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May 3, 2023

The Honorable Mariannette J. Miller-Meeks  
Chairwoman  
Subcommittee on Health  
Committee on Veterans' Affairs  
House of Representatives

The Honorable Jen Kiggans  
Chairwoman  
The Honorable Frank J. Mrvan  
Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Veterans' Affairs  
House of Representatives

The Honorable Tracey Mann  
House of Representatives

The Honorable Chris Pappas  
House of Representatives

**VA Whistleblowers: Resolution Process for Retaliation Claims**

Accessible Version

Federal employee whistleblowers can potentially help protect the government from fraud, waste, and abuse by reporting allegations of wrongdoing, such as a violation of law, abuse of authority, or gross mismanagement. However, these whistleblowers may risk reprisal from their agencies for their disclosures, such as demotion, reassignment, or termination. The Civil Service Reform Act of 1978 provided protections for whistleblower disclosures and created the Office of Special Counsel (OSC), now an independent federal investigative and prosecutorial agency. OSC is responsible for investigating prohibited personnel practices (PPP), including complaints of whistleblower retaliation.

The Department of Veterans Affairs (VA) is one of the largest federal agencies, with around 400,000 employees across hundreds of medical facilities, clinics, and benefits offices. In addition to protections under the Civil Service Reform Act of 1978, VA employees who make a whistleblower disclosure are also protected under the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017. This law established the Office of Accountability and Whistleblower Protection (OAWP). OAWP's functions include investigating allegations of misconduct against senior agency officials and receiving and referring whistleblower disclosures. Additionally, the VA has implemented administrative reforms in response to claims and reports of inadequate whistleblower protections within the agency over the last few years.

VA whistleblowers who suspect retaliation can submit complaints both externally, to agencies such as OSC, or internally to OAWP.<sup>1</sup> In some cases, the VA may enter into a settlement agreement with the whistleblower. Negotiated settlements provide legally binding resolution of the case and can help avoid lengthy litigation.

You asked us to provide information on VA whistleblower retaliation investigations and settlement agreements. This report describes

- (1) The process, length, and outcomes of OSC investigations of whistleblower retaliation allegations from VA employees, and
- (2) How VA resolves allegations of whistleblower retaliation through settlement agreements.

On February 23, 2023, we briefed staff on our preliminary observations. This report transmits a final version of the briefing slides (see enclosure I). We have also included additional data tables on case volume, case length, and favorable actions across federal agencies (see enclosure II). This is an interim product. We have ongoing work that expands on the topics covered in this report, including on OAWP investigations.

For both objectives, we reviewed OSC and VA documents related to whistleblower retaliation investigations, and we interviewed agency officials about the process for settling whistleblower retaliation claims. To address the first objective, we also analyzed OSC case management system data to provide a summary of the volume, length, and outcomes of whistleblower retaliation cases involving VA employees from fiscal years 2018 through 2022.<sup>2</sup> PPP cases investigated by OSC can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases may cover other issues as well. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. To assess the outcomes of cases, we analyzed the percentage of cases that were closed with favorable actions, which are actions that could result in a benefit to the complainant (i.e., whistleblower).<sup>3</sup>

We assessed the reliability of these data by reviewing available technical documentation, interviewing knowledgeable officials, and performing electronic testing of data. We determined the data were sufficiently reliable for describing the volume, length, and outcomes of OSC investigations of allegations of whistleblower retaliation against VA employees. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed.

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<sup>1</sup>Whistleblowers who face retaliation can also file an appeal with the Merit Systems Protection Board (MSPB). In some circumstances, an individual may file an Individual Right of Action claim where they must seek corrective action from OSC before appealing to the MSPB. There are also some circumstances under which an individual can file an appeal with MSPB without first filing with OSC. Merit Systems Protection Board, *Whistleblower Protections for Federal Employees* (Washington, D.C.: September 2010).

<sup>2</sup>Data for fiscal year 2022 are as of September 7, 2022, and may exclude cases closed between that date and the end of the fiscal year.

<sup>3</sup>For example, cases that closed with favorable actions included those that resulted in a settlement agreement or when the agency took a corrective action after an OSC request.

For the second objective, we also interviewed VA officials from OAWP and the Office of General Counsel (OGC) to understand policies surrounding settlement agreements to resolve claims of whistleblower retaliation. Specifically, we discussed the available guidance on the negotiation process, legal representation, and monetary settlements for agreements that resolve whistleblower retaliation claims. We also asked about VA's process for tracking data on settlement agreements that resolve whistleblower retaliation claims.

We conducted this performance audit from June 2022 to May 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In summary, cases alleging whistleblower retaliation comprised a majority of OSC PPP cases involving VA employees. These cases generally took longer to close than PPP cases overall and have increasingly closed with favorable actions in recent years. Over two-thirds (69 percent) of OSC PPP cases involving VA employees included allegations of whistleblower retaliation from fiscal years 2018 through 2022, according to our analysis of OSC's data. During that period, cases with whistleblower retaliation allegations took OSC a median of 94 days to close, compared to a median of 83 days for all PPP cases involving VA employees. Whistleblower retaliation cases that closed with favorable actions took longer to close (a median case length of 391 days). An increase in the percentage of cases closed with favorable action has contributed to longer case times overall, according to officials. In fiscal year 2018, 3 percent of VA whistleblower retaliation cases closed with favorable actions, compared to 10 percent in fiscal year 2022.<sup>4</sup> OSC closed a majority (59 percent) of VA whistleblower retaliation allegations over this period due to insufficient evidence for further action.

The VA and a complainant can settle claims of whistleblower retaliation in the office where a dispute arises and various parties are involved in the process. Settlement negotiations can happen at any point in the complaint process. A VA settlement official, who represents the office where the dispute occurred, is responsible for negotiating and approving the terms of the agreement. This is done in conjunction with an assigned VA attorney, who provides legal representation and advice to the agency's settlement official. A complainant has the right to legal or non-legal representation, or they can represent themselves. VA has general guidance available regarding the clearance authority required for monetary settlements above a certain amount. While there are no VA guidance documents that pertain specifically to whistleblower retaliation settlement agreements, VA attorneys provide legal advice based on precedential case law. This advice can include the appropriate corrective action or level of monetary compensation. While OAWP does not have a role in settlement agreements, it implemented a system in 2022 to track data on whistleblower retaliation settlement agreements in response to Congressional inquiries.

### **Agency Comments**

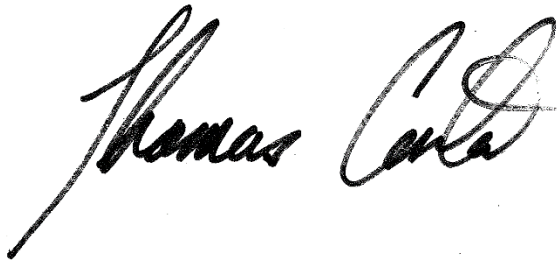
We provided a draft of this report to VA and OSC for review and comment. VA and OSC both provided technical comments, which we incorporated as appropriate.

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<sup>4</sup>We also analyzed data on the proportion of cases with whistleblower retaliation allegations, case length, and percentage of cases closed with favorable actions across federal agencies. VA was generally similar to rest of the government on these values. See enclosure II for additional data tables not included in the briefing slides.

We are sending copies of this report to the appropriate congressional committees, the Secretary of Veterans Affairs, and the Special Counsel. In addition, the report will be made available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-4769 or [costat@gao.gov](mailto:costat@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff members who made key contributions to this report are listed in enclosure III.

A handwritten signature in black ink that reads "Thomas Costa". The signature is written in a cursive, flowing style.

Thomas Costa  
Director, Education, Workforce, and Income Security

Enclosure(s) – 3





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**Preliminary Observations on the Resolution Process  
for Whistleblower Retaliation Claims from Department  
of Veterans Affairs (VA) Employees**

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**A Briefing to the House Veterans' Affairs Committee,  
Oversight and Investigations Subcommittee**

**February 23, 2023**

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For more information, contact Thomas Costa at [costat@gao.gov](mailto:costat@gao.gov)

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## Overview

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## Introduction

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- Federal employee whistleblowers report allegations of wrongdoing such as a violation of law, abuse of authority, or gross mismanagement. While whistleblowers potentially help to safeguard the government from fraud, waste, and abuse, they may risk reprisals from their agencies for their disclosures, including demotion, reassignment, or termination.
- The Civil Service Reform Act of 1978 provided protections for whistleblower disclosures and created the Office of Special Counsel (OSC) to help protect whistleblowers across federal agencies. OSC is now an independent federal investigative and prosecutorial agency tasked with protecting federal employees and applicants from prohibited personnel practices, including reprisal for whistleblowing.

## Introduction

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- The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 established the Office of Accountability and Whistleblower Protection (OAWP) whose functions include investigating allegations of misconduct against senior agency officials, investigating allegations of whistleblower retaliation against any VA supervisor, and receiving and referring whistleblower disclosures.<sup>1</sup> Additionally, the VA has implemented administrative reforms in response to claims and reports of inadequate whistleblower protections over the last few years.
- VA whistleblowers can submit complaints of whistleblower retaliation with external agencies such as OSC, or internally with OAWP. In some cases, the complainant (i.e., whistleblower) may enter into a settlement agreement with the VA to resolve the dispute.

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<sup>1</sup>Pub. L. No. 115-41, § 101, 131 Stat. 862, 863-65.

## Objectives

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- GAO received requests related to VA whistleblower retaliation investigations and settlement agreements from the Chair and Ranking Member of the Subcommittee on Oversight and Investigations, the Chair of the Health Subcommittee, along with other members of the House Veterans' Affairs Committee.
- This interim briefing provides preliminary observations on:
  - (1) The process, length, and outcomes of OSC investigations of whistleblower retaliation allegations from VA employees, and
  - (2) How VA resolves allegations of whistleblower retaliation through settlement agreements.



## Summary of Preliminary Observations

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- **Objective 1:** Cases alleging whistleblower retaliation comprise a majority of OSC prohibited personnel practice (PPP) cases involving VA employees. Cases involving alleged whistleblower retaliation generally take longer to close than overall PPP cases for VA employees, on average.
  - About 5 percent of all VA whistleblower retaliation cases (174 out of 3,706 cases) closed with a favorable action—an outcome that benefitted the complainant—in the last 5 years, and this percentage increased in recent years.<sup>2</sup>
  - Most VA cases alleging whistleblower retaliation are closed because OSC finds insufficient evidence for further action.

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<sup>2</sup>In cases alleging whistleblower retaliation, the complainant refers to the alleged whistleblower.

## Summary of Preliminary Observations

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- Objective 2: The VA and a complainant can settle claims of whistleblower retaliation in the office where a dispute arises. VA officials described the practices and roles of various parties during the initiation, negotiation, and enforcement of settlement agreements.
  - VA has general guidance available regarding the clearance authority required for settlement agreements.
  - VA's Office of General Counsel (OGC) provides legal representation of the agency during this process, and the complainant is entitled to their own representation (legal or non-legal).

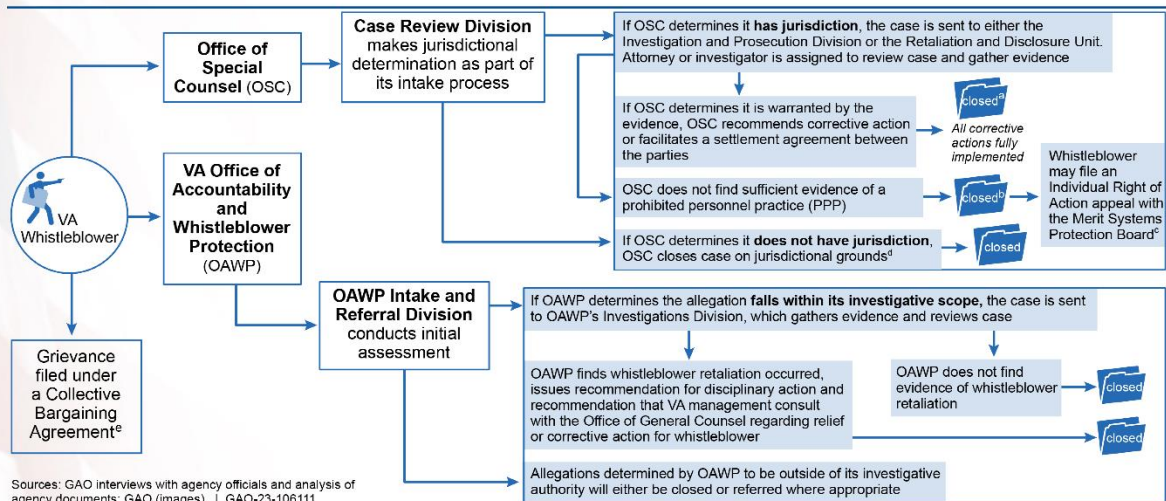
## Background: Whistleblower Retaliation Complaints

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- Currently, VA whistleblowers can choose to submit complaints of whistleblower retaliation both internally and with external agencies (see fig. 1).
  - Internal avenues to file a complaint include filing a retaliation complaint with OAWP or filing a grievance under a collective bargaining agreement.
  - External options include filing a complaint with OSC or an appeal with the Merit Systems Protection Board (MSPB).



**Figure 1: Selected Avenues that VA Whistleblowers May Choose to File a Claim of Retaliation**



Sources: GAO interviews with agency officials and analysis of agency documents; GAO (images). | GAO-23-106111

<sup>1</sup>If an agency disagrees with OSC's finding of a PPP or corrective action, OSC may file a complaint seeking corrective action directly with the Merit Systems Protection Board.

<sup>2</sup>Allegations that are investigated by OSC can close for a variety of reasons and OSC tracks over 40 closing dispositions. For example, a case may close if the complainant withdraws their complaint or does not provide further information.

<sup>3</sup>Under an Individual Right of Action, an individual must seek corrective action from OSC before appealing to the Merit Systems Protection Board. There are some circumstances under which an individual can file an appeal with the Merit Systems Protection Board, without first filing with OSC, known as "otherwise appealable actions."

<sup>4</sup>OSC may refer cases to the Office of Inspector General or other agencies in certain circumstances.

<sup>5</sup>In these circumstances, the relevant union would represent the whistleblower in the grievance process.

## Background: Settlement Agreements

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- According to VA officials, VA may enter settlement negotiations with whistleblowers at any point in the process after filing a complaint with OSC or OAWP.
- Negotiated settlements provide legally binding resolution of a case and can help avoid lengthy litigation.

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## OSC Investigations: OSC Oversees Whistleblower Protections through Its Investigation of Prohibited Personnel Practices

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- PPPs represent various employment-related activities that violate federal merit system principles and are banned in the federal workforce.
- PPPs include whistleblower retaliation. For example, if a whistleblower believes their agency took, threatened to take, or did not take a personnel action because of a protected disclosure, they may file a retaliation complaint with OSC.
- OSC's website includes publicly available guidance on the whistleblower retaliation investigation process. OSC does not have internal guidance or standard operating procedures for conducting PPP investigations, but procedures are guided by statutory requirements that OSC investigate PPP allegations, according to officials. OSC units maintain libraries of additional resources that are available to employees and supervisors.

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## OSC Investigations: OSC Oversees Whistleblower Protections through Its Investigation of Prohibited Personnel Practices

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- When OSC receives a PPP complaint it initially makes a jurisdictional, but not investigative, determination.
  - According to OSC officials, some cases outside their jurisdiction may be referred to the relevant Office of Inspector General or Council of the Inspectors General on Integrity and Efficiency.
- Next, OSC sends cases where it determines it has jurisdiction to its Investigation and Prosecution Division. In certain instances where there is a companion whistleblower disclosure within 10 days of the complaint, the case is referred to its Retaliation and Disclosure Unit, according to OSC officials.
  - The relevant unit assigns an investigative attorney to the case who reviews/requests documents, interviews witnesses, etc.



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## OSC Investigations: OSC Oversees Whistleblower Protections through Its Investigation of Prohibited Personnel Practices

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- If OSC determines it is warranted by the evidence, OSC recommends corrective action—such as back pay or damages—to restore the complainant, or it facilitates a settlement agreement between the parties.
- OSC closes a case once all corrective actions have been fully implemented, according to OSC officials.
  - If the investigated agency disagrees with OSC's finding of a PPP or recommended corrective action, OSC may file a complaint seeking corrective action directly with the MSPB.
- OSC also closes cases if there is insufficient evidence for further action or insufficient information from the complainant.

## OSC Investigations: OSC Changed Its Initial Complaint Processing Procedures

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- In 2018, OSC changed its process for initially examining complaints. As a result, data on the percentage of cases that are closed after a preliminary investigation are not readily available.<sup>3</sup>
  - Anecdotally, about 90 percent of cases are closed after an initial review without further investigation, according to OSC officials. They said that a common reason for complaints to not be further investigated is because OSC received insufficient information to show that a PPP occurred.
  - Since August 2019, OSC investigators have had an option to identify the cases that are further investigated in a data field in its case management system. According to OSC officials, while this data field is used regularly, it is subject to human error. Officials said from fiscal years 2019 through 2022, between 10 and 14 percent of cases were marked as being further investigated.

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<sup>3</sup>Specifically, prior to the current intake process described previously, OSC had a Complaints Examining Unit that conducted preliminary investigations and then referred cases that warranted further investigation to the Investigation and Prosecution Division. However, the Complaints Examining Unit has since become part of the Investigation and Prosecution Division, and data on the various investigative stages of a complaint cannot be as clearly tracked as a referral from one unit to another in the OSC case management system.

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## OSC Investigations: Most OSC Cases Involving VA Employees Include Allegations of Whistleblower Retaliation

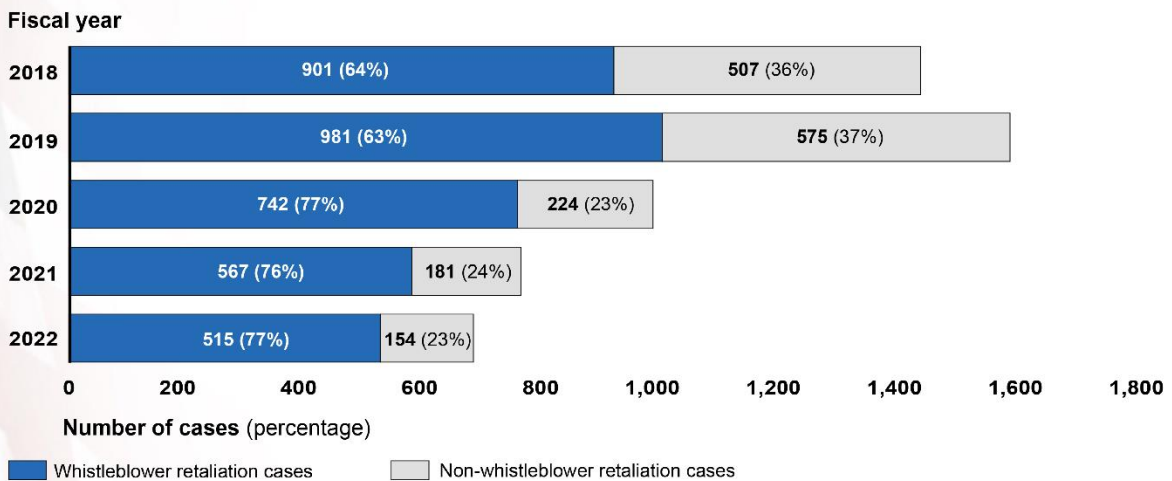
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- According to our analysis of OSC's case management system data, from fiscal years 2018 through 2022, **over two-thirds** (69 percent) of VA PPP cases involved allegations of whistleblower retaliation.
- While the total number of federal agency cases, as well as VA cases, with whistleblower retaliation allegations has **generally decreased** over the last 5 years, the proportion of VA PPP cases that include a whistleblower retaliation allegation has **generally increased** (see fig. 2).<sup>4</sup>
- Overall PPP cases arising from VA employee complaints comprise about a third of OSC's workload.

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<sup>4</sup>We observed a similar trend across all federal agencies in the proportion of PPP cases containing whistleblower retaliation allegations.

## Figure 2: Volume of Office of Special Counsel (OSC) Cases Involving VA Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year.

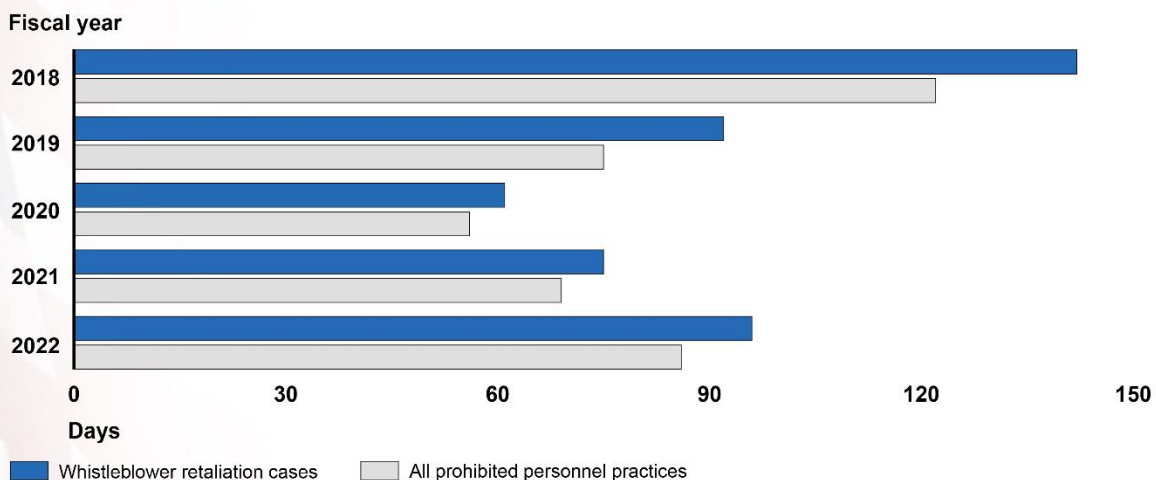


## OSC Investigations: Length of Cases Involving VA Employees

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- The **case length for those involving whistleblower retaliation allegations was longer** than across all PPP cases for VA employees. From fiscal years 2018 through 2022, the **median case length was 94 days** and the average length was 190 days (see fig. 3).
- In comparison, over the last 5 fiscal years, **the median case length was 83 days** for all PPP cases involving VA employees. The average case length was 166 days.

## Figure 3: Median Case Length for Office of Special Counsel (OSC) Investigations Involving VA Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-23-106111

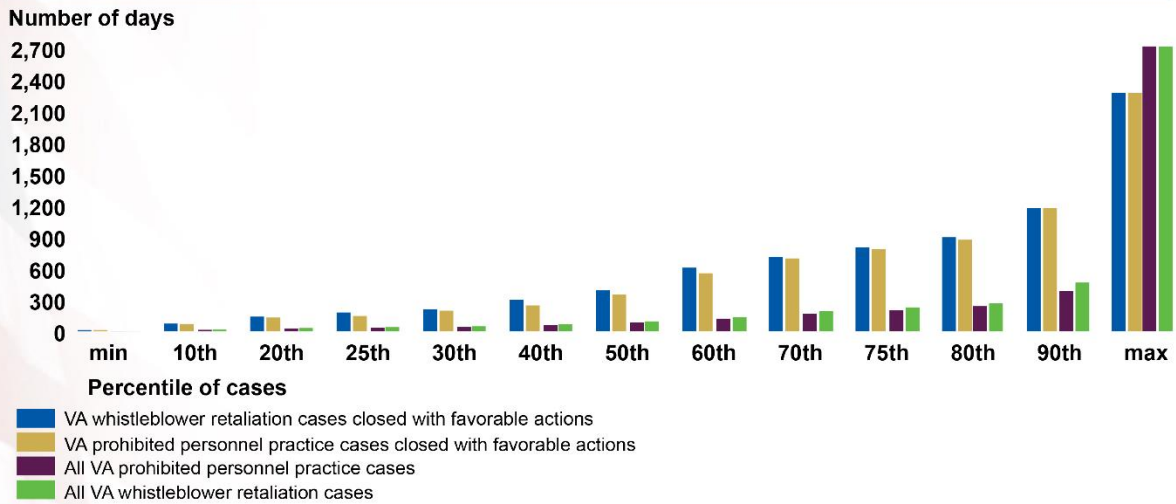
Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. "All prohibited personnel practices" includes cases with whistleblower retaliation allegations.

## OSC Investigations: Length of Cases Involving VA Employees

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- Cases that close with a favorable action tend to last longer than overall cases (see fig. 4).
  - From fiscal years 2018 through 2022, the median length of VA whistleblower retaliation cases closed with favorable actions was 391 days, and the average length was 537 days.
  - From fiscal years 2018 through 2022, the median length of VA PPP cases closed with favorable actions was 349 days, and the average length was 513 days.

**Figure 4: Case Length for Office of Special Counsel (OSC) Investigations Involving VA Employees by Percentile, Fiscal Years 2018–2022**



Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. "All VA prohibited personnel practice cases" includes cases with whistleblower retaliation allegations and those that close with favorable actions.

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## OSC Investigations: The Percentage of OSC Whistleblower Retaliation Cases for VA Employees Closed with Favorable Actions Has Increased

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- From fiscal years 2018 through 2022, **about 5 percent** of VA PPP cases that had whistleblower retaliation allegations closed with a favorable action for the whistleblower, and this **percentage increased over the 5 year time period** (see table 1).
  - According to OSC officials, the increase in the percentage of favorable outcomes for whistleblowers has contributed to longer case times.
- From fiscal years 2018 through 2022, **less than 1 percent** of whistleblower retaliation cases involving VA employees were closed due to a settlement agreement, which is one of the closing dispositions indicating a favorable action.



**Table 1: Percentage of Office of Special Counsel (OSC) Whistleblower Retaliation Cases Involving VA Employees with Favorable Actions**

Fiscal year	Total number of VA cases that involved whistleblower retaliation	Total number of VA cases that involved whistleblower retaliation closed with favorable action	Percentage of cases closed with favorable action
2018	901	24	3%
2019	981	23	2%
2020	742	37	5%
2021	567	41	7%
2022	515	49	10%
<b>Total</b>	<b>3706</b>	<b>174</b>	<b>5%</b>

Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year.



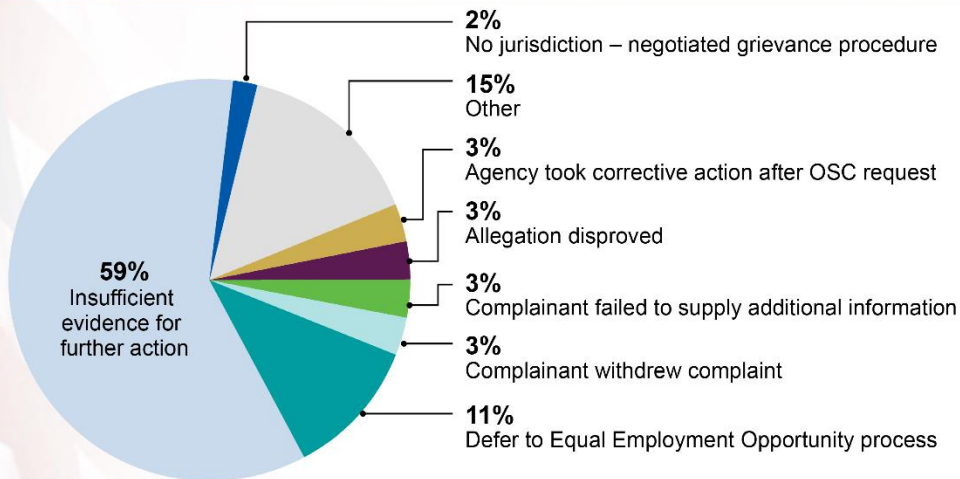
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## OSC Investigations: A Majority of Whistleblower Retaliation Allegations from VA Employees are Closed due to Insufficient Evidence

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- On average, OSC PPP cases involving VA employees addressed three allegations in 2022. Each allegation can have a different closing disposition within a case.
- We analyzed the closing dispositions of whistleblower retaliation allegations from VA employees, and a majority (about 59 percent) were closed due to insufficient evidence (see fig. 5).

## Figure 5: Office of Special Counsel (OSC) Closing Disposition of Whistleblower Retaliation Allegations from VA Employees, Fiscal Years 2018–2022



Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. There are over 40 types of closing dispositions, and closing dispositions are not reflective of any investigative stage. The "Other" category combines closing dispositions representing fewer than 2 percent of whistleblower retaliation allegations, such as instances where the agency was unable to contact the complainant or the allegation closed via a settlement agreement. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year.

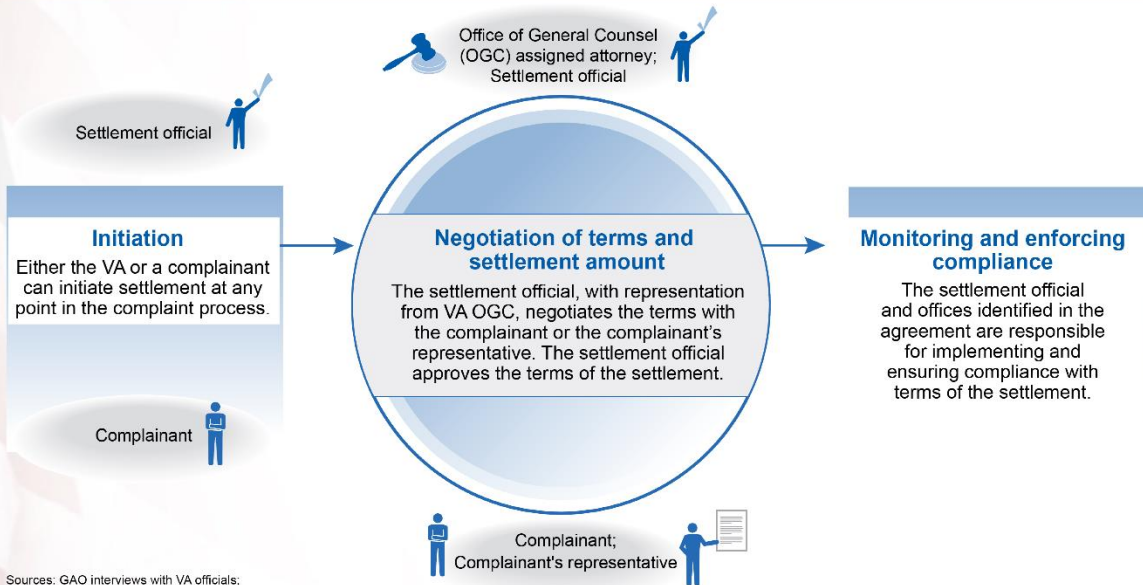


## VA Settlement Agreement Process: Overview

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- Settlement agreements can resolve employment disputes, including allegations of whistleblower retaliation, without litigation. They are voluntary agreements between a complainant and the agency where monetary relief may be provided and the employee agrees to withdraw their complaint. According to OGC officials, the settlement agreement process to resolve whistleblower retaliation allegations within VA involves various parties in the initiation, negotiation, and monitoring phases (see fig. 6).

## Figure 6: VA Process to Settle Complaints of Whistleblower Retaliation



Sources: GAO interviews with VA officials; GAO (images). | GAO-23-106111

## VA Settlement Agreement Process: Overview

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- Settlement can be initiated at any point in the complaint process, according to VA officials. The **settlement official**, who is an official at a certain level in the applicable office, is responsible for deciding to initiate or engage in negotiation. The settlement official represents the office where the complaint arises. When settlement is initiated, an **attorney within VA's Office of General Counsel (OGC)** is assigned to the case, and the group or geographic district of the attorney is determined by where the complaint arose.
  - VA negotiates the settlement terms with the **complainant or their representative**, if applicable. If the settlement amount exceeds the settlement official's delegated authority, additional clearance for the amount may be needed.
  - Generally, the **settlement official** and **offices identified in the agreement** are responsible for implementation, monitoring, and ensuring compliance with terms of the settlement.
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## VA Settlement Agreement Process: Legal Representation

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- VA OGC provides legal representation and advice to the VA settlement official and, according to officials, their obligation is to represent the best interests of the agency.
- Complainants (i.e., VA whistleblowers) have the right to engage their own representation, either legal or non-legal, and the complainant could incur attorney fees. Alternatively, complainants can opt to represent themselves.
- Neutral OSC mediators may facilitate the process via the OSC alternative dispute resolution process, if a settlement agreement arises from a complaint filed with OSC.

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## VA Settlement Agreement Process: General Guidance on Clearance Authority

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- In various memoranda, VA has outlined delegation of authority to clear settlement amounts for employment disputes, which include whistleblower retaliation allegations.
- According to an April 2019 memo, an employment dispute that results in a monetary settlement above \$5,000 must receive clearance for the settlement amount by the Under Secretary, Assistant Secretary, or equivalent Senior Executive within the organization in which the dispute occurs. VA administrations can further delegate this authority, and both the Veterans Health Administration and Veterans Benefits Administration have memos doing so.



## VA Settlement Agreement Process: General Guidance on Clearance Authority

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- For example, a September 2021 memorandum from the Under Secretary for Benefits outlines which staff have delegation authorities ranging from \$5,000 to \$100,000, including:
  - a District Director can provide clearance for an amount up to \$25,000, and;
  - a Principal Deputy Under Secretary is authorized to clear an amount up to \$100,000.

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## VA Settlement Agreement Process: Whistleblower Retaliation

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- Attorneys within VA OGC may provide legal advice based on precedential case law concerning compliance with settlement agreements, and appropriate corrective action, including the level of monetary compensation. They must also abide by their states' Rules of Professional Conduct, which are indirectly applicable to settlement agreements, according to VA OGC officials.
- There are no VA guidance documents, such as handbooks, that outline the settlement negotiation process, settlement amounts, or enforcement of agreements that are specific to whistleblower retaliation claims, according to VA officials.
- Similarly, there is no VA guidance outlining the roles of various parties, including on legal representation, in the whistleblower retaliation settlement agreement process, according to officials.

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## VA Settlement Agreement Process: Whistleblower Retaliation

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- While the general process for settlement agreement negotiations is the same for those that resolve whistleblower retaliation allegations and those that resolve employment discrimination allegations (which have a separate complaint process in the VA), there are differences in the availability of guidance and type of data collected for these two types of settlement agreements.<sup>5</sup>
- The VA does not have guidance on settlement agreements specifically for whistleblower retaliation because it is not required by statute or regulation, according to VA officials.
- We will conduct additional work on the VA settlement agreement process as part of our follow-on work.

<sup>5</sup>For example, the Equal Employment Opportunity Commission has regulatory requirements that agencies adopt procedures for processing complaints of discrimination, and in response, the VA has developed guidance for employment discrimination settlement agreements. One such guidance document VA has for these settlement agreements is the *Equal Employment Opportunity Settlement Agreement Handbook* that outlines settlement best practices.



## VA Settlement Agreement Process: Tracking Data

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- While OAWP's functions include investigating whistleblower retaliation allegations, it does not have a role in settlement agreements except to track executed settlement agreements resolving whistleblower retaliation claims. OAWP took on this responsibility in 2022, and it implemented a system to track settlement agreements that include whistleblower retaliation claims. This system tracks agreements settled in 2021 and later.
- According to officials, prior to February 2022, OAWP did not track any information on whistleblower retaliation settlement agreements because it was not part of the enumerated functions in the statute establishing OAWP. OAWP began efforts to track whistleblower retaliation settlement agreements in response to Congressional inquiries.

## VA Settlement Agreement Process: Tracking Data

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- Tracking time to settle whistleblower retaliation cases. VA does not track the length of time to negotiate a settlement agreement because there is no mechanism to do so, according to OGC officials. For example, there is no process to record the beginning of settlement negotiations in any VA database, and VA has not defined the trigger point that signals the beginning of a negotiation, according to officials.
  - According to officials, VA could track this information from a technical standpoint, with the commensurate resources needed to update their processes, and if it defined settlement agreements in guidance.

## VA Settlement Agreement Process: Tracking Data

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- Tracking the proportion of whistleblower retaliation complaints that end in settlement. OAWP officials noted that they could theoretically track the proportion of whistleblower retaliation complaints that are resolved through settlement when the complaint is filed with OAWP, but not when it is filed with other agencies. None of the current settlement agreements are for cases that originated in OAWP, and it does not maintain these data in the course of normal business.<sup>6</sup>
- We will conduct additional work on the VA settlement agreement process as part of our follow-on work.

<sup>6</sup>According to VA, one settlement agreement may have originated in OAWP, but the agency does not have data to determine if the complaint was first filed in OSC or in OAWP. The Office of Resolution Management, Diversity and Inclusion tracks data on equal employment opportunity complaints resolved by settlement agreement.

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## VA Settlement Agreement Process: Tracking Data

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- According to officials, in November 2022, OAWP coordinated with VA's Office of Resolution Management, Diversity and Inclusion on a data demonstration to see if OAWP should model the system it developed after the way settlement agreements are tracked for employment discrimination settlement agreements.
- OAWP officials said that, while they learned of some functionality they are interested in incorporating from the demonstration, they plan to proceed with the system OAWP developed because it is more robust and various adjustments could be made to accommodate further data collection.

## Scope and Methodology

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- To address our objectives, we:
  - analyzed OSC case management system data to assess the volume, length, and outcomes of whistleblower retaliation cases involving VA employees over the last 5 fiscal years (2018–2022);<sup>7</sup>
  - reviewed OSC guidance documents related to the investigation process; and
  - interviewed VA and OSC officials about how claims of whistleblower retaliation are resolved.

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<sup>7</sup>Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. We assessed the reliability of these data and determined they were sufficiently reliable for describing the volume, length, and outcomes of OSC investigations of whistleblower retaliation from VA employees.



## Prior Work Examining Whistleblower Protections

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- Previous GAO audits found inconsistencies in tracking of data and in investigating whistleblower retaliation cases.
    - VA consolidated its data systems tracking investigations of wrongdoing, including whistleblower retaliation, in response to recommendations in [GAO-18-137](#).
    - OSC implemented a new data system in response to recommendations in [GAO-18-400](#).
    - We also recommended that OSC require claimants to identify their status as permanent or probationary employees in [GAO-20-436](#). However, OSC disagreed with the recommendation, and as of January 2023, it remains open.
  - In 2019, the VA Office of Inspector General found that OAWP lacked written policies and procedures and failed to protect whistleblowers from retaliation. This report contained 22 recommendations, all of which have been implemented by OAWP.
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## **Enclosure II: Tables with Additional Office of Special Counsel (OSC) Case Data**

The following tables include the underlying data provided in the figures in enclosure I for prohibited personnel practice (PPP) cases involving VA employees, as well as data for all federal agency employees who filed complaints with OSC.

**Table 1: Volume of Office of Special Counsel (OSC) Prohibited Personnel Practice Cases, Fiscal Years 2018–2022**

	Veterans Affairs (VA)		All federal agencies in OSC’s data	
	Whistleblower retaliation cases (percent of total)	Non-whistleblower retaliation cases (percent of total)	Whistleblower retaliation cases (percent of total)	Non-whistleblower retaliation cases (percent of total)
<b>Fiscal year 2018</b>	901 (64%)	507 (36%)	2,394 (59%)	1,636 (41%)
<b>Fiscal year 2019</b>	981 (63%)	575 (37%)	2,612 (59%)	1,820 (41%)
<b>Fiscal year 2020</b>	742 (77%)	224 (23%)	2,302 (74%)	795 (26%)
<b>Fiscal year 2021</b>	567 (76%)	181 (24%)	1,776 (74%)	614 (26%)
<b>Fiscal year 2022</b>	515 (77%)	154 (23%)	1,592 (74%)	554 (26%)

Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. The “All federal agencies in OSC’s data” category includes VA cases. OSC’s jurisdiction does not cover certain categories of federal employees, such as judicial and legislative employees.

**Table 2: Median Case Length, in Days, for Office of Special Counsel (OSC) Investigations, Fiscal Years 2018–2022**

	Veterans Affairs (VA)		All federal agencies in OSC’s data	
	Whistleblower retaliation cases	All prohibited personnel practice cases	Whistleblower retaliation cases	All prohibited personnel practice cases
<b>Fiscal year 2018</b>	142	122	155	123
<b>Fiscal year 2019</b>	92	75	96	74
<b>Fiscal year 2020</b>	61	56	67	59
<b>Fiscal year 2021</b>	75	69	73	67
<b>Fiscal year 2022</b>	96	86	89	78

Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. “All prohibited personnel practice cases” includes cases with whistleblower retaliation allegations. The “All federal agencies in OSC’s data” category includes VA cases. OSC’s jurisdiction does not cover certain categories of federal employees, such as judicial and legislative employees.

**Table 3: Percentage of Office of Special Counsel (OSC) Prohibited Personnel Practice Cases with Whistleblower Retaliation Allegations Closed with Favorable Actions**

	Veterans Affairs (VA)	All federal agencies in OSC's data
	Percentage closed with favorable action	Percentage closed with favorable action
Fiscal year 2018	3	3
Fiscal year 2019	2	3
Fiscal year 2020	5	6
Fiscal year 2021	7	7
Fiscal year 2022	10	10

Source: GAO analysis of OSC case management system data. | GAO-23-106111

Notes: A favorable action is an outcome in a case that could result in a specific benefit to the complainant. OSC implemented a new case management system in August 2019, but the data fields we analyzed are generally comparable between the old and new system across the time period analyzed. We defined whistleblower retaliation to include allegations of retaliation for disclosures protected under federal law, as well as other protected activities that can be related to whistleblowing, such as exercising an appeal right. Cases can have multiple allegations, and whistleblower retaliation cases are those that include whistleblower retaliation allegations, though these cases could cover other issues as well. Data for fiscal year 2022 are as of September 7, 2022 and may exclude cases closed between that date and the end of the fiscal year. The "All federal agencies in OSC's data" category includes VA cases. OSC's jurisdiction does not cover certain categories of federal employees, such as judicial and legislative employees.



## **Enclosure III: GAO Contact and Staff Acknowledgments**

### **GAO Contact**

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### **Staff Acknowledgments**

In addition to the contact named above, Amber Yancey-Carroll (Assistant Director), Amrita Sen (Analyst in Charge), Lucas Alvarez, and Edward Young made key contributions to this report. Other contributors to this report were Howard Arp, Seto Bagdoyan, David Bruno, Rachael Chamberlin, Cliff Douglas, Brenda Farrell, Steven Flint, Alex Galuten, Lara Laufer, Serena Lo, Mimi Nguyen, Jessica Orr, Karissa Robie, Ray Sendejas, Erica Varner, Jason Vassilicos, and Adam Wendel.