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## U.S. OFFICE OF SPECIAL COUNSEL SECURES SETTLEMENT FOR IRAQ WAR VETERAN IN LANDMARK USERRA CASE

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FOR IMMEDIATE RELEASE

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WASHINGTON, DC/ December 14, 2009— The U.S. Office of Special Counsel (OSC) today announced that it settled a landmark case involving a former federal contractor and Army Reserve Brigadier General who served in Iraq but was unable to get his civilian job back upon his return from deployment.

In May 2006, Michael J. Silva was working as a contract employee at the U.S. Department of Homeland Security, Customs and Border Protection (CBP) facility in Lorton, Virginia. A member of the Army Reserve, he was deployed to Iraq and served honorably for over a year until his release from active duty in August 2007.

Soon after his return, Mr. Silva requested reinstatement in his former position supporting CBP, exercising his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), a federal law that prohibits employment discrimination against veterans and entitles them to reinstatement in civilian jobs upon their return from duty. The contractor, SPS Consulting (SPS), notified CBP of Mr. Silva's request. However, the CBP's Contracting Officer Technical Representative informed SPS that it was satisfied with Mr. Silva's replacement and would "cancel the contract" if SPS attempted to reinstate Mr. Silva.

Mr. Silva subsequently filed USERRA complaints against both SPS and CBP for failing to reinstate him. While SPS was his nominal employer, USERRA defines "employer" to include "any person, institution, organization, or other entity that pays salary or wages for work performed *or that has control over employment opportunities, including . . . the Federal Government.*"

OSC investigated Mr. Silva's complaint against CBP, determined it had merit, and represented Mr. Silva in a USERRA appeal before the U.S. Merit Systems Protection Board (MSPB), which adjudicates employment complaints involving federal agencies. Prior to Mr. Silva's case, the MSPB had never before determined whether the federal government could be held liable to a contract employee under USERRA. Mr. Silva sought lost wages and other benefits for his failure to be reinstated.

After an Administrative Judge dismissed Mr. Silva's case for lack of jurisdiction, OSC filed an appeal with the full MSPB. In a published decision, the MSPB reversed the dismissal, holding that OSC's theory that CBP acted as Mr. Silva's "employer" was cognizable under USERRA. In its ruling, the MSPB stated:

"We agree with [Mr. Silva] that a federal agency could be considered an individual's 'employer' under USERRA, even when the individual was not appointed in the civil service but instead was formally employed by a government contractor."

The Board then remanded the case for further development of the record on "the degree of control that the agency exercised over [Mr. Silva's] reemployment."

Following the MSPB's decision, Mr. Silva and CBP negotiated a settlement agreement and the case was dismissed. The parties agreed to keep the terms of the settlement confidential.

Federal agencies should take note of the MSPB's decision, which subjects them to potential liability if they interfere with the employment rights of Guard and Reserve members who work as civilian government contractors, even though such individuals are not government employees in the traditional sense. OSC applauds CBP's efforts to settle this matter to Mr. Silva's satisfaction.

Mr. Silva is currently employed in the private sector and serves as a Vice President of the Reserve Officers Association. He also continues his membership in the Army Reserve.

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*The U.S. Office of Special Counsel (OSC) is an independent investigative and prosecutorial agency whose primary mission is to safeguard the merit system in federal employment by protecting federal employees and applicants from prohibited personnel practices, especially retaliation for whistle blowing. OSC also operates as a secure channel for whistleblower disclosures and enforces the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act. For more information please visit our web site at [www.osc.gov](http://www.osc.gov) or call 1-800-872-9855.*