

**Testimony of Special Counsel Carolyn Lerner
United States Office of Special Counsel
before the
Senate Subcommittee on Oversight of Government Management, the Federal
Workforce, and the District of Columbia**

Tuesday, March 20, 2012

Chairman Akaka, Ranking Member Johnson, and Members of the Subcommittee:

I am delighted to be here today to testify about the U.S. Office of Special Counsel, the OSC. It is an honor to be on this panel with MSPB Chair Grundmann. It was just a little over a year ago that I was here for my nomination hearing. Since then, much has changed at the Office of Special Counsel and much also remains to be done. I look forward to sharing these updates and goals with you.

OSC protects the merit system for over 2.1 million civilian employees in the federal government. Congress has tasked OSC with four distinct mission areas: First, we protect federal employees from prohibited personnel practices, especially retaliation for whistleblowing. Second, we provide a safe and secure channel for employees to disclose waste, fraud and abuse, and threats to public health, safety or security. Third, we enforce the Hatch Act, which keeps the federal workplace free from political coercion and improper partisan politics. Finally, we protect the employment rights of Veterans and members of the reserves and the National Guard.

We fulfill these important roles with a dedicated career staff of approximately 110 employees – and the smallest budget of any federal watchdog agency.

In the past, I have talked about OSC being the best kept secret in government. I am pleased to report that federal employees are starting to take notice of our agency.

OSC's caseload is increasing across all of our program areas. Filings are up 30% over the last three years. Our FY2012 caseload is currently 10% above the FY2011 numbers. And, in just one important area – whistleblower disclosures of waste, fraud and abuse – our numbers are up 32% over last year's level. I refer you to the graphics at the end of my testimony for additional detail on OSC's caseload.

While our workload increases at record rates, OSC's budget remains relatively flat, and may actually see a decrease in FY2013. Nevertheless, we are finding innovative ways to do more with less.

For example, for the first time, we have recruited several Presidential Management Fellows for rotations at our agency. We are increasing our use of alternative dispute resolution which helps avoid costly and time intensive litigation while providing better outcomes for employees and agencies alike. And, to avoid increased rent payments,

we have converted our library, which was largely underutilized, into work spaces. Small savings add up too – just switching computerized legal research providers saved nearly \$50,000 annually. In an agency of this size, these modest changes make a difference, and allow us to put every available tax dollar toward fulfilling OSC's good government mission.

Even with our modest budget, the OSC gets a lot of bang for the buck. We know that whistleblower disclosures to OSC save tax dollars and make the government more efficient.

For example, a U.S. Army whistleblower disclosed that the Army failed to properly review and approve an \$8 million staffing contract with a private company, resulting in a substantial overpayment to the contractor. While this case remains open, we know that OSC's efforts will result in a significant recovery of tax dollars and reforms that will help prevent wasteful practices in the future. The Army division responsible for the contract already implemented new quality control safeguards and will increase scrutiny of all contracts over \$100,000.

In another case, a Department of Homeland Security (DHS) whistleblower told OSC that more than 145 uniformed Border Patrol officers were regularly and improperly paid overtime at a cost of about \$50 per day. By stopping these payments, the government saved approximately \$2 million annually – at just one DHS facility. In addition, because of OSC's intervention, the Border Patrol initiated an agency-wide policy to improve control over the use of overtime authority.

In a third recent case, a Defense Contracts Audit Agency (DCAA) employee disclosed audit practices that prioritized speed over accuracy and potentially cost the government millions of dollars. Her supervisors retaliated against her. OSC intervened and got the employee significant relief. The employee's disclosures led to hearings before this Committee and reforms at DCAA with significant potential cost-savings.

These types of results are not unique. OSC's efforts to support whistleblowers often stop the immediate problem and spark reforms that prevent wasteful, inefficient, or unsafe practices.

Indeed, this was the result when whistleblowers at the U.S. military's mortuary in Dover disclosed misconduct regarding the improper handling of human remains. After OSC reviewed the allegations and made recommendations, the Air Force took important, wide-scale corrective action. We also know that our report prompted other whistleblowers to come forward regarding the dumping of remains in a landfill.

OSC's work helped to ensure that problems were identified and corrected, and the Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

OSC Initiatives

Since I took office in June 2011, OSC has also launched several important new initiatives.

Hatch Act Reform

I will start with one that I know is on your list as well: Hatch Act reform. When I first arrived at OSC, I discovered the overreach of this otherwise important federal law. At its best, the Hatch Act keeps partisan politics out of the workplace and prevents those in political power from abusing their authority toward political ends. But at its worst, the law prevents state and local candidates from running for partisan office if their job has even a trivial connection to federal funding. This provision disqualifies otherwise well-qualified candidates from running for office. And, this law is increasingly being used as a political weapon that keeps qualified candidates from serving their local communities.

I applaud your recent introduction of the Hatch Act Modernization Act of 2012. This bipartisan, good government legislation will prevent unnecessary federal interference with state and local contests. It will also modify the overly-restrictive penalty structure for federal employees.

Retaliation Pilot Project

Second, after taking office last summer, I launched a program that we refer to as the Retaliation Pilot Project. This project reallocated agency resources for the investigation and prosecution of whistleblower retaliation cases. Taking this step is beginning to reduce the backlog in OSC's investigation unit. Additionally, the project is a professional development tool to train attorneys from other OSC units in whistleblower law.

Strengthened Mediation Program

Third, I have strengthened OSC's Alternative Dispute Resolution program. We hired an expert mediator to head up our efforts and entered into an inter-agency agreement with the Federal Mediation and Conciliation Service. This partnership allows us to mediate cases nationwide and at a lower cost. With significantly increasing caseloads in all program areas, a strong ADR program will allow us to resolve many cases without resource-intensive investigations and litigation. It also provides quicker and better results for both employees and agencies. The program has been operating for just a few months and already we're seeing excellent results.

USERRA Demonstration Project

Fourth, shortly after my arrival at OSC we initiated a Demonstration Project in our unit that enforces the Uniformed Services Employment and Reemployment Rights Act, or USERRA. This Demonstration Project significantly increases OSC's responsibilities to

protect the employment rights of veterans, reservists, and members of the Guard. We have already received approximately 90 claims of employment discrimination against veterans. OSC is playing a central role in ensuring that the federal government upholds its responsibility to be a “model employer” under USERRA.

Improved Communication

Finally, another top priority for OSC is to enhance our communication with complainants and their counsel. Complainants must have a fair opportunity to be heard. So, we are building into the early portion of the screening process a mechanism to ensure that our examiners fully understand the nature of the allegations. And we are requiring investigators and attorneys in our Investigation and Prosecution Division to provide periodic updates to complainants during the course of an investigation to inform them of the status of their case and to offer them an opportunity to respond to the agency’s position. To improve customer service, we are working to make our complaint filing process more user friendly and enabling whistleblowers to file both a disclosure and a retaliation complaint at the same time.

Support for Stronger Whistleblower Protections

As you know, in addition to the Hatch Act and USERRA, OSC enforces the Whistleblower Protection Act, a law that is also in need of an upgrade. Senator Akaka’s legislation, the Whistleblower Protection Enhancement Act of 2011 (WPEA), would strengthen whistleblower law, restore congressional intent in this important area, and help OSC better perform its mission.

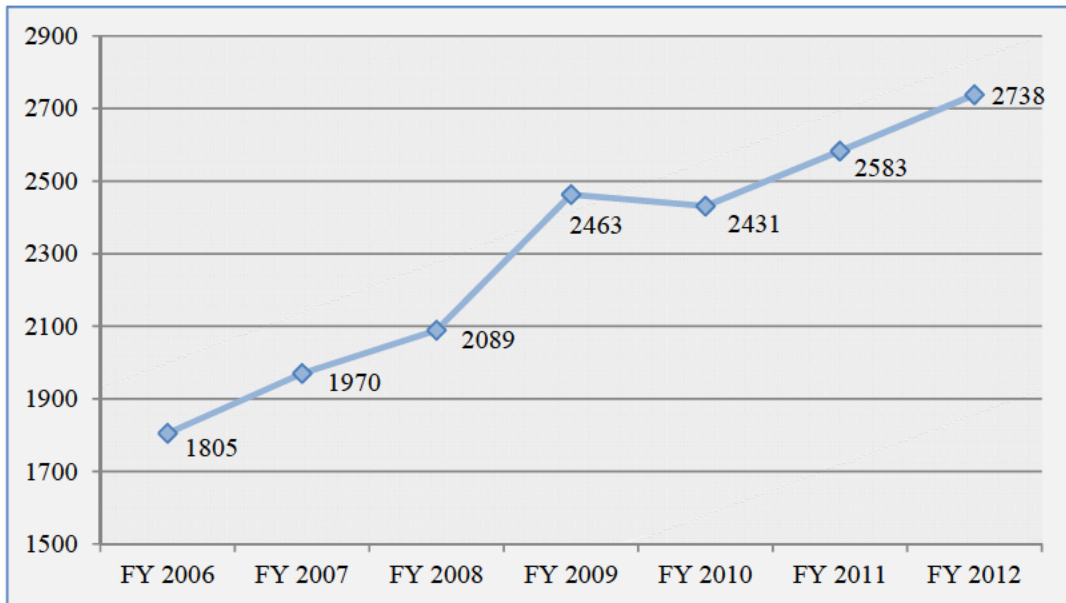
Right now, we are handcuffed by court decisions that too narrowly define who is protected for whistleblowing. The WPEA would broaden that definition by ensuring that employees are protected for any lawful disclosure, including those made in the course of their job duties. This is a key reform that will allow employees in critical positions, such as auditors and safety inspectors, to receive full protection under the law, as Congress always intended.

In addition, OSC cannot effectively deter retaliation by seeking disciplinary action against the retaliators before the MSPB because the current legal burden is extremely high. In addition, if OSC is not successful, even if our decision to pursue disciplinary action is reasonable and supported by the evidence, the agency may be required to pay attorneys’ fees. Both of these obstacles would disappear if this legislation passed.

Conclusion

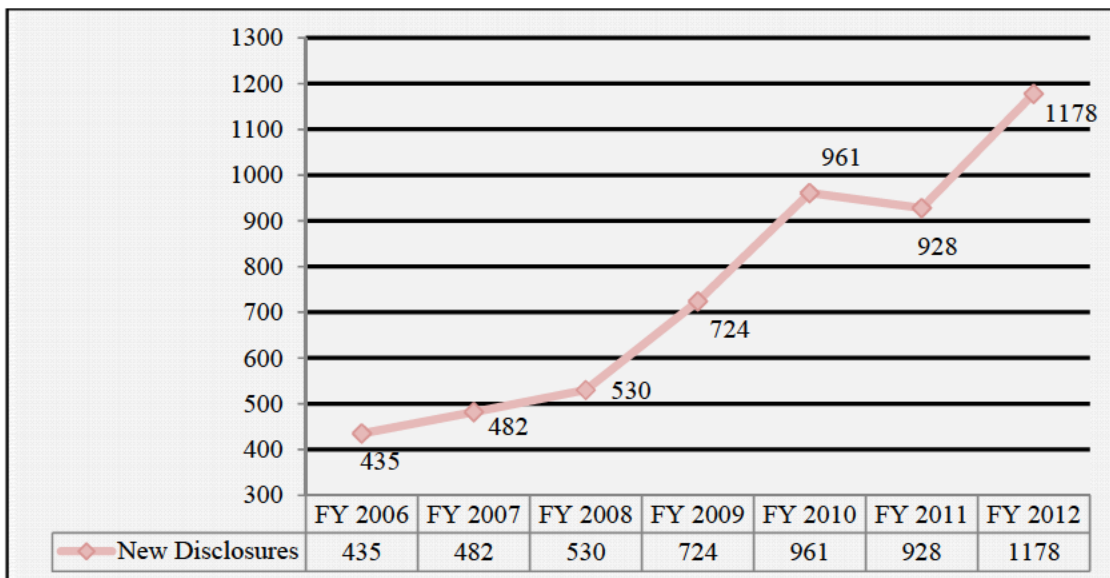
In conclusion, I appreciate and applaud this Subcommittee’s efforts to reform the Hatch Act and the WPA. I also thank you for your support for our important work. I look forward to answering your questions.

OSC New Prohibited Personnel Practices Cases



- For FY2012, a 6% increase in Prohibited Personnel Practice (PPP) cases is expected over the record level of PPP cases received in FY 2011

OSC New Whistleblower Disclosures



- For FY2012, new whistleblower disclosures are up 32% over FY 2011

Special Counsel Carolyn N. Lerner

Carolyn Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C. civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights. Ms. Lerner is in *Best Lawyers in America* with a specialty of civil rights law and is one of *Washingtonian* magazine's top employment lawyers.

Ms. Lerner earned her undergraduate degree from the University of Michigan with highest honors, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.