

**Written Testimony of Special Counsel Carolyn N. Lerner
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Senate Committee on Veterans' Affairs

Hearing on Pending Legislation

November 18, 2015

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over 2 million civilian employees in the federal government, with a particular focus on investigating and prosecuting allegations of whistleblower retaliation. We appreciate Senator Kirk's and the Committee's efforts to support whistleblowers at the Department of Veterans Affairs (VA), and offer the following views on the "Veterans Affairs Retaliation Prevention Act" of 2015 ("the Act").

The Act establishes a new process for VA employees to report concerns about misconduct. This new process directs employees to report concerns, on a designated form, to their immediate supervisor, and creates conditions under which an employee may elevate a complaint up the chain of command. It is often appropriate and practical for an employee to disclose information to their immediate supervisor. However, existing whistleblower protections do not require chain of command reporting, and also do not require that disclosures be made on a prescribed form. Accordingly, the process is more cumbersome, but also duplicative of existing protections. However, if Congress believes a new statutory process for reporting concerns is needed, to avoid confusion with existing law, employees should be clearly notified that the outlined procedure is not the exclusive process by which they may report a concern.¹

The legislation also requires the VA to evaluate supervisors on "whether the supervisor treats whistleblower complaints in accordance" with the new reporting process described above. We believe the Act's process is overly-prescriptive for employees and supervisors, and may not be practical in many instances, especially for low level supervisors who are not best-positioned to respond to their subordinates' concerns. This specific approach, therefore, is not the best method for evaluating management efforts to support and protect whistleblowers.

Nevertheless, OSC strongly supports the concept of including whistleblower protection and promotion criteria in management performance appraisals. The Labor Department's Whistleblower Protection Advisory Committee (WPAC), on which OSC is a non-voting member, recently recommended this as a best practice for all employers in the public, private, and non-profit sectors. Specifically, WPAC recommends that businesses "incorporate anti-retaliation measures (e.g. constructively addressing concerns, attending training, and championing compliance initiatives) in management performance standards and reviews." The

¹ In addition, because the process is primarily intended as an avenue for reporting concerns about waste, fraud, and abuse (and not to address complaints about retaliation), it may be helpful to use the term "whistleblower disclosure" rather than "whistleblower complaint" throughout this section.

goal of using these criteria is to provide management incentives for responding constructively to employee concerns, fostering an environment that promotes disclosure and prevents retaliation.

Rather than limiting the performance criteria to those specified in the Act, we recommend that the Committee seek the VA's views on what criteria would be a better fit for VA supervisors, and modify the legislation accordingly. Performance criteria to hold managers accountable for constructively resolving employee concerns can play a critical role in fostering an anti-retaliation culture in the VA.

The Act also establishes a VA "Central Whistleblower Office," which is responsible for investigating all whistleblower disclosures made by employees in the Department. To the extent that this office will act as a de facto depository of all VA whistleblower information and identities, it is critical that there are clear rules and expectations on confidentiality and the release and use of names and information. VA employees should also receive clear guidance that this office is in addition to other available channels for reporting concerns, such as OSC and the Inspector General.

OSC supports additional mandatory training on whistleblower protections for all employees, and would be pleased to work with the VA to carry out specific training requirements.

Finally, OSC supports the Act's expansion of the definition of a personnel action in section 2302 of title 5 to include performance evaluations under title 38. This covers a gap in OSC's enforcement authority for title 38 VA employees. Under current law, a title 38 employee may file a whistleblower retaliation complaint with OSC, and we may review and correct other personnel actions such as a termination, demotion, or suspension, but we are technically barred from seeking to correct a retaliatory performance review for these workers. The Act would address this concern, without adding considerably to OSC's caseload.

We thank you for the opportunity to submit these views.