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January 9, 2008

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

Subject: *Posthearing Questions Related to Federal Agencies' Activities regarding the Uniformed Services Employment and Reemployment Rights Act*

Dear Mr. Chairman:

On November 8, 2007, I testified before your committee at a hearing entitled "Protecting the Employment Rights of Those Who Protect the United States."<sup>1</sup> This letter responds to your request that I provide answers to questions for the record. The questions, along with my responses, follow.

Questions from Senator Patty Murray

**1. In their written testimony, GAO reported that some claims are taking close to two years to process in their entirety.**

**a. Why are USERRA claims taking so long to resolve at DOD, DOL, and OSC?**

The data referenced in our testimony were offered as an illustrative example of cases that were opened and closed multiple times where the Department of Labor's (DOL) database did not capture the full scope of time it took to resolve these claims. Of the 10,061 formal complaints filed with DOL from October 1, 1996, through June 30, 2005, more than 430 were closed and reopened, and 52 complaints were closed and reopened two or more times. A case could have been opened and then closed and then several months later reopened and then closed again. However, the time lapse between when a case was closed and subsequently reopened was not captured in DOL's database. As cited in the testimony, our analysis of the 52 cases that were opened and closed two or more times showed that the processing time captured in DOL's database averaged 3 to 4 months, but the total elapsed times servicemembers waited to have their complaints fully

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<sup>1</sup>GAO, *Military Personnel: Federal Agencies Have Taken Actions to Address Servicemembers' Employment Rights, but a Single Entity Needs to Maintain Visibility to Improve Focus on Overall Program Results*, GAO-08-254T (Washington, D.C.: Nov. 8, 2007).

addressed averaged about 20 to 21 months from the time they filed their initial formal complaints with DOL until they were fully addressed by DOL, the Department of Justice (DOJ), or the Office of Special Counsel (OSC). It should also be noted that our analysis did not include any elapsed time associated with assistance provided by the Department of Defense's (DOD) Employer Support of the Guard and Reserve (ESGR) representatives reviewing informal complaints if that additional assistance was requested. The overall point being made in our testimony was that it was taking much longer for these cases to be resolved than the database was capturing. We did not perform an overall analysis of processing time to determine the average length of time it took to resolve all formal complaints filed during that time period.

In our review of the demonstration project of federal sector Uniformed Services Employment and Reemployment Rights Act (USERRA) complaints, which represent approximately 10 percent of complaints filed, we found that DOL has a lengthy two-phase review process before complaints are referred to OSC. For those complaints where a servicemember requests that his/her complaint be referred to OSC, two sequential DOL reviews take place: a DOL Veterans' Employment and Training Service (VETS) regional office prepares a report of the investigation, including a recommendation on the merits of the complaint, and a regional DOL Office of the Solicitor conducts a separate legal analysis and makes an independent recommendation on the merits of the complaint. For those complaints referred to OSC during the period February 8, 2005, through September 30, 2006, we found that it took an average of 247 days or about 8 months before DOL sent the complaint to OSC. DOL uses the same process for nonfederal complaints, which are referred by DOL to DOJ, but we have not conducted a similar analysis of those complaints.

**b. What can each of your agencies do to make this process more efficient and effective for veterans?**

We have made a number of recommendations to DOD, DOL, DOJ, and OSC to improve the efficiency and effectiveness of their USERRA complaint processes. The agencies have generally been responsive to our recommendations. The agencies have improved their implementation of USERRA in the areas of outreach to employers, data sharing and trend information, reporting to Congress, and the internal review of DOL's investigators' determinations of USERRA complaints. One key effort that DOL has implemented is the use of an electronic case management system to more efficiently and effectively manage its data. At the time of our analysis of closed and reopened complaints, DOL was using a paper file system to manage its records. We had to conduct manual reviews of the individual case files to obtain the data necessary to calculate the total elapsed time for those cases that were opened and closed multiple times. This new electronic system now provides more visibility of the case data and could make it easier to determine total processing time, if the data are sufficiently reliable.

**2. We know as the war grows, so will the number of returning veterans who may need USERRA protection, resulting in a much greater case load than DOL, DOD, DOJ, OSC are currently handling.**

**a. Is the system as it stands today, ready and able to handle a possible increase in USERRA claims?**

USERRA provides both informal and formal assistance to servicemembers. Our past work reviewed the types and extent of assistance but did not address the adequacy of resources to handle any potential increase in USERRA complaints. Under the current system, servicemembers who have USERRA-related issues with their employers can file informal complaints with DOD's ESGR. A subgroup of ESGR's specially trained volunteers serve as impartial ombudsmen who informally mediate USERRA issues that arise between servicemembers and their employers. When ESGR ombudsmen cannot resolve complaints informally, they notify servicemembers about their options. Servicemembers can file formal complaints with DOL or file complaints directly in court (if their complaints involve nonfederal employers) or with the Merit Systems Protection Board (if their complaints involve federal executive branch employers). Under a federal sector demonstration project established by the Veterans Benefits Improvement Act of 2004,<sup>2</sup> DOL investigates complaints against federal executive branch agencies for individuals whose Social Security numbers end in even numbers, and OSC is authorized to directly receive and investigate complaints and seek corrective action for individuals whose Social Security numbers end in odd numbers.

When a servicemember files a formal complaint with DOL, one of VETS's investigators examines and attempts to resolve it. If VETS's investigators are unable to resolve servicemember complaints, DOL is to inform servicemembers that they may request to have their complaints referred to DOJ (for complaints against private sector employers or state and local governments) or to OSC (for complaints against federal executive branch agencies).

Our February 2007 report showed that nearly 10,000 informal complaints had been filed with ESGR and over 2,000 formal complaints had been filed with VETS and OSC during fiscal years 2004 and 2005.<sup>3</sup> At the time of our report the data were not yet available for fiscal year 2006.

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<sup>2</sup>Pub. L. No. 108-454, § 204 (2004), 38 U.S.C. § 4301 note. The demonstration project was extended through December 31, 2007. See section 130 of Pub. L. No. 110-92, as amended by Pub. L. No. 110-149 (Dec. 21, 2007).

<sup>3</sup>GAO, *Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues*, GAO-07-259 (Washington, D.C.: Feb. 8, 2007).

**b. How can your agencies work proactively to prevent the need for USERRA claims in the future?**

DOD and DOL have taken steps to conduct outreach efforts to educate servicemembers and employers about their respective responsibilities under USERRA. Much of DOD's outreach is accomplished through ESGR, which performs most of its work through over 4,000 volunteers. DOL conducts outreach through its VETS investigators, who are located nationwide. To conduct this outreach, DOD has placed an increased emphasis on capturing servicemembers' civilian employer data. In 2001, DOD established a database to collect voluntarily reported employer information from reserve component members. In March 2003, DOD directed the military departments to collect civilian employer information, and in August 2004, DOD implemented regulations that required each military department to implement employment related information reporting requirements for personnel assigned to the Ready Reserve. The department has established a 95-percent reporting compliance goal for the Selected Reserve. In August 2006, DOD's data showed an overall compliance rate of 91 percent.

Evidence that increased attention is also being paid to servicemembers' education is shown in the June 2006 Status of Forces Survey results. The 2006 survey showed that more personnel reported being briefed on USERRA than in 2004. Servicemembers reported being briefed on USERRA an average of 1.8 times compared with 1.5 times in May 2004. Additionally, in May 2004, 27 percent of the servicemembers reported that they had never been briefed on USERRA and in June 2006 that number had decreased to 21 percent.

**3. I understand that DOL and DOD have been working together to address the data compatibility concerns that GAO raised concerning common complaint categories for USERRA claims and that we can expect a pilot test of this new program in 2008.**

**a. Will this new initiative fully address the data concerns GAO raised so that congress has a more complete picture of the types of USERRA claims being filed?**

When implemented, the common data fields will allow analyses to be conducted that will provide Congress with a more comprehensive picture of the types of claims being filed. According to DOD and DOL officials, DOD's ESGR and DOL developed a USERRA issue crosswalk between ESGR problem codes and DOL's USERRA Information Management System (UIMS) issue codes. While this crosswalk will allow both agencies to match common issues, it only applies to cases DOL's VETS investigates and does not apply to claims handled by DOJ and OSC. To include servicemember claims filed with ESGR in DOL's annual report to Congress, all data will be sent from ESGR to VETS using UIMS codes. This change will allow for trend analysis to be conducted starting with fiscal year 2008 data. However, because existing data will not be recoded, it will be several years before any meaningful "trend" analysis can be performed that will show what is

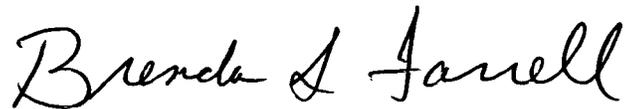
happening over time in the various complaint categories. At the time of our testimony, November 2007, *DOL's USERRA Annual Report to Congress for Fiscal Year 2006* due in February 2007 had not yet been released.

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We will make copies of this letter available to others upon request. This letter will also be available at no charge on GAO's Web site at <http://www.gao.gov>.

For additional information on our work on federal agencies' activities regarding USERRA, please contact me at (202) 512-3604 or [farrellb@gao.gov](mailto:farrellb@gao.gov), or George H. Stalcup, Director, Strategic Issues at (202) 512-9490 or [stalcupg@gao.gov](mailto:stalcupg@gao.gov). Contact points for our Offices of Congressional Affairs and Public Affairs may be found on the last page of this letter.

Sincerely yours,

A handwritten signature in black ink that reads "Brenda S. Farrell". The signature is written in a cursive, flowing style.

Brenda S. Farrell  
Director  
Defense Capabilities and Management

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