

**House Committee on Veterans' Affairs**

**"Protecting the Rights of Those Who Protect Us: Public Sector Compliance with the Uniformed Services Employment and Reemployment Rights Act and Improvement of the Servicemembers Civil Relief Act."**

**STATEMENT OF**

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Introduction

Mr. Chairman, and distinguished members of the Committee, I am honored to speak with you today about the vital role played by the Office of Special Counsel (OSC) in enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) and to assure you that OSC is dedicated to enforce the law expeditiously and decisively so that no one's reemployment rights are denied and no one suffers invidious discrimination because of military service.

The country is in the midst of an historic and unprecedented mobilization and forthcoming demobilization of National Guard and Reserve forces. As of June 9, 2004, there were more than 168,000 members of the Air and Army National Guard and Reserve Forces on active duty to fight the global war on terrorism. Those brave and talented servicemen and women have temporarily left their civilian vocations and joined career servicemen, such as my 20-year old son, Marine Lance Corporal Michael Bloch, serving in the First Battalion 7th Marine Regiment, who has been stationed in Iraq once and is soon to be deployed again to Iraq.

The Federal government is the country's largest employer of guardsmen and reservists. Indeed, my Deputy and several other OSC employees are members of the National Guard or Reserve.

God willing, each of the thousands of guardsmen and reservists who are proudly and valiantly defending our freedom will return safely home to their families, friends, and civilian jobs and careers.

In light of their dedication and service to our country, I am truly honored to be among those public servants asked to provide you with information about the important law that was enacted to protect their employment and reemployment rights.

Moreover, I am grateful to be here because today's hearing provides a timely occasion and an appropriate forum to dispel any false impression regarding my agency's commitment to protecting the employment rights of those brave military service members who have served,

are currently serving, and who will serve in the uniformed services.

Before becoming Special Counsel on January 5, 2004, there had been criticism of OSC's enforcement of USERRA. I examined therefore that critical commentary in light of OSC's past policies and practices. I concluded that some of the criticism was born of a lack of prompt action on USERRA cases.

Mr. Chairman and Committee members, be assured that regardless of what occurred or did not occur prior to my taking office, OSC, under my leadership, is steadfastly committed to enforcing USERRA. As you know, the statute states that it is the sense of the Congress that the Federal government should be a model employer in fulfilling its statutory obligations under USERRA. I assure you that as head of the independent agency with authority to prosecute violations of USERRA, I share completely in Congress' sense. Indeed, I have given USERRA matters a new found priority so that it now receives the attention it deserves.

### OSC's Role in Enforcing USERRA

Pursuant to Section 4324 of Title 38, the OSC is authorized to act as the attorney for an aggrieved person and initiate legal action against the involved Federal employer before the U.S. Merit Systems Protection Board (MSPB). The OSC is the Federal sector's "special prosecutor" of meritorious USERRA cases. As special prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either via litigation against, or full-corrective action settlements with, the involved Federal employer.

Under USERRA, a person who has sought relief through the U.S. Department of Labor (DOL), Veterans' Employment and Training Service (VETS), may request that OSC review his or her USERRA claim to determine whether it has merit and, if so, represent the person in USERRA litigation before the MSPB.

When such a request is made, OSC receives from the DOL's Regional Solicitor (RSOL) the VETS investigative file and the RSOL's legal analysis of the claim. As special prosecutor, OSC objectively reviews the facts and laws applicable to each claim. Where the Office of Special Counsel is satisfied that a claimant is entitled to relief, we may then exercise our prosecutorial authority and represent the claimant before the MSPB and, if required, on appeal to the U.S. Court of Appeals for the Federal Circuit.

From fiscal years 2000 through 2003, the OSC has received more than 50 referrals from VETS. During that time, full corrective action was successfully negotiated on every USERRA claim that we determined had merit.

Prior to today, the OSC had never filed a USERRA action before the MSPB. Mr. Chairman, unfortunately I had to instruct my staff to file a case this morning with MSPB because an Agency was not willing to provide adequate relief for a service member. I assure you that under my leadership there will be no hesitation to commence litigation against a Federal agency where the evidence shows that such agency has failed to comply with any provision

of USERRA.

### Improving the Process

As mentioned, I have carefully examined USERRA's referral process since becoming Special Counsel. I have determined that the process creates unnecessary inefficiency.

For example, it is unclear whether the OSC has the authority under USERRA to investigate claims or pursue disciplinary action against offending supervisors as we do in other Federal employment violations we enforce. Instead, the investigative function is performed by VETS. Hence, if deemed necessary during our review of a USERRA claim, OSC will request that the involved Federal agency voluntarily provide additional information. Additionally, pursuant to the February 7, 2001, Memorandum of Understanding (MOU) between OSC and VETS, OSC may request VETS investigative assistance. Indeed, pursuant to that MOU, VETS recently assisted us in obtaining additional relevant evidence that is important to our current review of a particular case.

While those methods are adequate for us to collect additional evidence, the bifurcation of the investigative and prosecutorial steps is not as efficient as OSC's authority to investigate and prosecute allegations prohibited personnel practice under Title 5.

In my judgment, our inability to investigate directly USERRA cases adversely affects our timely enforcement of meritorious cases. There is inherent delay in the duplicative effort resulting from the OSC's review of VETS and RSOL's respective investigation and legal analysis. Further, the OSC receives a USERRA referral only after RSOL has completed its legal analysis, which may take between three to six months from the time the claimant has requested that the matter be referred to OSC. Given that we must conduct an independent analysis of the facts and issues presented, the current referral process duplicates that effort.

I agree with British Prime Minister William Ewart Gladstone that "justice delayed is justice denied."

Already, I have made changes to reduce the inefficiency caused by duplication and delay. First, through our experience in investigating and analyzing prohibited personnel practices such as whistleblower reprisal cases, we have learned that the closer our attorneys are involved in the investigation, the more efficiently we resolve cases. For example, the merger of investigative and analytical functions lessens the chances of "over-investigating" cases that are without merit and increases the chances of identifying cases warranting prosecution. As to the latter, the sooner we find meritorious claims, the sooner the OSC can move toward obtaining corrective action on behalf of the aggrieved person.

Thus, at my urging and with my approval, the OSC and DOL are drafting amendments to our MOU concerning the referral process. The changes under consideration aim to have our investigative and legal expertise involved at a much earlier stage than under the current referral process. In particular, we have asked VETS to identify, as soon as practical, difficult

cases that would benefit from OSC's early involvement. By alerting our office to such cases, there will be a reduction in duplication of effort.

I appreciate Department of Labor Solicitor Howard Radzely and his staff for working closely with us in bringing about this change, and I have already seen the benefits of having the OSC's enforcement role triggered sooner. In fact, soon after this idea was presented, the RSOL invited the OSC's involvement in a USERRA matter prior to referring the matter to us. The OSC contacted the agency and we obtained an extension of the agency-set deadline for the claimant to accept a settlement offer that DOL had procured. The OSC thereafter obtained additional information from the agency and, along with the information obtained by VETS, was able to guide the claimant to a successful resolution of his USERRA claim. But for DOL's cooperation in allowing OSC to be involved earlier than usual, the settlement offer would have expired, and the claimant may not have secured a favorable resolution.

Moreover, OSC has changed the manner in which USERRA referrals are handled internally. Since becoming Special Counsel, I have established a Special Project Unit (SPU). The SPU's overriding function is to maximize OSC's efficiency in fulfilling its many crucial missions. The SPU can be likened to a SWAT team that can be quickly deployed to address any deficiency in OSC's ability to fulfill its various missions. When such an issue arises, OSC personnel having particular expertise in the given area are detailed to the SPU. For example, the SPU is examining new ways to eliminate permanently the OSC's chronic backlogs.

Experienced attorneys with specialized knowledge of USERRA have been detailed to the SPU and, at my direction, all USERRA referrals are assigned to the SPU. By assigning all USERRA referrals to the SPU, the matters receive priority attention and consideration. Additionally, OSC is prepared to detail additional attorneys and investigators to the SPU to handle any surge in USERRA referrals as the result of the record number of guardsmen and reservists being demobilized and returning to the Federal workforce.

In summary, our office has taken steps to speed up the referral process such that meritorious USERRA claims can be more quickly identified and prosecuted. I further pledge to devote whatever additional resources are needed to ensure that the law is vigorously enforced.

### Educating the Public

I sense another problem affecting the referral process: lack of awareness among the Federal workforce about our role in enforcing USERRA. Regardless of the merit of a USERRA claim, a person has the right to ask that his or her unresolved claim be referred to OSC. Yet, in fiscal year 2003, OSC received only seven USERRA referrals while the total number of Federal sector complaints is in the hundreds.

That low number of referrals may be the result of either: a) people knowingly choosing to bypass OSC as an avenue of redress, or b) people lacking accurate information about how OSC can protect their employment and reemployment rights. As to the latter, we want the public to know that OSC is here to assist persons who have had their reemployment rights violated and who have suffered discrimination because of their military service. We have

already taken steps to send that message.

First, I have changed the OSC's prohibited personnel practice outreach program so that it now includes information about OSC's role in enforcing USERRA. Now, each time OSC visits a Federal agency to provide prohibited personnel practice training, Federal employees will be informed of OSC's role in protecting the employment and reemployment rights of guardsmen and reservists.

Second, we have also been working closely with the Department of Defense's Employer Support for the Guard and Reserve (ESGR) to ensure that accurate information about the OSC is being disseminated more broadly. I extend my appreciation to ESGR for helping get the word out about OSC's vital role under USERRA.

Finally, the OSC's USERRA Coordinator—a GS-15 Supervisory Attorney with USERRA expertise— maintains OSC's telephonic and electronic USERRA "hotlines" and regularly provides information and assistance to persons and employers about their respective rights and responsibilities under USERRA.

We are encouraged that these efforts will lead to a greater public awareness of our role, and we will continue to look for additional ways to get out the message that we will aggressively enforce the law and protect veterans, reservists, and guardsmen.

As for the seeming reluctance of persons to seek OSC's assistance, allow me to make the most of my appearance here today by setting the record straight:

I say to the brave guardsmen and reservists risking their lives for our freedom, I am completely and passionately committed to the protection of your employment and reemployment rights. Your sacrifices merit no less than OSC's 100% commitment to enforcing USERRA.

I state emphatically before this committee to the heads of every Federal agency that one USERRA complaint is one too many. As Special Counsel, I:

- 1) will not tolerate discrimination against persons because of their service in the uniformed services;
- 2) will not permit anything less than the prompt reemployment of persons upon their return from military service; and
- 3) will prosecute aggressively the failure to comply with any provision of USERRA, and I will not hesitate to file an action before MSPB if necessary.

With that in mind, I challenge every Federal agency to be a model employer under USERRA by protecting fully, vigilantly, and enthusiastically the employment and reemployment rights of its employees and applicants for employment. It is an ambitious goal, but one that is within reach – and it is the right thing to do.

Indeed, it is a goal that Federal agencies must strive to attain; and, to every Federal agency trying to do so, the OSC pledges its assistance. As for complacent agencies, be advised that the OSC shall not waiver from its commitment to enforce USERRA aggressively, diligently, and zealously.

### Conclusion

Mr. Chairman and members of the Committee, regardless of what may have been the past policy; under my leadership OSC takes its role as the sole prosecutorial enforcer of USERRA seriously. As you can see, we have already moved away from past practice and have given USERRA cases the priority they deserve.

Shakespeare wrote:

*There is a tide in the affairs of men, which taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat. And we must take the current when it serves, or lose our ventures.*

As the Federal government is facing an historic and unprecedented number of guardsmen and reservists returning to their Federal careers, OSC will soon be afloat upon a full sea.

Consequently, we are properly focused, and newly invigorated to fulfill our vital role under USERRA. We will navigate the current with unwavering commitment to enforce USERRA law expeditiously and decisively. We will welcome any legislative changes that enhance our ability to enforce this important law.

Mr. Chairman and members of the Committee, I thank you for the opportunity to testify today.