GOVERNMENT ACCOUNTABILITY PROJECT

1612 K Street NW Suite 1100
Washington, DC, 20006
(202) 457-0034
whistleblower.org

April 19, 2021

Honorable Chris Pappas
Chair
Oversight and Investigations Subcommittee
House Committee on Veterans Affairs
Washington, DC 20515

Dear Chairman Pappas:

Thank you for the opportunity to share the Government Accountability Project's (GAP) written testimony on legislative reform of the Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection. (OAWP) GAP is a non-partisan, non-profit organization that has helped over 8,000 whistleblowers since 1979, been a leader in campaigns to enact or defend nearly all federal whistleblower laws since, and was honored to participate in this committee's 2019 hearings on OAWP. We currently represent eight VA whistleblowers, and are helping others informally.

The 2019 hearings appear to have earned a bi-partisan consensus that the status quo at OAWP is unacceptable, for which all VA whistleblowers can be grateful. The agency operates without any published policies; is not bound by Whistleblower Protection Act legal burdens of proof; fails to communicate with complainants; routinely switches investigators without notice or explanation; canceled its effective counseling program; and canceled its effective mentoring mediation program. Perhaps most distressing; it is the only game in town. There is no appeal from arbitrary, adverse OAWP rulings. This is unacceptable at the single agency which depending no the year produces from 33-40% of whistleblower retaliation complaints for the entire federal government.

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

There is no question that legislative leadership is necessary. While agency managers privately have agreed with whistleblowers on the need for voluntary changes consistent with last year's legislation, those reassurances have been empty. For instance, the agency declined to take any corrective action after the U.S. Office of Special Counsel found a reasonable belief that the lack of independence evidenced illegality, abuse of authority and gross mismanagement, and ordered an investigation under 5 USC 1213(g).

GOVERNMENT ACCOUNTABILITY PROJECT

1612 K Street NW Suite 1100
Washington, DC, 20006
(202) 457-0034
whistleblower.org

In our opinion, this should not be an either-or choice. Both problems need to be addressed – unacceptable investigative practices policies; and agency's counsel's control of OAWP policies, evidenced by the cancelation of key service functions. The dual double-barreled failure is an opportunity for bi-partisan legislation that addresses both. All the provisions of the VA WPA are compatible with the minority model. OAWP needs an independent General Counsel to set polices for training and services such as counseling and mentoring. As whistleblowers exposed, OAWP's ongoing training breakdown can be traced to agency OGC rejection of training developed by OAWP staff because it was too employee friendly.

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

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

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

2) Whistleblower Protection Act investigative standards: One approach would be to require that OAWP adopt procedures equivalent to OSC standards for investigations and relief, apply Whistleblower Protection Act legal burdens of proof to assess complaints; institute an expanded Alternate Disputes Resolution (ADR) program, and require associated hands-on OSC training for all OAWP staff. This would be a reform analogous to that imposed by Congress in the Whistleblower Protection Act of 1989. The OSC then had been an unstructured Trojan horse for whistleblowers, and groups such as GAP called for tis abolition. Rather than eliminating OSC, Congress instead chose to replace discretion with structures and duties more carefully required by statute. This more constructive approach has worked to a significant degree.

3) Due process: Due to resource realities, no remedial investigative agency can provide relief for more than a small percentage of worthy cases. That means no matter how well OAWP performs, it never can be a reliable outlet to challenge retaliation. For the rights to be legitimate, it is essential that there be due process channels available for enforcement – both to appeal adverse OAWP judgements, and to have a "kickout" for a jury trial in federal district court if there is no timely administrative relief. This is the approach Congress took for Department of Energy and Nuclear Regulatory Commission employees in the Energy Policy Act of 2005. We

GOVERNMENT ACCOUNTABILITY PROJECT

1612 K Street NW Suite 1100
Washington, DC, 20006
(202) 457-0034
whistleblower.org

believe this is a superior approach than a kickout to the U.S. Merit Systems Protection Board, because that institution has a 3,300 case backlog due to the lack of Board Members for the last four years.

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

Respectfully submitted,

___s/Tom Devine/s_____

Legal Director
Government Accountability Project