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United States Government Accountability Office
Washington, DC 20548

October 6, 2004

The Honorable Edward M. Kennedy
Ranking Minority Member
Committee on Health, Education,
Labor, and Pensions
United States Senate

Subject: *U.S. Office of Special Counsel's Role in Enforcing Law to Protect
Reemployment Rights of Veterans and Reservists in Federal
Employment*

Dear Senator Kennedy:

The U.S. Office of Special Counsel (OSC) enforces the rights of federal employees and applicants for federal employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.¹ USERRA provides for the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military service. USERRA also prohibits discrimination against persons because of their military service. In light of the significant number of National Guard members and reservists serving in the war in Iraq and in other conflicts who will be demobilized and returning to the federal workforce in the coming months, you asked us to review issues surrounding enforcement of the act in the federal sector, particularly by OSC.

Under USERRA, a federal employee or applicant who believes that his or her USERRA rights have been violated may file a claim with the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS), which investigates and attempts to resolve the claim.² If VETS cannot resolve the claim, the individual may request that it be referred to OSC.³ In addition to handling USERRA claims, OSC handles claims of prohibited personnel practices by federal agencies. In a March 2004 report, we discussed OSC's performance in processing cases filed with the

¹Pub. L. No. 103-353, 108 Stat. 3149, as amended, codified at 38 U.S.C. sections 4301-4333.

²VETS also handles claims from employees of other employers, including state government and private sector employers. If VETS cannot resolve these nonfederal claims, an individual may ask for a referral to the Department of Justice, which may prosecute the claim.

³According to VETS, in fiscal year 2003, the agency resolved about 94 percent of the claims submitted to it without the need for referral. The resolution of these claims includes agency voluntary compliance, settlement, no merit conclusions, and administrative closures.

agency, including those filed under USERRA.⁴ This report responds to your request to provide information on (1) how OSC carries out its responsibilities under USERRA, (2) the average number of days OSC took to process USERRA claims from fiscal years 1999 through 2003, (3) changes OSC has made to handle current USERRA claims and any increase in claims, and (4) changes OSC believes are necessary to make the handling of USERRA claims in the federal sector more efficient and effective.

To address these objectives, we interviewed OSC and DOL officials responsible for processing federal sector USERRA cases and coordinating efforts between OSC and VETS. We reviewed OSC's documents describing the agency's role in the referral process and the procedures for processing USERRA cases. To obtain perspectives concerning OSC's plans to handle any increase in USERRA cases and changes needed to ensure protections of service members' reemployment rights, we interviewed key agency officials and reviewed written testimony from a June 23, 2004, House Committee on Veterans Affairs hearing on compliance with USERRA. To determine the average time spent by OSC to process a USERRA claim during fiscal years 1999 through 2003, we reviewed caseload data generated from OSC's data tracking system (OSC 2000). Processing time for a claim is determined from the date that a claim is referred to OSC until the case is either resolved through corrective action, OSC decides that the case has no merit, or OSC files a case with the Merit Systems Protection Board (MSPB).⁵ In our March 2004 report, we assessed the reliability of the case tracking data system and verified the accuracy of the data by comparing and testing electronic data elements for obvious errors. To determine the completeness and accuracy of OSC's USERRA case data, we compared OSC's data with data from DOL on the number of cases referred and the recommendation of the merits of those cases. On the basis of our assessment of OSC 2000 and the caseload data that it generated, we determined that the data for fiscal years 1999 through 2003 were sufficiently reliable for the purposes of our report. We conducted our review in Washington, D.C., from April 2004 through September 2004 in accordance with generally accepted government auditing standards.

Results in Brief

OSC's responsibility under USERRA is to determine the merits of claims it receives from DOL and to seek corrective action on behalf of individuals in federal employment whose claims have merit. In its self-described role as a "special prosecutor" of such claims, OSC attempts to resolve a claim that has merit first by negotiating with the claimant's federal employer. If negotiation fails, OSC proceeds to initiate legal action against the employer before MSPB and then, if necessary, the U.S. Court of Appeals for the Federal Circuit. The claim referral from DOL to OSC includes the results of DOL's investigation and the legal analysis of the claim by the appropriate DOL regional solicitor. While OSC takes this information into account, the agency determines the merits of each claim by performing its own legal analysis and independently reviewing the facts and law applicable to the claim. OSC agreed

⁴See GAO, *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress*, GAO-04-36 (Washington, D.C.: Mar. 8, 2004).

⁵MSPB is an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit principles.

with DOL's recommendation about whether or not a claim had merit in about 73 percent of the claims (43 of 59) OSC processed from fiscal years 1999 through 2003. After conducting its own review of these claims, OSC determined that 5 of the 59 claims had merit.

OSC took an average of about 145 days to process the 59 USERRA claims that the agency received from fiscal year 1999 through 2003. During this period, USERRA claims represented less than 1 percent of OSC's overall caseload. Unlike the law governing prohibited personnel practice cases, USERRA does not include a time frame within which OSC is required to process cases covered under the act. According to OSC, it obtained full corrective action from the involved federal agency for all 5 claims that OSC determined had merit during fiscal years 1999 through 2003.

Recently, OSC has taken several steps that agency officials said would be helpful in processing USERRA cases more quickly and in dealing effectively with anticipated increases in new USERRA cases. Most significantly, in April 2004, OSC established its Special Projects Unit (SPU) to act as a "SWAT" team to address high-priority case processing needs, including the handling of all USERRA cases. Prior to the formation of SPU, OSC attorneys who specialized in USERRA may have had other priority cases, and nonspecialists in USERRA were assigned USERRA cases. By assigning all USERRA cases to SPU and detailing attorneys specializing in these cases to SPU, OSC's objective is to ensure that these cases get priority attention. OSC officials also reported that the agency is working closely with the Department of Defense's National Committee for Employer Support of the Guard and Reserve to explain to federal employees their rights under USERRA. Also, OSC said it maintains Web-based and telephone "hot lines" that provide a source of information and assistance about employer and employee rights and responsibilities under USERRA.

At the June 2004 hearing before the House Committee on Veterans Affairs, the Special Counsel discussed two potential enhancements to OSC's authority that he said could help make the handling of USERRA cases in the federal sector more efficient and effective. In both instances, the Special Counsel said it is unclear whether USERRA already gives OSC such authority. First, the Special Counsel said that to help ensure that OSC has all of the information that it needs to resolve a claim, OSC should be allowed to get involved in a USERRA claim while the investigation at DOL is ongoing, rather than having to wait until DOL finishes it and refers the claim to OSC. In this regard, OSC and DOL are discussing amendments to a memorandum of understanding between the two agencies that would bring OSC into the process earlier. According to DOL, OSC would become involved once VETS finished its investigation and sent the claim to DOL's regional solicitor. OSC has asked DOL to identify difficult cases that would benefit from OSC's earlier involvement. OSC officials have indicated that they support a demonstration project, included in proposed legislation, that would allow OSC to get involved earlier by requiring DOL to share responsibility with OSC for receiving and processing USERRA claims. DOL opposes a change that would give OSC authority to receive and process USERRA claims, noting that if OSC performs initial investigations it would create inconsistency in the federal USERRA process. Second, the Special Counsel said if OSC was given the authority under USERRA to pursue disciplinary actions against offending federal supervisors in cases in a manner similar to authority the agency has in enforcing other federal employment violations, supervisors would be held

accountable for upholding the law. Currently, under USERRA, OSC can seek only corrective action from the federal agency.

Background

OSC's mission is to safeguard the federal merit system, primarily by investigating prohibited personnel practices and seeking corrective or disciplinary action through negotiation with agencies or prosecuting claims before MSPB. OSC is authorized to receive disclosures of alleged wrongdoing, such as violations of law and "gross waste" of funds by federal employees (termed "whistleblower disclosures").⁶ The agency also has jurisdiction over the Hatch Act,⁷ which regulates the political activities of individuals employed by the federal and District of Columbia governments as well as certain state and local government employees employed in connection with programs financed by federal funds.

Following the 1991 Gulf War, reservists and employers flooded the government with questions and claims concerning the reemployment rights of reservists who had been away from their jobs during the war. At that time, reemployment rights were set forth in the provisions of the Veterans Reemployment Rights Act of 1974.⁸ In 1994, following review of the effectiveness of the 1974 act, Congress passed USERRA to clarify, simplify, and strengthen the existing employment and reemployment rights of veterans. USERRA prohibits a public or private sector employer from denying any benefit of employment on the basis of any individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects individuals from retaliation for asserting, or assisting someone in asserting, their rights under USERRA. USERRA also protects the employment and reemployment rights of veterans, reservists, National Guard members, and certain other members of the uniformed services who were absent from their civilian employment due to military service, including service for training.

OSC Evaluates Claims Received from DOL and Seeks Corrective Action for Individuals with Claims That Have Merit

OSC's responsibility under USERRA is to determine the merits of federal sector claims it receives from DOL and to seek corrective action on behalf of individuals whose claims have merit. In its self-described role as a "special prosecutor" of such claims, OSC attempts to resolve a claim that has merit first by negotiating with the claimant's federal employer. If negotiation fails, OSC would proceed with legal action against the employer before MSPB⁹ and then, if necessary, in the U.S. Court of Appeals for the Federal Circuit.

OSC is not authorized to receive USERRA federal sector claims directly from claimants. Instead, OSC receives claims after they have been filed with VETS. If

⁶Reprisal for whistleblower disclosure is a prohibited personnel practice.

⁷The provisions commonly referred to as the Hatch Act, as applied to federal and District of Columbia employees, are found under subchapter III of chapter 73 of title 5. The Hatch Act provisions relating to certain state and local employees are found under chapter 15 of title 5.

⁸Pub. L. No. 93-508, 88 Stat 1578 (Dec. 3, 1974).

⁹A claimant can bypass both VETS and OSC and take his or her claim directly to MSPB.

VETS efforts do not resolve the claim, the individual can have the case referred to OSC, regardless of its merit.

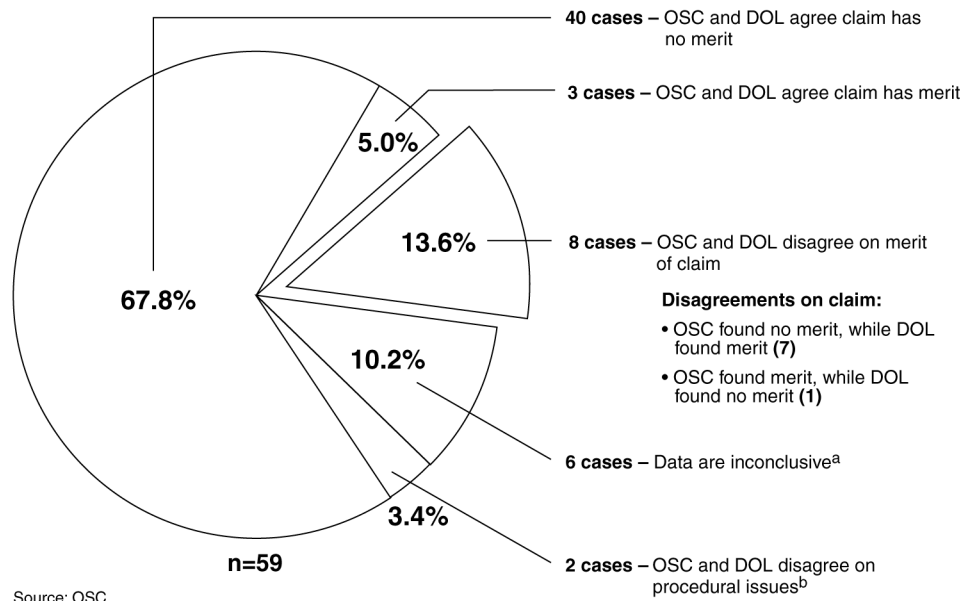
When an individual employed by the federal government requests that his or her claim be referred to OSC, VETS regional investigators first send the investigative file and a recommendation for or against representation to the appropriate DOL regional solicitor.¹⁰ The regional solicitor identifies the legal issues surrounding the claim and prepares a legal analysis. This analysis, a conclusion as to the merits of the case, and a recommendation about whether OSC should provide representation are included in the letter of referral from the regional solicitor to OSC. While OSC takes this information into account, the agency conducts its own review of the facts and law applicable to each claim. If OSC is satisfied that the claimant is entitled to corrective action, the agency begins negotiations with the claimant's federal employer. If an agreement cannot be reached, OSC may represent the claimant before MSPB, upon the claimant's request. If MSPB rules against the claimant, OSC may decide to appeal the decision to the U.S. Court of Appeals for the Federal Circuit. In cases where OSC finds that the claim does not have merit, OSC would inform the claimant of its decision not to represent the claimant and the claimant's right to take the case to MSPB.

In fiscal years 1999 through 2003, for claims referred to OSC by DOL, OSC and the regional solicitor agreed on whether or not a claim had merit for about 73 percent of the claims (43 of the 59)¹¹ and disagreed on about 14 percent (8 of 59). In 2 cases, OSC and DOL disagreed on procedural issues and in the remaining 6 cases, the information from OSC was not clear as to DOL's determination. (See fig. 1.)

¹⁰DOL's Office of the Solicitor is the chief legal counsel responsible for providing legal advice and analysis for the agency. The office has eight regional offices, which are each headed by a regional solicitor.

¹¹While OSC received 60 claims from DOL during this period, we excluded one case from our review because it was opened, closed, reopened, closed again, and is currently under reconsideration, meaning it was unresolved at the time of our review.

Figure 1: OSC and DOL’s Determinations for Cases Processed by OSC, Fiscal Years 1999 through 2003



Source: OSC.

^aDOL’s finding cannot be definitively ascertained from OSC data for varying reasons, including that recommendations were not in the OSC file or that according to OSC, the file was destroyed pursuant to federal archive regulations.

^bOSC found that one case was premature and DOL disagreed. In the other case, OSC found that the claim was barred because of a prior claim. Again, DOL disagreed.

In instances when OSC’s determination differs from DOL’s determination on the merits of a case, OSC notifies the regional solicitor of its determination and the reasoning behind it and invites comments. OSC reviews the comments of the regional solicitor, if any, prior to making its final determination on a case. The enclosure provides more detailed information on the steps in processing a USERRA claim from initiation to resolution as well as information on the types of USERRA claims.

Claim Processing Time Varied Widely, but OSC Obtained Corrective Action from Federal Employers on All USERRA Claims That Had Merit

From fiscal years 1999 through 2003, OSC took an average of about 145 days to process the 59 USERRA claims received from DOL. These USERRA claims represented less than 1 percent of OSC’s entire caseload. USERRA does not specify a time frame within which OSC is required to process claims covered under the act.¹²

¹²In its annual reports to Congress, OSC provides data on the different categories of claims pending at the end of each fiscal year. Because OSC is required to process prohibited personnel practice and whistleblower disclosure claims within certain statutory time frames, the agency reports the “backlog”—the number of claims that have not been processed in the applicable time frame. Technically, because USERRA does not require OSC to process claims within a specific statutory time frame, there is no backlog of these cases. Claims pending at the end of a fiscal year, however, are carried over to the following year.

OSC's USERRA claim processing time ranged from as little as 2 days to as long as 30 months. There was little correlation between whether a claim was ultimately found to have merit and how long it took to process it. For example, two of the five claims that the agency determined had merit took 30 months to process; the other three took 60, 96, and 119 days. Of the claims determined to lack merit, the range also varied widely. For example, five claims that the agency determined had no merit took from 10 to 17 months to process; three other claims found to lack merit took 2 days.

According to OSC, it was able to obtain full corrective action from the involved federal agency on each of the five claims that OSC determined had merit.¹³ DOL agreed with OSC's determination of merit in four of these claims. In the fifth claim, DOL determined that the claim lacked merit.

OSC Has Made Changes Designed to Expedite Handling of Current USERRA Claims and Any Influx of New Claims

According to OSC officials, under the current Special Counsel, the agency has taken several steps to help process current USERRA claims more quickly and cope effectively with anticipated increases in USERRA claims. Most significantly, in April 2004, OSC established its SPU that acts as a "SWAT" team to address high-priority claim processing needs, including the handling of all USERRA claims.

According to OSC, SPU is intended to maximize OSC's efficiency by eliminating OSC's chronic backlog of non-USERRA claims. Prior to the establishment of SPU, OSC attorneys who specialized in USERRA may have had other priority claims, and nonspecialists in USERRA were assigned USERRA claims. By assigning all USERRA claims to SPU and detailing attorneys specializing in these claims to SPU, the Special Counsel said he intends to give these claims priority attention. According to OSC, SPU will have two attorneys with USERRA experience and a supervisory attorney handling USERRA claims. OSC further stated that it would detail or hire additional attorneys, investigators, and other OSC staff, as needed, to handle any surge in the number of USERRA claims it receives.

In another action, OSC has initiated steps to inform federal employees and managers during visits to federal agencies about OSC's role in protecting the employment and reemployment rights of guardsmen and reservists. Officials also said that OSC is working closely with the Department of Defense's National Committee for Employer Support for the Guard and Reserve to explain to federal employees their rights under USERRA. In addition, OSC said it maintains Web-based and telephone "hot lines" that provide information and assistance about employer and employee rights and responsibilities under USERRA.

¹³During his June 23, 2004, testimony, the Special Counsel said OSC filed its first USERRA claim with MSPB that day because OSC determined that an agency was unwilling to provide adequate relief for a service member.

OSC Says Enhancements to Its Authority Are Needed to Ensure the Protection of USERRA Rights

In his June 2004 testimony, the Special Counsel said the USERRA referral process creates unnecessary inefficiency, and he said more specific authority for OSC to investigate claims and pursue disciplinary action against offending federal supervisors could help remedy this problem. The Special Counsel said it is unclear whether USERRA already gives OSC such authority.

Under current procedures, once a person with a claim against the federal government requests that VETS refer a claim to OSC, the regional solicitor undertakes its legal analysis or additional investigation where necessary, which OSC says generally takes about 3 to 6 months, but can take longer. Only after completion of the analysis is the claim referred to OSC. The Special Counsel said that after receiving a claim from the regional solicitor, OSC often requests that the involved federal agency voluntarily provide information to OSC that VETS had not requested.

The Special Counsel also testified that processing claims under USERRA could be more efficient if the investigative and prosecutorial authority, currently bifurcated between DOL and OSC under the act, were merged. He noted that OSC has the authority to investigate and prosecute allegations of prohibited personnel practices. The Special Counsel said merging of the investigative and analytical functions would reduce the chances of “over-investigating” USERRA cases that are without merit and would increase the chances of identifying claims warranting prosecution so that OSC can move expeditiously toward obtaining corrective action on behalf of the claimant.

In an attempt to bring OSC’s investigative and legal expertise into the process earlier, OSC and VETS are discussing amendments to a memorandum of understanding between the two agencies. VETS officials indicated that OSC’s earlier involvement would begin when the claimant asked that the claim be referred to OSC, which is when the regional solicitor gets the claim from VETS. OSC has also asked VETS to identify difficult claims that would benefit from OSC’s early involvement.

OSC officials have indicated that they support recently proposed legislation that calls for a demonstration project for OSC to share responsibility with DOL to receive and investigate USERRA claims.¹⁴ For the period of the demonstration, this legislation would allow OSC to receive certain USERRA claims directly from claimants employed by the federal government without these claims going through DOL first. Such a change would represent a new method of delivering services to those covered under the act. It is unclear whether OSC would need additional procedures or resources to use the new authority that this legislation would give the agency.

DOL officials stated that while they are working to involve OSC earlier in DOL investigations where it may be advantageous to the claimant to do so, DOL does not concur or support the idea of OSC receiving USERRA claims and conducting initial investigations of those claims. DOL is concerned that if OSC performs the initial investigations in USERRA claims without DOL participation, this would create inconsistency in the federal government in how USERRA cases are investigated. DOL

¹⁴H.R. 4658, 108th Cong. sec. 212 (2004). See also S.2791, 108th Cong. sec. 6 (2004).

currently investigates both private and public sector (including federal) USERRA claims. DOL officials stated that in fiscal year 2003, the department resolved about 94 percent of USERRA complaints without referral to either the Department of Justice or OSC.¹⁵ According to DOL, if OSC investigates USERRA claims brought against federal employers, the federal sector claimant will not have the benefit that private sector and other public sector claimants would have of DOL's expertise in investigating and settling cases, which currently resolves most cases without the need for litigation.

In response to DOL's concerns, OSC stated that an allegation of a USERRA violation is identical to a prohibited personnel practice, as every USERRA complaint involves the allegation of an illegal employment practice. According to OSC, it has experience and expertise in handling veterans' preference issues, discrimination cases, reprisal claims, and violations of federal personnel regulations. The agency stated that it employs personnel specialists, investigators, and federal labor law attorneys to carry out its role of investigating prohibited personnel practices in the federal sector and maintains liaisons with nearly every federal agency for the purpose of facilitating its investigations and case resolutions. OSC also stated that it has an Alternate Dispute Resolution Unit that offers mediation services in appropriate cases.

When discussing what he called a lack of clarity with respect to OSC's authority to pursue disciplinary action against offending federal supervisors for USERRA violations, the Special Counsel noted that OSC has this authority in dealing with other federal employment violations, such as prohibited personnel practice cases.¹⁶ Under USERRA, however, the agency generally seeks only corrective action.

Agency Comments

On September 10, 2004, we provided a draft of this report to DOL and OSC for their review and comment. DOL's comments, from the Office of the Assistant Secretary of Veterans' Employment and Training Services, centered on proposed legislation that would give OSC the authority to receive and investigate USERRA claims. Officials indicated that they are working to include OSC earlier in investigations done by the department but they do not concur or support a change that would allow OSC to do initial investigations of USERRA claims. DOL stated that such a change would create inconsistency in the federal government in how USERRA cases are investigated and deprive federal sector claimants of the benefit that private sector and other public sector claimants have of the department's expertise in investigating and settling cases. We incorporated DOL's position on the proposed legislation and other technical comments as appropriate.

¹⁵According to DOL, of the claims that are referred by DOL, 90 percent are private sector and state and local government claims that are referred to the Department of Justice and only about 10 percent are claims against the federal government, which are referred to OSC.

¹⁶Under 5 U.S.C. 1215, OSC is authorized to seek disciplinary action against an agency employee for having committed a prohibited personnel practice or having violated another provision of law within OSC's jurisdiction, as set forth in 5 U.S.C. 1216. 5 U.S.C. 1216 does not include specific reference to OSC's authority under USERRA.

We received oral comments from OSC's Director, Congressional and Public Affairs. OSC agreed with the contents of the report and stated that the report accurately reflected the agency's role in enforcing USERRA. With respect to concerns expressed by DOL about OSC becoming involved in initial investigations of USERRA claims, OSC responded that it has the experience and expertise to obtain all relevant information to reach a determination as to whether the USERRA claimant is entitled to relief under the statute. Officials further stated that given OSC's 25 years of experience in investigating and resolving illegal employment practices in the federal sector, USERRA claimants will not be disadvantaged at all by having OSC receive and process their claims. OSC reiterated its point that for claims received and processed entirely by OSC, the proposed legislation would eliminate an arguably unnecessary bifurcation of investigative and prosecutorial functions. Consequently, according to OSC, service members would benefit from having their USERRA cases processed in a more timely and efficient manner that may exceed that which is afforded under the current system. In addition, OSC provided technical comments, which we have incorporated as appropriate.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issuance date. At that time we will send copies to the Secretary of Labor; Special Counsel, Office of Special Counsel; interested congressional committees; and other interested parties. In addition, this report will be available without charge on GAO's Web site at www.gao.gov.

If you have questions about this report, please contact me at (202) 512-9490 or Belva Martin, Assistant Director, at (202) 512-4285. You may also reach us by e-mail at stalcupg@gao.gov or martinb@gao.gov. Other key contributors to this assignment were Karin Fangman, Sharon Hogan, and Michael Rose.

Sincerely yours,



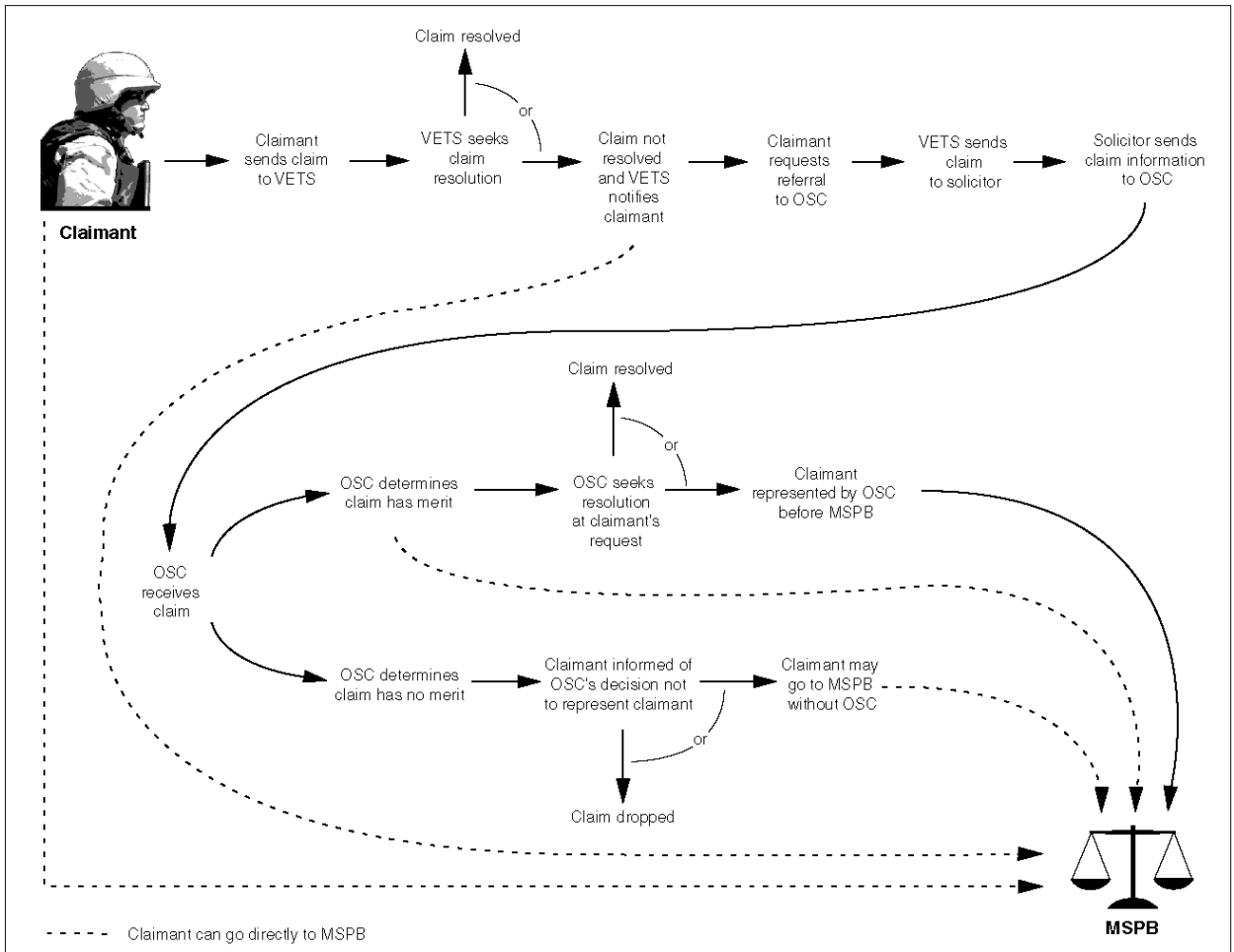
George H. Stalcup
Director, Strategic Issues

Enclosure

Procedures for Processing USERRA Cases

The processing of a Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) case generally begins when an aggrieved federal employee or applicant files a complaint with the Department of Labor’s (DOL) Veterans Employment and Training Service (VETS) and continues until the claim is resolved. Figure 2 details the steps in that process.

Figure 2: Administrative Process for Federal Sector USERRA Claims



Source: GAO.

When the Office of Special Counsel (OSC) receives a USERRA referral, the agency enters the claim into its computerized case tracking system—OSC 2000—and sends an acknowledgment letter to the DOL regional solicitor. OSC also sends an acknowledgment letter to the claimant along with a consent form for the claimant to sign and return to OSC. The consent form designates the extent to which OSC is permitted to (1) communicate with the regional solicitor, VETS, and the involved federal employer and (2) disclose the claimant’s identity. General procedures for referring USERRA claims are expressly stated in a February 2001 memorandum of understanding between OSC and VETS, which describes the respective roles and responsibilities of the agencies. OSC officials stressed that open communication with

DOL allows the two agencies to share information and is vital to effective USERRA enforcement. For example, OSC may request clarification of the letter of referral and legal analysis from the regional solicitor, who is supposed to facilitate communication between OSC and the DOL investigator of the claim.

OSC's criterion for deciding whether to represent a claimant is predicated upon the merit of the claim, which is dictated by two main factors: the facts of the case and application of the law. In reviewing USERRA cases, OSC officials told us that practical experience with other types of cases, such as prohibited personnel practice and whistleblower disclosure cases, has helped OSC attorneys to examine the evidence, identify deviations from standard operational procedures and practices, and look for signs of disparate treatment of the claimant compared to other federal employees or applicants.

On occasion, OSC receives alleged violations of USERRA or other laws pertaining to veterans' rights as part of broader, multifaceted prohibited personnel practice cases. An OSC official stated that staff are trained to detect cases alleging that a right under any law or regulation related to veterans' preference may have been violated and to immediately send these cases directly to OSC's USERRA supervisory attorney for review. This is especially important because only DOL handles claims alleging violations of veterans' preference. Mindful that there is a time limit within which individuals must file their claims in such cases, OSC advises claimants to promptly seek corrective action with DOL.

OSC is not required to represent every claimant who seeks its assistance. In USERRA cases where OSC determines there is no merit, OSC declines representation and notifies the claimants of (1) the fact that the Special Counsel has decided not to represent the claimant and (2) the claimant's right to file an appeal with MSPB. Pursuant to the terms of the memorandum of understanding between OSC and VETS, the notice does not discuss the factual or legal bases of OSC's determination not to represent the claimant as that notice, which is not privileged from discovery, may otherwise be obtained by the agency and used against the claimant in any subsequent litigation. OSC sends a copy of the notification to the DOL regional solicitor.

Types of USERRA Claims

Under USERRA, there are two types of claims: (1) discrimination, including retaliation, and (2) reemployment rights. Of the 59 USERRA claims that OSC received from DOL in fiscal years 1999 through 2003,¹⁷ OSC data show 12 as reemployment rights; 46 as discrimination, including a claim where the complainant alleged retaliation for filing a USERRA claim; and the remaining claim contained allegations of both reemployment and discrimination issues.

(450334)

¹⁷While OSC received 60 claims from DOL during this period, we excluded one case from our review because it was opened, closed, reopened, closed again, and is currently under reconsideration, meaning it was unresolved at the time of our review.

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