

**TRUST IN TRANSPARENCY:
HOLDING VA ACCOUNTABLE AND
PROTECTING WHISTLEBLOWERS**

HEARING

BEFORE THE

**SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS**

OF THE

COMMITTEE ON VETERANS' AFFAIRS

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SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room 360, Cannon House Office Building, Hon. Jen Kiggans [chairwoman of the subcommittee] presiding.

Present: Representatives Kiggans, Rosendale, Mrvan, Pappas, and Cherfilus-McCormick.

Also present: Representative Obernolte.

**OPENING STATEMENT OF JENNIFER A. KIGGANS,
CHAIRWOMAN**

Ms. KIGGANS. Good morning. The committee will come to order. I want to welcome our witnesses. I also ask unanimous consent that Representative Obernolte will be able to participate in questioning. Hearing no objection, we will proceed.

The first hearing I held as the chairwoman of this subcommittee was titled Accountability at VA, Leadership Decisions Impacting its Employees and Veterans. At that hearing, and at many other hearings over the past 10 months, my colleagues and I have stressed the importance of building a culture of accountability at the Veterans Affairs Department. It is clear that when accountability slips at VA, it is the veteran who suffers.

The bipartisan VA Accountability and Whistleblower Protection Act of 2017 was an important step in the second largest Federal agency's accountability journey. The law gave the Secretary new tools to hold poor performing employees accountable and swiftly remove employees who are not carrying out VA's mission of putting veterans first. A culture of accountability cannot exist at the VA if their leadership continues to tolerate employees that harm veterans and harass fellow employees.

The culture of accountability also cannot exist if VA employees are not empowered to speak out when they see this harm and harassment. That is why in addition to the disciplinary authorities created, the 2017 law established the Office of Accountability and Whistleblower Protection, or OAWP. OAWP was given the explicit task of investigating and making disciplinary recommendations concerning senior executives and whistleblower retaliators. It is

broadly accepted that the first few years of OAWP's existence were an absolute failure. At best, OAWP was a completely ineffective organization. At worst, it was a tool used to retaliate against the same whistleblowers it was tasked with protecting.

Last Congress, a bipartisan legislation that passed the House which would have taken away OAWP's investigative authority, was not considered by the Senate. This Congress, OAWP has confidently told my staff that things are much better now and that they have put the right people and policies in place.

I do not doubt that OAWP has many good employees who are attempting to make things right. I also know that these employees are fighting an uphill battle. Many VA employees I engage with do not trust OAWP, and as a result, they are hesitant to engage with the Office. It is not hard to understand why these employees are hesitant. Many VA employees do not view OAWP as independent, as OAWP's leadership reports directly to the VA Secretary. VA employees know about OAWP's past failings, and the Office has not earned VA employees' trust. Many employees who have engaged with OAWP, quite simply, have not seen results.

Also, VA whistleblowers have other avenues to ensure they receive necessary protections. The Office of Special Counsel, or OSC, has existed for more than 40 years and seems to do a decent job. OSC conducts investigations on almost every Federal agency, including almost as many VA investigations as OAWP. OSC also seems to get results. In 2022, they negotiated favorable actions with agencies in 12.5 percent of its prohibited personnel practice cases. By contrast, OAWP only recommended discipline in 3.4 percent of its cases.

I know that OSC and OAWP have somewhat different missions, and I know the OSC has had decades to work out the kinks. I am still left wondering if OAWP's juice is worth the squeeze. OAWP's budget request this year is \$30 million, only \$4 million less than OSC's. Last Congress, this committee decided some of this 30 million could be better spent by OSC or in other ways that protect veterans and whistleblowers. I look forward to examining whether OAWP is money well spent to build a better VA. I am also eager to learn about how VA is working to ensure that all VA whistleblowers are heard, protected, and empowered to speak out free of retaliation.

I appreciate our witnesses being here today to share their expertise on whistleblower protections at VA. I am looking forward to our discussion this morning. With that, I now recognize Ranking Member Mrvan for his opening comments.

**OPENING STATEMENT OF FRANK J. MRVAN, RANKING
MEMBER**

Mr. MRVAN. Thank you, Chair Kiggans. I appreciate you holding this hearing today. I also want to commend the work of the subcommittee on whistleblower issues over the last two Congresses under the leadership of my colleague Representative Pappas. I am pleased to continue our robust oversight of the Office of Accountability and Whistleblower Protection, or OAWP, at the Department of Veteran Affairs.

Whistleblowers are unsung heroes of our government that expose corruption, abuse, fraud, and waste. Reporting evidence of wrongdoing from the inside is a courageous task, and whistleblowers often risk their livelihoods to expose critical issues. Their actions are paramount in holding the government accountable, and whistleblowers should be commended for the courage it takes to come forward. VA is entrusted with caring for our Nation's veterans. VA employees must feel empowered to call out problems, including wrongdoing. Managers need to be trained on rules and policies so they are also empowered to create and foster an open and transparent culture which benefits everyone from the public, to staff, to veterans that engage with VA.

Over many decades, Congress has authorized important institutions which are charged with the oversight and investigative authority with administrating whistleblower protection laws and with holding the Federal Government accountable. We have the VA Office of Inspector General (OIG), the Office of Special Counsel, and the Government Accountability Office (GAO) as longstanding parts of that oversight and accountability structure.

In 2017, Congress established another layer by creating the OAWP in response to a very serious and catastrophic accountability failure, which is the Phoenix Wait Time scandal. However, OAWP quickly failed at its mission due to egregious abuses by leadership in the former administration, which were investigated by the Inspector General (IG). Current leadership has had an uphill battle rebuilding the OAWP into an office that could possibly meet the mission established by Congress.

From my perspective, OAWP has done a commendable job. It is now staffed up with dedicated individuals who are taking its responsibility seriously. We are starting to see outputs that show the Office can and wants to do the job. From our oversight work, we can see significant progress on the investigations side of the Office. Over the past year, OAWP has worked to clear the backlog of complaints. Improvements have been made in case timelines and referrals. Now we are starting to see what is possible on the accountability side. We need more fidelity on how VA is implementing OAWP's recommendations and understanding if this work is leading to institutional change.

OAWP has a mandate to advise the Secretary on accountability matters and to do data analysis to identify trends and issue reports. We have seen some of the results of efforts in these areas, but there are a lot of areas that would benefit from the analytics work, such as the settlement agreements ensuring that disciplinary actions are being used equitably across the VA, and how the Department can further build a culture that values accountability. From reading the testimony of the organizations on the second panel, it is clear that a trust gap still exists between the whistleblower community and OAWP. I know OAWP is working in earnest to bridge the gap, but I would like to discuss a few more specifics about ongoing concerns with both VA and the good government groups.

I know there have been questions since the 2017 law was passed about ways to enhance OAWP's independence, and there are also fundamental questions about its purpose and how it should or

should not differ from other oversight investigations such as the IG, the OSC. I hope we can have a thoughtful discussion on these and other issues.

Whistleblower protection and accountability are different sides of the same coin. They should not be in conflict. We should work hard toward accountability so that employees do not have to become whistleblowers. They should be able to speak up about concerns and have those concerns taken seriously by management. This is the goal we all should be working toward because that is what we owe to the veterans. With that, I look forward to hearing from our witnesses and I yield back my time.

Ms. KIGGANS. Thank you, Ranking Member Mrvan. We will now turn to witness testimony. Testifying before us today on our first panel, we have Mr. Bruce Gipe, who is Acting Assistant Secretary at the Office of Accountability and Whistleblower Protection. We have Mr. Eric Calhoun, Director of the Investigations Division at the Office of Accountability and Whistleblower Protection. We have Mr. Ted Radway, Executive Director of Investigations and Acting Executive Director of Compliance and Oversight at the Office of Accountability and Whistleblower Protection. We have Ms. Emilee Collier, Chief of the Investigations and Prosecution Division at the Office of Special Counsel. We have Mr. Thomas Costa, Director on the Education, Workforce, and Income Security Team at the Government Accountability Office.

On our second panel, which will be next, we have Mr. Tristan Leavitt, President of Empower Oversight, Ms. Samantha Feinstein, International Director and Staff Attorney, Government Accountability Project, Mr. Joe Spielberger, Policy Counsel at the Project on Government Oversight (POGO), and Mr. Paul Pearson, Vice President, Whistleblowers of America.

For the first panel will the witnesses please stand and raise your right hand, and we will swear you in.

[Witnesses sworn.]

Ms. KIGGANS. Thank you. Let the record reflect that the witnesses answered in the affirmative. Mr. Gipe, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF BRUCE GIPE

Mr. GIPE. Thank you. Good morning, Chairwoman Kiggans, Ranking Member Mrvan, and distinguished members of the subcommittee, the Office of Accountability and Whistleblower Protection appreciates your dedication to protecting whistleblowers and strengthening VA's workforce. Our former Assistant Secretary, Maryanne Donaghy, recently retired, but her passion for our mission and hard work continues to be a major factor in our success. In her absence, I am honored to be here testifying before you today.

In 2019, when the Inspector General released his report, OAWP was an agency in crisis. That is no longer the case. We have implemented the IG's recommendations and made significant improvements, which are resulting in concrete benefits for the Department and the veterans we serve. We have greatly improved the quality of our investigations and our recommendations for discipline. In Fiscal Year 2021, 32 percent of our recommendations were not accepted by VA management. By contrast, this year, all, each and

every recommendation we made has been accepted by VA management in some form, excluding those cases where someone retired prior to discipline.

We have also improved the timeliness of our investigations, cutting the average number of days it takes to do an investigation from 251 days in 2021 to just 82 days this year. Last year, we established the Investigative Attorney Division. Our attorneys help us identify issues, properly scope investigations, and provide legal sufficiency review for our reports of investigation.

The Division also addresses an important issue that has been raised before in this forum, our independence from the Office of General Counsel (OGC). While OGC serves as the Department's legal counsel, they do not review our investigations or our recommendations for discipline.

Training is another major part of OAWP's mission. We lead the whistleblower training required by statute for all VA employees, and we provide supplemental in person training upon request, and we receive a lot of those requests. We also led the Department's successful effort to receive recertification under OSC's 2302(c) Certification Program.

We recently improved service to VA employees by establishing a whistleblower navigator. As the title suggests, this position helps potential whistleblowers navigate the various choices available to an employee raising concerns or reporting wrongdoing. We continue to operationalize the portions of our statute not tied to investigations. Under the Advice to the Secretary provision, we have produced a series of reports about how the Department can provide better services to veterans who have experienced military sexual trauma. The recommendations in these reports will have a direct impact on veterans and improve available services and care.

We also recently conducted our inaugural climate review, which examines the extent to which a facility or office is fostering an environment where whistleblowers feel safe raising concerns. The information gathered will allow VA management to proactively address issues and create an environment that is safe for whistleblowers. Our Compliance and Oversight Directorate fulfills our statutory mandate to track and record oversight entity recommendations. We track more than 7,700 individual recommendations, and we examine trends in OAWP complaints and patient care recommendations. We also track whistleblower settlement agreements. This work provides insight into potentially systemic issues that can be proactively addressed by the Department.

These accomplishments are a credit to our dedicated and hard-working employees. I think they are the best in the Federal Government. The strength of our workforce is highlighted by our recent scores in the Federal All Employee Viewpoint Survey. OAWP received the highest Organizational Health Index scores and ranked as the most improved of all VA central offices.

Chairwoman Kiggins, Ranking Member Mrvan, and distinguished members, I want to thank you for this opportunity to discuss our progress and our path forward. We are committed to partnering with you to help improve OAWP and the Department, and we look forward to any questions you have. Thank you.

[THE PREPARED STATEMENT OF BRUCE GIPE APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you very much. We are looking forward to hearing from the other members on the panel as well, but a vote has just been called in the House that we will need to go to, and so the subcommittee will stand in recess subject to the call of the chair. We will be back.

[Recess]

Ms. KIGGANS. All right, we will resume where we left off. Let us see. Ms. Collier, you are recognized for 5 minutes to provide your testimony.

STATEMENT OF EMILEE COLLIER

Ms. COLLIER. Good morning, Chair Kiggans, Ranking Member Mrvan, esteemed members of the subcommittee, and fellow panelists. Thank you for holding this important hearing on protecting the brave civil servants who blow the whistle at the Department of Veterans Affairs. The Office of Special Counsel is strongly committed to supporting veterans and to helping the VA create a positive whistleblowing culture for its employees. Ensuring that whistleblowers are empowered to speak up about potential misconduct without fear of reprisal enables the VA to best protect the health and safety of our veterans. Indeed, as we all know, whistleblowers are an indispensable resource for oversight entities like the VA's Office of Accountability and Whistleblower Protection, OSC, Congress, and other organizations seeking to promote good government and accountability.

The statutes governing OSC's work allow us to support whistleblowers in three main ways. First, OSC provides a safe channel for making disclosures of wrongdoing. Second, OSC protects Federal employees from prohibited personnel practices, including retaliation for whistleblowing. Third, OSC provides training and stands as a partner with other Federal agencies and Congress in upholding the merit system. One noteworthy aspect of OSC's role as a safe channel for disclosures is the high degree of whistleblower involvement in our process. OSC relies on information provided by the whistleblower to determine whether an agency should investigate the alleged wrongdoing. Once we receive the whistleblower's disclosure, we make every effort to respond quickly to those concerns.

In fact, OSC's disclosure unit decides whether an investigation is required within 45 days in virtually every case. If the allegations warrant further inquiry, the Special Counsel will refer the case to the head of the agency, who must investigate and provide a report to our office. OSC then gives the whistleblower an opportunity to review and provide comments on the report. After taking the whistleblower's input into account, the Special Counsel determines if the report is reasonable and statutorily sufficient.

Finally, OSC provides that determination, the report itself, and the whistleblower's comments to the President and to Congress. OSC also provides an avenue for employees who file a complaint if they believe they have suffered a prohibited personnel practice, including whistleblower retaliation. OSC's process for handling these cases differs significantly from our disclosure work in that on the prohibited personnel practice side, our staff conduct the required investigations themselves. OSC has enforcement authority

to pursue corrective and disciplinary action in these matters when it is appropriate, and our office has a highly effective alternative dispute resolution program, which also facilitates meaningful, often creative relief for employees who file with us.

As a chief in OSC's Investigation and Prosecution Division, I am especially pleased to note that in each of the last 2 fiscal years, staff working on prohibited personnel practice matters obtained record numbers of favorable actions, including individual and systemic relief, as well as disciplinary action. This combination of enforcement authorities and successful resolutions sends a strong message that OSC will conduct independent, objective inquiries in an effort to bolster whistleblower protections and the merit system as a whole.

While it is imperative that OSC maintain its investigative independence, there are many opportunities for cooperation with other departments and agencies. Indeed, a key element of OSC's approach to assisting whistleblowers is our robust outreach and training program, whereby we train Federal managers and employees on all facets of OSC's mission. In the last fiscal year, OSC conducted the highest number of trainings in the agency's history, increasing our visibility among those who may need our assistance.

In addition, OSC has regular meetings with representatives from OAWP, the VA's Office of the General Counsel, and Veterans Health Administration's Office of the Medical Inspector. During these meetings, we discuss individual cases that merit high level attention, as well as general issues that impact our work. Developing a good working relationship with the VA through open lines of communication has been critical in working toward our shared goal of promoting better government through transparency and accountability. We remain steadfast in our commitment to helping the VA and this committee provide the best possible service to veterans by ensuring that any reported wrongdoing receives appropriate consideration.

VA employees are among the greatest patriots in Federal service as they have devoted their professional lives to serving veterans, and of course, many are veterans themselves. It is imperative that they feel supported in doing their jobs without fear of reprisal. I am here today on behalf of OSC to describe how our work contributes to that important goal. Thank you again for holding this hearing. I look forward to answering any questions you may have.

[THE PREPARED STATEMENT OF EMILEE COLLIER APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Ms. Collier. Mr. Costa, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF THOMAS COSTA

Mr. COSTA. Thank you. Chairwoman Kiggins, Ranking Member Mrvan, and members of the subcommittee, thank you for the opportunity to discuss our work looking at VA whistleblower retaliation.

Federal employee whistleblowers can protect the government from fraud, waste, and abuse by reporting wrongdoing. However, whistleblowers may also risk reprisal from their agency for these disclosures. VA whistleblowers can choose to submit complaints of

retaliation both internally through OAWP and their union, as well as externally through OSC and the Merit System Protection Board's appeals process. OAWP investigates misconduct against senior agency officials, and the independent OSC is responsible for investigating whistleblower retaliation and other prohibited personnel practices across the Federal Government. My statement is based on our May report as well as related preliminary observations from our ongoing work, and will address 1) OAWP whistleblower retaliation investigations, 2) OSC's investigations of VA whistleblower retaliation, and 3) how VA resolves these cases using settlement agreements.

First, the number of whistleblower retaliation cases that OAWP receives has increased since Fiscal Year 2020, though the number of other types of cases has also increased. Specifically, OAWP received almost 580 whistleblower retaliation cases in 2020 and 740 in 2023, more than a 25 percent increase. We will continue to analyze this data in our ongoing work. Second, Paycheck Protection Program (PPP) cases arising from VA employees make up about one-third of OSC's workload. From fiscal years 2018 through 2022, over two-thirds of VA PPP cases involved allegations of whistleblower retaliation. However, unlike the increase in OAWP cases, the total number of VA whistleblower retaliation cases at OSC had generally decreased from about 900 to 515 over the last 5 years. That said, the percentage of whistleblower retaliation cases with a favorable action for the complainants has increased from 3 to 10 percent, which, according to OSC officials, has also contributed to longer case times.

If warranted, OSC recommends corrective action, such as back pay or damages, or it facilitates a settlement agreement between the parties. OSC cases can have multiple allegations that can each have a different closing disposition. However, OSC closed most cases due to insufficient evidence. Less than 1 percent were closed due to a settlement agreement.

Which brings me to my third point. Settlements can be initiated at any juncture in the complaint process. An official within the applicable VA office serves as a settlement official and decides on whether to proceed with negotiations. Once negotiations begin, VA's General Counsel provides the settlement official with legal counsel, while complainants can opt for legal or non-legal representation or represent themselves. Following an agreement, the settlement official and related officers monitor its implementation. This process largely mirrors that for employment discrimination allegations. However, according to VA officials, the Department does not have specific guidance for whistleblower retaliation settlements due to the absence of a statutory or regulatory mandate. In contrast, VA has guidance for employment discrimination settlement agreements in response to Equal Employment Opportunity Commission (EEOC) requirements.

Regarding some of the data around settlement agreements, OAWP began tracking them in 2021. However, it does not have a mechanism currently to monitor how long it takes to negotiate a settlement, and we plan to follow up with OAWP about these aspects of the process as part of our ongoing work.

As of September, VA had settled 71 whistleblower retaliation cases since they began tracking them. Most of the settlements included a monetary award of between \$2,000 and \$500,000 for the whistleblower, and they totaled around \$5.2 million. Additionally, the settlements may also have provided for salary adjustments or back pay. More than two-thirds of the settlements were filed with the Merit System Protection Board, suggesting many have gone through the appeals process. The remainder of the cases were filed with OSC, EEOC, VA's Office of Resolution Management, Diversity and Inclusion, and the Courts, with only one settlement addressing a complaint filed with OAWP.

Most settlements address complaints involving Veterans Health Administration (VHA), the largest of VA's administrations, but complaints come from across VA's offices. Specifically, 59 of the 71 settlements addressed allegations at VHA, while two or more cases involved the Office of Information and Technology, VA Central Office, and OAWP itself. This completes my statement, and I look forward to answering your questions. Thank you.

[THE PREPARED STATEMENT OF THOMAS COSTA APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Costa. We will now move to questions, and I yield myself 5 minutes first. Mr. Costa, what can you tell us about the volume of VA whistleblower retaliation investigations that are initiated through OSC? I know you spoke about it a little bit. How does that compare to OSC's caseload at other Federal agencies? In your remarks or answering questions, can you also just try to tease out a little bit more about why we need both? I know you mentioned about OSC is doing more with the kind of senior level cases, but, you know, is there like, a finite need for both of these organizations? It seems like they are duplicative in a lot of their responsibilities.

Mr. COSTA. Thank you. About one-third of OSC's caseload is from VA, so it is a significant portion of their caseload. VA, of course, is the second largest Federal agency, so that is not terribly surprising that it would be a significant portion. The number of total cases for the years, VA whistleblower cases, for the 3 years that we have in common for both OSC and OAWP is around 1,225 cases a year split between the two agencies. That number has gone up for OAWP as the number has gone down for OSC. The total numbers have remained relatively stable during that timeframe. The total number of OSC cases involving VA whistleblower over the last 5 years was 3,700. As I mentioned, most of those PPP cases involve VA whistleblower retaliation allegations.

Regarding the duplicative nature, there certainly is a duplicative nature to these two agencies. We have not looked into whether or not that duplication is warranted or not. It gives VA personnel multiple options to pursue their cases. There are some subtle differences that we are still looking into as part of our ongoing work as to when it might be more advantageous to go one route versus another. In addition, you also have the OIG, and in some cases, you also have Office of Resolution Management Diversity & Inclusion (ORMDI) where whistleblowers could also raise their concerns.

Ms. KIGGANS. Thank you. Mr. Gipe, could you also just address that issue of, you know, why we need the two separate offices?

Mr. GIPE. Excuse me. Absolutely. First of all, I would start with I think this is what Congress put in place, and they wanted to have more options rather than fewer options. I think that was a wise thing. I think if you look at the past 2 years and we talked about the rough start OAWP had at the beginning, and you spoke about trust in your opening statement, I think you can see that the trust is we are growing that trust. The good work we are doing is helping growing that trust.

I think it is a good option to have more options, but it is also a very good option for our employees who want to come to us. If you look at our stats, because we have increased both the recommendations that are being taken and we have increased the time that—decreased the time that it is taken to do investigations, we are working faster and better. Also, OSC tends to focus on corrective action, and we have, until now, focused more on accountability. I think that is another important part.

The last thing I will say is OSC looks at PPPs, whistleblower retaliation, PPPs, but we also look at senior leader misconduct and poor performance and retaliation by a supervisor. Our mandate's a bit larger. Then that is only one side of our house. We have a whole other side of the house that does other things. I think we add a lot of value. Thank you.

Ms. KIGGANS. Thank you very much. Mr. Calhoun, can you explain the reasons a VA whistleblower or victim of whistleblower retaliation would want to contact OAWP rather than OIG or OSC?

Mr. CALHOUN. Yes, ma'am. Thank you for the question. Congress gave us different authorities. Our authority is broader than OSC's when it comes to protecting whistleblowers within the VA. For example, they receive their authority from the Civil Service Reform Act, the Whistleblower Protection Act. None of those laws give them the authority to investigate general misconduct.

The burden that whistleblowers carry to prove their case is quite high. The next panel will be addressing that, as they have done historically, seeking stronger protections for whistleblowers. We have the ability to use VA policies to make sure that even if they do not reach that threshold of a meritorious whistleblower retaliation case, that VA supervisors and senior leaders are not violating policies in going after whistleblowers. Thank you, ma'am.

Ms. KIGGANS. Thank you. My time is up, so I will yield to Ranking Member Mrvan for 5 minutes.

Mr. MRVAN. Thank you, chairwoman. Mr. Costa, the GAO's testimony touches on the settlement agreement process. We have heard concerns from individuals that VA was not meeting the terms of settlement agreements, leaving employees with little resources. To what extent did GAO come across this issue during its review? Could the GAO look at this issue in its plan to follow up work?

Mr. COSTA. Thank you, Congressman. We are actually still in the middle of our review right now, so we have not actually delved too deeply into that particular issue. We do have copies of the 71 settlement agreements that I mentioned, and we are starting to comb through those. We also hope to be able to talk to VA officials that participated in that process, as well as some of the complainants who participated in that process to get an idea of where the pain points might be in the process. We have not yet been able to do

that work. We are looking forward to doing that in the coming months.

Mr. MRVAN. Okay. Mr. Gipe, you are aware of the issue I am talking about. I know that the OAWP just began monitoring settlement agreements in 2022. To what extent does this monitoring include ensuring that VA is upholding its end of the agreement?

Mr. GIPE. I am going to defer to my colleague, Mr. Radway, since he is the one who takes care of that. Sorry, got it?

Mr. RADWAY. Thank you. Currently, that is a future state that we would like to attain, Congressman. Right now, we are just tracking the settlement agreements and whether the basic terms, such as restoration of pay or leave have been fulfilled. We do not really have—there is a question as to whether we have statutory authority to go further than that. We are not quite tracking whether the settlement has been fully implemented or not yet.

Mr. MRVAN. Is there an entity that is tracking that to see that it is fully implemented?

Mr. RADWAY. Each settlement agreement has a provision alerting the complainant where they can reach out to if they feel that the settlement agreement is not being fulfilled. Typically, the EEO complaints, for example, the complainants would reach out to our EEO office. There is no other office that is designated to tracking enforcement of the settlement agreements.

Mr. MRVAN. One last follow up. Then your office in the future State will have what role, in your vision?

Mr. RADWAY. In our vision, we would be tracking enforcement of the settlement agreements, and a complainant could reach out to OAWP if they feel that the settlement agreement has not been fulfilled according to the terms of the agreement.

Mr. MRVAN. Okay. Mr. Gipe, the Four Corners recently sent a letter to the VA requesting data about the non-Section 714 authorities VA has used to take disciplinary action since 2017. VA's response was that it did not have this information broken down by authority and that its confidence in historical records was low. Although this was frankly not surprising, it is not acceptable. What work is OAWP doing in the data analysis space that might give us a better data moving forward?

Mr. GIPE. With 714, you know, the Secretary decided to stop using it because it had been chipped away at by the Merit Systems Protection Board (MSPB), the Federal Circuit, and the Federal Labor Relations Authority (FLRA). We are still taking actions—the VA is still taking actions, but it is under Title 5 rather than title—rather than 714.

However, for our part of what we do is the 714 hold is still something that is important to protect whistleblowers. Even though we are not using 714, we have done an internal policy to make sure that we are achieving the same goals, which is to protect whistleblowers. Then I will let Ted answer specifically about any numbers. We do not track numbers. I think that is big VA does that.

Mr. RADWAY. Yes, we are no longer requesting 714 holds, so we do not track. VHA would have numbers. We could get numbers for you, Congressman, if you are looking for specifics on 714 holds in the past.

Mr. MRVAN. Absolutely. With that, I yield back.

Ms. KIGGANS. Thank you, Mr. Mrvan. The chair now yields 5 minutes to Mr. Obernolte for questions.

Mr. OBERNOLTE. Thank you very much, Chairwoman Kiggins, and thank you to everyone for allowing me to wave onto this subcommittee. This is an issue that is very near and dear to my heart. I represent a district with five major military installations and nearly 40,000 veterans. I think everyone in this room shares my opinion that they are entitled to the fulfillment of the promises that we have made to them when they volunteered their service to our country. I think we are all on the same team that way.

One of the facilities that I represent is the Veterans Affairs Hospital in Loma Linda, which is in most respects an excellent facility. However, in recent years, whistleblowers have emerged to allege that there are supervisory employees there that are creating a hostile work environment. Obviously this is something that we want to avoid because we want to attract the best and the brightest to care for our veterans. If we allow a facility to establish a reputation as somewhere that is not a good place to work, then we are not going to get the best care for our veterans there.

An administrative board was convened to investigate this. They did a very thorough job. They interviewed 36 witnesses, 57 hours of testimony, over 4,000 pages of documents. At the end of this, they recommended that the supervisory employee in question be removed from employment at the VA. Okay? For the system has functioned exactly as intended.

However, unfortunately, nothing was done. Those whistleblowers came to my office earlier this year in understandable frustration about the fact that they had followed the rules, they had raised these concerns, a board had been convened, and then made a recommendation that was not followed by local administrative staff. When we looked into it, and Chairman Bost was great about partnering with my office, VA staff came out, interviewed these whistleblowers with me, and we were astonished to find out this is the third time this supervisory employee had been investigated. He had been recommended for termination multiple times and yet nothing was done.

I met with the director and what I was told is that the VA does not have the legal tools and authority necessary to follow through on that recommendation. I was a little astonished because obviously in 2017, Congress passed the VA Accountability and Whistleblower Protection Act, one of the pieces of legislation we have been discussing here in this hearing, for the express purpose of giving the VA the tools necessary to deal with situations like this. We are attempting to close some of the loopholes that were brought up. Chairman Bost, Chairwoman Kiggins, and I have partnered to introduce H.R. 4278, a bill that would give the VA more authority in this respect.

I want to talk to you about why this situation exists and what we can do to fix it. Mr. Calhoun, I guess I will start with you. Or you can pass the baton if someone else is more appropriate, but what would you say? Does the VA have the tools to effectively discipline and if necessary, terminate employees in situations like the one I described?

Mr. CALHOUN. Thank you, Congressman Obernolte, for the question. I could only—I do not know the full circumstances. I believe the individual you are referring to is outside of our investigative authority. I have very limited knowledge on that. I would say in previous testimony I have heard Human Resources and Administration (HR&A) and OGC say that they believe they do have the tools they need to take appropriate actions in those cases, but I do not have enough information to discuss the specific matter you are referring to.

Mr. OBERNOLTE. Okay. Well, if you could follow up—

Mr. CALHOUN. Yes, sir.

Mr. OBERNOLTE [continuing]. that would be much appreciated, because if the answer is no, you do not have the tools that you need, we want to make sure that we equip you with the tools that you need to make sure situations like this do not develop in other facilities.

Mr. CALHOUN. Yes, sir.

Mr. OBERNOLTE. Mr. Gipe, the whistleblowers that I spoke with are understandably frustrated with this situation, and they expressed to me something that I found even more alarming, which is kind of a hopelessness that they had brought this situation to everyone's attention and nothing was done. Because it is a supervisory employee, when a whistleblower raises their hand and says, something is wrong here, an investigation is conducted, their claim is substantiated, and yet nothing is done, they are fearful that that enhances the chance of retaliatory action against the whistleblower. I would share that too, if I were in their shoes, I would be afraid of that. What can be done to reassure whistleblowers like that retaliatory action will not take place if they come to OAWP with a complaint?

Mr. GIPE. Thank you for that question. I would follow up a little bit on what Mr. Calhoun said. If wrongdoing does take place, if misconduct takes place, there are definitely the tools available across the Federal Government, including VA, to deal with that. I do believe, my understanding is the person that you are referring to is not within our jurisdiction. Still, I can give you more of an answer on your specific question, and we would be happy to give you briefings on any of the specific cases in a private setting.

There are other things we can do to help improve the atmosphere and the culture of accountability there. It is a coincidence that this week we actually kicked off our second climate review, which again, looks at the atmosphere in a medical center to see if there is an appropriate atmosphere that people feel like they can raise allegations of wrongdoing. The climate review is a several step process. I believe that the survey went out this week, and will go for 2 weeks, and then we are doing our site visit in early December.

What you should do is think about this a lot like the All-Employee Viewpoint Survey. If you just get result—not you, but if, you know, the medical center gets results and just kind of looks at them, it does not help much. The results will show where there are weak points and opportunities for improvement. I think you can use those, the hospital can use those to make important changes. We can also increase our training there and make sure people

know all the options they have coming to us, coming to OSC, going to OIG.

If this was the Administrative Investigation Board (AIB) that I am thinking about, that you are talking about, that was not within our jurisdiction, it would be up to the responsible management official who was getting that to decide what discipline was appropriate.

Mr. OBERNOLTE. Right. Thank you. I see I am overtime. I want to emphasize we are all on the same team here, but we want to make sure that you have the tools necessary to set an environment where this does not happen again. Let us work together to make sure that that happens. I yield back, Madam Chair, thank you.

Ms. KIGGANS. Thank you very much, Mr. Obernolte. The chair now recognizes Mr. Pappas for 5 minutes.

Mr. PAPPAS. Thank you very much, Madam Chair. I thank our panel for their points that they have made here today. I do appreciate how challenging it is to change the culture in a big agency like VA. I will say that after 6 years of the establishment of OAWP, I think it is clear to me that there are major shortcomings within the initial law that was passed, certainly with its implementation over the last 6 years, because we have seen repeated leadership changes, missed deadlines, and lack of accountability, especially when it comes to enforcement of those settlement agreements.

We know that the Office of General Counsel plays a role in whistleblower issues, especially when it comes to implementation of these agreements. These agreements are binding, and they are signed by the Department and the whistleblower. Usually, VA agrees to take specific actions to reinstate and protect whistleblowers in these agreements.

Unfortunately, this committee has documented instances in which OGC does not comply with agency agreements and takes months or years to respond to settlement offers made by whistleblowers or causes other problems for them. It is critical to note that since OGC is tasked with protecting the Department, it has an inherent conflict of interest, I believe, with whistleblower cases when it is advising OAWP.

To address these concerns, I worked with then Ranking Member Mann on this subcommittee in the last Congress. We introduced a bipartisan bill, the Strengthening Whistleblower Protections at the VA Act. It was a bill that passed the House at that time. A key provision in this bill was providing OAWP with greater independence from VA leadership by establishing a separate Office for General Counsel for OAWP and would prevent the Department's OGC from directly or indirectly advising on OAWP cases.

I am wondering, Mr. Gipe, if you can reflect on that provision. It is something that VA did not support in the last Congress. Can you talk about this principle of independence and whether or not that would make a difference here as we think about some accountability and protection for those that are coming forward with information to help serve our veterans better?

Mr. GIPE. Yes, thank you for that question. Usually when I have heard issues raised about our independence, it really stemmed more from OGC being involved in our investigations and recommendations. We set up our own attorney division within OAWP

to make sure that we are doing our own work and OGC has nothing to do with it. Then on the backside, they are the ones, as you mentioned, trying to work out a settlement in some cases.

At this point, the way the law is written, we have our independence that way, but there is nothing where we are getting involved in the settlement agreement process. Usually there is the complainant, the agency, and OGC is representing the agency and trying to come to a settlement. We are just not involved in that part. I think the reason that VA, you know, opposed that provision was we thought we could take care of the other part with OGC staying out of our investigations.

There is some language in the Leadership, Engagement, Accountability, and Development (LEAD) Act that I think talks about us maybe having more involvement in settlement agreements. We really think probably it makes the most sense for OGC and VA to be involved in the actual reaching an agreement, and then we could be tracking and maybe helping those if they feel like there is a breach of the settlement agreement after the fact.

Mr. PAPPAS. Are there either provisions of that bill that I had mentioned, you mentioned another piece of legislation that is out there, other things that we can be doing to give you the tools you need to do your job better and to improve performance, because clearly there has been a lack of confidence in the numbers that we have seen over a lot of years.

Mr. GIPE. Well, I think a couple of things. That first of all, I think our numbers show that there is a little bit more confidence in us because I think we have been doing good work. I think we continue to get more cases, and I think that is a good thing. Whistleblowers and complainants have another place to come to, and you can see by those numbers that they are choosing to come to us quite a bit.

As far as the statute, I will tell you that I think the statute has really good bones and has a lot of provisions. As you have noted, we are a brand new, you know, 5 years, 5, 6 years or whatever we have been around, so we are really continuing to grow into this statute and operationalize it. I think there is a lot of good stuff there. We are trying to have continuous improvement. I think a lot of those improvements that we have been making do not really require statutory change. There is nothing that jumps out at me that says we must have this statutory change. At some point there might be, but I think we are still continuing to grow into and operationalize the statute, and we are heading on a good trajectory.

Mr. PAPPAS. Okay. Well, I hope you can appreciate the frustration on this side of the table, because we have heard similar statements from leader after leader after leader who have appeared before us talking about implementation of the statute and about getting it right for our whistleblowers, for VA employees, and ultimately for, and veterans. We want to continue to partner with you on that and identify areas where Congress needs to act to help shore things up. Thank you. I yield back.

Mr. GIPE. Appreciate that.

Ms. KIGGANS. Thank you, Mr. Pappas. I want to do one quick round of extra questions. I yield a few minutes back to myself if anyone else has any additional questions. Mr. Radway, for Fiscal

Year 2024, the OAWP requested a budget of approximately \$30 million. Approximately what percentage of this budget is for OAWP's investigations?

Mr. RADWAY. Chair Kiggans, I do not have that information. I do not believe that we have that handy.

Mr. GIPE. I could try.

Mr. RADWAY. Mr. Gipe.

Ms. KIGGANS. Okay.

Mr. GIPE. The breakdown of our office, our office, like most offices that do this work, OSC is the same way, it is mostly Full-Time Equivalent (FTE). The investigative side of the office is kind of the big side of our office. I think 80, 90, employees out of 131. It is the majority of our FTE are being paid for the investigations.

Ms. KIGGANS. The settlement agreements do not come out of that 30 million. Is that correct?

Mr. GIPE. Our tracking of the settlement agreements happens under the Compliance and Oversight Directorate, which is Ted's other job.

Ms. KIGGANS. Okay. Okay. Do you have a cost estimate about how much each disciplinary recommendation is costing?

Mr. GIPE. No, but we can get that for you.

Ms. KIGGANS. I am just curious. Okay, thank you. Mr. Costa, data you shared in your testimony showed that the proportion of VA OSC cases spiked in 2019, a few years after the creation of OAWP, and has since decreased. Do you attribute this change to OAWP or to other factors?

Mr. COSTA. I think it is hard to say since it is only been a few years. There appears to be a growing awareness, as has been suggested by OAWP, of what they are doing. They did address the OIG recommendations, and that might also be a factor in the growth of their cases. As I mentioned before, the total number of cases between OSC and OAWP remain about the same in the 3 years that we have comparable data. It went from about 1,300 to 1,200 cases. All within that range. It seems as though some people are moving more of their caseload to OAWP over the last few years.

Ms. KIGGANS. Thank you very much. I now yield to Ranking Member Mrvan for additional questions.

Mr. MRVAN. Mr. Gipe, if you could clarify something that is ringing in my head. Representative Obernolte asked a question about a specific case, and with your answer, you had stated and I want to separate the specific case to a general question. You had stated that an employee was not within the jurisdiction of the VA. Can you explain to me how someone who has an impact on others at a hospital does not have jurisdiction from the VA or does not fall under the jurisdiction of the VA?

Mr. GIPE. Sure. If that was exactly what I said, I misspoke. Let me give you the nuance that I meant to say.

Mr. MRVAN. Okay.

Mr. GIPE. VA would have jurisdiction over all VA employees for sure. If I said something else that was incorrect. What I was trying to say was that OAWP has jurisdiction to investigate senior leader misconduct. Senior leaders are defined in Directive 0500 and whistleblower retaliation by supervisors. If we get a lower-level employee who is not a senior leader and not a supervisor, then we do

not have jurisdiction to look into that case. Other parts of VA do. That is why you have administrative investigatory boards and other places like that where they can go.

Mr. MRVAN. Okay. As a point of clarification for me, in an employee who does not fall in the supervisor category, if someone is a whistleblower toward that employee, this bill does not cover that?

Mr. GIPE. It is another nuance. There is two things. If somebody is making a complaint against an employee for either misconduct, poor performance, or whistleblower retaliation, we would have it if it is a senior leader or a supervisor. If it is a straight whistleblower disclosure about someone or something, it is very much like OSC's disclosure unit. That is usually a situation where we are not investigating. The good example is somebody comes to us and says there is a bunch of cardboard in the stairway at a hospital and that is a potential fire hazard. That would be a straight whistleblower disclosure that would not need an investigation by us. We would refer that out to the hospital. They would take care of it and will report back to us and we would resolve that issue. It is a little bit of a nuance, but that is a big part of our work.

Mr. MRVAN. It is nuanced. I am going to ask this question. Say someone is abusive from one employee to the next employee, and that whistleblower does not get the same protections if it is not against a supervisor or it is just given to a different organization?

Mr. GIPE. If someone is abusive and, let us say, creating a hostile work environment and maybe it is not a senior leader or a supervisor, so it is not within our jurisdiction, there are still other ways that could be dealt with. That sounds that sounds more like an EEO case. ORMDI would have jurisdiction over that. There is also harassment provisions that, you know, there is a whole mechanism that deals with harassment issues.

Mr. MRVAN. In your opinion, would it be a better service to veterans in VA and the entire enterprise if the piece of legislation covered all employees, just not supervisor positions?

Mr. GIPE. It would give us a lot more work. You know, definitely if we are resourced to take care of that, we would be happy to meet that mission, but it would be a strikingly enlarged mission. Having said that there are processes in place for people experiencing those things. This is another situation where, for instance, either our whistleblower navigator or our intake and referral division, when they get these kinds of cases, they do not just say like, no, it is not ours. They will point people in the right direction so they can go where their problem can be addressed.

Mr. MRVAN. Last question. Does your organization then follow up on that—

Mr. GIPE. Yes.

Mr. MRVAN [continuing]. and document it?

Mr. GIPE. Yes, both. Our whistleblower referrals, their disclosures, we call them referrals and we refer them out, they come back to us. We close the case when we get information that that issue has been taken care of.

Mr. MRVAN. Thank you very much. With that, I yield back. Thank you.

Ms. KIGGANS. Thank you, Mr. Mrvan. The chair now recognizes Mr. Obernolte.

Mr. OBERNOLTE. Thank you, Madam Chair. I know I went over a couple of minutes last time. I will try not to overstay my welcome here. Mr. Calhoun, going back to you for a question. In looking at other investigations done by OAWP, it seems to me that only about 2 percent of OAWP's investigations result in a disciplinary action. Does that statistic sound about right to you?

Mr. CALHOUN. Thank you for the question. If I could just expand on that just a little bit to give you some perspective. If we go back to Fiscal Year 2021, 38 of our recommendations for discipline resulted in disciplinary action being effectuated. During that same timeframe, Fiscal Year 2021, 33 of OSC's investigations resulted in disciplinary actions being implemented.

I think there needs to be some context added to that when we start talking about percentages. To give you an idea, there is probably about 3 percent of our investigations that result in disciplinary actions, but many times that result in some type of recommendation. We make recommendations for both disciplinary and non-disciplinary actions. Our non-disciplinary recommendations also result sometimes in discipline being taken, but we leave that up to management's discretion as opposed to our authority to recommend disciplinary action, which has an oversight provision in it for Congress. Congress gets notified if we make a recommendation for disciplinary action and it is not taken by the VA.

Mr. OBERNOLTE. Okay. Just to be clear, when we talk about disciplinary action, that is not necessarily termination.

Mr. CALHOUN. That is correct.

Mr. OBERNOLTE. It could be something as mild as a written warning or counseling or something like that?

Mr. CALHOUN. Yes, sir. If I may, so going back to March 2019, we have received 35 allegations of whistleblower retaliation from Loma Linda. Of those 35 allegations, 11 resulted in investigations and five resulted in recommendations for disciplinary action. Of those five recommendations, one was fully implemented. On three of those events, the employee left the VA before it could be implemented. On the fifth, no action was taken by the VA.

Mr. OBERNOLTE. Okay. I do not know if that gives me comfort or it further alarms me if you are telling me 50 percent of your investigations of my facility in my district resulted in disciplinary action. You know, the point obviously is, even if it is 3 percent and not 2 percent, you know, to me that is a little alarming. If we are telling these whistleblowers who are coming forward, you know, at great personal risk to themselves and their reputations and feeding us information, if only 3 percent of the time their information results in, you know, action, disciplinary action being taken, you know, that is not very reassuring to them.

Just with the time I have left, Ms. Collier, if I could give you a platform if you could just tell us briefly just in case there are whistleblowers watching and I hope potential whistleblowers watching, and I hope that there are, can you tell us how a whistleblower would report retaliation to you and to the VA?

Ms. COLLIER. Absolutely. I am happy to speak about how whistleblowers can come forward with a retaliation claim, at least to OSC. We have multiple ways of filing a complaint. We recently launched a new web filing portal that I think makes the experience

quite a bit easier. There is a lot of education built in about what it requires to pursue and to prove a retaliation case under the statutes that we enforce.

Whistleblowers are welcome to go to our website and review those materials, fill out a complaint, which is then processed by OSC's Case Review Division. They are doing a very quick, like a few days check to make sure that we have jurisdiction over the allegation. Then from there, the case is assigned to the appropriate sort of programmatic unit in OSC, whether that be our disclosure unit where they are alleging wrongdoing or they are alleging a prohibited personnel practice like retaliation. From there, they have sort of a stable point of contact an OSC attorney that they can talk to as issues arise, if they have questions about the process and we work our way through our investigation.

Mr. OBERNOLTE. Right. If they think they have been retaliated against, they go to OSC, fill out an online form, and the case is investigated. What is that Uniform Resource Locator (URL)? Is it something that we can tell people? You just Google it?

Ms. COLLIER. Yes. OSC.gov, and there is a big green button that says file a complaint.

Mr. OBERNOLTE. Excellent. Thank you very much and thanks to all of our witnesses. I have enjoyed your testimony today. I yield back, Madam Chair.

Ms. KIGGANS. Thank you, Mr. Obernolte, and also thank you very much to our first panel. The first panel of witnesses is now excused. If I could invite the second panel to now take their seats at the witness table and we will take a few minutes just for transition. Thank you.

Welcome to all of our members on the second panel. Will you all please stand and raise your right hand and we will swear you all in.

[Witnesses sworn.]

Ms. KIGGANS. Thank you. Let the record reflect that witnesses answered the affirmative. You may be seated. Mr. Leavitt, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF TRISTAN LEAVITT

Mr. LEAVITT. Thank you, Chairwoman Kiggins, Ranking Member Mrvan, members of the subcommittee. I am very pleased to have been invited back before this subcommittee. I appear today as the President of Empower Oversight, a nonpartisan nonprofit that works closely with whistleblowers in order to enhance independent oversight of government and corporate wrongdoing.

You play a very important role in ensuring the VA properly cares for our Nation's veterans. I deeply believe the United States is a land of the free because of the brave women and men who serve in our armed forces. Our Nation owes them an immense debt of gratitude. Many know these famous words from Abraham Lincoln's Second Inaugural Address, "with malice toward none, with charity for all, with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in, to bind up the Nation's wounds." Less well known is what he said next, which for nearly 65 years served as the motto of the VA, "to care for him who shall have borne the battle, and for his widow and his orphan."

Eighteen years after these words were spoken, when Congress contemplated adopting a merit based civil service system, providing effective service to the American people was a prime motivation for Congress. Hiring based on merit would ensure taxpayers received the best value possible for their hard-earned tax dollars. As it is later been described, the other side of the merit coin is the removal of Federal employees who are not providing effective service.

When the Civil Service Reform Act of 1978 was signed into law 45 years ago, it included new provisions for removing underperforming Federal employees. It also established statutory protections for Federal whistleblowers, a first in our Nation's history. These provisions attempted to strike a balance that Congress continues to grapple with today how to ensure accountability for employee performance and misconduct without chilling whistleblower disclosures or enabling retaliation.

This is actually more difficult than it sounds since whistleblower retaliation is almost always disguised as appropriate discipline. Thus, the Civil Service Reform Act established the independent Merit Systems Protection Board to review adverse personnel actions and ensure whistleblowers are protected, while not impeding accountability for poor performers or employees committing misconduct. This administrative process provides a cost-effective way to consider these cases more so, in my opinion, than sending them directly to the Federal court system to be decided.

As a Senate confirmed member of the Merit Systems Protection Board, I considered case after case that hinged on the appropriateness of adverse personnel actions. I was always very mindful that we as adjudicators are fallible, that from time to time, facts buried in the record get overlooked despite our best efforts, and that no written record can perfectly capture all the complicated circumstances that often surround personnel actions. Nevertheless, I felt we tried our best to identify whistleblower retaliation in the cases we adjudicated while I was there.

By contrast, I am concerned that our current system does not strike the right balance to ensure accountability for Federal employees. This is a concern which this committee has grappled with for years. Both the Veterans Access Choice and Accountability Act of 2014 and the subsequent VA Accountability and Whistleblower Protection Act of 2017 were aimed at this issue. As I have indicated, I believe MSPB has a very important role to play in distinguishing whistleblower retaliation from proper accountability. In my opinion, it would be a serious mistake to further limit the categories of employees who have MSPB appeal rights. However, I do not have confidence that in non whistleblower cases, MSPB always contributes to protecting the other side of the merit coin by ensuring accountability.

My experience on the board led me to believe the most important variables for accountability are not timeframes, but rather how MSPB sees its role in the disciplinary process. In the seminal 1980 case on this issue, *Douglas v. Veterans Administration*, the board held that its function is to assure managerial judgment has been exercised within tolerable limits of reasonableness, not, as the board noted, to insist the balance be struck precisely where the board would choose if it were in the agency's shoes.

Yet, time and again since then, the board has displaced management's reasonable judgment regarding disciplinary decisions. What is more, appellate courts are only granted limited latitude by the statute in reviewing board decisions. For these reasons, I support statutorily lowering the standard of proof required for disciplinary decisions, not just at the Department of Veterans Affairs, but across the civil service. Standardizing relevant personnel laws for the civilian workforce would reduce confusion and contribute to greater consistency across the Federal Government.

That said, there is wisdom in the observation that you cannot fire your way to excellence. At the end of the day, the most important variable for any Federal agency or department may be cultivating a culture of excellence and accountability, both for employees and for supervisors. In my opinion, OAWP would likely be best situated to contributing to such a culture if investigating whistleblower retaliation was left to the experienced Office of Special Counsel, and OAWP focused on the big picture of addressing trends to VA. In my view, this is what will most help us to do the mission the VA was started for, to care for him who shall have borne the battle, and for his widow and his orphan. Thank you.

[THE PREPARED STATEMENT OF TRISTAN LEAVITT APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Leavitt. Ms. Feinstein, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF SAMANTHA FEINSTEIN

Ms. FEINSTEIN. Thank you. Chairwoman Kiggans, Ranking Member Mrvan, thank you for the opportunity to testify here today. My name is Samantha Feinstein, and I am a staff attorney and director of the International Program at Government Accountability Project, which is a nonprofit, nonpartisan organization dedicated to the protection of whistleblowers. First, I want to commend this committee for its bipartisan support of veterans and making sure that they get the medical care they deserve as it relates also to accountability and whistleblower protection, which is what we are speaking about here today.

It is going to take a change in culture, time, consistent oversight, and meaningful accountability to change from what our legal director, Tom Devine previously described as Death Valley for whistleblowers and turning that into, I think, what we are already seeing being implemented at the OAWP today, which has been remarkably improved, I think, since our previous testimony. It is also going to take some congressional legislation to institutionalize some of those improvements and changes that we are currently seeing.

I do want to give credit where it is due to Ms. Donaghy. It was under her leadership, OAWP has reinstated its Alternative Dispute Resolution program. The Whistleblower Stakeholder Liaison has been liaising with the whistleblower group. There is improved communication, which I think has much improved. They have been resolving cases meaningfully and operating more independently than in the past.

It is important that we go beyond the goodwill of good leaders and institutionalize some of these reforms that we are seeing

today. I just want to go through a few key reasons why I think legislation is really needed. First, of course, the cornerstone for a whistleblower office is independence. Legislation should ensure that they have full independence, even if counsel are more—operating more independently today than in the past when there were interferences with the office or overlap with the Office of General Counsel.

Second, is there is really no supplement for the Office of Special Counsel's investigative authority because they can litigate for enforcement of corrective actions, which right now the OAWP does not have the mandate to do and just structurally that would be kind of an awkward arrangement if they did have that authority. Next, is its important to close the loophole to ensure that state license board referrals as an act of retaliation is something that OAWP can stop from happening because then whistleblowers can be blacklisted then through these board referrals and that can stop them from getting meaningful employment sometimes for the rest of their career.

The next is just the level of transparency. While it has improved, it just needs to be institutionalized through legislation. They should have the same public results published like the Office of Special Counsel has.

Next, is OAWP's compliance analysis and reporting system. Findings should be made public and included in reports to Congress. Additionally, I think its really great that OAWP's Navigator program has been restored as well as their Alternative Dispute Resolution program. We would also like to see that institutionalized through legislation just to ensure that there is no backsliding in this regard.

I just want to conclude by saying there is still hope for OAWP and I think that a legislative fix can help ensure that there is no backsliding into the past here. I want to just remind the committee Office of Special Counsel was at one point an agency where the Special Counsel was coaching employers on how to get away with firing whistleblowers without getting caught. Today, with congressional amendments, it is the independent agency that it is today.

I do think that there is hope for OAWP through new legislation. I just want to say that we are happy at Government Accountability Project to be a resource for you and help finish what Congress has started last Congress. I just hope that it will continue to be a strong, bipartisan issue because I think we all agree that the veterans who have sacrificed so much for our country deserve to be supported and people who commit misconduct and violate patients' rights should be held accountable. Thank you.

[THE PREPARED STATEMENT OF SAMANTHA FEINSTEIN APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you very much, Ms. Feinstein. Mr. Spielberger, you are recognized for 5 minutes to provide your testimony.

STATEMENT OF JOE SPIELBERGER

Mr. SPIELBERGER. Chairwoman Kiggins, Ranking Member Mrvan, and subcommittee members, thank you for inviting me to testify here today on whistleblower protections and accountability

at the VA. It is important to be clear that when we talk about protecting VA whistleblowers, we are talking about the VA's ability to fulfill one of the most important mandates of the Federal Government to serve veterans, their families, caretakers, and survivors, and most critically, those veterans who are enduring some of the most personal and isolating circumstances. Survivors of Post-Traumatic Stress Disorder (PTSD), military sexual trauma, suicide ideation, traumatic brain injuries, exposure to Agent Orange and toxic burn pits, physical injuries, whether combat related or otherwise, and other mental, behavioral, and psychological issues that may very well impact them for life.

What does it mean when veterans are cutoff from life saving services or those services are compromised or denied? That is ultimately what is most at stake here. VA whistleblowers have exposed systemic corruption, widespread medical negligence, and abuse within the VA at large, and conflicts of interest, waste, and whistleblower retaliation directly from within the Office of Accountability and Whistleblower Protection itself, all of which implicates and undermines the fundamental health, safety, and dignity of the veterans they serve. That is why it is so important to protect VA whistleblowers, not just because we want accountability for those who have been denied their legal rights, although we certainly do, but because we are concerned about the entire system of care.

We are all aware of the historic problems with OAWP that have stemmed from its lack of independence from the VA. From the very beginning, POGO raised concerns about housing a central whistleblower office within the agency without proper independence. While it was clear that we needed more resources to address the rise of whistleblower complaints, we knew that without critical independence, the Office would not be able to provide the accountability that was and still is so sorely needed.

No internal whistleblower office can adequately protect whistleblowers without being independent of their parent agency, and disciplinary recommendations are only effective if they are enforceable. That is why, regardless of any other reforms, OAWP must have its own independent legal counsel with the authority to enforce discipline without agency interference. OAWP itself has concurred with this recommendation at times in the past, noting that coordinating with the agency's general counsel, at the very least, creates the appearance of a conflict of interest. During last year's subcommittee hearing on this topic, then Chairman Chris Pappas reported that in 2021, OAWP made 15 disciplinary recommendations against senior leaders who retaliated against whistleblowers, but the VA acted on only five, and only fully implemented one. Then Ranking Member Tracey Mann analogized, "the fox is guarding the hen house, and it is time for a change."

With respect to some of the testimony that we heard from the previous panel where the agency cites numbers of disciplinary recommendations the VA implements that also includes recommendations implemented only partially. Respectfully, this is still one of the many concerns we have had ever since the GAO's 2019 report showed the VA relying on advice from the Office of General Counsel, severely mitigated proposed discipline for any number of reasons.

If Congress simply required OAWP to provide more transparent data, that would really help determine whether the issue really is a lack of authority, as some have argued, or rather the VA's willingness to discipline its senior officials. We do appreciate many of the recent improvements to OAWP's internal practices, but any such improvements should be grounded into law and still are no substitute for OAWP's proper independence of the VA. We are very pleased to see the subcommittee engaging to address these issues. We encourage you to act urgently and provide OAWP with its own independent legal counsel and authority to enforce discipline against senior leaders and supervisory officials. That is the best way that we can protect whistleblowers and bring more accountability to the agency so the VA can provide the highest standard of care for America's veterans, their families, caretakers, and survivors. Thank you again for inviting me to testify here today. POGO is committed to working closely with the subcommittee on these issues, and I am happy to answer any questions.

[THE PREPARED STATEMENT OF JOE SPIELBERGER APPEARS IN THE APPENDIX]

Ms. KIGGANS. Great. Thank you very much, Mr. Spielberg. Mr. Pearson, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF PAUL PEARSON

Mr. PEARSON. Thank you. Chairwoman Kiggans, everybody here, my first time. My name is Paul Pearson. I am the Vice President of Whistleblowers of America. If you guys are not aware, Whistleblowers of America is, I think, the largest peer support network for whistleblowers in America. We work with whistleblowers in all kinds of industries, but veterans is core to our mission. We take—this subcommittee is very important to our organization. Jackie generally comes to these, but she was not able to make it today. I am here to represent whistleblowers. Jackie has submitted a statement for the record, eight-page statement. I am only going to go over a couple of things then I am going to give back my time.

H.R. 4461, we believe that it is draconian in its approach to justice and it tramples on the rights of the employees. We feel that H.R. 8510 that was proposed last year, is a much better piece of legislation and we would like to see that reintroduced.

The OAWP, we feel that it falls way short of its goals. According to a GAO investigation that found that while the rest of the Federal Government saw a decline in retaliation cases, the VA saw an increase. We would like to work more with the OAWP in the future. We work closely with the Commodity Futures Trading Commission (CFTC), GAO, and the Whistleblower Ombuds offices. I would like to invite Mr. Gipe or anybody at the OAWP to come to our conference or have a meeting with us. I yield my time.

[THE PREPARED STATEMENT OF PAUL PEARSON APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Pearson. We will now move to questions and I yield myself for 5 minutes. Mr. Leavitt, you have spent time at both OSC and the MSPB. Are they equipped to protect VA whistleblowers? Also, would additional resources allow OSC to better investigate whistleblower retaliation cases?

Mr. LEAVITT. Yes and yes. I mean, in terms of additional resources, that would allow them to investigate more. I do not know about better investigate. Where they have resources to investigate, where they do investigate, I think they do a very good job. You know, it is been noted that OSC's budget is about equivalent to that of OAWP. OSC has this jurisdiction for the entire Federal Government. OSC would certainly benefit from more resources, but they are very adequately equipped to conduct these investigations.

Ms. KIGGANS. I know that even listening to Ms. Feinstein and several of you talked about more independence for OAWP, you know, their own legal counsel and whatnot, you know, we have, this \$30 million request from them already is more to provide that autonomy that seems to be several of you are asking for. Is that going to be a larger ask then, as far as budgetary constraints? Is that something that we need to be thinking ahead or is that, to provide them with more independence and authority, OAWP, is it going to cost more?

Mr. LEAVITT. I do not have great insight into that. The challenge in part for all of this, right, is that OAWP is a new project, it is a new experiment. Each of these steps, including whether if you were to expand their jurisdiction, it is just unknown, right? With OSC, there is a track record of several decades of just figuring out what they can do with a certain amount of money.

Ms. KIGGANS. Okay. Let us see. Mr. Spielberg, in your testimony, you note that the percentage of VA prohibited personnel practices which involve whistleblower retaliation have generally gone up in the last few years. Can you discuss this data a little bit further?

Mr. SPIELBERGER. Congresswoman, I think we heard both from the GAO in their recent testimony and recent reports that both the number of whistleblower retaliation cases that whistleblowers have brought to OAWP have increased, as well as you are referencing the number of prohibited personnel practice cases that come from VA employees to OSC that include whistleblower retaliation. I think that just goes to show the deep concern and underscore the need that regardless of whatever improvements are being made to training and additional hiring and those types of internal policies and practices, those reforms are not, to this point, resulting in the results that we want to see on behalf of veterans and on behalf of whistleblowers.

Again, for any of those internal improvements, we would like to see those codified into law so any progress cannot be undone by future leadership. We go back to our primary recommendations about providing OAWP with its own independent legal counsel and with much greater authority to actually enforce disciplinary recommendations.

Ms. KIGGANS. Okay. Ms. Feinstein, you testified that while OAWP may have improved, you believe that the agency's investigative authority should still be transferred to OSC. What about the OAWP? What is it about the OAWP that has you convinced that it should not have investigative authority?

Ms. FEINSTEIN. I think that the difference is in terms of the issues we have been seeing with corrective action and that being taken and implemented and followed through. I think that it would

be difficult to give that authority to OAWP because their assistant secretary reports to the secretary of the agency. The Office of Special Counsel already has the ability to litigate, to enforce corrective actions if there is a finding of retaliation. I think that with the existing authorities that they have and the resources, but also adding that actually they could also benefit from increased resources as well. I do think that they are equipped to be conducting these investigations.

If I may also offer, I think in terms of the Alternative Dispute Resolution program, I know that OSC has been helping and I think maybe they have even been helping some inspectors' general offices with their ADR mediation programs. I think that this is something that we have seen, I want to say about 70, maybe even more than that, percent of OSC cases that go to mediation end up in some sort of successful settlement result. It is very successful. They are a very small agency considerably.

I think that investing resources into these types of programs gives whistleblowers, I think, more options in terms of what can provide them with some relief and also just speedier results, and it is just a lot more cost efficient for them. I think that is something to keep in mind as well.

Ms. KIGGANS. Great, thank you very much. Ms. Feinstein, you also mentioned you had, I think, five or six things that Congress could do just to encourage some of the work that OAWP is doing. Thank you for that pretty specific list.

Mr. Pearson, just curious as to your opinion too. OAWP seems to have made some progress on being more transparent about its work. Do you have any recommendations of what Congress can do to encourage this?

Mr. PEARSON. I think some more engagement with the target audience. Whistleblowers would be great. Generally, peer support really works when you are like really conversing and talking with people. I think opportunities like that would be really great.

Ms. KIGGANS. How about Mr. Spielberg, do you have any comments and specifics on what Congress can do to encourage more transparency?

Mr. SPIELBERGER. Yes, absolutely. You know, like my fellow panelists, POGO has advocated in the past for shifting investigative authority to the Office of Special Counsel. I think that would also free up agency resources. To make OAWP more of an educational and resource-based office, again, I would reiterate the need for more transparency with data. I think that is still a very big concern, that when we see the numbers of recommendations that are being implemented in total, in part, or if an employee is allowed to retire or leave the agency prior to any discipline being meted out, that is a cause for concern. I think we would like to see more transparency with that data, those numbers broken down more, which I think would again send a very clear message to Congress and the public again, whether the issue is a lack of authority or an inability to actually discipline or fire employees when it is necessary and appropriate.

Ms. KIGGANS. I do not disagree. I think transparency is always a good solution. Thank you very much. I am over time and I will yield to Ranking Member Mrvan.

Mr. MRVAN. Thank you, Chairwoman. Ms. Feinstein, we cannot understate how badly OAWP was misused under the previous administration. Your testimony acknowledges that the current leadership has made some improvements, but you do not seem to believe that OAWP can ever fulfill its mission. Is the solution in your view that unless OAWP becomes a completely independent office, it should really cease to exist?

Ms. FEINSTEIN. That is a good question and a tough one. I do think that independence is the cornerstone for a whistleblower office to be able to be effective and do its job and be a safe place for whistleblowers to go. I do think it does need complete independence. I also think that is exemplified by some of the issues that we have experienced in the past. If we have seen these problems come up and if we can get a legislative fix from Congress to ensure that we do not backslide into the past, then I do think that there is hope that we can get there and that it can fulfill its mission.

I think it is implementing in spirit, I think, what legislation like the Strengthening Whistleblower Protection of the Department of Veterans Affairs Act has proposed. We just want to make sure that that does not backslide, of course, into what we have seen in the past. I think the positivity I feel about the office stems from just seeing the history of the Office of Special Counsel and what that used to be like for whistleblowers and seeing the amount of time that it is taken for OSC to be the agency that it is today that is able to do, I think, a lot for whistleblowers. It just takes time sometimes, and legislative amendments over time to fix some of the loopholes that we find on some of the issues as they come up.

Mr. MRVAN. I guess my next question, if nothing changes about the structure of the office in terms of having its own council, but it continues to improve its operations, can it ever regain your trust or the trust of the whistleblower community?

Ms. FEINSTEIN. You mean in terms of having its own general counsel?

Mr. MRVAN. Mm-hmm.

Ms. FEINSTEIN. I am going to answer what I really think and—

Mr. MRVAN. Please.

Ms. FEINSTEIN [continuing]. I, you know, I have some concerns based on what we have seen in the past between the role of OGC and OAWP. I think that legislation that fixes that obviously would be preferred to stop that from happening. What we are seeing in practice is positive. I do not think it is the only or necessarily most important thing. This is my personal opinion.

I do think that trust can be restored with many of the other amendments that we would request in addition to restoring the Navigator program and ADR and making that permanent and institutionalized through legislation because that is something that was removed basically in the past and was recently brought back. We just do not want to see that happen again because obviously educating whistleblowers and helping them navigate the system and helping them resolve their disputes, hopefully amicably between the parties is always a really important part of an effective whistleblower program. I also feel like there is some hope in that respect.

We always advocate for best practices and we even think that past legislation could go further if you are so inclined. I do think that what we have seen, at least with the H.R. 8510 from last Congress does lay out some of the key things that we think are really important and it will surely again take time to test even some of these amendments and find more problems as we might in the future. Yes, I think that there is hope with the other amendments. That is a long answer to your question, sorry.

Mr. MRVAN. Thank you for telling us how you feel. Greatly appreciate it. With that I yield back.

Ms. KIGGANS. Thank you, Mr. Mrvan. I have a couple of other questions. I think we are waiting for one more member to arrive also. Mr. Leavitt, can you tell me in your opinion, why do you think so many VA whistleblowers are distrustful of the OAWP?

Mr. LEAVITT. Well, the history is a clear starting point and just specific examples, word of those kinds of things travels when someone feels like they are ill used in an office. I thought it was very interesting what Bruce Gipe, who I worked with at OSC and have great respect for, what he mentioned, which is that OSC is focused on corrective actions and OAWP is focused on accountability.

If you are a whistleblower and you are going to put your career on the line by coming forward because nothing is, you know, obligating you to do that, you do it because you want to see the agency be a better place. You want veterans to be cared for. If you are doing that, if you run the risk that there is not going to be corrective action for you, that you are not going to be made whole for doing what you did, why would anyone be motivated to do that? I think that is part of the dynamic that can drive any office.

You see it with IG offices also that are very motivated to find the wrongdoing and that is good, and they sometimes are not as focused on then making sure that the sources of their information are protected. That is where OSC excels and so that is where I think that is where distrust can stem from if someone goes to OAWP and again feels like it is a bad experience. I have spoken with a number of whistleblowers in that position over the years. That is the big challenge for any whistleblower is to make sure that they feel that it was worth it, what they did.

Ms. KIGGANS. Do you think that the transparency that we talked about, greater transparency and some of the results, would be beneficial then, for empowering whistleblowers or not?

Mr. LEAVITT. Transparency can be helpful. Again, my personal view is the cornerstone has to be that the whistleblower is protected. Transparency about what happens, I mean, that is studies show that that is the biggest deciding factor. Whether people come forward or not is actually not whether they will be protected, but whether the problem will be fixed. That is significant, but people also have to be protected in that. Having transparency about what happens, what the outcome is, is good as long as you also still have your job.

Ms. KIGGANS. Right, right, thank you. Thank you very much for that. Mr. Pearson, can you please discuss just briefly your opinion of some best practices of how we can ensure whistleblowers are empowered to speak out?

Mr. PEARSON. Yes, I mean, I think I would just definitely have to agree with what Tristan said about transparency and being protected. A lot of whistleblowers well, I will say a lot of people, they see what happened to their coworkers and they do not want to do the same thing. I am sure I will not blow the whistle. No, I cannot think of anything off top of my head. Sorry, I am nervous.

Ms. KIGGANS. Okay. Thank you for that. Then Mr. Spielberg last question, do you believe OAWP's Investigative Attorney Division will help create its independence? Is that enough of a step?

Mr. SPIELBERGER. I think that change is a significant step in the right direction, and that is the type of reform that should be better codified. My question would be what the legal grounding is for that change? If that is just an internal practice right now, that is exactly the type of legislative change that we would want to see to make sure that future leaders cannot undo that progress.

At the same time, we know that the Office of General Counsel still plays a role in determining and implementing discipline and settlement agreements. We still have a lot of concerns about their role in that process and seeing what can often be strong recommendations for discipline or corrective action coming from OAWP that then get mitigated down severely. Where, you know, we have seen more egregious disciplinary recommendations become more of a slap on the wrist, or, you know, verbal counseling, and that sort of thing. Again, it is a step in the right direction, but we want to codify those changes, and there is still much more that we need to do.

Ms. KIGGANS. Great. Thank you very much. I will yield to Mr. Rosendale for questions for 5 minutes.

Mr. ROSENDALE. Thank you very much, Madam Chair. Madam Chair, whistleblowers play a vital role in detecting and preventing corruption. They have saved our government millions of dollars by uncovering malfeasance and wrongdoing. Whistleblowers also help expose and shine a light on bad actors who violate their positions of power and trust.

In my State of Montana, whistleblowers played a key role in helping me bring about needed accountability and change that I am optimistic will lead to improved care for veterans across the state.

To recap, whistleblowers contacted my office in late 2022, raising serious concerns about mismanagement that was taking place at the Fort Harrison VA facility in Helena. After hearing directly from whistleblowers, I started to investigate these issues. One such egregious example included a doctor who was performing unauthorized surgeries that resulted in serious patient harm.

I worked closely with Secretary McDonough and Undersecretary Elnahal to ensure that an investigation was completed. The investigation led to an incompetent director being removed. In my book, that is what the definition of accountability is. She was removed. We are in the process of implementing many positive changes.

The whistleblowers who contacted my office showed immense bravery, and their efforts will lead to better care for thousands of veterans in Montana. Congress must do all that it can to protect whistleblowers and ensure that they are not subject to retaliation. One of President Trump's great accomplishments was to improve

the VA to ensure our veterans receive the care they have earned and deserve. One of his main focuses was protecting whistleblowers. President Trump directed the VA to establish the Office of Accountability and Whistleblower Protection and signed the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, which formally codified and expanded OAWP's functions.

While the idea was great in merit, the VA has failed to use the office properly.

Mr. Leavitt, in your testimony, you allude to the fact that the most important variable for any Federal agency or department is cultivating a culture of excellence and accountability for employees and supervisors. In your experience, how do you cultivate this?

Mr. LEAVITT. That is a million-dollar question, sir.

Mr. ROSENDALE. Actually, it turns out to be a multibillion-dollar question, unfortunately.

Mr. LEAVITT. You are absolutely right. It is clear and there is a lot of data on this, but it is clear that how we select managers and how we select leaders within agencies is probably the most neglected thing in our whole entire Federal Government. Finding good, you know, career civil service managers who can do the hard work of not just not retaliating that is good, that is the baseline, right, but also being good leaders and making the hard decisions, like firing people when it needs to be done. That is just not a skill that comes easily. A lot of people are conflict averse, and so I think that is where that culture starts.

Of course, leadership at the top matters. That is something that Empower Oversight has spoken up about with regard to the recent nominee and now current deputy secretary. You know, at the end of the day, the real building blocks, I think, start with the managers in every office and ensuring that they care about these things and they pursue excellence.

Mr. ROSENDALE. Before I go into hiring the right people, how does the poor culture result in worse care for veterans?

Mr. LEAVITT. In every way you can imagine. Obviously anywhere. We have all been in offices before where we feel we have seen people maybe not do their jobs or other things like that. When your job is not just approving a report or something else, but the care of veterans, there are all kinds of ways that I have seen it break down. At OSC specifically, a number of the, you know, of course the veterans wait time scandal in 2013 was because of whistleblowers who went to OSC. Then it became clear that it was a nationwide problem. In that case, it was particularly dire. There were other medical centers where it became clear that veterans were not receiving the care they needed.

I have read lengthy reports on flies infesting operation areas. I mean, you have all seen this. Veterans need good medical care, and the number of ways they can receive, you know, subquality care are innumerable. That is what we are—

Mr. ROSENDALE. We have substandard care for the veterans, and we have substandard mental health state morale for the other employees that are surrounded by, okay, these folks that are underperforming. You astutely point out that hiring based on merit en-

sures taxpayers receive the best value possible for their hard-earned tax dollars.

The Biden Administration is filled with bureaucrats who were hired not on merit, but based on sex, race, and what they do in their bedroom. How does that harm the taxpayer? We have witnessed how it hurts the organization, and we have witnessed how it hurts the veterans. How does it hurt the taxpayer?

Mr. LEAVITT. Well, in any administration, if people are not hired on the basis of being the best candidate, then the taxpayers are losing out. That can range from people getting through who are completely not qualified and you see misconduct. That is been a concern, you know, since the 1800's, that is when the civil service system was created. You also, if someone is just again, not—there are better people out there who are better candidates, those are the people that are going to provide the best service for the taxpayers. That is what taxpayers deserve, is to just have the best. They expect that government, regardless of party, is going to do the best that it can to provide the—fulfill the missions that it is assigned. That is why merit to me is such a key thing. It is truly the lodestar of civil service and personnel issues.

Mr. ROSENDALE. Thank you very much. Thank you for attending today. Madam Chair, I yield back.

Ms. KIGGANS. Thank you, Mr. Rosendale. Thank you very much to our panel members from this panel and the previous panel just for taking time to answer our questions today. We are all here to ensure VA whistleblowers are protected and to ensure every veteran receives the quality care and benefits they have earned. I appreciate all your comments. I know we have work to do now with staff to hopefully put in place some of those changes so we can make whistleblower protections and just accountability throughout the VA system better.

I look forward to working with this committee to ensuring that structures are in place to achieve this worthy goal. I ask unanimous consent that all members shall have 5 legislative days in which to revise and extend their remarks and include any extraneous material. Hearing, no objections, so ordered. This hearing is now adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]

A P P E N D I X

PREPARED STATEMENTS OF WITNESSES

Prepared Statement of Bruce Gipe

Good Morning Chairwoman Kiggans, Ranking Member Mrvan and distinguished Members of the Sub-Committee on Oversight and Investigations, thank you for the opportunity to provide testimony on the Office of Accountability and Whistleblower Protection (OAWP). Accompanying me are Mr. Ted Radway, Executive Director, Investigations and Acting Executive Director, Compliance and Oversight, and Mr. Eric Calhoun, Director, Investigations Division. OAWP appreciates Congress' long-standing support and unwavering dedication to strengthening VA's workforce. As you know, protecting VA whistleblowers is paramount, not only to the integrity of this Department, but to the health and well-being of the Veterans we serve. We thank Congress for continuing to extend opportunities to partner in our shared goal of maintaining an accountable and safe environment for VA employees.

The 2017 statute establishing OAWP gave VA critical tools to build an office of highly specialized employees to investigate senior leader misconduct and whistleblower retaliation by supervisors, receive and refer whistleblower disclosures within the Department, advise the Secretary on matters of accountability, track and confirm implementation of audits and much more. Today, VA is proud to share the significant strides OAWP has made over these last few years to operationalize the statute and bring value to VA. OAWP continues to improve upon its execution of these important accountability tools given by Congress.

1. Intake and Referral Division

OAWP's Intake and Referral Division (IRD) receives all disclosures and complaints filed with OAWP. In the last fiscal year, IRD reviewed over 2,700 submissions. In September 2023, OAWP completed a refresh to the online complaint form that focused on improving the end-user experience and reducing redundancies in the form.

Complainants are contacted within 3 days of receipt to initiate development of their disclosure. Veteran complainants seeking assistance with health care or benefits receive a direct referral to the client relations team of either the Veterans Health Administration (VHA) or the Veterans Benefits Administration (VBA). In the last year, IRD assisted over 180 Veterans by referring their patient care and benefits concerns. Because IRD is the frontline for receiving Veteran complaints and there are times when Veterans may be in crisis when communicating with IRD staff, IRD has partnered with the Veterans Crisis Line office to obtain first-hand Suicide Prevention training. This comprehensive training has improved IRD staff's abilities to be better prepared to recognize and assist Veterans in crisis for the purpose of referring the caller to the Crisis Line.

IRD works with a complainant to fully develop their disclosure and to determine if the matter is appropriate to refer to an Administration or Staff Office for action or if it falls within the scope of OAWP's investigative authority. In the last year, IRD transmitted 552 submissions that were outside of OAWP's scope (for example, criminal matters or health care concerns) to the Office of the Inspector General (OIG), Office of the Medical Inspector (OMI) and VA Administrations and Program Offices.

Whistleblower disclosures received by OAWP that do not involve allegations of whistleblower retaliation by a supervisor or senior leader misconduct are developed by the IRD and referred to the appropriate VA Administration for investigation. There were 663 whistleblower disclosure allegations referred in the last fiscal, and 174 allegations were substantiated by the VA Administration that conducted the investigation. Of the referred substantiated whistleblower disclosures, 86 percent involved violations of law, rule, regulation. IRD closed a total of 299 whistleblower disclosure cases last year within an average of 115 days from the date the disclosure was filed with OAWP. Disclosure referrals are closed when OAWP receives a satisfactory response from the Administration or Program Office, which includes a plan for addressing the merits of the disclosure with appropriate remedial actions.

IRD is responsible for the preliminary review of all matters that involve whistleblower retaliation or senior leader misconduct or poor performance allegations. We receive these matters directly from VA employees, applicants, Veterans, concerned citizens and other entities. When IRD receives matters that are within OAWP’s investigative scope, the case is quickly transferred to the Investigations Division on average within 9 days. In the last fiscal year, IRD transferred 775 cases involving allegations of whistleblower retaliation or senior leader misconduct or poor performance to the Investigation Division for further review.

2. Investigations

OAWP’s investigations of senior leader misconduct, poor performance, and whistleblower retaliation; reports of investigation; and disciplinary recommendations have improved immensely in recent years. These improvements include more timely investigations and higher quality reports of investigations and disciplinary recommendations, resulting in OAWP’s disciplinary recommendations being accepted by management in a far greater percentage of cases than in recent years.

In Fiscal Year (FY) 2021, OAWP investigations took, on average, 251 days from the date of case receipt to the date of case conclusion, and for cases resulting in a report of investigation the average was 496 days to case conclusion. For FY 2023, OAWP’s investigations took an average of 82 days from the date of case receipt to the case date of conclusion, and for cases resulting in a report of investigation the average was 180 days.

OAWP	FY 2021 Investigations Averages	FY 2023 Investigations Averages
Days from date of case receipt to date of case conclusion	251	82
Days for cases resulting in a report of investigation	496	180

In fiscal year (YY) 2021, OAWP disciplinary recommendations were not implemented in 32 percent of cases, but in calendar year 2023, some form of disciplinary action (or voluntary retirement prior to discipline being taken) was taken in 100 percent of cases in which OAWP made a disciplinary recommendation. In some of those cases the recommended discipline was modified because the deciding official considered the Douglas Factors, which are mitigating and aggravating factors established by the Merit Systems Protection Board that must be considered by the deciding official when determining the appropriate disciplinary action, but which are not taken into consideration when OAWP makes a disciplinary recommendation.

	FY 2021	FY 2022	FY 2023	CY 2023
Implemented in full or part // Left VA prior to discipline	49 (68%)	22 (73%)	24 (92%)	19 (100%)
Not Implemented	23 (32%)	8 (27%)	2 (8%)	0 (0%)
Total	72	30	26	19

There are many reasons for the improvement in OAWP’s investigations and disciplinary recommendations, including:

- Development of standard operating procedures based on the Council of the Inspectors General on Integrity and Efficiency quality standards for investigations;
- System enhancement to provide efficiencies and automation in support of the investigative workflow;
- Development and implementation of standardized basic training and advanced training for all OAWP investigators;
- Staffing and structuring the Investigations Division to meet the workload; and
- Strengthened reports of investigation which are more informative and educational to management.

3. Investigative Attorneys Division

OAWP's independence is crucial to avoiding a conflict of interest, or the appearance of one, in VA investigations. OAWP was founded on these principles to ensure that whistleblower and senior leader misconduct and poor performance investigations are not led by VA Medical Center or Program Office leadership, who may have a conflict of interest in the investigations. To help ensure independence, in 2022 OAWP created the Investigative Attorneys Division (IAD), which is comprised of attorneys highly skilled in whistleblower and/or Federal personnel law. IAD reports to OAWP's Assistant Secretary, through the Executive Director for Investigations, and its attorneys are independent of VA's Office of General Counsel. IAD assists investigators in allegation reviews, investigative planning and in the drafting and finalization of investigative reports and recommendations. OAWP's use of specialized attorneys to assist the investigators throughout the investigations has led to more properly scoped, efficient and timely investigations, and has contributed to the greater adoption of OAWP's disciplinary recommendations in FY 2023.

VA recognizes and respects the independent authorities of OAWP. OAWP is not subordinate to VA's Office of General Counsel. OAWP relies on IAD for investigative support and legal sufficiency review of its investigations, and the Office of General Counsel does not participate in OAWP's investigations or in discussions on case-specific disciplinary recommendations.

4. Alternative Dispute Resolution Pilot and Section 2302(c) Certification Program

VA is excited to share that beginning in October 2023, OAWP [is launching] an Alternative Dispute Resolution (ADR) Pilot Program. The initial focus of this pilot ADR program will be both on whistleblower retaliation cases and cases involving allegations of senior leader misconduct or poor performance, which will allow for potential corrective action to be addressed upfront via a binding settlement agreement. If mediation is not successful, the case returns to OAWP for investigation. All mediation cases will be subject to an accountability review after a successful mediation.

This year, VA became re-certified under the U.S. Office of Special Counsel's (OSC) 5 U.S.C. § 2302(c) certification program. OAWP obtained this certification for VA and continues to ensure the annual requirements of 2302(c) certification are met. OSC's 2302(c) Certification Program allows Federal agencies to show that they meet the statutory obligation of informing their workforce about the rights and remedies available to them under the Civil Service Reform Act, the Whistleblower Protection Act, the Whistleblower Protection Enhancement Act, the new requirements of the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and other related laws.

5. Training and Outreach

Under 38 U.S.C. § 733, VA is required to provide training to employees on whistleblower rights and protections. In FY 2023, approximately 405,154 VA employees and 43,771 supervisors were compliant with OAWP's mandatory education on whistleblower rights and protections provided through our online education platform (Talent Management System).

In addition to the online training, OAWP also provided live, supplemental training to the employees of VA. In FY 2021, OAWP provided live, supplemental training on whistleblower rights and protections to 1,535 employees. Just two years later, in FY 2023, OAWP provided 169 sessions of this live, supplemental training to 13,210 employees, an 861 percent increase. Additionally, in April 2023, OAWP started conducting in-person supplemental training sessions for supervisors in VA. OAWP conducted 18 sessions across the country and reached over 1,700 supervisors in-person.

At the start of FY 2023, OAWP established a new position, the Whistleblower Navigator, that is designed to assist whistleblowers navigate the myriad of entities who have investigative authority. The Whistleblower Navigator provides direct information on OAWP's processes, procedures and practices, and helps to identify relevant laws and policies that may affect whistleblowers.

In addition to supporting whistleblowers, OAWP recently initiated a senior leader outreach and education program directed at senior leaders in VA facilities across the Nation. These live, in-person presentations include instruction on whistleblower rights and protections and OAWP recommendations. These presentations also provide an opportunity for meaningful discussions with VA leadership on OAWP's investigations and recommendations, management's obligations and ways OAWP can continue to make improvements.

6. Advice to Secretary

Through its Compliance and Oversight Directorate, OAWP provides advice to the Secretary on all matters relating to accountability and similar matters that affect public trust. Under the advice to the Secretary provision, the Directorate also re-

views the efficiency and effectiveness of VA programs and operations across the enterprise. In FY 2023, OAWP provided four inaugural reports to the Secretary under this provision. Three reports focused on the critical role of VHA's Military Sexual Trauma (MST) Coordinators, specifically, training of MST Coordinators, resources for and accountability of MST Coordinators, and governance of the MST Coordinator program. The fourth report focused on VBA's use of trauma-informed communications in its claims correspondence with Veterans. VHA and VBA are taking steps to address OAWP's MST recommendations.

7. Climate Review and Tracking Data

In 2023, OAWP conducted its inaugural climate review to evaluate whether VA facilities and Program Offices are fostering an environment where employees feel safe raising concerns. OAWP climate reviews are critical to VA's accountability efforts. When employees feel empowered to blow the whistle on waste and misconduct, their disclosures can lead not only to a more accountable workforce, but to powerful systemic changes that ultimately improve the way VA serves the country's Veterans.

The Compliance and Oversight Directorate is also comprised of a Compliance Analytics and Reporting Division (CARD) that fulfills the statutory mandate to track and record oversight entity recommendations. To date OAWP has tracked and recorded at least 1,369 reports with 7,748 individual recommendations from OIG, OMI, OSC and the U.S. Government Accountability Office (GAO). CARD has begun work on reviewing and confirming implementation of recent recommendations and tracking disciplinary recommendations to identify cases of potential senior leader misconduct within OAWP's authority to investigate. The Directorate is working on operationalizing the statutory requirement to review recommendations by planning performance audits or reviews that would look at whether the VA's implementation of OIG, OMI, OSC and GAO recommendations actually solved the underlying problems identified by those oversight entities, and whether systemic issues need to be addressed.

CARD also produces calendar year and quarterly reports examining trends in OAWP complaints and is creating a real-time dashboard that will be available to the field to identify critical areas/issues (including potential Climate Review sites). The trend analyses can be used to spot burgeoning problems and identify areas where education or focused attention would be productive. At the beginning of FY 2023, CARD presented its inaugural meta-analysis of oversight entities' patient care recommendations across Veterans Integrated Services Networks (VISN), essentially a composite of OIG, OMI and GAO reports on patient care issues, but consolidated by area of health care and VISN. This adds value and drives accountability by giving VISN directors insight into potentially systemic issues across their VISN before they become substantial problems.

CARD is also responsible for tracking whistleblower retaliation settlement agreements. Once the agreements are received from OGC, CARD enters them into its custom data base, recording the underlying cases resolved by the settlement and the amount of settlement, among other things. To date over 65 settlements have been recorded. Settlements above a certain financial threshold amount are sent to the Investigative Attorneys Division for an accountability review—to determine if the underlying conduct that gave rise to the settlement needs to be addressed. If so, OAWP would conduct an investigation and make a disciplinary recommendation as appropriate.

Conclusion

OAWP could not have done any of this without our incredible staff. OAWP's ongoing employee engagement efforts aim to create a supportive and fulfilling work environment where employees can thrive personally and professionally. By fostering a culture of active participation, open communication and continuous improvement, we are enhancing employee satisfaction and strengthening our organization's overall health.

OAWP's Employee Engagement and Organizational Health Index (OHI) scores are captured through the VA's annual All Employee Survey (AES). During the 2023 AES (polled in June 2023), 89 percent of employees participated in the survey. OAWP received two awards as the highest Organizational Health Index scoring site and the Most Improved site for 2023 for all VA Central Offices. The combined measures of employee engagement and our OHI score are a testament to OAWP's employees and their ongoing commitment to the VA I-CARE values of Integrity, Commitment, Advocacy, Respect and Excellence.

VA is committed to accountability and OAWP employees work hard every day to continue to operationalize the tools provided in the Accountability and Whistle-

blower Protection Act of 2017 to protect whistleblowers and create a culture of accountability. Because of this hard work, OAWP will continue to add value and serve as an asset to the Department, its whistleblowers and employees, and the Nation's Veterans.

Chairwoman Kiggans, Ranking Member Mrvan and Members of the Subcommittee on Oversight and Investigations, thank you for allowing VA the opportunity to discuss the progress of OAWP.

Prepared Statement of Emilee Collier

Good morning Chair Kiggans, Ranking Member Mrvan, esteemed members of the subcommittee, and fellow panelists.

Thank you for holding this important hearing on protecting the brave civil servants that come forward to blow the whistle at the U.S. Department of Veterans Affairs (VA). The U.S. Office of Special Counsel (OSC) is strongly committed to supporting veterans and to helping the VA create a positive culture of whistleblowing for its employees. Ensuring that whistleblowers are empowered to speak up about potential misconduct without fear of reprisal enables the VA to best protect the health and safety of our veterans.

Indeed, as we all know, whistleblowers are an indispensable resource for oversight entities like the VA's Office of Accountability and Whistleblower Protection (OAWP), OSC, Congress, and other organizations seeking to promote good government and accountability. The statutes governing OSC's work allow us to support whistleblowers in three main ways. First, OSC provides a safe channel for making disclosures of wrongdoing. Second, OSC protects federal employees from prohibited personnel practices, including retaliation for whistleblowing. Third, OSC provides training and stands as a partner with other federal agencies and Congress in upholding the merit system.

One noteworthy aspect of OSC's role as a safe channel for disclosures is the high degree of whistleblower involvement throughout the process. OSC relies on information provided by the whistleblower to determine whether an agency should investigate the alleged wrongdoing. Once we receive the whistleblower's disclosure, we make every effort to respond quickly to those concerns. In fact, our Disclosure Unit decides whether an investigation is required within 45 days in virtually every case. If the allegations warrant further inquiry, the Special Counsel will refer the case to the head of the agency, who must investigate and provide a report to our office. OSC then gives the whistleblower an opportunity to review and provide comments on the report. After taking the whistleblower's input into account, the Special Counsel determines if the report is reasonable and statutorily sufficient. Finally, OSC provides that determination, the report itself, and the whistleblower's comments to the President and to Congress.

OSC also provides an avenue for employees to file a complaint if they believe they have suffered a prohibited personnel practice, including whistleblower retaliation. OSC's process for handling these cases differs significantly from our disclosure work in that, on the prohibited personnel practice side, our staff conduct the required investigations themselves. OSC has enforcement authority to pursue corrective and disciplinary action in these matters when appropriate. And our office has a highly effective alternative dispute resolution program, which also facilitates meaningful, often creative, relief for employees who file with us. As a chief in OSC's Investigation and Prosecution Division, I am especially pleased to note that in each of the last two fiscal years, staff working on prohibited personnel practice matters obtained record numbers of favorable actions, including individual and systemic relief, as well as disciplinary action. This combination of enforcement authorities and successful resolutions sends a strong message that OSC will conduct independent, objective inquiries in an effort to bolster whistleblower protections and the merit system as a whole.

While it is imperative that OSC maintain its independence in its investigative work, there are many opportunities for cooperation with other departments and agencies. Indeed, a key element of OSC's approach to assisting whistleblowers is our robust outreach and training program, whereby we train federal managers and employees on all facets of OSC's mission. In FY23, OSC conducted the highest number of trainings in the agency's history, increasing our visibility among those who may need our assistance. In addition, OSC has regular meetings with representatives from OAWP, the VA's Office of General Counsel, and the VHA Office of the Medical Inspector. During these meetings, we discuss individual cases that merit high-level intervention, as well as general issues that impact our work across the board. Developing a good working relationship with the VA through open lines of communication

has been critical in working toward our shared goal of promoting better government through transparency and accountability.

We remain steadfast in our commitment to helping the VA and this committee provide the best possible service to veterans by ensuring that any reported wrongdoing receives appropriate consideration. VA employees are among the greatest patriots in federal service, as they have devoted their professional lives to serving veterans, and, of course, many are veterans themselves. It is imperative that they feel supported in doing their jobs without fear of reprisal. I am here on behalf of OSC to describe how our work contributes to that important goal.

Thank you again for holding this hearing. I look forward to answering any questions you may have.

Prepared Statement of Thomas Costa



United States Government Accountability Office

Testimony
Before the Subcommittee on Oversight
and Investigations, Committee on
Veterans' Affairs, House of
Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
Thursday, October 19th, 2023

VA WHISTLEBLOWERS

**Retaliation Claim
Investigations and
Settlement Agreements**

Statement of Thomas Costa, Director,
Education, Workforce, and Income Security

GAO Highlights

Highlights of [GAO-24-107090](#), a testimony before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives.

Why GAO Did This Study

Whistleblowers can help protect the public interest by reporting allegations of wrongdoing, such as a violation of law or gross mismanagement. While whistleblowers potentially safeguard the government from fraud, waste, and abuse, they may risk reprisal from their agencies for disclosures, such as demotion, reassignment or termination. VA is one of the largest federal agencies and employs around 400,000 people across hundreds of medical facilities, clinics, and benefits offices. Whistleblowers at the VA can file complaints of retaliation internally, through the agency's OAWP, or externally with other agencies, such as OSC. In some cases, whistleblowers will enter into a settlement agreement with VA to resolve the dispute.

This testimony summarizes GAO's May 2023 report on VA whistleblower retaliation claims and settlements, as well as preliminary observations from related ongoing work. Specifically, this testimony examines: 1) the characteristics of OAWP whistleblower retaliation investigations, 2) the characteristics of OSC whistleblower retaliation investigations, and 3) how VA resolves such allegations through settlement agreements.

GAO reviewed OSC and VA documents, interviewed agency officials, analyzed OSC case management system data from fiscal years 2018-22, which were the most recent data at the time of the report. In addition, as part of our ongoing work, we collected additional information on whistleblower retaliation claims and settlements from OAWP's Matter Tracking System.

View [GAO-24-107090](#). For more information, contact Thomas Costa at (202) 512-4769 or costat@gao.gov.

October 19, 2023

VA WHISTLEBLOWERS

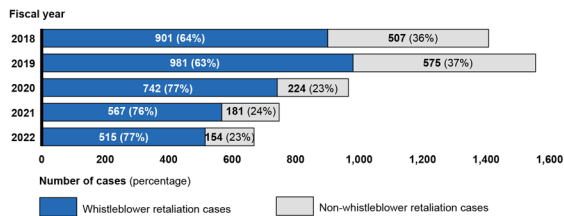
Retaliation Claim Investigations and Settlement Agreements

What GAO Found

The number of whistleblower retaliation cases that the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection (OAWP) has received increased since fiscal year 2020. The number of other cases also increased. Specifically, OAWP received 577 whistleblower retaliation cases in fiscal year 2020 and 736 in fiscal year 2023. The non-whistleblower retaliation cases that OAWP received increased from 1,594 in fiscal year 2020 to 1,972 in fiscal year 2023.

Office of Special Counsel (OSC) investigations of allegations of whistleblower retaliation from VA employees have decreased in number and have increasingly closed with a favorable action that benefits the complainant (i.e., whistleblower). Most OSC investigations of complaints from VA employees included allegations of whistleblower retaliation. From fiscal years 2018 through 2022, 69 percent of OSC cases involving VA employees included allegations of whistleblower retaliation. Specifically, OSC received 901 whistleblower retaliation cases involving VA in fiscal year 2018 and 515 in fiscal year 2022 (see figure). The percentage of these cases with a favorable action increased from 3 percent to 10 percent.

Volume of Office of Special Counsel (OSC) Cases Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

According to VA OGC officials, the settlement agreement process involves three distinct phases: initiation, negotiation, and monitoring. VA and a complainant can settle claims of whistleblower retaliation in the office where a dispute arises at any point in the complaint process. The agency has settled 71 whistleblower retaliation cases since it began tracking them in 2022. OAWP tracking information showed that most of the settlements included monetary awards for the whistleblower, ranging from about \$1,800 to 525,000. In addition, the settlement may also have included salary adjustments or back-pay. OAWP information also showed that complaints come from program offices across the agency, but most of the settlements originate from complaints out of VA's Veteran's Health Administration, the largest of VA's three administrations.

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on the Department of Veterans Affairs (VA) process for resolving whistleblower retaliation claims. Federal employee whistleblowers can potentially help protect the government from fraud, waste, and abuse by reporting allegations of wrongdoing, such as a violation of law, abuse of authority, or gross mismanagement. However, these whistleblowers may risk reprisal from their agencies for their disclosures, such as demotion, reassignment, or termination and VA has faced reports of inadequate whistleblower protections within the agency over the last few years. The Civil Service Reform Act of 1978 provided protections for whistleblower disclosures and created the Office of Special Counsel (OSC), now an independent federal investigative and prosecutorial agency. OSC is responsible for investigating prohibited personnel practices (PPP), including complaints of whistleblower retaliation.¹

VA is one of the largest federal agencies, with around 400,000 employees across hundreds of medical facilities, clinics, and benefits offices. In addition to protections under the Civil Service Reform Act of 1978, VA employees who make a whistleblower disclosure are also protected under the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017. This law established the Office of Accountability and Whistleblower Protection (OAWP). OAWP's functions include investigating allegations of misconduct against senior agency officials and receiving and referring whistleblower disclosures.

My statement summarizes the findings from our May 2023 report, as well as related preliminary observations from our ongoing work, and will address: 1) the characteristics of OAWP investigations of whistleblower retaliation allegations, 2) the characteristics of OSC investigations of whistleblower retaliation allegations from VA employees, and 3) how VA

¹ Prohibited personnel practices (PPPs) are employment-related activities that are banned in the federal workforce because they violate the merit system through some form of employment discrimination, retaliation, improper hiring practices, or failure to adhere to laws, rules, or regulations that directly concern the merit system principles.

resolves allegations of whistleblower retaliation through settlement agreements.²

For the May 2023 report on which this testimony is primarily based, we reviewed OSC and VA documents related to whistleblower retaliation investigations, and we interviewed agency officials about the process for settling whistleblower retaliation claims. We also analyzed OSC case management system data from fiscal years 2018 through 2022, which were the most recent at the time of our report.³ We assessed the reliability of these data and determined the data were sufficiently reliable for our purposes. We also interviewed VA officials from OAWP and the Office of General Counsel (OGC) about policies on settlement agreements to resolve claims of whistleblower retaliation. A more detailed explanation of our methodology is available in our May 2023 report. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition, as part of our related ongoing work, we collected additional information on whistleblower retaliation claims and settlements from OAWP's Matter Tracking System and determined they were sufficiently reliable for our purposes. This work is being conducted in accordance with generally accepted government auditing standards.

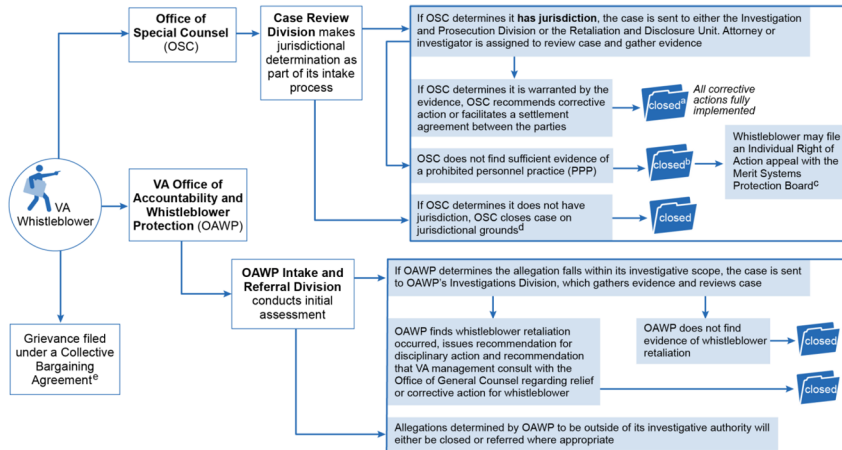
²GAO, *VA Whistleblowers: Resolution Process for Retaliation Claims*, [GAO-23-106111](#) (Washington, D.C.: May 3, 2023). GAO has ongoing work at the request of the chair and ranking member of the House Veterans Affairs Committee Oversight and Investigations Subcommittee, the chair of the Health Subcommittee, and other members of the House. This work examines: 1) characteristics of whistleblower retaliation investigations involving VA employees; 2) how VA resolves allegations of whistleblower retaliation, and how that compares to VA settlements of allegations of other prohibited personnel practices, such as those alleging discrimination, and 3) typical components of settlement agreements, and the extent to which VA monitors compliance with them.

³Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

Background

Whistleblower Retaliation Complaints Currently, VA whistleblowers can choose to submit complaints of whistleblower retaliation both internally and to external agencies (see fig. 1).

Figure 1: Selected Avenues that Department of Veterans Affairs Whistleblowers May Choose to File a Claim of Retaliation



Sources: GAO interviews with agency officials and analysis of agency documents; GAO (images) | GAO-24-107090

¹If an agency disagrees with OSC's finding of a PPP or corrective action, OSC may file a complaint seeking corrective action directly with the Merit Systems Protection Board.

²Allegations that are investigated by OSC can close for a variety of reasons and OSC tracks over 40 closing dispositions. For example, a case may close if the complainant withdraws their complaint or does not provide further information.

³Under an Individual Right of Action, an individual must seek corrective action from OSC before appealing to the Merit Systems Protection Board. There are some circumstances under which an individual can file an appeal with the Merit Systems Protection Board, without first filing with OSC, known as "otherwise appealable actions."

⁴OSC may refer cases to the Office of Inspector General or other agencies in certain circumstances.

⁵In these circumstances, the relevant union would represent the whistleblower in the grievance process.

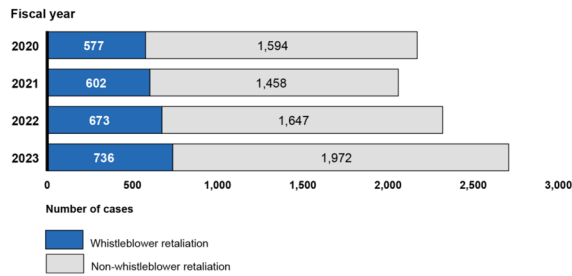
Settlement Agreements

Settlement agreements are voluntary arrangements made between a complainant and the VA. They can resolve employment disputes, including allegations of whistleblower retaliation, with a legally binding resolution, while avoiding lengthy litigation. These agreements can involve monetary compensation for the complainant, and in return, the complaint may be withdrawn.

OAWP Investigations of Whistleblower Retaliation Allegations

The number of whistleblower retaliation cases that OAWP has received has increased since fiscal year 2020. The number of other OAWP cases also increased (see fig. 2). Specifically, OAWP received 577 whistleblower retaliation cases in fiscal year 2020 and 736 in fiscal year 2023. The largest categories of non-whistleblower retaliation cases that OAWP tracks are cases that OAWP determines to not be an OAWP matter and cases that OAWP refers to other agencies or VA offices because they are not within OAWP's authority to investigate. The non-whistleblower retaliation cases that OAWP received increased from 1,594 in fiscal year 2020 to 1,972 in fiscal year 2023. We plan to further analyze OAWP case management data as part of our ongoing review.

Figure 2: Volume of Office of Accountability and Whistleblower Protection (OAWP) cases, Fiscal Years 2020-2023



Source: GAO analysis of OAWP's Matter Tracking System Data. | GAO-24-107090

OSC Investigations of VA Whistleblower Allegations

OSC's Investigation Process

When OSC receives a PPP complaint it first determines if it has jurisdiction, and if so, sends the case to its Investigation and Prosecution Division. In certain instances where there is a companion whistleblower disclosure within 10 days of the complaint, the case is referred to its Retaliation and Disclosure Unit, according to OSC officials. The relevant unit assigns an investigative attorney to the case who requests and reviews documents and interviews witnesses, among other efforts.

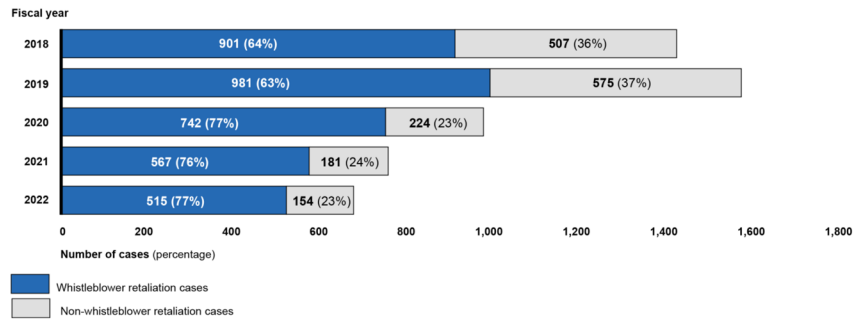
If warranted by the evidence, OSC recommends corrective action—such as backpay or damages—to restore the complainant, or it facilitates a settlement agreement between the parties. Once all corrective actions have been fully implemented, OSC closes the case, according to OSC officials.

OSC Data on VA Whistleblower Cases

Overall PPP cases arising from VA employee complaints comprise about a third of OSC's total workload, and most of these complaints include allegations of whistleblower retaliation. According to our analysis of OSC's case management system data, from fiscal years 2018 through 2022, over two-thirds (69 percent) of VA PPP cases involved allegations of whistleblower retaliation. While the total number of federal agency cases, as well as VA cases, with whistleblower retaliation allegations has generally decreased over the last 5 years, the proportion of VA PPP cases that include a whistleblower retaliation allegation has generally increased (see fig. 3).⁴

⁴We observed a similar trend across all federal agencies in the proportion of PPP cases containing whistleblower retaliation allegations.

Figure 3: Volume of Office of Special Counsel (OSC) Cases Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022

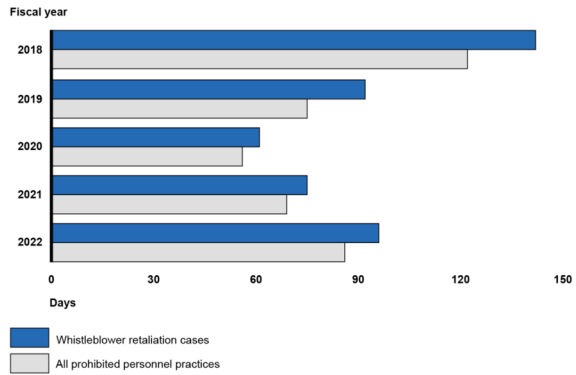


Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

For VA employees, the length for cases involving whistleblower retaliation allegations was longer than across all PPP cases (see fig. 4). From fiscal years 2018 through 2022, the median length for whistleblower retaliation cases was 94 days, and the average length was 190 days. In comparison, over the last 5 fiscal years, the median case length was 83 days for all PPP cases involving VA employees. The average case length was 166 days.

Figure 4: Median Case Length for Office of Special Counsel (OSC) Investigations Involving Department of Veterans Affairs Employees, Fiscal Years 2018–2022

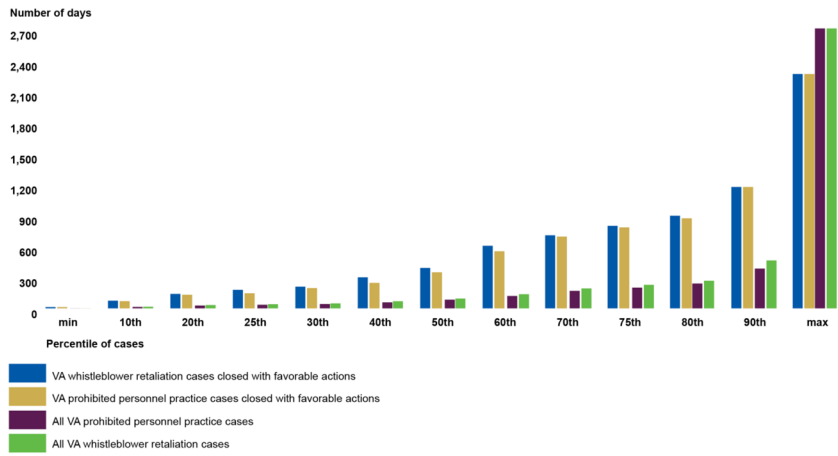


Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year. "All prohibited personnel practices" includes cases with whistleblower retaliation allegations.

Cases that close with a favorable action tend to last longer than overall PPP cases (see fig. 5). A favorable action is an outcome in a case that could result in a specific benefit to the complainant.

Figure 5: Case Length for Office of Special Counsel (OSC) Investigations Involving Department of Veterans Affairs Employees by Percentile, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year. "All VA prohibited personnel practice cases" includes cases with whistleblower retaliation allegations and those that close with favorable actions.

The percentage of OSC whistleblower retaliation cases for VA employees closed with favorable actions has increased. Specifically, from fiscal years 2018 through 2022, VA PPP cases that had whistleblower retaliation allegations and closed with a favorable action for the whistleblower increased from 3 percent to 10 percent (see table 1). According to OSC officials, the increase in the percentage of cases with favorable outcomes for whistleblowers has contributed to longer case times.

Table 1: Percentage of Office of Special Counsel (OSC) Whistleblower Retaliation Cases Involving Department of Veterans Affairs (VA) Employees with Favorable Actions

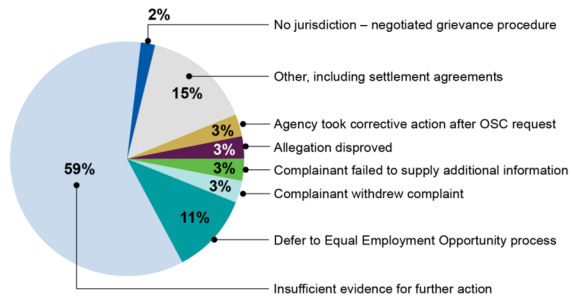
Fiscal year	Total number of VA cases involving whistleblower retaliation	Total number of VA cases involving whistleblower retaliation closed with favorable action	Percentage of cases closed with favorable action
2018	901	24	3%
2019	981	23	2%
2020	742	37	5%
2021	567	41	7%
2022	515	49	10%
Total	3706	174	5%

Source: GAO analysis of OSC case management system data. | GAO-23-107090

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

OSC closes most whistleblower retaliation allegations from VA employees due to insufficient evidence. On average, OSC PPP cases involving VA employees addressed three allegations in 2022. Each allegation can have a different closing disposition within a case. We analyzed the closing dispositions of whistleblower retaliation allegations from VA employees, and a majority (about 59 percent) were closed due to insufficient evidence (see fig. 6). From fiscal years 2018 through 2022, less than 1 percent of whistleblower retaliation cases involving VA employees were closed due to a settlement agreement.

Figure 6: Office of Special Counsel (OSC) Closing Disposition of Whistleblower Retaliation Allegations from Department of Veterans Affairs Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-24-107090

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the period analyzed. There are over 40 types of closing dispositions, and closing dispositions are not reflective of any investigative stage. The “Other” category combines closing dispositions representing fewer than 2 percent of whistleblower retaliation allegations, such as instances where the agency was unable to contact the complainant, or the allegation closed via a settlement agreement. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

In 2018, OSC changed its process for initially examining complaints, and as a result, data on the percentage of cases since then that are closed after a preliminary investigation are not readily available.⁵ Since August 2019, OSC investigators have been able to identify the cases that are further investigated in a data field in its case management system. According to OSC officials, while this data field is used regularly, it is subject to human error. However, officials said from fiscal years 2019 through 2022, between 10 and 14 percent of cases were marked as being further investigated. We plan to follow up with OSC about this as part of

⁵Anecdotally, about 90 percent of cases are closed after an initial review without further investigation, according to OSC officials. They said that a common reason for complaints to not be further investigated is because OSC received insufficient information to show that a PPP occurred.

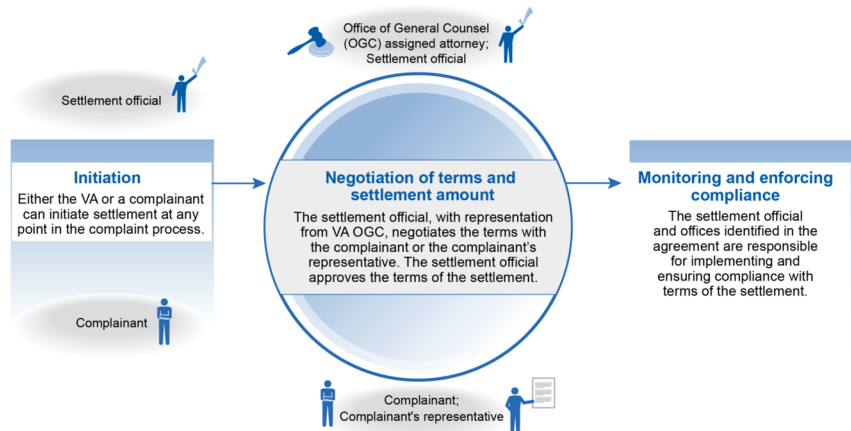
our ongoing review to determine what additional steps, if any, the agency is taking to accurately collect information in its case management system.

How VA Resolves Whistleblower Allegations of Retaliation through Settlements

VA's Settlement Agreement Processes

According to VA OGC officials, the settlement agreement process involves distinct phases: initiation, negotiation, and monitoring (see fig 7).

Figure 7: Department of Veterans Affairs (VA) Process to Settle Complaints of Whistleblower Retaliation



Sources: GAO interviews with VA officials; GAO (images). | GAO-24-107090

Settlements can commence at any juncture in the complaint process. The settlement official, an official within the applicable VA office, decides on whether to proceed with negotiations. This official represents the office where the complaint originates. As part of this phase, an attorney from VA's OGC is assigned to the case, determined by the group or geographic district where the complaint arose. VA then discusses settlement terms with the complainant or their representative, if applicable. Following an agreement, the settlement official and the related offices monitor its implementation and ensure compliance.

VA's OGC provides the settlement official with legal counsel, and according to officials they are obligated to represent the best interests of the agency. Complainants, on the other hand, can opt for personal representation, either legal or non-legal, or choose self-representation. In certain instances, neutral OSC mediators may facilitate a settlement if the complaint stems from OSC filings.

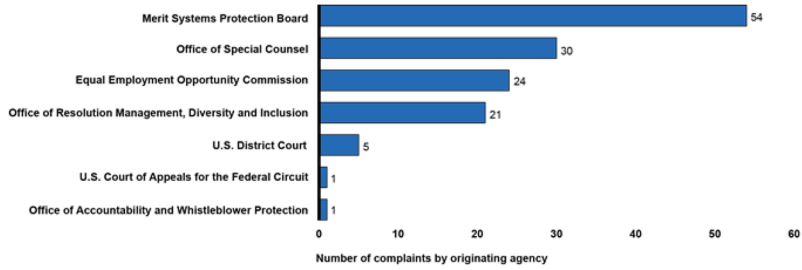
VA has disseminated memos detailing the delegation of authority related to settlement amounts for employment disputes. According to an April 2019 memo, disputes culminating in settlements above \$5,000 require clearance by senior VA officials. VA administrations can further delegate this authority.

While the general process for whistleblower retaliation settlement negotiations largely mirrors those for employment discrimination allegations (which have a separate complaint process in VA), differences lie in the guidance and data collection methodologies. Notably, VA does not maintain specific guidance for whistleblower retaliation settlements due to the absence of a statutory or regulatory mandate, according to VA officials. In contrast, the Equal Employment Opportunity Commission has regulatory requirements that agencies adopt procedures for processing complaints of discrimination, and in response, VA has developed guidance for employment discrimination settlement agreements.

OAWP began tracking executed settlement agreements in 2022. Previously, such tracking did not exist, and this change was largely spurred by Congressional inquiries according to VA officials. VA, however, does not have a mechanism to monitor the length of time to

	<p>negotiate a settlement.⁶ According to VA officials, while tracking this is theoretically possible, the agency would first have to define settlement agreements in guidance and dedicate resources to update their processes. We plan to follow up with OAWP about this as part of our ongoing review to determine what additional steps, if any, the agency is taking to track various information in its case management system.</p>
<p>VA Whistleblower Settlement Agreement Characteristics</p>	<p>According to information from OAWP's tracking system that we received in the course of our ongoing work on VA whistleblower settlements, as of September 2023, the agency has settled 71 whistleblower retaliation cases since they began tracking them in 2022.⁷</p> <p>Most of the settlements (64 of 71) included a monetary award for the whistleblower. According to OAWP's tracking system, these settlements totaled around \$5.2 million as of September 2023. The amounts awarded in the settlements varied considerably, from \$1,800 to \$525,000. Additionally, according to information included in VA's tracking system the settlements may provide for salary adjustments or back-pay for the whistleblower, which is not included in these totals.</p> <p>Overall, more than two-thirds (54) settled cases filed with the Merit Systems Protection Board with the remainder settling cases filed with OSC, the Equal Employment Opportunity Commission, and the Office of Resolution Management, Diversity, and Inclusion, and cases filed in U.S. District Court or the U.S. Court of Appeals for the Federal Circuit (see fig. 8). As noted in our prior report, only one of the settlements is from a case filed with OAWP.⁸ Additionally, settlements may address more than one complaint and more than one allegation of whistleblower retaliation.</p>
	<p>⁶In November 2022, OAWP collaborated with VA's Office of Resolution Management, Diversity, and Inclusion to enhance OAWP's data collection mechanisms, according to VA officials. OAWP officials said that, while they are interested in incorporating some functions they learned of in the demonstration, they will retain their current system because it is more robust and can be adapted to accommodate further data collection.</p> <p>⁷The discussion of whistleblower settlement agreements in this statement relates to work this is still ongoing. The information, observations and analysis discussed here are preliminary and are subject to change.</p> <p>⁸According to VA, one settlement may have originated in OAWP, but the agency does not have the data to determine if the complaint was first filed with OSC or with OAWP. GAO-23-106111.</p>

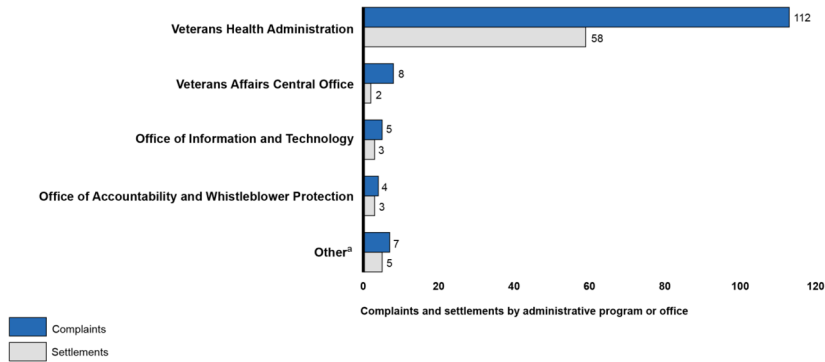
Figure 8: Whistleblower Complaints Settled by Department of Veterans Affairs, Listed by Agency where the case was filed, Fiscal Years 2022-23



Source: GAO analysis of OAWP's Matter Tracking System data. | GAO-24-107090

OAWP's tracking information also indicates that most settlements address complaints out of VA's Veteran's Health Administration (VHA), the largest of VA's three administrations, but complaints come from program offices across the agency. Specifically, 58 of the 71 settlements addressed allegations in VHA, and the VA Central Office, the Office of Information and Technology, and OAWP also had two or more whistleblower retaliation cases settled (see fig. 9). As part of our ongoing review, we plan to conduct further work to learn more about these VA whistleblower retaliation settlements.

Figure 9: Department of Veterans Affairs (VA) Whistleblower Settlements and Complaints Addressed, Listed by Administrative Program or Office within VA, Fiscal Years 2022-23



Source: GAO analysis of OAWP's Matter Tracking System data. | GAO-24-107090

^aAdministrative programs and offices in the "other" category include: Office of Congressional and Legislative Affairs, Office of Construction and Facilities Management, Office of Acquisition, Logistics, and Construction, and Veterans Benefits Administration.

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee, this concludes my prepared statement. I would be happy to answer any questions you may have.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this statement, please contact Thomas Costa, Director, Education, Workforce, and Income Security, at (202) 512-4769 or costat@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

In addition to the contact names above, GAO staff who made key contributions to this statement are Amber Yancey-Carroll (Assistant Director), Lucas Alvarez (Analyst-in-charge), Vincent Patierno-Beavers, Sheila Thorpe, Alex Galuten, Serena Lo, Mimi Nguyen, Jessica Orr, and Adam Wendel.

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Prepared Statement of Tristan Leavitt

Chairman Kiggans, Ranking Member Mrvan, and members of the Subcommittee: I'm very pleased to have been invited back before this Subcommittee today. I appear today as the president of Empower Oversight, a nonpartisan nonprofit dedicated to enhancing independent oversight of government and corporate wrongdoing. In its two years of existence, Empower has conducted extensive oversight of the Department of Veterans Affairs (VA).¹

This Subcommittee plays an important oversight role in ensuring the VA properly cares for our nation's veterans. I deeply believe the United States of America is a land of the free because of the brave women and men who serve in our Armed Forces. Our nation owes them an immense debt of gratitude. Many know these famous words from President Abraham Lincoln's second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds..." They were delivered in 1865, one month before the end of the Civil War and Lincoln's assassination. Less well-known is what Lincoln said next, which for nearly 65 years served as the motto of the VA: "To care for him who shall have borne the battle and for his widow, and his orphan."

Eighteen years later, when Congress contemplated adopting a merit-based civil service system, more effectively serving the American people was a prime motivation for Congress. Hiring based on merit would ensure taxpayers received the best service possible for their hard-earned tax dollars. As it has later been described, "the other side of the merit coin" is the removal of federal employees who are not providing the best service for the American people.

When the Civil Service Reform Act of 1978 was signed into law 45 years ago, it included new provisions for removing underperforming federal employees. It also established statutory protections for federal whistleblowers, a first in our Nation's history. These provisions attempted to strike a balance that Congress continues to grapple with today: How to ensure accountability for employee performance and misconduct without chilling whistleblower disclosures or enabling retaliation. This is usually more difficult than it sounds, since whistleblower retaliation is almost always disguised as appropriate discipline. Thus, the Civil Service Reform Act established the independent Merit Systems Protection Board, or MSPB, to review adverse personnel actions and ensure whistleblowers are protected while not impeding accountability for poor performers or employees committing misconduct. In my view, this administrative process provides a more cost-effective way to consider these cases than sending them directly to the federal court system to be decided.

When I last testified before this Subcommittee, in July 2019, I was serving as the acting head of MSPB because it had no Senate-confirmed Board members. Later, on March 1, 2022, the Senate confirmed me to that Board, restoring a quorum after five years without. As a member of the Board, I considered case after case that hinged on the appropriateness of adverse personnel actions. I was always very mindful that we as adjudicators are fallible, that from time to time facts buried in the record get overlooked despite our best efforts, and that *no* written record can perfectly capture all the complicated circumstances that often surround personnel actions. However, I felt we tried our best to identify whistleblower retaliation in the cases we adjudicated while I was there.

By contrast, I am concerned that our current system does not strike the right balance to ensure accountability for federal employees. This is a concern with which the Veterans Affairs Committee has grappled for years. In the spring of 2014, whistleblower disclosures to the U.S. Office of Special Counsel helped bring to light the

¹"Empower Oversight probes conflicts of interest and resistance to Congressional oversight at the Veterans Benefits Administration," Aug. 6, 2021, <https://empowr.us/empower-oversight-probes-conflicts-of-interest-and-resistance-to-congressional-oversight-at-the-veterans-benefits-administration/>; "Did the Department of Veterans Affairs Enable Insider Trading?" Sep. 21, 2021, <https://empowr.us/did-the-department-of-veterans-affairs-enable-insider-trading/>; Jason Foster, "Newly Uncovered Documents Show Senior VA Officials Smearing a Whistleblower to Avoid Congressional Oversight," *Whistleblower Network News*, Oct. 25, 2021, available at <https://whistleblowersblog.org/opinion/newly-uncovered-documents-show-senior-va-officials-smearing-a-whistleblower-to-avoid-congressional-oversight/>; "Empower Oversight Obtains Copy of Veterans Affairs Department Letter Being Withheld from Senate," Nov. 9, 2021, <https://empowr.us/empower-oversight-obtains-copy-of-veterans-affairs-department-letter-being-withheld-from-senate/>; "Internal Watchdog Uncovers More Evidence of Conflicts of Interest at the VA After Push from Empower Oversight," Mar. 24, 2022, <https://empowr.us/internal-watchdog-uncovers-more-evidence-of-conflicts-of-interest-at-the-va-after-push-from-empower-oversight/>; "Empower Oversight and Whistleblowers of America Seek Accountability for VA Watchdog's Findings of Ethical Violations," Jun. 16, 2022, <https://empowr.us/empower-oversight-and-whistleblowers-of-america-seek-accountability-for-va-watchdogs-findings-of-ethical-violations/>.

scandal of veterans' wait times at the VA. Just a few months later Congress passed the Veterans Access, Choice and Accountability Act of 2014. That law authorized expedited demotion and removal timelines for senior executives at the VA, and gave MSPB administrative judges 21 days to decide appeals before they became final. After the U.S. Court of Appeals for the Federal Circuit held it was unconstitutional to limit appeals to MSPB administrative judges, who are not appointed by the President, Congress passed the VA Accountability and Whistleblower Protection Act of 2017. This law addressed the constitutionality issue by simply eliminating MSPB review of senior executive removal. It further authorized expedited demotion and removal timelines for large swaths of VA employees.

As I've indicated, I believe MSPB can play an important role in distinguishing whistleblower retaliation from proper accountability. I believe it would be a serious mistake to further limit the categories of employees who have MSPB appeal rights. However, I do not have confidence that, in non-whistleblower cases, MSPB always contributes to protecting "the other side of the merit coin" by ensuring accountability. My experience on the Board has led me to believe the most important variables for accountability are not timeframes, but rather how MSPB sees its role in the disciplinary process.

In the seminal 1980 case on this issue, *Douglas v. Veterans Administration*, the Board held that it "must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness... The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance."² Yet time and again since then, the Board *has* in my view displaced management's reasonable judgment regarding disciplinary decisions. What's more, appellate courts have limited latitude in reviewing Board decisions.³ For these reasons, I support statutorily lowering the standard of proof required to support disciplinary decisions—not just at the Department of Veterans Affairs, but across the civil service. Standardizing relevant personnel laws across the civilian workforce would reduce confusion and contribute to greater consistency across the federal government.

That said, there is wisdom in the observation that you can't fire your way to excellence. At the end of the day the most important variable for any federal agency or department may be cultivating a culture of excellence and accountability—both for employees and for supervisors. The Office of Accountability and Whistleblower Protection (OAWP) would likely be best situated to contribute to building such a culture if investigating whistleblower retaliation was left to the far more experienced Office of Special Counsel, and OAWP focused on the big picture of addressing trends at the agency.

Congress must also help ensure agency management receives sufficient training and invest in the intentional cultivation of leadership in federal agencies. The example at the top matters. The Senate recently voted to confirm as Deputy VA Secretary an official who did nothing to protect the confidential information of veterans and whistleblowers in its VIEWS system, even after she became aware of the problem through whistleblower disclosures.⁴ Such a lack of leadership or accountability sets the tone for the agency, and requires that Congress maintain particular vigilance at this time and vigorously exercise its oversight responsibilities.

Whether promoting the development of better leaders and managers, removing inadequate or misbehaving employees, or protecting the brave employees who point out the problems, we should care deeply about the quality of the VA workforce. They are the front lines: only through them can we "care for him who shall have borne the battle and for his widow, and his orphan."

Thank you.

² 5 M.S.P.R. 280 (1981).

³ See 5 U.S.C. 7703(c).

⁴ "Empower Oversight Urges Scrutiny of Top VA Nominee's Failure to Safeguard Veterans' Info," Jun. 12, 2023, <https://empowr.us/empower-oversight-urges-scrutiny-of-top-va-nominees-failure-to-safeguard-veterans-info>; "Whistleblower Coalition Groups Jointly Call on Senate Committee to Investigate VA Whistleblower Claims," Jun. 26, 2023, <https://empowr.us/whistleblower-coalition-groups-jointly-call-on-senate-committee-to-investigate-va-whistleblower-claims>.

Prepared Statement of Samantha Feinstein

MR. CHAIRMAN:

Thank you for the opportunity to contribute with testimony at today's hearing on the Department of Veterans Affairs (DVA) Office of Accountability and Whistleblower Protection. (OAWP) I serve as Legal Director of the Government Accountability Project, a non-profit, non-partisan whistleblower support organization. This is the fourth time GAP has testified on OAWP. Two prior written submissions are attached as Exhibits 1 and 2 with a summary of GAP's qualifications to assess the effectiveness of whistleblower support offices like OAWP. The Committee's persistence in oversight reflects a genuine, bi-partisan commitment to provide veterans with the medical care they deserve.

Veterans also should appreciate this committee's persistence is obtaining a rare bi-partisan consensus last Congress for approval of H.R. 8510, the Strengthening Whistleblower Protections at the Department of Veterans Affairs Act. I am testifying today to explain why this solid good government legislation is needed more than ever.

One reason is that the DVA remains the government's most hostile agency for whistleblowers who challenge patient care breakdowns, despite the life or death consequences of its mission. As summarized previously, the DVA is a free speech Death Valley for government whistleblowers. This is not surprising, because retaliation is an ingrained tradition. It will take years of aggressive oversight and accountability before this agency respects the First Amendment or the Whistleblower Protection Act (WPA) in practice, rather than empty rhetorical promises.

Despite this long-term challenge, it matters to give credit where it is due. Under prior OAWP leadership, my docket was dominated by whistleblowers facing OAWP retaliation from inside and outside this agency whose job is to protect whistleblowers. Since Ms. Maryanne Donaghy assumed leadership, all the OAWP reprisal cases have been constructively resolved and GAP has not received any new complaints of OAWP retaliation. OAWP administratively has restored programs such as counseling and Alternate Disputes Resolution (ADR) whose cancellation initially had sparked internal whistleblowing.

Anecdotal leadership is no substitute for structural reforms to institutionalize better practices. Otherwise, depending on the whims of less effective leadership, the prior nightmarish mismanagement and abuses of power can resume at will. That is why it matters so much whether Congress institutionalizes reform through the sound good government mandate of H.R. 8510. That is why groups in the Make It Safe Coalition will continue our commitment as resources until this goal is achieved. Below is a summary of why H.R. 8520's legislative teeth are still needed.

* **Independent counsel.** This provision should not be controversial, because the agency already has largely permitted OAWP lawyers to take control of their cases without vetoes by the DVA Office of General Counsel (OGC). However, OGC still will have a decisive role in assessing discipline, which is the bottom line for accountability, deterrence and corrective action. Independent counsel is the cornerstone for a legitimate watchdog mission. Now is the proper time to institutionalize and H.R. 8510's requirement for complete structural independence of the current voluntary, partial improvements.

* **Transfer of investigative authority to the Office of Special Counsel (OSC)** At first glance, improvements in OAWP's performance appear to make this provision unnecessary. Unfortunately, no matter how good faith OAWP operates, it always will be an inherently inferior substitute to the Office of Special Counsel. That is because OAWP does not have enforcement teeth. OSC can litigate to enforce its corrective action recommendations after confirming retaliation. OAWP can only recommend that agencies engaging in harassment change their minds and stop. DVA bullies can and routinely do defy the recommendations with impunity. If OAWP retains its authority to investigate retaliation, the only way this role can be legitimate is if Congress expands the scope of H.R. 8510 to provide the Office with litigative enforcement authority.

* **Retaliatory state licensing board referrals.** This common form of retaliation allows DVA to circumvent the Whistleblower Protection Act again with impunity to seek permanent blacklisting of agency whistleblowers. None of OAWP's voluntary improvements have the legal authority to affect this practice, which can have a worse chilling effect than firing from an immediate position. The loophole must be closed.

* **Transparency for track record.** Again, the agency deserves credit where due. It has significantly expanded public disclosure for the scope of its work and impact.

OAWP also has created a stakeholder liaison office that appears to operate constructively and in good faith. Particularly impressive is that office's Climate Review initiative, to evaluate office environments for whistleblowing. Again, however, Congress should institutionalize and complete the job. The lights for transparency still can be turned off at whim.

Further, the current voluntary effort is incomplete. For example, OAWP now is monitoring and assessing agency corrective action on whistleblowing referrals. OAWP shares its evaluations with the agency chain of command. Unlike the Special Counsel under 5 U.S.C. 1213(e), however, the public does not get to see the results. Congress should assure that there is parity for OAWP transparency, the same as in the Whistleblower Protection Act. The assessments should be more than a management resource. They are vital for congressional and public oversight.

Similarly, OAWP boasts that 95 percent of its recommendations have been accepted, at least in part. However, there is a transparency loophole for the nature of mission breakdowns, recommendations' substance, and a complete vacuum of data whether the "accepted" recommendations actually were implemented in good faith. Agencies commonly accept recommendations and promise to do better, without implementing them in whole or part.

Similarly, OAWP has created a Compliance Analysis and Reporting system to track compliance and prepare trend analyses. However, this should not be merely an internal management resource. The full results should be required in an annual report to Congress, and posted on the OAWP website.

* **OAWP navigator.** The agency initially had whistleblower counselors who played an invaluable role in helping over 1,000 whistleblowers to understand and functionally act on their rights. The program was canceled, but thankfully OAWP has restored it under current leadership with the navigator function. This serviced is essential for OAWP's mission. It should not be controversial to legislatively institutionalize this voluntary initiative as a mandatory structure.

* **Alternative Disputes Resolution:** OAWP initially had a "mentoring" program that achieved promising initial results for no fault, mediated resolution of reprisal cases. The goal was to find a new professional home for whistleblowers that would welcome their initiatives rather than suppress them. Despite promising initial results, the program was canceled. Under Ms. Doherty's leadership, a pilot ADR program has been restored. Again, it should not be controversial to institutionalize this pilot legislatively, mandating the no fault mediation dimension that has worked well previously.

If this Committee chooses to be more ambitious than H.R. 8510, GAP stands behind its detailed recommendations listed in prior testimony. However, that bill reinforced by the counseling and ADR elements, is an excellent breach had to lock in a legitimate, badly needed resource for whistleblowers. OAWP was a good idea that went bad due to normal growing pains and too much discretion to abuse. You have our organization's unqualified commitment to be a resource finishing what the Committee started in the last Congress.

Prepared Statement of Joe Spielberger

Chairwoman Kiggans, Ranking Member Mrvan, and members of the subcommittee, thank you for the opportunity to testify today on whistleblower protection and accountability at the Department of Veterans Affairs (VA).

I am a policy counsel at the Project On Government Oversight (POGO). POGO is a nonpartisan independent watchdog organization that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

POGO's Investigations of VA Abuse and Corruption

Whistleblowers play a key role in exposing misconduct at the VA at great risk to themselves. Their disclosures have exposed systemic corruption, medical negligence, and abusive government actors. They have saved the lives of VA patients and safeguarded taxpayer dollars to provide better resources to veterans. Congress depends on whistleblowers in order to fully exercise its own constitutional oversight and legislative authorities. Unfortunately, whistleblowers frequently face retaliation for their disclosures while senior leaders are rarely held accountable for their actions.

In coming forward, whistleblowers risk losing their jobs, ending their careers, suffering lifelong mental and psychological hardship, and facing retaliatory lawsuits or even serious criminal charges. All this simply for speaking out to ensure their agencies fulfill their missions and maintain the public's trust. Whistleblowers deserve the safest avenues to make legal disclosures and expose wrongdoing. Agency officials who retaliate against whistleblowers both violate their legal rights and do real harm to our government and our country. These officials betray the public's trust not only by allowing corruption and abuse of power to continue, unaddressed, but by further exacerbating it. That is why it is so important to hold retaliators accountable for their actions and ensure that whistleblowers who experience retaliation have a fair shot at justice and at being made whole.

This is especially true for VA whistleblowers, whose disclosures can literally mean the difference between life and death. In 2014, whistleblowers exposed that VA hospitals were falsifying records, keeping secret wait lists, and allowing veterans to languish for months without care.¹ At least 40 veterans died while waiting for appointments through the Phoenix, Arizona, VA health care system alone.² The VA's Office of the Inspector General (IG) later told the House Veterans Affairs Committee that these secret wait lists contributed to veterans' deaths.³ Officials used fake wait lists and manipulated wait-list times to make them appear shorter, which reportedly allowed them to personally collect performance bonuses.⁴ Complaints of inaccurate VA wait lists continued, and were alleged nationwide in 2019.⁵ The IG later confirmed that wait-time data the VA relied on was inconsistent and misleading.⁶

Many of the whistleblowers who played a critical role in exposing these abusive practices paid with their careers. The VA placed a California pharmacy supervisor on administrative leave after he raised concerns about "inordinate delays" delivering medicine to patients. In Pennsylvania, a former VA doctor was removed from clinical work after he sounded the alarm about on-call physicians failing to report to the hospital. In Appalachia, a VA nurse was forced out of her job after reporting concerns regarding her patients being subjected to medical neglect.⁷ POGO's 2014 investigation into the VA amid the wait-list scandal exposed what insiders called a rampant "culture of harassment," one so "full of fear and intimidation that very few employees advocate for the [v]eteran."⁸ This culture of fear was not limited to employees, either. Sources told POGO that families of VA patients at the time reported "fear of not being able to continue receiving services, if they complain, or make concerns known."⁹ This was a shameful dereliction of duty and catastrophic failure of the VA's core mission to care for veterans and their families and caregivers.

Congress attempted to address this scandal by establishing the VA's Office of Accountability and Whistleblower Protection (OAWP) in 2017. Congress authorized OAWP to fulfill a critically important mandate: to improve VA accountability by receiving whistleblower disclosures and investigating allegations of retaliation and wrongdoing against senior executives and supervising employees.¹⁰ Prior to OAWP's establishment, POGO and other whistleblower advocates raised concerns about housing a central whistleblower office within the agency without proper independ-

¹ VA Office of Inspector General, *Veterans Health Administration: Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practices at the Phoenix VA Health Care System*, 14–02603–267 (August 26, 2014), <https://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf>.

² Scott Bronstein and Drew Griffin, "A fatal waitlist: Veterans languish and die on a VA hospital's secret list," CNN, April 23, 2014, <https://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/>.

³ Jim Avila, "Phoenix Wait-Lists 'Contributed' to VA Deaths," *ABC News*, September 17, 2014, <https://abcnews.go.com/blogs/politics/2014/09/phoenix-wait-lists-contributed-to-va-deaths/>.

⁴ Quil Lawrence, "Audit Reveals Vast Scale of VA Waitlist Issues," NPR, June 9, 2014, <https://www.npr.org/2014/06/09/320375564/audit-reveals-vast-scale-of-va-waitlist-issues>.

⁵ Joe Davidson, "Whistleblower says there's a secret VA wait list for care. The department says that's not true," *Washington Post*, June 3, 2019, https://www.washingtonpost.com/politics/whistleblower-says-theres-a-secret-va-wait-list-for-care-the-department-says-thats-not-true/2019/06/01/197e59a2-83df-11e9-bce7-40b4105f7ca0_story.html.

⁶ Department of Veterans Affairs Office of Inspector General, *Concerns with Consistency and Transparency in the Calculation and Disclosure of Patient Wait Time Data*, Memo #21–02761–125 (April 7, 2022), <https://www.va.gov/oig/pubs/VAOIG-21-02761-125.pdf>.

⁷ *Whistleblower Claims at the U.S. Department of Veterans Affairs: Hearing before the Senate Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies* (July 30, 2015) (testimony of Danielle Brian, executive director, Project On Government Oversight), <https://www.pogo.org/testimonies/testimony-of-pogos-danielle-brian-on-whistleblower-claims-at-us-department-of-veterans-affairs>.

⁸ Lydia Dennett, "Fear and Retaliation at the VA," Project On Government Oversight, July 21, 2014, <https://www.pogo.org/investigations/fear-and-retaliation-at-va>.

⁹ Dennett, "Fear and Retaliation at the VA," [see note 8].

¹⁰ 38 U.S.C. § 323(c) (2023), <https://www.law.cornell.edu/uscode/text/38/323>.

ence. While it was clear that more resources were necessary to address the rise of whistleblower complaints, POGO believed the office would not be sufficiently independent from the agency to investigate and provide accountability.¹¹ Reluctance of employees at the VA to come forward to their own inspector general indicated a culture of retaliation that likely would not be alleviated by the creation of another office with similar “independence” at the VA.¹²

At the time, we warned that OAWP “may well be a wolf in sheep’s clothing,” and would risk “becoming an internal clearinghouse to help agency managers identify and retaliate against whistleblowers.”¹³ Since then, POGO has investigated and reported about conflicts of interest, waste, and whistleblower retaliation within OAWP itself.¹⁴ POGO also previously warned this Subcommittee that OAWP does not operate as Congress intended, especially because of its lack of independence and inability to enforce disciplinary recommendations.¹⁵

OAWP’s Lack of Independence and Enforcement Authority

Because OAWP was established without its own in-house general counsel, the office is forced to coordinate with and rely on the VA’s Office of General Counsel for legal advice and analysis concerning proposed disciplinary actions against senior VA leaders.¹⁶ The authorizing statute only stipulates that OAWP “shall not be established as an element of the Office of the General Counsel and the Assistant Secretary may not report to the General Counsel,” without specifying how the two offices should or should not coordinate.¹⁷ However, in practice, when an OAWP investigation results in a disciplinary recommendation, OAWP drafts a recommendation in consultation with the Office of General Counsel and sends their draft to that office for legal review. OAWP then engages with Office of General Counsel attorneys and the management officials who will decide whether to sustain, mitigate, or set aside the proposed disciplinary action.¹⁸

This is a clear conflict of interest because, although OAWP and the Office of General Counsel are both housed within the VA, they have conflicting mandates and their interests are not the same. OAWP is charged with conducting objective, fact-based investigations and analysis and ensuring whistleblower disclosures are properly investigated. On the other hand, the Office of General Counsel’s mandate is to represent the best interests and meet the legal needs of its client, the VA, including limiting its legal liability. POGO has found department general counsels often believe their job is to protect the public’s perception of the department, future funding,

¹¹ *Pending Health and Benefits Legislation: Hearing before the Senate Committee on Veterans Affairs* (May 17, 2017) (testimony of Liz Hempowicz, policy counsel, Project On Government Oversight), <https://www.pogo.org/testimonies/pogo-testimony-on-va-accountability-and-whistleblower-protection-act>.

¹² Hempowicz, *Pending Health and Benefits Legislation* [see note 11].

¹³ Daniel Van Schooten, “POGO and Others Oppose ‘Trojan Horse’ Office for VA Whistleblowers,” Project On Government Oversight, September 30, 2016, <https://www.pogo.org/analysis/pogo-and-others-oppose-trojan-horse-office-for-va-whistleblowers>.

¹⁴ Daniel Van Schooten, “‘Terrified’ of Retaliation: Inside Veterans Affairs Whistleblower Office,” Project On Government Oversight, March 5, 2020, <https://www.pogo.org/investigations/terrified-of-retaliation-inside-veterans-affairs-whistleblower-office>; Adam Zagorin and Nick Schwellenbach, “Protect the Secretary: VA Chief Robert Wilkie Installs Political Aide at Watchdog Investigating His Inner Circle,” Project On Government Oversight, December 16, 2020, <https://www.pogo.org/investigations/protect-the-secretary-va-chief-robert-wilkie-instaldvjs-political-aide-at-watchdog-investigating-his-inner-circle>; Daniel Van Schooten, “VA Whistleblower Office Wasted \$300,000 on ‘Useless’ Training,” Project On Government Oversight, October 24, 2019, <https://www.pogo.org/investigations/va-whistleblower-office-wasted-300-000-on-useless-training>.

¹⁵ Rebecca Jones, “Whistleblower Retaliation at the Department of Veterans Affairs,” Project On Government Oversight, June 25, 2019, <https://www.pogo.org/testimonies/whistleblower-retaliation-at-the-department-of-veterans-affairs>; *Protecting Whistleblowers and Promoting Accountability: Is VA Making Progress?: Hearing before the House Committee on Veterans Affairs Subcommittee on Oversight and Investigations* (May 19, 2021) (testimony of Melissa Wasser, policy counsel, Project On Government Oversight), <https://docs.house.gov/meetings/VR/VR08/20210519/112646/HHRG-117-VR08-Wstate-WasserM-20210519-U1.pdf>; *Ensuring Independence and Building Trust: Considering Reforms To Whistleblower Protections at VA: Hearing before the House Committee on Veterans Affairs, Subcommittee on Oversight and Investigations* (June 16, 2022) (testimony of Joanna Derman, policy analyst, Project On Government Oversight), <https://docs.house.gov/meetings/VR/VR08/20220616/114903/HHRG-117-VR08-Wstate-DermanJ-20220616-U1.pdf>.

¹⁶ Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, Report #18-04968-249 (October 24, 2019), 6–7, <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>.

¹⁷ 38 U.S.C. § 323(c)(3)(e) (2023), <https://www.law.cornell.edu/uscode/text/38/323>.

¹⁸ Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017* [see note 16].

and individual jobs of senior leaders. It is entirely inappropriate for the Office of General Counsel to be able to weigh in on a whistleblower retaliation complaint or other allegations of senior leader misconduct. The chance of improper consultation is too high and puts whistleblowers at a severe disadvantage. Agency officials can reject OAWP recommendations even if it finds senior officials engaged in misconduct or retaliation. And OAWP lacks enforcement power to implement disciplinary recommendations or corrective action that the VA chooses not to implement. Even the appearance of a conflict on the part of the Office of General Counsel undermines OAWP's independence and effectiveness.

No internal whistleblower protection office can adequately protect whistleblowers without real independence from the agency it investigates. An office without enforcement authority is toothless, because at most it can only make recommendations to the agency. OAWP must have its own independent legal counsel, with the authority to prepare legal opinions without review or approval from the Office of General Counsel, as well as final decision-making authority for disciplinary recommendations. This structure is not unprecedented: It is used elsewhere in the federal government where independence is critical, especially at offices of inspectors general that have their own general counsel to provide unbiased and objective legal advice around disciplinary or other corrective recommendations.¹⁹

OAWP has concurred with this recommendation in the past, noting that its reliance on the agency's general counsel causes unnecessary delays in resolving cases and creates at the very least the appearance of a conflict of interest.²⁰ Removing the bias of the agency from this equation would help better prevent retaliation, protect whistleblowers, and hold more senior officials accountable for misconduct.

OAWP Retaliation

In addition to concerns about structural independence and conflicts of interest failing to protect whistleblowers, perhaps most concerning are instances where OAWP has been the *source* of retaliation.²¹ Reporting in 2020 showed that OAWP retaliated against Anthony Everett, a whistleblower leading the security team that protects senior VA officials. Everett reported to OAWP what he viewed as an ethical breach and a misuse of taxpayer money by two senior VA officials, then-Acting Deputy Secretary Pamela Powers and then-Chief of Human Resources Daniel Sitterly. Everett's disclosure was supposed to be kept confidential, but just three hours after he made his disclosure, Powers demoted him with no reason given.²²

Shortly thereafter, then-VA Secretary Robert Wilkie installed Sitterly, who was under investigation by OAWP at the time, to be second-in-command of the office. This was over the objections of then-Assistant Secretary for Accountability and Whistleblower Protection Tamara Bonzanto, who had already conducted a search for candidates and selected one to fill the position. According to POGO's sources, Sitterly repeatedly asked the office's staff about specific whistleblower cases, including whether employees he identified by name had made whistleblower disclosures, and whether any whistleblower disclosures implicated senior VA officials. Other leaders within OAWP reportedly replied that, for privacy and confidentiality reasons, such information could not be released, yet he persisted in making those requests. A whistleblower complaint about Wilkie also cited an exchange between Powers and Bonzanto regarding the role of whistleblowers at OAWP. According to the complaint, Bonzanto told Powers that employees have a right to raise concerns, to which Powers replied, "Yes, but we also have to protect the Secretary," and that there are "a lot of problematic employees in OAWP."²³

Additionally, VA employees have reported similar improper coordination between OAWP and the VA. This includes OAWP wrongfully referring whistleblower retaliation

¹⁹ Ben Wilhelm, Congressional Research Service, *Statutory Inspectors General in the Federal Government: A Primer*, R45450, updated May 12, 2022, <https://crsreports.congress.gov/product/pdf/R/R45450>.

²⁰ Department of Veterans Affairs, Report to The Committee on Veterans Affairs of the Senate and The Committee on Veterans Affairs of the House of Representatives on the Activities of the Office of Accountability and Whistleblower Protection, For the Period: June 30, 2017 – June 30, 2018, 22 (July 2018), ANNUAL-REPORT-Office-of-Accountability-and-Whistleblower-Protections-Activities.pdf.

²¹ Eric Katz, "VA Office Meant to Protect Whistleblowers Actually Helped Retaliate Against Them, IG Finds," *Government Executive* (October 24, 2019), <https://www.govexec.com/management/2019/10/va-office-meant-protect-whistleblowers-actually-retaliated-against-them-ig-finds/160847/>.

²² Lisa Rein, "Biden's new VA chief inherits oversight office from Trump viewed as abetting corruption," *Washington Post* (February 18, 2021), https://www.washingtonpost.com/politics/biden-mcdonough-va-whistleblower-trump-2021/02/16/072bab0e-5ced-11eb-b8bd-ee36b1cd18bf_story.html.

²³ Zagorin and Schwellenbach, "Protect the Secretary" [see note 14].

tion cases to other department components despite having jurisdiction, including to “the very facilities or network offices where the complainant worked or that were the subject of the allegations,” and requiring whistleblowers to consent to OAWP releasing their identities before investigating or referring their case, in direct conflict with OAWP’s responsibility to keep whistleblowers’ identities confidential.²⁴ The VA’s repeated attempts to undermine or otherwise assert undue influence over OAWP speaks to the need for the office’s greater independence from the agency.

OAWP’s Failure to Hold Senior Leaders Accountable

Another key part of OAWP’s mandate is to investigate misconduct of senior leaders, but early results demonstrate OAWP’s failure to hold high-ranking officials accountable. Despite receiving nearly 2,000 submissions from whistleblowers from June 2017 to June 2018, OAWP was unable to secure any meaningful disciplinary action against VA executives or senior leadership. In fact, over the course of OAWP’s first year of operation, only 0.1 percent of disciplinary actions were taken against VA executives or senior leadership, a figure on par with the years prior to the office’s creation. In contrast, 36.4 percent of disciplinary actions within the same timeframe were taken against lower-level VA employees, between GS rank 1 and GS rank 6.²⁵

This failure led to the Office of Inspector General’s scathing 2019 report, which found “significant deficiencies” in how the VA Accountability and Whistleblower Protection Act was being implemented and that OAWP had “floundered in its mission to protect whistleblowers.”²⁶ The report even found that in some cases, OAWP investigations were instruments of retaliation.²⁷ Despite this, accountability was scarce. From June 23, 2017, to March 22, 2019, officials involved in covered executive disciplinary actions (proposing, deciding, or grievance officials) mitigated the discipline recommended by OAWP in 32 of the 35 covered executive cases that proceeded to a final decision. OAWP’s recommendation was accepted only three times.²⁸

During a 2022 subcommittee hearing on this topic, then-Subcommittee Chair Chris Pappas (D-NH) reported that in 2021 OAWP made 15 disciplinary recommendations against senior leaders who retaliated, but the VA acted on only five, and only fully implemented one.²⁹ Then-Ranking Member Tracey Mann (R-KS) reported that an investigation into a senior official found that they did retaliate, and even though OAWP recommended discipline and the VA agreed, it was never carried out: The report was allegedly delayed for more than a year, then finalized the same week the individual retired. As Representative Mann analogized, “The fox is guarding the hen house, and it’s time for a change.”³⁰ Without more accountability, the VA sends a message to its officials that they can act with impunity, especially regarding senior leader misconduct and whistleblower retaliation.

Recent Improvements

OAWP leadership deserves credit for implementing recommendations from the 2019 report from the Office of the Inspector General, including hiring needed staff, conducting educational training exercises, and significantly reducing the backlog of investigations. However, OAWP’s larger structural issues continue to undermine the office’s independence and ability to fulfill its important mission and mitigate retaliation.

The Office of Special Counsel continues to receive far more cases from VA employees than any other agency, a majority of which (69 percent) involve alleged whistle-

²⁴ Eric Katz, “VA Office Meant to Protect Whistleblowers Actually Helped Retaliate Against Them, IG Finds,” [see note 21]; Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, ii [see note 16].

²⁵ Department of Veterans Affairs, *Report to The Committee on Veterans Affairs of the Senate And The Committee on Veterans Affairs of the House of Representatives* [see note 20].

²⁶ Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, ii [see note 16].

²⁷ Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, iv, 53 [see note 16].

²⁸ Department of Veterans Affairs Office of Inspector General, *Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, 37 [see note 16].

²⁹ Ensuring Independence and Building Trust: Considering Reforms to Whistleblower Protections at VA: Hearing before the House Committee on Veterans’ Affairs Subcommittee on Oversight and Investigations, 117th Cong. (June 16, 2022), https://www.youtube.com/watch?v=RzdMvL_vb_w.

³⁰ *Ensuring Independence and Building Trust: Hearing before the House Committee on Veterans’ Affairs Subcommittee on Oversight and Investigations* [see note 29].

blower retaliation.³¹ The percentage of favorable actions in VA whistleblower retaliation cases at the Office of Special Counsel increased from 3 percent in fiscal year 2018 to 10 percent in FY 2022. However, while the total number of VA whistleblower retaliation cases has generally decreased over the last five years, the proportion of VA cases of prohibited personnel practices that include a whistleblower retaliation allegation has generally increased.

Finally, while we are hopeful about improvements that new OAWP leadership has made to the culture of whistleblowing at the VA, any such improvements can easily be undone by future leadership and are no substitute for the structural reforms that OAWP needs.

Ensuring Due Process

We appreciate the bipartisan commitment to holding senior leaders accountable for retaliation and other misconduct and the urgency to address this issue. At the same time, accountability must include necessary due process rights for all VA employees. Any departure from that due process sets the agency up for further scandal, low morale, and mission failure. Streamlining removal processes may be one way to rid the agency of bad actors, but it should not come at the cost of stripping hard-fought workplace protections from all employees, including whistleblowers themselves.

Without independence from their parent agencies, self-policing entities will continue to protect senior leaders while facilitating the removal of lower-level employees, placing whistleblowers at further risk of retaliation. Stripping civil service protections is a surefire way to curtail whistleblowing, because employees who are already vulnerable to retaliation will face increased obstacles to coming forward. But if, on the contrary, employees have full civil service protections and safe avenues to report wrongdoing, it will empower more whistleblowers to speak out and expose misconduct, ensuring the VA can better fulfill its mission of serving veterans and their families. The path to better accountability is to provide for OAWP's independence from the agency; ensure that senior leaders' misconduct is swiftly and properly investigated; authorize OAWP to enforce disciplinary recommendations; and ensure that whistleblowers are protected and, when faced with retaliation, have a fair shot to prevail on the merits of their claims and to be made whole.

POGO is pleased to see this subcommittee engaging on whistleblower policy. We encourage Congress to act expeditiously to provide OAWP with its own independent legal counsel with final determination for disciplinary recommendations and enforcement authority to ensure that the VA holds senior leaders accountable for retaliation and other misconduct. With these suggested reforms, OAWP can become more independent, better protect whistleblowers, ensure unbiased reviews of allegations, and bring about more accountability for agency officials.

Thank you again for inviting me to testify before you today. POGO is committed to working closely with this subcommittee to enact these recommendations and further explore how Congress can better protect VA whistleblowers and ensure senior leaders are held accountable for their actions.

³¹ Office of Special Counsel, *Annual Report to Congress for Fiscal Year 2023*, (June 26, 2023), <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202022%20Annual%20Report%20to%20Congress.pdf>; Government Accountability Office, *VA Whistleblowers: Resolution Process for Retaliation Claims*, GAO-23-106111 (2023), <https://www.gao.gov/assets/gao-23-106111.pdf>.

Prepared Statement of Paul Pearson



Jacqueline Garrick, LCSW-C, SHRM-CP, WPA

Testimony on behalf of

Whistleblowers of America

October 19, 2023

Before the

House Committee on Veterans' Affairs, Subcommittee on Oversight and Investigations

Chairman Kiggans and Ranking Member Mrvan:

Whistleblowers of America (WoA) appreciates the opportunity to provide this statement for the record. I regret that surgery has kept me from appearing before you in person. As you consider this statement today, I call to your attention that this is the fourth time I have made such comments regarding the Department of Veterans Affairs (VA). I have discussed these issues at hearings on June 25, 2019, May 19, 2021, and June 16, 2022. During the first hearing we discussed the new Office of Accountability and Whistleblower Protection (OAWP). I raised issues related to the lack of timeliness, unclear processes, misaligned staffing, and poor performance in assisting employees as well as the disconnect between the Office of Inspector General (OIG) and the Office of Special Counsel (OSC). At that time and reiterated in 2021, I suggested that VA be mandated to:

- 1. Publish a policy and transparent data; utilize independent, unbiased staff; and have timely sanctions for retaliators; and 2. Abolish OAWP and transfer resources to the Office of Special Counsel (OSC) and/or;*
- 3. Allow VA employees to take their cases*

to civilian courts and provide them with access to legal counsel or support.

In 2021, I added recommendations for VA to have a ***Duty to Assist*** as the law requires the Secretary for all Claimants. *This should include: 1. Explaining level of evidence necessary to substantiate a claim against a perpetrator, 2. Assisting with obtaining the necessary evidence to substantiate the violation of laws, rules, or regulations, 3. Assisting in documenting retaliation by using the Occupational Safety and Health Administration (OSHA) descriptions or the Whistleblower Retaliation Checklist, 4. Offering options for remedies and settlement agreements. 5. An independent Mentor program with training and education in peer support and a trauma-informed framework as described by the Substance Abuse Mental Health Services Administration (SAMHSA) and retaliation according to OSHA.* We are still waiting to see the full gamut of these recommendations implemented by VA.

In 2022, WoA, its fellow Make It Safe Coalition (MISC) partners, and a bipartisanship effort by this Committee saw the House pass, ***The Strengthening Whistleblower Protections at the Department of Veterans Affairs Act; HR 8510.*** We thought this was going to be demonstrative progress, but we were let down. That effort would have separated OAWP from VA General Counsel (GC) (giving it its own GC), removed investigatory authority from OAWP and given it fully to OSC, which can do more than make recommendations, and required an analysis of settlement agreements, which remain a mystery for employees who are trying to obtain justice. HR 8510 would have addressed a myriad of VA ethical challenges. Therefore, we are disappointed that this Committee abandoned those goals and instead introduced a draconian approach to justice with the ***Restore Department of Veteran Affairs Accountability Act; H.R. 4461***, which the Committee Marked Up this summer. It represents a *baby out with the bath water* approach. As a veteran myself, I absolutely appreciate that bad actors must be punished. No doubt. However, this country and what veterans have fought for is a democracy with rights and protections. HR 4461 tramples on those American rights. Rule of law and due process should not be taken for granted. VA already has difficulty recruiting and

retaining employees. Why work for VA when there are not comparable civil service rights to other government employees? This is a clear violation of the Merit System Principles that require fairness in treating all employees equally.

All too often, WoA has seen and reported to this Committee instances where VA OAWP have fallen short. WoA has highlighted how Medical Serial Killers are not removed by complacent medical center directors while the whistleblowers experienced retaliation as retired Special Agent Bruce Sackman recorded in his book, *Behind the Murder Curtain*. I've shared the example of the self-inflicted death of Dr. Jeff Belinski. The medical team at the Cheyenne, WY VA Medical Center knew he was diverting drugs and performing procedures on veterans while under the influence. It is documented that surgeries were performed on wrong body parts. Yet, employees, including VA Police, who reported problems with Dr. Belinski, who wanted to help him and protect veterans from wrongful deaths, suffered retaliation instead. I have brought a proposal to this Committee to realign VA Police under the Department of Justice and remove them from the control of the Medical Center Directors and VA Central Office who can stop criminal investigations at the local level without any oversight or accountability. This would be a much better approach to catching and punishing adverse events at medical centers than by turning VA into a fascist regime.

We also know that it took Senator Charles Grassley (letters dated April 2, 2021, and July 11, 2022, to hold accountable VA Senior Executive Charmain Bouge for her conflicts of interest with her husband and his contracting work through her Education Services office. VA allowed Bogue to resign while under investigation even after Congress gave the VA OIG subpoena authority. The OIG refused to continue its interviews with Bouge, her husband, and the contractor, Veterans Education Success (VES). And what happened to the whistleblower who gave so much information to Senator Grassley? She was fired for her initial disclosures and has spent almost half a million dollars on legal representation, which VA will not fully cover. In addition, VA has misrepresented its intentions at arbitration, missed

dates and deadlines, lied about its legal authorities, and with the clock ticking into its 6th year of negotiations has yet to fairly settle this case.

This summer, we saw the AFGE end its Accountability and Whistleblower Act of 2017 dispute with the Administration in a union agreement settlement that covered thousands of wrongfully terminated Trump-era VA employees who finally can return to work, collect back pay, and regain other benefits. This will cost the VA millions of dollars for violating employment due process rights.^[1] WoA congratulates employees like Patty Stamos, a social worker who was impacted by the 2017 law, wrongfully removed after reporting concerns within her mental health clinic over suicide prevention program coverage. She will now go back to work assisting veterans.^[2] The restitution from the settlement is some vindication, but the grief and betrayal, like it is for combat veterans can linger. When this Committee holds other hearings on topics like suicide prevention, homelessness, and PTSD treatment, it should remember those employees who were fired under such oppressive regimes where not the only victims of enslaved truths but also victimized were the veterans who expected safe and equitable care. If only VA would listen to internal concerns instead of vesting in cover ups.

^[1] <https://federalnewsnetwork.com/veterans-affairs/2023/07/va-afge-reach-historic-settlement-to-reinstate-compensate-thousands-of-wrongfully-fired-feds/>

^[2] <https://labornotes.org/blogs/2023/09/va-firings-reverse-d-so-trump-makes-grievance-settlement-campaign-issue>

Furthermore, Senator Grassley's investigation into VA also uncovered its mismanagement of its Secretarial level communication tool, VA's Integrated Workflow Solution (VIEWS), which is a Salesforce system. This included mishandling veterans' and employees' personally identifiable information (PII), personal health information (PHI), and confidential whistleblower disclosures. Whistleblowers, getting no relief from OAWP went to OSC, which forced VA to investigate. This led to substantiations that whistleblowers and veterans PII and PHI were compromised and not kept confidential or noted as sensitive. Other issues, VA was unable to substantiate. But here is the catch. The VA Secretary assigned the investigation to the Office of Information Technology (OIT), which is the same office that contracted with Salesforce in the first place and the OIT recommendation is to improve system security by purchasing additional Salesforce products. The OIT made no recommendations that involved any relief for the whistleblowers whose information was compromised. And the OAWP has taken no action to assist or support the whistleblowers in any of the cases mentioned herein. In fact, OAWP has only acted to refer the cases to the OIG or OSC, further diminishing its usefulness as an office. OAWP does not have the same authority as OSC to issue decisions or stays from termination.

According to the VA's website, OAWP has 128 staff members and for this year so far, it has made 73 recommendations with 4 of the recommendations specifically related to whistleblower retaliation¹. That's about 1.8 recommendations per Full Time Equivalent (FTE) OAWP employees for the year. And, keeping in mind that OAWP does not have deciding authority, like the OIG, it can only make recommendations to the VA Secretary. It has no enforcement authority like the OSC. So, of the 73 recommended disciplinary and non-disciplinary actions it made to the VA Secretary, OAWP does not report on the final decision related to its work. Thus, it is possible that those recommendations have resulted in little to no actions. We must also pause and contemplate the 4 times OAWP this year says it made a recommendation for disciplinary action against a leader or supervisor for

¹ As of Oct 13, 2023: <https://www.va.gov/accountability/>

whistleblower retaliation. It is unknown who those leaders were or what actions were taken to correct the retaliation. It certainly was not against any of the leaders involved in the Senator Grassley investigations. There has been no accountability for the SES that was found by the OIG to have engaged in unethical behavior and conflicts of interest. Is she barred from ever being able to earn federal funds as an employee or a contractor? No. The Government Accountability Office (GAO) once found that over \$6 Million in suicide prevention money was not properly accounted for. Was anyone held responsible? No. Has there been accountability for the \$82 Million in CARES money that was misspent? No. Has any contract been terminated? No. Has any government official been fined or banned? No. Retaliation disciplinary actions were certainly not taken against any of the police chiefs or medical center directors we have previously discussed. The AFGE would not be in the fight it is in to represent police officers if OAWP was doing its job. And as far as we know, disciplinary action was certainly not taken against those who violated the use of VIEWS. Those are more than 4 examples that have come to the attention of WoA. It also is more than 4 according to a GAO investigation that found that while the rest of the federal government saw a decline in retaliation cases, the VA saw an increase with two-thirds reporting retaliation.² That is more than 4. So why the disconnect between OAWP reports and GAO findings?

We have tried to develop a working relationship with OAWP to better understand its operations and authorities. We would welcome regular briefings instead of having to fight for space at the table. We are grateful for the OAWP leadership who has met with us to discuss plans. They did introduce us to the new navigator program, which we hope matches our Duty to Assist contentions, but without consistent follow up, it is hard to know how implementation has gone. WoA invited OAWP leaders to present at our 3rd annual Workplace Promise Institute conference September 6-8, 2023, but after a few agreements, they declined to participate. This was very disappointing since we clearly have a large VA employee following. We did get leaders from the Commodity Futures Trading Commission (CFTC) to come and

² <https://www.military.com/daily-news/2023/05/04/majority-of-va-whistleblowers-report-retaliation-after-calling-out-agency-wrongdoing.html>

answer questions about their whistleblower program so it was disconcerting that VA could not be as transparent as CFTC. We also appreciated the House and Senate staff who met with us that week, including staff from this Committee. We cannot imagine that congressional staff have more time for stakeholder engagement than OAWP whose mission it is to “promote and improve accountability within VA.”³ In light of this lackluster accountability, WoA suggests that the OAWP should be mandated to provide at a minimum a quarterly briefing to the members of the Make It Safe Coalition along with the Veteran Service Organizations. The VA for too long has gotten away with pitting employees against veterans when they are more often than not on the same side. VA Police, OIG, and even the OAWP should have more than recommendation authority. If Congress truly wants accountability, then there needs to be greater transparency and a forcing function for these disciplinary actions. We do not need to obfuscate due process and rule of law. Every corner of the American Government should practice and uphold these rights, but we must also empower the agencies who can act. Realign VA Police to the Department of Justice and let them bring criminal charges against wrongdoers. Enforce OIG investigative authority and subpoena witnesses. Do not prematurely close cases. Hold accountable leaders who fail to meet their Merit System Principle Standards. They should pay fines and fees to the Judgement Fund that in turn can assist whistleblowers bring forth cases. The OAWP should be the navigator and provide a Duty to Assist a Claimant. The Navigator should be more than a glorified NO FEAR Act paper pusher. Whistleblowers should not have to FOIA information pertinent to their cases to develop evidence. The OAWP should be able to give them access to the information that they need to better serve veterans.

And finally, settlement agreements should not be so mysterious. In previous testimony before this Committee in 2022⁴, the VA General Counsel said that it adjudicates each one of its settlements based on the merits of the case. It denied that there was any kind of guidebook. Since that hearing, we have found ample evidence

³ <https://www.va.gov/accountability/>

⁴ <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114903>

that disproves those contentions. There are in fact manuals and policies dedicated to settlement agreements. However, the employee is rarely afforded this information or counseled on the best possible negotiated outcome. From the very first disclosure, through the retaliation and finally when it comes to settlement, there is little cooperation. The entire process is adversarial. There is no winning for anyone. The employees are shattered, veterans have suffered, and the system has lost credibility. We need to take steps to restore VA as an employer of choice because our nation's veterans deserve a workforce that is based upon American values and ethics, free of fear from reprisal and the bastion for civil liberties.