

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

September 16, 2015

The Honorable Robert A. McDonald
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

Dear Secretary McDonald:

The Committee on Homeland Security and Governmental Affairs is examining the challenges that whistleblowers face when they report wrongdoing in the federal government. The Committee held a hearing in June 2015 during which four whistleblowers testified about their personal experiences with ostracization and retaliation in wake of their whistleblowing.¹ In furtherance of the Committee's ongoing work to protect federal whistleblowers, I ask your assistance in better understanding the protocols and procedures that the Department of Veterans Affairs (VA) has in place for protecting whistleblowers.

The Office of Special Counsel (OSC) is the neutral investigator of whistleblower claims brought by federal employees. OSC's protection of whistleblowers comes in two forms: investigating whistleblower retaliation cases, and providing federal employees a safe venue to disclose wrongdoing.² For whistleblower retaliation complaints, OSC investigates allegations from federal employees that they were subjected to one of thirteen "prohibited personnel practices" as a result of their disclosure.³ If OSC can demonstrate that the employee faced retaliation, the OSC works with the agency to obtain relief for the employee.⁴ On whistleblower disclosures, OSC evaluates the employee's claim to determine whether a "substantial likelihood" of wrongdoing exists.⁵ If OSC finds that there is a "substantial likelihood" of wrongdoing, OSC transfers the matter to the agency for investigation and a report to Congress and the President.⁶

¹ *Blowing the Whistle on Retaliation: Accounts of Current and Former Federal Agency Whistleblowers: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, 114th Cong. (2015).*

² *Review of Whistleblower Claims at the Department of Veterans Affairs: Hearing Before the Subcomm. on Military Construction, Veterans Affairs, and Related Agencies of the S. Comm. on Appropriations, 114th Cong. (2015) (testimony of Carolyn Lerner, Special Counsel, U.S. Office of Special Counsel), <http://www.appropriations.senate.gov/sites/default/files/hearings/073015%20Lerner%20Testimony%20-%20Office%20of%20Special%20Council.pdf>.*

³ *Id.* at 1

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 4.

Recently, OSC has seen an alarming rise its retaliation and disclosure caseload brought forth by VA employees. According to data provided to Congress, the OSC is on track to receive over 3,800 “prohibited personnel practice” complaints from federal employees in 2015.⁷ In 2015, OSC projects that it will receive 1,300 complaints—or approximately 35 percent of its entire retaliation caseload—from VA employees alone.⁸ In 2014, OSC received more retaliation complaints from VA employees than Department of Defense (DOD) employees, even though the DOD has twice as many civilian employees as the VA. The data paints an equally troubling picture for the OSC’s disclosure caseload. OSC expects to receive nearly 2,000 whistleblower disclosures from all federal employees in 2015.⁹ According to current projections, the OSC predicts that approximately 750 of OSC’s disclosures—or over 37 percent—will come from VA employees.¹⁰ The data OSC has provided to Congress illustrate severe cultural problems towards VA whistleblowers. The OSC has been forced to reallocate significant staff and resources to address the influx of VA complaints.¹¹ Despite its efforts to streamline VA complaints and investigations, Special Counsel Carolyn Lerner testified to Congress last month that “the volume of incoming VA complaints remains overwhelming.”¹²

The Committee’s own interaction with VA whistleblowers nationwide has raised similar concerns about the culture at VA facilities. For example, the Committee’s ongoing investigation of the VA Medical Center in Tomah, Wisconsin (Tomah VAMC) has revealed that a number of individuals raised concerns about prescription practices at the facility over several years. At least three would-be whistleblowers—Dr. Christopher Kirkpatrick, Dr. Noelle Johnson, and Ryan Honl—were all fired after they raised concerns about the over-prescription of narcotics at the facility. Each of them had a different experience as a would-be whistleblower at the Tomah VAMC. Dr. Kirkpatrick tragically committed suicide on the day of his termination.¹³ Dr. Johnson litigated her case through the Merit Systems Protection Board (MSPB) and obtained a settlement with the VA that fully reinstated her to VA employment.¹⁴ Mr. Honl filed his case with the Office of Special Counsel (OSC), which recently obtained a settlement with the VA that resulted in several corrective actions for Mr. Honl.¹⁵ All told, the experiences of these three whistleblowers from the Tomah VAMC are deeply troubling.

⁷ *Id.* at 3.

⁸ *Id.* at 3.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² *Id.* at 1

¹³ Donovan Slack, *For one whistleblower, getting fired was too much*, USA TODAY, (Apr. 12, 2015), <http://www.usatoday.com/story/news/2015/04/12/va-whistleblower-killed-himself-after-dismissal/25587367>.

¹⁴ *Tomah VAMC: Examining Quality, Access, and a Culture of Overreliance on High-Risk Medications: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs and the H. Comm. on Veterans Affairs, 114th Cong. (2015) (statement of Noelle Johnson).*

¹⁵ Press Release, Office of Special Counsel, OSC Secures Relief for Additional VA Whistleblowers (July 22, 2015), <https://osc.gov/News/pr15-15.pdf>.

The problems that whistleblowers faced within the VA are not isolated to the Tomah VAMC. Just last month, Dr. Katherine Mitchell from the Phoenix VAMC and Dr. Lisa Nee from the Hines VAMC in Chicago, IL testified before a Senate Appropriations Subcommittee about the retaliation and reprisal they have faced as whistleblowers in the VA system.¹⁶ In addition, the VA Truth Tellers, a group of over 50 current and former VA employees who have faced discipline for taking the courageous step of coming forward, have exposed wrongdoing nationwide. The treatment of VA whistleblowers throughout the country has illustrated severe, deep-rooted issues within the VA that encourage retaliation and punish the very individuals who expose problems that harm our nation's veterans.

When a VA whistleblower faces retaliation, not only is the whistleblower's life and livelihood directly affected, but the problems raised are often not addressed and veteran care suffers. For example, Brandon Coleman, a Marine Corps veteran and addiction therapist at the Phoenix VAMC, brought concerns to his superiors about how the facility addressed veterans who posed a risk for suicide. Mr. Coleman faced retaliation as a result. According to a sworn affidavit signed by the acting human resources officer for the Phoenix VA, shortly after Mr. Coleman publicly discussed his concerns about the shortfalls with the facility's suicide prevention protocols, the hospital's interim director met with the hospital's senior leadership and VA regional counsel to inquire whether "it were possible to remove Coleman from employment."¹⁷ The VA regional counsel explained to the director that under federal whistleblower statutes, Mr. Coleman could not be disciplined for publicly discussing his concerns about veteran care; however Mr. Coleman could be removed for "unrelated misconduct." Curiously, three weeks after the meeting, Mr. Coleman was accused of having an altercation with a colleague.¹⁸ Mr. Coleman was subsequently placed on administrative leave pending an investigation and he has not worked at the facility since January 2015.¹⁹

The VA's discipline of Mr. Coleman has placed veterans' health and safety at risk. During his time in the VA, Mr. Coleman designed and built a 52-week outpatient program designed to help veterans in their battles with addiction and work to keep veterans out of jail. As a veteran, Mr. Coleman has successfully obtained the trust of fellow veterans in his program and 51 veterans have graduated the program.²⁰ Since Mr. Coleman has been on administrative leave, his program has been shut down and a number of veterans have been without it for several months. I am concerned that in his absence, veterans previously under Mr. Coleman's care could potentially suffer significant consequences.

¹⁶ See note 2, *supra*.

¹⁷ Affidavit of Laurie Angela Butler, *In re Brandon Coleman*, (Aug. 1, 2015) at 5, <https://www.scribd.com/doc/273846172/Affidavit>.

¹⁸ Dennis Wagner, *VA retaliation alleged in sworn statement*, THE ARIZONA REPUBLIC, (Aug. 6, 2015), <http://www.azcentral.com/story/news/arizona/investigations/2015/08/06/va-whistleblower-retaliation-allegation-sworn-statement/31224653>.

¹⁹ *Id.*

²⁰ Interview between Brandon Coleman and Comm. Staff (Sept. 8, 2015).

While Mr. Coleman's experiences are just one example, it seems clear that the VA can do much more to protect and support whistleblowers. In order to properly assess the current state of whistleblower protection within the VA, please provide the following information and materials:

1. Has the VA launched an investigation into the apparent retaliation against Brandon Coleman? Please explain.
2. How many cases does the VA currently have pending with the Office of Special Counsel (OSC) involving whistleblowers?
3. How much taxpayer money does the VA spend each year litigating whistleblower cases with the OSC?
4. How much taxpayer money has the VA spent on settlements with VA whistleblowers since 2010?
5. How much taxpayer money does the VA spend each year litigating whistleblower cases with the Merit Systems Protection Board (MSPB)?
6. Once OSC has found a whistleblower to have either made a protected disclosure or to have been retaliated against, does the VA have protocols to investigate and/or discipline management for whistleblower retaliation? Please explain.
7. How many VA employees have been reinstated through either the OSC or the MSPB for making protected disclosures since 2010?
8. How many VA employees have been disciplined since 2010 for whistleblower retaliation and/or reprisal?
9. How many VA employees have been fired since 2010 for whistleblower retaliation and/or reprisal?
10. A number of veterans who were also VA whistleblowers claim that their private VA medical records were improperly accessed as a result of their whistleblowing.²¹ Does the VA have protocols in place to investigate allegations from veteran-employees concerning the improper accessing of their medical records? Please explain.

Please provide this material as soon as possible but no later than 5:00 p.m. on September 30, 2015.

²¹ See e.g., Daniel Bice, *'Candy Man' prescriber at Tomah VA threatens to sue whistleblower*, Milwaukee Journal Sentinel (Feb. 9, 2015), <http://www.jsonline.com/news/wisconsin/candy-man-prescriber-at-tomah-va-threatens-to-sue-whistleblower-b99441495z1-291286871.html>.

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The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and effectiveness of all agencies and departments of the Government.”²² Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”²³ For purposes of this request, please refer to the instructions and definitions contained in the enclosure.

If you have any questions about this request, please contact Kyle Brosnan of the Committee staff at (202) 224-4751. Thank you again for your assistance in this matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Enclosure

²² S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

²³ S. Res. 73 § 12, 114th Cong. (2015).