

**STATEMENT OF MARYANNE DONAGHY, ASSISTANT SECRETARY
OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION
DEPARTMENT OF VETERANS AFFAIRS
ON IMPROVEMENTS TO THE OFFICE OF ACCOUNTABILITY AND
WHISTLEBLOWER PROTECTION AND PENDING LEGISLATION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES**

JUNE 16, 2022

Chairman Pappas, Ranking Member Mann and other Members of the Subcommittee, thank you for inviting us here today to present our views on the draft bill, to amend title 38, United States Code, to make certain improvements to the Office of Accountability and Whistleblower Protection (OAWP) of the Department of Veterans Affairs (VA), and for other purposes. Joining me today is Catherine Mitrano, Acting General Counsel, Office of General Counsel (OGC).

The statute establishing OAWP was passed in 2017 and was designed to improve accountability within VA and to increase the protection of whistleblowers. Its provisions are innovative within the Federal Government and created an additional tool for whistleblowers. These tools are additive for whistleblowers; the functions of OAWP do not diminish nor supplant the investigative authorities already vested within the Office of Special Counsel (OSC). Also important, the statute establishing OAWP provides additional authorities that transcend those of OSC and provides important non-investigative tools for VA to assess and improve the overall culture of accountability and whistleblower protection as an Agency.

OAWP's ability to lay the groundwork adequately for this new office and begin to execute on the tools provided by Congress was significantly hampered during the first several years of its existence, which culminated in an October 24, 2019, report, Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017 (Accountability Act), by VA's Office of The Inspector General (OIG). The recommendations made by OIG involved core elements of establishing the foundation for OAWP to appropriately execute on its functions, such as Standard Operating Procedures, alignment of other internal VA processes, and appropriate delegations of authority. VA fulfilled these recommendations and OIG formally closed the matter as completed on August 27, 2021. Building on these efforts, VA is just beginning to embed the tools provided by the Accountability Act, engage in continuous improvement of a function that is new across the Federal Government and begin to assess how OAWP can use the additional aspects of the statute (such as the ability to provide advice, reports and recommendations to the Secretary) to help to identify and affect cultural improvements within VA and to continue to work to protect whistleblowers. VA believes that additional time is needed to operationalize the statute, and thus to appropriately assess the effectiveness and impact of OAWP.

Two of OAWP's current statutory functions are to conduct independent investigations of allegations of whistleblower retaliation and to investigate allegations of senior leader misconduct and poor performance. This bill eliminates these functions and would require OAWP to refer allegations of whistleblower retaliation to the Office of Special Counsel (OSC). Two other OAWP functions are to advise the Secretary on all matters related to accountability, including whistleblower retaliation and other matters the Secretary considers similar; and to issue reports and recommendations concerning such matters. This bill would eliminate these functions.

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VA does not support the draft legislation to improve OAWP, because it would fundamentally change the responsibilities and tools provided to VA through OAWP. VA does not support the bill because its primary provisions would: (1) eliminate important OAWP responsibilities; (2) hinder VA's ability to improve accountability and to protect whistleblowers; and (3) take away key options for relief that have been used by whistleblowers since the inception of the statute. This bill also would remove significant whistleblower protections.

By eliminating OAWP's investigative function, the bill would reduce the options for individuals who have experienced whistleblower retaliation. Under current law, individuals have the option to file a whistleblower retaliation complaint with OAWP and/or OSC. Whistleblowers have, and have always had, the right to bypass OAWP and file their complaint with OSC if they choose. VA believes that this choice is an important option for whistleblowers who claim retaliation. Further, the potential for duplication is mitigated by collaborative work between OAWP and OSC to avoid overlapping investigations, and continuous communication to identify best practices to ensure consistency and efficient use of public funds.

VA views OAWP functions as supplementing, and not supplanting, OSC functions. OSC tends to focus on relief for the whistleblower. OAWP's processes are more directly targeted to address accountability as its investigative authority is focused on the individuals responsible for the wrongdoing and enable recommendations directly to VA. OAWP's statute also requires notification to Congress when VA management fails to timely initiate or take OAWP's recommendations. Therefore, OAWP's investigative focus is an important complement to OSC's mission. Both work in tandem to ensure that whistleblower rights are protected.

Moreover, as an investigative entity that handles only VA matters, OAWP can establish institutional knowledge and expertise in matters unique to VA. OSC is responsible for investigating whistleblower retaliation for all Executive branch agencies with few exceptions. OAWP provides much needed support to OSC by taking on allegations of VA whistleblower retaliation.

OAWP's investigative authority also is broader than OSC's authority in that OAWP also is charged with investigating VA senior leader misconduct and poor performance. OSC's investigative authority does not extend to certain categories of senior leader misconduct, including poor performance and neglect of duty and general misconduct. Consequently, the bill dilutes the tools available to VA to ensure and embed accountability.

The draft bill also would require OAWP to refer all whistleblower disclosures to OSC rather than referring them to VA's Office of Medical Inspector, OIG or to VA officials for investigation. OSC does not investigate whistleblower disclosures. Rather, OSC refers disclosures back to an agency for investigation. This bill would create an inefficient whistleblower disclosure process by requiring OAWP to receive disclosures and send them to OSC, which would then refer the disclosures back to VA for investigation.

The bill would create a "Counsel of the Office," responsible for providing the Assistant Secretary for OAWP with legal advice "on all matters relating to the Office" and enables OAWP to hire additional OAWP counsel staff. VA does not support the creation of such an office. An additional "counsel" outside of the Office of General Counsel presents significant legal and practical issues and challenges. Such a position impacts the statutory authority vested in VA's General Counsel, who is appointed by the President and confirmed by the Senate. The General Counsel of VA serves as the chief legal officer of VA and is responsible for providing legal advice and assistance to the Secretary of VA and all of its components, including OAWP.

An OAWP Counsel position also is unnecessary. OAWP already has authority to hire attorneys who provide legal reviews of investigative cases. A supervisory attorney joined OAWP in April and OAWP is recruiting actively for additional attorneys within its investigative division. The OAWP attorneys report through OAWP and are not a part of VA's Office of General Counsel. This reporting structure addresses any appearance of conflict involving individual investigations and their conclusions. In addition, a senior leader position has been created within OGC responsible for providing legal advice and guidance to the Assistant Secretary for OAWP and for all related accountability matters. This position ensures that OAWP has the operational legal resources it needs with a focus on its mission, yet permits the importance of alignment of legal advice within VA. This alignment is consistent with the organizational structure of other cabinet agencies within the Federal Government, compliments the ethics and professional responsibilities of attorneys and is critical to the ability for the Secretary, the Assistant Secretary for OAWP and the Department to receive consistent legal advice upon which to base their decisions.

The draft bill also would create new OAWP requirements to track the negotiation, implementation and enforcement of settlement agreements regarding claims of retaliation, including the work of OGC. This language also creates significant legal and practical issues and challenges. VA already is taking steps to meet the intent of this language while avoiding those legal and practical challenges. Within the last year,

OAWP and OGC have established an electronic mechanism by which OAWP receives copies of settlement agreements that involve claims of whistleblower retaliation. Therefore, legislation is not needed to accomplish this goal. OAWP's receipt and review of these settlement agreement aligns with its current statutory authority. For example, OAWP can ensure that appropriate disciplinary action has been investigated and considered, confirm management's commitments within the settlement agreement have been fulfilled and investigate any allegation that breach of a settlement agreement has been caused by further retaliation or other misconduct. VA also does not oppose efforts by OAWP to engage with OGC to ensure that delays in reaching and executing settlement agreements are not improper. VA believes that additional statutory authority is not needed to fulfill these goals.

VA opposes the bill to the extent that it would require OAWP to oversee legal work of OGC or otherwise impede in active litigation between represented parties. Such a function could interfere with the attorney client responsibilities of the parties, including the whistleblower who is represented by counsel, and insert a function that has no precedent within the litigation process.

VA generally supports continuous review of additional resources for whistleblowers within VA and also training, including that OAWP provides appropriate and helpful general informational resources about OAWP processes and other resources available to individuals outside of OAWP. These functions are currently within the authorities of OAWP and thus no additional statutory authority is needed.

This bill also would create a new function for OAWP requiring OAWP to ensure employees who have suffered a prohibited personnel action are issued a binding decision for temporary relief. VA supports corrective action for whistleblowers who have experienced retaliation and continuous improvement of OAWP's tracking of such corrective action; however, binding decision of temporary relief is not defined. It is unclear what the intent of this language is and why any relief would be temporary. The current statutory language provides VA with the tools to accomplish the desired effect.

VA does not support the amendment of 38 U.S.C. § 713, which applies to VA's Senior Executive Service employees. The hold required by this language would significantly impact the ability of VA to timely hold senior executives accountable for misconduct and poor performance without adding meaningful safeguards for whistleblowing activity. OSC already has the authority to seek a stay of any potential disciplinary action resulting from a prohibited personnel practice.

VA is committed to transparency and supports reporting of settlement information to Congress. VA also supports continued reports to Congress when management does not take recommendations for discipline, except that it does not support requirement of notification for a singular matter. VA submits that singular notifications of discipline are administratively burdensome and does not increase transparency to Congress. VA believes that reporting such data involving whistleblower retaliation should be aligned with established procedures involving similar important functions such as EEO. Periodic

reports increase transparency and provide systemic information in a way such that trends and other systemic accountability issues can be analyzed more easily. VA is committed to providing such reports in a timely manner, such as quarterly, so that timely Congressional oversight is not impeded.

Conclusion

This concludes my statement. We would be happy to answer any questions you or other Members of the Subcommittee may have.