

Law Review 1163

New Special Counsel Pledges Diligent USERRA Enforcement

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.8—USERRA Applicability to Federal Government

1.4—USERRA Enforcement

Special Counsel Carolyn N. Lerner invited ROA and other military and veterans service organizations to a meeting held on August 24, 2011, and I attended. She pledged to make effective enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA) a priority of her administration.

The Honorable Carolyn N. Lerner took office as Special Counsel of the United States in June 2011. She was appointed by President Obama and confirmed by the Senate, for a five-year term that runs until June 2016. Like the FBI Director and the IRS Director, but unlike most other appointive positions in the Executive Branch of the Federal Government, the Special Counsel serves a term of years, without regard to the duration of the presidency of the President who appointed that Special Counsel. Thus, Ms. Lerner will likely remain in office until June 2016, regardless of whether President Obama is reelected next year.

The Special Counsel heads the Office of Special Counsel (OSC), an independent federal investigative and prosecutorial agency established by the Civil Service Reform Act of 1978 (CSRA), which split the former Civil Service Commission (CSC) into three separate entities.

The CSC (established in 1883) had overlapping administrative, investigative, prosecutorial, and adjudicative functions. Some commentators suggested that these overlapping roles in the same agency created an institutional conflict of interest. Congress agreed and split the CSC into three federal agencies.

The greater part of the CSC became the Office of Personnel Management (OPM), which serves as the personnel office for the Executive Branch of the Federal Government. OPM inherited the myriad administrative functions of the former CSC.

The Merit Systems Protection Board (MSPB) inherited the adjudicative functions of the CSC. The MSPB is a quasi-judicial federal agency with three members, each of whom is appointed by the President with Senate confirmation. The MSPB adjudicates cases involving federal agencies as employers and federal employees under many different laws, including "merit principles" and "prohibited personnel practices" (PPPs) set forth in title 5 of the United States Code (U.S.C.). An Administrative Judge (AJ) of the MSPB conducts a trial and makes findings of fact and conclusions of law, much as a federal judge would do in a civil case. Either party can appeal to the MSPB itself.

MSPB decisions can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court here in Washington. The Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from MSPB decisions.

OSC inherited the investigative and prosecutorial functions of the former CSC. From 1979 until 1989, OSC was an independent part of the MSPB. In 1989, OSC became its own separate federal agency.

OSC serves as a secure channel for federal employees and others to disclose apparent fraud, waste, and abuse (FWA) within the Federal Government. Each federal agency has its own Inspector General (IG), and FWA allegations can be made to those IGs. But some federal “whistleblowers” prefer to make their allegations to an organization completely outside their own agency, and OSC serves an important role as a conduit for these allegations.

OSC is responsible for protecting federal employees from PPPs. The most common PPP is reprisal for whistleblowing. For example, Mary Smith, a federal civilian employee, makes an FWA allegation against Joe Jones, her supervisor. Jones becomes aware that Smith is the likely source of the allegations against him, and he takes unfavorable personnel actions (up to and including firing) against Smith, to retaliate against her for blowing the whistle on him.

IGs need information from federal insiders, in order to carry out their critical mission of ferreting out fraud, waste, and abuse. Federal insiders will not provide that critical information if they reasonably fear reprisal for doing their duty and bringing their information to IGs. It is necessary to protect whistleblowers from reprisal, in order to enable IGs to do their jobs and to protect the public. It is necessary to deter reprisal for whistleblowing by holding the unlawful repliers accountable, up to and including removal from federal service. It is also necessary to undo or correct unfavorable personnel actions that have been taken against whistleblowers. This is an important function of the OSC—bringing actions in the MSPB to undo the unfavorable personnel actions and to hold the unlawful repliers accountable.

OSC is also responsible for preventing undue influence of politics in the federal workplace (and certain state and local government workplaces supported by federal funds) by enforcing the Hatch Act restrictions on political activity by government employees. OSC has had these Hatch Act and PPP responsibilities since its creation in 1979.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which dates back to 1940. USERRA gave important new responsibilities to both the MSPB and OSC.

The reemployment statute has applied to the Federal Government as an employer since 1940, but prior to 1994 there was no specific enforcement mechanism for federal employees and applicants for federal employment. Section 4324 of USERRA (38 U.S.C. 4324) gives the MSPB specific authority and responsibility to adjudicate claims that federal executive agencies have violated USERRA. This USERRA jurisdiction is in addition to the broad jurisdiction granted to the MSPB by the CSRA in 1978.

National Guard and Reserve personnel are required to file annual reports with the Department of Defense, identifying their civilian employers. Those reports show that approximately 25% of Guard and Reserve personnel are federal employees, although the Federal Government does not represent 25% of the total civilian workforce of this country. I believe that about 25% of all USERRA cases involve federal agencies as employers, but reliable statistics are hard to come by.

A person claiming that any employer (federal, state, local, or private sector) has violated USERRA can make a written complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). 38 U.S.C. 4322(a). DOL-VETS will investigate the complaint. If DOL-VETS determines, as a result of its investigation, that the complaint has merit, the agency will attempt to persuade the employer to correct the violation and come into compliance with USERRA. 38 U.S.C. 4322(d).

If the DOL-VETS investigation does not result in resolution, DOL-VETS is required to notify the claimant of the results of the investigation and to advise the claimant of his or her options regarding enforcement. 38 U.S.C. 4322(e). If the employer is a federal executive agency, the claimant may request that DOL-VETS refer the case to OSC, and DOL-VETS is required to refer as requested. 38 U.S.C. 4324(a).[\[1\]](#) If OSC is reasonably satisfied that the complaint has merit, OSC may represent the claimant and initiate an MSPB action on the claimant's behalf. 38 U.S.C. 4324(a)(2)(A).[\[2\]](#)

Section 105 of the Veterans' Benefits Act of 2010[\[3\]](#) provided for a demonstration project (DP) on USERRA enforcement with respect to federal agencies as employers, and the DP began on August 9, 2011. The DP will last for 36 months, or until August 2014.

During the DP, USERRA claims against federal agencies will be investigated by OSC, rather than DOL-VETS, if the claimant has a Social Security Number (SSN) ending with an odd digit.[\[4\]](#) The distinction between even and odd SSNs is to provide that roughly half the federal-sector USERRA cases will go to OSC for investigation and possible prosecution, while the other half will go to DOL-VETS for investigation and to OSC for possible prosecution, if requested by the claimant. The Government Accountability Office (GAO)[\[5\]](#) will evaluate the DP results during and immediately after the DP. The final GAO report should come out late in 2014 or early in 2015.

OSC is a small federal agency, with a staff of 110 and a Fiscal Year 2011 budget of \$18.5 million. The President's budget for Fiscal Year 2012 proposed to add \$1 million to the OSC appropriation, but the appropriation proposed by the House of Representatives (but not the Senate) would instead cut the OSC budget by \$500,000.

At the meeting, Special Counsel Lerner expressed her strong commitment to USERRA enforcement, including cases that come from DOL-VETS by referral as well as cases that OSC receives directly under the DP. I believe that she is serious, and I will support her efforts.

[\[1\]](#) If the employer is a state or local government or private employer, DOL-VETS refers the claim to the United States

Department of Justice (DOJ). 38 U.S.C. 4323(a).

[\[2\]](#) The claimant is not required to go through DOL-VETS or OSC. The claimant can appeal to the MSPB directly, without going through DOL-VETS. If the claimant does go through DOL-VETS, the claimant may appeal to the MSPB, in lieu of requesting referral to OSC. If OSC declines the claimant's request for representation, the claimant may nonetheless

appeal to the MSPB. 38 U.S.C. 4324(b). The claimant does not need a “right to sue letter” from DOL-VETS or OSC, before initiating an MSPB action. But if the claimant wants free legal representation from OSC, the claimant must go through DOL-VETS.

[\[3\]](#) Public Law 111-275.

[\[4\]](#) Claims filed by individuals with even SSNs will also be investigated by OSC, rather than DOL-VETS, if the individual also has a closely related PPP claim that is also within OSC’s jurisdiction.

[\[5\]](#) GAO is the investigative arm of Congress.