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## OSC SEEKS QUICK ACTION TO PROTECT TWO PUBLIC HEALTH AND SAFETY WHISTLEBLOWERS

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### FOR IMMEDIATE RELEASE

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Special Counsel Carolyn Lerner has announced that the US Office of Special Counsel filed critical requests on Friday on behalf of two federal whistleblowers to "stay" (temporarily halt) serious adverse personnel actions against them. The requests were filed with the Merit System Protection Board (MSPB).

In OSC v. U.S. Marine Corps, the Special Counsel is seeking a 45-day stay on the proposed indefinite suspension without pay of Franz Gayl, a high-level civilian science and technology advisor to the Marines. Gayl, a GS-15, blew the whistle on the failure of the Marine Corps to timely provide Mine Resistant Ambush Protected (MRAP) vehicles to our troops in Iraq, as well as other protected disclosures. Gayl's suspension is slated to begin on October 13. The Marine Corps stripped Gayl of his Top Secret security clearance one year ago and placed him on administrative leave. While the MSPB does not have jurisdiction to hear a challenge to Gayl's security clearance suspension, OSC asserts that the MSPB may nonetheless rule on Gayl's claim that his indefinite suspension without pay violates the Whistleblower Protection Act.

In OSC v. US Public Health Service, the Special Counsel is seeking to stay the effect of the 2010 performance evaluation of Paul T. Hardy, a Regulatory Review Officer for the U.S. Public Health Service (USPHS). In 2009 Hardy was detailed to the US Food and Drug Administration, his previous employer. An expert in biomedical engineering, Hardy led a team of scientists who found serious safety and effectiveness problems with a Full-Field Digital Mammography device that is supposed to detect breast cancer, the Carestream Health Inc. KODAK DirectView Computed Mammography. Such devices are used on millions of women every year to detect and diagnose breast cancer. Concerned that FDA managers intended to approve the device over his team's recommendations, Hardy objected and his supervisor accused him of insubordination. Hardy then documented his objections in official FDA records and disclosed his concerns to members of Congress. FDA then launched a criminal investigation of Hardy for "releasing Agency information without authorization." That investigation closed without any action against Hardy, but the agency approved the device late last year.

After having received Exceptional or Fully Successful performance evaluations the prior three years, Hardy was given a negative performance rating in January 2011. In May, he was placed on "Non-Duty with Pay Status" and prohibited from entering an FDA/HS facility. Based upon his negative performance review by FDA managers, the USPHS recommended against his promotion, which automatically resulted in his termination.

Ordinarily, MSPB does not have jurisdiction in matters concerning members of the uniformed services. At issue in this case is whether MSPB may consider a whistleblower claim

action by a member of a uniformed service who, like Hardy, was effectively an employee of the FDA at the time of his fatal performance evaluation.

Special Counsel Carolyn Lerner stated that “these cases concern serious threats to public health and safety, and raise important issues of law. OSC’s actions make clear that this agency will vigorously protect federal employees against retaliation when they blow the whistle.” Ms. Lerner recently completed her first 100 days at the helm of the Office of Special Counsel.

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*The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC’s primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. For more information, please visit our website at [www.osc.gov](http://www.osc.gov).*