driven by an earnest belief in VA's mission, and fulfill their individual responsibilities and organizational responsibilities.”

“(c) *Advocacy*. VA employees will be truly veteran-centric by identifying, fully considering, and appropriately advancing the interests of veterans and other beneficiaries.”

“(d) *Respect*. VA employees will treat all those they serve and with whom they work with dignity and respect, and they will show respect to earn it.”

“(e) *Excellence*. VA employees will strive for the highest quality and continuous improvement, and be thoughtful and decisive in leadership, accountable for their actions, willing to admit mistakes, and rigorous in correcting them.”

(Accessed 5/10/21 at https://www.ecfr.gov/cgi-bin/text-idx?SID=270ad8e9e2efb149d554aacb25174ff9&mc=true&node=se38.1.0_1601&rgn=div8)

- **All VA employees including VACO-level senior officials and OGC employees have an obligation to follow VA ICARE core values and characteristics in all its operations.**

By virtue of their leadership positions in VACO, VA senior officials have the responsibility to encourage ethical standards/ICARE values/VA Core Characteristics of by modeling/promoting ICARE values within VA operations.

On its public website, the OGC affirms “The VA Core Values and Characteristics apply across the entire VA organization, including OGC. These core organizational values are the foundation of VA culture and support VA’s mission to provide the best care and services to Veterans, their families, and beneficiaries.”

(Accessed 5/10/21 at <https://www.va.gov/OGC/Opportunities.asp>)

- The OGC services include providing real-time legal advice, sound legal expertise and, as needed, critical problem-solving skills and risk management advice in various areas which include federal statutes regarding whistleblower protections.

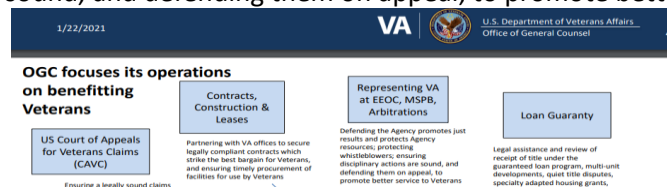
In the 1/21/2021 “About OGC.pdf”, the OGC describes its mission, services and structure. The OGC pdf contains several statements including “The Office of General Counsel (OGC) serves as VA’s in-house counsel and is committed to ensuring that every member of our organization has a Veteran focus and an understanding and commitment to the business priorities of our VA clients. OGC’s attorneys act as business partners, providing sound legal expertise, and as needed, critical problem-solving skills and risk-management advice...OGC strives to provide real-time legal advice. Our goal is to be involved with Department decision-makers (our clients) during the initial phases of decisions and actions, rather than focusing only on defending actions after the decisions have been made. This proactive, preventive approach promotes better outcomes and reduces risk.” (Accessed 5/10/21 at <https://www.va.gov/OGC/docs/AboutOGC.pdf>)

- The OGC’s has stated its primary objective is to ensure just and faithful execution of the laws, regulations, and policies for which the VA has responsibility for administering.

As per the VA’s website, the Office of General Counsel (OGC) mission “is to identify and meet the legal needs of the Department of Veterans Affairs (VA). Its primary objective is to ensure the just and faithful execution of the laws, regulations and policies that the Secretary has responsibility for administering, and by so doing enable the Department to accomplish its mission of service to our Nation's veterans.” (Accessed 5/10/21 at <https://www.va.gov/directory/guide/facility.asp?ID=2009>)

- Although OGC’s activities include representing VA at arbitrations, OGC acknowledges part of its legal operations are focused on protecting whistleblowers.

In the 1/21/2021 “About OGC.pdf”, the OGC describes its mission, services, and structure. The OGC makes several statements including “OGC focuses its operations on benefitting Veterans [including] representing VA at EEOC, MSPB, Arbitrations...[operations including] Defending the Agency promotes just results and protects Agency resources; protecting whistleblowers; ensuring disciplinary actions are sound, and defending them on appeal, to promote better service to Veterans.”



(Accessed 5/10/21 at <https://www.va.gov/OGC/docs/AboutOGC.pdf>)

- **The OGC’s Personnel Law Group possesses legal expertise in the area of whistleblower retaliation and should be well prepared to advise VACO officials on Agency responsibilities related to federal whistleblower protections, MSPB case law, and whistleblower retaliation.**

In the 1/21/2021 “About OGC.pdf”, the OGC describes its mission, services, and structure. The OGC pdf contains several statements including “OGC’s Law Groups are based in VA Central Office... [each law group is] led by a senior executive Chief Counsel. Law Group attorneys typically possess expertise in specific subject-matter areas and provide specific legal advice to program officials, review proposed regulations and directives, and handle litigation involving VA programs... Personnel Law Group –[is responsible for legal operations involving] Human Resources (Title 5 & 38), Labor Relations, Equal Employment Opportunity, Merit Systems Protection Board, Office of Special Counsel (Whistleblower retaliation), and Immigration” (

(Accessed 5/10/21 at <https://www.va.gov/OGC/docs/AboutOGC.pdf>)

- **VACO officials and the OGC staff who advise them should be aware of key MSPB rulings including the fact that MSPB has noted that remaining in a retaliatory workplace, as opposed to removal, can cause special and severe harm because the whistleblower has been forced to endure the retaliation or threat of retaliation on a daily basis while working among her retaliators. *McDonald v. VA, 2018 MSPB LEXIS 2305, *9* (M.S.P.B. June 21, 2018)**
- **The OGC has one chief counsel office in each VA District which is responsible for advising and representing management of VA facilities on issues relating to personnel and labor law which would include issues surrounding whistleblower protections and retaliation.**

In the 1/21/2021 “About OGC.pdf”, the OGC describes its mission, services, and structure. The OGC PDF contains several statements including “There is one Chief Counsel office in each VA District, each office is led by a senior executive Chief Counsel. Each Chief Counsel is responsible for providing legal advice and assistance to Directors and other officials of all designated VA facilities within a District. The Chief Counsels fulfill these functions by performing the following tasks: Advise and represent management of VA facilities on issues relating to personnel and labor law...”

(Accessed 5/10/21 at <https://www.va.gov/OGC/docs/AboutOGC.pdf>)

- **In addition to having expertise in the areas of whistleblower protections and retaliation, OGC has an Ethics Specialty Team is responsible for providing advice on ethics issues to all VA employees including VACO-level decision-makers. The Ethics Specialty Team should be trained to identify/prevent Agency or employee actions which are inconsistent with ethical obligations of federal employees and ICARE values.**

In the 1/21/2021 “About OGC.pdf”, the OGC describes its mission, services, structure, and law groups. The OGC makes several statements including “OGC’s Ethics Specialty

Team (EST) manages the Department's Ethics Program. The Senior Counsel to the General Counsel will serve as VA's Designated Agency Ethics Official (DAEO). Clients contact the EST directly for advice on ethics issues"

(Accessed 5/10/21 at <https://www.va.gov/OGC/docs/AboutOGC.pdf>)

- **As licensed professionals, OGC attorneys are obligated to follow rules of professional conduct established by their respective state bar associations in addition to following rules of ethics/conduct for federal employees. According to the American Bar Association, the *ABA Model Rules of Professional Conduct* serves as a model for state bar association's ethical standards in most jurisdictions.**

ABA Model provisions/accompanying ABA interpretations of those provisions include:

- Lawyers "may render advice by referencing not only law but also moral and ethical factors relevant to the client's situation."
- "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization."
- "Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law."
- "... in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."
- "...a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."
- "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

Accessed 5/10/2021 at

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/