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A REVIEW OF THE OFFICE OF SPECIAL COUNSEL AND MERIT SYSTEMS PROTECTION BOARD

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

MARCH 20, 2012

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CONTENTS

	Page
Opening statement:	
Senator Akaka	1
Prepared statement:	
Senator Akaka	21

WITNESSES

TUESDAY, MARCH 20, 2012

Hon. Susan Tsui Grundmann, Chairman, Merit Systems Protection Board	3
Hon. Carolyn Lerner, Special Counsel, U.S. Office of Special Counsel	5

ALPHABETICAL LIST OF WITNESSES

Grundmann, Hon. Susan Tsui:	
Testimony	3
Prepared statement	23
Lerner, Hon. Carolyn:	
Testimony	5
Prepared statement	36

APPENDIX

Background	41

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:54 Sep 11, 2012 Jkt 073677 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 P:\DOCS\73677.TXT JOYCE

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A REVIEW OF THE OFFICE OF SPECIAL COUNSEL AND MERIT SYSTEMS PROTECTION BOARD

TUESDAY, MARCH 20, 2012

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in Room 342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senator Akaka.

OPENING STATEMENT OF CHAIRMAN AKAKA

Chairman AKAKA. I call this hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia to order.

Aloha and good afternoon. I would like to thank you all for joining us today at this hearing to review the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

I would like to welcome our two very distinguished witnesses—Special Counsel Carolyn Lerner and Chairman Susan Grundmann.

The Civil Service Reform Act (CSRA) of 1978 created the Office of Special Counsel and the Merit Systems Protection Board to safeguard the merit system principles to help ensure that Federal employees are free from discriminatory and retaliatory actions, especially against those who come forward to disclose government waste, fraud and abuse.

I believe these two agencies to be among the most important to Federal employees. At a time when resources are limited, both agencies provide essential protections to employees so they can perform their duties in the best interests of the American public.

The Board is responsible for monitoring the Federal Government's merit-based system of employment by hearing and ruling on Federal employees' appeals of job removals and other major personnel actions. The Board also reviews the Office of Personnel Management (OPM) rules and regulations, and conducts studies that evaluate Federal merit systems policies, operations and practices.

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OSC is charged with protecting Federal employees and job applicants from prohibited personnel practices (PPPs) like reprisal for whistleblowing. OSC serves as a safe and secure channel for Federal workers who wish to disclose violations of law, gross mismanagement or waste of funds. In addition, OSC enforces and provides advisory opinions regarding the Hatch Act and protects the rights of military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The laws that the Board and OSC enforce are key protections for the Federal workforce and for government accountability, more broadly. For more than a decade, I have worked to reform protections for Federal whistleblowers. Whistleblowers play a key role in making the government more effective and save the Federal Government money. Enacting the Whistleblower Protection Enhancement Act (WPEA) is one of my top priorities.

Additionally, earlier this month, I introduced legislation to modernize the Hatch Act. Congress has not amended this law since 1993. My bill would remove the prohibition on State and local employees running for partisan elected office, a prohibition that currently drains OSC of resources and often results in qualified, dedicated public servants not being permitted to run for office. The bill also would provide the Board with more flexibility in issuing penalties for violations and would treat District of Columbia employees like other State and local employees. This common sense legislation would provide a much needed update to the law and would allow OSC to use its limited resources more efficiently.

As a senior member of the Veterans' Affairs Committee and a veteran myself, I believe one of the Federal Government's most sacred responsibilities is to care for our Nation's warriors after they return home. Our dedicated service members should not be worried about finding employment or returning to work after the completion of their service. I expect protecting veterans' rights to be among the highest priorities of these agencies.

Finally, as our Nation faces pressing fiscal challenges and tough budget choices, we must remember that safeguarding the merit system and protecting whistleblowers are critical to an effective, accountable and efficient government. We must provide the Board and the OSC the resources they need to do their important work.

With that, I would like once again to thank everyone for being here today, and I am looking forward to hearing from our witnesses.

Our first panel is—and it is really my pleasure to welcome—Susan Grundmann, Chairman of the Merit Systems Protection Board, and Carolyn Lerner, Special Counsel of the United States Office of Special Counsel.

It is a custom of this Subcommittee to swear in the witnesses, and I will ask both of you to stand and raise your right hand.

Do you solemnly swear that the testimony you are about to give this Subcommittee is the truth, the whole truth and nothing but the truth; so help you, God?

Ms. GRUNDMANN. I do.

Ms. LERNER. I do.

Chairman AKAKA. Thank you.

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Let the record show that the witnesses answered in the affirmative.

I want you both to know that although your remarks are limited, you can give your statement and your full statements will be included in the record.

So Ms. Grundmann, will you please proceed with your statement?

TESTIMONY OF HON. SUSAN TSUI GRUNDMANN,[1] CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD

Ms. GRUNDMANN. Thank you, Mr. Chairman. It is an honor to come before this panel to discuss the steps that the Merit Systems Protection Board has taken during my tenure as Chairman to ensure that the agency fulfills its statutory responsibility to protect the Federal merit systems.

Joining me today is my colleague and friend, the Vice Chair, Anne Wagner, and members of our senior staff, whom we welcome.

Mr. Chairman, my chairmanship of the MSPB began in November 2009 and, fortuitously, coincided with President Obama's issuance of the Open Government Executive Order, an order that heralds an unprecedented level of transparency in the Federal Government. Transparency is now a core value at MSPB. It guides our efforts to promote and safeguard the Federal merit systems and principles through our adjudication and our studies function.

Transparency has played a major role in our adjudication function. We have resurrected the practice of oral arguments on legal issues of significant agency or governmentwide impact. These issues are briefed, argued and presented before the Board and interested members of our community and the public.

In addition, the Board now routinely calls for amicus briefs on significant issues of wide-ranging impact, allowing the parties and stakeholders to weigh in on a particular rule interpretation and influence. These briefs serve to educate and inform the Board as the members deliberate on the cases that come before us.

Transparency has also resulted in the changing of the format of the Board's decisions. Since June 2010, the Board has issued more detailed and reasoned decisions in a nonprecedential form. This new format takes the place of the summary denial, or short form, that the Board has traditionally used and provides the parties with additional information about the rationale for the outcome.

This format has assisted in the review of our decisions by our controlling court, the U.S. Court of Appeals for the Federal Circuit. As a result, we believe our affirmance rate by the Federal Circuit is now 98 percent; it is at an all-time high.

And yet, there is more to come. The MSPB is currently in the process of a comprehensive review of our adjudication regulations, the first thorough examination and potential revision since our inception in 1978. We are undertaking this endeavor transparently, with the support and interactive engagement of stakeholders, sister agencies and customers in the MSPB community.

And while our adjudication function allows us to resolve existing disputes, our statutory studies function permits us to suggest best

[1] The prepared statement of Ms. Grundmann appears in the appendix on page 23.

H605-41331-79W7 with DISTILLER

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practices and recommend improvement and to examine whether the workforce is managed under the merit systems principles without prohibited personnel practices. We approach this function with transparency.

Beginning early 2010, the Board embarked on a series of outreach activities with stakeholders including agency representatives, the private bar, union officials, good government affinity groups and our sister agencies. These meetings culminated in late 2010. We held our first entirely open government in the Sunshine Act Meeting in over 10 years. This meeting was specifically dedicated to our national research agenda. And for the first time, instead of presenting our stakeholders with a list of topics, we asked them to suggest topics of their own. Their suggestions will guide our studies program for the next 3 to 5 years.

We also plan to study the merit principles system as it affects performance motivation in the Federal Government, preserving the integrity of the merit system by addressing perceptions of favoritism and managing public employees in the public interest. We believe these studies will help strengthen merit, improve adherence to the merit principles systems and prevent prohibited personnel practices which will, in turn, improve service to the public and provide value to the taxpayer.

We hope that these reports, like our recent reports on prohibited personnel practices and barriers to whistleblowing, will be useful to Federal agencies, such as the Office of Special Counsel in advancing their missions and purposes.

When Congress passed the Civil Service Reform Act of 1978, it separated the creator of personnel rules for Federal employees from the adjudicator of those rules. Congress also gave the Board an independent statutory mission which is essentially a marriage between our adjudication and our studies function; that is, to study the significant actions of the Office of Personnel Management.

We have, in this context, reviewed OPM regulations directed at the Federal Career Intern Program (FCIP), the Outstanding Scholar Program and suitability determinations and limitations in addition to regulatory topics touched on through oral argument.

Outside of our adjudication function, we plan to review in our 2011 Annual Report an update to OPM's hiring reform, incorporating telework into government dismissal and closure procedures, among other rules.

Unfortunately, we do face many of the same challenges that the other Federal agencies—confront, which is tightening budgets and retirements. Our greatest concern is indeed the vast wave of retirements we face internally at MSPB. In the next 2 years, over 30 percent of MSPB's workforce will be retirement-eligible, and 47 percent of that number is the administrative judges (AJs) who are responsible for issuing initial decisions in thousands and thousands of individual cases every year.

Because it takes approximately 2 years of training before an AJ can work independently, retirement, recruitment and training are extremely pressing concerns, particularly if appeals increase in the areas of retirement, veterans' work, veterans' claims and as a result of agency restructuring due to tightening budgets.

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Mr. Chairman, you and your distinguished Subcommittee have been our strong supporters of our work and mission. Thank you for your leadership during your successful tenure as either Chairman or Ranking Member of this Subcommittee and its predecessor subcommittees. You have been a champion for effectiveness and efficiency in the Federal Government, an early advocate for greater workforce flexibilities, such as telework, and a consistent voice for fair treatment of Federal employees. Your efforts to protect the rights of whistleblowers are renowned, and your ability to bring legislation to the Senate floor, important legislation, is notable indeed.

Thank you for this opportunity to talk about the important work we do. I look forward to answering your questions.

Chairman AKAKA. Thank you very much, Chairwoman Grundmann.

Ms. Lerner, will you please proceed with your statement?

TESTIMONY OF HON. CAROLYN LERNER,[1] SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Ms. LERNER. Thank you. I am delighted to be here today to testify about the United States Office of Special Counsel. It is also an honor to be on this panel with MSPB Chair Grundmann.

I am joined today by senior members of my agency, and I would like to recognize them and thank them for their support as well.

Chairman Akaka, before I go into the good work being done by the Office of Special Counsel, I would like to take just a moment to commend you for the phenomenal work that you have done in Congress. Throughout your long career, you have been a leader in advancing stronger whistleblower protections for Federal employees, most recently, with the reintroduction of the Whistleblower Protection Enhancement Act.

When we spoke last week, you told me that after serving for so many years in the Congress you wanted to be able to spend more time with your many children, grandchildren and great grandchildren in Hawaii. And you and they certainly deserve that opportunity, but please know that your other family, the family of the Federal workforce, deeply appreciates all that you have done for them and your service on their behalf.

It has been an honor to get to know you, and I look forward to working closely with you over the next few months to see the Whistleblower Protection Enhancement Act enacted and to reform the Hatch Act.

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 I am pleased to have this opportunity to share these changes with you today.

The Office of Special Counsel safeguards the merit system for over 2.1 million Federal employees. We have four distinct missions: We protect employees from prohibited personnel practices, particularly retaliation. We provide a safe and secure channel for employees to disclose waste, fraud and abuse, and health and safety violations. We enforce the Hatch Act, which keeps the Federal work-

[1] The prepared statement of Ms. Lerner appears in the appendix on page 36.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:54 Sep 11, 2012 Jkt 073677 PO 00000 Frm 00009 Fmt 6633 Sfmt 6633 P:\DOCS\73677.TXT JOYCE

place free from political coercion and improper partisan politics. And we protect the employment rights of veterans and service members.

We fulfill these roles with a career staff of about 110 employees and the smallest budget of any Federal watchdog agency.

In the past, I have talked about how the OSC is the best kept secret in government. I am pleased to report that seems to be changing. Caseloads are increasing in all of our programs. In just one important area, whistleblower disclosures, our numbers are up 32 percent over last year's levels. But while our workload increases at record rates, OSC's budget has remained relatively flat.

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

For example, in one recent case, a whistleblower disclosed that the Army had failed to properly review an $8 million contract, resulting in a substantial overpayment to the contractor. OSC's efforts will result in a significant recovery of tax dollars and reforms that will help prevent something like this from happening again.

In another case, a Department of Homeland Security (DHS) whistleblower told OSC that more than 145 border patrol officers were improperly being paid overtime. By stopping these payments, the government saved approximately $2 million annually at just one DHS facility. And because of OSC's intervention, the Border Patrol instituted an agencywide policy to improve the use of overtime and prevent something like this from happening again.

These types of results are not unique. OSC's efforts to support whistleblowers often stop both the immediate problem and spark wider reforms.

Indeed, this was the result when whistleblowers at the U.S. Military's mortuary in Dover disclosed the improper handling of human remains. After OSC intervened, the Air Force took wide-scale corrective action. Our report also prompted other whistleblowers to come forward and report the dumping of remains in a landfill. The Air Force is now better able to uphold its sacred mission on behalf of fallen service members and their families.

Beyond specific casework, since I took office, we have launched several important new initiatives, and I want to talk about just a few of them. I will start with one that I know is on your list as well—Hatch Act reform—and I thank you, Senator Akaka, for introducing the Hatch Act Modernization Act of 2012.

This bipartisan, good government legislation will prevent unnecessary Federal interference with State and local elections, and it will allow well qualified candidates to serve their communities. It will also fix the overly restrictive penalty structure that currently exists for Federal employees.

A second initiative that I launched is the Retaliation Pilot Project. This project allows employees from any of our units to spend 6 months in the Investigation and Prosecution Unit, working on whistleblower retaliation cases. It is already beginning to reduce our backlog, and it also provides a great professional development opportunity for our employees.

Third, I have strengthened OSC's Alternative Dispute Resolution Program (ADR). We have brought in an expert mediator and

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partnered with the Federal Mediation and Conciliation Service with an interagency agreement. A strong ADR program helps resolve many cases without resource-intensive investigations and litigation. It also provides for quicker and better results for both employees and agencies alike.

Finally, we initiated a demonstration project for the Uniformed Services Employment and Reemployment Rights Act program. This project significantly increases OSC's role in protecting the employment rights of veterans and service members.

So in conclusion, over the last 8 months, we have been very busy and we have been very productive.

I thank you, and I thank this Subcommittee for its continued support of our important work, and I look forward to answering your questions.

Chairman AKAKA. Thank you very much to both of our witnesses.

I would like to thank you both for you leadership in these important areas.

My first question to both of you is your agencies' statutory missions are intertwined with each other's, along with the statutory missions of the Office of Personnel Management, the Federal Labor Relations Authority (FLRA) and the Equal Employment Opportunity Commission (EEOC).

What are your agencies doing to work together? What are you doing to work together along with other sister agencies in the Federal Government to protect Federal employees?

Any one of you may begin.

Ms. LERNER. I am happy to start or I will defer to you, Susan.

Ms. GRUNDMANN. Go ahead.

Ms. LERNER. OK, I will start on this one.

We do have several sister agencies, and we have been working hard to establish ties with all of them, really.

And the MSPB is certainly our closest sister agency, both figuratively and literally. We are about a block away from each other, and our work is so closely linked. In fact, the OSC used to be part of the MSPB.

Some of the things that we have done to establish a better relationship, from the very simple, like visiting the MSPB—our senior staff went over and met with the entire agency, and they will reciprocate for us. We have consulted with the MSPB when we were setting up our mediation program. We filed an amicus brief when the Board called for them on the security clearance issue. We have been more actively seeking formal stays from the MSPB, and that helps us to get voluntary stays as well from agencies. And, we have been using their reports. In particular, I have used their report on employee perceptions of prohibited personnel practices and barriers to making disclosures in doing outreach.

You mentioned the EEOC as well, and we have been reaching out to them. We are working right now on a work-sharing agreement, or a memorandum of understanding (MOU), to more efficiently process mixed cases.

I have met with the head of the Office of Federal Operations about ways to do outreach to Federal agencies.

H605-41331-79W7 with DISTILLER

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I have met with Commissioner Feldblum regarding sexual orientation cases, and their representatives have attended one of our stakeholder meetings on LGBT issues.

You mentioned the (FLRA), and I have also met with the head of that agency, Carol Pope, regarding best practices in agency management.

And, OPM continues to refer cases to us, and we continue to have a strong working relationship with them.

So we are trying very hard to coordinate with our sister agencies and find ways to work together.

And I will just mention one more agency—the Federal Mediation and Conciliation Service. I mentioned in my opening statement we entered into an interagency agreement with them to help us be more efficient in the way we provide mediation services. And they have offices all across the country, and so it is very good for us to be able to have cases mediated out in the field. It saves us money, it is more efficient, and it is a better use of resources.

So there are lots of ways to work together, and we are exploring them all.

Chairman AKAKA. Thank you very much for your response, Special Counsel Lerner. Chairman Grundmann.

Ms. GRUNDMANN. Thank you, Mr. Chairman.

Like the Special Counsel, we have interacted in many ways with all our sister agencies, and we do so with a certain amount of respect for the various jurisdictions as we are the adjudicator of many of the things that come before us.

But that aside, going back at least over a year, each of these agencies that you have mentioned.

And a problem that has paid a visit to the MSPB, their leadership. They have brought their processes, their vision, their goals and their challenges before us to share in front of all our agency employees.

With respect to particularly if we look at the adjudication regulations and our review of our adjudication regulations, our proposed regulations have gone out to OPM, to the Special Counsel, to EEOC, asking for their input before we go into the public rulemaking process.

As Ms. Lerner mentioned, we do issue routine calls for amicus briefs. We have done, so far, eight in the last 2 years, and all these agencies participate when they believe it is appropriate.

And finally, we have designed a strategic plan. It is unveiled on our Web site. Copies of the draft strategic plan went to all the agencies for their input and their assessment. We understand that we received some very positive statements from our stakeholders, from our sister agencies, and even in the early days of Special Counsel Lerner's arrival we worked with her team to design their strategic plan.

So it is a good working relationship with all these agencies, bearing in mind the role that we take.

Chairman AKAKA. Well, thank you very much. I am glad to hear your responses.

I have often said that a problem that our government organizations have, and our government really, is that, because of its size, it can be unwieldy.

H605-41331-79W7 with DISTILLER

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When I was Chairman of the Veterans' Affairs Committee and also senior member of the Armed Services, I worked to improve communication between Federal officials, and now the secretaries and deputy secretaries speak to each other. And I smile because it has been something that has saved time. By lifting the phone, we can talk to each other and things get done. And there are no letters that need to be written, and so things really move quickly.

Of course, this is important. Communication needs to exist throughout the Federal Government. So I am glad to hear that you are both able to do as much of that as possible, because it will certainly save time and make the government more effective.

Ms. Grundmann and Ms. Lerner, the 1978 Civil Service reforms separated your agencies from the previous Civil Service Commission. The OSC originally was part of the Board, but the 1989 whistleblower reforms separated your agencies from each other.

Will you please discuss your agencies' respective roles and why it is important for them to function independently of other Federal workforce agencies? Ms. Grundmann.

Ms. GRUNDMANN. Let me take a shot at it.

The separation is important. It is significant in that the Civil Service Reform Act separated a number of agencies in our view, to maintain our neutrality and our impartiality in adjudicating whether the merit systems are being protected and whether the public interest is served in a civil service free of prohibited personnel practices.

That separation from OPM, the creator of the rules for Federal employees, and from the OSC, the prosecutor, if you will, of claims of violations of prohibited personnel practices, has allowed a balance. They review the cases; they bring their cases; they adjudicate the cases, with us at arm's length. And as such, we are able to deal with it with impartiality.

I think the relationship is good in that sense. It does not preclude any of the agencies from being collegial in nature, but it certainly preserves the original purpose for which we were intended to be formed.

Chairman AKAKA. Thank you for your response. Ms. Lerner.

Ms. LERNER. I will just add a couple things, and that is for the Office of Special Counsel in particular—let me put my microphone on.

For the Office of Special Counsel, our role really is in many ways to be an independent reviewer of agencies' actions, at least in the disclosure area.

So for example, when we receive a disclosure from an agency and we make a determination there is a substantial likelihood that the disclosure is valid, we have to then send it back to the agency and ask them to do an independent investigation. We review their investigation and send it back if we need more information or sort of act as a second pair of eyes, to make sure that what the agency has done really is legitimate and is going to solve the problem.

So we have to have some independence from the agencies, and it is an independence that often Inspectors General do not have within an agency.

That being said, there are so many areas where we can work collaboratively with agencies as well. One of them is in outreach and

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education. We do that a lot with our Hatch Act Unit, in particular, as well as USERRA. Virtually every one of our units is actively involved in outreach and education and trying to prevent problems from happening in the first place.

We are hoping to be able to revive our 2302 certification program as well. That will give agencies goals to meet and better protect the Federal workforce from violations of the Civil Service rules and USERRA and the Hatch Act.

Chairman AKAKA. Thank you very much for your response.

Ms. Lerner, as I mentioned in my opening statement, my bill to modernize the Hatch Act would eliminate the current prohibition on State and local employees running for partisan elected office. How does this prohibition affect your office, both in terms of resources and its ability to fulfill other statutory obligations?

Ms. LERNER. Well, the Hatch Act obviously has a very important function which is keeping political coercion out of the Federal Government, and stopping misuse of official office. But there are two really serious problems that need fixing, and your legislation would fix them both.

The first is the impact on State and local cases. You asked about the impact on our agency of those cases. Forty-five percent of the cases in the Hatch Act Unit right now involve investigating State and local political campaign cases. So over 500 investigations in the last 2 years have involved just these State and local campaign cases. The caseload would be significantly higher if you counted within that number the informal and formal advisory opinions beyond just the investigations that take place.

Right now, the law impacts thousands of State and local employees across the country every year, and these are not people who have done anything wrong. They just want to run for local office and serve their communities. So it has a very big impact both on our agency and on State and local employees all across the country.

If I can just give you a couple of examples of the types of cases that we have had to be involved in: Routinely, we have to tell deputy sheriffs that they cannot run for sheriff because of the influx of Federal funding into those departments. And who better to run for sheriff than a deputy?

We have had to tell an ambulance driver he could not run for county coroner because he transports Medicaid patients.

We had to tell a local transit officer in a canine unit that he could not run for school board, an unpaid position, because his dog was paid for with Federal funds.

These are the types of cases that we have to get involved in all the time.

And the legislation would really help us use our resources better because these State and local cases require very fact intensive investigations to try and show whether there is in fact a connection to the Federal funds. So it takes a lot of time to investigate these cases.

If we could reallocate our resources, we could focus on cases where there is coercion or actual misconduct. We could do more education and outreach, which I think is vital to preventing Hatch Act violations in the first place.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:54 Sep 11, 2012 Jkt 073677 PO 00000 Frm 00014 Fmt 6633 Sfmt 6633 P:\DOCS\73677.TXT JOYCE

In this Federal election year, we are going to have a tremendous influx of cases, and we will need to put more resources into those cases. So we would like to be able to prioritize these areas and use our resources in that way.

Chairman AKAKA. Thank you.

Ms. Lerner, your office also recommended that penalty provisions of the Hatch Act be amended so that the Board will have more flexibility in issuing penalties when violations of the law occur. Will you please discuss why your office made this recommendation?

Ms. LERNER. Sure. Well right now, there is only one penalty for any level of infraction regardless of other factors, and that is if someone is found to be in violation the presumptive penalty is always termination. Now, it can be mitigated down to 30 days with a unanimous decision by the Board. But in fact, it really is not fair right now, that this is the only penalty, and it is unlike any other violation for a Federal employee, where there is a range of penalties. The Hatch Act only has the one, and it is a very severe penalty of termination.

We think that agencies are hesitant sometimes to refer cases to us because they do not want to lose an otherwise good employee who they know can be terminated for what could be a very minor violation.

So we believe that it would be in everyone's interest to fix this part of the law, to provide for a range of penalties. And I think it reflects well on the Federal Government to be fair about this kind of thing.

Chairman AKAKA. Thank you.

Ms. Grundmann, you mentioned a number of Board studies, and I am so glad that we have a group that can conduct those studies. It is my understanding that a number of studies are currently pending, addressing issues such as violence in the workplace, fair hiring practices and motivating strong employee performance. I would like to hear more about the Board's current work and how you believe it will contribute to a more productive Federal workforce.

Ms. GRUNDMANN. I would be happy to talk about it. Let me first talk about the violence in the workplace report. And let me begin by noting that all these reports that we are going to talk about are subject to the review and the approval of the Board members, and the Board members have not seen these reports yet, but they are vetting internally within the agency.

With respect to the violence in the workplace report, that is, interestingly enough, something that the stakeholders wanted us to study. So we are following through on that request or recommendation.

And what we are finding is that violence in the workplace leads to, of course, lost work time, low morale, increased employee turnover.

We are looking toward developing objective criteria in terms of the frequency and the nature of this type of violence and perhaps an enhanced data collection proceeding. Eventually, we hope to help agencies craft their own anti-violence programs using the findings of this report.

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The second report that is significant is the performance motivation in Federal Government, linkages, potential linkages and performance, and that is a relevant report in this time because we are dealing with tightening budgets, pay freezes, lower bonuses and loss of training dollars for development and progress of employees.

The question we present is how you keep Federal employees motivated in this environment where rewards may not necessarily be monetary in nature. So we will be designing a series, or offering a series, of nonmonetary incentives that agencies can provide employees.

This report is also based on our 2010 Merit Principles Survey, and in it, we look for items that will identify factors that will elicit efforts and performance above and beyond the minimum. So again, motivation.

The final report I would like to talk about is managing employees in the public interest, and this is also based on our 2020 Merit Principles Survey.

And the interesting thing about our surveys is one survey is conducted, but it produces multiple results for multiple reports. So no data is ever wasted, and the reports actually build on each other.

This time we will be looking at Federal agencies' adherence to the nine merit principles from the employees' perspective. And it will be hopefully insightful to our stakeholder community in addition to the agencies, as to how effectively and efficiently Federal employees are managing their workforces in terms of hiring, in terms of employment, in terms of retention, and identifying areas of improvement.

Chairman AKAKA. Thank you very much.

Ms. Lerner, your testimony mentions that OSC is effectively handcuffed by court decisions narrowing the Whistleblower Protection Act. Would you please elaborate on that problem as well as the practical implications it has for those who come forward to disclose waste, fraud and abuse or illegal activity?

Ms. LERNER. Sure. Right now, we are really handcuffed by court decisions that have narrowed the scope of protections and the definitions of who is actually protected by the Whistleblower Protection Act.

We can always weed out frivolous claims. In fact, a fairly small percentage of complaints actually gets investigated and prosecuted, but right now we cannot protect employees who blow the whistle during the course of their job duties, during the ordinary course of their job duties. For example, an auditor who finds waste in a government contract and blows the whistle about that is not protected under the Whistleblower Protection Act. Safety inspectors are not protected.

The Whistleblower Protection Enhancement Act, which you have introduced, would restore Congress's intent to protect whistleblowers for any lawful disclosure of waste, fraud, abuse, health or safety violation regardless of their position.

The other way that we are really handcuffed by the current law is in the area of disciplinary action. If we can take disciplinary action against wrongdoers, that can have the effect of deterring retaliation from happening in the first place.

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We cannot do it effectively now though. The burden is just too high, and we are required to pay attorneys' fees if we lose before the Merit Systems Protection Board regardless of whether we were justified in bringing the disciplinary action in the first place. With our very small budget, it would be really the rare case that would justify the high risk of prosecution.

The other way that we are a little bit hamstrung now with the current law is that we cannot file amicus briefs. With the Whistleblower Protection Enhancement Act, we could help shape whistleblower law by filing briefs in important cases. Right now, we cannot participate at the Federal appeals court level. The bill would give us limited authority to do so.

Chairman AKAKA. Thank you.

Ms. Grundmann, in your testimony, you stated that almost half of the Board's administrative judges will be eligible to retire in less than 3 years. Will you please discuss the effect these potential retirements could have on your agency and what steps the Board is taking to address this issue?

Ms. GRUNDMANN. I would be happy to. Our workforce, like the rest of the Federal workforce, is aging. That does not mean they are any slower or they are any duller. In fact, they are operating at peak capacity. But knowing that they have been operating at this incredible level for their entire careers, many are ready to retire.

Early on, we identified the critical vacancies of this agency that we needed to plan for in the future, and those are the administrative judges and the writing attorneys in our office. Our goal, if we could possibly do it, is to hire a few administrative judges every year and allow, for that 2-year period of time, the transference of institutional knowledge from an experienced AJ to a fledgling AJ.

In addition to that, we hope for mentoring of the two sides. That is traditionally the kind of training environment that we have used. It has been very profitable; very productive. It has been good for our agency.

What we are concerned about is the Board has a culture of timeliness. We are very timely in the issuance of initial decisions in the regional and field offices. I believe we average about 90 days per case in the regional and field offices. That number will go up as the number of judges declines.

In addition to that, with the influx of cases that we anticipate from retirement claims, from veterans claims, from RIF, or restructuring, claims, consequentially, the caseload will go up. So, it is longer.

We would like to plan for the future. We are planning for it now. We will make do with what we have now. But if we could bring in a couple judges every year, that would get us through this next couple of years and plan for the future so that we can adjust to any caseload changes that occur.

Chairman AKAKA. Thank you.

Ms. Lerner, the Veterans' Benefits Act of 2010 established a second demonstration project which requires OSC to investigate and enforce cases brought under USERRA. Will you please discuss OSC's progress and the challenges associated with this important statutory requirement?

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Ms. LERNER. Sure. The second demonstration project started in August. So for the next 3 years, we will be the primary agency in the Federal Government responsible for USERRA enforcement. We had very good results the first time that we had the demonstration project, and we are expecting excellent results this time as well.

We have always been responsible for the prosecution of USERRA claims after referrals from the Department of Labor (DOL). The way it was structured before is that the Department of Labor would investigate the USERRA complaints and send to us the ones that they believed were worthy of prosecution. Now we are taking on half of those cases for investigation as well as prosecution, along with other mixed cases.

So what we will be doing over the next 3 years is investigating these cases. We will offer mediation to try and resolve them informally. Where we cannot achieve settlement, we will litigate them before the Board. And we also hope to do a lot of education and outreach to agencies to prevent problems from happening in the first place.

This is a lot to do on our very small and very fixed budget. So far this year, we have received 90 complaints. We expect to get about 180 complaints altogether this year.

We only just received some funding for the demonstration project from the Department of Labor, so we have had to be pretty creative in our staffing solutions. We have recruited, for the first time, Presidential Management Fellows to help us. We are looking into term-limited hires so that we can bring people on through the end of this fiscal year (FY). We are trying to use legal interns more. As I mentioned, we are trying to use mediation more, to resolve cases without investigations and litigation. And, we are also seeking detailees from other agencies to help us with USERRA claims.

With the drawdown in Iraq and Afghanistan, we expect even more cases as vets return home. We are, as an agency, deeply committed to helping the Federal Government be a model employer for the protection of veterans' employment rights, and we look forward to doing a thorough job over the next 3 years with this demonstration project.

Chairman AKAKA. Thank you.

I will ask both of you this, but Ms. Grundmann, as your Agency's workload has grown, your budget have not kept pace, and your funding per case has fallen significantly. I would like to give you an opportunity to discuss your current funding challenges, and how you are making every dollar count, and why it is important that Congress give you the resources you need to do your important work.

Ms. LERNER. Thank you.

I would like to begin by saying that we want to not just do more with less but to work smarter and we are doing so in a number of areas.

Many of our employees wear multiple hats. Some work in the studies department as well as they work in case processing. We cross-train when we can. In addition to that, we are doing it now even in these times.

We are making use of video conferencing.

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Our electronic filing is up. It was 29 percent in 2007. It is over 50 percent now. We are piloting a mandatory e-filing project for attorneys and agencies in our Washington Regional Office and our Denver Field Office.

And we are looking at more effective ways of delivering our studies. Originally, it was the hard copy. Then it became the Web site. And now, we are introducing the mobile app, which started last year on the iPhone and the Android and is now headed toward the iPad very shortly.

And of course, we are looking at streamlining our processes.

At the same time, we are doing cuts the old-fashioned way, which is decreases in travel, 40 percent across the board, decreases in equipment and general operations as well. But what we have committed to our employees is that given the current level of funding we have committed that nobody goes home and the lights stay on.

But in order to maintain with the increased case filings—and let me give you some numbers here—last year, it was over 8,100 cases we processed. The year before, it was 7,800. So you can see the growth year by year.

In order to maintain that efficiency, that effectiveness, to be able to produce a case result at the initial level and at the appeals level in a timely, efficient context, we need more people. And, we need time to train those people so they can experience the institutional knowledge that this core group of employees at MSPB has to offer.

Chairman AKAKA. Thank you. Ms. Lerner.

Ms. LERNER. Sure. So our caseloads are up significantly. As I mentioned before, our caseload is up across the board about 20 percent over the last 3 years. In fiscal year 2011, we had about 4,000-plus cases, and about 2,500 of those were prohibited personnel practices complaints. In fiscal year 2012, we expect about 2,800 prohibited personnel practices complaints, and we expect an increase as well in every single one of our units—disclosure, Hatch Act and USERRA.

All of this is happening as our funding levels remain relatively flat and in fact for fiscal year 2013 our budget is projected to go down by $280,000. This will result in potentially a decrease in the number of staff that we have. Right now, we have about 110 full-time equivalents. If our funding went down as expected, we will have to reduce our staffing to about 107 full-time equivalents.

It is a big problem. A lot of our budget—89 percent of it—is devoted to salaries, benefits and rent. So there is not really any extra room in there to cut back.

Some of the things that we are doing—as I mentioned, we are recruiting Presidential Management Fellows to help us fortify our staff without having to increase our salaries. We are trying to recruit more interns, trying to use temporary employees and form alliances with other agencies, like the Federal Mediation and Conciliation Service.

We are trying to make sure that every dollar that comes to our agency is well spent and that not a single dollar is wasted. Some of the small steps I have taken are things like changing computerized legal service providers. That saved us $50,000 this year alone. We have stopped getting hardbound copies of 5 Code of Federal

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Regulations (CFR), and that saves about $40,000. We are dividing large offices into two offices, putting up walls to save on office space. We have converted our library, which was largely underutilized, so that it can now hold carrels for extra work space so that we do not have to spend more money on rent. We have significantly curtailed travel and extra expenses.

But it certainly hurts. I mean, day to day our hands are tied on things like ordering transcripts in our investigations. We had a huge investigation of the Port Mortuary and could not afford to have transcripts done, and so our attorneys had to listen to hundreds of hours of tapes in putting together a report, and that really does affect how we do our job.

Not having adequate staffing for the demonstration project has affected how we have done our job in that area. So it is a serious problem.

We understand that every agency is similarly under the same types of pressures, but we think that the mission of the Office of Special Counsel is so important. And the budget is relatively small. We are talking about $18.5 million, and the benefits to the government in the work that we do far outweigh the small budget we have.

So I sincerely hope that we will be able to keep the number of staff that we have and increase it as we certainly need to do, with a more realistic budget come fiscal year 2013.

Chairman AKAKA. Thank you very much for your response.

Ms. Lerner, during your confirmation hearing, I noted that employee morale at the Office of Special Counsel was low at that time and there had been complaints of possible illegal retaliation at OSC prior to your tenure. You told me that you would work to improve the workplace environment at OSC with a focus on increasing employee morale. Will you please discuss what steps you have taken to address this issue since your confirmation?

Ms. LERNER. Sure. The first thing I did was to start by listening. I was able to meet with virtually every employee at the agency, either individually or in small groups. Because of the size of our agency—we have about 110 full-time employees—I really was able to get to know many of them personally and certainly talk with all of them in some way.

I have made trips to the field offices. I have been to Dallas and Detroit. I will go to Oakland next week.

We have started to have informal brown-bag lunches that are open to everyone in the agency to attend, and the folks out in the field offices can attend by video conference.

We have attended meetings with all of the units so that we are getting to know their work, and it provides them with an opportunity to ask us questions as well. We have frequent meetings, as well, with the senior staff.

So that is the first step—listening and doing outreach within the agency.

A second step I have taken to try to improve morale is to provide professional development opportunities. The Retaliation Pilot Project that I spoke about briefly in my opening statement has provided many agency employees with an opportunity to work on whistleblower complaints during 6-month rotations. Out of 80 eligi-

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ble employees, 22 applied to participate in the program, and so that has been a nice source of professional development and training.

We have begun to offer continuing legal education courses and more training possibilities for employees at the agency.

And we also have a new pro bono policy that allows people to do work in their communities, using administrative leave to do it, up to 20 hours a year.

There are some external influences too that have had an impact on morale. I have had nothing to do with it, but it has had a very positive impact, I believe, and that is we have received a lot of positive press about what the agency has been doing. I think that really helps employees feel proud about the work that they are doing.

I think our work speaks for itself. We do excellent work. We have received excellent results. And it helps for other agencies and stakeholders to know about it and to recognize it. So I think that helps.

But the biggest challenge that I think remains for morale really is workload because, as I mentioned, we have had a tremendous increase in the number of cases that are filed without any corresponding increase in resources. So it is a real challenge to feel like people are able to do everything they want to be able to do on cases when we are so overwhelmed.

The last thing I will mention about morale is that we are about to conduct our first Viewpoint Survey through OPM. The agency had never participated in the survey before, and I think by participating we will be able to get a better sense of how employees really are feeling about the workplace.

But overall, I think signs are good that morale has improved, and we are certainly looking for new and other ways of making people feel good and valued about their work at the OSC.

Chairman AKAKA. Thank you.

Ms. Grundmann, for the first time since its inception in 1978 the Board is conducting a comprehensive review of its adjudication regulations. Will you please discuss how you have included stakeholders and other Federal agencies in this process as well as the Board's long-term goals for this review.

Ms. GRUNDMANN. This was a rather heavy lift, if one could call it that. We started last year, and like everything we do at MSPB, it is agencywide. We took representatives from all parts of our agencies—judges, writing attorneys, general counsel's office, the clerk's office and even some of our studies folks—and we pulled together—we went through the regulations. I mean, let's go back a little bit.

In the past, the Board has tinkered with particular parts of its regulations. This is the first time we have gone through to make sure that the regulations are uniform, clear, consistent throughout, and streamlining certain processes that may appear time-consuming or redundant.

So internally, a team got together, a reg review team, and they met one hour every week. And then, they doubled up. And they produced an internal document which is a matrix of every single rule that we have—the current regulation, the proposed change and the reason for the change.

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That document went to stakeholders, approximately 40 stakeholders, and they were private bar, agency representatives, folks that use the regulation—and sister agencies—that use the regulations on an ongoing basis. We took their comments in written format.

And then, as recently as March 6, I believe, we brought them in to discuss their viewpoints with our team.

We are currently in the process of refining our proposed regulations with these comments from the stakeholders and from our community, and we will be going to notice of proposed rulemaking, we are hoping, sometime early summer. During that period, there has been discussion of having another open meeting with the Board members and our community, and hopefully, we will be finishing up the regulations by late fall.

So it is a massive undertaking. It could not have been done without the dedication of very committed staff in headquarters and certainly the dedication and commitment from all the stakeholders and the community who took time out of their lives to review our regulations in detail and to comment upon them as well.

Chairman AKAKA. Thank you very much.

This is my final question to both of you. We have discussed a number of important issues today. And as I mentioned, it is clear that your agencies are making progress.

What are your top priorities, moving forward, and how do you intend to meet these priorities?

You have done well since you have been in your leadership roles and I am confident you both will continue to do well. I am looking forward to hearing what your plans are for the future, as you move forward from this point in time, and how you intend to meet challenges. Ms. Grundmann.

Ms. GRUNDMANN. Our vision is really a Federal service that is free of prohibited personnel practices. And looking at the Federal Government as a whole, the Federal Government does aspire to be that model employer. And what makes the Federal Government a model employer are basic tenets and principles that guide and shape its behavior, and those principles are, of course, the nine merit principles.

Our goal is to get the word out, to get people thinking, not just agencies and stakeholders, that these nine principles are the foundation of Federal employment. They are what makes Civil Service civil. These principles are with employees before they become employees, when they are applicants to Federal positions. They go on the journey with employees, through their promotion, through their training, throughout their careers and even follow them into retirement.

In order to achieve this goal, we have to do it two-fold: First, through adjudication, which is essentially retroactive in nature and that is maintaining the current level of excellence and productivity that our judges and our decisions demonstrate, and it is again, through our studies program, doing more, because a good studies program, if adhered to, will actually prevent prohibited personnel practices from occurring. And let me just give you an example.

In 2005, we did a study on the then-new hiring program which is the Federal Career Intern Program. In the program, we noted

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a number of concerns that we had with the program and that we encouraged agencies and OPM to implement this new hiring authority consistent with the merit principles, with EEO dictates and, of course, with veterans' preference benefits, veterans' preference rights, which ultimately became the Evans and Dean case. As a result, that program terminated, and we understand that OPM is developing a new program in conjunction with it. So that is one example of how the studies can be used prospectively.

Can we expand the program? Part of the expansion of the program—we have talked about that third statutory function, which is the OPM oversight. It is partially envisioned, as we say in our testimony, in terms of the architects of the Civil Service Reform Act. They viewed this as a part of our function.

And in order to fully have use of this function we need to be able to staff for this particular function. Right now, we borrow from our studies staff, and we do a review of OPM significant actions. We will do a more extensive review of it in our 2011 Annual Report, but again, more resources at a time of tightening budgets and fewer bodies.

And finally, we would like to get through the end of this adjudication regulation review. It is a fairly large undertaking for a very small staff, and again, our projected time is sometime later this fall. We hope to be able to achieve it, like some of the other good things that we have done. Thank you.

Chairman AKAKA. Thank you very much. Ms. Lerner.

Ms. LERNER. I have a lot of goals for my term. Luckily, I have a few years left to meet them because I think it is going to take a little while, but one that I hope we can meet this year is passage of the Whistleblower Protection Enhancement Act and passage of the Hatch Act. Both of those laws would help us do our job much better.

Passage of the WPEA, as I mentioned, would I think make us viewed as an agency that can really help people when they need it. Right now, we are in the position of having to tell folks a lot of the time that we cannot help them because of the court decisions that have restricted our review of certain types of cases. So that would be, a No. 1 priority, I think.

Another important priority for our agency, and for me personally, is restoring OSC's reputation within the Federal community, and I think there are a couple of benefits to doing that. One of them is that people will feel like they can come to our agency for help. They will feel like if they come forward and report a problem—waste, fraud or abuse, or a health or a safety problem—there will be a real agency there to back them up.

I think that will also have an impact on the Federal community in terms of respecting whistleblowers because the more we do our job right, I think, whistleblowers will be viewed better in the Federal community. I want to change the image of whistleblowing and make it valued within the Federal community.

A third goal, and this is related to the fact that we have to do more with less and that we have serious budget constraints, is to buildup our Alternative Dispute Resolution Program. I think that the benefits are overwhelming, to using ADR. As I have mentioned, it can provide quicker and better results for employees and agen-

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cies alike and at the same time help us reserve our resources so that we are not having to do intensive investigations and pursue cases through litigation that can be resolved earlier on.

Most cases do end up getting resolved. If we can do it at the front end without having to spend 6 months or a year investigating, it serves everybody's interest. So I hope to be able to buildup that program.

Those are a few of my goals.

And in conclusion, I guess I just want to thank you again for your support of both the OSC and for the Federal Government and Federal employees in general. It is very important to have support in Congress for the work that we do, and I have certainly felt it from the beginning of my term, and I just want to thank you.

Chairman AKAKA. Well, thank you very much, both of you.

I want to thank our distinguished guests and witnesses for attending this hearing and providing thoughtful testimony and answers to these questions.

I am pleased to hear that the Board and OSC are making progress in areas critical to improving government performance and efficiency. As I noted earlier, I consider these two agencies to be among the most important to Federal employees, and I look forward to monitoring their continued progress in fulfilling their statutory obligations and protecting rights in the workforce. I look forward to keeping in touch and working together to improve government efficiency and protect the Federal workers.

Again, thank you so much for being here.

And the hearing record will be open for 2 weeks for additional statements or questions other Members may have pertaining to this hearing.

Again, I thank you immensely for your participation in this hearing. I have been at this for a number of years, and I want to tell you it is good to hear what I have heard today, and I look forward to continuing to help the Federal employees of our country.

So, thank you very much.

This hearing is adjourned.

[Whereupon, at 3:47 p.m., the Subcommittee was adjourned.]

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APPENDIX

STATEMENT OF CHAIRMAN DANIEL K. AKAKA

A Review of the Office of Special Counsel and Merit Systems Protection Board

Hearing
Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia,
Senate Committee on Homeland Security and Governmental Affairs

Aloha and good afternoon. I would like to thank you all for joining us for today's hearing to review the Office of Special Counsel (OSC) and the Merit Systems Protection Board. I would like to welcome our two very distinguished witnesses, Special Counsel Carolyn Lerner and Chairman Susan Grundmann.

The Civil Service Reform Act of 1978 created the Office of Special Counsel and the Merit Systems Protection Board to safeguard the merit system principles. They help ensure that federal employees are free from discriminatory and retaliatory actions, especially against those who come forward to disclose government waste, fraud, and abuse.

I believe these two agencies to be among the most important to federal employees. At a time when resources are limited, both agencies provide essential protections to employees so they can perform their duties in the best interests of the American public.

The Board is responsible for monitoring the federal government's merit-based system of employment by hearing and ruling on federal employees' appeals of job removals and other major personnel actions. The Board also reviews the Office of Personnel Management rules and regulations, and it conducts studies that evaluate federal merit systems policies, operations, and practices.

OSC is charged with protecting federal employees and job applicants from prohibited personnel practices, like reprisal for whistleblowing. OSC also serves as a safe and secure channel for federal workers who wish to disclose violations of law, gross mismanagement, or waste of funds. In addition, OSC enforces and provides advisory opinions regarding the Hatch Act and protects the rights of military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act.

The laws that the Board and OSC enforce are key protections for the federal workforce and for government accountability more broadly. For more than a decade, I have worked to reform protections for Federal whistleblowers. Whistleblowers play a key role in making the government more effective and save the federal government money. Enacting the Whistleblower Protection Enhancement Act is one of my top priorities.

Additionally, earlier this month, I introduced legislation to modernize the Hatch Act. Congress has not amended this law since 1993. My bill would remove the prohibition on state and local employees running for partisan elected office, a prohibition that currently drains OSC of resources, and often results

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in qualified, dedicated public servants not being permitted to run for office. The bill also would provide the Board with more flexibility in issuing penalties violations, and would treat District of Columbia employees like other state and local employees. This common sense legislation would provide a much-needed update to the law and would allow OSC to use its limited resources more efficiently.

As a senior member of the Veterans' Affairs Committee, and a veteran myself, I believe one of the federal government's most sacred responsibilities is to care for our nation's warriors after they return home. Our dedicated service members should not be worried about finding employment or returning to work after the completion of their service. I expect protecting veterans' rights to be among the highest priorities of these agencies.

Finally, as our nation faces pressing fiscal challenges and tough budget choices, we must remember that safeguarding the merit system and protecting whistleblowers are critical to an effective, accountable, and efficient government. We must provide the Board and OSC the resources they need to do their important work.

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Statement of

Susan Tsui Grundmann

Chairman, Merit Systems Protection Board

Before the

Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia

of the

Committee on Homeland Security and Governmental Affairs

United States Senate

A Review of the Office of Special Counsel
and Merit Systems Protection Board

The Honorable Daniel K. Akaka
Chairman

The Honorable Ron Johnson
Ranking Member

March 20, 2012

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Good Afternoon Chairman Akaka, Ranking Member Johnson, and Subcommittee Members. It is an honor to come before this panel to discuss the steps that the Merit Systems Protection Board ("MSPB") has taken during my tenure as Chairman to ensure that the agency fulfills its statutory responsibility to protect Federal merit systems.

Mr. Chairman, before I begin this discussion, I would like to take this opportunity to congratulate and thank you for the leadership you have demonstrated during your successful tenure as Chairman or Ranking Member of this subcommittee and its predecessors. You have served with distinction in those roles continuously since 1999. You have been a champion for effectiveness and efficiency in the operations of the Federal Government. You articulated the need for designing and implementing systems for recruiting and retaining the best and brightest for Federal service and demanding accountability of Federal employees, managers, and officials. You were an early advocate of greater workforce flexibilities, including teleworking. You have also been a consistent voice for fair treatment of Federal employees. Your efforts to protect the rights of whistleblowers are renowned and your ability to work on a bipartisan basis to bring important legislation to the Senate is noteworthy.

As you know, MSPB safeguards, protects, and promotes the merit principles through our three statutory functions: (1) adjudicating cases within our jurisdiction; (2) conducting studies and issuing reports to the President, Congress, and our community on the health and well-being of the Federal civil service; and (3) reviewing significant actions of the Office of Personnel Management ("OPM") and reviewing OPM regulations to determine whether they would, on their face or in implementation, require an employee to violate 5 U.S.C. § 2302(b).

TRANSPARENCY, COLLABORATION, AND PARTICIPATION AS GUIDING PRINCIPLES

During the course of my tenure as Chairman of the MSPB, I am proud to report to this Committee that the principles of transparency, collaboration, and participation[1] have served as the overarching tenets for how my Board colleagues and I have carried

[1] See President Obama's Memorandum on Transparency and Open Government, January 21, 2009 and the OMB Open Government Directive, December 8, 2009.

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out these statutory responsibilities. With respect to the adjudicatory function, the Board has exemplified these principles by hearing oral arguments on petitions for review to the Board. In a period of 15 months, the Board held three separate oral arguments on cases having significance to the civil service. These proceedings were the first oral arguments that have been held by the Board in 24 years. In addition to the oral arguments, the Board issued calls for amicus briefs in eight cases. Additionally, the Board has changed the format of its decisions by issuing nonprecedential final orders[2], which include more information about how the Board arrived at its decision in a particular case. The adoption of nonprecedential final orders has been applauded by the judges from our reviewing court—the U.S. Court of Appeals for the Federal Circuit. The Board is also currently in the process of overhauling its adjudication regulations with early and significant input from its stakeholders.

These principles were also reflected in our studies function when the agency held its first ever Government in the Sunshine Act meeting to develop the Board's national research agenda. During that meeting, stakeholders suggested topics for future studies which resulted in new areas for examination relating to the merit system principles. Also, as I will discuss, prior to the Sunshine Act meeting the Board solicited input from the public as to what studies the Board should consider. I am happy to report that we received over 900 suggestions.

The Board is currently developing its operational strategy for reviewing significant OPM actions. I can assure you that we will work in partnership with OPM, applying the principles of collaboration and participation, to fulfill this important responsibility.

MSPB ADJUDICATION

In FY 2011, MSPB headquarters and the regional offices adjudicated over 8,100 cases. The average case processing time for adjudication of cases in our regional and field offices was 94 days. The average case processing time for matters brought before the Board was 213 days. Though our average processing times are expeditious, we have

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[2] Nonprecedential orders replaced the final orders which provided no information as to how or why the Board reached its decision on petition for review.

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continued to focus on issuing quality decisions. Accordingly, only 7% of the decisions issued by the administrative judges in the regional offices were remanded back to the administrative judge by the full Board. Moreover, only 2% of the decisions that were issued by the full Board were reversed or otherwise changed by our reviewing court, the U.S. Court of Appeals for the Federal Circuit.

We have continued to explore ways to improve and expedite the adjudication process. In the first quarter of FY 2012, over 50% of appeals were filed online using the agency's e-Appeal system, compared to 29% in 2007. The use of e-filing for pleadings has increased from 28% in FY 2009 to 48% in the first quarter of FY 2012. In fact, we are piloting a paperless filing system in our Washington Regional and Denver Field offices. Under the pilot program, e-filing is mandatory for agencies and appellants represented by attorneys. Pro se appellants are not required to comply with the e-filing requirement. We have also increased the use of video-teleconferencing for hearings, thereby reducing time and expenses associated with in-person hearings.

I am also happy to report that the Board has improved the effectiveness of its adjudicatory function by issuing nonprecedential orders rather than short-form decisions. We have determined that nonprecedential orders are appropriate when the decision does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but the Board and administrative judges are not required to follow or distinguish them in any future decisions. Like our precedential opinions and orders, nonprecedential decisions are accessible and searchable on the MSPB website.

The MSPB also is currently in the process of a comprehensive review of our adjudication regulations, the first thorough examination and potential revision since our inception in 1978. We are undertaking this endeavor with the support and interactive engagement of stakeholders, sister agencies, and users in our MSPB community.

MSPB STUDIES

The Merit Systems Protection Board was established to serve as a guardian of Federal merit systems, assuring that the Federal workforce is managed in accordance with merit system principles and free from prohibited personnel practices (PPPs). To that end, the Civil Service Reform Act of 1978 (CSRA) authorized MSPB to "conduct, from time to time, special studies relating to the civil service and to other merit systems

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in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected [.]"[3] Clearly, the framers of the CSRA took an expansive view of what those "studies" might encompass. For example, when introducing the bill that was ultimately enacted as the CSRA.

Senator Abraham Ribicoff stated that the legislation "requires the Board to report to Congress annually on whether OPM policies and decisions are in accord with the merit system principles including the prohibitions against political abuses, and authorizes the Board to conduct any additional, special studies it wants on such matters." [Emphasis added][4] Consistent with that intent, CSRA has given MSPB broad scope to obtain—or demand, if needed—information in support of those studies:

> In conducting any studies on the merit system **or** on the protections against prohibited personnel practices, the Board will determine which inquiries are

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[3] 5 U.S.C. § 1204(a)(3) (emphasis added).

[4] Committee on Post Office and Civil Service, House of Representatives, 96th Cong., Legislative History of the Civil Service Reform Act of 1978, (Comm. Print No. 96-2), p. 1609. See also, "What was behind the 1978 Civil Service Reform?" by Dwight Ink, Pfiffner, James P. and Brook, Douglas A., eds., The Future of Merit: Twenty Years after the Civil Service Reform Act, Woodrow Wilson Press, Washington, DC, The John Hopkins University Press, Baltimore and London, 2000, p. 49. "A critical part of the reform was the establishment of an independent bipartisan Merit Systems Protection Board . . .to . . . perform special studies concerning the overall performance under the CSRA. Special emphasis was to be given to emerging system problems that threatened to violate the merit principles and undermine the integrity of the career services . . . . Congress would never have enacted the CSRA without the promise of a strong a vigorous MSPB that Congress believed could discover and correct abuse on a timely basis." [Mr. Ink served as executive director of President Carter's Personnel Management Project, which was responsible for designing the reform.] Additionally: While we have not been able to yet locate the transcripts of some hearings related to the CSRA (these may have been lost when the Board abolished its library function), our records indicate that we previously identified the following testimony on the subject of the Board's ability to select what issues it should study.

Alan Campbell, who was the architect of the plan for the CSRA, described the studies authorities as "powerful tools for keeping agencies and Office of Personnel Management in line with merit principles." The Board was to be the "watchdog" and "be free to focus public attention on any policy matter it regards as contrary to merit principles." The express purpose of this was to keep OPM from holding "imperial sway over the policy field."

Bernie Rosen said that without the Board's independent studies function, "the Board would be left with using reports of inspections made by a White House controlled Office of Personnel Management and the protection of merit principles would range from quite modest to superficial. The watchdog would have a patch over one eye."

It is also notable that in their testimony regarding the CSRA, GAO officials recognized that MSPB would have the authority to conduct studies even when it overlaps with GAO's ability to conduct studies, and that GAO expressly wanted the Board's study findings made public.

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necessary and shall have full access, unless otherwise prohibited by law, to the personnel records, or information collected by the Office of Personnel Management. In addition, the Board may require whatever additional reports from Executive Branch agencies it determines are needed.[5]

Moreover, the studies function is critical to MSPB's fulfilling its role as guardian of Federal merit systems because it has distinctive elements that complement or transcend MSPB's other statutory functions. Those elements include—

- The ability to focus on adherence to *merit system principles*. The merit system principles are critical to efficient and effective Government, but they are aspirational rather than legally actionable. The studies function enables MSPB to reach issues that cannot be reached under the adjudication or OPM oversight functions and to take a perspective that is both broader (Government-wide and policy-oriented) and more focused (for example, looking at agency implementation of policies and their effects on employees and stakeholders) than is possible through adjudication of individual appeals or review of an individual OPM action or regulation.

- The ability to focus on the incidence and prevention of *PPPs*. The vision of a Federal service "free from prohibited personnel practices" cannot be achieved solely through adjudication or review of OPM actions and regulations.

- Timeliness and relevance. The studies function enables MSPB to examine issues when they are most timely and relevant to the public, policymakers, and other stakeholders. In contrast, the adjudication function can only consider issues if and when they are raised in an appeal, and the OPM oversight functions (significant actions and regulatory review) are necessarily driven by OPM initiatives.

- An independent, objective, and long-term perspective on merit system issues. This element was expressly provided for in MSPB's structure. In contrast to most agencies, including OPM, Board Members' terms do not coincide with those of the President, and the statute requires diversity of political allegiance among the three Members. While OPM was intended to serve as an arm of the Administration, MSPB was intended to provide policy-makers with an independent perspective on the effect of OPM policy initiatives. In this way, the CSRA intended MSPB to serve as a part of a checks and balance system on the greater control the President was given over the civil service.

To carry out this function in a focused and efficient manner, MSPB periodically reviews and develops a formal research agenda. As I mentioned earlier, the most recent

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[5] S. Rep. No. 95-969 at 31 (1978 U.S.C.C.A.N. 2723, 2753).

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review, which included formal solicitation of input from stakeholders and open discussion under the Sunshine Act, was completed in 2011 and will be discussed later in this statement.

Role and Impact of the MSPB Studies Function

The prospective nature of the studies function, in conjunction with MSPB's adjudication of individual appeals and the authority to review OPM significant actions regulations, enables MSPB to fulfill its role as guardian of Federal merit systems and to ensure that the Federal workforce is managed in a manner that is consistent with merit system principles and free from PPPs. Particularly in recent years, MSPB's studies have had significant impact on how the Federal workforce is being managed through recommendations concerning policy and practice to both OPM and the various Federal agencies that have day-to-day responsibility for recruiting, managing, and retaining Federal employees. Illustrations of that impact include—

- **Improving Management of the Federal Workforce**

  Employee Engagement. In 2008, MSPB demonstrated the importance of an engaged workforce to improving Federal agency results and other desirable agency outcomes (such as sick leave use) and outlined ways that agencies could improve the level of engagement in their workforces. Subsequent MSPB research identified the supervisory behaviors that are important for fully engaging Federal employees, and recommended ways that Federal supervision could be improved toward this end.

  Impact. OMB planning guidance for the FY 2011 budget and performance plans, which was based on MSPB research, stated that employee engagement is directly linked to achievement of agency missions, and, for the first time, required that agencies submit reports detailing how they promote employee satisfaction and wellness as a means to improving employee engagement. In addition, agencies were able to use MSPB's engagement scale to determine how engaged their employees are in lieu of much costlier alternatives.

  As a result of MSPB's research, agencies are also determining whether current supervisors or applicants for supervisory positions can demonstrate the supervisory behaviors that foster employee engagement as a basis for selection and development decisions. For example, MSPB consulted with the Department of Defense in their effort to incorporate these concepts into the supervisory regimen of their post-NSPS human resources system.
  Probationary Period. In 2005, MSPB reported that OPM's regulations regarding the appeal rights of individuals serving in probationary or trial periods were

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misleading. Federal agency misuse of the probationary and trial periods was also discussed, and recommendations were offered to ensure these management tools were used as intended—as the final hurdle in the hiring process.

Impact. In 2008, OPM finalized regulations clarifying the appeal rights of individuals serving on a probationary or trial period.

- **Improving Federal Hiring—Openness, Transparency, and Reform**

MSPB Research. In research taking place over a number of years, MSPB has demonstrated that the hiring process is too long, too complicated, and not applicant-friendly. These problems create barriers to attracting and hiring a high-quality workforce. MSPB has issued a number of reports calling for reform of this process and its component parts

Impact. Many MSPB recommendations have been included first in OPM's End-to-End hiring process improvement effort, and more recently in the Administration's hiring reform initiative. Additionally, MSPB has on issues in Federal hiring in hearings held by both the House of Representatives and the Senate in 2007 and 2008. [6]

- **Improving Federal Hiring—Merit-Based Selection**

Category Rating. In 1995, MSPB recommended eliminating the rule of three in favor of category rating—a more flexible requirement for merit-based hiring that allows selection from among an adequate number of well-qualified candidates.

Impact. Category rating was enacted into law in 2002 and agencies were specifically directed to adopt category rating by the Administration's hiring reform initiative.

Outstanding Scholar Hiring Authority. In 2000, MSPB brought attention to the non-merit aspects of the Outstanding Scholar hiring authority, including: its grade point average eligibility criterion, which was a highly questionable predictor of future job performance; its denial of consideration to individuals who otherwise met basic job qualification requirements, contrary to the merit principle of and openness and selection based on ability; and its function as a primary hiring tool, contrary to the intent that the authority merely supplement competitive hiring.

Impact. OPM advised agencies against further use of the Outstanding Scholar authority in 2007.

Federal Career Intern Program (FCIP). In 2005, MSPB noted several shortcomings with how some agencies were implementing FCIP, including:

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[6] These hearings are listed in MSPB's Annual Reports for fiscal years 2007 and 2008.

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recruiting strategies that limited FCIP applicant pools; reliance on weak assessment tools to make distinctions between applicants; failure to use the trial period as an intended final hurdle of the hiring process; and failure to provide required training to career interns once selected.

Impact. In 2010, the Board ruled that FCIP violates veterans' preference rules and unfairly blocks veterans from being considered for some Federal jobs. OPM is developing a successor to the FCIP program.

- **Improving the Management of Federal Contracts**

MSPB Research. In 2005, MSPB advocated for agencies to better manage their Contracting Officer Technical Representatives—the experts who help ensure that contractors are meeting a contract's technical requirements. Our research showed that better daily management of these employees was empirically related to more positive contract outcomes in terms of the quality, completeness, timeliness, and cost of deliverables.

Impact. In 2007, OMB issued guidelines for the selection, training, and management of Contracting Officer Technical Representatives referencing MSPB's research on managing these employees.

Development of MSPB's Research Agenda—2010

Studies conducted by MSPB are typically Government-wide in scope and take a long-term perspective on merit systems and effective management of the Federal workforce. To use resources most effectively and to respond to changes in policy and practice in the Federal Government, MSPB undertook a review of its research agenda in 2010.

To assure that the research agenda focused on those merit system issues that are most timely and important, and consistent with the Administration's initiatives to increase transparency in government, MSPB took an inclusive and open approach to developing the agenda that included—(1) solicitation of ideas from Federal employees, the general public, and institutional stakeholders; (2) staff review to consider the ideas received and reduce them to a manageable number, considering factors such as centrality to MSPB's mission and availability of resources; (3) a public meeting[7] to formally present the draft research agenda to MSPB's three Board Members and hear

[7] This public meeting was held on December 8, 2010, pursuant to the Government in the Sunshine Act (5 U.S.C. §552(b)) and in accordance with MSPB's regulations at 5 CFR §§ 1206.1-12.

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comments from key stakeholders; and (4) an invitation to the stakeholders and the public to make further post-meeting comments.

The outcome was a published research agenda[8] that lists 6 issues and 29 associated research topics of particular importance to the viability and effective implementation of Federal merit systems. MSPB uses that agenda to guide its current and planned research, including the studies I will discuss today.

Recently Completed Merit System Studies

Since my appointment as Chairman in November 2009, MSPB has issued eight studies on important issues affecting the Federal service. These include three studies related to PPPs, including retaliation for whistleblowing, issues that are central to maintaining the public's confidence in government, and protecting the public's interest in a civil service that is free of PPPs, for which MSPB has special responsibility.

Whistleblowing Protections for Federal Employees

Blowing the Whistle: Barriers to Federal Employees Making Disclosures

Prohibited Personnel Practices: Employee Perceptions

Telework: Weighing the Information, Determining an Appropriate Approach

Women in the Federal Government: Ambitions and Achievements

Making the Right Connections: Targeting the Best Competencies for Training

A Call To Action: Improving First-Level Supervision of Federal Employees

Prohibited Personnel Practices: A Study Retrospective

Merit System Studies Currently in Progress

You requested that I address studies in progress and how they will contribute to an efficient and effective Federal Government. Here, I will limit my testimony to those studies for which research is fully or nearly complete, with plans to issue a report in fiscal year 2012 or 2013.[9]

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[8] U.S. Merit Systems Protection Board, 2011-2013 Research Agenda, March 2011, available at www.mspb.gov/studies.

[9] We show these draft studies with working titles, which are subject to review and approval by MSPB's Board Members. *See* Appendix for detailed summary of each study listed.

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Violence in the Federal Workplace

Fair and Open Competition for Federal Government Jobs

Performance Motivation in the Federal Government: Potentials, Linkages, and Performance

Preserving the Integrity of Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism

Using Training and Experience Measures to Assess Applicants

Managing Public Employees in the Public Interest

REVIEWING SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT (OPM)

MSPB has devoted increased attention to this role, as reflected in MSPB's revised 2012-2013 Annual Performance Plan (which includes a commitment to conduct an after-action review of MSPB's actions on a major OPM rule or regulation) and our forthcoming 2011 Annual Report, which will provide a more comprehensive review of OPM's significant actions than previous annual reports. For example, in addition to describing specific actions that OPM has taken in support of hiring reform, the report also discusses systemic challenges facing OPM in this initiative. Also, the report outlines trends and issues that may affect OPM's ability to exercise policy leadership for Federal merit systems.

Looking ahead, further use of MSPB oversight of OPM's significant actions (under 5 U.S.C. §1206) and regulations (under 5 U.S.C. §1204(f)) will depend on both the scope and substance of OPM's actions and the resources that MSPB can devote to this function without compromising performance in adjudication and merit system studies.

AGENCY CHALLENGES

MSPB is a small agency, but it provides tremendous value to the Federal workforce, Federal agencies, and the American taxpayer in terms of a more effective and efficient merit-based civil service that ensures high quality service to the public. Fulfilling our responsibilities to protect merit, improve adherence to merit system

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principles, and prevent PPPs requires a fully-funded and staffed MSPB. MSPB's greatest challenge is ensuring we have the resources and staff needed to accomplish our statutory functions now and in the future. To ensure the continued success of the agency, this year we implemented new agency strategic and performance plans that encompass our full mission and better track our performance. We have also implemented management initiatives that promote the best use of resources to facilitate the achievement of annual administrative goals, such as program evaluation and cost-saving measures as a regular part of business.

However, even with these tremendous improvements to our internal operations, challenges remain as annual budgets shrink while operating requirements remain the same or increase. Despite our best efforts to cut operating costs, we are still forced to delay or freeze hiring each year. As of today, we have more than 18 critical vacancies that we are not able to fill this year. In addition, one-third of our employees and 47% of our administrative judges (AJs) will be retirement eligible in the next two and one-half years. Bearing in mind that the typical AJ receives two years of training and oversight before becoming a fully independent judge, the agency may suffer dramatic increases in case processing times if judges retire in significant numbers.

We must also be prepared to manage the effects of several Government-wide factors that will likely increase our adjudication and enforcement workload, and increase the importance of our studies and OPM review functions. These factors include—(1) an increase in cases involving veterans due to the increase in employees and applicants with veterans' employment rights; (2) an increase in Government-wide retirements which may increase retirement cases; and (3) an increase in Reduction-in-Force and other cases related to structural changes in the workforce driven by budget constraints.

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CONCLUSION

In closing, Mr. Chairman and members of this panel, I want to assure you that the Merit Systems Protection Board is committed to "walking the talk." MSPB is committed to implementing efficient and sound management policies and practices. We recognize that we have a heightened responsibility to be a model Federal employer and to implement the operational efficiencies that we identify in our studies and reports that impact the Federal merit system. To that end, we have restructured agency leadership to improve the ability of all managers to address agency-level issues. We have earned clean financial audits for the past 5 years. We have designed and implemented mechanisms to increase employee involvement and their awareness of the critical role they each play in fulfilling the agency's missions. We are developing creative ways to recognize employees' contributions and enhance their engagement.

Thank you for the opportunity to talk about the important work that MSPB does and the significant contributions it makes to the operations of the Federal Government, and by extension, the American public. Again, Mr. Chairman, thank you for the positive example and high standard you have set for those who will assume the reigns of leadership for this important subcommittee.

I am happy to answer any questions that you might have.

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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,

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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.

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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

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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.

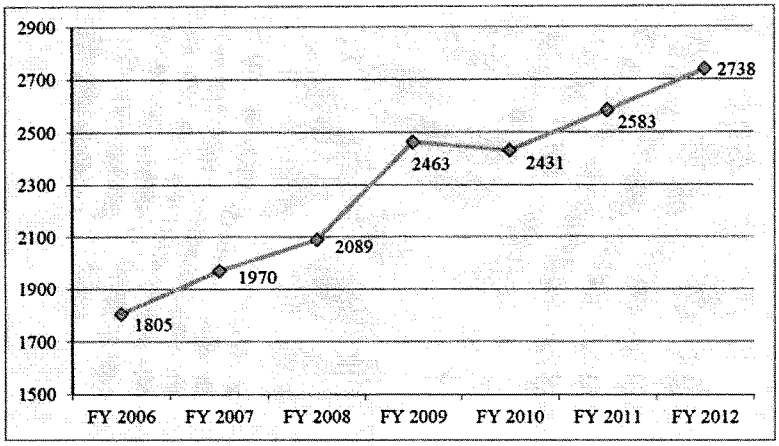
In addition, OSC cannot effectively deter retaliation by seeking disciplinary action against the retaliators before the MSPB because the current legal burden is extremely high. In addition, if OSC is not successful, even if our decision to pursue disciplinary action is reasonable and supported by the 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.

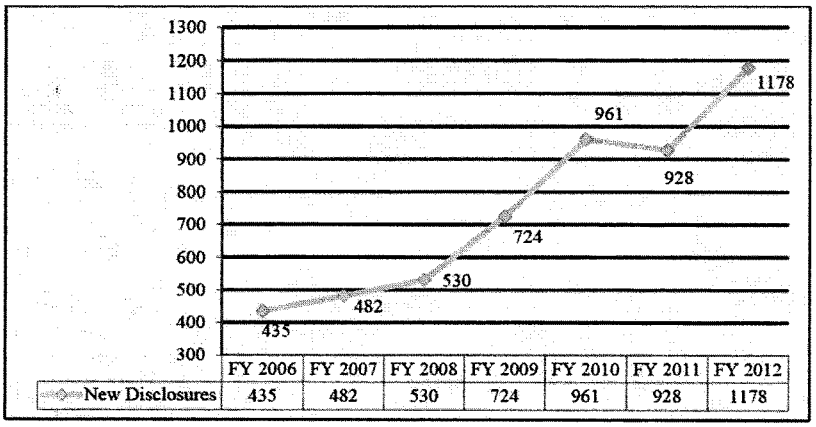
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OSC New Prohibited Personnel Practices Cases



- 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



	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
New Disclosures	435	482	530	724	961	928	1178

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

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BACKGROUND
A REVIEW OF THE OFFICE OF SPECIAL COUNSEL AND MERIT SYSTEMS PROTECTION BOARD
MARCH 20, 2012

Background

THE OFFICE OF SPECIAL COUNSEL

OSC is an independent federal investigative and prosecutorial agency. The Civil Service Reform Act of 1978 created OSC, which operated as an autonomous investigative and prosecutorial arm of the MSPB until 1989. In 1989, with the enactment of the Whistleblower Protection Act,[1] OSC became an independent agency within the Executive Branch. OSC's mission is to protect current and former federal employees and applicants for federal employment from prohibited personnel practices; promote and enforce government employees' compliance with legal restrictions on their political activity; and facilitate disclosures by federal whistleblowers about government wrongdoing.

OSC carries out this mission by:

- Investigating complaints of prohibited personnel practices, such as reprisal for whistleblowing, and pursuing remedies for violations;[2]
- Providing advisory opinions on and enforcing Hatch Act restrictions on political activity;[3]
- Operating an independent and secure channel for disclosures of wrongdoing in federal agencies;[4]
- Protecting federal re-employment and anti-discrimination rights of veterans under the Uniformed Services Employment and Re-Employment Rights Act (USERRA);[5] and
- Promoting greater understanding of the rights and responsibilities of federal employees under the laws OSC enforces.[6]

A. PROHIBITED PERSONNEL PRACTICES AND WHISTLEBLOWER PROTECTIONS

OSC receives, investigates, and prosecutes allegations of prohibited personnel practices,[7] with an emphasis on protecting federal government whistleblowers from illegal reprisal. When a

[1] P.L. 101-12.
[2] 5 U.S.C. § 1214.
[3] 5 U.S.C. § 1216(a)(1) and (2).
[4] 5 U.S.C. § 1213.
[5] 38 U.S.C. § 4324(a).
[6] 5 U.S.C. § 2302(c).

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prohibited personnel practice is committed, OSC seeks corrective action remedies, including back pay and reinstatement, by negotiating with the employing agency or by petitioning the MSPB for injuries suffered by complainants[8]. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit prohibited personnel practices[9]. If OSC determines that a prohibited personnel practice case has merit, it will seek to remedy the situation with the employing agency[10]. If meritorious prohibited personnel practice cases cannot be resolved through negotiation with the agency involved, OSC attorneys will represent the Special Counsel and, in some cases, the affected employee in any litigation before the MSPB[11].

In addition to investigating and prosecuting prohibited personnel practices, OSC receives and investigates whistleblower disclosures from federal employees, former federal employees, and applicants for federal employment. These disclosures are separate and distinct from the prohibited personnel practice designation for complaints of reprisal for whistleblowing. The disclosures are evaluated to determine whether or not there is sufficient information to conclude with substantial likelihood that that one of the following conditions has been disclosed: a violation of law, rule or regulation, gross mismanagement, gross waste of funds, an abuse of authority, and a substantial and specific danger to public health and safety has occurred. If this substantial likelihood is found, OSC refers the disclosure to the appropriate agency, which is then required to conduct an investigation and submit a written report on the findings of the investigation to the Special Counsel.

According its *Fiscal Year 2013 Congressional Budget Justification and Performance Budget Goals*,[12] in Fiscal FY 2011, OSC received 4,026 new matters, which was more than any

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[7] 5 U.S.C. § 2302(b) specifies the twelve prohibited personnel practices: 1) Discriminating against an employee or applicant on the basis of race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation; 2) soliciting or considering any employment recommendation based on factors other than personal knowledge or records of job-related abilities or characteristics; 3) coercing the political activity of any person; 4) deceiving or willfully obstructing anyone from competing for employment; 5) influencing anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person; 6) giving an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant; 7) engaging in nepotism (*i.e.*, hiring, promoting, or advocating the hiring or promotion of relatives); 8) engaging in reprisal for making protected disclosures of wrongdoing (whistleblowing); 9) taking, failing to take, or threatening to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law; 10) discriminating based on personal conduct (except a criminal conviction) that does not adversely affect the on-the-job performance of an employee, applicant, or others; 11) knowingly taking or failing to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and 12) taking or failing to take a personnel action if taking or failing to take such an action would violate any law, rule or regulation implementing or directly concerning merit system principles.

[8] 5 U.S.C. § 1214.

[9] 5 U.S.C. § 1215.

[10] 5 U.S.C. § 1214(b)(2)(B) and (C).

[11] 5 U.S.C. § 1214(b)(2)(A)(i), 5 C.F.R. 1201.129.

[12] OSC's *FY 2013 Congressional Budget Justification and Performance Budget Goals* has not yet been made public, but it is available upon request to the Subcommittee. All OSC performance-related data referenced in this memorandum can be found in that document.

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previous year. These new matters represented a 2 percent increase over the already record levels of matters brought to OSC in FY 2010. Almost two-thirds (64 percent) of these new matters were prohibited personnel practice complaints. OSC also reported that its Whistleblower Disclosure Unit cases have more than doubled in the last five years. In FY 2011, the Whistleblower Disclosure Unit received 928 whistleblower disclosures, 97 percent of the record level of FY 2010, and processed and closed a total of 870 of these cases. OSC also referred a record number of 47 whistleblower disclosures to the heads of federal agencies for investigation and reporting.

B. HATCH ACT

OSC's Hatch Act Unit is responsible for enforcing Hatch Act restrictions on the political activities of federal and certain state and local government employees. The Hatch Act prohibits certain federal employees, certain state and local government employees, and employees of the government of the District of Columbia, from engaging in certain partisan political activity, both at the workplace and during off-duty time[13]. For instance, the Hatch Act currently prohibits federal, and state and local employees, from running for partisan elective office. The presumptive penalty for federal employees who violate the Hatch is removal from employment, unless the MSPB unanimously finds that removal is not warranted, in which a federal employee must be suspended for at least 30 days without pay[14].

Hatch Act Unit attorneys receive and review complaints alleging Hatch Act violations and, when warranted, prosecute violations before the MSPB. The Hatch Act Unit also issues advisory opinions to individuals seeking information about the provisions of the Act. During FY 2011, OSC's Hatch Act Unit processed and closed a total 635 Hatch Act complaints and issued 334 new Hatch Act written advisory opinions. Because 2012 is an election year, OSC expects a significant surge in Hatch Act complaints in FY 2012.

C. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND THE OSC DEMONSTRATION PROJECT

USERRA prohibits discrimination against persons because of their service in the Armed Forces, Reserves, National Guard, or other uniformed services. USERRA also protects the rights of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

The Veterans Benefits Improvement Act of 2004[15] established a demonstration project providing OSC, rather than the Department of Labor, with the authority to investigate federal sector USERRA claims from 2005 through 2007. With the passage of the Veterans Benefits Act of 2010,[16] Congress established a second demonstration project, which took effect on August 9, 2011. Under the demonstration project, OSC receives and investigates approximately half of

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[13] 5 U.S.C. § 1501, *et seq.* and 5 U.S.C. § 7321, *et seq.*
[14] 5 U.S.C. § 7326.
[15] P.L. 108-454.
[16] P.L. 111-175.

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federal sector USERRA claims, including all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction. OSC expects that the current demonstration project will result in an additional 180 USERRA cases filed per year. As of February 10, 2012, OSC has docketed 83 USERRA cases under the demonstration project.

THE MERIT SYSTEMS PROTECTION BOARD

The MSPB is an independent, quasi-judicial agency in the Executive Branch that protects the federal merit systems. The Board was established by the Civil Service Reform Act of 1978 (CSRA).[17] Under the CSRA, the MSPB assumed the employee appeals function of the Civil Service Commission and was given the new responsibilities to perform merit systems studies and review significant actions of the Office of Personnel Management.

MSPB carries out its statutory mission principally by:

- Adjudicating employee appeals of personnel actions over which the Board has jurisdiction, such as removals, suspensions, furloughs, and demotions;
- Adjudicating employee complaints filed under the WPA, USERRA, and the Veterans Employment Opportunities Act;
- Adjudicating cases brought by the Special Counsel, principally complaints of prohibited personnel practices and Hatch Act violations;
- Adjudicating requests to review regulations of OPM that are alleged to require or result in the commission of a prohibited personnel practice or reviewing such regulations on the Board's own motion;
- Ordering compliance with its final orders where appropriate; and
- Conducting studies of the federal civil service and other merit systems in the Executive Branch to determine whether they are free from prohibited personnel practices[18].

The MSPB is composed of a Chairman, Vice Chairman, and Member[19] who adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of the Board.

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[17] P.L. 95-454.

[18] 5 U.S.C. § 1204(a).

[19] Currently, Susan Tsui Grundmann and Anne Wagner serve as Chairman and Vice Chairman of the Board, respectively. The Committee on Homeland Security and Governmental Affairs held a hearing to consider the nomination of Mark A. Robbins to be a Member of the MSPB on March 6, 2012.

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THE MSPB'S SPECIAL STUDIES FUNCTION

The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate federal merit systems policies, operations, and practices. These studies are typically government wide in scope and take a long-term prospective on the merit system and effective human capital management. According to the MSPB, its studies function, in conjunction with MSPB's adjudication of individual appeals and its authority to review human resources regulations, enables it to more effectively fill its role as the guardian of the federal merit systems and ensure the workforce is well managed and free from prohibited personnel practices. Currently, the MSPB has six studies pending:

- **Merit Principles Survey 2010: Motivation** – This study will focus on the manner in which the federal workforce can be motivated to do more with less, and how there can be a better understanding of the factors that drive employee engagement.

- **Merit Principles Survey 2010: Agency Adherence to Merit System Principles** – This study will complement other MSPB studies and provide insight into government adherence to merit system principles that are more dependent on individual supervisors' practices than formal polices or protections (such as protecting employees from arbitrary action).

- **Violence in the Federal Workplace** – This study will focus on developing objective information in the nature and frequency of violence in the federal workplace.

- **Fair and Open Competition for Federal Employment** – This study will examine the implementation and practice of fair and open competition for jobs in the federal government.

- **Preserving the Integrity of Federal Merit Systems: Understanding and Addressing Favoritism in the Workplace** – This study will examine the causes and consequences of the perception of favoritism in the federal workforce.

- **Using Training and Experience Measures to Assess Applicants** – This study summarizes current research and best practices in the evaluation of training and experience and makes recommendations that are intended to help agencies choose and get the most from valid assessments.

In FY 2011, the Board completed eight special studies, versus five in FY 2010 and six in FY 2009. In FY 2012, for the first time, the Board will survey external stakeholders to evaluate whether its study reports are objective, timely, well written, and include recommendations that can be implemented at the appropriate level.

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A. MSPB PERFORMANCE IN FY 2011

In Fiscal Year 2011, the MSPB received a total of 7,907 cases, which represented a slight decrease in total cases received from 2010[20]. The Board decided 8,025 cases in FY 2011, four percent more than were decided in FY 2010. Sixty-nine percent of initial appeals were processed in 110 days or less (the Board's established time standard for the processing of initial appeals), while 20 percent of petitions for review of Board decisions were decided in 110 days or less.

The U.S. Court of Appeals for the Federal Circuit currently has jurisdiction over all appeals from the MSPB. According to the MSPB's *Congressional Budget Justification for Fiscal Year 2013*,[21] in FY 2011, 98 percent of the Board's decisions were left unchanged (either affirmed or dismissed) by the Federal Circuit.

To save time and resources, the Board is encouraging individuals to file adjudication-related documents electronically, instead of in person or by mail. The Board reported that 48 percent of initial appeals and 44 percent of subsequent pleadings in FY 2011 were filed electronically, which represented a five percent and eight percent increase respectively from FY 2010.

PENDING LEGISLATION

On April 6, 2011, Senator Daniel Akaka introduced S. 743, the Whistleblower Protection Enhancement Act, which was cosponsored 14 senators. The Whistleblower Protection Enhancement Act would strengthen the Whistleblower Protection Act in a number of ways, including by: eliminating a number of restrictions the Federal Circuit has read into the law regarding when disclosures are covered; barring federal agencies from revoking an employee's security clearance in retaliation for whistleblowing; and expanding coverage to new groups of whistleblowers, such as employees of the Transportation Security Administration.

On March 7, 2012, Senator Daniel Akaka introduced S. 2170, the Hatch Act Modernization Act, which was cosponsored by Senators Lieberman (ID – Connecticut), Levin (D – Michigan), and Lee (R – Utah). Representative Cummings (D – Maryland) introduced a companion bill in the House of Representatives on the same day. The Hatch Act Modernization Act would amend the Hatch Act by removing OSC jurisdiction over state and local government employees seeking partisan office; expanding the range of penalties for federal workers under the law; and placing employees of the government of the District of Columbia under provisions of the Hatch Act that are applicable to state and local employees.

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[20] All data in this paragraph can be found in the MSPB's Performance and Accountability Report for FY 2011, pp. 10, 22-23. This document can be found at:
http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=663654&version=665626&application=ACROBAT

[21] MSPB's FY 2013 Congressional Budget Justification has not yet been made public, but it is available upon request to the Subcommittee. All data other than that contained in the first paragraph of this section can be found in that document.

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Office of Special Counsel Views on Pending Legislation to Reform the Hatch Act

The Office of Special Counsel (OSC) is an independent executive branch agency with responsibility for enforcing the Hatch Act. Since 1940, the Hatch Act has covered state and local government employees who work in connection with federal loans or grants. In covering state and local employees, Congress sought to achieve two important ends: 1) to prevent the misuse of federal funds for partisan political agendas, and 2) eliminate political coercion in the public workplace.

Recently, legislation was introduced in both chambers of Congress that would modify the Hatch Act by removing the law's prohibition on partisan candidacy by state and local employees who work in connection with an activity financed in whole or in part by federal loans or grants.

The legislation would **not** affect the Hatch Act's prohibitions on coercive conduct or misuse of official authority for partisan purposes. In fact, by removing the candidacy provision, the legislation would allow OSC to target its resources on conducting better and timelier investigations in cases involving coercion and misuse of office, the objectives initially sought by Congress.

Pending Legislation Would Not Allow Employees to Misuse Federal Funds or Engage in Coercive Conduct to Support Their Own Candidacy

The Hatch Act provisions applicable to state and local public workers are in chapter 15 of title 5. Under 5 U.S.C. § 1502, a state or local officer or employee may not:

> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
>
> (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
>
> (3) be a candidate for elective office.

If pending legislation passed, a covered state or local employee who runs for partisan political office would remain subject to the Act's prohibitions on misuse of official authority and coercive conduct. For example, a covered employee who runs for office would still be in violation of the Hatch Act if the employee:

- used federal (or any other public) funds to support his own candidacy;
- used his state or local office to support his candidacy, including by using official email, stationary, office supplies, or other equipment or resources; or
- compelled subordinates to volunteer for his campaign or contribute to the campaign.

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There is Not a Strong Federal Interest in Barring Candidates From State and Local Office

The federal government has a clear interest in preventing this type of abuse and misconduct. The federal interest in prohibiting elective activity by state and local workers, *absent any showing of coercive, abusive or other misconduct*, is less clear.[1]

The number of candidacy cases and investigations is increasing. The substantial increase in federal grant programs since 1940 and the case law interpreting the Hatch Act have extended the law's coverage well beyond Congress' initial intent to cover a small number of state and local public workers. Hundreds of thousands of public servants, in essentially every locality in the country, are now covered by this prohibition. OSC routinely finds first responders, healthcare workers, police officers, and many other positions across state and local government covered by the Hatch Act.

Over 45% of OSC's overall Hatch Act caseload, including more than 500 investigations over the last two years and thousands of OSC advisory opinions annually, involve state and local campaign cases.

These cases do not involve allegations of coercive or abusive political conduct. Rather, OSC must conduct a detailed and thorough inquiry into the financial and administrative structure of state and local agencies simply to determine if an employee is working in connection with federal funds, and if so, barred by the Hatch Act from running for office. These cases drain state and local agencies, which must spend time and resources responding to document and interview requests by OSC.

Investigating hundreds of state and local campaign cases annually is a poor use of OSC's limited budget. If pending legislation is approved, OSC would be in a better position to investigate and enforce cases in which an employee engaged in actual political misconduct.

Pending Legislation Would Eliminate Bad Outcomes for Affected State and Local Employees and their Communities

Employees are often found to be in violation of the Hatch Act if their employment involves only a minor connection to federal funds. These cases help to illustrate some of the absurd results

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[1] Courts have routinely upheld the constitutionality of the candidacy provision in light of the government's interest in diminishing the appearance of partisanship in the public workplace. OSC does not contest the constitutionality of the law. However, the government's interest in avoiding the appearance of partisanship, standing alone, does not justify the interference with state and local elections as a policy matter. This is true especially in light of the fact that covered state and local employees currently may:

- campaign for and hold elective office in political clubs and organizations
- actively campaign for candidates for public office in partisan and nonpartisan elections
- contribute money to political organizations or attend political fundraising functions
- be a candidate for public office in a nonpartisan election (including high profile contests such as Mayor of Detroit and Mayor of Chicago)

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caused by enforcement of the candidacy prohibition. For example, OSC recently told a police officer in a canine unit that he could not run for his local school board because his partner, a black Labrador, was financed in part by Department of Homeland Security grants.

However, cases in which employees are significantly or fully funded by federal dollars often lead to equally unfair results.

For example, OSC recently told a reemployment specialist for a State Department of Labor that he could not run for local office because his position is fully funded by a federal grant. Similarly, OSC told a motor carrier compliance trooper for the Florida Highway Patrol that his candidacy was in violation of the Hatch Act because his salary was funded significantly by a federal grant aimed at reducing the number and severity of crashes and fatalities involving large trucks and commercial vehicles. And, OSC recently told a maintenance worker for the New York State Canal Corporation that his candidacy was in violation of the Hatch Act because the agency received a federal grant that substantially financed the personnel costs and supplies for various positions including maintenance workers.

While these positions are funded by federal dollars, the employees have no supervisory authority within the agency and only the most indirect control over how the federal funds are used. Despite being fully or significantly funded by federal dollars, these employees are not in a position to engage in the type of pernicious political activity contemplated by Congress when the law was passed in 1940.

In contrast, employees whose salaries are not federally-funded are often in a far greater position to influence the manner in which the federal funds are used or implemented. Under current law, these employees are often found to be covered by the Hatch Act. For example, OSC routinely tells Deputy Sheriffs and Assistant District Attorneys that they are not eligible to run for Sheriff or District Attorney, respectively, because they have supervisory authority over the federal grant dollars within their office and manage personnel who work directly on the grant program.

Absent any allegation of coercive or abusive conduct, these determinations by OSC are a disservice to local communities because the most qualified candidates for law enforcement and other positions are barred by the federal government from participating in a local election. This concern is heightened in rural areas where there is a small pool of potential candidates for elective office.

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Appendix

Recently Completed Merit Systems Studies

- *Whistleblowing Protections for Federal Employees.* This report discusses what is required under current law and precedents for MSPB to have jurisdiction over appeals involving alleged reprisal for whistleblowing. As the report explains, those requirements establish criteria for what matters qualify for protection, how apparent wrongdoing is reported, and how an individual seeks redress for reprisal.[1] Failure to meet even one of these criteria will deprive MSPB of jurisdiction, rendering MSPB unable to provide any redress in the absence of a right of appeal that is not based on whistleblower protections.

- *Blowing the Whistle: Barriers to Federal Employees Making Disclosures.* This report examines Federal employee perceptions related to whistleblowing and compares results from our 2010 Merit Principles Survey to the results of a similar MSPB survey conducted in 1992. Although the percentage of employees who perceive any wrongdoing has decreased since 1992, perceptions of retaliation against those who blow the whistle remain a serious concern. In both 1992 and 2010, approximately one-third of the individuals who felt they had been identified as a source of a report of wrongdoing also perceived either threats or acts of reprisal, or both. Also, although employee knowledge of whistleblower protections has improved, far too many employees remain unaware of them. MSPB research also showed that strong training and formal protections must be accompanied by strong agency leadership that can accept and constructively respond to reports of wrongdoing. The most important factor for employees when deciding whether to report wrongdoing was not personal consequences (such as retaliation), but whether the agency would act on a report of wrongdoing. Thus, the most important step that the Federal Government can take to prevent wrongdoing may be the creation of a culture that supports whistleblowing.

- *Prohibited Personnel Practices: Employee Perceptions.* This report uses survey data to examine trends in the apparent incidence of PPPs and a review of case law to summarize how the PPPs have been interpreted by the Board and the U.S. Court of Appeals for the Federal Circuit. This report documents a general decline in the perceived occurrence of PPPs, but notes that improvement is both possible and necessary, as perceptions of PPPs—even in the absence of actual PPPs—are detrimental to organizational productivity and effectiveness.

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[1] First, to qualify for redress as a protected whistleblower, a Federal employee or applicant for employment must disclose: a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Second, the individual also must: avoid using normal channels if the disclosure is in the course of the employee's duties; make the report to someone other than the wrongdoer; and suffer a personnel action, the agency's failure to take a personnel action, or the threat to take or not take a personnel action as defined in title 5, section 2302. Finally, for an individual right of action appeal, the employee must seek redress through the proper channels before filing an appeal with MSPB.

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- *Telework: Weighing the Information, Determining an Appropriate Approach.* This study examined the usage and effects of telework in Federal agencies in light of the changing nature of Federal work, advances in technology, and efforts to promote telework throughout the Federal Government. MSPB found that the telework can indeed promote efficient and effective Government, by providing benefits to both agencies (such as enhanced continuity of operations and emergency preparedness and savings in office space and related expenses) and employees (such as improved work/life balance) without diminishing employee performance or agency operations. However, telework must be managed properly to achieve this outcome. The report identified issues that Federal agencies should address when planning and implementing telework, including organizational culture, supervisory competence in performance management, technology infrastructure, and continuous evaluation and optimization of telework programs.

- *Women in the Federal Government: Ambitions and Achievements.* Full representation of women, and full use of their talents, is critical to attaining a workforce that can effectively serve all citizens. This report examined the Federal Government's progress in the employment, treatment, and advancement of women in the Federal service. We found that substantial progress has been made in areas such as advancing women to the highest levels of the Federal service and eliminating overt sex-based discrimination, although barriers—including continuing occupational differences between men and women, both inside and outside the Federal workforce—remain to achieving the Civil Service Reform Act's vision of "a workforce from all segments of society."[2]

- *A Call to Action: Improving First-Level Supervision of Federal Employees* Effective supervision is essential to employee engagement, workplace fairness, and organizational performance. The report recommended actions that Federal agencies can take to improve the recruitment, selection, and management of first-level supervisors. For example, when recruiting and selecting first-level supervisors, Federal agencies should provide realistic job previews to help applicants make an informed decision about a career in supervision and leadership and use highly predictive selection tools to improve the quality of referred candidates and the likelihood that any selectee will succeed on the job. If a new supervisor does not perform or develop satisfactorily, agencies should use the supervisory probationary period to remove the individual from a supervisory role. When managing first-level supervisors, agencies should provide supervisors with adequate training; the information needed to manage their work units and communicate with their employees; and continuing performance feedback and development. Agencies should also strengthen supervisory accountability—both positive and corrective—and base that accountability on both work group outcomes and supervisory behaviors.

- *Making the Right Connections: Targeting the Best Competencies for Training.* Research on mental abilities distinguishes among competencies that can be developed

[2] Title 5, United States Code, Section 2301(b)(1).

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through training, those that are unresponsive to training, and those that are moderately responsive. In this report, we refer to this dimension as competency "trainability." The goal of the study was to contrast employee perceptions of the trainability of job-relevant competencies with research findings about the actual trainability of these competencies. The results should help agencies identify and avoid training which targets less trainable competencies and is therefore less likely to be successful. This should help agencies make more effective use of their increasingly scarce Federal training dollars.

- *Prohibited Personnel Practices—A Study Retrospective.* In this retrospective report, MSPB noted that the percentage of employees reporting discrimination based on ethnicity/race, sex, age, and religion has declined over time, while an increasing percentage of Federal employees believe that they are being treated fairly. However, MSPB also acknowledged that the Federal Government still has work to do to ensure a workplace free of PPPs. For example, although a decreasing percentage of employees believe that they have experienced prohibited discrimination, many employees believe that personnel decisions are often based on factors other than merit, such as favoritism. There is also a continuing gap between minority and nonminority employees' perceptions of the prevalence of discrimination and other PPPs.

Merit System Studies Currently in Progress

- Violence in the Federal Workplace. Workplace violence costs American employers billions of dollars annually in lost work time, medical costs, workers' compensation payments, reduced worker productivity, low employee morale, and increased employee turnover. Because of its implications, including the safety, morale, and performance of individual employees to organizational productivity and dynamics, MSPB conducted research to develop objective information on the frequency and nature of workplace violence in the Federal Government. Initial findings reinforce the importance of this issue. When asked whether they had observed an incident of physical assault, threat of assault, harassment, intimidation, or bullying within the previous two years, 13 percent of Federal employees said they had. Over half of the incidents observed were caused by current or former Federal employees. The report will recommend ways that Federal agencies can reduce the instances of violence perpetrated by Federal employees in the workplace, and will call for enhanced data collection to provide Federal decision makers with the information needed to craft more effective anti-violence programs for the Federal workplace.

- *Fair and Open Competition for Federal Government Jobs.* The principle of fair and open competition for filling Federal jobs is fundamental to Federal merit systems, which are intended to promote efficient and effective Government by assuring that Federal employees are hired on the basis of their competence rather than their connections. That principle has been generally implemented through requirements for public notice and acceptance of applications from the general public. History

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shows a trend toward increasing the coverage of this requirement. Nevertheless, fair and open competition for federal jobs is neither universal or nor absolute. For example, there are continuing exemptions from open competition for certain Federal positions, and preferences in hiring for certain groups are a longstanding element of Federal merit systems. Also, we now see the confluence of a near-complete decentralization of Federal hiring process with a proliferation of hiring authorities.[3] This study will examine whether these factors threaten the historic ideal of fair and open competition and discuss the results of a survey of Federal human resources staff on practices and issues related to fair and open competition in their agency.

- *Performance Motivation in the Federal Government: Potentials, Linkages, and Performance*. High-performing organizations require both forward-thinking, supportive leadership and a motivated workforce composed of employees who freely contribute their insights and efforts to achieve organizational goals. Thus, Federal employee motivation is essential to efficient and effective Government, especially in a time of rising expectations and constrained resources. Yet such conditions also make it difficult to increase or sustain employee motivation. This study will examine, using data from MSPB's 2010 merit principles survey, the importance of monetary and nonmonetary rewards from an employee perspective and discuss what Federal agencies and Federal managers can do to structure jobs and incentives that elicit employees' best efforts.

- *Preserving the Integrity of Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*. Previous MSPB research has documented a significant decrease in Federal employee perceptions of discrimination on the bases of race and national origin, sex, and age.[4] However, the merit system principles require more of Federal agencies than simply avoiding prohibited discrimination. For example, agencies must also protect employees against personal favoritism.[5] Unfortunately, MSPB surveys show that employee perceptions of favoritism—giving an applicant or an employee an unfair advantage that is not based on merit—remain widespread. To examine this issue, we have conducted a Governmentwide survey of Federal employees and a review of selected cases involving allegations of favoritism. The study will (1) discuss how employee perceptions of unfair practices, such as favoritism, can affect employee engagement and intention to leave; and (2) recommend actions that Federal agencies can take to improve practices and reduce employee perceptions of favoritism, which can reduce costs associated with low morale and unwanted turnover.

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[3] See U.S. Merit Systems Protection Board, *Federal Appointing Authorities: Cutting through the Confusion*, June 2008 for a discussion of selected hiring authorities that could be used to fill positions that are normally in the competitive service.

[4] See, for example, U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, December 2009, pp. 53-58.

[5] Title 5, United States Code, Section 2301(b)(8) states that "Employees should be...protected against arbitrary action, personal favoritism, or coercion for partisan political purposes...."

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- *Using Training and Experience Measures to Assess Applicants.* Hiring reform initiatives have required Federal agencies to reduce their reliance on written descriptions of job-related training and experience ("KSA narratives"). Nevertheless, previous MSPB research has revealed that most Federal hiring decisions are still made using some assessment of work-related training and experience. Common methods include review of resumes and academic transcripts, self-evaluation of experience using rating schedules, and awarding of points based on experiences, coursework, or professional certifications. These methods differ in their ability to predict job performance, ease of implementation, and degree of acceptance by job applicants. Those differences directly affect the ability of Federal agencies to "recruit from qualified individuals from all segments of society" and base selection and advancement "solely on the basis of relative ability,"[6] which are crucial to attaining the high-performing workforce the American public expects. This study will summarize current research and best practices in the evaluation of training and experience and make practical recommendations that will help agencies choose the most valid assessments and hire the best qualified applicants.

- *Managing Public Employees in the Public Interest.* Using data from MSPB's 2010 Merit Principles Survey, this study examines Federal agency adherence to the nine merit system principles from an employee perspective. The study will provide insight on how effectively and efficiently Federal agencies are managing their workforces, from hiring (e.g., merit-based selection) through employment and retention (e.g., supporting performance through training, maximizing efficiency, recognizing excellence, and holding employees accountable for satisfactory performance or conduct), and identify areas for improvement.

[6] Excerpted from the first merit system principle, Title 5, United States Code, §2301(b)(1).

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