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AN EXAMINATION OF VA'S MISUSE OF EMPLOYEE SETTLEMENT AGREEMENTS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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AN EXAMINATION OF VA'S MISUSE OF EMPLOYEE SETTLEMENT AGREEMENTS

Wednesday, September 14, 2016

COMMITTEE ON VETERANS' AFFAIRS,
U. S. HOUSE OF REPRESENTATIVES,
Washington, D.C.

The Committee met, pursuant to notice, at 10:29 a.m., in Room 334, Cannon House Office Building, Hon. Jeff Miller [Chairman of the Committee] presiding.

Present: Representatives Miller, Lamborn, Bilirakis, Benishek, Huelskamp, Coffman, Wenstrup, Costello, Radewagen, Takano, Brownley, Kuster, O'Rourke, Rice, Walz, and McNerney.

OPENING STATEMENT OF JEFF MILLER, CHAIRMAN

The CHAIRMAN. Good morning, everybody. Thanks for being here at today's hearing entitled, "An Examination of VA's Misuse of Employee Settlement Agreements." Since 2013, when this Committee first began examining accountability measures. in earnest, we have seen a recurring practice in which VA frequently enters into settlement agreements with employees who are resigning or who have been proposed for disciplinary actions as opposed to taking the steps to follow these personnel actions to their final disposition. These agreements are binding legal documents between VA and the employee which lay out the terms for, in most cases, the employee's departure from the department, and their agreement to drop any current grievance or appeal to the Merit System Protection Board, the U.S. Equal Employment Opportunity Commission, the Office of Special Counsel, or any other entity. While in theory, I think these agreements are useful tools to avoid lengthy administrative or legal disciplinary processes, it is clear that the potential overuse of these agreements stems from burdensome civil service laws that make it difficult for VA managers to appropriately discipline VA employees.

In an effort to make the disciplinary process more convenient, VA often agrees to pay out thousands of taxpayer funded dollars both to the employee and their legal representation, as well as other benefits for the employee to simply just go away. It is because of this Committee's continued investigation into personnel matters at VA, and our own healthy skepticism about the lack of transparency in VA's potential overuse of these agreements that last October I sent a letter to the Secretary requesting copies of every settlement agreement that VA had entered into since July of 2014. Earlier this year VA complied with my request and provided copies of 208 settlement agreements for the Committee to review.

An analysis of these documents paints, what I think, is a disturbing picture of VA's use of these agreements and raises more serious questions about who really benefits from these settlements. Is it the taxpayers or veterans, or is it the wayward employee themself? In 72 percent of the settlements reviewed, the employee received monetary compensation directly to them and/or their attorney which totaled just over $5 million. The average amount that VA paid to employees as part of their settlement was $24,305. The largest settlement that was received by one individual, was $225,000.

Another concern beyond just these large monetary payments is that 96 percent of the settlements that we reviewed, the discipline that was proposed or finalized against the employee was not included in their permanent employee record. I think by allowing these records to be left clean and by allowing employees to negotiate for a positive or neutral reference for future employers, VA management has made it much easier for the employee to obtain a job in the future in another Federal agency or the private sector irrespective of their behavior at VA that caused their termination or their resignation.

For example, in one case an employee was proposed for removal due to reports of hostility in the workplace. The employee, however, received $80,000 and a totally clean record. I know that Ms. Bradley will remark that VA's use of these agreements is supposedly in line with other Federal agencies. But as we all remember our parents telling us as a child if somebody told you to jump off a bridge, would you jump off a bridge? Comparing ourselves to the rest of the Federal government is not necessarily the appropriate way to do a comparison in this particular instance.

I also wonder what type of message that VA is sending to other good employees when they allow bad employees to settle for thousands of dollars just because it would be too expensive or possibly embarrassing to litigate. I understand the pressures being placed on VA managers to make the right call in these situations is immense. There is always a judgment call to make as to whether these settlement agreements are warranted. But the review of these documents raised three important questions that I hope we are going to be able to talk about today.

First, what type of review or training has VA central office provided to managers in the field on how to use these agreements? What part of the budget are these damages paid out of? And who reviews the payments?

Second, are these settlements being used as a way to buy off or to silence whistleblowers whose choice is between accepting monetary settlements or retaliation or abuse? I know in one case where this appears to be happening where a whistleblower has been offered over $300,000 to quit and I am interested to hear from Mr. Bachman at OSC about this specific case and another similar instance.

And thirdly and most importantly it would seem logical that anytime VA agrees to pay out damages to employees that this is at least a tacit admission of guilt on behalf of the agency. In these circumstances what type of review or proposed discipline does VA provide to the employee who may have retaliated against whistle-

blowers or participated in prohibited personnel practices, which created the need for these agreements in the first place? While I understand that simply settling with an employee in a certain circumstance can be a great tool for the department due to current lengthy disciplinary processes required by a broken and antiquated civil service system, it is this Committee's job to ensure that they are being used judiciously and with great care of taxpayer dollars.

With that, I yield to my good friend the Ranking Member Mr. Takano for any opening statement he has.

OPENING STATEMENT OF MARK TAKANO, ACTING RANKING MEMBER

Mr. TAKANO. Thank you, Mr. Chairman. And we are indeed good friends.

We are here as part of our ongoing responsibility to oversee the Department of Veterans Affairs to investigate how the people's money is being spent by the VA and why.

During today's hearing we will examine the settlement agreements VA has entered into with employees over the past three years.

We want to understand what factors VA considers when engaging in Alternative Dispute Resolution, which often results in settlement agreements between parties.

We also want to learn why it is important that local VA managers have the flexibility to resolve employee complaints based on the individual circumstances at each facility.

Most importantly, we want to know how VA employee settlement agreements have affected whistleblowers in the past three years. We can all agree that their courage in coming forward in Phoenix, Philadelphia, Tomah and in many other places has been crucial to helping to reform the Department.

We want to make sure these settlements are not being used to silence whistleblowers, and that a settlement between a whistleblower and the VA does not preclude consequences against the offending supervisor.

So thank you, Mr. Chairman, for giving us the opportunity to examine the VA's use of settlement agreements in detail today, and to determine whether they are serving the safety and well-being of the Nation's veterans, the interests of VA employees, and the costs to taxpayers. Thank you and I yield back, Mr. Chairman, the balance of my time.

The CHAIRMAN. Thank you very much. I want to welcome our first panel of witnesses to the table. With us today is the Honorable Leigh Bradley, the General Counsel for the U.S. Department of Veterans Affairs, who is accompanied today by Mr. James Manker, the Acting Principal Deputy Under Secretary for Benefits, and Mr. Steve Young, the Acting Deputy Under Secretary for Health for Operations and Management at the Department of Veterans Affairs. And we also have Mr. Eric Bachman, who is the Deputy Counsel for Litigation and Legal Affairs with the U.S. Office of Special Counsel. We appreciate all of you being with us today. Your complete written statement will be made a part of the record. Without objection, so ordered. And Ms. Bradley, we will start with you and recognize you for five minutes for your opening statement.

OPENING STATEMENT OF THE HONORABLE LEIGH BRADLEY

Ms. BRADLEY. Good morning, Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to discuss settlement agreements between the Department of Veterans Affairs and its employees.

Addressing employee disputes in the Federal government which manifest in complaints of discrimination, allegations of prohibited personnel practices, such as whistleblower retaliation, and appeals of proposed disciplinary actions, is a particularly daunting challenge. At VA managers at every level are required to do this in the most cost effective manner with the least amount of disruption to the effective functioning of the organization as it carries out its statutory obligations to our Nation's veterans. Moreover, VA managers must resolve employment disputes consistent with the vital goal of building and sustaining high performing teams and workplace cultures that will achieve excellent outcomes for veterans at good value to the taxpayer.

Congress clearly intended that Federal agencies had the authority to settle matters expeditiously without resorting to protracted litigation. In the 1990s faced with litigation dockets clogging Federal courts and administrative tribunals, Congress passed three laws that were designed to reduce the cost and time required to litigate many disputes by requiring Federal agencies to adopt a policy encouraging the use of ADR, alternate dispute resolution, and mandating that Federal trial courts make ADR programs available to litigants. As a result the judicial and administrative bodies that have jurisdiction to investigate and decide Federal employment disputes, and these are the Equal Employment Opportunity Commission, the Merit Systems Protections Board, the Federal Labor Relations Authority, and the Office of Special Counsel, have adopted policies and practices that encourage or require settlement negotiations.

VA's use of ADR and execution of settlement agreements are not only proper but critical to maintaining a positive workplace of high performing teams to carry out VA's mission. It is noteworthy that many of these agreements contain no monetary payout provision. With nearly 350,000 employees VA is simply not resourced to litigate all employee disputes to final adjudication without significantly and detrimentally impacting service and benefit delivery to veterans. Furthermore, for example, in reviewing the most recent data maintained by the EEOC the percentage of formal EEO cases settled within VA is within two percent of the average percentage of formal EEO cases settled in other cabinet departments.

That said, oftentimes the best course of action is to litigate the matter all the way to judgment or final decision. VA is not reticent to litigate. Indeed the presumption is that we will litigate most personnel disputes. But it is our obligation and in the best interests of veterans and the taxpayers to consider the merits of settling an employment dispute on a case by case basis. In each and every case there is a delicate balance that must be struck between expediting the resolution of an employment dispute and formal vindication of the agency's position in a Federal court or administrative board.

So what is the business calculus used to decide whether to litigate or settle? Here are the key factors that VA management offi-

cials consider. In consultation with legal counsel, management officials will evaluate the litigation risk, meaning the strength of the evidence and availability of key witnesses. They will also consider the monetary cost of litigation. In other words this is a key business decision and that will include the administrative resources needed to investigate and process a complaint, loss of employee productivity during depositions and trial testimony, deposition and transcript costs, and if VA does not prevail payment of compensatory damages, back pay, interest and attorneys fees. Managers must also assess the disruption and divisiveness that litigation will likely create for the facility's workforce.

In addition consider that it is not unusual for an EEO complaint to take between 18 to 24 months just to get to a formal EEOC hearing. That is time in which members of the work unit can become mired in the adversarial drama unfolding and lose focus on teamwork and achieving mission objectives.

Management officials also settle cases when it is determined that the employee has been legitimately aggrieved and it is simply the right thing to do. Over the past two years, for example, working with the Office of Special Counsel VA has been able to negotiate expedited settlements with employees who have been the victims of whistleblower retaliation.

Finally and importantly settlement does not end the obligation of the department. If a settlement agreement is reached with an employee who filed an EEO or whistleblower retaliation complaint, VA has a duty to determine whether there was any wrongdoing by another employee that necessitated that settlement, and if so what disciplinary action should be taken against that responsible management official or offending employee. Accountability actions must be based on sufficient evidence, which is typically derived from follow on investigations conducted by the Office of Inspector General, VA's own Office of Accountability Review, other internal VA offices, or in many instances involving retaliation the Office of Special Counsel.

Regardless of the entity that conducts the investigation, VA managers are expected to hold employees accountable based on the evidence provided. To that end VA is making meaningful strides in resetting the bar on accountability throughout the department and refocusing VA's business processes and culture first and foremost on the needs of America's veterans.

That concludes my oral statement.

[THE PREPARED STATEMENT OF LEIGH BRADLEY APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you very much, Ms. Bradley. Mr. Bachman, you are recognized.

STATEMENT OF MR. ERIC BACHMAN

Mr. BACHMAN. Good morning, Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to testify today about the U.S. Office of Special Counsel and our work with whistleblowers at the Department of Veterans Affairs.

OSC is an independent Federal investigative and prosecutorial agency and our primary mission is to safeguard the merit principles by protecting employees from prohibited personnel practices, in particular from whistleblower retaliation. Since 2014 OSC has seen a dramatic increase in the number of whistleblower retaliation complaints filed with our office by VA employees. As our docket of VA cases has grown so too has our rate of securing favorable actions for VA employees, which has helped courageous employees restore successful careers at the VA.

Since 2013 the number of VA prohibited personnel practice complaints filed with our office has increased by 67 percent, while the number of favorable actions that we have obtained in these cases during that same timeframe has increased by 232 percent.

We are currently investigating approximately 300 whistleblower retaliation cases related to VA whistleblowers across the country and settlements are an important and effective tool for OSC to use in handling this large caseload for two reasons. First, our top priority is to help the whistleblowers as quickly as possible and they can often get relief far more swiftly through a settlement than through a litigation context. Second, the whistleblower and the agency can often be more creative in the type of relief that they agree upon than can be done through a litigation context. For example, OSC recently mediated a settlement between the VA and Brandon Coleman, who is a whistleblower from the Phoenix VA medical facility. The settlement included a new position for Mr. Coleman and moved him away from his previous chain of command. And this was a positive outcome for Mr. Coleman as well as the veterans he now serves and would not have been possible without OSC's alternative dispute resolution program mediating a voluntary settlement between the VA and Mr. Coleman.

Through settlements OSC has helped hundreds of whistleblowers at Federal agencies across the government. And at the VA alone we have secured 169 favorable actions in the last two years. We are proud of OSC's role in protecting whistleblowers and helping to put employees back into their jobs so they can continue their important service to veterans.

When a whistleblower and the VA settle a case their settlement does not necessarily end OSC's role in the case. OSC recognizes that disciplining managers who retaliate against employees is an important tool to promote accountability. Accordingly, even where a whistleblower settles their individual claim, OSC may still investigate the case for potential discipline against alleged retaliators. For example, in whistleblower retaliation cases at the VA's Puerto Rico facility OSC has investigated and obtained corrective actions for several whistleblowers. Although these cases have either settled or are in settlement negotiation, OSC is continuing to actively pursue its investigation of several high level officials at the Puerto Rico VA for potential discipline. Notably, even though it takes significantly more time and resources to complete disciplinary investigations, in the first four full years of Special Counsel Carolyn Lerner's tenure, which was from 2012 to 2015, OSC more than doubled the number of disciplinary actions taken government-wide as compared to the previous four years.

We appreciate the Committee's attentions to the issues we have raised and your interest in our efforts to protect and promote VA whistleblowers. I thank you for the opportunity to testify and am happy to answer your questions.

[THE PREPARED STATEMENT OF ERIC BACHMAN APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you very much, Mr. Bachman. You had referenced the issue about the supervisor who dressed up as a particular employee and that that employee has now been moved to a different job, but, Ms. Bradley, what I want to know is what happened to the people who actually retaliated against this person? Was there disciplinary action taken against them? Could you—microphone?

Ms. BRADLEY. What I want to tell the entire Committee that what we have been working very hard on is a process to hold all people that have engaged in some form of either retaliatory behavior, discriminatory behavior, or acted inappropriately, accountable. So while I am not able to actually talk about specific accountability actions in a public hearing—

The CHAIRMAN. No I just want to, just answer the question. Was anybody held accountable for what they did?

Ms. BRADLEY. They either have been held accountable or will be held accountable through the process that we have put into place, which again I want to go back to. We have got to do a follow-up investigation to get evidence that will be the basis of the accountability action so that it will be sustainable on appeal. We have got to make sure that these actions stick.

The CHAIRMAN. Is a photograph of somebody dressed up as an employee and making fun of them not good enough evidence?

Ms. BRADLEY. Again, I am not able to talk about the specific actions that we have or intend to take in that particular matter. But as we have said before, we are happy to brief you in private. And I believe we have had a variety of leaders brief the Committee on individual cases in private.

The CHAIRMAN. I also want to talk about the Puerto Rico issue with Ms. Lopez. I think it is in the news these days. According to media reports, she was originally fired for failing to discipline a VA whistleblower that was disclosing legitimate yet damaging information about a senior VA manager at the Puerto Rico VA Medical Center. And following further investigation by OSC they concluded that Ms. Lopez should be reinstated. So has Ms. Lopez been reinstated? And if not, why not?

Ms. BRADLEY. Do you want me to take that first? I think we can answer this in concert with one another. We are in the process of conducting two follow-up investigations to get the evidence that we need. The Deputy Secretary has been briefed at least preliminarily on what we have learned so far. And we will be prepared to tell the Committee what the final accountability resolutions are in this matter as well as some related matters at that facility I think in very short order.

The CHAIRMAN. Can you tell me when this actually happened? I do not have a date, so I am, I am sure the Committee does.

Ms. BRADLEY. I cannot.

The CHAIRMAN. I am sure the OSC can if you cannot.

Mr. BACHMAN. Yes. The actions with Ms. Lopez occurred during 2014. When Ms. Lopez filed a case with OSC we took a look at the available evidence and determined at that time that we believed a stay of a proposed removal of Ms. Lopez was in order. We discussed that with the VA. The VA did agree to stay it, and by that I mean to hold off on actually removing Ms. Lopez, while we continued our investigation. So she has been reinstated. My understanding is that they are currently in settlement negotiations.

The CHAIRMAN. So the press has reported there is a $305,000 settlement agreement on the table if she agrees to resign from VA. Is that true?

Ms. BRADLEY. Again, Mr. Chairman, I really am not at liberty under the Privacy Act to discuss the specifics of the case. But I would be happy to meet with you in private and talk about it, or bring over experts that are dealing with that case right now and talk to you or the Committee about that.

The CHAIRMAN. Mr. Bachman, can you discuss it?

Mr. BACHMAN. Because it is an ongoing open case with active settlement negotiations between Ms. Lopez, her attorney, and the VA, I do not believe I should discuss the specifics.

The CHAIRMAN. Okay.

Mr. BACHMAN. I do not want to undermine their opportunity to settle the case.

The CHAIRMAN. Okay. Well I do not want to undermine their opportunity to settle the case either. But it is my understanding that the first offer was $100,000. It has now ballooned to triple that in this process. And, you know, I just, I want to know how VA can expect to build a culture that encourages whistleblowers to come forward when VA takes such a hard line against those like Ms. Lopez.

Ms. BRADLEY. May I answer that?

The CHAIRMAN. I am looking right at you.

Ms. BRADLEY. This is a key priority for the entire leadership team of VA. So it started two years ago with Secretary McDonald saying that we would change our culture and it would be an open culture, one that would be free of fear, that would encourage people to come forward and raise concerns. As a result we have seen a dramatic spike in the number of people who have been willing to come forward and raise concerns. He did this by making the somewhat unusual public statement repeatedly about giving out his private cell phone number. And then he told all of us as senior leaders that he expected us to do something very similar. To make sure that all of our employees know that first and foremost it was our sacred obligation to ensure that the environment was a place where people could raise—

The CHAIRMAN. Thank you. My time has expired, and I appreciate it very much. And unfortunately Mr. McDonald's phone goes to voice mail, just like a lot of the hotlines that they have right now which I think is very unfortunate. And one quick question. Does it make sense that over 96 percent of the agreements that were made have allowed employees to leave the agency with a totally clean record?

Ms. BRADLEY. I do not know that that is accurate. But I can tell you that a clean record—

The CHAIRMAN. Just suppose that it is accurate.

Ms. BRADLEY [continued]. I can tell you—

The CHAIRMAN. If it is accurate does it make sense, yes or no, that 96 percent would leave with a clean record?

Ms. BRADLEY [continued]. I can only speak to what our current policy is. Which is that clean records, while they do occur every once in a while, they are—

The CHAIRMAN. Ninety-six percent of the time.

Ms. BRADLEY [continued]. I am speaking from my time as the General Counsel. They are, MSPB disfavors them, my attorneys disfavor them. And furthermore what a lot of people do not understand is that along with a clean record usually comes a request for VA to provide what is called neutral reference. And anybody at any other Federal agency that calls VA and says, well can you provide a reference on this individual? When we say, well, we can provide you a neutral reference, that means something to them. They know that there is something that has been going on with that person in the workplace.

The CHAIRMAN. Thank you very much. Mr. Takano?

Mr. TAKANO. Yes, I am looking for a little context for some of this. Are the settlement agreements the VA has entered into in the recent past, from 2014 to the present, more costly or more frequent in comparison to other Federal agencies and the private sector? Go ahead, counsel.

Ms. BRADLEY. Well you have to understand that employment disputes really fall into three to four buckets. So let us start with EEO complaints. Those are complaints of discrimination based on race, sexual orientation, age, they can be harassment related complaints. Those make up the lion's share of employment disputes in the Department of Veterans Affairs, and I believe in other Federal agencies. So in looking at the data, and this is all reflected not by me. If you look at the EEOC's Web site they have annual reports and they put the data on their Web site. And it shows that the rate of settling cases, EEO related cases, by VA is within, as I said in my oral statement, two percentage points or so of all the other cabinet departments. So that is one bucket of cases.

If you look at the MSPB cases, those are the ones that go to the Merit Systems Protection Board. The ones that are actually going to be litigated, they too, in their annual report, they show the incidence of settlement amongst all of the Federal agencies. And you will see that our incidence of settlement is around 70 or 71 percent, which is very closely aligned with the, I will call them our 12 sister agencies. So the key is there is nothing that is going on at VA that is out of whack with respect to the practices of other cabinet departments.

Mr. TAKANO. But I am interested in private sector comparisons.

Ms. BRADLEY. Well I spend a lot of—well, not a lot. I spent some time in the private sector, and I was also the Chief of Staff of the American Red Cross for about three years. And I can tell you that the CEO of a company that I worked for as a lawyer or at the Red Cross, from our perspective almost never was protracted litigation good for the bottom line. It is very, very costly to any entity to en-

gage in litigation and everything that leads up to litigation for 18 to 24 months.

Mr. TAKANO. Well, Ms. Bradley, this last question that the Chairman asked about references, neutral references. I seem to recall from my days as a member of the Board of Trustees at Riverside Community College that as an employer if we gave negative references, there was some liability that accrued to the employer. Is that true also with Federal agencies?

Ms. BRADLEY. I do not want to say that there is. I think it is always a concern, that you could be sued for it. I do not know if it is a legitimate suit but I think a lot of senior managers are afraid of that. But I still think the important point is this notion that VA regularly engages in a clean record settlement is a misnomer. We are moving away from them. We have not completely eliminated them but we are moving away from them. Just as we are moving away from non-disclosure agreements. I just recently sent out a memo to all of the attorneys in OGC and said that non-disclosure agreements are to be disfavored. And in the rare cases where we feel like we need to enter into one, it should be limited just to the specific terms of that settlement.

Mr. TAKANO. Great. I want to move on to another question and my time is limited. Please share with the Committee the nature of what settlement agreements represent. Are settlement agreements an admission of guilt by either side?

Ms. BRADLEY. I guess at their very core they represent a mutual and final resolution of an employment dispute. So if you litigate, if you go all the way to an adjudication before the EEOC or the MSPB, what happens there is those bodies have to attribute fault. And sometimes it is important for the agency to go all the way to one of those boards or to a Federal court in order to attribute fault. But oftentimes employment disputes are something as simple as a person says, I did not get a promotion and I feel like I was unfairly treated. I feel like maybe I did not get the promotion because I am gay, or because I am an African American. And so you want to try, it is in your best business interest to talk through those issues at the most local and informal level possible. Because you really want to get that person back onto the team working on the agency's mission and not being kind of sidelined and engaged in, well, you know, I have a deposition next week, or my litigation is coming up. So it is the mutual and final resolution of a matter that counts. But it does not tie our hands. We are able to then pursue accountability.

Mr. TAKANO. Mr. Chairman, will you permit me to ask one follow-up? Thank you. I appreciate that. So I just want to make sure, as we all do, that settlement agreements between the VA and whistleblowers, are really a mechanism by which both parties can officially come to resolution in a difficult situation. But I want to make sure, as we all do, that settlement agreements between the VA and whistleblowers do not preclude accountability for bad supervisors. In the case of a settlement between the VA and a whistleblower, does the VA still have a duty to determine wrongdoing by an employer that necessitated the settlement?

Ms. BRADLEY. Absolutely, we have a duty. And there is nothing in the settlement agreement that precludes us from pursuing ac-

countability. In fact that is the most important piece I would argue in this whole process. That is why we have the various mechanisms for people to raise concerns and then to use ADR to try to resolve their concerns. But it is up to us to make sure that we have the right leaders in place and that we address workplace culture issues. It is our obligation to pursue accountability. And remember the agreement, the settlement agreement, is between the aggrieved party and the agency. Not between the person who was engaging in the wrongdoing. So yes, the agency is not waiving its rights in any way, shape or form in entering into that agreement.

Mr. TAKANO. Okay. Mr. Chairman, my time is up. But I hope somebody will ask a question related to whether the agency has pursued further discipline after a settlement has been reached with the supervisor.

The CHAIRMAN. Thank you very much. Mr. Lamborn, you are recognized.

Mr. LAMBORN. Thank you, Mr. Chairman, for having this hearing. Thank you for all the witnesses for being here. Ms. Bradley, would you make any changes to existing civil service laws to make it easier to discipline employees so that managers are not trapped in a system that, at least it appears to us on the outside, that settlement agreements are used because nothing, there is no other avenue to hold someone accountable?

Ms. BRADLEY. So there are some important and I think helpful provisions in the House bill on accountability, as well as in the Senate bill on accountability, that our department supports. I think that we have made clear in our public statements and in our testimony that we do agree in strict accountability measures.

Mr. LAMBORN. So specifically what would you like to see changed?

Ms. BRADLEY. I guess I am concerned about the disparity for VA senior executives that the bill language affords. So I have spent most of my Federal career at the Department of Defense. So for example, recently I was trying to hire our top procurement lawyer and so where did I want to go? I wanted to go to DoD and recruit there because that is where they do the most contracting work. So I wanted to go back to the Department of the Navy, where I had worked, or I wanted to go to the Defense Logistics—

Mr. LAMBORN. Okay, hurry up. Be specific. My time is running out.

Ms. BRADLEY. So specifically when I reached out to people and said I want you to come to VA, I need your help, they said, yeah, but you treat senior executives differently at VA. And so why would I leave my department? So that is what I am concerned with—

Mr. LAMBORN. No, you are talking about the status quo.

Ms. BRADLEY [continued]. —is the disparate treatment of senior executives.

Mr. LAMBORN. You are not, you are saying the status quo is broken. And I am saying what changes—okay, I am not going to get a good answer from you on that so let us move on to something else. Is it discretionary with the VA in a settlement agreement to remove derogatory information from an employee's permanent record or not to allow it to go into the record in the first place?

Ms. BRADLEY. Well that is the purpose of a clean record. You enter into an agreement as to exactly what will be reflected in the—

Mr. LAMBORN. So it is a negotiating tool?

Ms. BRADLEY. It is a negotiating tool, which is why we have not completely outlawed it. We frown on it. But there are some instances where we want the ability to be able to do that to settle the case.

Mr. LAMBORN. We on the Committee here, we, I think everyone here wants, number one, the taxpayer to be protected, the dollars to be spent for the veterans' needs, and for justice to be done. Innocent people not to be punished or guilty people to be held accountable. And if the withholding of derogatory information from someone's record is a negotiating tool, it seems to me that that is liable for abuse. Have you ever seen cases where—

Ms. BRADLEY. I think that is—

Mr. LAMBORN [continued]. —something should have been in someone's record that got removed that you think the next employee should have known about? Especially if it was a Federal employer?

Ms. BRADLEY. I think you are exactly right. I think that is why we have moved way from the use of clean record settlements. I think that is why the MSPB frowns on them. So I think that you raise valid points. I just, I do not know what to say other than we do not use them regularly as has sort of been depicted that that is the way we do business.

Mr. LAMBORN. Thank you. Mr. Bachman, how would you comment on this topic?

Mr. BACHMAN. I would note that the ability to give an employee a clean record through settlement negotiations, when we are talking about a whistleblower who has come forward and part of the retaliation they believe they have suffered is derogatory information in their personnel file, that is a negotiation tool that we at OSC do like to have on the table for the parties because it is important that it not follow them for the rest of their career just because they had a retaliatory supervisor who placed it in their folder. So we, I would just want to make sure that that ability is taken into account from OSC's perspective as well. That this clean record provision in settlement agreements often does help the whistleblower themselves.

Mr. LAMBORN. Would you recommend any changes in the regulations or laws to make sure that that is not abused?

Mr. BACHMAN. I do not have any particular specific recommendations on the legislation. I can tell you one observation, one area that we have mentioned that could be improved is the idea of having a permanent office within the VA whose statutory mandate is to be identifying potential problem areas, whether it is in patient care or whistleblower retaliation issues, to make sure that they can proactively respond to those ongoing or upcoming problems instead of having to react to it once it has already spiraled out of control. So that is the type of more structural improvements we think would be extremely helpful.

Mr. LAMBORN. Okay. Thank you all.

The CHAIRMAN. I would note for the members that the 208, I think it was, or 203 that we looked at date back to July of 2014. Ms. Bradley, you came in I think in December of 2014. Ninety-two percent, 96, I am sorry, higher, 96 percent of those were clean records. That is the records that were provided to us. So I am having a hard time figuring out how we are doing away with it when we actually are almost at 100 percent clean records. Mr. O'Rourke?

Mr. O'ROURKE. Thank you, Mr. Chairman. Mr. Bachman, when you were citing the changes since 2013 and you mentioned 230 percent plus change in favorable actions, I believe over 65 percent more claims being filed, is that a sign of success? Does that mean that there was this latent demand to be able to do these things and people did not feel comfortable doing it before and now post-2013 they do? Or is it a sign that there is a problem within the VA because this many more people feel like they have a legitimate whistleblower issue that they want to bring forward? How do we read that? You seem to cite it as kind of a success.

Mr. BACHMAN. I think there are a variety of factors at play here in terms of why we have seen this spike in VA whistleblower complaints with our office. And I do not think there is any one factor in particular. But one of them certainly is the fact that the VA did become the first cabinet level agency to become certified under OSC's process. And what that certification means is they have taken some specific steps to make sure that their employees are educated about their rights and responsibilities under the various whistleblower protection laws. So this may have alerted VA employees about their opportunity to come to OSC and that may have increased their comfort level about doing that.

Another factor I think that plays into this are VA whistleblower are often blowing the whistle about serious patient care issues.

Mr. O'ROURKE. Mm-hmm.

Mr. BACHMAN. And those are the types of issues that get employees motivated to come forward and, you know, they feel like it is a really important issue that needs to be brought to light. And then I think the third factor is that OSC has been helpful or has been successful in helping whistleblowers. And whistleblowers when they are making disclosures, when they are blowing the whistle, are starting to see results. And so I think that is also contributing to their likelihood to come to OSC.

Mr. O'ROURKE. Got you. Ms. Bradley, two things from Ms. Lopez's case in Puerto Rico. Because I know you cannot describe the case in detail and cannot respond to our specific questions about it, but just to extrapolate from that anecdote. Do we have a problem within the VA of using settlement agreements to stifle whistleblowers? To make them go away?

Ms. BRADLEY. I do not think that that particular case would support that proposition. I think the proposition that is of great interest to me and to Bob McDonald and to Sloan Gibson is once we resolve the retaliation piece, what accountability measures will we take with respect to not just one leader but maybe several leaders? And how do we do that, and on what basis? And how do we get the evidence and how do we pursue those accountability actions?

Mr. O'ROURKE. We are, and I know this is tough because we cannot talk about the details, but you and I are drawing two different

conclusions from this. My conclusion is this employee, from the facts that I understand, was trying to do the right thing. Her superiors were trying to get her to do the wrong thing. In an effort to make her go away, she was first offered $150,000 and they doubled it to over $300,000. That seems like using settlement dollars to make somebody go away is a problem for upper management. So my question still stands. Do we have a problem in the VA of using these settlement agreements to stifle whistleblowers or others who are trying to call out wrongdoing? And as Mr. Bachman said, if someone is finding that patients are not being taken care of, if wait lists are being manipulated, are they going to be paid to go away?

Ms. BRADLEY. Let us talk about the case just sort of hypothetically. If we had a situation like this one I think that we should be concerned that that is at least what a reasonable person would conclude.

Mr. O'ROURKE. Do you feel that that is a problem within the VA?

Ms. BRADLEY. I believe it is anomalous.

Mr. O'ROURKE. Here is the deal. I do not know, I do not have the data that the Chairman has and I want to see what he is looking at. I do not know if this, is this one anecdote that does not represent the whole? Is this the exception? Or is this prevalent enough that we have a problem within the system? And so that is the question I am asking, not, I do not want to talk hypothetical. Do you from your position, knowing about what goes on VA-wide, do you see a problem in management, not you, but people at the level that we are talking about in Puerto Rico and elsewhere, are they using these settlement agreements to stifle people who are trying to call attention to issues within the VA facilities nationally?

Ms. BRADLEY. I think that this, this issue is anomalous. I see great progress being made and I measure that by the numbers of people who feel free to come forward.

Mr. O'ROURKE. So you have seen nothing from your position, which is the best position from which to understand whether or not we have a problem, you do not think we have a problem?

Ms. BRADLEY. I do not want to say that we have a problem but I think it is worthy of us looking very hard at for the next period of time, like maybe two more years, to look at and ask that hard question. I do not want to say there is no problem. I think we are making a significant culture change in our department and culture change is hard and it takes a long time. And I think it is incumbent upon every leader to be asking that kind of question. You know? Are we taking the easy way out here? Do we want this person to still work for VA? And who was willing to sort of pay off the whistleblower? What do we think about him or her, and should they be a leader in our department? I think those are very important questions that we need to keep asking on a regular basis.

Mr. O'ROURKE. Okay. I am looking forward to the answer. Thanks.

The CHAIRMAN. Mr. Bilirakis, you are recognized.

Mr. BILIRAKIS. Thank you, Mr. Chairman. A question for the panel, is there someone currently tasked with the responsibility of what overseeing these settlement agreements, to make sure that they are appropriately entered into and used? And then is it the Office of General Counsel, Special Counsel? Someone with the VA?

I also want to know if there are audits being conducted and if these audits are available to the public or to the VA Committee as well. So who wants to go first?

Mr. MANKER. I will take that question, Congressman. VBA has several levels of review prior to entering into settlement agreements. HR Directors, EEO Managers, the Office of General Counsel, the Office of Regional Counsel, as well as senior leadership are all consulted for guidance before entering into these agreements. We do that to make sure that they are correct in terms of legal sufficiency, they are cost effective, and also in the overall interest of our employees, our veterans, and our taxpayers. So we look at it through all those lenses. Additionally at the department we do compliance reviews to make sure that settlement agreements were completed in compliance with the rules that we have in place to govern these things.

Mr. BILIRAKIS. Now let me ask you, is there one person specifically responsible for the oversight?

Mr. MANKER. I would submit to you that from each of our administrations we have responsibility across the leadership team to look at and review settlement agreements.

Mr. BILIRAKIS. Are audits being taken place and are they available to the public?

Ms. BRADLEY. I am not really sure what you mean by audits. Certainly the costs have to be monitored by the individual administration because the costs come out of their operating budgets. But I do not, I do not exactly know what you mean by auditing a settlement agreement.

Mr. BILIRAKIS. Is this information available to the public?

Ms. BRADLEY. Generally not.

Mr. BILIRAKIS. Okay, we will get onto the next question. Ms. Bradley, when these payouts occur do the funds come from the central office operation budget or does it come from that particular facility?

Ms. BRADLEY. I am going to turn that over to my colleagues from VHA and VBA.

Mr. BILIRAKIS. Okay.

Mr. MANKER. So Mr. Congressman, in my former role I served as the CFO for VBA and I can tell you that settlement agreements come out of our operating funds so, our very precious operating funds that we use to adjudicate claims. So again, the reason why we take these things seriously and make sure that we have all the Is dotted and Ts crossed is because it comes out of the same funds that we use—

Mr. BILIRAKIS. It comes from the central office's operation funds, is that correct?

Mr. MANKER [continued]. It comes from our operating account, that is correct. We like to—

Mr. BILIRAKIS. From the individual facility?

Mr. MANKER. It depends on the size of the agreement. But in general it comes from our general operating expense account, so from our main appropriation.

Mr. BILIRAKIS. Are any of the concerns, do you have any concerns that the funds diverted from these facilities, if it comes from the

particular facility, can negatively impact veterans receiving care at that particular facility?

Mr. YOUNG. So let me address that from VHA—

Mr. BILIRAKIS. Please.

Mr. YOUNG [continued]. —as a prior medical center director. Those funds come directly from the individual medical center's operating funds. And consequently the medical center directors that work in consultation with the attorneys look very hard at every decision to make certain that it is a good business decision because it is so important because it is coming out of the medical center's funds. So the direct answer to your question concerning where those dollars come from is in VHA from the medical center level.

Ms. BRADLEY. And if I could add to that, so I understand your point is, gosh, this money is coming out of operating budget accounts and that could harm veterans. But it is a business decision. So you have to evaluate how much are you spending in settling the case versus how much money would need to be spent to adjudicate it all the way to a final resolution. Like what are all the expenses associated with litigating the case? That is the business decision that these gentlemen and other leaders in VHA, VBA, and Cemeteries have to make. So it is not just simply the, you know, what would the settlement cost? It is what would this cost us to litigate for some number of months or years?

Mr. BILIRAKIS. Well again, that point is well taken. However I am concerned that there is not enough oversight and you do not have one particular individual appointed to oversee these settlement agreements. So I would like to work with you on that. I yield back, Mr. Chairman. Thank you.

The CHAIRMAN. Ms. Brownley, you are next.

Ms. BROWNLEY. Thank you, Mr. Chairman. Ms. Bradley, I wanted to follow-up with you. In your opening comments you talked about accountability action that it sounds like you are going to introduce here pretty soon. And you said that you could not really speak about it, but I was wondering if you could just describe to me what, you know, what this looks like generically in terms of accountability actions after these disputes are settled?

Ms. BRADLEY. What I was referring to is a process, where we get into a rhythm, a battle rhythm if you will, which is we ask our investigators to give us sound evidence so we can bring an action, and it can be any, you know, variety of disciplinary action if appropriate and then be able to pursue that all the way through the appeals and have that action sustained. That is what I was referring to. But there is something I would love to share with the Committee that I think will help senior leaders and managers with accountability. It is something that is being developed in the human resources and administration part of VA.

I have behind me, I believe behind me, is the Deputy Assistant Secretary for the Office of Resolution Management. He has been using what I call business intelligence. It is really using data analytics to be able to give leaders better intelligence about what is happening at their facility or group of facilities. It is going to give in concrete terms some ideas about how many complaints have been raised or lodged at this particular facility over some period of time? How many of those cases were settled? What is the cost of

settlement? This is going to give us some ability to see where we might have problems with leaders or we might have a culture that is not conducive to a high performing workforce. That is going to be rolled out in November. So I am really excited about this because I think this helps us get at accountability in a more meaningful way.

We have a lot of medical center directors and RO directors who are in acting positions. They come into a facility, imagine coming into Phoenix right now and trying to understand the lay of the land over like the past five years. You do not, we have not given them good data analytics to be able to see where they have strong leaders and where they have room for improvement. So that is something, thank you for giving me the opportunity to talk about it, we would like to come over and share this with the Committee, maybe give the Committee a demonstration about how this data science project is going to work in practice.

Ms. BROWNLEY. Thank you. So you know, I think, you know, I think we all can agree and we all do agree that the VA needs a cultural shift and a cultural change. And it feels to me as though the work that you do is really very much at the heart of that shift within the organization. And I think it is a little concerning to me where it seems as though in this settlement practice there is a focus on time and money, and I understand that. I mean, I understand that at one level. But it seems like that is the emphasis and rather than, you know, on the principle and the accountability. And so, you know, I do not think you are going to get to the cultural shifts and changes that need to really permeate deep into the organization, you know, unless we are focused more on the principle and the accountability. And yes, time and money, and I agree with your argument that we want those operating expenses to go to our veterans. But on the other hand, you know, this cultural shift within the organization is I think very, very important. And I think the other measure you have just mentioned, one issue that it sounds to me more of a proactive measure that your department is taking that you just described to me. And I am wondering if there are other, you know, proactive measures coming out of your department that will help to, you know, anticipate some of these personnel issues so that they do not happen, so that there is that strong cultural change that we are a veteran-centric operation and whistleblowers are to be safe and secure and recognizing that they are only trying to move the organization forward in a positive way for veterans. So if you could talk a little bit about, you know, the focus on principle and accountability and some more proactive measures you are taking?

Ms. BRADLEY. I really appreciate your question. When I arrived at VA almost two years ago it was not just my assessment, it was sort of a general assessment, that we had a problem in terms of training our first, you know, first line supervisors and managers. And I mean training them, especially about whistleblower activity and protecting whistleblowers and not retaliating against whistleblowers. So we started to do some training. You know—

Ms. BROWNLEY. My time is up so I, well maybe we can talk offline. So I yield back.

The CHAIRMAN. Thank you very much. Mr. Huelskamp, you are recognized.

Mr. HUELSKAMP. Thank you, Mr. Chairman. A few clarifications, if I might, Ms. Bradley? You do note in your written statement that the VA does not have a national policy on these issues. Can you describe the type of training for the decision makers on these particular policies?

Ms. BRADLEY. Again, I am really pleased to talk about this because I think we have made some real progress. When I first arrived at VA this became a, like a central focus for me. I even myself trained, but it was telephonic, all of our medical center directors on whistleblower, the laws, what a whistleblower is, what it means to actually take action against a whistleblower. Then we decided, okay, the training was good but it really was not sufficient to get our supervisors and managers ready to do the right things. So we worked closely, we partnered with the Office of Special Counsel. Actually Mr. Bachman and I worked on this with Carolyn Lerner. They helped us develop what I think is a fabulous module on whistleblower and whistleblower protection. And—

Mr. HUELSKAMP. Ms. Bradley, if I might interrupt? Let me restate the question, and I am very interested in the whistleblower. But these settlements are not solely whistleblower agreements, is that correct?

Ms. BRADLEY. That is correct.

Mr. HUELSKAMP. Okay. But for what type of training do you have just for general employee settlements for, and who exactly makes the decision? You mentioned the medical director. Is there a legal counsel in every clinic that is making this decision and writing these agreements?

Mr. YOUNG. So I come to this position most recently from being a medical center director so I can speak to my experiences as a medical center director. And I always worked in and we collectively always worked very tightly with legal counsel in the field that provides us the information about the risks of the case, the strengths of the case, the likelihood of prevailing, the likelihood of not prevailing, and what the cost may be so that we can make a business decision. But that is done in very tight concert with legal counsel that provides that expertise.

Mr. HUELSKAMP. Local, regional counsel, or the central office?

Ms. BRADLEY. It is generally the local counsel. We have senior executive service lawyers assigned across the country. But sometimes in an unusual case they will consult with central office because we have national experts in—

Mr. HUELSKAMP. But you do not have a national policy?

Ms. BRADLEY. We do not, but we do not see—

Mr. HUELSKAMP. Is there a memo here that can describe what you sent out to the, I do not know what Mr. Young's background, or were you a doctor or an attorney? Or what was your background as the medical center director?

Mr. YOUNG. I have been an employee of VA for approaching 40 years working from a dishwasher to a medical center director.

Mr. HUELSKAMP. Okay. Do you have any legal background?

Mr. YOUNG. None.

Mr. HUELSKAMP. But you are the final individual that signs off on these employee settlements?

Mr. YOUNG. At my medical center I would be the deciding, the decision maker. But I would also, and again widespread practice within VHA, any case that would be a high dollar value, a high visibility, I would certainly bump that up to my network director and the network director for a particularly high value, high visibility would bump it even higher.

Mr. HUELSKAMP. Before the Chairman's request, was there any consolidation or report to central office on these employee settlements across the country? Is there a threshold where you said this is an important level, $100,000? What was the threshold?

Mr. MANKER. So there is not a threshold per se. Those that revolve around EEO there is in fact a reporting process for those. I believe that report comes here to Congress as well.

Mr. HUELSKAMP. EEO even if the complaint is withdrawn? Does that end up, that does not end up in the Congressional report. Most of these settlements, if I understand correctly, they withdraw all of those complaints, correct?

Mr. MANKER. I cannot speak for that, that part of that.

Mr. HUELSKAMP. Okay. I thought that was somewhere in the report. And lastly, I am trying to figure that out. I am trying to figure out who makes the decision, but there is no national policy. But is there a memo you can provide to the Committee that you sent out to all the medical directors, saying we have got dozens and dozens of employee settlements, here are the national guidelines? Is there nothing at all we can look at?

Ms. BRADLEY. Again, we do not have national guidelines. But we have longstanding practices of how we work together to evaluate each individual case on its merits. That is done in close consultation with lawyers. In unusual cases that is done in consultation with lawyers in the central office. From my experience in other Federal cabinet department agencies, I do not remember there being a national policy. Perhaps there is. But I can tell you what is important is are they getting the right level of scrutiny, are we paying attention? In the EEO arena, for example, there are some triggers or threshold amounts that require reporting up to—

Mr. HUELSKAMP. Yeah, and I, and that makes sense. But if the complaints are withdrawn, as a function of the settlement, how do they ever, do they ever move up? And lastly, and we will come back hopefully another round of questions, think about that, but the initial response to us was we have more whistleblower settlements and that is the reason for this sudden increase. I understood from the Secretary that we had adequately trained in the last two or three years to take care of that. But if I am understanding here this would suggest we have, we are not treating our whistleblowers fairly if suddenly this is the reason for many of these settlements. And we are out of time. Think about that. If we come back around I will reask the question. I yield back, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Huelskamp.

Mr. Walz, I apologize, you had stepped back in the room and you are now recognized.

Mr. WALZ. Thank you, Chairman. I appreciate it.

Thank you all for being here. And I know that getting away, it is important to not get into the specifics, although at many times that what we want to ask is to get away from the sweeping generalizations. But maybe because you are experts in this and especially labor law, to help us in what we are getting up against and what we hear and you are hearing in some of the questions is, maybe go to you, Ms. Bradley, first and then, Mr. Bachman, help me with this, when I hear this from constituents, when they hear some of these stories, and whether they are egregious or they are the norm, that is our job to figure out, but when they say, you know, if this kind of stuff happened in the private sector, they would be gone tomorrow, there wouldn't be anything, they would be gone tomorrow; is that a true statement? Are you at a different standard, is there differences there?

And again I understand striking that balance between doing the right thing, having managerial authority and due process. How would you respond to that when someone walks up to one of us and says that?

Ms. BRADLEY. I think it is a fair statement that there is less regulation in the private sector surrounding personnel disputes or employment disputes; I think they are regularly settled. I know from my law firm days in seeing them that they were regularly settled.

So I think that there is a perception that there is less regulation, that there is less chance of litigation. There are more rights for public or Federal employees, I suspect, I don't think anybody would disagree with that, than in the private sector, but I think we have made some good strides in trying to move more expeditiously in our accountability actions and I think that the American people deserve that.

Mr. WALZ. And so we should, we also take then—and I don't have the data on this to know of protections on wrongful terminations or some of the things we are talking about, and whistleblowers, that you might not get in that. So with the ability to sweepingly move someone, you can sweep up people who are doing the right thing, and so it is striking that balance.

And so your contention is, Ms. Bradley, that we are moving in that direction to strike the proper balance between a worker's rights, due process, but also, if you will, a veteran's due process to make sure that a bad employee is gone?

Ms. BRADLEY. We have to do that. We are not in the business at VA of litigating and dealing with employment disputes all day. We are in the business of providing the best health care possible for our Nation's veterans, for adjudicating claims quickly, for burying our heros appropriately. So it is striking a balance and running the business, managing the business. We may be in the public sector, but we are running businesses.

So, yes, that is something that is hard for leaders to do, but we have to do it.

Mr. WALZ. Yeah, and we need to work that part out, because I do think then there is that belief that, again, it has been mentioned and again, if it is anecdotal or not, but the public certainly hears this a lot, well, it is just easier for us just to pay this and move on. That is not really the answer the public wants from a taxpayer perspective or I think from doing it right.

So I guess we are trying to strike that balance of giving you the right tools to do it while protecting them, but it is your contention, as you are saying and we will hear some of the data, that that cultural shift is moving in the right direction. Because I could agree with you on this and I keep coming back to this, I have heard Dr. Shulkin say it, I have heard the Secretary say it, many of these things start with the leadership: the leadership culture, the leadership incentive, that if it starts there many of the things we are talking about never get to that point. Would you agree that that is—

Ms. BRADLEY. Completely.

Mr. WALZ. And you feel it is moving in that direction?

Ms. BRADLEY. I do, I do.

Mr. WALZ. What is the role of OSC in all of this then in terms of changing culture, following up, making sure that, I mean, I think most of us here agree, the best thing we would want is to be able to keep good employees, give people due process, and be able to move folks on who should be moved on.

Mr. BACHMAN. No, our central role is to help whistleblowers and protect whistleblowers when they come forward. So if a VA whistleblower comes to us and we have reason to believe they have been retaliated against, we want to help them. We want to help them get back on their feet and back on their job as quickly as possible.

And I think it sends a message, whether it is through settlement or some other mechanism, when that employee who blew the whistle, who shined a light on an important issue, who had been fired, when they are brought back into that facility through settlement or some other mechanism it sends a message, it sends a message that the employee will be protected, that things are changing. And we have said in other testimony on other occasions, we do believe the VA has made positive steps in terms of tone at the top, and the importance and value of whistleblowers at the VA.

Mr. WALZ. No, I would agree with you, but I think it is a valid point that Members here have made that I agree with you on that, but if they go back into that institution and the very people who were there are still there, I think all of us know just by human nature that is a very challenging one.

So we look forward to working with you on this and appreciate you being up here today.

I yield back, Chairman.

The CHAIRMAN. Thank you very much.

Mr. Costello, you are recognized.

Mr. COSTELLO. Thank you, Mr. Chairman.

As I understand it from reading the materials, as well as listening to the questions, there is really two perspectives of concern, or at least two perspectives of concern, and they are not mutually exclusive. First, I don't think that anyone wants to see a frivolous filing of a claim result in a settlement.

Now, I understand, I think somewhere in the materials the nuisance value of these suits is at least $35,000, maybe more, it costs you to defend a claim and probably is a little more than that. It will be helpful to know or cite to examples to address that concern where you have successfully defended to the bitter end a frivolous claim just because you do not want to develop a reputation for, uh,

they filed a suit, let's just settle it. I can tell you as a formerly practicing attorney and someone who served in local and county office, when insurance defense counsel would come to us and say, such-and-such filed a claim, we think it is frivolous, we think it is hogwash, we think you should defend it because you do not want to be in a situation where you develop a reputation where you just settle everything, because that invites more claims.

So information related to where you have not been willing to settle on that basis and, candidly, spent more money defending it than you would have spent had you just settled it, I think that we want to see that, because I think that that is what you want plaintiff's counsel who bring these cases to know.

The inverse of that is the situation where a claim has been filed and I think we can all concede that sometimes these cases, I mean, there is a little bit of unclean hands all around, but where a claim is filed, it paints some supervisor or someone in the VA in a very unflattering position, and there is at least some merit to the factual basis underlying the claim. I think that there is a rightful concern if that is passively settled in order to basically protect that supervisor; we don't want to see that happening either.

That invites the question in my mind, out of the 200 or so cases I think that we are using sort of as a data pool here, how many times has that claim been defended to the end, there has been a finding of guilt, and that supervisor or employee who was the aggressor to the claimant been fired? Because there is I think a frustration that there is wrongdoing and people get reassigned or, you know, this sort of gets buried in paperwork.

And there is actually, to the accountability question, you had mentioned there is a duty of accountability that extends beyond the life cycle of the claim. Can you provide some instances where that accountability has resulted in people no longer being employed by the VA?

The final point if you could provide me some clarity on is, and that would relate to whistleblower claims as well, the final question and then I will just leave it open, is this clean-record settlement. All right? I don't think anyone wants to see clean-record settlements where people have done really egregiously things wrong or even things that they shouldn't have done, but you mentioned the neutral reference. Can you at least expound a little bit further on what that means? Because if the only people that get neutral references are people that did something wrong, that is fine. I think we want to make sure that there is at least some distinction between a neutral reference, you know, I could have somebody work for me in the past that they didn't do anything wrong, but I am not so sure I felt that they would be good for an organization where I may say, oh, you know, I am not going to say anything. That is actually different than someone who has done something wrong, but rather than disclose it you provide a neutral reference. Do you understand that distinction?

So those would be the three sort of areas that I would be looking for your feedback. Thank you.

Ms. BRADLEY. So let me take the neutral reference first. I had to do some digging on this myself. And so generally what it means is that the agency when asked will simply state the dates of em-

ployment, the performance rating of record at the time of departure, and the highest grade and title held. And so generally when somebody from the other agency, pick an agency, gets that information, red flags go up because it is a very consolidated set of facts.

And with respect to would we give a neutral reference for somebody who hadn't really engaged in any wrongdoing, that would be a different conversation. This is more formulaic, I guess is what I am trying to say, it is formulaic. It would sound wooden and there would be red flags that would go up.

With respect to the examples that you have asked for, I would be happy to provide them to you. I can't provide them to you just off the cuff, but not only would I be happy to provide them to you, it might be good for us to use in our training now that you mentioned it, because I want everyone in the Department to understand that we are willing to go all the way when we need to.

Mr. YOUNG. And I can certainly speak anecdotally from my personal experiences of taking a case all the way to litigation because I believed absolutely that we did not do anything wrong with that employee and we won. And so it does indeed happen, at least from one person's personal experience.

Mr. COSTELLO. I see my time is up. The part that you didn't get to was the sort of passive settlement where we don't get to the accountability and I can just say from a culture perspective, I don't think I am the only one who feels this, it is nice to see—that is a weird way of putting it—it would be helpful to see the examples where someone has filed a claim, a supervisor has done wrong, and that supervisor has been held accountable by them being fired, because there is still a feeling that we don't ever get to that last part. There is reassignment, there is, you know, some sort of paperwork shuffle where they are in a different title or a different part of the country, and it is just sort of swept under the rug.

Thank you for allowing me to go over my time, Mr. Chairman.

The CHAIRMAN. Very good.

Before I recognize Miss Rice, can I ask one question, Ms. Bradley? If you have two equal candidates and one of them has a neutral recommendation, can you not hire that person based on that neutral recommendation?

Ms. BRADLEY. Do you mean may the agency choose not to hire the person based on the neutral recommendation? Of course, absolutely.

The CHAIRMAN. Okay.

Miss Rice, you are recognized.

Miss RICE. Thank you, Mr. Chairman.

I just want to continue on what Congressman Costello was talking about, and I don't know if this is information that the Chairman and his staff have, but I am curious as to what the total amount of settlement amount was for 2015, if you have those numbers.

Ms. BRADLEY. That was not in the request to us for the hearing, but we could certainly pull that together, I think, and provide it.

Miss RICE. I am just curious, because it seems to me that—and this is a question for you, Ms. Bradley—

The CHAIRMAN. If the gentlelady will yield, it is $5 million.

Miss RICE. For 2015?

The CHAIRMAN. Since July of 2014.

Miss RICE. Since July of 2014. Okay. Thank you, Mr. Chairman.

So my question is, we are talking about all of these financial settlements, are there other outcomes and can you talk about them?

Ms. BRADLEY. Yes, thank you so much. Actually, I said it briefly in my opening statement, but I don't know what the exact percentage is, but oftentimes we are able to resolve employment disputes with no monetary payout. Sometimes it could be something as simple as would you move me from the person I don't like working next to, could you move me to a different location in the facility, or I didn't compete effectively for a promotion, could you promise to put me in for this certain kind of training this year so I will be more competitive. There are so many things we can do to resolve employment disputes short of paying money and we do it all the time.

I think in the EEO context we might be able to give you more graphically in the informal resolution stage what the kind of percentages of non-monetary payouts versus monetary payouts, but it is significant the numbers of complaints that we can resolve with no money.

Miss RICE. So if you can just take us through this process. If someone, they either come directly to you or a complaint is fed up to you, comes up to you through a chain and you then begin to address the mediation or working out the issues, if you during an interview with an aggrieved employee learn that they are in fact a whistleblower who is being retaliated against, what is your responsibility vis-a-vis that information that you get?

And we have talked a lot about the outcomes with whistleblowers, but what is the process for the wrongdoers and can you give examples of them being held responsible? And how does that work?

Ms. BRADLEY. Well, you have talked about really three or four different kinds of employment disputes that have different kinds of processes and procedures associated with them. So could we take EEO as the first bucket of employment disputes?

The reason I pick EEO first is because that is the majority of our employment disputes and those are handled in a very regular course of business through an office called the Office of Resolution Management. Again, I think that I mentioned before that the Deputy Assistant Secretary who leads that office, Harvey Johnson, is here today with me. So there are processes and procedures that require informal discussions of settling the matter.

When I say settle, I don't mean like payouts, I mean like let's talk, let's get the aggrieved party, let's get the manager in a room, let's have a neutral in that room with those two parties, let's see if we can work this out informally without having to have a formal investigation.

If that process breaks down, then you move to the next level in the EEO process, which is a formal investigation. So you are going to have witness statements, you are going to have transcripts, you are going to have court reporters and things like that. And then if it has to go beyond the formal stage in the Department of Veterans Affairs, it can either go to the EEOC, the Equal Employment Op-

portunity Commission, or it can go to an arm of VA called OEDCA that will make final decisions.

But if we go all the way to those two entities, then there is going to be some finding of wrongdoing, some finding of fault.

Miss RICE. Are you responsible for imposing a punishment or—

Ms. BRADLEY. No. I really have nothing to do with any of this process. I am the chief legal officer for the Department, so I might be responsible for helping train or to explain the laws. But no, those processes are carried out at the local level through—take it away, Mr. Young.

Mr. YOUNG. So an OEDCA decision would come back to the medical center director describing the improper actions that a supervisor would have had in the medical center and the proposed actions that should be taken on that, and then we take those actions and then need to report that back up to OEDCA.

Miss RICE. Mr. Bachman, any deficiencies you see in terms of the treatment of whistleblowers versus that of those who retaliate against them, in your opinion, and what if any recommendations would you make?

Mr. BACHMAN. Well, if I can just add on a little bit to the process and you were talking about accountability. When a whistleblower comes to us from any agency, but let's say the VA, files a complaint of whistleblower retaliation, we need to investigate that. At the same time though, if the whistleblower and the agency wish to engage in settlement negotiations, we are going to encourage that, because that is going to help the whistleblower get back on their job and back on their feet more quickly.

But I want to be clear on this: just because the whistleblower and the VA settle their claims does not mean that OSC's role in the case has to end. In fact, we have a number of ongoing disciplinary action cases in facilities around the country where the whistleblower and the VA have settled and OSC is continuing its disciplinary action investigation of subject officials.

So I just wanted to be clear on that point. In terms of where the VA has come upon in terms of how they are treating whistleblowers, we have seen substantial improvement, but as I have said to Ms. Bradley herself and to others, there is still a significant room for improvement on that front.

Miss RICE. No question about that. Thank you very much.

I yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

Mrs. Radewagen, you are recognized.

Mrs. RADEWAGEN. Thank you, Mr. Chairman.

And welcome to the panel, thank you for your appearance today.

Ms. Bradley, before VA compiled the documents to satisfy this Committee's request, have you or anyone else at VA ever compiled all of these settlement agreements into one place for nationwide review, so you could see the overall cost to the taxpayers?

Ms. BRADLEY. I have not.

Mrs. RADEWAGEN. Mr. Bachman, what level of transparency do you have into whether employees who retaliate against whistleblowers are properly disciplined?

Mr. BACHMAN. As I said, our first mission, our primary responsibility at OSC is to make sure we are helping to protect whistle-

blowers and through that we have been using settlement agreements with the VA to make sure that they are able to get back on their job, continue serving veterans, and that has really needed to be our primary responsibility.

At the same time, however, we have really been working to improve actions on the disciplinary front to help the VA improve accountability there. And to that end we have got these several ongoing disciplinary action investigations I have mentioned, but I think an important one to point out is that over the last few years the VA has disciplined over 40 VA employees who were implicated in wrongdoing that was brought to light by VA whistleblowers who would come to OSC to make their whistleblower disclosure there. And I think that is an important point, because it shows the role that whistleblowers as well as OSC can take in helping the VA to improve their accountability.

Two of those 40 folks that the VA has disciplined, those involved removals of high-level officials at the Fort Collins, Colorado facility, which was struggling with the wait-time manipulation problem there. So I think there has been an ability to take some accountability, not always through the strict litigation sense, but through other coordination between OSC and VA.

Mrs. RADEWAGEN. Thank you.

And, Ms. Bradley, has any thought been given to doing what it is I asked about? In other words, you say nothing has been compiled, but has any thought been given to such a possibility?

Ms. BRADLEY. Well, I don't want the Committee to believe that nothing has been compiled. You asked me if my office, I am in the Office of General Counsel, we didn't compile that data; we don't track the total number of payouts. I think that it is fair to say that the administrations are very attentive and track that information, as they should, because again these are business decisions and the money comes out of their operating budget.

I would say what I track as the General Counsel is can we show our veterans, can we show the American people, can we show this Committee that when we uncover wrongdoing, whether it is racial discrimination or whether it is whistleblower retaliation or something along those lines, can we show the American people that we will hold those wrongdoers accountable.

That is what I have been really focused on doing in my office, focused on doing it in our training, focused on doing it with respect to the standup of the office in my shop called the Office of Accountability Review, ensuring that we have put really top-notch investigators in the Office of Accountability Review so they can provide to us competent investigations with sound evidence, so that when we take these actions we won't have them overturned. Those are some of the things that my office and that I personally have been focused on.

Mr. YOUNG. And speaking as my previous job as a medical center director, that was a fundamental piece of what I looked at regularly with the rest of the leadership team was, for example, the number of EEO complaints that we have, the number of labor grievances, those sort of human resource indicators that would give us a sense of the health of the organization.

Mr. MANKER. And from a VBA perspective, we do the same thing at the districts. Obviously, we are probably a fraction of the size of VHA, so we can look even closer at those agreements from an enterprise level. So at each of our districts, as well as in our Office of Resolution Management within VBA, we do that same thing.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you very much, Mrs. Radewagen.

Ms. Bradley—oh, Dr. Benishek.

Mr. BENISHEK. Well, thank you, Mr. Chairman.

I want to touch on something a little bit different than I think that the whole gist of the meeting here this morning is and that is my concern is that the average employee is not getting evaluated in the process of making sure that—infractions are not documented, so that we have to use this special agreement thing, because you don't have the documentation in the record to justify the disciplinary action stuff.

And, you know, a couple years ago Gina Farrisee, the Assistant Secretary of Human Resources and Administration at the VA, told me and this Committee that she was writing her own evaluation and that it was common practice for employees to write their own evaluations and have them simply be signed off by their supervisor. And, you know, in my opinion, that is a way to make it easier for the supervisor, but it doesn't really document any problems that might be there with the employee. And then later on when, you know, the problem is worse and worse, there is no documentation, employee record that there was a problem that was attempted to be corrected.

Is that still going on in the VA? This was two years ago she told me that.

Ms. BRADLEY. I think that it is an issue and it is so much of an issue from my perspective that I have had several meetings with my top lawyers. So that would be our district chief counsels and the deputy district chief counsel.

Mr. BENISHEK. So it is still going on then?

Ms. BRADLEY. I don't want to say it is still going on, I would say it is still a concern for me. So what I have said to my attorneys is for each and every case, when your clients come to you and they start to talk about how they might want to settle a case, I expect you to be proactive and talk about why it is that maybe the record looks a little, let's just say it is not as strong as it could be, and the reason that the record might not be as strong as it should be is because there wasn't proper documentation.

Mr. BENISHEK. Well, that is my whole point here.

Ms. BRADLEY. Yes, it is hit or miss.

Mr. BENISHEK. And maybe, you know, if the managers have a better control over the nuts and bolts—

Ms. BRADLEY. Yes.

Mr. BENISHEK [continued]. —the blocking and tackling of doing their managerial jobs, then we wouldn't be resorting to these special things so often. Okay?

Mr. Young, you mentioned that you are a former medical center director, so do you have any familiarity with this problem of people writing their own evaluations? Have you ever written your own evaluation?

Mr. YOUNG. I do a self-assessment, an honest self-assessment where I look in the mirror and I—

Mr. BENISHEK. But that is not signed by your division director as your evaluation for the year?

Mr. YOUNG [continued]. I write my self-assessment and I provide it to the network director, and he then evaluates me and writes what he thinks about me and then rates me. And then it goes before a panel within—

Mr. BENISHEK. So you are not familiar with this process of people writing their own evaluations?

Mr. YOUNG. Writing a self-assessment, yes.

Ms. BRADLEY. I am not aware of that problem either. I am aware that we have had—

Mr. BENISHEK. Well, I mean, I had an Assistant Secretary for Human Resources tell me she was writing her own evaluation and that it was common practice, and I just don't want to see that continue to be a common practice because, as I have mentioned and the reason I am asking these questions is it doesn't allow for documentation of bad behavior and corrective action efforts and all that.

Mr. MANKER. So if I can address that. From a VBA perspective, the executive, as well as our employees, as part of the performance review and performance-rating process they are asked to say, from your perspective, how do you view what you have done this year. That is input to the rating that I do on the individual, but it is not the final say. The senior leader or the rater is the final say on the assessment of that individual employee.

So Ms. Farrisee may have indeed said that she wrote her own, but she could have been speaking about a very specific part of your performance appraisal, which is your self-assessment, which becomes a part of the record.

Mr. BENISHEK. So how many times have you written these yearly? Everyone underneath you, do they get a yearly assessment?

Mr. MANKER. So I will speak to my old job, because I have been in this one for about two months. So as the Chief—

Mr. BENISHEK. So have you written these assessments for other people?

Mr. MANKER [continued]. So my deputy has written assessments on my employees that worked for me and then I wrote the assessment of my deputy. On all of the employees that worked directly for my deputy, I was the senior reviewing official. So let's say that—

Mr. BENISHEK. How often do these assessments have a corrective action plan or some sort of a recommendation for improvement?

Mr. MANKER. So I can't speak to that, because the—

Mr. BENISHEK. So you have never done that?

Mr. MANKER. I have not had the reason to do that.

Mr. YOUNG. From my experience, I would always ask my employees to provide a self-assessment, but then I would also write an assessment of them and in that assessment, the last paragraph would very typically be these are my expectations for them for the coming year and the areas that I believe that they have opportunities to improve.

Mr. BENISHEK. And then is that ever checked again?

Mr. YOUNG. Absolutely, and then I would always do a mid-year review. And just good management is having regular conversations with your direct reports about the progress that they are making in their work lives.

Mr. BENISHEK. All right, I am out of time. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Doctor.

Ms. Bradley, if settlement agreements are tracked and handled locally and you don't track them, or it doesn't appear anybody at the central office tracks them, how can this Committee be sure that we have received all of the settlement agreements that we asked for?

Ms. BRADLEY. Well, again, I didn't say we don't track any of them. For those that are in the realm of EEO, those are tracked.

The CHAIRMAN. I asked and, I guarantee you, you know what I asked the Secretary for.

Ms. BRADLEY. I know what your request letter said, yes, absolutely.

The CHAIRMAN. Yes. And how can I be sure that I got all of those?

Ms. BRADLEY. Because we requested those from the various entities that keep the settlement agreements.

The CHAIRMAN. And how can you be sure that they gave you every one of them?

Ms. BRADLEY. I suppose I can't be absolutely sure that they gave me every one of them.

The CHAIRMAN. Okay, very good. Next question. You cannot tell us about accountability actions in those 208? Nobody knows about any type of accountability actions?

Ms. BRADLEY. Of course we know about accountability actions. What I said was I couldn't discuss individual accountability actions in this hearing.

The CHAIRMAN. Could you tell us about though just in a—let me see how to put it—in a broad way—

Ms. BRADLEY. Yes.

The CHAIRMAN [continued]. Have you done an analysis of the 208 cases that are out there on what accountability was taken?

Ms. BRADLEY. I have looked at some of them, yes.

The CHAIRMAN. Okay, the answer is no.

Ms. BRADLEY. I didn't say no. I said I have done some and especially those that—

The CHAIRMAN. Have you done all 208—

Ms. BRADLEY [continued]. —have gotten to the Secretary or the Deputy Secretary.

The CHAIRMAN. Ms. Bradley, my question was have you done an analysis on any disciplinary actions in all 208, your answer is you have done some.

Ms. BRADLEY. Yes, some, some.

The CHAIRMAN. So the answer is, no, you haven't done all two hundred—

Ms. BRADLEY. My answer is that I have done it on some; that is my answer.

The CHAIRMAN. The question is, have you done it on all of them?

Ms. BRADLEY. I understand. That is where I am, I have done it on some.

The CHAIRMAN. Okay, and the answer is no. Thank you very much.

Also, Members, just for your personal information, we did an analysis, in 72 percent of the 208 there was a monetary payout. You were talking about many, many not, but many is not 72 percent. That was either people received money or their attorneys received money. That is an analysis that we got of the 208.

And let me also for the record, and I am going to be very cautious, because even though I could through speech and debate talk about a particular settlement agreement, but I want to let you know about one in particular. That there was an Inspector General report, and there was an AIB that was done, both of them said this person should be terminated and removed, and this is what the settlement agreement ended up being. And this is why, you know, even though you talk about there not being monetary payouts, this person is still employed at VA. VA agreed to give them a 2015 performance rating of fully successful with no negative narrative regarding the issues that were addressed in the proposed removal. They had 137 hours of annual leave restored into their annual leave account. They agreed, they being the Department, that there would be no disciplinary action taken against this individual for any matters or acts known or that should have been known to VA before the effective date, which means what they didn't know they can't go back at this point and discipline this individual; the VA agreed to give this person a letter of reference and also pay their attorneys' fees.

This is for a person that was recommended for removal. I just don't understand how it could go from removal to all of this. And so this person still is employed at the Department even though they were charged with retaliating against whistleblowers. It just doesn't make sense that something like that would be allowed to take place.

Mr. Takano.

Mr. TAKANO. Mr. Chairman, certainly the minority does not agree with any practices of the VA which would encourage the retention of bad employees and certainly we want to see accountability occur at the VA.

But I just want to ask, Ms. Bradley, are you able to talk about and respond to the Chairman's particular case even if he were to tell you who this person was? You can talk, go ahead.

Ms. BRADLEY. I would very much like to. I can't do it in a public hearing and we have got to do it with context. So I have to know exactly which case he is talking about, I have to make sure that I have all of the facts.

But, yes, we have offered that, in fact I think we have done that on a number of occasions, we have brought over the relevant experts to talk with the Committee. We want to be completely transparent.

And I don't know when this case took place. I can tell you that is antithetical to the leadership of Bob McDonald and Sloan Gibson in the area of accountability, it is antithetical to my leadership.

So I would very much like the opportunity to do that in a closed session.

The CHAIRMAN. Will the gentleman yield?

Mr. TAKANO. I yield for a followup, yes.

The CHAIRMAN. Very quickly. We did get a briefing on this particular issue and the answer was the Department had to make a judgment call; that was the answer.

Mr. TAKANO. Okay. Mr. Chairman, I hope that you might meet with Counsel and see if Ms. Bradley can explain it further.

The CHAIRMAN. I already have.

Mr. TAKANO. You have? It just has not been satisfactory.

All right. Well, I would like to go—I don't have any more questions on my side; can we go to closing statements?

The CHAIRMAN. Yes, you are recognized to close.

Mr. TAKANO. Okay, great. Thank you.

Well, I want to thank you for the hearing, Mr. Chairman. I mean, I thought Mr. Costello's questions were very good, I thought we had good questions on all sides. And I feel we have done a good job of beginning what I hope will be an ongoing involvement in these matters with VA as the agency works to reform its culture, because I agree with Ms. Brownley and Ms. Bradley, that is the key element in that effort is changing the culture.

I want to let Mr. Bilirakis know that I want to work with him on a way to get a better, concrete handle on the numbers of agreements, their terms and the cost to VA down in the medical center.

And it would be helpful, Ms. Bradley, if we could be absolutely sure that all those agreements are back. I mean, I don't want any feeling that there are agreements that your administrators out there could keep from the attention of the Secretary or your office. So we need to have a way to make that absolutely certain in law and in policy, and I would join the majority in such an effort to make sure that that happened.

Finally, I look forward to that detailed briefing on the new data analytics program, a program briefing that Ms. Bradley has offered us as a followup to this hearing.

And I am myself quite interested in the kind of training that has occurred. This has been a theme I think raised by also the Commission on Care co-chairs in their testimony before us, their amazement at the relative de-emphasis or the undervalue of the personnel department. And I think that connects to much of the legal liability that you have to defend against when our managers and supervisors are not adequately trained and if they are not adequately trained on what retaliation is or what it means to have whistleblowers. So retaliation is a serious problem not only in the VA context as a workplace, but workplaces across this country, public and private.

But I think we also need to examine how we can empower our managers and supervisors and executives to hold employees more accountable through progressive discipline, that they are thoroughly trained on how to issue progressive discipline, and also to document employees properly. I mean, your office cannot pursue cases of dismissal when the managers are not doing all the things they need to be doing. And there is I think admittedly an onus, but

not an insurmountable onus and a reasonable onus, but that is all the more reason why we need better-trained personnel.

I am curious to know whether we are doing enough. And we have heard two private sector leaders of health care organizations, health care providers, who both raised this question, and I would love to engage with the majority more on this topic.

And I welcome us examining the streamlining of an overly burdensome due process, but I don't think we can focus on due process alone. We should also be focusing on, if there are missing pieces for our managers both in terms of retaliation, whistleblower protection, but also progressive discipline, which is I think the key. And that done effectively, is a powerful tool for changing the culture of an organization.

So that is my final comment.

The CHAIRMAN. Thank you very much.

Ms. Bradley, Mr. Bachman, thank you both for being here. Ms. Bradley, you always do a very good job as the lead attorney for the Department of Veterans Affairs, which means it is very difficult sometimes for us to get the answers that we are looking for, but I understand who you work for. To both of your colleagues that have joined you, thank you for your service to the Department. We will continue focusing on this particular issue.

I would ask that all Members would have five legislative days within which to revise and extend their remarks and add extraneous material. Without objection, so ordered.

This hearing is adjourned.

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

A P P E N D I X

Prepared Statement of Honorable Leigh A. Bradley

Opening Remarks

Good morning, Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to discuss settlement agreements between the Department of Veterans Affairs (VA) and its employees.

Addressing employment disputes in the federal government, which manifest in complaints of discrimination, allegations of prohibited personnel practices such as whistleblower retaliation, and appeals of proposed adverse/disciplinary actions, is a particularly daunting challenge. At VA, managers at every level are required to do this in the most cost effective manner with the least amount of disruption to the effective functioning of the organization as it carries out its statutory obligations for our Nation's Veterans. Moreover, VA managers must resolve employment disputes consistent with the vital goal of building and sustaining high performing teams that will achieve excellent outcomes for Veterans at a good value to the taxpayers. Oftentimes the best course of action when addressing a personnel dispute is to litigate the matter all the way to judgment or final decision, understanding that this approach will require a substantial diversion of agency time, resources, and expertise away from core mission activities in order to achieve success in the relevant court or administrative board. VA is not reticent to litigate—indeed the presumption is that we will litigate most personnel disputes. But it is our obligation, and in the best interest of Veterans and the taxpayers, to consider the merits of settling an employment dispute on a case-by-case basis. In each and every case, there is a delicate balance that must be struck between expediting the resolution of an employment dispute and formal vindication of the agency's position in a federal court or administrative board.

Why settle?

Congress clearly intended that federal agencies have the authority to settle matters expeditiously without resorting to protracted litigation. In the 1990s, faced with litigation dockets clogging federal courts and administrative tribunals, Congress passed three statutes that were designed to reduce the cost and time required to litigate many disputes. For example, the Administrative Dispute Resolution Acts of 1990 and 1996 and the Alternative Dispute Resolution Act of 1998, collectively required each agency to adopt a policy encouraging the use of Alternative Dispute Resolution (ADR) in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants.

At its most basic, ADR is an efficient means of resolving disputes through various mechanisms including mediation and arbitration. Settlement reflects the successful result of ADR. Resolving cases through ADR often saves parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and productivity. VA's use of settlement agreements is not only proper, but critical to maintaining a positive workplace of high performing teams to carry out VA's mission of serving Veterans. This, we believe, is exactly the result Congress intended in passing the 1990's legislation.

The American Bar Association provided a roadmap for settlement in its Ethical Guidelines for Settlement Negotiation, published in August 2002, stating "Most litigation is resolved through settlement. Courts and court rules encourage settlement of disputes as a means of dealing with burgeoning caseloads, increasingly crowded dockets, and scarcity of judicial resources. Parties in litigation frequently recognize that settlement can achieve substantial costs savings and preserve relationships, and does provide certainty in results . . .".

VA, like a number of other Federal agencies, does not have a national policy specifically aimed at settling employment disputes; and considering the unique nature of every employment dispute, we do not see the need for such a policy. VA, however, has implemented an effective national policy on the use of ADR. Indeed, Secretary

McDonald underscored the importance of ADR in the VA Equal Employment Opportunity (EEO), Diversity and Inclusion Policy, stating "Workplace conflict is often the result of miscommunication or creative tension in the organization. Properly managed, it can yield improvements in business processes and positive outcomes in the organizational climate. To maintain a respectful, productive, and effective work environment, it is VA's policy to address and resolve workplace disputes and EEO complaints at the earliest possible stage. VA offers ADR services such as mediation, facilitation, and conflict management coaching to assist parties in constructively resolving disputes. ADR involves a neutral third party working with the employee, supervisor, or group to engage in constructive communication, identify issues, and develop collaborative solutions." In our experience, some ADR attempts call for settlement—some monetary but many with non-monetary implications, e.g., reassignment, resignation, or alteration of workplace conditions.

VA does recognize, however, the need for tools that will help leaders identify negative trends at a particular facility to gauge an organizations workplace culture and have more granular information about the frequency of complaints, litigation, and settlements and how bad actors are held accountable. I'm pleased to report that our Office of Human Resources and Administration has developed an initiative, which will use data science techniques to analyze internal data and publicly available data to ascertain systemic personnel issues and root causes in order to measure facility risks for high value settlements and findings of discrimination. This information will be available to managers at every level to assist them in performing their oversight responsibilities in ensuring prudent use of the taxpayer's money. This initiative is essential to achieving sustainable accountability across the enterprise.

Settlement factors

VA strives to resolve employment disputes consistent with its goal of creating and sustaining a high performing workforce to carry out VA's mission of providing excellent services and timely benefits to our nation's Veterans. This important work must be done at the local level in our Medical Centers, Cemeteries, and Regional Offices across the country. It is imperative that local managers and supervisors have the flexibility to resolve employee complaints and appeals at the lowest possible level based on the individual circumstances at each facility, and the commitment to litigate cases when an appropriate settlement cannot or should not be obtained.

VA settlement officials consider a variety of factors before resolving an employee complaint through a monetary settlement, such factors include: the disruption the complaint creates for that facility's workforce; the historical relationships between employees, management, and labor representatives; and the challenges the facility is attempting to overcome, including Veteran access issues and accountability challenges. Settlement officials balance the monetary cost of settlement against the loss of productivity of the employees and managers if the dispute is not resolved. They also settle cases when it is determined an employee has been legitimately aggrieved and it is simply the right thing to do.

Furthermore, the primary judicial and administrative bodies that decide federal employment disputes have adopted policies and practices that encourage or require settlement negotiations. These bodies, the Equal Employment Opportunity Commission (EEOC), Merit Systems Protection Board appeals, Federal Labor Relations Authority, and Office of Special Counsel (OSC), with their own burgeoning caseloads, often strongly encourage all federal agencies to settle cases prior to engaging in discovery and hearing. Additionally, based on statutorily required bargaining procedures, VA has a number of labor contracts that include language that strongly encourages mediation and arbitration.

Another consideration in settling an employee complaint or appeal is the significant cost of litigation to the facility, including the administrative resources needed to investigate and process a complaint, loss of employee productivity during depositions and trial testimony, travel costs, deposition and transcript costs, payments of damages and attorney's fees, decreased morale and increased divisiveness in the work unit, and loss of focus on the mission. Unlike the Department of Justice, whose mission includes litigating cases for the government, VA's mission is providing excellent services and timely benefits to our nations Veterans. In our case, litigation often requires the dedication of significant time by doctors and nurses, claims adjudicators, and cemetery personnel that is not focused on their primary duty of serving Veterans. Moreover, protracted litigation requires the dedication of substantial resources from all parts of the Department, including human resources, contracting, Office of Information and Technology, and Office of General Counsel (OGC), delaying work on other critical initiatives such as hiring to fill critical vacancies. Given the substantial resource requirements associated with personnel litigation, it is incumbent on every facility manager to factor these considerations into

settlement. In this way, they are serving as prudent stewards of the taxpayers' money.

In cases where VA proposes a disciplinary action against an employee, VA must also consider the employee's response and defenses before taking such an action. This response and defense, while not obviating the need for discipline, might cause the settlement authority to reconsider the level of discipline required and, in order to resolve the matter quickly, without the need for prolonged litigation, may mean that VA and the employee enter into a settlement agreement.

In VA's experience the lion's share of employment disputes arise in the EEO forum. VA's Office of Resolution Management, which processes EEO complaints for VA, estimates that the cost to the organization in which an EEO complaint is filed is, at minimum, $35,000 to process and investigate the complaint from the time the complaint is initiated until it either goes to the EEOC for a hearing or to VA's Office of Discrimination Complaint Adjudication for a Final Agency Decision. This does not include the sunk cost in time the employee and managers spend during the investigation. In addition, should the complaint go forward to the EEOC for hearing, VA incurs additional costs in depositions and other discovery as well as travel costs for VA witnesses. Furthermore, in those cases in which VA does not prevail, VA would be liable for additional monetary costs such as back-pay, compensatory damages, interest, and attorney fees.

In addition to the costs issue, the ability of VA to successfully defend a personnel complaint is sometimes compromised by the unavailability of key witnesses needed for the VA's defense. For example, it is not unusual for an EEO complaint to take 18 to 24 months, from the start of the formal complaint, before a hearing is held by the EEOC. In that time, key witnesses may retire or leave federal service. Once a witness retires or leaves federal service, neither VA nor the EEOC can compel that witness to testify in connection with an EEO complaint even if that individual has been named as a responsible management official. Settlement of such cases often allows VA to avoid near certain defeat at hearing at a much higher cost.

To put this in context, VA received 2,347, 2,047, and 2,130 EEO complaints during Fiscal Years 2012, 2013, and 2014 respectively. VA is not resourced to litigate this volume of cases to final adjudication without significantly and detrimentally impacting its mission of serving Veterans. Importantly, according to the most recent data maintained by the EEOC, the percentage of formal EEO cases settled within VA is within 2% of the average percentage of formal EEO cases settled in both Cabinet Level Government Agencies and all Government Agencies. This clearly demonstrates that the incidence of settlement agreements in VA is in line with the rest of the federal government. We expect with our new data science initiative to have real-time visibility of the magnitude of the EEO settlements VA enters into going forward.

Prior to engaging in settlement discussions, settlement authorities are encouraged to consult with OGC, which advises management about the strengths and weaknesses of a case as well as the litigation risks posed by the matter. Based on this analysis, OGC may also recommend whether a matter should be settled. For example in accordance with its own internal written policy, OGC advises its clients to settle an EEO matter "when settlement is supported by (1) objective evidence of the claimed loss or suffering and (2) objective evidence that the loss or suffering was caused by the discriminatory acts alleged in the complaint." OGC also advises its clients on the legal restraints regarding proposed settlement terms, thereby avoiding illegal or unreasonable settlements, e.g., compensatory damages in excess of $300,000 in an EEO case or inappropriate entitlement to retirement benefits. Ultimately, however, the authority to settle a matter lies with a settlement authority who is in the best position to assess the impact and true cost of litigation to his or her organization.

The authority to resolve a matter derives from the Secretary of Veterans Affairs organic authority to manage the Department. Through his delegated authority, management officials resolve matters with their employees. Typically, in a Medical Center, the Director acts as the settlement authority and in a Regional Office, the Regional Office Director acts in this capacity. When settling cases, these senior leaders are naturally inclined to be frugal as they consider a proposed monetary settlement because the money paid in a settlement of employment cases comes directly from their administration's operating budget.

Settlement does not end the obligation of the Department. If a settlement agreement is reached with an employee who filed an EEO or whistleblower retaliation complaint, VA has a duty to determine whether there was any wrongdoing by another employee necessitating settlement and, if so, what disciplinary action should be taken against or training provided to the responsible management official or responsible employee(s). In most cases, VA conducts the investigation. In cases involv-

ing potential wrongdoing by senior leaders, VA's Office of Accountability Review conducts the investigation. However, with whistleblower retaliation, OSC may, in accordance with law, conduct such investigations and recommend proposed disciplinary action to VA. VA supervisors should hold employees accountable based on the results of such investigations, when it is appropriate to do so.

Conclusion

VA does not misuse its authority to enter into settlement agreements to resolve employment disputes. VA settles cases in appropriate circumstances after carefully considering the cost of litigation to include devoting critical resources to deposition and hearing preparation and weighing the strength of the evidence and the potential defenses. Settlements have helped VA successfully provide expedited corrective action to whistleblowers and employees who have experienced retaliation or discrimination. Settlements have also helped VA successfully remove employees without the delay and uncertainty that comes with litigation, including the risk that the employee will be returned to VA on appeal. Most importantly, settlements have helped VA keep its doctors, nurses and other employees focused on direct patient care or other services to Veterans rather than litigation.

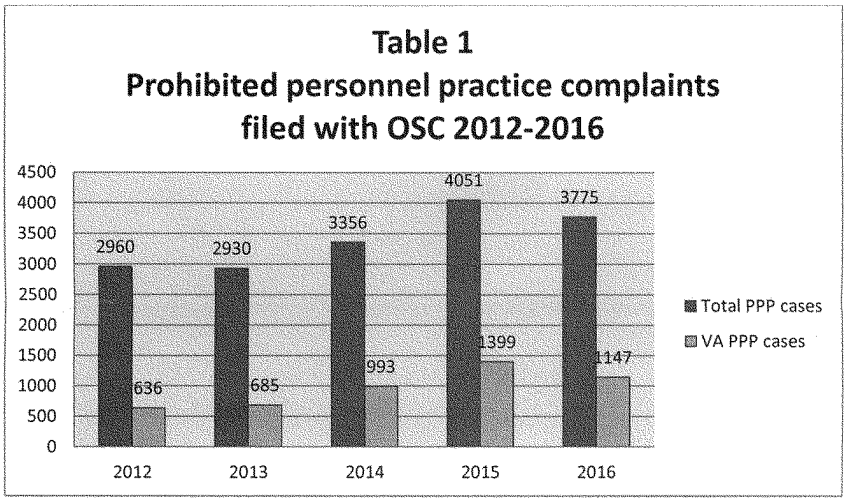
The ability to successfully settle employee complaints or actions taken against employees is an important management tool in employee-employer relations and helps ensure our workforce is focused on its mission of serving Veterans rather than on litigation. The use of this tool is not and has not been taken lightly and, in all instances, before entering into a settlement agreement with employees, settlement authorities weigh the benefit that an agreement will have on VA, Veterans, and taxpayers, against the agreement's costs. We also take seriously our obligation to hold employees accountable and, notwithstanding considerations that might favor settlement, we will not hesitate to litigate appropriate cases to reinforce our commitment to our Veterans.

Prepared Statement of Eric Backman

Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC) and our work with whistleblowers at the Department of Veterans Affairs (VA).

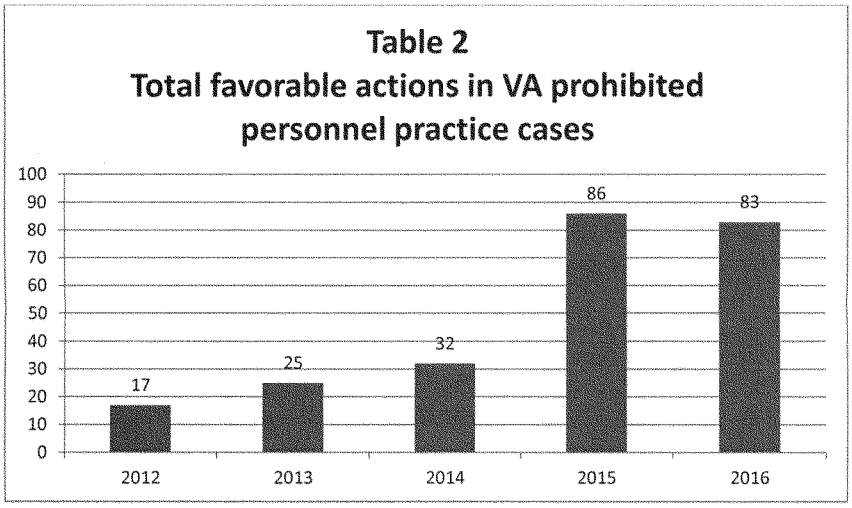
VA complaints by the numbers

Since 2014, OSC has seen a dramatic increase in the number of whistleblower retaliation claims filed by VA employees. In response, our office has helped to secure a record level of favorable actions for VA whistleblowers. These favorable actions help courageous employees restore successful careers at the VA. The following tables highlight our current and historical caseloads for prohibited personnel practice complaints, which include whistleblower retaliation cases, filed by VA employees.



As Table 1 demonstrates, prohibited personnel practice complaints filed by VA employees constituted 30–35% of all prohibited personnel practice cases OSC received government-wide during 2014–2016. While the number of complaints by VA employees decreased somewhat in 2016, our VA caseload remains at a historically high level, with nearly double the number of cases received prior to the national media coverage of the patient wait list scandal in summer 2014. OSC currently has 300 active VA whistleblower retaliation cases in locations across the country. In addition, OSC is reviewing the retaliatory conduct of more than a half-dozen VA managers in several facilities for possible disciplinary action.

Although OSC is a small agency, with limited resources, we have taken a number of steps to maximize our response to this tremendous surge in VA complaints. We prioritized the intake and initial review of all VA health and safety-related whistleblower complaints and have streamlined procedures to handle these cases. The Special Counsel assigned senior leadership staff to supervise and coordinate investigations of VA cases. We reallocated additional program staff to work on VA cases and established a regular coordinating meeting on VA complaints. And finally, we opened and have maintained an ongoing dialogue with VA leadership to help identify and resolve meritorious cases as quickly as possible and to discuss certain trends and areas of concern related to VA whistleblower cases filed with OSC.



As our docket of VA cases has grown, so too has our rate of securing relief for VA employees. As shown in Tables 1 and 2 above, between 2015 and 2016 to date, OSC obtained either full or partial relief 169 times for VA employees who filed whistleblower retaliation or other prohibited personnel practice complaints. Since 2013, the number of VA prohibited personnel practice complaints filed with our office has increased by 67%, while the number of favorable actions we have obtained in these cases during this timeframe has increased by 232%.

Settlements between the whistleblower and the agency are the most efficient way to help get whistleblowers back on their feet quickly

OSC routinely conducts investigations of whistleblower retaliation complaints. An investigation typically involves requests for documents and information, including electronically stored information, sworn witness interviews, and, as necessary, travel to VA or other facilities. Whistleblower investigations are fact-intensive, complex, and may involve thousands of pages of competing evidence provided by the whistleblower and the agency involved. Once OSC completes its investigation and concludes that retaliation has taken place, it issues a prohibited personnel practice report to the agency with recommendations. If the agency does not accept OSC's recommendations, OSC files a complaint with the Merit Systems Protection Board (MSPB), litigates the complaint in an administrative hearing, and potentially on appeal to the MSPB and federal court. The investigation and prosecution of a whistleblower investigation is expensive and time-consuming, and a case may take years to wend its way through the system.

OSC operates under one of the smallest law enforcement budgets in the federal government, and it would not be possible to fully investigate and litigate each meritorious complaint we receive.

The settlement process is therefore a critical component of OSC's toolkit in handling whistleblower retaliation complaints filed with our agency. Settlement may occur at any stage of our process. OSC staff assigned to a particular case may facilitate settlement discussions between the whistleblower and the agency, or the parties may agree to participate in OSC's robust Alternative Dispute Resolution (ADR) program.

Through settlement, whistleblowers obtain relief far more quickly than through a completed investigation and prosecution. Where OSC's investigation shows that retaliation may have occurred, our first priority is to try to help the whistleblower as quickly as possible. On a litigation track, it could take years for a whistleblower to get corrective action, and of course, the whistleblower may ultimately lose and receive no relief at all. For these reasons, all but a very small percentage of complaints settle rather than going to trial. This is true for VA employees as well as employees throughout the government.

Examples of the relief available to a whistleblower through settlement include reinstatement to his or her job, rescinding a suspension, and/or providing back pay relief or compensatory damages. But settlement negotiations also allow the whistleblower and the agency to be more creative in the relief provided. For example, the parties may agree to place the whistleblower in a new, mutually agreeable position, even though that relief would be more difficult to obtain through litigation. Likewise, the agency may agree to provide training to its managers regarding whistleblower protections or to change the whistleblower's reporting structure. Ultimately, settlements can allow the parties to move forward in a productive work environment and reduce the likelihood of future complaints/litigation.

To illustrate, OSC's recent efforts to mediate resulted in a settlement between the VA and Brandon Coleman, a high-profile whistleblower at the Phoenix VAMC. The settlement included a new position for Mr. Coleman as an addiction therapist in Anthem, a Phoenix suburb, and moved him away from his previous chain of command. This was a positive outcome for Mr. Coleman and the veterans he now serves, and would not have been possible without OSC's ADR program mediating a voluntary settlement between the VA and Mr. Coleman.

OSC's role in settlement negotiations between the whistleblower and the agency

When a whistleblower and agency express an interest in settlement, OSC encourages them to engage in settlement negotiations. This is true not just for the VA, but for all agencies we investigate. It is important, however, to clarify OSC's role in any settlement negotiations between a whistleblower and his or her employing agency. OSC is an independent federal agency, does not personally represent any OSC whistleblower, and cannot give a whistleblower legal advice. Indeed, whistleblowers are often represented by their own private counsel, who advise them throughout the settlement negotiations. With rare exception, OSC is not a party to

the settlement agreement between the whistleblower and the agency. Rather, if the parties—the whistleblower and the agency—wish to engage in settlement negotiations, OSC will often facilitate these discussions by relaying the various offers and counter-proposals between the two parties and/or by acting as a mediator through our ADR program. OSC may also assist in the process by discussing the strengths and weaknesses of the case, and by providing information about both sides' liabilities should the case proceed. But OSC itself does not make any settlement offer nor does it accept or reject a settlement offer made by the agency. Rather, the decision to accept a particular offer from an agency remains solely with the whistleblower.

A settlement between the whistleblower and the agency does not preclude further investigation by OSC

When a whistleblower and the VA settle a case for corrective action, such as rescinding a suspension, that settlement does not necessarily end OSC's role in the case. OSC recognizes that disciplining managers who retaliate against employees is an important tool to promote accountability and deter future violations of the whistleblower laws. Accordingly, even where a whistleblower settles his or her claim, OSC assesses the need for further investigation for potential discipline against alleged retaliators. For example:

- In a Maryland VA facility, OSC determined that the VA had retaliated against an employee (who is also a disabled veteran) because he contacted a member of Congress for assistance with his own VA benefits. About one month after the employee's congressional contact, the VA terminated his employment, even though the VA had not previously raised performance concerns prior to his congressional contact. OSC investigated and found that the VA' bases for termination were pretexual, the VA's charges lacked evidentiary support, and termination was an excessive penalty for the alleged conduct. The VA ultimately settled and provided full corrective action to the employee, including, among other things, reemployment with the VA, back pay, and compensatory damages. In addition, as a result of our investigation, OSC further sought and obtained disciplinary action against two supervisors, both of whom received 10-day suspensions.
- In whistleblower retaliation cases at the VA's Puerto Rico facility, OSC has investigated and obtained corrective actions for several whistleblowers. Two whistleblowers resolved their claims through settlement agreements with the VA that included, among other things, the repeal of a suspension, a return to their former positions, and compensatory damages. A third whistleblower is currently in settlement negotiations with the VA. Given the severity of the allegations in these cases, OSC also has an active, ongoing investigation of several high-level officials at the Puerto Rico VA for potential disciplinary action.
- A whistleblower in the Cincinnati, Ohio VA facility settled his retaliation claim with the VA. OSC has continued its investigation for potential disciplinary action against the subject official, and the VA has indicated it will propose discipline.
- A whistleblower in a Wisconsin VA facility settled her retaliation claim with the VA for relief including a clean personnel record and back pay and compensatory damages. OSC has continued its investigation and is actively reviewing two subject officials for potential discipline.

We will keep the Committee updated on the resolution of these important disciplinary action cases.

As these and other cases demonstrate, even where the whistleblower and the VA agree to settle their claim for corrective action, OSC will, in appropriate cases, continue to investigate and seek discipline against officials who may have retaliated against the whistleblower. Although it takes significantly more time and resources to complete disciplinary investigations, in the first four full years of Special Counsel Carolyn Lerner's tenure (2012 – 2015), OSC more than doubled the number of disciplinary actions taken as compared to 2008–2011. From 2012 to 2015, OSC generated 78 disciplinary actions government-wide against retaliators and other violators.

Conclusion

We appreciate the Committee's attention to the issues we have raised and your interest in our efforts to protect and promote VA whistleblowers. I thank you for the opportunity to testify, and am happy to answer your questions.

Deputy Special Counsel for Litigation and Legal Affairs Eric Bachman

Eric Bachman joined the U.S. Office of Special Counsel in 2014. He served as a special litigation counsel in the Justice Department's Civil Rights Division from 2012 to 2014, and was a senior trial attorney from 2009 to 2012. Before joining the Justice Department, he was in private practice, as an associate and then as a partner, in a Washington, DC civil rights law firm. Mr. Bachman began his legal career as a public defender in Louisville, Kentucky. He received a J.D. from Georgetown University Law Center.