CORRECTED TESTIMONY OF TOM DEVINE,

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before the

HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

on

PROTECTING WHISTLEBLOWERS AND PROMOTING ACCOUNTABILITY: Is VA Making Progress?

May 19, 2021

Chair Pappas, Ranking Member Mann, and Members of the Committee:

Thank you for the opportunity to share the Government Accountability Project's (GAP) testimony on legislative reform of the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection. (OAWP) Government Accountability Project is a non-partisan, non-profit organization that has helped over 8,000 whistleblowers since 1977, been a leader in campaigns to enact or defend nearly all federal whistleblower laws since, and was honored to participate in this committee's 2019 hearings on OAWP. We currently represent eight VA whistleblowers, and are helping others informally. Two of our clients also testified at those hearings, describing ugly retaliation and failure to receive help from any remedial agency.

Unfortunately, things have not gotten better at the Department of Veterans Affairs for whistleblowers, despite the impressive record at this committee' 2019 hearings. To illustrate, both our clients who testified in 2019 continue to twist in the legal wind while ongoing retaliation has them struggling for emotional survival. That also is the case with the whistleblower who founded effective counseling and mentoring programs still not restored by agency leadership. He has been struggling severely, because last year despite a real job on paper the agency refused to assign him duties in practice.

MANDATE FOR CHANGE

The 2019 hearings appear to have earned a bi-partisan consensus that the status quo at OAWP is unacceptable, for which all VA whistleblowers can be grateful. Also, at a series of recent briefings OAWP chief Hansel Cordeiro agreed previous practices have been unacceptable. There is a consensus to overhaul the Office's operations. That is the first step.

Briefings by Mr. Cordeiro and OAWP staff described an impressive, professional approach to better protecting VA whistleblowers. While recognizing past problems, they reassured that the Office is changing. He said that OAWP is trying to earn employee trust through upgrading its website; widespread training; and plans to publicize how whistleblowers have made a difference. On a more tangible level, my notes indicate the OAWP team stated that --

* since April 2020 OAWP has made 99 recommendations, including 29 for discipline due to whistleblower retaliation and 30 non-disciplinary recommendations, including an unspecified number for correct action against confirmed whistleblower retaliation.

* for reprisal complaints, OAWP conducts a clarification interview within a week to decide whether an investigation should be opened; provides regular status reports; allows whistleblowers to see the Report of Investigation without requiring a Freedom of Information Act request; and provides an opportunity to request reconsideration of adverse initial decisions.

* with respect to temporary relief against alleged retaliation, OAWP has 126 active holds.

* for disclosures, OAWP contacts the whistleblower within five days of submitting a disclosure to ask follow-up questions, works with the whistleblower to properly frame issues for investigative referral, and generally maintains constant notifications. OAWP keeps the disclosure case open util it is satisfied that appropriate corrective action has occurred.

* OAWP tracks compliance with corrective action commitments both for disclosures and retaliation complaints.

* After past failures, OAWP has instituted an ambitious training program conducted by staff from the OSC and other whistleblower agencies that requires a week-long hands-on course for all investigators and OAWP supervisory staff.

CREDIBILITY GAP BETWEEN PROMISES AND REALITY

Despite these official reassurances at briefings, whistleblowers report to us that in practice the agency operates without any published policies; is not bound by Whistleblower Protection Act legal burdens of proof; fails to communicate with complainants; routinely

switches investigators without notice or explanation; canceled its effective counseling program; and canceled its effective mentoring mediation program. Perhaps most distressing, it is the only game in town. There is no appeal from arbitrary, adverse OAWP rulings. This is unacceptable at the single agency which depending on the year produces from 33-40% of whistleblower retaliation complaints for the entire federal government.

Case studies

The case that VA Dr. James Murtagh has recounted to Government Accountability Project is representative of the frustrations whistleblowers keep reporting to us when they seek justice through OAWP. When he blew the whistle, Dr. Murtagh had been working for five years at the Fresno facility that recruited his services, earning outstanding evaluations.

The concerns that convinced him to speak out internally and make a disclosure to OAWP included –1) lowering a key indicator on mortality rates, by withholding critical care to patients in the Emergency Room without patient consent. Those patients who survived would be pressured the next day to waive resuscitation; 2) denying specialty consultation or surgery to emergency care patients arriving during the night shift, making those who needed immediate treatment wait until the next day; 3) a pattern at several VAMC's especially Wilkes Barre to reduce mortality rates by shipping critically ill patients to other facilities rather than treat them, with consequences such as one patient dying on the hospital steps of the next facility; and 4) not adhering to the laws governing hospital transfers and referrals

In response, the hospital stopped giving him work, refused to process his credentials renewal, banned him from working at the facility and apparently blacklisted him in light of more than 25 job applications rejected, many after initially enthusiastic interest or initial offer. Two jobs were withdrawn even after Dr. Murtagh was completely credentialled and on the schedule to

start. No one could explain why Dr. Murtagh was taken off the schedule. Dr. Murtagh had previously worked at both facilities (Mt Home Tenn and Amarillo) and had been asked back with new contracts. In both cases Dr. Murtagh had travel plans and had to cancel airfare. Simultaneously, Dr. Murtagh holds staff privileges at Albany VAMC, but has inexplicably been taken off the schedule.

Dr. Murtaugh only decided to make these disclosures after checking first with OAWP and receiving assurances that he would be protected. Unfortunately, that is not what happened. OAWP broke his reprisal complaint into at least seven sub-issues covered by a revolving cast of investigators[1] who were repeatedly replaced without notice or explanation after s single phone call. Over the course of three years, this whole OAWP team –

* failed to interview Dr. Murtagh's key witness;

* informed him that OAWP operates from the "gut," rather than being bound by Whistleblower Protection Act legal burdens of proof;

* failed to address material evidence of blacklisting, although the Cincinnati VAMC claims that without notice to Dr. Murtagh or an opportunity to respond a black mark has been placed Vetpro record so that no VAMC can hire him.

* accepted agency defenses at face value, without giving Dr. Murtaugh a chance to rebut.

* failed to tell him any additional evidence needed to prove his case before ruling against him.

* provided no formal resolution and contradictory informal responses to his disclosure of undermining patient care, with one communication that there was no wrongdoing, and another that there appeared to be criminal misconduct which would be referred to the Inspector General and VISN21 – neither of which he subsequently heard from.

* after three years, issued the final dismissals of his claims through an email that did not reference Whistleblower Protection Act legal standards.

[1] Dr. Murtagh's attorney has filed a FOIA request to find out how many sub-investigations were opened, and how many investigators assigned to which issues in the case.

* refused to provide him the investigative file, requiring an FOIA that resulted in withholding significant portions of the file.

This is the opposite of what the agency described to us. Further, based on reports to GAP, Dr. Murtagh's experience was not an aberration. He was in good company.

The pattern of internal retaliation against OAWP whistleblowers helps explain why it has been ineffective against agency retaliation. Over the last year, half of GAP's VA whistleblower reprisal clients have come from OAWP. We are hopeful that three of the cases can be resolved through the OSC's effective Alternative Disputes Resolution unit, which OAWP needs to restore for its own mission. These resolutions could be an indication that OAWP truly is starting to clean its own house.

However, a case which the agency has refused to try resolving illustrates how the combination of conflict of interest and retaliation can severely compromise the Office. The individual involved desires to protect his identity at this point due to an ongoing investigation by the Office of Special Counsel.

In this case, a retired Army colonel, a highly decorated three-time combat veteran and former Army Brigade Commander, was hired in July of 2018, and until his March 2019 removal served as the GS-14 Regional Director of Investigations responsible for OAWP cases east of the Mississippi. He was retaliated against when he refused to accept the gross mismanagement and abuse of authority by Todd Hunter, then the #2 official at OAWP, under then Assistant Secretary Tamara Bonzanto. Internally he blew the whistle on Mr. Hunter, who had openly threatened OAWP employees in the presence of Ms. Bonzanto, and also ordered the immediate elimination of a backlog by assigning out all cases, despite the lack of resources to complete the investigations. Mr. Hunter desired to "pencil-whip" the problem, portraying an image that

OAWP was properly investigating and steadily eliminating the case backlog. Ms. Bonzanto witnessed the entirety of Mr. Hunters behavior, yet refused to act to stop him.

Mr. Hunter, after stating that he knew many of the OAWP employees had spoken to the IG, made clear to them that OAWP leadership was worried about the IG inquiry and warned members of the OAWP investigations division that they would be transferred if they didn't get on board with OAWP leadership, bewildering the OAWP employees who to that point had no idea that they were out of compliance with any standard or policy. It was immediately after this statement to OAWP employees that Mr. Hunter ordered the pencil-whipping of the case backlog.

The Regional Director of Investigations was removed one week after informing the Assistant Secretary, Ms. Bonzanto, and Mr. Hunter himself that he would cooperate with an Office of Inspector General investigation into OAWP. Despite Mr. Hunter's removal from his position at OAWP after the Secretary Wilkie was informed of his abuses, and Ms.Bonzanto also was removed, the VA still refuses to cooperate with the Office of Special Counsel and discuss settlement of the case.

Nor were OAWP's reassurances convincing based on its own records. For example, its team could not answer how many of its 99 recommendations were adopted in whole or part, despite its tracking program. They did not have data for disciplinary recommendations in whistleblower cases but estimated a 51-49% deference. Nor did they know the results of retaliation cases in the aftermath of holds. The constant notifications to whistleblowers in disclosure cases do not include an opportunity to comment on the report into their disclosure, unlike the Office of Special Counsel. On balance, even if the Office operates as described – 1) its improved practices do not fully meet those required by the Whistleblower Protection Act and

followed by the Office of Special Counsel; and 2) it does not have a track record of making a difference.

RECOMMENDATIONS

It appears there is not yet a bi-partisan consensus on the solutions. Among other reforms, your legislation from last Congress, The Strengthening VA Whistleblower Protection Act of 2020 (VA WPA) would – 1) restore and strengthen OAWP's independence from the agency's Office of General Counsel, whose mission conflicts with OAWP; 2) restore the service function to counsel whistleblowers on their rights; and 3) restore the mentoring program to seek mediation of retaliation cases. The minority's model would emphasize removing OAWP's investigative authority, transferring those functions to the U.S. Office of Special Counsel.

There is no question that legislative leadership is necessary. While agency managers informally have agreed on the need for voluntary changes consistent with last year's legislation, we are not confident of results. For instance, the agency declined to take any corrective action after the U.S. Office of Special Counsel found a reasonable belief that the lack of independence for OAWP from the agency Office of General Counsel evidenced illegality and ordered an investigation under 5 USC 1213(g).[2]

In our opinion, this should not be an either-or choice. Both problems need to be addressed – unacceptable investigative practices; and agency's counsel's control of OAWP policies, evidenced by the cancelation of key service functions. Double-barreled failure is an

[2] In response to a whistleblowing disclosure by OAWP employee Brandon Coleman, the Office of Special Counsel found a reasonable belief that his disclosure evidenced an illegal failure to maintain OAWP's independence from the DVA's Office of General Counsel. See the agency report denying any problems, attached s Exhibit 1; and Government Accountability Project's rebuttal on behalf of Mr. Coleman, attached as Exhibit 2.

opportunity for bi-partisan legislation that addresses both. All the provisions of the strengthening VA WPA are compatible with the minority model. OAWP needs an independent General Counsel to set policies for training, and services such as counseling and mentoring.

With respect to OAWP's investigative work, whistleblowers would enthusiastically agree that the agency has utterly failed in its mission and often been counterproductive. However, there are serious concerns from throwing out the baby with the bathwater by substituting the Office of Special Counsel to conduct investigations. OSC already is so overwhelmed that investigations routinely take years to complete. OAWP has been an essential safety valve to keep the Office of Special Counsel functional for the rest of the civil service. Further, OSC does not and never will have the authority to grant temporary relief that OAWP possesses by statute. While the follow-through remains a mystery, OAWP has been ambitious and effective obtaining temporary relief, which is essential for whistleblowers to survive while their cases are pending, and also facilitates settlements that reduced unnecessary conflict.

On balance, as recommended below we believe that merging the goals of both approaches to protect all VA whistleblowers is the best response to lessons learned since OAWP's creation:

1) Comprehensive coverage: OAWP rejects protection due to numerous loopholes, and the Whistleblower Protection Act only covers Title 38 employees. Any reform should guarantee that best practice whistleblower rights will protect all VA personnel.

2) Mandatory regulations: One reason that OAWP's impressive description of how it operates on occasion has been a fantasy is that it is so informal. Nearly all the effective practices OAWP described to stakeholders are part of Standard Operating Procedures unavailable to those seeking help. Whistleblowers do not know how to operate within these SOP's, because they are

secret. Nor can they hold OAWP investigators or staff accountable for violating the SOP's, because they are secret. Mr. Cordeiro explained that some corresponding directives have been issued and will be expanded. Like at the Department of Labor for its Office of Whistleblower Protection Programs, OAWP's SOP's should be formalized under the Administrative Procedures Act with an opportunity for notice and comment on proposed enforceable regulations. This will replace secret SOP's with legally binding rules of the game.

3) Creation of an OAWP General Counsel. The agency never will be legitimate, until it has counsel free from conflict of interest. Otherwise, it always will be vulnerable to direct or indirect control by adverse counsel in whistleblowing cases. Legislation is necessary, because the current leadership is adamant that the status quo is functioning adequately.

4) Restoration of counseling program: Whistleblowers are bewildered by the legal maze and informal OAWP procedures. The legal landscape often costs them their rights due to violation of rules they were not even aware of. Until it was canceled in 2019, this service had assisted over 1,000 whistleblowers to navigate their rights. There is no public policy excuse to make whistleblowers fly blind when they seek OAWP's help. Congress must restore this essential function, because OAWP's current leadership canceled it and in its briefings made no commitment to restoring it.

5) Restoration of Mentoring and Alternate Dispute Resolution program to resolve unnecessary conflict. The Office of Special Counsel and Department of Labor Office of Administrative Law Judge ADR programs have made more difference helping more whistleblowers through constructive resolution, compared to any other option against retaliation. When it was arbitrarily shut down in 2019, OAWP's innovative Mentoring program was beginning to accomplish the same results with the added dimension of proactively helping to find

placements for a "fresh start." There is no excuse for OAWP to skip the option of constructive resolution for whistleblower disputes. Unfortunately, it must be required by statute, since the current leadership canceled the program and made no commitment in its briefings to restoring it.

6) Preservation and expansion of OAWP authority to provide temporary relief: Unique within the Executive branch, OAWP has authority to provide temporary relief that freezes attempted retaliation when it refers a whistleblowing disclosure for investigation. That authority must not be erased and should be expanded. It is significant, because it insures the whistleblower can participate freely in the investigation of mission breakdowns.

It should be expanded, however, to cover all whistleblower retaliation complaints. Temporary relief is the most expeditious, constructive resource available to jump start settlements and prevent unnecessary time-consuming and draining conflict. The proper standard would be for OAWP to provide it in all retaliation cases where a preliminary review demonstrates a substantial likelihood that whistleblowing was a contributing factor to alleged retaliation, the standard for the employee's *prima facie* case. Once it has been demonstrated that the action was contaminated in some way by retaliation, it should be frozen until all the facts are in. This is the proposed test for all Title 5 employees in the Whistleblower Protection Improvement Act just introduced by the Committee on Oversight and Reform.

7) Whistleblower Protection Act standards: Whether for reprisals or investigations, Congress should require OAWP to apply the same statutory standards governing the Office of Special Counsel for whistleblower cases. This would replace "gut" judgment calls with Whistleblower Protection Act burdens of proof. It would allow whistleblowers to comment on agency reports about their disclosures, currently not part of OAWP's SOP's,

8) Choice of forum for reprisal investigation: While OAWP should be available to all whistleblowers due to its ability to provide temporary relief, once that determination has been made they should have the opportunity to refer their cases to the Office of Special Counsel for investigation under the Whistleblower Protection Act. While it matters to upgrade OAWP, no one is counting on it. Almost all observers are wary. This recommendation seeks to preserve OAWP's unique authority for temporary relief, while providing whistleblowers the right to an investigation by the more independent Office of Special Counsel.

9) Access to investigative file: OAWP's description of providing access was welcome, because it provides whistleblowers the right to know what happened to their rights. Since that has not been the case in practice, Congress should require the commitment by statute.

10) Due process: Due to resource realities, no remedial investigative agency can provide relief for more than a small percentage of worthy cases. That means no matter how well OAWP performs, it never can be a reliable outlet to challenge retaliation. For the rights to be legitimate, it is essential that there be due process channels available for enforcement – both to appeal adverse OAWP judgements under the Administrative Procedures Act, and to have a "kickout" for a jury trial in federal district court if there is no timely administrative relief. This is the approach Congress took for Department of Energy and Nuclear Regulatory Commission employees in the Energy Policy Act of 2005. We believe this is superior than a kickout to the U.S. Merit Systems Protection Board, because that institution has over a 3,200 case backlog due to the lack of Board Members for the last four years.

Government Accountability Project applauds this Committee's bi-partisan consensus on the need for OAWP reforms. We pledge any assistance that is helpful for a bi-partisan consensus to address all dimensions of the mission breakdown.