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FULFILLING THE PROMISE? A REVIEW OF VETERANS' PREFERENCE IN THE FEDERAL GOVERNMENT

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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FULFILLING THE PROMISE? A REVIEW OF VETERANS' PREFERENCE IN THE FEDERAL GOVERNMENT

THURSDAY, MARCH 30, 2006

U.S. SENATE,
OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE AND THE
DISTRICT OF COLUMBIA SUBCOMMITTEE,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:37 p.m., in room SD–342, Dirksen Senate Office Building, Hon. George V. Voinovich, Chairman of the Subcommittee, presiding.

Present: Senators Voinovich and Akaka.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. The Subcommittee will please come to order. Thank you for coming. Today's hearing, "Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government" continues this Subcommittee's commitment to oversight of the Federal workforce. The purpose of today's hearing is to evaluate one of the most important civil service protections, veterans' preference.

I would first like to thank my good friend, Senator Akaka, who has served as my partner in many civil service reform initiatives. I would also like to thank him for requesting today's hearing. As a veteran himself and the ranking member of the Senate Committee on Veterans' Affairs, our Nation's commitment to veterans holds a very personal interest to him.

Since its inception, this country has recognized the special sacrifice of veterans. To this end, our Nation has taken the necessary steps to provide for their health and well-being due to service-related injuries. We have also established safeguards and mechanisms to ensure that our veterans are afforded professional, vocational, or technical opportunities upon completion of their military service.

Near the conclusion of the Civil War, Congress passed the first veterans' preference legislation for qualified disabled veterans for a position in the Federal Government. Although not a veteran myself, I understand the importance of honoring veterans, and particularly in my case our Ohio veterans and their families. As Governor of Ohio, one of my first actions was to create the Governor's Office of Veterans' Affairs. This office was the first of its kind in

Ohio to provide services for veterans seeking Federal benefits and overseeing State laws pertaining to veterans.

I brought the office to the 30th floor, which is where the Governor's office is situated, and gave it a high profile so everybody knew that we meant business. The first man to serve as director of this office was my good friend, the late Dave Alstead, a Vietnam veteran, who did an absolutely fantastic job in that office.

I also lobbied for legislation during my first term establishing a special task force during times when the National Guard and Reserves were activated. The Ohio Military Activation Task Force assisted the dependent families, employers and employees of Guard and Reserve members with needs that may arise in their absence, and that task force continues today.

We didn't have to set up a special task force when we got involved in Afghanistan and Iraq because the group is ongoing. I strongly believe we must take care of those who serve when they return from duty. Furthermore, in Ohio, we facilitated private sector job fairs for veterans and declared several periods, Veteran Week periods.

In other words, the government has to get the private sector to try and help our veterans. I also developed the Veterans' Bill of Rights, and a 1–800 number with the Ohio Bureau of Employment Services to assist veterans in finding employment.

As Governor, Commander-in-Chief of the Ohio National Guard, I felt duty-bound to honor our veterans. I had the distinct privilege of dedicating the Congressional Medal Grove at Valley Forge, Pennsylvania. How many have been to the Congressional Medal Grove? It is an unbelievable way to honor our National Medal of Honor recipients.

They couldn't get a governor to go to Valley Forge to dedicate it. They have a provision that says, "If your governor won't come, we won't dedicate it." I will never forget that day, and Ray Allman was one of our Congressional Medal of Honor winners who is still alive and was over there. It was a very emotional experience I had that day.

When I became Governor, I was also surprised to learn that the only veterans' memorial on the grounds of the State House were to commemorate veterans from the Civil War and one from the First World War. There was nothing to honor our veterans from the Second World War, Korea, Vietnam, or Desert Storm.

So when we undertook the renovation of the State House, a site was reserved to build the Ohio Veterans' Plaza. We now have a very fine memorial to our veterans. It will be there for other veterans who served us.

In 1992, Ohio established the Nation's first Veterans' Hall of Fame, which is run by the Governor's Office of Veterans' Affairs. Again, we wanted to honor veterans at that Hall of Fame, and those annual events are something that I will always remember.

We, in Congress, continue to recognize the service, sacrifice, and dedication our veterans have made to our Nation. As a result, Congress continues to evaluate and improve upon the opportunities for veterans to continue their service by facilitating their entry into the Federal service.

Congress most recently clarified veterans' preference laws in the 2006 Defense Authorization Act, which ensures preference for veterans which have served in operations in response to September 11 through the conclusion of the Operation Iraqi Freedom. As the number of our veterans grows, it is imperative for us, in Congress, to evaluate new laws and consider their implementation by the government to ensure veterans are afforded the opportunities promised.

While it is impossible for us to adequately express our gratitude to the brave men and women who have served our Nation in the Armed Forces, and their families, the government must do all it can to care for these brave individuals. And I share their commitment.

I am really anxious to hear the testimony of our witnesses. No one should refrain from being critical. One of the reasons why we are having this hearing today is to find out how are we doing. And what are we doing that we could improve upon?

I would like to turn this over to Senator Akaka for his opening statement.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. Thank you very much, Mr. Chairman. It is a pleasure to work with you on the Subcommittee on Government Management, Federal Workforce, and the District of Columbia.

I sincerely appreciate your willingness to hold today's hearing on veterans' preference. I know you share my commitment to helping our Nation's veterans. Through our discussions this afternoon, we will have the opportunity to review veterans' preference which, as you mentioned, has been in effect since the Civil War.

I also wish to thank you for your continued leadership in making the government an employer of choice. I enjoy being your partner in this joint endeavor, and look forward to the days ahead as we work together on this Subcommittee.

As a veteran and the ranking member of the Senate Committee on Veterans' Affairs, I understand the importance of ensuring that the Federal Government fulfills its promise to our veterans. I firmly believe that young men and women will serve in this Nation's all-volunteer military only if they see that the veterans who have come before them are treated with the respect that they have earned through selfless service.

One area where this is especially true is veterans' preference in Federal employment. We know all too well the sacrifices our veterans made for their country. While we must do much more to keep our promise to provide health care to our veterans, the Federal Government also has an obligation to support returning members of the Armed Forces in finding employment and guaranteeing that their time in the military does not count against them.

Although many modifications and enhancements have been made to veterans' preference, the basic premise is the same, ensuring that America's veterans are not disadvantaged because of military service. Veterans' preference recognizes the economic loss suffered by those who have served their country in uniform and acknowledges the larger obligation owed to disabled veterans.

The good news is that the Federal Government is a leader in hiring veterans. According to the Office of Personnel Management, there were nearly 454,000 veterans employed by the Federal Government in fiscal year 2004, representing 25 percent of the Federal workforce. According to the most recent data on the civilian labor force, veterans comprise only 9.4 percent of the private sector work force.

However, once you subtract the roughly 231,000 veterans hired by the Department of Defense from the total number of veterans in the government, it is clear that the Federal Government as a whole has room for improvement. To ensure that the government retains its role as a leader in hiring veterans, we must work to improve recruiting and placing veterans in professional positions, as only 4,200 of the 43,000 veterans hired in 2004 received such jobs. This number pales in comparison to the 24.8 percent of veterans hired for administrative positions, the 23.2 percent hired for clerical positions, and the 21.9 percent hired for blue collar positions.

Currently, veterans are provided a preference in hiring and a protection in a reduction in force. However, I have heard from concerned veterans that, one, the system to ensure veterans' preference is not working as intended. Two, agencies are trying to avoid hiring veterans, and are using surrogate systems for RIFs. And, three, the new personnel regulations at the Department of Defense will adversely impact veterans' preference. For example, I have heard from employees at the U.S. Forest Service and a management association at the U.S. Postal Service that their agencies appear to use involuntary reassignments to circumvent applying veterans' preference in a RIF.

I look forward to discussing some of these issues with our witnesses today and exploring ways to address these concerns. With over 1.2 million members of the Armed Services having been deployed to fight the wars in Iraq and Afghanistan, this hearing is timely.

Again, I appreciate Chairman Voinovich calling today's hearing to review how well veterans' preference is working, both in theory and in practice. If problems need to be addressed, let's do it now before more of our troops come home. Our veterans deserve no less.

In closing, Mr. Chairman, I want to thank our witnesses. I appreciate the work of our Federal partners, the Office of Personnel Management, the Department of Labor, and the Office of Special Counsel. Together, they provide the framework to put veterans' preference into practice. I am especially pleased that we are also joined by representatives of the veterans' service organizations, who have a long and proud tradition of working on behalf of those who put themselves into harm's way to protect us all.

I thank you again, Mr. Chairman, for this hearing, and look forward to hearing the testimony of the witnesses.

Senator VOINOVICH. Thank you, Senator Akaka.

We have a tradition here of swearing in the witnesses.

[Witnesses sworn.]

Senator VOINOVICH. Time is always at a premium in the Senate. One of the things Senator Akaka and I don't know is when they call votes to the floor, so we like to move things along so everybody has a chance to at least be heard. I would ask the witnesses to

limit your oral statements to 5 minutes, and I am going to be really tough today about it, 5 minutes, and you know that your complete written testimony will be put into the record.

Our first panel, we have Hon. Dan Blair, the Deputy Director of the Office of Personnel Management; the Hon. Charles Ciccolella, the Assistant Secretary of Labor for Veterans' Employment and Training of the Department of Labor; and James McVay, Deputy Special Counsel, Office of the Special Counsel. We are very happy that you gentlemen are here today.

Mr. Blair, will you proceed?

TESTIMONY OF HON. DAN G. BLAIR,[1] DEPUTY DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Mr. BLAIR. I would be happy to.

Our mission at the Office of Personnel Management (OPM) is to ensure that the Federal Government has an effective civilian workforce. To accomplish this, we are dedicated to assuring compliance with Merit System principles, including veterans' preference laws and regulations. This Administration and OPM are committed to ensuring veterans receive all rights and benefits to which they are entitled under Federal employment laws.

The Federal Government serves as the Nation's largest employer of veterans. According to our recent statistics, the government employs more than 456,000 veterans out of our work force of more than 1.8 million. Internally at OPM, we have one of the highest veterans' employment representations among independent agencies.

While the numbers appear good, we have worked hard over the last 5 years to invigorate compliance with veterans' preference laws and regulations. To do this, we conduct audits of agencies' practices, as well as auditing agencies' human resources authorizations. Enforcement and compliance are key aspects of our program. We also have focused on building strong relationships with the veterans' service organizations (VSOs). To this end, I meet on a quarterly basis with the VSOs to address important veterans' issues and to provide an opportunity for the VSOs to share their concerns.

We also are proud of our efforts directed at the agencies in support of veterans. For example, we worked closely with the Department of Defense (DOD) to preserve veterans' preference rights in workforce shaping and reductions in force in the new National Security Personnel System (NSPS). Further, we coordinated with the Department of Veterans' Affairs to reduce the paperwork burden placed on veterans in determining eligibility for employment preferences. Critical to the enforcement and compliance partnership is our partnership with the Department of Labor to resolve veterans' preference complaints and veterans' reemployment issues.

Federal agencies today have seen an increasing number of their employees continuing to serve in the military through their Reserve service. In an effort to encourage agencies to assist these employees when activated, OPM initiated a program in which we asked agencies to pay both the employee and government shares of the Federal Employee Health Benefits premium during this period

[1] The prepared statement of Mr. Blair appears in the Appendix on page 33.

of activation. I am pleased to report that all 114 Federal agencies and departments have heeded this call.

My written statement goes into great detail about OPM's specific actions in support of veterans. For example, our outreach efforts at the military's Transition Assistance Program Centers and our staffing of an office at the Walter Reed Army Medical Center to serve as a point of contact to provide employment information and counseling to veterans. We also have worked to make our USAJOBS web site more veteran-friendly, by providing prominent links to veterans' employment information and web resources at agencies and elsewhere.

These are just a few of the efforts that are covered in detail in my testimony. We are very proud of the work that we have done in this area, and will continue to make our efforts even greater throughout our government, in order to make the Federal Government the Nation's leader in veterans' employment. Thank you for this opportunity to testify. I will be happy to answer any questions.

Senator VOINOVICH. Thanks, Mr. Blair. Mr. Ciccolella.

TESTIMONY OF HON. CHARLES S. CICCOLELLA,[1] ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING, U.S. DEPARTMENT OF LABOR

Mr. CICCOLELLA. Thank you, Mr. Chairman. And let me say before I begin that I appreciated your opening comments. I believe the Senate has no finer advocates for veterans than Senator Akaka and yourself.

Having been to Ohio a number of times, I can tell you that the traditions that you have started have carried on. In fact, from my recent visit, you might be interested to know that your workforce system actually runs a transition program, in addition to the transition program that we run for returning veterans. So it is a very good program.

Thank you for the opportunity to appear, sir. I want to say, first of all, that we are absolutely committed to veterans' preference in the Federal Government. We believe the government does have a good record on veterans' preference and, as Senator Akaka mentioned, one in four employees, about 25 percent of our Federal Government are veterans.

It is the job of our organization, the Veterans' Employment and Training Service, to work collaboratively with OPM and the Office of Special Counsel and all of the Federal agencies, and we are champions of veterans' preference. We are also committed to ensuring that veterans receive all their rights and benefits to which they are entitled under the Federal employment laws.

At Veterans' Training and Employment Service (VETS), which is our organization, we regularly communicate that to all Federal agencies in our outreach efforts, and in our primary responsibility for investigating and attempting to resolve veterans' preference complaints against the Federal Government that are filed under the Veterans' Employment Opportunity Act.

The VEOA or Veterans' Employment Opportunity Act provides that a veteran or any preference-eligible person who believes that

[1] The prepared statement of Mr. Ciccolella appears in the Appendix on page 44.

their rights have been violated under law or regulation may file a written complaint to us. We then investigate that complaint. I can assure you we have very highly trained investigators who do that, and the investigations are through.

I have discussed the investigative process in my testimony, and so what I would like to do is just talk a little bit about veterans' preference trends. I think that is where the Subcommittee wants to go.

There are many complaints that are filed with our Department that are determined to have no merit. There is actually good news to that, and there is also bad news. The good news is that we think the Federal agencies, from our outreach to these Federal agencies, are actually observing and applying veterans' preference. But there is also some bad news, and the bad news is that there is still some confusion about who is eligible for veterans' preference and the details about veterans' preference. That is particularly true of our recently separated veterans.

One reason for that is because veterans don't understand, in many cases, that veterans' preference doesn't apply to the in-house promotions, the merit promotions. It applies primarily to the open competitive promotions. The other thing is that sometimes agencies don't respond to veterans in a timely manner with regard to whether they were or were not selected, and so we get complaints in that regard. Then sometimes a veteran is not qualified for the position, and when that is the case, then there is not much that we can do.

What we are trying to do in working with OPM, because they have a major effort in this regard, is to improve the Federal agencies' knowledge of veterans' preference and, just as importantly, the use of special hiring authorities for bringing veterans in noncompetitively. And we think we are making big progress in this area.

We have improved our outreach to veterans themselves with regard to the veterans' preference through the military transition points at the TAP employment workshops. We have very good online resources, and veterans preferences is also covered in the Federal application process.

Thus, we are not only visiting the transition points and talking directly to our separating service members, but both OPM and DOL also have electronic tools or advisors that actually coach an individual through those programs so they know whether they have a veterans' preference complaint or not.

In many agencies, especially at DOL and OPM, the secretary or director of the agency has encouraged the use of special hiring authorities. That has resulted, I believe, in significant increases in the number of veterans, and particularly disabled veterans and special disabled veterans, in the Federal Government.

I would conclude by saying that I cannot stress enough how important our collaboration is with OPM, the Office of Special Counsel, and with the Federal agencies. It is the only way that things get done in the government. But, more importantly, I think all agencies, and particularly DOL, OPM, and I know the Special Counsel as well, are dedicated to ensuring that all Federal agencies do apply veterans' preference and they do make use of the special hiring authorities.

That concludes my statement.

Senator VOINOVICH. Thank you very much. Mr. McVay.

TESTIMONY OF JAMES McVAY,[1] DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF SPECIAL COUNSEL

Mr. MCVAY. Thank you, Mr. Chairman, for the opportunity to discuss how the Office of Special Counsel, OSC, promotes veterans' preference under Titles 5 and 38 of the United States Code. The Special Counsel extends his respect and gratitude to this Subcommittee for providing OSC with such an incredible responsibility.

At OSC we honor the commitment and sacrifice of these noble Americans. One cannot spend 5 minutes at Walter Reed or Bethesda Naval Hospital without an overwhelming sense of gratitude, awe, and an understanding of our clear commitment to these American warriors.

It is my goal to leave you today with an understanding of our commitment to these laws and the people they are designed to affect. We, at OSC, perform our mission by enforcing the Uniformed Services Employment and Reemployment Rights Act, USERRA, to ensure that they are not discriminated against because of their status as service members. We also protect our veterans under Title 5, the Civil Service Reform Act, relating to veterans' preference laws during the job application process. Allow me to explain how we have improved our enforcement of these important laws.

With the passage of USERRA in October of 1994, Congress expanded OSC's role as protector of the Federal merit system and the Federal workforce. In cases where we are satisfied that the service member is entitled to relief, we may exercise our prosecutorial authority and represent the claimant before the Merit System Protection Board.

When the Special Counsel took office, he made it a high priority to champion service members' rights. We were startled to learn that not a single USERRA case had ever been filed for corrective action before the Merit System Protection Board by OSC. Several of these cases had been in OSC for years. Within a few short months we had filed three cases before the Merit System Protection Board and obtained full corrective action for the aggrieved service members.

Let me tell you about one. The preference in this case, the claimant, a full time staff nurse serving under a temporary appointment, alleged that her agency had violated USERRA by terminating her employment because she was excessively absent from the workplace due to her military obligations. The agency argued that term employees were not covered by USERRA. OSC filed an action before the MSPB and successfully obtained full corrective action for the claimant, namely, back pay, and expunging her record of any derogatory comment in her official personnel file. The agency also agreed to USERRA training for their managers.

As you know, in late 2004 Congress further expanded OSC's role in enforcing USERRA. Pursuant to a demonstration project established under the Veterans Benefits Improvement Act of 2004, OSC now has the exclusive authority to investigate Federal sector

[1] The prepared statement of Mr. McVay appears in the Appendix on page 49.

USERRA claims brought by persons whose social security number ends in an odd-numbered digit.

Given these additional investigate responsibilities, OSC has established a USERRA unit as part of the organization of our agency. The USERRA unit is the investigative and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues.

We have also stepped up our technical assistance and outreach through modification of our web site. We have created a new electronic filing form and a new web-based help line for answering USERRA-related questions. We have also conducted educational outreach to several agencies and Federal employment seminars. The Federal Counsel's goal is to improve the awareness of Federal managers of these important laws.

Here is just one of the examples of the 26 cases where our USERRA unit has obtained full corrective action. In this case the claimant was a member of the U.s. Air Force Reserve. She applied for two jobs with an agency. During her job interview, the selecting official noted that she was a member of the Air Force Reserve and asked her if she could be activated. She was honest. The claimant was not selected for either job. However, she did accept another job outside of that agency.

Our investigation indicated the claimant would likely have been selected for the jobs, and the selecting official's comments and question suggested that the claimant's Reservist duties were the reason for her non-selection. The agency paid a lump sum settlement amount reflecting her loss of pay from the time the claimant would have been selected until the time the claimant began her current employment.

As I commented earlier, OSC also provides relief under Title 5 of the United States Code to veterans under our authority granted in the Civil Service Reform Act, again noted as prohibited personnel practices. Section 2302(b)(11) forbids managers from taking, or failing to take, a personnel action if it would violate a veterans' preference law. However, OSC's role with respect to these allegations is limited to seeking disciplinary action against offending managers in appropriate cases. By statute, the Office of Special Counsel has no authority to help service members obtain corrective action.

In closing, I want to thank the Subcommittee for allowing me to testify today. I truly believe the issues we are focusing on today cut to the core of our values as a Nation. According to Congress in enacting USERRA, Federal employers should be model employers in this regard. OSC strives to hold agencies to that high standard. Thank you.

Senator VOINOVICH. Thank you, Mr. McVay.

We will begin the questioning with 5-minute rounds.

I think Senator Akaka mentioned this new National Security Personnel System has raised concerns that it would be used to avoid veterans' preference. One of the things that I was concerned about when we went from the rule of three to the categorical hiring was that it would be used to circumvent veterans' preference. Mr. Blair, how many agencies are using it? I know the last time I looked, it wasn't very many.

Mr. BLAIR. I can not tell you how many agencies are but I do know that is in our strategic plan. We are going to get all agencies up and running on category ratings.

Senator VOINOVICH. At the time there was some concern that somehow we were going to diminish the effort to uphold veterans' preference. To my knowledge, we haven't had a complaint on that, but maybe we will in the testimony later this morning.

Mr. BLAIR. With category rating and ranking, it is a simplified form, as opposed to the rule of three. And, under category rating, ratings go to the highest division in their respective category. For instance, if you have categories of minimally qualified, qualified, and then best qualified, veterans would float to the top of each of those respective categories, depending on how their qualifications are determined. If you are a disabled veteran, you would float to the very top of the highest quality category. In other words, you float to the top of that best quality category.

The preliminary data that we have seen or evidence that we have seen is that veterans fare better under category rating and ranking than they do under the rule of three. Veterans service organizations expressed some trepidation at first about moving to this area. They voiced that quite clearly to us and we heard those concerns. So we are watching to make sure that it is not being used as a subterfuge to get around veterans' preference. We believe at this point, that it is probably better for veterans than under the old rule of three.

Senator VOINOVICH. I would like to get an update on the status of implementation of categorial hiring in the government. I think the law has been in effect for a couple of years.

Mr. BLAIR. It has been.

Senator VOINOVICH. I know it was very controversial and they said we would never get it done, and we did.

Mr. BLAIR. Yes we did.

Senator VOINOVICH. I think that has helped a great deal.

Mr. BLAIR. It has. I would like to say that at our recent workforce conference we had one session devoted specifically to category rating and ranking. This session was held to ensure that agencies know how to use it and what not to do when using it. We also emphasized the application of veterans' preference during that breakout session. So the information is out there, and we will be holding agencies' feet to the fire to make sure that they are using that flexibility correctly.

Senator VOINOVICH. One of the things that is always of concern to me, is how frequent is the contact with veterans' organizations? In other words, there are benefits that accrue to veterans in the Federal Government, all kinds of them. But how often do you make sure that you get that information to the veterans' organizations?

For example, I constantly hear web site, web site, web site. I don't know how many veterans have computers. How much communication is there throughout the country? Do you have a regular, formalized program to make sure that veterans, in all three of your cases, are familiar with what is available in terms of jobs and so on, so that they can take advantage of the system?

Mr. BLAIR. At OPM we have quite regular contact on multiple levels. For instance, I chair our veterans' service organization quar-

terly meetings. We have between 15 and 20 of the VSOs come in. We have an established agenda that we talk about, that is worked out beforehand, and go through that. For instance, we briefed the VSOs on the new personnel systems at the Department of Homeland Security and the Department of Defense. Our next meeting will be in April. We have not set that date yet, but it is done on a quarterly basis.

Although that is at a higher level, that is my contact with the VSO representatives. We also have a dedicated staff member at OPM who serves as a liaison with the veterans' service community as well. He is in constant contact, on a daily basis, with the VSOs to act as a pulse-taker, to ensure that we have an open line of communications.

If we have briefings on matters of mutual concern, we will call them in for situations like that. We also have gone beyond the Washington, DC area. When we did our job fairs, we placed special emphasis on veterans' hiring. We even had a veterans' hiring symposium a couple of years ago, in which we brought in the agencies to make sure that they understood how to use category rating and ranking, and to understand the meaning behind veterans' preference and how important it is. I remember a couple of years ago, we had one of our first meetings at Walter Reed Medical Center. The purpose behind that was to emphasize the commitment that the Federal Government has to returning veterans.

So, it is a multi-layer process that we have. I am quite proud of the progress we have made over the last 5 years. I know that when I went into OPM, I was struck by the level of suspicion and ill-will that was expressed towards OPM, because there was a great level of distrust. I think the VSOs can speak better to that, but I hope that we have done a good job at displacing that. Are we always going to agree on every issue? That's why we have these meetings—to express those comments and try to work through those disagreements.

Senator VOINOVICH. My time is up. Senator Akaka, I understand that we have a vote going on. Would it be OK if I went to vote? And you just take as much time with the questioning as you want, and then you can go vote. Is that all right for you?

Senator AKAKA. Yes. Thank you very much, Mr. Chairman.

Mr. McVay, current law provides that OSC may take action against an agency only when the agency knowingly—and I stress knowingly—violates preference laws. Acording to the VSOs the term knowingly undermines the effectiveness of this law. My question is, how many disciplinary action cases has OSC brought against agencies for violating veterans' preference? What was the final outcome of these cases?

Mr. MCVAY. Thank you, Senator, for that question. I will tell you I can only answer in the last year and a half since I have been there. I didn't know I would be asked this, but I can certainly get some of that information to you.

I will tell you that in the last year and a half there has been one case filed for disciplinary action for violation of a veterans' preference. And before that, frankly, it had been quite some time. But since the current Special Counsel took office, there has been one. Before that, it has been quite some time. That case was filed and

actually settled before it went to trial with that manager, and that manager took discipline and actually took quite a bit of time off as part of the discipline.

Senator AKAKA. So that was one case that was filed?

Mr. MCVAY. That is correct.

Senator AKAKA. How has the word "knowingly" impacted enforcement of veterans' preference?

Mr. MCVAY. Keep in mind, Senator, that we only have authority to discipline managers, which can be anything from suspension all the way up to debarment from Federal service. And when we are talking about debarring somebody with Title 75 protections, they have a lot of due process rights. And so with that understanding, I believe the statute was written to make sure that they could only be disciplined when there was a knowing violation, an intentional violation, if you will, of veterans' preference laws.

Now, if we had authority to get corrective action for complainants, there would probably be a different standard, just like in whistle-blower reprisal cases, where the standard is somewhat lower. When we are simply getting corrective action, such as back pay, expungement of the official personnel file for disciplinary actions taken in reprisal, for example, it would probably be a lower standard.

But, considering the fact that we are talking about debarment, there is probably a necessity for us to show that the manager really had an ill mind, if you will, mens rea almost in the criminal sense, when they made the decision to not use the veterans' preference law. Otherwise, frankly, would you be disciplining managers for making mistakes.

Senator AKAKA. Thank you.

Director Blair, you mentioned that OPM has quarterly meetings with veterans' service organizations to discuss issues important to veterans. What are three recurring issues that the VSOs bring up at these meetings? And what steps has OPM taken to address these issues?

Mr. BLAIR. I have our January agenda with me, and it was an update on the NSPS. As you know, the regulations at that point were about to be finalized. So, we wanted to give the VSOs an update.

Another issue is compliance issues, to make sure that the VSOs understand our role in the compliance process where complaints—if there are complaints, who handles such complaints, if it is us or if it is the Department of Labor, what our roles are in auditing agencies, when we are looking at what we call the Delegated Examining Unit of the authorities—that is the authority for an office within an agency to hire without having to go through OPM—or if it was a full-blown audit of an agency's resources operations. We talked about our recent report to Congress that we issued on the employment of veterans.

I think this is fairly representative of the issues that we have discussed with VSOs over the course of the last 3 years that I have been doing this. These are issues that come to the forefront, whether they are core issues or hiring issues. I think we have had several sessions on category rating, exactly what it is and what it is not.

But the bottom line is this is a great opportunity for both sides. For OPM to bring in the program folks who are charged with directing these programs, to let the VSOs know who the faces are behind these names, and also for them to have one-on-one interaction with VSOs. These can be quite lively meetings, as they should be. I think over the course of the last few years we have elicited very good will between the organizations, knowing that we can not agree on everything but knowing that there will not be surprises, and they will always know who to call in case there are situations which demand immediate attention.

Senator AKAKA. You mentioned the VSOs and we have here three VSOs on the next panel.

Mr. BLAIR. Yes.

Senator AKAKA. What are the issues raised regularly by VSOs as common problems?

Mr. BLAIR. An update on the NSPS was done in January. We have done updates on the Department of Homeland Security. We did a presentation on the draft "Working For America Act."

What are we doing in terms of our audit? A few years ago we did a complete audit report. We did a briefing on that as well. We did an overview on our 2004 report to Congress on our hiring of veterans. Those are just examples of things that have come up during the VSO meetings.

Senator AKAKA. Mr. McVay, I reviewed the OPM report on the employment of veterans in the Federal workforce but did not see the OSC listed. Can you tell me how many veterans currently work at OSC?

Mr. MCVAY. No, I can not. I will tell you that recent hirings have included multiple veterans, and frankly I have been on several of the boards where there have been a lot of veterans hired in the Office of Special Counsel. But if you want me to, I will be glad to get that information to you.[1]

Senator AKAKA. Will you please have it for the record?

Mr. Ciccolella, you testified that VETS entered into an MOU with OSC in the year 2000, requiring that any meritorious veterans' preference cases be automatically referred to VETS for review as a potential prohibited personnel practice. Mr. McVay states that VETS refers cases to OSC involving egregious violations of veterans' preference rights. As a point of clarification, are all violations sent to OSC, or only the egregious ones? And if the latter, what criteria does VETS use to determine if the case is serious enough to warrant disciplinary action?

Mr. CICCOLELLA. Senator Akaka, if during the process of our investigation, and in looking at the hiring process, which is what our responsibility is, to determine whether a veterans' preference has been applied, if we make a merit determination, we obviously try to resolve the case right there. Sometimes we can, sometimes we can not. If we can not resolve the issue, we will then take the other route of working with the client, the complainant, to buck it up to the Merit System Protection Board and beyond that.

It doesn't matter what the violation of veterans' preference is. If we make a merit determination, whether the agency complies with

[1] The information appears in a letter dated November 20, 2006, on page 105.

our request for them to resolve it in favor of the veteran or not, we inform the Special Counsel's office and provide the case to them to review. The Special Counsel's office reviews it for prohibited personnel practices, i.e., any violation of the 12 very clearly codified prohibited practices. At that point we continue on, obviously, with the settlement of the case if we can.

With regard to the kinds of egregious violations, we don't find a significant number of egregious, willful violations. But it is very clear when an agency has violated veterans' preferences.

Senator AKAKA. Thank you for that.

Mr. Blair, employees at the Forest Service and the Postal Service have contacted me about involuntary reassignments that appear to be directed at veterans as a way of circumventing the prohibition on designer reduction in force (RIFs). I raised this issue with OPM Director Springer, who advised that this practice does not violate veterans' preference laws. However, I believe that even if it does not violate the law technically, it still violates the spirit of the law.

Have you heard of this happening at other agencies? And what can be done to ensure that this process does not turn into a designer RIF?

Mr. BLAIR. I do remember seeing the letter that you sent to Director Springer and the response that she sent back to you. At this time I am not aware of any practices like that at other agencies, and I would say that any effort to target veterans as a subterfuge to veterans' preference, if it is intentional, would likely be a prohibited personnel practice. However, if these are done as an effort to mitigate the effects of a reduction in force, I think that you need to be careful to make sure that the efforts you are doing do not exacerbate the impact of a reduction in force.

While we have not seen it at other agencies, you mentioned the U.S. Postal Service and the Forest Service. I am not aware of any other instances where that has occurred. I also would say that you need to look at the totality of the circumstances in which the situation occurs and make sure that if any actions are taken, that you are not doing anything to give greater impact to the disruptive effect that a reduction in force has.

Senator AKAKA. I would tell you that I would appreciate a meeting of the chief human capital officers on this issue of veterans' preference, and look forward to that.

Mr. Blair, I have also heard from veterans that agencies will often cancel vacancy announcements once it is determined that a veteran will get the position, and then reopen the announcement after the job description and requirements have been tailored to a particular person who is not a veteran.

To the best of your knowledge, how many times has an agency returned a certificate unfilled? And how many of those were withdrawn for a valid business reason?

Mr. BLAIR. We look at those things when we do our audits of agencies, and particularly, when we do what we call our Delegated Examining Unit (DEU) audits. That is one piece of evidence that we look for if we are looking for violations of veterans' preference.

If we can see a pattern developing where an agency or an office in an agency is returning certificates unused because a veteran topped the certificate, or any other evidence indicating an intent to

violate veterans' preference, that is something that we would turn over to the Special Counsel's office, as well as looking at withdrawing their DEU authority or other corrective actions. I can not tell you for certain how many agencies have done that, but those are things that we do look at. We do about 120 to 130 Delegated Examining Unit audits a year. So, those are things that we look for and would pick up on as evidence of violations of veterans' preference.

Senator AKAKA. Mr. Blair, last year the Merit System Protection Board ruled that the hiring of an individual under the Outstanding Scholar Program violated the veterans' preference rights of qualified veterans. I understand that OPM has asked the MSPB to reconsider that decision. Can you tell me why OPM is asking MSPB to reconsider the case? And how many individuals are hired under the Outstanding Scholar Program each year?

Mr. BLAIR. In Fiscal Year 2004 there were approximately 1,000 appointments under the outstanding scholar authority, as opposed to 43,000 veterans that were hired in Federal service. So overwhelmingly, for every one outstanding scholar appointment there are 43 veterans hired. I think that gives you a perspective in which you can evaluate this.

As far as OPM's intervention with the Merit System Protection Board and our request for reconsideration, I can tell you that Outstanding Scholar is the product of a consent decree that is approximately 25 years old. I am kind of limited as to what I can say about this because it is the subject of current litigation—but we have always used Outstanding Scholar as a supplement to the hiring process, and it should not supplant veterans' preference. We see the two as coexisting within the same framework, although there are some natural tensions between the two.

Senator AKAKA. Mr. Ciccolella, can you walk us through the process of reviewing a veteran's claim that an agency has violated veterans' preference laws? For example, do you always talk to the veteran, review the veteran's performance files, and review the personnel file of the individuals who were hired instead of the veteran?

Mr. CICCOLELLA. Certainly, Senator Akaka.

First of all, VETS does not make a determination of the job qualifications of the veteran. That is not within our jurisdiction. With regard to the process, the complaints can come to us in a number of ways. They can come on our toll-free help line. They can come through the veteran employment representatives, the DVOP or LVER, for example, in Hawaii. An individual can also file a veterans' preference complaint electronically. They can come through our State directors.

We do talk personally with the veteran at that point in time because you have to verify the individual's eligibility. Have they filed a complaint within 60 days? If not, how do we sort that out? And you can get a little bit of information with regard to whether the veteran may have veterans' preference. Some do and some don't.

Then we immediately start gathering information, the selection certificate, for example. It doesn't take a lot of time. If there is a denial letter, or the information from the job announcement, or

how the agency has informed the individual, we will get all of that information.

Then we will formally notify the hiring authority, and we will tell them what our authority is. We may visit with them. We may ask them who was selected, why that individual was selected. Did they bypass veterans' preference? Was veterans' preference applied? Did they use categorical rating criteria? Or did they use the rule of three? Did they pass over a preference-eligible? Our investigators are pretty good at determining that.

It becomes very clear when you're looking at the process whether or not there is an anomaly or a problem. If we find merit, then we will immediately try to resolve the situation with the employer, the agency, and the veteran. Sometimes we can, sometimes we can not. If we can not, we will then help the veteran refer their case to the Merit System Protection Board. If it does have merit, and we can work it out, then we will seek whatever remedy there is, including any back wages or placement.

Senator AKAKA. Thank you very much, Mr. Ciccolella. I have to run and vote now, but I will return.

Mr. CICCOLELLA. I apologize. It's sort of a long process.

Senator VOINOVICH. One of the questions that I am going to ask the second panel is, how would they characterize their organization's relationship with Federal agencies, the Office of Personnel Management, Department of Labor, and the Office of Special Counsel? I got into that a bit before, but I would like all of you to clarify just exactly how do you think they are going to answer that question?

Mr. BLAIR. I would hope they would characterize their relationship with OPM as one of being a straight shooter. We are not always on agreement on things. However, they will get accurate and timely information from us. I think that is the best that you can ask from an agency like ours—that we understand the importance of that constituency.

We have worked hard to build trust that was not there before, and I am pleased with the relationship that I, individually, have with a number of the representatives of the VSOs. So, I think that we have done a good job. We can always do a better job, but I think the most important thing is to keep the lines of communication open and make sure that communication is fair, accurate, and timely.

Senator VOINOVICH. Mr. Ciccolella.

Mr. CICCOLELLA. We have a pretty good relationship with the veterans' organizations. We try to get the VSOs together.

Senator VOINOVICH. What does "pretty good" mean?

Mr. CICCOLELLA. I would say they would rate 8 or 9. We have a very open line of communication. We have regular communications with them. We try to meet monthly or every 2 months. They get part of the agenda. We get part of the agenda. We not only meet with them, but we also try to make sure that we address their legislative conferences, their service officers conferences, and we try to get the Secretary or a very high level official out to their national conferences.

So we are in regular dialogue with them. But, frankly, Mr. Chairman, it would be very difficult to do my job if we didn't have

an open dialogue with the veterans' service organizations. They are enormously helpful to us.

We have a program called REALifelines, which seeks to employ the most seriously wounded an injured service members. Veterans' service organizations are very helpful in that regard.

They are extraordinarily helpful because they have good outreach to homeless veterans. And the veterans' service organizations actually have homeless veteran task forces. They are very well organized. So they complement our Homeless Veteran Reintegration Program.

Senator VOINOVICH. What is that called, again?

Mr. CICCOLELLA. The Homeless Veteran Reintegration Program.

Senator VOINOVICH. The one before that.

Mr. CICCOLELLA. The REALifelines program. It is a program we started about 2 years ago out at Walter Reed. We have stationed veteran employment representatives at Walter Reed and Bethesda, Madigan, Brooke Army Hospital, Balboa, and now we are putting them into the medical holding companies, so that as these folks come back and they are seriously wounded, while they are waiting for discharge or their evaluation boards, we can get them interested in employment, especially if they are going to leave the service.

We have a network of veteran employment representatives around the country. Many of those veteran employment representatives are members of the DAV, the American Legion, and the VFW. So that is a network that we can actually refer those individuals to get jobs. So far we have put a little fewer than 100 of the most seriously wounded—I am talking multiple amputees, even brain-injured service members—and their spouses into employment.

So the veterans' service organizations are instrumental, in that effort, and they are very instrumental in the compliance area. They are very interested in veterans' preference. I think their view of veterans' preference is that it is not broad enough. So we have a regular dialogue with them about that.

An area that is just as important for me is the USERRA area, the Uniformed Services Employment and Reemployment Rights Act, because as you know we have had half a million Guard and Reservists in particular being mobilized. A lot of those are young people, and they come back, and some are not employed. But if they are employed, they get their jobs back when they come back.

The veterans' service organizations also can be very helpful in terms of when and if an individual comes back and they have issues or problems. If they know about what the reemployment regs are, they can connect that veteran to us, and it is very helpful.

Senator VOINOVICH. First of all, I want to say that this REALifeline is wonderful. I don't get out there often enough. I get out there maybe once a month to Walter Reed. I go down and meet men and women recovering there. They have that fantastic rehab center. It is amazing what they are doing.

But you meet them and they say, "I wanted to have a career in military service. I'm not going to be able to have one." And the first thing in their mind is, "I need a job." They have to know that there is somebody out there that cares about them. I think that the stress level is reduced substantially if they can talk to somebody

and they know somebody is going to look out for them because they appreciate what they have done for our country.

Mr. CICCOLELLA. Sometimes we can not get them employed right away, but it is very important that we are there for them. One of the things they may need is funding. So we may be able to help their spouse get employed until they are ready to get employed. So it is a good program.

Senator VOINOVICH. The other thing is the National Guard people that are coming back and the Reservists. Are they familiar with their rights? Are you hearing any complaints such as, "I'm getting hassled about my job." Would that be brought to their Adjutant General or do they bring that to you?

Mr. CICCOLELLA. Yes. They can certainly take it to the unit—the National Guard has a good structure for receiving those complaints. If it is going to require an investigation, it comes to us. The Defense Department has a national committee of volunteers around the country. In Ohio, you have General Hartley up there, who really has a very good program for this. You have about 6,000 National Guard who are deployed from Ohio at any given time.

Senator VOINOVICH. The point is, that if I come back and I am having a hard time with my employer, most of the time that is going to be handled on the State level and it won't usually get kicked up to you?

Mr. CICCOLELLA. No, actually, not so. We have a network of Federal staff in every one of the States. We make sure that prior to mobilization, all National Guard and Reserve are briefed on their employment and reemployment rights. When they return, during the demobilization process, we also provide them at least a one-hour presentation on what their employment and reemployment rights are and how to find assistance. If they need assistance, then either us or the ESGR people will open a case on them. ESGR does informal case work. We do formal Federal investigations.

You asked about what the trends are. Before September 11, we were doing 900 investigations every year. During the Gulf War, the first Gulf War, we were doing 2,500 for those 2 years, 1991 and 1992. After September 11 we had a very significant mobilization. And so about April 2003, when the first of the Guard started coming back, we found that the investigation numbers went up. They went up to almost 1,500 cases a year in 2004. And then in 2005 they went down to about 1,250.

During the first Gulf War we had one complaint and one investigation for every 54 returning Guardsmen and Reservists. Now, I am not talking about the guys who do their weekend drills. I am talking about the people who are actually deployed. Now we are at 1 in 81, so we are doing better. We put new rules out about USERRA that are extremely good and easy to understand. We have got a tremendous outreach effort to the employer community and the service members.

Senator VOINOVICH. When they get called up, do they get a letter that they give their employer that explains what they are doing and what their rights are?

Mr. CICCOLELLA. The law, the way that works is that an individual who is called up, is supposed to provide advance notice to the employer. Most of the time that is possible. There are a few

cases where it is not possible, and if that is the case, then the employer can get whatever proof he or she needs from the military, a set of orders or whatever.

But the point is, if the individual is called up and mobilized, there is no penalty to that individual. So it doesn't require a letter. We encourage the advance notice unless the individual can not do that, and DOD does the same thing.

Senator VOINOVICH. It is helpful for reservists and employers to have a call up letter. Everyone is better able to understand what is happening.

Mr. McVay, what about you? On a scale of 1 to 10, how would the veterans organizations rate you?

Mr. MCVAY. Let me make sure you understand. Our position in the process has always, historically, been at the back end, so we have little if any relationship with veterans' service organizations, because when we got the cases, it was time to either prosecute or not prosecute. It was with the individual.

However, since the demonstration project we have been given in essence half, or the odd-numbered social security numbers of USERRA cases, we have, if you will, contacted some of these organizations, let them know that we are out there, that we are now in the game and that we are interested. If they want to, they can come directly to us. This is something that we have actually discussed with Mr. Ciccolella. They know what we are doing, and hopefully we are building relationships as we go. That has been the first effort ever for OSC in that regard.

I will also say that every time somebody has gone through those mobilizations as an enlisted man, you do get the letter. You get it from your division. And if you are paying attention when you get demobilized, if you are not sleeping, you get an education on what your rights are, too.

And so they do get education when they get back. They are told what their rights are. The military does a very good of making sure of that because they are an advocate for these people. The First Sergeant of each company, I assure you, looks at each one and says, "You're going to a class and you're going to learn about your USERRA rights."

Senator VOINOVICH. Thank you.

Mr. Blair, if I asked you what Federal facility in the United States is not doing the job they are supposed to be doing, could you answer the question?

Mr. BLAIR. With regard to?

Senator VOINOVICH. There are so many Federal facilities—we have DFAS in Cleveland, we have DFAS in Columbus, we have a tremendous number of employees down at Wright-Patterson. Are you able to communicate to the Department of Defense the record of some of these various facilities if they do not honor veterans' preference? In other words, you get statistics specific enough so that you can tell if somewhere around the country isn't adhering to the law.

Mr. BLAIR. We can focus in on it if we hear a number or a series of complaints. As I was telling Senator Akaka earlier, we do about between 120 and 130 Delegated Examining Unit (DEU) audits of various agencies and departments, of offices that do the hiring. We

look at things such as returned certificates to see if veterans have topped the certificate, to see if there is a pattern emerging, or to see if they have cancelled vacancy announcements.

Those are what set off our alarm bells and cause us to say, "Are you doing the right job? Are you applying veterans' preference as appropriate?" In the past there have been some cases where we have had to go and say, "Look, we have some serious problems here," or we are finding some egregious violations, and we have had to lift the Delegated Examining Unit authority, which basically means they have to go through others to hire until you remedy their situation.

Senator VOINOVICH. What you are saying is, that you could tell me, if I asked you, how the DFAS operation is doing in Columbus?

Mr. BLAIR. If we had done a DEU review for that operation, which I would have to go back and check.

Senator VOINOVICH. What you are telling me, and I would like to have it on paper, is if a location has a pattern of violations, that the penalty is to pull out the hiring authority? So they loose the control of hiring and firing personnel?

Mr. BLAIR. That is one of the penalties. We can order some corrective action to be taken, and if we find that there was a violation, OPM would refer it to the Office of Special Counsel to prosecute.

Senator VOINOVICH. We should be, in fact we are, looking at the agencies and how many do performance evaluations on senior executives. We are moving towards pay-for-performance. But, I just wonder, is one of the things that they are taking into consideration, when a manager is being evaluated, is whether or not they are complying with veterans' preference?

Mr. BLAIR. I have to go back and see if it is that specific or if it is more generic, but I would be happy to provide that for the record.

Senator VOINOVICH. I would like to find that out, because one of the best ways that you can get people to do what they are supposed to do is include it in their performance evaluation. That is what I did when I was governor and I was mayor. If managers are being judged on that, then they will start paying more attention to it. But if they don't think it is a high priority, and it is just something that is nice to do, then I don't think you get the kind of response that you should.

I will say this, and I would be interested to hear what the veterans' organizations have to say. The numbers that you have given me are very impressive. I would be interested to know, what were the numbers before? You've been there now, Dan, almost 4 years? What was the record under the previous administration?

Mr. BLAIR. I think that it has been relatively steady at about 25 percent of the work force. If you remember, we downsized during the 1990s. So, the total number of veterans in the work force, since most of them were World War II VETS or Korea-era veterans, went down. But the representation in the work force has stayed relatively steady.

Last year we did see a blip upward. I think you are going to continue to start seeing higher representation of full-time hires. We are seeing that a third of the new hires are veterans. So, I think

you are going to start seeing those numbers increase again as veterans return from the Middle East.

That is on the good side. The flip side is that just because you have increasing numbers does not mean that the violations do not exist. We are going to keep the heat up at OPM on agencies to make sure that they are following the letter of the law as intended by Congress.

Senator VOINOVICH. As you know, we have probably done more to change Title 5 of the Civil Service Act since 1978, a lot of changes. I have been very much involved in that, along with Senator Akaka. All through this process we have been concerned that we maintain the merit system, including veterans' preference.

The Federal Government has an Outstanding Scholar Program. We have given more of the agencies the opportunity to go to college campuses and identify individuals that are really outstanding and hire them on the spot because we don't want to lose them to the private sector. We have a real crisis today in the Federal Government. We have an unbelievable number of employees who could retire. We are trying, as Senator Akaka likes to say, to be the employer of choice.

But, we have the Outstanding Scholar Program, and the purpose of it was to increase representation of African Americans and Hispanics in non-clerical entry level GS–5 and GS–7 positions. Through the program, agencies can noncompetitively appoint college graduates to an entry-level Federal job if they receive a grade point average of 3.5 or higher from accredited schools.

However, some suggest that this Outstanding Scholar Program is being misapplied. Would you please share with the Subcommittee what steps are being taken to ensure that Federal agencies correctly apply veterans' preferences to all hiring decisions for competitive and exempted service positions?

Mr. BLAIR. It is a kind of affirmative action, trying to have a well-balanced work force and at the same time make sure that we maintain our veterans' preference. Specifically, just a couple of points I want to make because this is a product of litigation right now before the Merit System Protection Board.

Outstanding Scholars is a product of a consent decree that was entered into in 1980, in an effort to remedy under-representation. At OPM we said to agencies that you can use this Outstanding Scholars appointment authority as a supplement to your regular hiring. So, if your regular hiring does not work right, then you can go out and use an Outstanding Scholar.

We have never intended agencies to use it as a subterfuge or to supplant veterans' preference. Veterans' preference and Outstanding Scholar have been able to coexisted.

Senator VOINOVICH. What you are saying is that this program came about because of a court decision mandating a prospective remedy for past discrimination. Is that correct?

Mr. BLAIR. This is an old thing. This has been going on for about 25 years, the Outstanding Scholars appointment authority.

Senator VOINOVICH. And today you are trying to make sure that it doesn't interfere with the application of veterans' preference?

Mr. BLAIR. We want to make sure that it doesn't supplant veterans preference or be used as a subterfuge to it. There is a court

case going on right now before the Merit System Protection Board, in which MSPB made some rulings. I just want to limit my comments on this point, given the litigation that is going on. But the points I did want to make were that, they have coexisted within this universe for the last 25 years. There is tension between the two. However, we think that there is room for both.

Senator VOINOVICH. I can understand that, because I had a similar situation in Cleveland, Ohio, with the police and fire departments, the Vanguard case.

Mr. BLAIR. The other thing we were pointing this out with Senator Akaka, he had asked earlier how many Outstanding Scholar appointments were made. For 2004, we made about 1,000 government-wide Outstanding Scholar appointments. During that same time, we hired over 43,000 veterans. So for every Outstanding Scholars appointment, there were 43 veterans hired under different authorities.

What that is intended to show, is the context in which we should consider these two programs.

Senator VOINOVICH. Well, as I have stated to you before, these reforms that we have made are very significant, and they have caused some anxiety. As you know, some of the unions have even taken us to court.

But, we will be going through this whole period, and I would hope that a year from now or 2 years from now through oversight, we will have testimony to the effect that the new personnel system have not interfered with veterans' preference, and that we have the same kind of report for categorical hiring, that veterans are doing better under the categorical hiring than they did under the old system.

Senator Akaka, I had about 16 minutes, you had about 15. Do you have any more questions? I don't know when the next vote is, but I would like to hear our second panel of witnesses.

Thanks very much for your appearance here today. I appreciate it.

Our second panel is Richard Weidman. Mr. Weidman is speaking on behalf of the Vietnam Veterans of America. Joseph Sharpe is here on behalf of the American Legion, and Brian Lawrence is here for the Disabled American Veterans.

I would like to thank all of you for being here today. You had the benefit of hearing the testimony from folks of the other agencies, so as we begin the question and answer period, if you have any comments about some of the things that they have said, we welcome that.

Mr. Weidman, we are going to start with you.

TESTIMONY OF RICHARD WEIDMAN,[1] DIRECTOR OF GOVERNMENT RELATIONS, VIETNAM VETERANS OF AMERICA

Mr. WEIDMAN. Thank you very much, Mr. Chairman, and thank you Senator Akaka, for holding this oversight hearing as a comprehensive review of the Veterans' Employment Opportunities Act passed by Congress and enacted in 1998. We were grateful back then for the bipartisan effort of Senator Hagel, Senator Specter,

[1] The prepared statement of Mr. Weidman appears in the Appendix on page 60.

Senator Cleland, and others to get that landmark legislation through, to try to put some reality back into veterans' preference.

Subsequent to the Civil Service Reform Act of 1978, veterans organizations won the battle to keep veterans' preference on the books, which was a heck of a battle here in Congress.

Senator VOINOVICH. When was that?

Mr. WEIDMAN. In 1978, under President Carter. But that's when we started to lose the ball game, when the corporate culture started to grow up, which is the HR sections of each of the Federal departments and agencies. There was also discrimination allegations that led to the court order that created the Outstanding Scholar Program referred to before.

There was a perception at that time that veterans' preference was primarily a white male benefit, when in fact it is a veterans' benefit. Veterans look like America. We are every race, we are every creed, we are every national origin, we are both genders, increasingly so, including in combat theaters of operation.

And, therefore, to think that there is a dichotomy between affirmative action and veterans' preference is simply a false dichotomy altogether, sir. You can accomplish both goals, both afford the individual earned right of veterans' preference and meet every single affirmative action goal that an agency might have.

I would challenge my good friend, Dan Blair, to name me one Outstanding Scholar who is veterans' preference eligible, because I certainly have never heard of them. Customarily, it has been abused to circumvent veterans' preference in the last 25 years, unfortunately so because these should not be things that are equivocal, whatsoever.

Our problem with the way in which it is and is not happening at this point is, the accountability for actions does not seem to be there for Federal managers who violate individual veterans' preference, and there is not accountability for agencies that consistently, such as the Forest Service and Fish and Wildlife, appear to have a terrible record when it comes to hiring veterans and disabled veterans.

We also worked very hard, and with the assistance of your colleagues in this body, we are grateful that we were able to hold off designer RIFs. But now there is a new wrinkle that is known as the involuntary repositioning rules that will accomplish the same thing by, as an example, taking someone who has family ties for four generations in the State of Idaho and repositioning them in the State of Mississippi, knowing that they will not take that transfer in order to keep that job, but rather it was a run-off drill so that person would quit. Or taking someone from Hawaii and repositioning them in Montana, when there are strong family ties, that they know they will not leave the State of Hawaii.

We have great concerns as well——

Senator VOINOVICH. Are you basically saying, if I understand this, that through repositioning an employee, who is a veteran, they can be forced out of his or her job by moving him or her someplace else, knowing that they will quit their job?

Mr. WEIDMAN. Well, yes. Essentially, it is a run-off drill about people they don't care about. It is not so much anti-veteran, as the favorites of the agencies are herded into one area, into essentially

a no-fire zone, which is exactly what used to happen under designer RIFs, those they want to keep, and those who they don't care one way or the other about are put into a free-fire zone.

Senator VOINOVICH. But wouldn't that apply to anybody that they are not really happy with?

Mr. WEIDMAN. That is correct.

Senator VOINOVICH. So, in other words, what you are saying is in the process of doing that, with positions they would like to eliminate, veterans are included?

Mr. WEIDMAN. The veterans are part of the pool, but in many cases, it is a service-connected disabled veteran. They have to keep those people first if they go to a formal RIF. Then the service-connected disabled veteran would probably stay, the same thing with your veterans.

Senator VOINOVICH. So if there is a formal RIF, you still have veterans' preference applies?

Mr. WEIDMAN. That is correct, sir.

Senator VOINOVICH. In using repositioning, it does not apply?

Mr. WEIDMAN. That is correct, sir. There is no waiting whatsoever.

There had been previous talk on making agencies accountable and I was smiling at that. It was right dead on point, Mr. Chairman, about why isn't there a computer program to be able to monitor what is going on in each agency at each locality around the country? Everything is already computed. It is just a matter of setting up the system to monitor, to hold agencies accountable, and we would encourage the Subcommittee to mandate OPM to do just that. The audits are too much hit-and-miss, and therefore what is indicative of that is, unfortunately OPM can not tell you the results of a single one of those audits because they make so little impact, unless they dig down and go back and dig it out.

In terms of need of legislation to go further at this time, to build off of the base of the Veterans' Employment Opportunities Act, we would ask that you consider, sir, the elimination of the word "knowingly" from the statute altogether, and to clarify the lines of authority between OSC, the Office of Personnel Management, OPM, and the Veterans' Employment and Training Service.

There is great confusion on that, even amongst the three of them, as to who is responsible for what. When we approach them with an individual case, that is clearly an egregious violation of veterans' preference, Labor says it is OPM's job, OPM says it is Labor's job.

The reporting, for a true picture about what is going on, the 2004 report to which Mr. Blair alluded, while this report was being prepared, we pointed out that they were listing all veterans and not veterans' preference eligibles, and they still didn't make a distinction in the final report. The gentleman who was in charge of it was on detail from another office, which highlights a significant weakness of that. Historically, unfortunately, that is what OPM has always done, because there are more veterans than there are veterans' preference eligibles in the population, and it is very specifically awarded to wartime veterans only.

Senator VOINOVICH. Mr. Weidman, can you wrap up? I have given you a little extra time.

Mr. WEIDMAN. Should I stop?

Senator VOINOVICH. If you could wrap it up, yes.

Mr. WEIDMAN. So we need reporting and data by grade, by age, per agency, because those are the key things to get a picture of what is happening, and whether or not the younger veterans, who have extraordinary unemployment at the moment of 60 percent or greater, in fact are being picked up and will be able to move up within the Federal agencies in the future.

There are a number of other things that we would have to say about that that have to do with making veterans' preference apply to all pay grades and wage grades in the future, and every agency being put under measurable performance outcomes for applying the law.

Thank you very much, Mr. Chairman, for holding the hearing and for allowing us to present our views here today.

Senator VOINOVICH. Thank you. Mr. Sharpe.

TESTIMONY OF JOSEPH C. SHARPE, JR.,[1] DEPUTY DIRECTOR, NATIONAL ECONOMIC COMMISSION, THE AMERICAN LEGION

Mr. SHARPE. Mr. Chairman and Members of the Subcommittee, the American Legion appreciates this opportunity to share its views on veterans' preference in the Federal Government.

Congress enacted the Veterans' Preference Act of 1944 to address the readjustment needs of the men and women who served their country during the time of war.

The law was designed to assist veterans in regaining the lost ground suffered in their civilian careers as a result of military service.

When the American Legion was founded in 1919, one of the first mandates was to convert the existing patchwork of veterans' preference laws, administrative rules, and executive orders into one national policy that would be protected by law. That goal was realized 25 years later when President Roosevelt signed the Veterans' Preference Act of 1944 into law.

With the closing of World War II, the Federal Government enthusiastically complied with the provisions of the new veterans' preference law. Unfortunately, as time passed and the memory of war faded, so did America's concern for fulfilling its obligations to its citizen-soldiers. Today, provisions of the original legislation and its amendments as codified in Title 5, United States Code—USC—seem almost nonexistent to many veterans across the country.

The American Legion believes there are several reasons for this. A large number of Federal managers do not understand, or agree, with the reasoning for granting veterans' preference to those who fought to keep this country free, nor do they understand or care how this process works.

Veterans' preference laws are intended to give veterans an advantage over other applicants for Federal positions and during a reduction in force, RIF. Veterans are disadvantaged while serving their country. For many years, veterans' preference laws successfully provided significant advantages, as intended. However, over many years, agencies have gradually gained access to appointment

[1] The prepared statement of Mr. Sharpe appears in the Appendix on page 71.

methods that do not require providing preference. Other weaknesses in the current system relate to enforcement of veterans' preferences, accountability and disciplinary action for veterans' preference violations, and the limited appeal rights for violations of veterans' preference.

The American Legion would like to reiterate how important veterans' preference in Federal hiring is to returning service members and veterans. It is equally important that OPM maintain enforcement power over Federal agencies.

In a time of rapid change, and with the pending departure of 400,000 service members within the next 2 years, the American Legion believes that the current structure within OPM, which is designed to monitor, inform, promote, and enforce veterans' preference laws, is clearly inadequate. The American Legion recommends that Congress provide additional funding for an Office of Veterans' Affairs within OPM, so that it is adequately staffed and funded. Such an office would better exercise OPM's mandate to protect veterans' preference.

Mr. Chairman, a grateful Nation created the concept of veterans' preference for those citizens who served this country in our Armed Forces. Due to the current war on terror, thousands of service members of the Reserve component, who make up 40 percent of the current fighting force in Iraq and Afghanistan, will now qualify for veterans' preference due to their extraordinary contribution to the freedoms we all enjoy as Americans. The American Legion urges the Subcommittee to send a strong message to Congress to do more to preserve and protect veterans' preference.

Mr. Chairman, this concludes my statement.

Senator VOINOVICH. Thank you. Mr. Lawrence.

TESTIMONY OF BRIAN E. LAWRENCE,[1] ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. LAWRENCE. Thank you, Chairman Voinovich. Good afternoon, Senator Akaka. On behalf of the 1.3 million members of the Disabled American Veterans, thank you for the opportunity to present our views on the state of veterans' preference in Federal employment.

Our country has recognized that members of the Armed Forces deserve special consideration regarding appointments to Federal positions since the Revolutionary War. Along with rewarding benefits for their patriotic duties and sacrifices, our government realized the value in harnessing veterans' inherent leadership qualities and skills, which are essential to any successful business or government agency.

Despite statutory requirements providing Federal employment preferences, we occasionally receive complaints from disabled veterans who believe their preference rights were ignored or intentionally circumvented by the agencies, to which they had applied. Most often such complaints are in reference to the Outstanding Scholar Program. Many Federal agencies use the OSP to hire new employees that have maintained college grade point averages of 3.5

[1] The prepared statement of Mr. Lawrence appears in the Appendix on page 78.

or higher. The program should never take priority over veterans' preference.

Senator VOINOVICH. Excuse me just a minute. We have heard this now, and what I would like to know from you, whether this is anecdotal or can you show us specific cases where this has occurred? That is very important to us. In other words, so often witnesses come here and say this is that. But for us to really investigate, I need some examples.

Mr. LAWRENCE. It is anecdotal, largely, but there has been a lot of it. So many instances of it that we have had resolutions actually introduced to ban the Outstanding Scholar Program. There wasn't a resolution that was adopted by our membership included with our legislative agenda, but it has risen to that level.

Again, we feel that the Outstanding Scholar Program should never trump veterans' preference. It lacks the statutory preference. And, additionally, I don't think maintaining a 3.5 grade point average indicates that somebody would be a better worker than somebody that served their country in the military.

In my testimony I refer to the Merit System Protection Board, the MSPB case. We were disheartened that OPM asked for a reconsideration of that case, and we feel that it sends the wrong message to the men and women serving in the military.

The Outstanding Scholar Program is probably the foremost example of ways that veterans' preference has been voided. But again, I am going largely by anecdotal information here. I don't have a specific case to mention to you right away.

We appreciate the Subcommittee's interest on these issues, and we will do whatever we can to help enforce veterans' preference and see that there is a better upholding in the future. That will conclude my statement.

Senator VOINOVICH. Thanks very much.

Would you all agree that Federal managers do not understand veterans' preference, and why we have it?

Mr. WEIDMAN. No. Many managers do, and God bless them. The problem is that there is no repercussions for those who either do not, or those who understand the purposes, but disagree with the purposes and do not act accordingly with the law.

Senator VOINOVICH. Do you know whether or not OPM, in terms of orientation for managers, gives them information through their chief human capital officers or human resource people? Has there been a training program so they understand why we have veterans' preference?

Mr. WEIDMAN. I think most of their training program focused on that, but it is not a competency based program, number one. And, number two, at the Department of Labor, some of their staff—most of their staff I guess has been trained now. But, none of them have taken any competency based tests about how to investigate a complaint as to whether someone has a veterans' preference right, if there is a legitimate case in an agency, and where there have been repeated complaints from the same locality, the same agency, whether or not there is pattern and practice happening at that locality. That means that it is the given norm there and needs to have significant action.

Senator VOINOVICH. So you would like to see a follow-up on this—that gets back to the statistical analysis that I talked about—so that there would be some coordination between the Department of Labor and OPM? Maybe Senator Akaka and I can ask for a report every 6 months or a year that basically talks about how people are performing?

Mr. WEIDMAN. We are sensitive to the lack of performance, and we are sensitive to the fact that we are all, to some degree, flying blind. It is not an affirmative action program. So the question is, how do you pinpoint the specific cases? Now, we do get individual complaints, and quite often get a real run-around, and I can show you some war stories.

Senator VOINOVICH. I can tell you this. Talking to some managers that I talk to, they will say to you, "Veterans' preference doesn't make any sense. It's not the best way to manage." So there has got to be some education that this is a policy Congress has decided to do.

I think you heard my comments to Mr. Blair, that as we, the government, moves into strong employee performance evaluations, we should include understanding of veterans' preferences, along with other things they should be measured on.

Mr. WEIDMAN. If I may just say, one thing I would like to do publicly is commend Secretary Nicholson. In this coming year, for the first time ever it is a specific, stated goal of the Veterans' Administration to hire more veterans, overcoming, I might add, the objections of Office of Management and Budget of those being included. Office of Management and Budget has less than 10 veterans working for it, in the entire agency, and no disabled veterans, so that is where their mind set is at. They are already putting it into managers' job descriptions because Secretary Nicholson is serious about it.

It takes that kind of commitment from the top of each agency, doing what it is supposed to do. But there is no centralized reporting mechanism on things like the disabled veterans and affirmative action program. They state what the goals are, but nobody comes back and says, "What did you do?"

Senator VOINOVICH. You would support Senator Akaka and I in requesting OPM Director Linda Springer to provide the good examples, role models, among agnecies?

Mr. WEIDMAN. I would say that, yes, sir.

Senator VOINOVICH. Mr. Sharpe.

Mr. SHARPE. You mentioned earlier about the Outstanding Scholar Program, if we had any evidence. We are currently involved in a case now, and one of our assistant directors, Juan Latta, has brought some hard copies of it, of our involvement, so we can give that to you after this session.

Senator VOINOVICH. We would like to have it. If I ask the NAACP or the Urban League, or other national organizations that represent minorites, what do you think would they say about it?

Mr. SHARPE. I have spent 22 years in the military, and I recently returned from Iraq, so I am still in that military mind-set, so I have no idea what the NAACP or any other group would say.

Senator VOINOVICH. This consent decree is prospective relief for past discrimination. The courts decided that there was discrimina-

tion in the Federal Government. You feel the program is being abused. I would be interested in knowing what other organizations think.

Mr. SHARPE. My unit is on its way back to Iraq, and so as far as I am concerned, I am against the Outstanding Scholar Program. I don't care who it is for. But I really thing veterans deserve that.

Twenty percent of the Army is made up of African Americans, and that is where my loyalty goes. I consider myself an Army Sergeant, and I am still that. And I feel that this goes against the grain of veterans' preference.

I have seen too much, and I believe that when these veterans come back—I have too many people in my unit that are currently unemployed. I have people that are homeless. I know too many military folks that are trying to get into the Federal Government. I have met people in Walter Reed, severely injured, and they are upset because they have to wait a year to try and get their applications through to the Federal Government.

Senator VOINOVICH. So do you have concerns with the REALifeline program?

Mr. SHARPE. I think it is an excellent program.

Senator VOINOVICH. But you don't think it is doing enough?

Mr. SHARPE. The problem is that there seems to be a funding issue with everything. There is a funding issue with OPM. We feel that there ought to be an Office of Veterans' Affairs. There is one full-time person. I can not see how one full-time person can monitor veterans' preference in all the agencies, even though OPM has made a great effort in trying to do outreach. The same thing with the Department of Labor. I think that they are understaffed. The Amerian Legion and other organizations have been fighting for years for more funding.

I think with more funding, and a greater willingness, on certain individuals in the government, to ensure that veterans are ensured of their rights, I think we can solve the problem. But, I think they are doing a good job with what they have.

Senator VOINOVICH. I am over my time, Senator Akaka.

Senator AKAKA. Thank you, Mr. Chairman.

This is a question to all of you. I asked this question of Mr. Blair earlier about three reoccurring issues at OPM's quarterly meetings.

I know there are many issues, but what are three reoccurring issues that you have at these meetings, and how would you rate OPM's responsiveness to your concerns? Mr. Weidman.

Mr. WEIDMAN. One issue that occurs almost every meeting, is the lack of measured performance outcomes. Most of us in veterans' service organizations feel strongly that, if you have these glowing generalities, how do you know if you are making any progress towards it? That is number one.

Mr. Blair has challenged us to come back exactly with what you asked, Mr. Chairman, and that is with specific cases. We are trying to do that through surveys of our own membership, to the point where, this past month, I ran an ad in the Federal Times, Army Times, Navy Times, Air Force Times, and Marine Times, with a special e-mail address, vetpref@vva.org. We are going to continue to do that, but, in the meantime, each agency has to come from the other end.

Their 1984 report makes certain recommendations. To our knowledge, there has been no look-back to see whether any of these has been implemented. And, second, none of them were quantitative in any manner, shape, or form. And there is no redress mechanism in the form of an 800 number or a specific e-mail address that somebody can send an e-mail to and say, "This is my case," and leap over the agency at hand or whatever the problem may be at the local level to seek redress.

So it is a question of measurable performance outcomes, lack of redress, and the last, but by no means least, is concern in regard to trying to get a grip on the specific scenarios with the new categorical rankings. They have brought in, to their credit, George Nesterchuck, who is somebody who worked for Congressman John Mica when we fashioned the veterans' peference—actually it was first fashioned in 1995 and finally enacted in the 106th Congress. Mr. Nesterchuck is somebody who we value, and he is working at OPM now, trying to make sure that there is veterans' preference in the new DOD system.

Senator AKAKA. Mr. Sharpe.

Mr. SHARPE. For the American Legion, we are very concerned again with accountability: OPM's ability to oversee and enforce. We are concerned, with their staffing levels, if they are able to conduct what they need to do. We feel that they have made an effort, a huge effort, under Kay Coles James and the current administrator, to do what they could, but we just feel that this is not enough. They really don't have the funding, the personnel, or the statutes in place to allow them to be more effective. I think they are doing the best they can, with what they have, but I don't think they have enough to work with. And neither does the Department of Labor.

Senator AKAKA. Yes, and in your testimony you did use the word "inadequate," and you are saying it again. Mr. Lawrence.

Mr. LAWRENCE. I don't think I can add anything to what my colleagues have said on that issue, so rather than reiterate, I will just defer to what they have said.

Senator AKAKA. Let me ask the three of you again another question. You heard Director Blair's response to Senator Voinovich's question about the impact of category ratings on veterans' preference. In your view, what has been the impact of this personnel flexibility on veterans' preference? Mr. Weidman.

Mr. WEIDMAN. It is unclear. The jury is very much still out on it. In terms of the initial switchover, if we were asked, the veterans' service organizations, "Why are you so paranoid about that?" we would have replied, "If we couldn't trust you with the rule of one in three, why in the world would we trust you with the rule of one in three hundred?"

And, until they put into place the performance measures and ways of monitoring station-by-station to pick up patterns and practice, to go in and discover where there appears to be statistical anomalies, then to go in and see if rights of individual veterans' preference eligibles are being violated, until they put that in place, we remain even more skeptical about the categorical rankings.

Senator AKAKA. Mr. Sharpe.

Mr. SHARPE. From our viewpoint, the jury, again, is still out. But we are not sure OPM has enough to be able to adequately tell us

if preference is being violated or not, or if this is a better system or not. I just think certain things are not in place to be able to definitely let us know how the Federal agencies are carrying out their mandates.

Senator AKAKA. Mr. Lawrence.

Mr. LAWRENCE. The DAV hasn't had a specific position on that issue, so I don't have any comments in that regard.

Senator AKAKA. Mr. Chairman, my time has expired, but if I can ask one more question——

Senator VOINOVICH. I have a suggestion. I have a commitment at 4:30, and what I would like to do is continue the hearing and then you can adjourn it. Is that all right?

Senator AKAKA. I will submit questions for the record, so you may adjourn the hearing.

Senator VOINOVICH. I want to say I appreciate your testimony here today. What I would like to do, with Senator Akaka, is to sit down and get a letter summarizing some of the issues that were brought here.

One of the things that bothers me about these hearings is, you guys come in and testify. Then, maybe, we are going to come back a year from now and do the same thing. I hate to have hearings without a follow-up.

So I would like to sit down with Senator Akaka. We will try to draft a letter, it may not include everything that you want, but, we would be glad to even run it past you to see what you think about it, and then we will have to decide whether it is going to be included or not included. Then we will see if we can get some action on some of these things, particularly with OPM.

But I want you to know this, that OPM, the Department of Labor, and some Federal agencies do not have the budget they need.

One of the things that we have to do here is to figure out how people can get things done with the budget they have. We are asking them to do jobs and we don't give them the resources to do the job. What I found from my experience as a mayor and a governor, when you say to somebody, "I want you to do the job," and you don't give them the tools to do it, then basically what you are telling them is you don't think much of the job you are asking them to do.

We have got to address this. Director Springer is coming in next week to see me, and I am going to try to ask her to identify areas that we are asking her to take care of and talk about the real resources. This Administration wants us to get involved in a lot of reforms that are controversial, and I am unsure if they have the capacity to implement further reforms well. If they want us to cooperate with them, then I want them to show me the money.

When we consider the issues of today, and halting illegal immigration, including more drones, and helicopters. But at the same that we are talking about doing these things, never have I heard a Member of the Senate or Congress by the same token say, "And, by the way, folks, it's going to cost us X number of dollars." So the public doesn't get it.

I learned we are spending $154 million protecting the oil lines in Saudi Arabia. It just drives me crazy. I call it the silo effect.

There is a silo and there is a silo and there is a silo. Nobody ever looks at the big picture to see how do all the silos fit together.

If we don't start looking at the big picture, we are going to have more trouble. We don't have the right people with the right knowledge and skills at the right place at the right time. We have underestimated how important it is to have those people in place. The most important resource we have in this government are good workers, management that pays attention to what they are doing, and the resources to get the job done.

I will adjourn this hearing now, but I want you to know we are going to work on this. Six months from now we know it is not going to be one of those deals where you came in to say, "Well, you saw those guys, and they'll forget about it for a year." We are going to do something. OK?

Senator AKAKA. Mr. Chairman, let me just say that your statement was eloquent, and I can tell it comes out of your experiences as a mayor and governor, and knowing what happens in the trenches. Unless we have the personnel and an office that can handle veterans' preference, then veterans are left without recourse. Using the words of Mr. Sharpe, agencies efforts are inadequate.

I know the frustration the Chairman goes through, that we have these hearings and there is no appropriate answer. I am so glad, Mr. Chairman, that you are pushing this, and I am with you on putting a letter together to try to get answers on this.

Senator VOINOVICH. The hearing is adjourned.

[Whereupon, at 4:35 p.m., the Subcommittee was adjourned.]

APPENDIX

STATEMENT OF
THE HONORABLE DAN G. BLAIR
DEPUTY DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

Before the

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

MARCH 30, 2006

Background

Good afternoon Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss veterans' preference in the Federal Government.

This Administration and the Office of Personnel Management (OPM) are committed to ensuring veterans receive all rights and benefits to which they are entitled under Federal employment laws. Veterans' preference lies at the heart of OPM's mission. We administer veterans' entitlements under the United States Code, in both title 5, which includes veterans' preference in employment and reduction in force, and title 38, which covers reemployment rights for Federal employee veterans called to active duty.

The veterans' preference laws have long been a cornerstone of the Civil Service. OPM has been, and continues to be, at the forefront of efforts to preserve and protect veterans' preference in Federal employment. Today I will focus on OPM's efforts to promote veterans' preference throughout the Federal Government, work with veterans to educate them on opportunities for employment with the Federal Government, and implement and promote veterans' preference within OPM.

Governmentwide Activities

Issuing regulations and guidance is one way in which OPM promotes the application of veterans' preference throughout Government. We have also partnered with our colleagues in various Departments and agencies for a more "hands-on" approach to safeguarding veterans' preference entitlements. For example:

- We work closely with the Department of Defense to ensure veterans' preference entitlements are preserved in the creation of the National Security Personnel System, including veterans' preference in reduction-in-force situations.
- We work with the Department of Veterans Affairs (VA) to revise, simplify or even eliminate the dozens of different form

letters that VA was using to document service-connected disabilities, which are used for preference determinations. This work has and will continue to make it easier for veterans to claim their preference and for agencies to grant it.

- In 2002, we issued a Memorandum for Heads of Executive Departments which strongly encouraged agencies to assist employees called up to active duty by paying both the Government and employee shares of the Federal Employees Health Benefits premium. We specifically asked agencies to pay both shares of the premium in support of the reservists called up to support military operations such as Operations Iraqi Freedom and Enduring Freedom. I am pleased to say that all 114 agencies surveyed agreed to pay both shares.
- We routinely partner with our colleagues at the Department of Labor's Veterans' Employment and Training Service (VETS) office to help resolve veterans' preference and veterans' reemployment rights issues.
- We are improving our USAJOBS website to make it more veteran-friendly by providing prominent home page links to

veterans' employment information and web resources at agencies and elsewhere.

Regulatory Functions

As a part of our regulatory responsibilities we are engaged in numerous programs. For example:

- Right now we are currently revising our rules to reflect recent statutory changes to veterans' preference contained in the National Defense Authorization Act for Fiscal Year 2006. These changes grant veterans' preference to certain individuals serving on active duty on September 11, 2001, or later, and clarify veterans' preference eligibility for individuals released or discharged from active duty.
- In February 2006, we issued a memorandum to the Chief Human Capital Officers Council informing them of these statutory changes and updated our guidance on the OPM website.
- We published regulations in January 2006, which make violations of veterans' preference in alternative rating and selection procedures, or category rating as it is commonly known, a prohibited personnel practice.

- We continue to update, when necessary, our veterans' employment guidance, contained in VETGUIDE and the Delegated Examining Operations Handbook, and our website contains extensive guidance describing the rights and benefits of reservists called to active duty.
- We have also published a set of Frequently Asked Questions on military leave, in recognition of the vast number of Federal employees currently serving in Iraq and Afghanistan.

OPM has also made several improvements to our web-based veterans' products in an effort to provide better customer service to veterans who are seeking Federal jobs. Last year we revised and streamlined our most used Federal form (*Standard Form 15 Application for 10 Point Veteran's Preference)* by aligning it with current policy of the Department of Veterans Affairs and making it more user-friendly for both veterans and the agencies that hire them. This form is used nationally by all disabled veterans seeking Federal employment.

Regulatory Compliance

In terms of compliance with veterans' preference laws, OPM considers any violation of veterans' preference by a covered agency to be a serious matter and will direct any agency to take appropriate action to correct veterans' preference violations. Towards this end, we conduct periodic, systemic reviews of agency hiring practices. More specifically, our oversight office has been directed to give increased emphasis to veterans' reemployment matters in reviewing agency personnel actions.

Apart from our regular oversight schedule, OPM occasionally takes a more focused look at veterans' employment around the Federal Government. For example, in June 2004, we issued a "Veterans' Employment Audit Report" in which we identified potential barriers, issues, or practices that could have a negative impact on the hiring of veterans. We posted this report on our website and shared it with the Chief Human Capital Officers Council, as well as the Veterans Service Organizations (VSOs).

We publish an annual report to Congress on the employment of veterans in the Federal Government, sometimes referred to as the DVAAP report, which includes highlights of agency's efforts to recruit, train, and provide career advancement for veterans.

OPM's Outreach Activities

Now, I'd like to tell you about OPM's efforts to work with veterans to educate them on opportunities for employment with the Federal Government. In 2003, OPM created the Veteran Invitational Program (VIP). This is an educational and recruitment initiative that provides veterans, military personnel, stakeholders and Federal hiring officials with timely, accurate, and useful information on veterans' rights and employment opportunities with the Federal Government. The program helps Federal agency representatives understand how to hire veterans through special appointing authorities and inform veterans and military personnel on what jobs are available and how to apply for Federal employment.

As part of the Veteran Invitational Program, OPM created brochures, wallet-size information cards, wall posters and a veterans' preference DVD entitled *"What Veterans Need to Know About Veterans' Preference."* The DVD offers a comprehensive 40-minute video seminar of veterans' preference rights and eligibilities. OPM sends this material to the Veterans Service Organizations (VSOs), the Department of Labor Veterans Employment and Training Service

(VETS), and Federal agencies (e.g., VA Regional Offices and military separation offices throughout the country).

OPM staff frequently visit veteran medical facilities and military installations to speak with transitioning military service men and women to encourage them to continue to serve their country in the Federal Government and educate them on the benefits available in Federal service. At these visits, OPM human resource specialists provide training sessions on how to navigate the USAJOBS website; resume writing and interviewing techniques; and hiring under veterans' preference and special appointing authorities. OPM provides similar training and job assistance to veterans at job fairs and career days that OPM participates in across the country. We used the momentum from the positive feedback we received from these visits to provide similar training to the Department of Labor's Local Veterans Employment Representative (LVER) staff and DOL's Disabled Veterans Outreach Program (DVOP) staff in the State of Virginia, and will offer training to LVER and DVOP staff in the State of Utah this summer.

Last year, OPM opened an office at the Walter Reed Army Medical Center (WRAMC). Our office provides a variety of services

to military members and their families at the Center. These include serving as a point of contact for other Federal agencies interested in providing employment opportunities to veterans and providing military personnel transitioning out of the armed services with Federal employment and educational information and one-on-one employment counseling. We plan to expand this outreach effort to other military hospitals in 2006 and 2007.

In June 2004, OPM sponsored a special veterans' employment symposium for over 250 Federal agency human capital leaders, human resource supervisors, and program managers on veterans' preference recruitment which focused on advancing existing policies and strategies to recruit veterans into the Federal workforce. The symposium highlighted the importance of effective leadership and agency programs that help managers and human resources professionals understand the benefits of recruiting and hiring veterans.

OPM meets quarterly with the Veterans Service Organizations (VSOs) to address important veterans' issues and to provide an opportunity for the VSOs to share their concerns. We work closely

with the VSOs to ensure that veterans' preference rights are honored and protected throughout Government.

These are some of the outreach efforts OPM has undertaken to promote veterans' preference.

OPM's Achievements

Now, I'd like to tell you about some of the things OPM, as an employing agency, has done and the results our efforts have produced. Within OPM itself, we review each recruitment request and work with the employing office to determine the appropriate source of candidates. When it is determined that hiring from outside the current Federal Government workforce would be a logical source of qualified applicants, we accept applications from all United States citizens. We ensure that OPM vacancy announcements contain explicit instructions to veterans for completing all necessary forms and submitting the necessary paperwork in order to claim veterans' preference as appropriate. As a result, in Fiscal Year 2004, **27 percent of OPM's new hires were veterans and 10 percent of OPM's new hires were disabled veterans.** These were the highest percentages among independent Federal agencies.

OPM is proud of its efforts to preserve and protect veterans' preference. These efforts, in part, have helped make the Federal Government the Nation's leader in veterans' employment. I'm happy to answer any questions you may have. Thank you.

TESTIMONY OF

CHARLES S. CICCOLELLA

ASSISTANT SECRETARY FOR
VETERANS' EMPLOYMENT AND TRAINING
U.S. DEPARTMENT OF LABOR

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

UNITED STATES SENATE

MARCH 30, 2006

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to talk about the role of the Department of Labor's Veterans' Employment and Training Service (DOL/VETS) in assuring Veterans' Preference is applied in the Federal government hiring process. We appreciate the interest of this Committee on this very important benefit for veterans, especially those returning from the Global War on Terror and who are interested in working for the Federal government.

First let me say that we enjoy a very close working relationship with officials at the Office of Personnel Management (OPM). Our two agencies work collaboratively to implement, enforce and improve Veterans' Preference in Federal hiring. Our staffs are in regular contact with each other on both investigative and educational/outreach efforts. We are both champions of Veterans' Preference and we regularly communicate that to all Federal agencies and departments. We believe the Federal government has an excellent record in hiring qualified veterans and both agencies are committed to ensuring veterans receive all rights and benefits to which they are entitled under Federal employment laws.

Agency Responsibilities

OPM is responsible for providing information to veterans and agencies on Veterans' Preference and the procedures for implementing the preference. OPM promulgates the regulations for Veterans' Preference and special hiring authorities for veterans. OPM conducts periodic, systemic reviews of agency hiring practices.

VETS is responsible for investigating and attempting to resolve Veterans' Preference complaints against Federal agencies filed under the Veterans Employment Opportunities Act (VEOA). The VEOA provides that a veteran or other preference eligible person who believes that his or her rights under any law or regulation related to Veterans' Preference have been violated, may file a written complaint with VETS. We carry out our responsibility under the VEOA through the use of trained investigators in each of our state offices.

The Merit Systems Protection Board (MSPB) is responsible for adjudicating Veterans' Preference complaints filed by a veteran or preference eligible, if VETS has investigated and been unable to resolve the issue. The Office of Special Counsel (OSC) is responsible for investigating alleged prohibited personnel practices (PPP) relating to failure to comply with Veterans' Preference requirements.

VETS' Investigative Procedures

If VETS investigates a Veterans' Preference complaint and finds the case to have merit, we will make every effort to work with the agency to resolve it. If resolution cannot be achieved within 60 days, the claimant may elect to appeal the original Federal agency's action to the MSPB.

A veteran also has the right to appeal the original Federal agency's action to the MSPB within 15 days after the claimant is notified of VETS' merit determination. If the MSPB has not issued a judicially reviewable decision within 120 days, the claimant may file a claim in the appropriate U. S. District Court and the MSPB will cease all activity on the claim. If the MSPB or the District Court find in favor of the claimant, they may order the agency to comply with the applicable provisions of law and award compensation for any loss of wages or benefits.

To further support these compliance efforts, VETS entered into an MOU with OSC in December 2000 requiring that any meritorious Veterans' Preference cases be automatically referred to OSC for review as potential PPPs.

Recent Veterans' Preference Investigative Data

The table below shows Veterans' Preference investigative actions by VETS for Fiscal Years 2004, 2005, and through January for Fiscal Year 2006.

	FY 2004	**FY 2005**	**FY 2006 (thru Jan.)**
Carried in from previous years	**31**	**45**	**66**
Cases opened	**351**	**527**	**143**
Cases closed	**337**	**506**	**170**
Average Days Open	**35**	**24**	**33**
Merit	**26**	**15**	**5**
No merit	**215**	**380**	**131**
Merit determination not made (Admin. Closure/Withdrawn/Not Eligible)	**96**	**111**	**34**

Veterans' Preference Investigative Trends

From the table above, it might appear that we are seeing an increase in the number of Veterans' Preference cases. However, in FY 2005, 156 cases were filed by one individual. So, if those cases are removed from the totals, we are actually seeing only a gradual increase in the number of cases (about 20) for FY 2005. For FY 2006, we are expecting a 10% increase in cases based on totals thus far.

As evident from the table above, most complaints filed with the department are determined to have no merit. We believe there are three reasons for this:

1. There is significant confusion by veterans regarding the difference between "open competitive" and "merit promotion" job announcements. Since Veterans' Preference does not apply in "merit promotion" situations, many cases are closed with no merit findings because Veterans' Preference did not apply.

2. Many agencies do not respond to individual inquiries from veterans regarding the status of their applications. As a result, we receive numerous complaints that are filed before the veteran has been notified of the results of the hiring process. In these cases, VETS opens a case file and then discovers that the position is either still pending, has been cancelled, or that another veteran has been selected for the position and the agency had not yet notified other applicants of their hiring decision.

3. We also receive many complaints from preference eligible veterans because an agency makes a determination that the veteran is not qualified for the position. Since Veterans' Preference is only applied after an individual is determined to be qualified for the position, we cannot conduct an investigation on qualification issues. However, we will advise the claimant that he or she may request a second level review of their qualification issue with the agency, or to contact their OPM Service Center for additional assistance.

Outreach and Education Efforts

In addition to our investigative responsibility, VETS conducts an extensive compliance assistance program. This outreach is focused on educating potential Veterans' Preference eligibles and Federal agencies with regard to Veterans' Preference rights and responsibilities.

In 1997, the Department launched its Employment Laws Assistance for Workers and Small Businesses (elaws) program. This program consists of interactive e-tools or "Advisors" that provide easy-to-understand information about many of the Federal employment laws administered by DOL. The Advisor simulates the interaction a person might have with an employment law expert. It asks questions and provides answers

based on the responses given. Over 5,000 organizations currently link to the elaws home page from their Web sites.

As part of the elaws program, VETS has developed a Veterans' Preference elaws Advisor (http://www.dol.gov/elaws/vetspref.htm). The Veterans' Preference Advisor was the first online elaws Advisor developed by DOL. This Advisor is consistently among the top five most popular elaws Advisors, just behind Advisors for the Fair Labor Standards Act and the Family and Medical Leave Act, even though Veterans' Preference applies to a much smaller number of employees. In FY 2005, the Veterans' Preference Advisor had an average of over 12,000 visitors a month. The Advisor has been consistently updated to reflect regulatory changes, as well as advances in technology.

Complaints may now be filed electronically

It is now possible for users to access and file Veterans' Preference complaints through the Veterans' Preference Advisor. After responding to the questions in the Advisor, and gaining a better understanding of his or her Veterans' Preference rights, the veteran or preference eligible is given the opportunity to file a complaint electronically. The electronic filing goes directly to a VETS investigator for processing.

State of the art technology allows us to serve our customers with up-to-date information through the Advisor, 24 hours a day, 7 days a week, and to begin the complaint process in a most expeditious manner. The Advisor enables us to be at the forefront in providing outreach and information on Veterans' Preference, and to more quickly address and prevent violations of the law.

Disabled Veterans Hiring Initiative (DVHI)

VETS also conducts outreach activities through our Disabled Veterans Hiring Initiative (DVHI). DVHI was developed several years ago to educate Federal agency human resources personnel and agency hiring officials on how to better use the available special non competitive hiring authorities to hire certain veterans and disabled veterans.

The DVHI initiative first focused on Federal agencies in the metropolitan Washington, D.C. area. We are in the process of scheduling presentations to the Federal Executive Boards in regions where there is significant Federal hiring. In addition, we have continued our special emphasis in the national capital region by hosting Federal job fairs specifically for veterans.

At DOL, Secretary of Labor Elaine Chao has encouraged Agency Heads to use special hiring authorities for veterans. In FY 2004, veterans comprised 14.1% of new hires in DOL. Moreover, the Department has continued to improve its representation of disabled veterans (4.9%) and 30% or more disabled veterans (2.4%).

Partnership with OPM

VETS collaborates continuously with OPM to help improve representation of veterans in the Federal workforce. Our staffs are in frequent communication regarding specific investigative issues and general trends in Veterans' Preference. Moreover, VETS makes regular use of the excellent material that has been developed by OPM.

For example, the OPM "Veteran Invitational Program" provides resources that promote hiring of veterans and how veterans can apply for Federal employment. VETS has provided this information to all field staff that provide information to veteran employment specialists in America's workforce system, as well as directly to veterans and disabled veterans. VETS also distributed the OPM-produced DVD, "What Veterans Need to Know About Veterans' Preference," to field offices for their use in making presentations to veterans.

Finally, VETS ensures that transitioning service members are provided essential information about Veterans' Preference as well as general information about the Federal hiring process and resources available, during the Transition Assistance Program Employment Workshops. In addition, VETS recently developed a REALifelines (Recovery and Employment Assistance Lifelines) elaws Advisor. This Advisor was designed for wounded and injured service members and veterans transitioning to the civilian workforce and provides specific information on Federal employment, including Veterans' Preference and special hiring authorities, as well as one-on-one employment assistance in each of our states.

Mr. Chairman, that concludes my statement and I would be happy to respond to any questions.

Written Testimony of James McVay, Deputy Special Counsel, Before the Subcommittee on Oversight of Government Management

Mr. Chairman, thank you for the opportunity to discuss how the United States Office of Special Counsel (OSC) promotes veteran's preference under titles 5 and 38 of the Unites States Code. My written submission gives great detail to these topics. In fact, OSC is in the middle of our special project to increase awareness and enforcement of these invaluable laws.

I would like to preface my remarks by giving the committee an understanding of my commitment to these laws and the people they are designed to protect. I believe that the citizens of any nation can be judged by how they treat those who protect and serve them. Within the area of responsibility given to me under these laws, OSC will not fail to meet its commitment. Ultimately, OSC will be judged as having vigorously protected those who protect us.

After taking office in January of 2004, the Special Counsel was struck by the difference in attitude that some had in the federal government towards those service members protected by these laws. It brought to my mind the rule of ancient Rome. At the height of the empire, the military was not allowed to enter the city for fear that they would threaten the republic. Today this would be quite dangerous considering that the federal government is the largest employer of the National Guard and Reserve forces. It is the mission of OSC that any like attitude does not pervade the federal work force.

At OSC we honor the commitment and sacrifice of these noble Americans. Unlike antiquity, we believe that these service members combine the best in us: they are citizens and soldiers. One cannot spend 5 minutes at Walter Reed or Bethesda without an overwhelming sense of gratitude, awe and understanding of our clear commitment to these American warriors.

OSC performs our mission by enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) and 5 U.S.C. § 2302 (b)(11) of the Civil Service Reform Act, relating to veteran's preference laws. Allow me to expand on their specifics and how we have improved our enforcement of these important laws

With the passage of USERRA in October of 1994, Congress expanded OSC's role as protector of the federal merit system and the federal workplace. Under USERRA, where the Department of Labor's Veterans' Training and Employment Service (VETS) is unable to resolve claims, the matter is referred to OSC for review at the claimant's request. Where we are satisfied that the service member is entitled to relief, OSC may exercise its prosecutorial authority and represent the claimant before the Merit Systems Protection Board (MSPB) and, if required, the U.S. Court of Appeals for the Federal

Circuit. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before the MSPB.[1]

As I indicated above, OSC has been on our own offense to strengthen the enforcement of these laws. When the Special Counsel assumed office, he noticed that not a single USERRA case had ever been filed for corrective action before the MSPB. Several of these cases had been in OSC for years. He immediately ordered that all cases be reviewed and placed under the guidance of the new Special Projects Unit. Within a few short months we had filed 3 cases before the MSPB and obtained full corrective action for the aggrieved complainants. Let me tell you about the cases under USERRA.

- Claimant, a commissary store worker alleged that the U.S. Department of Defense, Defense Commissary Agency, Ansbach Commissary (agency) violated USERRA by failing to extend her term appointment, which had expired while she was on military duty and for which she reasonably expected to receive an extension. OSC determined that the agency's disparate treatment of the claimant violated USERRA. OSC successfully obtained full corrective action for claimant, namely: eight weeks of back pay.

- Claimant, a full-time staff nurse serving under a temporary appointment, alleged that the Department of Veterans' Affairs violated USERRA by terminating her employment because she was excessively absent from the work place due to her military service obligations. The agency had taken the position that claimant's position was not covered under USERRA. USERRA's anti-discrimination provisions, however, cover all types of appointments. OSC filed an action before the MSPB and successfully obtained full corrective action for claimant, namely: back pay, the expunging of all negative documentation relating to her termination, and issuance of an SF-50 reflecting that claimant resigned from the agency. The agency also agreed to undergo USERRA training.

- Claimant, a GS-10 Electronics Technician, alleged that his employer, the U.S. State Department, International Broadcasting Bureau, failed to grant him a career ladder promotion while he was absent for 12 months due to military service. The evidence indicated that the agency routinely promoted technicians to the GS-11 level after approximately 12 months of service at the GS-10 level. Because the agency's practice was to promote automatically to the GS-11 level after satisfaction of 12 months time-in-grade at the GS-10 level (i.e., much like a within grade increase of salary) and because there was no issue concerning the claimant's performance, OSC determined that the agency violated USERRA by failing to grant claimant his career ladder promotion while he was absent. The agency agreed and promoted complainant retroactively, granted back pay, and made up TSP contributions.

[1] There is currently no provision under USERRA that permits OSC to seek disciplinary action against federal employees who knowingly and willfully violate USERRA.

- Claimant alleged that he was offered and accepted a law enforcement position with the U.S. Department of Homeland Security, Immigration & Customs Enforcement. When the agency gave claimant an entry on duty (EOD) date, claimant informed the agency that he could not start on the EOD date because of military service obligations. In response, the agency said it would delay his employment until he returned from military service. When he returned from military service, claimant told the agency about an incident of alleged misconduct that occurred while he was on military service. The incident was one that required the agency to conduct a supplemental background check before the agency would allow the claimant to start his employment. The agency investigated the matter, cleared claimant, and hired him to the position it had offered initially. OSC determined that the agency violated USERRA by failing to place claimant on the rolls and in a leave without pay status as of the initial EOD date. Had the agency done so, there would not have been a delay in hiring claimant while it investigated the alleged misconduct. Under the terms of the settlement, the agency adjusted claimant's EOD date to when he would have started at his new, higher graded position but for his military service and paid a lump sum amount reflecting the difference in salary he would have earned upon return from military service in light of the earlier EOD date.

- Claimant had been accepted into the U.S. Postal Service's 16-week Associate Supervisory training program (ASP). Enrollees who successfully complete the ASP are noncompetitively promoted to supervisory positions. Over the first eight weeks of the ASP, claimant earned excellent performance evaluations and attained a grade point average of 3.65 on a 4.0 scale. While enrolled in the ASP, however, claimant performed reservist duties and was absent from employment and unable to attend the ASP on Saturdays. The agency expressed concern over the fact that claimant's military duties caused him to miss the ASP every Saturday. Moreover, the agency believed there would be an adverse affect on agency morale when claimant, after completing the program, would be assigned to a junior supervisory position but would be unavailable to work on Saturdays—as is expected of junior supervisors—because of his reservist duty. Thus, it decided to dismiss claimant from the ASP. Because the evidence established that claimant's military service obligations were a substantial and motivating factor in his dismissal from the ASP, OSC determined that the agency violated USERRA. OSC filed a USERRA action before the MSPB and successfully resolved the case with claimant accepting a large cash settlement.

- Claimant was appointed by the U.S. Postal Service to a 90-day term. In part, claimant's job entailed the lifting of heavy packages. Soon after starting his temporary employment, claimant notified the agency that he would be absent from work to perform military service. Claimant suffered a shoulder injury while on military duty. Although he returned to work and attempted to perform the duties of his civilian job, he was unable to do so. Claimant informed the agency and, in response, the agency informed him that he was being fired because of his non-agency injury. OSC determined that the agency violated USERRA by

terminating his term appointment and making no effort to find him a suitable alternative position. OSC filed suit and the case settled with the agency awarding full back pay to claimant and issuing appropriate documentation reinstating claimant to his position and indicating that he completed his 90-day term appointment. The agency also agreed to undergo USERRA training.

Also, shortly after taking office the Special Counsel testified before the U. S. House Veteran's Affairs Committee, explaining our role in enforcing this law. In late 2004, Congress further expanded OSC's role in enforcing USERRA. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), OSC has the exclusive authority to investigate federal sector USERRA claims brought by persons whose social security number ends in an odd-numbered digit. Under the project, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person's social security number, these are so-called "mixed claims." Pursuant to the project, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project.

Thus, given the new, additional investigative responsibilities, the Special Counsel established OSC's USERRA Unit as part of his January 6, 2005, directive reorganizing the entire agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and veteran-related employment issues. The unit investigates USERRA claims and resolves or prosecutes those claims it determines to have merit. The USERRA Unit is comprised of three investigators, three staff attorneys, and a supervisory attorney who serves as Chief of the unit. The USERRA Unit is part of OSC's Special Project Unit, which is headed by the Deputy Special Counsel.

In order to inform service members and federal agencies of OSC's new role in enforcing USERRA, we substantially modified OSC's web page. The changes describe OSC's role under the demonstration project and explain the manner in which certain federal claimants may seek OSC's assistance for alleged violation of their rights. To make the claim filing process faster and easier for service members, OSC created a new claim form solely for filing USERRA claims. Form OSC-14 entitled "Complaint of Possible Violation of USERRA" has been approved by the U.S. Office of Management and Budget and has been in use since March 2005. The unit also maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors. To further educate the federal public, I have sent members of my staff and the USERRA unit to conduct educational outreach to several agencies and federal employment seminars. Our goal is to inform service members of their rights and improve the awareness of federal managers of this important law.

Here are sample cases that the USERRA Unit has handled under the new demonstration project:

1. In this USERRA reemployment rights case, claimant alleged that the U.S. Drug Enforcement Administration, Mid-Atlantic Laboratory, Largo, Maryland (agency) denied

her career ladder promotion because she was absent from employment due to military service. Claimant is a Chemist for the DEA in the Mid-Atlantic Field laboratory. In June 2003, she transferred to that laboratory as a GS-11 Chemist. Previously, she worked at a DEA laboratory in Texas. Claimant performed military service from December 2004 to January 26, 2005. Upon her return, pregnancy kept claimant out of the laboratory until August 1, 2005. When she left to perform military service in December 2004, claimant had only completed nine months of the 12-month time-in-grade requirement for her career ladder promotion to the GS-12 level. On April 21, 2004, the 12-month time-in-grade requirement passed. When she returned to her civilian career, the agency did not promote her to the GS-12 level claiming that her performance at the time her departure for military service did not show an ability to perform at the GS-12 level. OSC's investigation corroborated the agency's assertion. OSC, however, also obtained evidence indicating that claimant's supervisor would have been able to work with claimant over the remaining three months prior to her career ladder promotion anniversary such that she would have been performing at the GS-12 level by her anniversary date. The agency agreed to provide claimant 90-days training, starting on August 1, 2005. Upon successful completion of the 90-day training, she was promoted retroactive to April 2004 and awarded back pay at the higher GS level from January 26, 2005.

2. In this USERRA discrimination case, claimant alleged that the U.S. Department of Justice, Bureau of Prisons, Metropolitan Detention Center, Guaynabo, San Juan, Puerto Rico, improperly charged him annual leave instead of military leave while he was absent from his civilian employment performing military service. OSC corroborated the allegation and persuaded the agency to take the necessary action to correct claimant's annual and military leave balances.

3. In this USERRA discrimination case, claimant alleged that the Bureau of Indian Affairs, Spirit Lake Health Center (agency) improperly questioned claimant's requests for authorized absences due to military service obligations. OSC contacted the agency and explained its obligations to the service members. Consequently, the agency no longer questioned claimant's right to be absent from civilian employment due to military service. Also, the agency agreed to exhibit a USERRA rights poster.

4. In this USERRA reservist discrimination case, claimant, a member of the United States Air Force Reserve, applied for two Social Insurance Specialist/Claims Representative positions with the Social Security Administration. During her job interview, the selecting official noted that she was a member of the Air Force Reserve and asked if she could be activated. Claimant responded that it was not likely that she would be. When the agency later notified claimant that she was not selected, claimant contacted the selecting official and was told that did not have sufficient civilian experience and that her 5-point military experience did not count because that the position was an internship in the excepted service under the Federal Career Intern Program. Claimant subsequently accepted another job outside of the agency. Under USERRA, it is illegal to fail to hire an applicant because the person may be absent from employment due to military service. In this case, the evidence indicated that claimant would likely have been selected, and the selecting official's comments and questions

suggested that claimant reservist duties were a reason for claimant's non-selection. OSC successfully persuaded the agency to provide full relief to the claimant. Specifically, the agency agreed to pay claimant a lump sum amount of $5,910.00, an amount reflecting loss of pay from the time claimant would have been selected until the time claimant began her current employment. (Claimant did not want to work at the agency.)

5. In this USERRA discrimination case, claimant alleged that the U.S. Department of Homeland Security, Transportation Security Administration, St. Louis, Missouri (agency), which had laid off claimant and numerous of his co-workers, did not later reemploy him because he was on active duty at the time the agency began rehiring former employees it had laid off. Specifically, claimant alleged that he had received a letter from the agency offering him reemployment and that, in response to the letter, claimant telephoned the agency, accepted the offer, and informed it that he was currently on military duty. Claimant further alleged that the agency told him to contact it once he was released from military duty. Initially, the agency denied that it had made an offer of employment to claimant. Rather, it asserted that it had sent claimant a letter merely seeking to determine if he would be interested in being reemployed should a position become available. Claimant did not have a copy of the letter, but OSC obtained a copy through its investigation. The letter corroborated claimant's version of events. Consequently, the agency agreed to reemploy claimant and to award him back pay and related benefits to which he is entitled under USERRA.

6. In this USERRA reemployment rights case, the complainant alleged that the agency violated his USERRA rights by failing to make contributions to his Thrift Savings Plan (TSP) account upon his return from military service. OSC contacted the agency to obtain relevant information. OSC corroborated claimant's allegation and persuaded the agency to take corrective action. The agency agreed to make the required contributions to the TSP account.

7. In this USERRA reemployment rights case, claimant alleged that the U.S. Postal Service, Raleigh Airport Mail Center, Raleigh, North Carolina (agency) failed to reemploy her. OSC's investigation uncovered that, soon after claimant began a 90-day term position with the agency, her military unit notified her that she was being called onto active military service for a one-year overseas deployment in support of Operation Iraqi Freedom. Claimant promptly informed her supervisors that she was being called to active military service and that her final day with the agency would be May 2, 2005. On May 10, 2005, after reporting for duty, Claimant received notice from her military commanders that she was being immediately released from active military service due to medical reasons. She promptly contacted an agency manager and told him that she was released from service and wished to return to her position. The request for reemployment was denied because the agency had already replaced claimant. On June 11, 2005, however, the agency appointed Claimant to another 90-day term position. Under USERRA, an employee serving in a time-limited position is entitled to complete any unexpired portion of his or her appointment upon return from military service. Thus, Claimant was entitled to complete the remainder of her 90-day term appointment upon her discharge from military service. OSC explained the law to the agency and, at OSC's

request, the agency agreed to pay lost wages for period from May 11, 2005 (the next business day after Claimant requested reemployment) until June 10, 2005 (the last day of Claimant's original 90-day term).

8. In this USERRA discrimination case, claimant alleged that he was offered and accepted a position with the U.S. Department of Army, Stuttgart, Germany. When the agency gave claimant an entry on duty (EOD) date, claimant informed the agency that he could not start on such date because of military service. In response, the agency withdrew the offer of employment. OSC contacted the agency and explained that it is illegal under USERRA to deny initial employment because of military service. In response, the agency re-offered the position, which claimant again accepted, and the parties agree to a new EOD.

9. In this USERRA reemployment rights case, claimant alleged that the Department of Veterans Affairs, Veterans' Administration Medical Center, San Antonio, Texas (agency) did not restore her to the status of her previously held Nurse Practitioner position. The agency explained that it was unable to so restore her because claimant's nurse practitioner's license and certification—which are issued by the state—had lapsed while claimant was overseas performing long-term military service. OSC informed the agency of its USERRA obligation to train returning employees and the law's purpose of encouraging military service by minimizing the disadvantages to service member's civilian careers that arises whenever they are called to duty. Thereafter, OSC successfully persuaded the agency to expedite claimant's certification process and clear her to work as a Nurse Practitioner.

10. In this reemployment rights case, claimant alleged that the U.S. Department of Veterans' Affairs, Philadelphia VA Medical Center-Research Department (agency) violated USERRA by failing to reemploy her after performing military service. Claimant was a "fee basis" one-year term employee who was called to military service for several months. While absent due to military service, claimant contacted her employer and informed it that she would likely be released shortly. She was not so released as she had expected but did not subsequently so inform her employer of her continuing military service obligation. Due to a lack of communication between the claimant and her employer as to when she would return, the employer did not reemploy the employee when she was finally released from military service. Notwithstanding the communication lapse, OSC determined that claimant had satisfied her obligations under USERRA (i.e., advance notice of service, qualifying service, and request for reemployment). Thus, OSC informed the employer of its duty to reemploy claimant "promptly" and successfully persuaded the agency to reinstate the employee and award her back pay for the delay in reemploying her. Claimant was paid for 174 hours of work at $17 per hour less withholdings.

11. In this USERRA reemployment rights case, claimant alleged that the U.S. Department of Agriculture, Agriculture Research Service, Beltsville, Maryland (agency) violated USERRA by prematurely reassigning him from a GS-12 Supervisory Farm Manager position to a WS-10 Maintenance Mechanic Supervisor position while he was

absent from work performing military service. OSC's investigation corroborated claimant's allegation. Thus, OSC persuaded the agency to grant full relief to claimant consisting of extending his temporary GS-12 promotion to the appropriate date awarding him the additional pay associated with the extension.

12. In this USERRA reemployment rights case, claimant alleged that the U.S. Department of Labor, Jacob Creek Job Corps, Bristol, Tennessee (agency) required him to provide copies of his military orders to his supervisor prior to being absent due to military service. When claimant failed to do so, it denied his request for military leave (i.e., paid leave while absent due to the performance of military service) and placed him in an absent without leave (AWOL) status. Claimant did not have official orders because he was performing Individual Duty Training (IDT). OSC interceded on claimant's behalf and informed the agency of its obligations under USERRA. The agency agreed to accept documentation other than orders when claimant performed IDT, which claimant volunteered to provide. The agency also granted OSC's request that it change claimant's AWOL status to paid military leave.

13. In this USERRA reemployment rights case, claimant alleged that the U.S. Department of Health and Human Services, Indian Health Service, Rosebud Hospital, Rosebud, South Dakota (agency) improperly placed him in "leave without pay" status and "absent without authorized leave" status instead of allowing claimant to use annual and military leave while absent from employment due to military service. OSC's investigation corroborated claimant's allegations. OSC provided information to agency about how service members are to be carried on the rolls while absent from employment due to military service. OSC also persuaded the agency to change claimant's time and attendance records and grant him leave and associated pay in accordance with USERRA.

14. In this USERRA case, claimant alleged that the U.S. Immigration and Customs Enforcement Federal Air Marshal Service, New York Field Office (agency) failed to promote him while he was absent due to his military obligations and suspended him for 12 days in reprisal for seeking assistance from the Employer Support of the Guard and Reserve. The evidence showed that the agency did not grant claimant, a Federal Air Marshal, a career ladder promotion to the next pay band while claimant was absent due to military service even though he was performing at a successful level at the time the claimant was eligible for his promotion in May 2004. Agency officials indicated that claimant would have been promoted had not been absent. The agency subsequently promoted claimant in August 2005. The agency agreed to make claimant's promotion retroactive and to award claimant back pay associated with the delay. (The agency's attorneys are currently reviewing the settlement.) There was insufficient evidence, however, to support claimant's retaliation and, thus, no corrective action was sought for that aspect of the claim.

15. In this reemployment rights case, claimant alleged that the U.S. Postal Service, Eagan Accounting Service Center, Eagan, Minnesota (agency) wrongfully cancelled his health insurance while he is absent from employment due to military service. The

USERRA Unit contacted the agency to obtain information about claimant's insurance coverage and confirmed that it had erroneously cancelled claimant's coverage. OSC requested and obtained representations from the agency ensuring that corrective action had been taken including the agency informing claimant's health care provider that his insurance has been reinstated.

16. In this USERRA mixed claim, claimant, a GS-15 Administrative Officer who is also a Colonel in the Air Force Reserves, alleged that the U.S. Attorney's Office, San Francisco (USAO), proposed to remove her effective August 8, 2005, because she is allegedly disruptive to the workplace as evidence by disparaging remarks she made to co-workers about management officials and the U.S. Attorney. For example, claimant allegedly referred to management as "twisted pretzels." Claimant transferred to USAO only few months prior to her proposed removal and alleges that she was never counseled and that her proposed removal shocked her. The agency allowed her to go on an "AWS" work schedule to accommodate her reservist duties, but management officials do not appear to like the fact that claimant, as part of upper management, is not in the office everyday. The notice of proposed removal was issued soon after claimant informed agency of an impending absent due perform reservist duties. After obtaining some information from witnesses about claimant's whistleblower reprisal claim, OSC requested an informal stay on August 4, 2005. The agency granted the stay. Claimant eventually left the agency for another job. The investigation is still ongoing.

17. In this USERRA reemployment rights case, claimant alleged that the U.S. Department of Homeland Security, Immigration and Customs Enforcement (agency) failed to allow him to make up Thrift Savings Plan (TSP) contributions missed as a result of his military service in 2002, 2003 and 2004. Under USERRA, employees may be permitted to make up TSP contributions missed as a result of military service. In addition, employees covered by the Federal Employees Retirement System who elect to make up TSP contributions will also receive the appropriate retroactive agency matching contribution to their TSP account. As a result of OSC's inquiry into the matter, the agency promptly processed claimant's request for retroactive TSP deductions. In addition, the agency processed the payments it owes claimant for matched contributions and forwarded the appropriate documentation to the National Finance Center.

18. In this USERRA discrimination case, claimant alleged that the civilian personnel advisory center (CPAC) serving U.S. Department of the Army, Camp Zama, Japan, failed to hire him because of his military service obligation. The CPAC issued a vacancy announcement number for an overseas Logistics Management Specialist GS-0346-12 position. Claimant applied and was selected. Soon after claimant accepted the position, the CPAC allegedly informed claimant that he would not be hired because he was unavailable for employment within 45 days of his acceptance of the employment offer. Claimant was unavailable because of military service obligations. OSC contacted the agency and the agency agreed to hire claimant and place him in a LWOP status until he was available. Also, the agency agreed to receive USERRA training. (Claimant, however, eventually determined that he did not want the overseas position as he had found employment stateside.)

19. In this USERRA case, claimant filed against the U.S. Department of Agriculture, Office of Inspector General (USDA OIG) and the U.S. Department of the Air Force, Office of Special Investigations (AFOSI). He alleged that USDA OIG improperly denied him military service credit under your Law Enforcement Officer Retirement Plan. He alleged that AFOSI violated USERRA by changing his assigned duty station, failing to promote him to a GS-12 level position because of his absence from his civilian employment due to military service, and not crediting his thrift savings plan (TSP) account upon being reemployed. OSC favorably resolved the complaint against claimant's present employer and the TSP issue with the former employer. Specifically, the present employer granted claimant the full military service credit to which he was are entitled under your retirement plan, and the former agency made appropriate contributions and adjustments to his TSP account. (There was not a sufficient basis to seek corrective action from the former employer on the other issues about which claimant complained. In part, there was insufficient evidence of a violation and, in part, claimant's acceptance of a promotion at the new agency, where he is currently employed, made moot the reassignment and the career ladder promotion issues.)

20. In this USERRA discrimination case, claimant sought the recovery of erroneously charged military leave from the U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management ("agency"). Under the "Butterbaugh" line of cases, OSC persuaded the agency agreed to restore eight days of annual leave to claimant's leave balance.

As I commented earlier, OSC also provides relief under Title 5 of the U.S. Code to veterans under our authority granted in the Civil Service Reform Act, also known as a prohibited personnel practices. Section 2302 (b) (11) forbids managers from taking, or failing to take, a personnel action if it would violate a veteran's preference law. However, for OSC purposes, the most significant change to title 5 is set forth in section 2302(e)(2), which states that the MSPB does not have authority to order corrective action for (b)(11) violations and, in turn, divests OSC of authority to seek corrective action for such violations. Hence, OSC's role with respect to allegations of violations of § 2302(b)(11) is limited to seeking disciplinary action in appropriate cases.

A person alleging a prohibited personnel practice under § 2302(b)(11) may seek redress by filing a written complaint with the Secretary of Labor within 60 days of the alleged violation. Further, the veteran's preference laws require the Secretary of Labor to investigate the complaint and, upon determining that a violation occurred, to attempt to resolve the complaint by making reasonable efforts to ensure that the agency complies with the statute or regulation relating to veteran's preference. The task of investigating the complaint is delegated to Department of Labor's Veterans' Training and Employment Service (VETS). If VETS is unable to resolve a complaint within 60 days, it is to provide notification of an unsuccessful effort to resolve the complaint to the complainant. Upon receipt of a notification of an unsuccessful effort to resolve the complaint to the complainant, the complainant may elect to appeal the alleged violation to the MSPB.

In lieu of continuing the administrative redress through the MSPB, veteran's preference law permits a preference eligible veteran to terminate appellate proceedings before the MSPB and file an action with the appropriate United States District Court. In light of the laws 60-day statute of limitations, whenever OSC receives an allegation of a violation of § 2302(b)(11), OSC will notify the claimant of the administrative process to be followed as soon as possible. This is accomplished by providing the claimant with the address and telephone number of the VETS office closest to the claimant.

Pursuant to a Memorandum of Understanding (MOU) between OSC and VETS, VETS refers to OSC cases involving egregious violations of veteran's preference rights for possible disciplinary action.

I want to thank the committee for allowing me to testify today. I truly believe the issues we are focusing on today cut to the core of our values as a nation. Some have called America a modern Roman empire. Perhaps there are parallels, but let us hope that we are not like Rome in distrusting service members. These are our brothers and sons – sisters and daughters, also – and should be treated equally by employers. According to Congress in enacting USERRA, federal employers should be model employers in this regard. OSC strives to hold agencies to that high standard.

STATEMENT

OF

VIETNAM VETERANS OF AMERICA

SUBMITTED BY

RICHARD WEIDMAN
DIRECTOR OF GOVERNMENT RELTIONS

BEFORE THE

SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

REGARDING

FULFILLING THE PROMISE? A REVIEW OF VETERANS' PREFERANCE

MARCH 30, 2006

Chairman Voinovich, Senator Akaka, and distinguished Senators on the Subcommittee, Vietnam Veterans of America (VVA) is grateful to you for holding this hearing, and pleased to have the opportunity to present testimony today. The Veterans Employment Opportunities Acct was enacted in 1998 after a true bi-partisan effort in the Congress and with the support of a broad coalition of virtually all of the veterans' service organizations and military service organizations. Since that time, the issues surrounding implementation and enforcement of the provisions of this law have been steeped in controversy. VVA hope that this Subcommittee will look deeper into the implementation of the act's provisions, and push to put into practice the original intent of our nation's veterans' preference laws.

Veterans Preference is a long-standing part of the fabric of U.S. Law. It was part of the movement toward civil service reform in the early 1800s. I was part of the move toward civil service reforms in the late 19th century as well. Most explicitly, it was part of the set of laws enacted in 1944 that have come collectively to be known as the GI Bill to the public. Most recently, the Veterans Employment Opportunities Act was enacted to reinforce veterans' preference laws, and to ensure that the will of the Congress was carried out in practice.

Veterans' preference is the most basic of veterans' benefits. However, it is not only a reward for service, it is also to acknowledge that while the service member was in the military, they were not building a resume that would translate well into the private sector. The whole concept is - make them whole again. This is especially true for our service disabled.

Lastly, VVA would point out that with the shift about to take place in the composition of the Federal workforce, with many of the Vietnam generation eligible to retire now, and so many new veterans now eligible for veterans' preference, to provide the avenue to recruit veterans, particularly disabled veterans, is just the right time to press hard to recruit these fine young

veterans into the Federal workforce. Our Federal workforce, and the American people, will be the better for bringing these disciplined, drug free, patriotic young people who are mission oriented into further service to country in the civilian sector.

Veterans Preference has two focal points

Initial hiring – to get a civilian job

Retention in RIF

Both now have problems.

In veterans hiring we have two areas of concern: 1) The word "knowingly" has been thrust into law rendering enforcement of veterans' preference laws nearly impossible and spawning numerous workarounds. Knowingly does not apply to other protected classes, just veterans. In eight years, the DOPM has not disciplined a single manager for violation of a person's rights to veterans' preference. 2) The second area of concern is the development of a culture of ignoring veterans' preference with immunity. In Government Executive's Daily Briefing from October 1, 2004 you will find comments from then OPM Director Kay Coles James regarding comments at the Chief Human Capital Officers (CHCOs) Council that met in May 2004. The thrust of those comments is that some CHCOs regarded veterans' preference as an annoyance, and something to circumvent. She indicated that some individuals/agencies engaged in prohibited personnel practices, but would not state her follow up actions.

Whatever happened to the executive branch enforcing the law is our question?

In fairness to the Honorable Kay Cole James, former Director of the Office of Personnel Management (OPM), she did in fact make some efforts to push enforcement of the law and to push hard to ensure that some form of veterans' preference, no matter how weak, was contained in the new personnel systems evolving at the Department of Defense (DoD) and at the

Department of Homeland Security (DHS). Some believe that because of her candor and mild advocacy for veterans' preference she was not re-appointed for the next four years.

On the horizon are further steps toward alternative personnel management systems and category rating systems in areas other than DHS and DoD, as well as implementation of the new systems at these two agencies. It seems that the focus on the former is a return to a patronage based system of management - where the employee pledges allegiance to their supervisor and policy disagreement is not tolerated. In this system, the supervisor is always right and controls

Unfortunately for enforcement or compliance with veterans' preference laws, all of the sticks, and all of the carrots to motivate the agencies and individual managers is limited. Additionally, redress is too limited and too weak. That said, alternative systems that improve processes are welcome - but the high performing organizations may indeed be the ones that have intellectual diversity. Yes there is room for improvement, but why must these alternative systems of the type planned by DHS and DoD script out of veterans' preference.

As for category rating systems, the book is still basically unwritten for this system. In Category Ratings, you must have at least two categories, but the maximum number is not stated. The system seems skewed against veterans, but the data is far too general to determine if it is harmful to veterans. As VVA has said regarding category rankings, if we cannot trust them to make the "one in 3" rule work, would we trust them with a "1 in 300" rule?

VVA wishes to begin by addressing several misconceptions about what exactly veterans preference does and does not do. We firmly believe that the concerns some have are based upon erroneous information, and in some cases a disingenuous interpretation of current law regarding veterans preference. Further, many veterans misunderstand because of poor outreach and education regarding their rights.

There are some key points to bear in mind:

- Veterans' preference does not guarantee any individual veteran the right to any particular job, nor the right to absolute retention in a federal reduction-in-force (RIF). The VEOA did not change this premise -- veterans must still compete for positions.
- Veterans' preference is NOT an affirmative action program -- there are no goals, no timetables, and no quotas for agencies to meet in hiring veterans. Veterans' preference is an individually earned right, not a program designed to do outreach and provide opportunities to a broad class of individuals. A high rate of veterans employed in any federal agency does not negate the individual's right to veterans' preference.
- Veterans' preference applies to all veterans' preference eligibles equally, irrespective of the gender race or national origin of the eligible. And the numbers of these groups continue to grow in the active-duty military. Veterans look like America, in all of our splendid diversity. As the number and percentage of persons of color and of women in the Armed services continues to increase, the future looks very different than the past in terms of the demographics of the veteran population. The goals of veterans' preference and affirmative action for women and minorities are not mutually exclusive, but rather absolutely compatible.
- The current VEOA law was supposed to provide eligible veterans effective redress in the event that his/her rights are violated. Unfortunately, there is no effective means of actually and effectively appealing an agency hire or RIF decision. The only case of which we are aware where a disabled veteran has prevailed before the Merit System Protection Board, the Office of Personnel Management has appealed AGAINST the veteran! Consequently, there are only scant records, in any form, of formal appeals from

veterans who believe their preference rights have been violated. Low appeal filings, therefore, are not a valid indicator that rights being upheld. In other words, the Veterans Employment & Training Service of the Department of Labor (VETS) is not adequately investigating cases and helping veterans prepare complaints. Reportedly the VETS staff often call the agency in question and asks whether the alleged perpetrator whether or not they violated veterans' preference of a certain individual, and then takes the agency's word for their innocence.

VVA strongly supported enactment of the Veterans Employment Opportunities Act eight years ago. We commend Senators Chuck Hagel and Max Cleland for introducing this successful legislation in the Senate some eight years ago, just as we strongly commend you today for seeking to ensure proper enforcement/compliance with existing law, and possible further legislation to ensure compliance.. At the time we strongly believed this legislation would correct serious shortcomings in veterans' preference law, by creating an appeal and enforcement mechanism to bring our nation's 60 year old Veterans Preference laws up to date with the current federal employment realities.

Analysis by the General Accounting Office (GAO), as well as cases that cross the desks of VSO employment advocates, clearly demonstrate that it is now time for further legislative action to make Veterans' preference laws effective seems clearly evident to us. Currently veterans' preference appears to be circumvented at an alarming rate -- far more than mere anecdotal occurrences. VVA believes that the new "banding" may well only compound the situation of poor compliance and virtually no redress. Why, one might ask, would anyone in the federal government wish to violate veterans' preference? Theories vary, but the seemingly

obvious reasons are threefold: a) a severe lack of understanding of the contributions and readjustment needs of veterans, as well as the objective of veterans preference; b) a misconception that veterans preference laws conflict with affirmative action programs for women and minorities, and that these groups' employment opportunities are damaged by veterans preference; c) an effort to ease future personnel actions related to the ongoing federal downsizing through RIFs; and d) a lack of understanding of the tremendous asset that these young people have been, and can continue to be, to the Nation.

The original veterans preference laws were designed to provide veterans with an even playing field in competing for jobs against civilians who did not take time away from the job market in service to their country. Veterans, it was recognized, not only sacrificed safety and health while in the military, but also fell behind their non-veteran counterparts in career development. Veterans' preference was never intended to put veterans in jobs for which they are not qualified. Rather, the law aims to give recognition to veterans for their prior "federal" service in the military, and provide a compensative advantage in cases where competition for a federal position runs equal between a veteran and a non-veteran.

Advocates can point to numerous incidents in which veterans were denied jobs for which they were rightfully qualified or inappropriately lost their jobs through Reduction-In-Force (RIF) or the new version of "designer RIFs," which is known as "involuntary repositioning rules." And under current law, these veterans have minimal recourse within a system which has proven very unresponsive. And therefore, very little data is available through the Department of Labor's (DOL) Veterans Employment and Training Service (VETS) or the Merit Systems Protection Board (MSPB).

In an era of decentralized hiring, these hiring decisions are often made very creatively. We have all heard "designer RIFs" discussed, in which particular employees are targeted for single competitive levels, then dismissed within a RIF. Some agencies employ what we would refer to as "designer hires," in which the job description and vacancy announcement are crafted in such a way that a pre-selected candidate is uniquely qualified for the position.

The provisions of VEOA cannot prevent "designer hires" in federal agencies and it cannot guarantee that veterans will get these jobs or be able to compete effectively against applicants who meet the tailored criteria. But it will allow veterans to get a foot in the door of the application office, and hopefully may make hiring managers more cognizant of adhering to veterans preference and to unique qualifications many veterans can bring to the civilian workplace.

Section 3 pf VEOA, dealing with Special Protections for Preference Eligibles in Reductions in Force, would prohibit agencies from placing preference eligible veterans in a single-position competitive level, thereby restricting "designer RIFs." The objective was fairly self-explanatory. VVA believes this is a critical provision of the law. However, now agencies have come up with a new wrinkle to do the same thing, only they call it the "involuntary repositioning rules." VVA supports amending this provision to prohibit all designer RIFs, and the newest ugly game known as "involuntary repositioning rules."

Section 4 of VEOA created the Improved Redress for Veterans. This is a key provision of this law that is not working well. The lines of who is responsible for what – OPM, VETS, or the Office of the Special Counsel –is murky and unclear, even to them. Currently veterans have no effective means of appealing an adverse hiring or RIF decision, even if they know that they can turn to VETS or how to find VETS or the other elements in this process. And because of

this, agencies seem to use any method at their disposal to circumvent are violated. If an agency is adhering to the letter and intent of existing veterans preference law, there should be no burden; in fact, to claim administrative burden would seem to indicate trative burden.

Section 8 of VEOA makes "Failure to Comply with Veterans' Preference Requirements a Prohibited Personnel Practice." This is very important because, in combination with the redress, this provision creates the second key element of an improved enforcement of veterans' preference. The word "knowingly" must be eliminated from this provision of law, and a stronger mandate on OPM for enforcement of action against managers and other hiring authorities that allow violation of veterans' preference.

One perspective VVA continues be frustrated with is the misleading use of statistics showing total numbers of veterans employed by the federal government to indicate that the veterans preference laws are working well. First, not all veterans are eligible for veterans preference, and therefore using these gross numbers is a misrepresentation of the facts; we understand the Committee staff has access to numbers of "preference eligible" veterans among the personnel of each agency, but we have not yet seen these figures and therefore naturally assume the true "veterans preference" statistics to be somewhat less impressive. Secondly, a point we raised earlier, if veterans preference is working well within the federal personnel system, implementation of the enforcement mechanisms in this legislation should not be burdensome.

These aggregate statistics of total veterans within the federal workforce also fail to detail numbers of veterans preference eligibles hired in any given time frame, as well as the numbers of veterans preference eligibles who applied for federal employment but were not hired. The demographics of the veterans' population among federal employees are also unclear. Are the

large majority of veterans employed by the federal government older veterans, about to reach retirement age? A review of recent statistics from the Department of Labor will show larger numbers of young, recently separated OIF/OEF veterans among the unemployed. Thus, we would venture to guess that statistics of veterans within the federal workforce broken down by age group and by grade would not show as impressive a record of hiring veterans, particularly disabled veterans and younger veterans.

VVA further argues that looking at gross numbers of veterans in the federal workforce is irrelevant because veterans' preference is an individually earned benefit, not an affirmative action goal. Anecdotal evidence of veterans' preference violations, however, is very relevant in this debate. Whether it is only one veteran's rights that are violated, or if it is some 100,000 veterans whose preference rights are violated -- this is an indication that the law is not being upheld. Whether the evidence is episodic or systemic, a violation of the law is still a violation of the law. There is not space nor time to describe in detail some of the cases that we have tried to In fact, when one looks prospectively at the veteran population of the future, the intent of veterans preference and affirmative action goals are not mutually exclusive. VVA would be pleased to work with your staff on some of these specific cases.

We all have a responsibility to ensure that our nation's total U.S. military personnel will have the opportunity to serve in the civilian sector. Further, VVA believes that we all have an obligation to see that the law of the land is enforced, and that each eligible veteran is accorded his or her full rights to veterans' preference in hiring and retention. America is at war. Our newest veterans, many still under fire, deserve veterans' preference in hiring and retention that happens in fact, and that provides equal justice under the law. VVA appreciates this opportunity to present views. I would be very pleased to respond to any questions you may have.

VIETNAM VETERANS OF AMERICA

Funding Statement

March 30, 2006

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans membership organization registered as a 501(c)(19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:

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Vietnam Veterans of America.

(301) 585-4000 extension 127

STATEMENT OF
JOSEPH C. SHARPE, JR., DEPUTY DIRECTOR
NATIONAL ECONOMIC COMMISSION
THE AMERICAN LEGION

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

VETERANS' PREFERENCE WITHIN THE FEDERAL GOVERNMENT

MARCH 30, 2006

TESTIMONY OF
JOSEPH C. SHARPE, JR., DEPUTY DIRECTOR
NATIONAL ECONOMIC COMMISSION
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BEFORE THE
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UNITED STATES SENATE
ON
VETERANS' PREFERENCE WITHIN THE FEDERAL GOVERNMENT

MARCH 30, 2006

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates this opportunity to share its views on veterans' preference in the Federal government.

Congress enacted the Veterans' Preference Act of 1944 to address the readjustment needs of the men and women who served their country during a time of war. The law was designed to assist veterans in regaining the lost ground suffered in their civilian careers as a result of military service.

When The American Legion was founded in 1919, one of its first mandates was to convert the existing patchwork of veterans' preference laws, administrative rules and executive orders into one national policy that would be protected by law. That goal was realized 25 years later when President Roosevelt signed the Veterans' Preference Act of 1944 into law.

With the closing of World War II the Federal government enthusiastically complied with the provisions of the new veterans' preference law. Unfortunately, as time passed and the memory of war faded, so did America's concern for fulfilling its obligation to its citizen-soldiers. Today, provisions of the original legislation and its amendments, as codified in Title 5, United States Code (USC), seem almost non-existent to many veterans' across the country.

The American Legion believes there are several reasons for this. A large number of Federal managers do not understand or agree with the reasoning for granting veterans' preference to those who fought to keep this country free, nor do they understand or care how this process works. These problems are compounded by the fact that many veterans are unaware and confused regarding their rights under veterans' preference statutes.

The American Legion's National Veterans' Preference Committee recognized the need for better education and published a pamphlet entitled *Questions and Answers About Veterans' Preference*. The purpose of the pamphlet is to not only answer veterans' most commonly asked questions about this entitlement, but to also educate the general public about veterans' preference.

In the early 1970s, veterans' preference became politically controversial. As public opposition to the war in Vietnam escalated, the stigma of the war spilled over to those who served in the armed forces. The American Legion wants to ensure that the current war on terror does not become as unpopular and that negative sentiment does not spill over to those currently serving in the armed forces. The number of veterans complaining of losing jobs, veterans' preference discrimination, homelessness, health care benefits, and other quality-of-life issues are increasing.

During the time of the Vietnam War, affirmative action legislation was enacted that required Federal agencies to establish "goals" and "timetables" for the recruitment of women and minorities for careers in civil service. Because veterans' preference is an earned entitlement and not an affirmative action program, there have never been quotas for the hiring of veterans'. As a result, there is very little incentive for Federal agencies to hire veterans; therefore, choosing to ignore the law.

While The American Legion recognizes the importance of increasing employment opportunities for women and minorities, we are concerned that all too often that goal has been accomplished by denying veterans their rights under veterans' preference laws. Ironically, a large percentage of women and minorities are veterans. In fact, the percentage of minorities serving in the armed forces reflects a larger percentage than the overall percentage of minorities in America.

Under affirmative action, women and minorities are protected from discrimination by the rules and regulations of the Equal Employment Opportunity Commission (EEOC). As a result, those protected by EEOC may file a formal complaint if they feel they have been discriminated against in hiring, promotion or retention. Unfortunately, that same level of EEO protection is not afforded to veterans under veterans' preference even though veterans make up an extremely small percentage of all Americans (less than 10 percent).

While Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans'' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

As a result of the current law, Federal managers who have ignored veterans' preference often times, may not have been held accountable. The weakness in the redress authority must be strengthened.

Office of Personnel Management (OPM)

OPM has a statutory obligation to ensure that agencies abide by statutes providing veterans' preference and we applaud their efforts since 9/11 to promote and protect veterans' preference

throughout the Federal Government. The American Legion has thanked former OPM Director Kay Cole James and current OPM Director, Linda Springer, for efforts to reach out to the veterans' service organizations (VSOs) with invitations to attend OPMs annual meetings, OPM's participation in VSOs' annual conferences and National Conventions, and the veterans' community appreciates these efforts to provide outreach service to veterans and service members stationed around the country. However, The American Legion is still deeply concerned that veterans are not receiving the hiring preference that they rightfully deserve.

With the mandatory downsizing of the Federal government and the implementation of the Flexibility Act, many Federal agencies have become extremely creative in finding ways of circumventing veterans' preference regulations.

Unfortunately, in violation of veterans' preferences statutes, Federal agencies sometimes make appointments by methods that do not require the recognition of veterans' preference. Some of these methods have been approved and endorsed by OPM in the name of "flexibility in hiring." One major focus of The American Legion during the last five years has been to challenge the validity of such appointment methods.

Outstanding Scholar Program

One program that does not require application of preference rules is the Outstanding Scholar Program. In 2001 and 2003, The American Legion filed *amicus* briefs with the Merit Systems Protection Board (MSPB) on behalf of veterans who claimed that the Outstanding Scholar Program violated their preference rights. In the fall of 2005, the MSPB determined that hiring an Outstanding Scholar over a preference eligible was a violation of veterans' preference. (*Dean v. Department of Agriculture,* 99 M.S.P.R. 533 2005) However, OPM, the Federal agency charged with protecting veterans' preference, is asking the MSPB to reconsider this favorable decision. OPM's position is that hiring an Outstanding Scholar is not subject to veterans' preference. The American Legion not only sent a letter to the Director of OPM to reiterate our concern over OPM's filing of a motion for reconsideration in the Dean case, but we are also currently appearing as a friend of the court (*amicus curiae*), arguing that the MSPB decision that found in favor of veterans' preference should prevail.

Several other Federal employment issues were recently decided in favor of veterans. The OPM's Clerical and Administrative Support Positions (CASP) assessment tool, which established a standing register of applicants without regard to veterans' preference, was found to violate veterans' preference rights. (*Deems v. Department of the Treasury, 100* M.S.P.R. 161) The MSPB also decided that although employees are not entitled to veterans' preference in the Merit promotion process an internal applicant for vacancy is entitled to veterans' preference on the same terms as external applicants. (*Perkins v U.S. Postal Service, 100 M.S.P.R.*)

National Security Personnel System

In October 2004, OPM and DoD representatives briefed The American Legion on the National Security Personnel System (NSPS). According to OPM and DoD press releases: "The NSPS represents the most significant change to the civil service since the Civil Service Reform Act of

1978, with flexibilities never before afforded that have the potential to impact the entire Federal work force. These new flexibilities are being married with pillars of the civil service, such as Veterans' Preference, in order to create a new, agile personnel system."

In November 2004, during a special quarterly VSO meeting with OPM representatives, The American Legion expressed its concerns that deficiencies and flaws in veterans' preference rules in the current Federal personnel system would be continued or magnified in the NSPS. A follow up letter was sent to OPM outlining those concerns. The following is a summary of those concerns with the current personnel system:

> *Veterans' preference laws are intended to give veterans an advantage over other applicants for Federal positions and during a reduction in force (RIF). Veterans earned this advantage by serving their country. For many years, veterans' preference laws successfully provided significant advantages as intended. However, over many years, agencies have gradually gained access to appointment methods that do not require providing preference. Other weaknesses in the current system relate to enforcement of veterans' preference, accountability and disciplinary actions for veterans' preference violations, and the limited appeal rights for violations of veterans' preference.*

The following is a summary of some current problems and a description of how any new personnel system might avoid these problems:

- **Lack of Accountability, Corrective Action and Enforcement of Veterans' Preference Laws**

  Title 5, USC, section 2302 (e) states that no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11) providing that violating veterans' preference requirements is a prohibited personnel practice.

  However, an enforcement mechanism to hold human resource managers accountable for not applying veterans' preference in appointments to the NSPS should be added to NSPS regulations.

  There is a definite need for the creation of disciplinary action under Title 5, USC, section 1215 or a similar statute, should a violation of a veterans' preference prohibited personnel practice occur in the NSPS. Such disciplinary action is available for violations of other prohibited personnel practices.

  The NSPS regulations should also establish an Office of Veterans' Affairs in order to ensure an ongoing, vigilant review of NSPS hiring and RIFs with regard to veterans' preference. The Office of Veterans' Affairs within NSPS should have the power to investigate and prosecute violations of veterans' preference so that there is prompt, appropriate corrective action, such as hiring or other actions, to make a veteran "whole" again.

- **Availability of Appointment Methods not Requiring Application of Veterans' Preference**
  The Outstanding Scholar (OS) Program, allows agencies to ignore veterans' preference in appointments to a wide variety of Federal positions. *See* DELEGATED EXAMINING OPERATIONS HANDBOOK § 2.8 (October 1999) stating that veterans' preference does not apply to the OS program.

  The consent decree upon which the OS Program is based unlawfully exempts a class of individuals from veterans' preference statutes and, in addition, violates Title VII of the Civil Rights Act of 1964, as amended, Title 42, USC section 2000e et seq., which specifically states that nothing in Title VII should be interpreted to repeal or modify a Federal law creating special rights or preference for veterans.

  The American Legion urges that the NSPS rely on hiring tools that require application of veterans' preference and not use any hiring method not requiring the consideration veterans' preference law.

- **Use of Multiple Certificates for a Single Position Weakens "Pass over" Rules**
  Title 5, USC, section 3318(b) protects veterans' preference by requiring a special review process where an appointing authority proposes to *pass over* a preference eligible on a certificate in order to select "an individual who is not a preference eligible." In addition, certain disabled veterans are provided notice and the opportunity to respond to the proposed *pass over*. (*See* Title 5, USC, section 3318(b)(2))

  When this *pass over* law was passed, agencies prepared only a single certificate for each open position. However, over time agencies began to prepare separate certificates for each different hiring flexibility that might be used to fill the position. (As noted earlier, some hiring authorities do not require that veterans' preference be applied; for example, OS does not require that veterans' preference be applied). Agencies began to fill a single position by choosing from among multiple certificates. The use of multiple certificates at the current time means that an appointing authority may *pass over* a preference eligible heading one certificate simply by choosing from another certificate drawn from a hiring authority that does not require application of veterans' preference. This weakens veterans' preference and renders impotent the important section 3318 protections against *pass overs*.

  The NSPS should incorporate important pass over protections into its system. Also the NSPS should not allow the creation of multiple certificates or lists for a single position. NSPS should rank the various hiring flexibilities--flexibilities that require veterans' preference should top the hierarchy of hiring flexibilities.

- **Lack of Hierarchy in Appointment Methods**
  As noted above, a number of hiring flexibilities are available under the current Federal hiring system. If hiring authorities that do not apply veterans' preference continue to exist, The American Legion believes that appointment methods requiring application of veterans' preference should explicitly be favored over other methods and top the

hierarchy of appointment methods. The NSPS should only be able to resort to a lower hiring flexibility in limited cases when there is an absolute necessity.

- **Weakness in the Ability of Veterans' to Appeal Veterans' Preference Violations**
  Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

  The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

Conclusion

The American Legion would like to reiterate how important veterans' preference in Federal hiring is to returning service members and veterans. It is equally important that OPM maintain enforcement power over Federal agencies. In a time of rapid change and with the pending departure of 400,000 service members within the next two years, The American Legion believes that the current structure within OPM that is designed to monitor, inform, promote and enforce veterans' preference laws is clearly inadequate. The American Legion recommends that Congress provide additional funding for an Office of Veterans Affairs within OPM that is adequately staffed and funded. Such an office could better exercise OPM's mandate to protect veterans' preference.

Mr. Chairman, a grateful nation created the concept of veterans' preference for those citizens who served this country in the armed forces. Due to the current War on Terror, thousands of service members of the Reserve component, who make up 40 percent of the current fighting force in Iraq and Afghanistan, will now qualify for veterans' preference due to their extraordinary contribution to the freedoms we all enjoy as Americans. The American Legion urges this Subcommittee to send a strong message to Congress to do more to preserve and protect veterans' preference.

Mr. Chairman, this concludes my statement.

STATEMENT OF
BRIAN E. LAWRENCE
ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
UNITED STATES SENATE
MARCH 30, 2006

Mr. Chairman and Members of the Subcommittee:

On behalf of the 1.3 million members of the Disabled American Veterans (DAV), thank you for the opportunity to present our views on the state of veterans' preference in federal employment. The DAV was founded on the principle that our nation's first obligation to veterans is the rehabilitation of its wartime disabled. Along with quality health care and adequate compensation, this principle envisions gainful employment as a primary step toward that goal. It is our duty as a grateful nation to ensure that those who have sacrificed so dearly in the name of freedom have the opportunity and support needed for self-sufficiency.

The United States has recognized that members of the armed forces deserve special consideration regarding appointments to federal positions since the Revolutionary War. Along with rewarding veterans for their patriotic duties and sacrifices, our government realized the value in harnessing veterans' inherent leadership qualities and skills, which are essential to any successful business or government agency. Emphasis on hiring veterans has provided a benefit to our entire national economy throughout the history of our country. While many regulatory provisions and Executive Orders accorded veterans a preference in federal employment prior to World War II, no statutory provisions existed until veterans' service organizations' efforts to elevate such preferences resulted in the Veterans' Preference Act of 1944. With the exception of a few modifications and enhancements, current veterans' preference laws have remained essentially the same since they were first codified.

The Act, as amended, requires that eligible veterans be given enhanced consideration for federal jobs. This is done by adding either 5 or 10 points to the passing examination scores of honorably discharged veterans meeting certain military service requirements. The basic preference to which applicants are entitled is the 5-point preference. The 10-point preference is given to disabled veterans and Purple Heart recipients, as well as to the eligible spouses, unmarried surviving spouses, and mothers of totally disabled or deceased veterans. Candidates are ranked according to their examination ratings augmented by their preference points. Service-connected disabled veterans who have compensable disabilities are automatically placed at the top of civil service registers for nonprofessional, nonscientific positions below GS-9. Federal agencies have discretionary authority to give noncompetitive appointments to any veteran who has a service-connected disability of 30 percent or more. Federal law also gives eligible veterans certain protections that help them retain their jobs during a reduction-in-force.

Despite statutory requirements providing such preferences, we occasionally receive anecdotal information from disabled veterans seeking federal employment who believe their

preference rights were ignored or intentionally circumvented by the agencies to which they had applied. Most often, such complaints are in reference to the outstanding scholar program (OSP). Many federal agencies use the OSP to hire new employees who have maintained college grade point averages of 3.5 or higher. The process enables agencies to hire new employees in a relatively quick and easy manner, but no evidence exists to indicate that OSP hires possess any more initiative or common sense than other categories of employment candidates. Regardless, a qualified veteran should never be passed over in favor of an OSP candidate. As previously stated, veterans' preference is a statutory requirement. The OSP is merely a regulatory provision, therefore it lacks the precedence veterans' preference holds. Besides being based on higher statutory authority, veterans' preference provides a better indication that a candidate will be a reliable, hard working employee. Veterans have already proven themselves to be goal oriented, disciplined, drug-free, and patriotic.

In August 2005 the U.S. Merit Systems Protection Board (MSPB) ordered the U.S. Department of Agriculture (USDA) to retroactively appoint an appellant, David Dean, to a position that was given to a new employee under the outstanding scholar program. Dean is a service-connected disabled veteran who contended that the USDA hired a non-veteran under the OSP as a way to get around the veterans' preference requirement. In an unprecedented decision, the MSPB ruled in favor of the veteran. Clearly, the DAV, along with our fellow veterans' organizations, was quite pleased with the ruling. Our satisfaction was short lived however because soon after the MSPB made its decision, the U.S. Office of Personnel Management (OPM) requested that the decision be overturned. OPM's stated concern was that the OSP would be weakened. Clearly, if OPM had its way and the decision was in favor of the OSP, veterans' preference would be the program that was weakened. The unmistakable message OPM sent to disabled veterans is that their sacrifices are less meritorious than the ability to maintain decent scores at the local college. My frequent contact with OPM and its staff members avails me enough knowledge to state with some confidence that the consequences of its action were unintentional. Still, it is outrageous that such ramifications were not carefully considered, especially when thousands of disabled veterans are returning from operations in the War on Terrorism.

Veterans' preference is also weakened by the variety of systems and processes used by the different federal agencies to hire new employees. A 5 or 10 point preference is meaningless in a system that does not employ standard 100 point examinations. Agencies also create various categories from which to hire. Such techniques, sometimes referred to as "stove piping," can be manipulated to achieve desired outcomes. For instance, disabled veterans could be placed at the top of every category in which they are listed, but unless an employee is selected from their respective category, they will never get the job they are seeking. More uniformity is needed to ensure this injustice does not occur. A single application process or single application portal should be established so that applicants are accorded fair measure, and veterans' preference is not circumvented.

We appreciate the Committee's interest in these issues, and we appreciate the opportunity to present the DAV's views, which we hope will be helpful.

Post-Hearing Questions for the Record
Submitted to Deputy Director Dan Blair, Office of Personnel Management
From Senator Daniel K. Akaka

"Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government"

March 30, 2006

1. **I have heard from veterans that agencies will often cancel vacancy announcements once it is determined that a veteran will get the position and then reopen the announcement after the job description and requirements have been tailored to a particular person who is not a veteran. To the best of your knowledge, how many times has an agency returned a certificate unfilled, and how many of those were withdrawn for a valid business reason?**

   The assertion that agencies "often" cancel vacancy announcements to prevent veterans from being hired is incorrect. OPM addressed this issue in a 2004 Veterans Audit Report. The audit included a review of unused competitive certificates issued by both agency delegated examining units and OPM to determine if veterans received proper consideration and the preference to which they are entitled. We found veterans do receive appropriate consideration and requests for pass overs and objections to veterans' applicants are limited.

   Agencies provided the same reasons for not using a competitive certificate whether the unused certificate was topped by veterans or non-veterans. Generally, the position was filled by some other means allowed by civil service laws or regulations, e.g., merit promotion or non-competitive appointment, or a funding issue caused the vacancy to be cancelled between the time the job was announced and the certificate was provided to the selecting official.

   We did not find a direct correlation between agencies' use or non-use of certificates containing veterans and the representation of veterans in the workforce. We found the same pattern of use and non-use among agencies with a high percentage of veterans on their rolls as in those agencies with veteran levels below the Civilian Labor Force (CLF) percentage. In fact, 25 percent of veteran accessions were through competitive examining, which is about the same selection rate from this appointment source as for non-veterans.

2. **In 2002, Congress passed the Homeland Security Act which included the authority for all agencies to use category ratings instead of the Rule of Three in hiring. This authority was granted to speed up the hiring process while still preserving veterans' preference. When can we expect a report on the number of agencies using category ratings and the number of veterans hired, including disabled veterans?**

The use of category rating is optional; however, with regard to category rating reporting, in accordance with 5 U.S.C 3319(d), agencies are responsible for providing the following information directly to Congress:

- Number of employees hired under category rating;
- Impact category rating has had on the hiring of veterans and minorities, including those who are American Indian or Alaska Natives, Black or African American, and native Hawaiian or other Pacific Islanders; and
- Way in which mangers were trained in the administration of category rating.

To date, OPM has received copies of the following reports:

2005

- Federal Housing Finance Board

2004

- International Trade Administration
- National Endowment for the Arts
- Social Security Administration

In the past two years, OPM has reminded agencies of the requirement to provide annual reports to Congress. This has been communicated through the following:

- Memorandum for Chief Human Capital Officers – Calendar Year 2004 Reports, dated January 25, 2005;
- Memorandum for Human Resources Directors – Annual Reporting Requirements under Category Rating, dated January 31, 2005;
- Memorandum for Chief Human Capital Officers – Calendar Year 2005 Reports, dated December 23, 2005

In addition, OPM has provided guidance on category rating and the specific requirement to provide annual reports to Congress and OPM through its initial and recertification delegated examining training sessions; at various conferences with human resources directors, managers, and human resources specialists; and in one-on-one meetings with agency representatives. More information on category rating can be found in the Delegated Examining Operations Handbook - www.opm.gov/deu, and in the Category Rating Fact Sheet – www.opm.gov/employ/category_rating/index.asp.

3. **What do you see as the leading cause of agencies' failure to apply veterans' preference, and what is OPM doing to address this problem?**

The vast majority of agencies follow veterans' preference requirements to the letter of the law. We typically do not see violations of veterans' preference and the rule of three at a systematic level across an entire agency. Problems are

usually isolated to a specific installation or organization and are caused by inadequate direction, oversight or accountability on the part of administrative authorities at the local level.

If we find a willful violation, OPM refers the matter to the agency Inspector General and/or the Office of Special Counsel to investigate and prosecute any prohibited personnel practices. If merit system violations are systemic and severe, OPM will also withdraw an agency's authority to conduct delegated examining activity.

4. **Over 50 percent of all veterans in the federal government work at the Department of Defense (DoD). Although the DoD is the largest agency, it represents only one-third of the federal workforce. Has there been a review to determine why veterans are being hired at significantly lower percentages at other agencies?**
OPM has not conducted a review. Ultimately, each agency is responsible for its own hiring decisions. OPM will send a memo to the Chief Human Capital Officers Council reminding them that veterans have been, and continue to be, one of the main sources of candidates for Federal jobs and urging them to use veterans' hiring flexibilities whenever possible.

5. **According to OPM's report on the employment of veterans in the federal government for fiscal year 2004, veterans are disproportionately placed in clerical or blue-collar jobs instead of professional positions. Why is this, and what can OPM do to increase the number of veterans in professional positions?**

As with any job-seeker, veterans apply for whatever positions they choose and, if selected, are placed into the job for which they applied. Professional occupations (e.g., doctors, lawyers, scientists), have a positive education requirement. Historically, the representation of new veteran hires in professional occupations is consistent with the data shown in our FY 2004 report (i.e., about 10 percent).

6. **The law permitting agencies to use category ratings instead of the Rule of Three states that applicants are to be divided into two or more categories based on their qualifications and that veterans in each category will rise to the top. There is concern among veterans that this will allow agencies to place each applicant in their own category as a way to circumvent veterans' preference. This practice would certainly be in violation of the spirit of the law, if not the law itself. Are agencies able to place each individual in his or her own category? Is there any evidence that agencies are doing this, and if so, what action has OPM taken? Can you provide any data to support this for the record?**

In category rating, an agency must establish and define a minimum of two quality categories. Quality categories must be written to reflect the requirements to

perform the job successfully and to distinguish differences in the quality of candidates' job-related competencies/knowledge, skills and abilities (KSAs). Each quality category will have eligible candidates who have demonstrated, through an assessment tool or tools, similar levels of proficiency on the critical job-related competencies/KSAs. Preference eligibles are placed ahead of non-preference eligibles within each quality category.

We have no information or evidence to indicate that agencies are applying category rating inappropriately.

7. **OPM is charged with making sure that agencies are following federal personnel laws and regulations. How many employees at OPM are assigned to investigating veterans' preference violations, and how many OPM employees are on staff to educate agencies about veterans' preference?**

Approximately 100 OPM employees are responsible for merit system compliance and audit work that includes reviewing how well agencies adhere to veterans' preference requirements. We annually conduct 125 delegated examining unit (DEU) reviews to ensure hiring operations comply with law and regulation, including veterans' preference rules. We also annually conduct 15-20 Human Resource Operations Audits (HROA) that broadly examine agency HR programs, including competitive examining and the use of Veterans' Employment Opportunities Act and other veteran hiring authorities and practices. Many of these 100 employees provide training to agency delegated examining staff on how to properly apply veterans' preference in hiring.

Approximately 55 OPM employees directly consult with and advise agencies on their human capital management programs to ensure that agencies manage employees effectively, efficiently, and in accordance with merit principles, including veterans' preference requirements. Another 20 employees work on a broad range of staffing policy matters, including examining, reduction in force, and special veterans' appointment authorities. All 75 of these employees serve as available resources that agencies can and do draw on for information and education about veterans' preference.

We believe that educating selecting officials and human resources staff on the variety of hiring authorities designed to support veterans' employment will help open doors for veterans across Government. OPM has provided guidance and training on the application of veterans' preference through a number of venues. These include:

- Training sessions on hiring flexibilities and category rating (both topics covered at OPM's 2006 Federal Workforce Conference)
- OPM's VETGUIDE, which we are updating to further emphasize the application of veterans' preference in excepted service appointments such as Veterans Recruitment appointments
- At the request of DHS, OPM designed and delivered a course on category

rating that is now available for all agencies

- Our Strategic Management of Human Capital web site, which has sections devoted to "Hiring Flexibilities" and "Appointing Veterans"
- OPM's 2004 veteran's employment symposium where some 250 Federal agency human capital leaders, human resource supervisors, and program managers received training and information on strategies to recruit veterans into the Federal workforce
- Informational briefings for the Chief Human Capital Officers Council covering veterans' hiring issues

8. **In 2000, the Office of Policy and Evaluation at the U.S. Merit Systems Protection Board (MSPB) reported that OPM's Outstanding Scholar program, which allows agencies to appoint individuals on a noncompetitive basis and does not include veterans preference, did not use highly valid selection tools as the basis for permanent appointments. Has OPM taken any steps to address MSPB's concerns and developed highly valid selection tools for use in hiring individuals under the program?**

   As you know, this matter is currently under litigation. In deference to the legal process, OPM has suspended its own use of these authorities and our position is that other agencies should likewise suspend their use of these authorities while this matter is under litigation.

9. **According to the Veteran Service Organizations, I understand that the majority of complaints about veterans' preference come from the Department of Agriculture – including the Forest Service, the Transportation Security Administration, the Postal Service, and the Federal Aviation Administration. Has OPM conducted any special training programs for these agencies to address the number of complaints regarding veterans' preference violations?**

   OPM conducts mandatory training for all agencies that have been delegated examining authority under Title 5, U.S. Code. This does not include the Postal Service, Federal Aviation Administration, and the Transportation Security Administration as their hiring authority does not stem from Title 5. Delegated examining staffs are certified by OPM as part of the training and recertified every three years. The training includes a thorough discussion of the importance of proper application of veterans' preference. In addition, OPM has conducted over 30 hiring flexibilities training sessions across the country over the past three years. These sessions included discussion of veterans' preference requirements as well as use of veterans' hiring authorities such as the Veterans Employment Opportunities Act (VEOA).

10. **Under title 5, if an agency plans to pass over a veteran for a position who is 30 percent or more disabled, the agency must notify OPM and the veteran of the action. How many notifications does OPM receive a year, and what are**

the reasons usually given for the action? How many of these pass overs are in violation of veterans' preference laws? How many are egregious violations that are referred to the Office of Special Counsel? What standard do you use to determine if the violation is egregious enough to send to OSC?

For the period April 1, 2005 - April 6, 2006, OPM received 103 veterans pass over requests from Federal agencies. From this group of cases:

- 24 requests were sustained (this includes two medical pass over cases and four suitability cases)
- 79 were not approved (this group includes withdrawn requests and cases returned without action due to insufficient documentation)

Under 5 USC section 3318(a), OPM may only approve a pass over request when an agency demonstrates "proper and adequate reasons" for passing over a preference eligible to select a lower-ranking non-preference eligible. The criteria for determining whether a pass over is "proper and adequate" are found in 5 CFR part 332 and OPM's Delegated Examining Unit Handbook and, for medical pass over cases, in 5 CFR section 339. Agencies with delegated examining authority may adjudicate their own pass over cases but only OPM can adjudicate pass overs involving 30% preference eligibles.

The DEU Handbook lists various grounds for pass over requests but the list is not comprehensive and each case must be decided on its own merits. OPM's final decision has to recognize both the needs of the agency and the basic principles of the merit system. Among the listed grounds for objecting to a selection are lack of minimal qualifications for the job, fraud or false statements, habitual alcohol use, illegal drug use, unsatisfactory performance in a prior Federal job, and personal qualities such as mature judgment, tact, objectivity, flexibility, temperament, initiative, or reliability when such qualities are essential for satisfactory job performance.

For 30% preference eligibles, the agency submits its pass over request to OPM and must, at the same time, notify the preference eligible of the proposed pass over. The notification must include:

- Notice of the proposed pass over, including the agency, title/series/grade of the job, duty location, and certificate number;
- An explanation of the reasons for the proposed pass over; and
- Notice of the right to respond to those reasons to OPM within 15 days of the notice.

OPM decides the matter after considering any response submitted by the preference eligible. We notify the appointing official and the preference eligible

of our decision in writing. If the objection is sustained, the appointing official removes the preference eligible from consideration for the job. If the objection is not sustained, the appointing official can either challenge the decision by submitting additional information to OPM to support a favorable decision or select the preference eligible for the job.

OPM's review of pass over requests is intended to safeguard veterans' rights under the law. We have not found veterans' preference violations stemming solely from a pass over request.

11. **Department of Labor Assistant Secretary Ciccolella testified that veterans' preference applies only after an individual is determined to be qualified for the position, and therefore is unable to investigate qualification issues. However, Veterans Employment and Training Services (VETS) will advise the veteran to contact OPM for assistance with this issue. How often does OPM hear from veterans based on an agency's review of their qualifications, and what does OPM do in this situation?**

OPM is occasionally contacted by veterans who have questions about job qualification issues. They seek our guidance or help through USAJOBS, the Veterans Service Organizations, OPM's veteran assistance phone line, or through the mail. We encourage veterans with a qualification-related issue to take the matter up with the agency to which they applied. While only the hiring agency can explain why an applicant did or did not meet the qualifications for a particular position, we will contact the agency and work with the veteran to ensure that he or she understands the basis for the agency's decision. We also take these opportunities to work with the veteran and his or her local employment assistance office, TAP manager, LVER, DVOP, or state employment office to provide any job search assistance the veteran might need, and we stay in touch with the veteran to see how the search is going.

12. **Has many times since the Veterans Employment Opportunities Act of 1998 has OPM taken action against an agency, a manager, or a person who is designated position to hire someone because of a violation of the rights of a veterans' preference eligible person, and in which departments or agencies?**

Beginning with the large scale delegation of examining to agencies in 1996, OPM has taken a systemic approach to ensuring that competitive hiring activities are in accordance with law, regulation, merit system principles, and the Veterans' Preference Act of 1944, as amended. Since 1996, OPM has conducted 878 audits of agency delegated examining units, reviewing all aspects of competitive examining including the application of veterans' preference. When problems are found, OPM works with the agency to achieve correction of veterans' preference violations or other problems that it finds. For example, when an audit of the Department of Housing and Urban Development Headquarters found that errors had resulted in five veterans not being hired for positions for which they were

qualified, OPM instructed the agency to make employment offers to the five veterans who were denied jobs as a result of the errors or give them priority consideration for future appropriate vacancies. OPM does not monitor or direct agencies' actions to discipline or reprimand individuals who may have caused or taken an action that violated veterans' preference. In egregious cases where there is indication of a prohibited personnel practice (PPP) or abuse of authority, we refer the matter to the Office of Special Counsel (OSC) or agency Inspector General (IG), as appropriate. OSC receives, investigates, and prosecutes allegations of prohibited personnel practices and is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs. OPM has not tracked the number of cases it has referred to the Office of Special Counsel. Recently, OPM referred serious findings at the Centers for Disease Control to the Office of Special Counsel for their investigation and action if their investigation warrants.

13. Do you believe the word "knowingly" should be eliminated from 5 U.S.C. 2302(b)(11) in regard to veterans' preference and prohibited personnel practices? If not, why? What constitutes knowingly?

We do not believe the word "knowingly" should be eliminated from 5 U.S.C. 2302(b)(11). Under the law that governs prohibited personnel practices, willful intent to deprive or disadvantage someone is a necessary element of a finding that a prohibited personnel practice has been committed. In this context, the law makes an important distinction between innocent errors (which can be fixed administratively) and purposeful attempts to evade the law (which should be punished). In either case, the Veterans Employment Opportunities Act already provides redress to any veteran who believes he or she was not accorded their veterans' preference entitlements.

Responses to Questions for the Record
From Senator Daniel K. Akaka

Following March 30, 2006 Testimony
By Charles S. Ciccolella
Assistant Secretary of Labor for Veterans Employment and Training

1. **I am pleased to see that the Department of Labor (DOL) has developed a Veterans' Preference E-law Advisor to help veterans understand how veterans' preference laws work. Does DOL conduct any customer surveys to determine ways to improve the E-law advisor to better educate veterans on their rights?**

   Each E-laws application allows the user to access a questionnaire and identify if they received the information they wanted. Customer surveys are part of the standard web format of all Department of Labor sites, and links to the general format customer survey can be found at the bottom of every page, including each page of the Veterans' Preference elaws Advisor. The Veterans' Preference elaws site is widely used with an average of more than 12,000 hits per month during calendar year 2005 and just under 12,000 hits per month from January through June of 2006.

2. **How many trained investigators does the Veterans' Employment and Training Service (VETS) have on staff to investigate allegations of veterans' preference violations?**

   VETS has 106 investigators who have received training through the National Veterans Training Institute and are assigned to investigate veterans' preference cases.

3. **In the case *Dean v. Department of Agriculture,* the U.S. Merit Systems Protection Board (MSPB) said that a veteran whose rights have been violated is not automatically entitled to the position sought. Rather, the veteran is entitled to a selection process consistent with law. Can you describe what remedies are available to a veteran whose rights have been violated, and do you believe they are sufficient?**

   Because *Dean v. Dep't of Agriculture,* 99 M.S.P.R. 533 (2005), is currently under appeal before the MSPB, it would be inappropriate for VETS to comment on the case.

Under the Veterans' Employment Opportunity Act (VEOA) (5 U.S.C. 3330a), a preference eligible who alleges that an agency has violated his/her rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor. Upon receipt of the complaint, the Veterans Employment and Training Service (VETS) investigates the claim and, if it determines that a violation occurred, makes every effort to negotiate a resolution with the hiring agency, up to and including selection with all back pay and benefits.

If VETS is unable to reach a negotiated solution within 60 days after the date on which the claim was filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board (MSPB). If the MSPB determines that an agency has violated an individual's veterans' preference rights, it has authority to order the agency to comply with such provisions and award compensation for lost wages or benefits suffered by reason of the violation and attorney fees and costs. Further, if the violation is willful, the claimant may also be entitled to liquidated damages.

. **How do you believe the Uniformed Services Employment and Reemployment Rights Act (USERRA) pilot project between DOL and the Office of Special Counsel (OSC) is working, and are there any changes that should be made? Should the pilot project become permanent?**

The USERRA demonstration project, which began on February 8, 2005 and will end on September 30, 2007, is working well. We do not recommend any changes at this time. It would be premature to make any recommendations on whether or not the demonstration should be made permanent until it has been completed and the data is studied carefully.

. **Some veterans groups say that not all of your staff are properly trained in veterans' preference law and how to investigate illegal prohibited personnel practices. Please describe the competency based training programs VETS staff must take.**

VETS does not have the authority to investigate illegal prohibited personnel practices (PPPs). That authority rests exclusively with the Office of Special Counsel (OSC).

Under the terms of the USERRA demonstration project discussed in my response to question #4, all mixed cases (e.g., those Federal USERRA cases which contain allegations of PPPs) are transferred to OSC for review and investigation. In order to more efficiently and effectively identify such cases, OSC is providing PPP training to VETS' Senior Investigators. The Senior

Investigators will train the remainder of VETS' investigative staff on how to identify PPPs.

All VETS' investigators attend the Investigator's course of instruction, required for both USERRA and the Veterans' Employment Opportunities Act (VEOA), and the VEOA course of instruction. Both courses are conducted by the National Veterans Training Institute (NVTI) at the University of Colorado in Denver. Upon completion of these training courses, investigators are able to investigate veterans' preference complaints.

6. **When several complaints are received about a particular federal agency in a particular locale, say in Hawaii, does VETS look at the entire agency to uncover any systemic problems or just investigate cases individually?**

Under the VEOA, VETS' authority is limited to investigating individual complaints from preference eligible veterans who allege that their preference rights have been violated by a federal agency. If VETS believes there is any systemic problem at a particular agency, VETS will bring that issue to the attention of OPM, who is responsible for addressing systemic problems in agency hiring practices.

Responses to Questions for the Record from Senator Akaka for Mr. James McVay, Office of the General Counsel

Violations of veterans' preference appears to be the only prohibited personnel practice in which corrective action is taken by another agency and disciplinary action by Office of Special Counsel (OSC). How does the lack of authority to take corrective action affect the ability of OSC to bring disciplinary actions against those agencies that violate veterans' preference?

Preamble

The above statement and question requires three clarifications.

First, a violation of a veterans' preference right is not a prohibited personnel practice. Rather, a prohibited personnel practice occurs where a federal manager knowingly takes, recommends, or approves (or fail to do so) any personnel action if taking (or failing to take) such action violates a veterans' preference requirement. See 5 U.S.C. § 2302(b)(11).[1]

Second, OSC does not have the authority to seek disciplinary action for a violation of a veterans' preference right.[2] Instead, OSC has the authority to seek disciplinary action for a violation of 5 U.S.C. § 2302 (b)(11).

Third, the U.S. Department of Labor, Veterans' Employment and Training Service (VETS), does not "take" corrective action. It endeavors to resolve meritorious violations of veterans' preference rights. If VETS cannot resolve the dispute, the claimant has a right to file a Veterans Employment Opportunities Act of 1998 (VEOA) appeal with the U.S. Merit Systems Protection Board (MSPB). The MSPB has the authority to order the involved agency to take corrective action.

Similarly, OSC does not take disciplinary action under 5 U.S.C. § 2302 (b)(11). OSC has the authority to prosecute that prohibited personnel practice for disciplinary action purposes. It is the MSPB that orders the involved agency to take disciplinary action in appropriate cases.

Response

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[1] That is to say, one can violate a veterans' preference right without committing a prohibited personnel practice.

[2] OSC probably has authority under 5 U.S.C. § 1216 (a)(4) and (c) to pursue corrective and disciplinary action for an agency's wide spread, systemic violations of veterans' preference rights as if such violations were prohibited personnel practices. But such authority would not apply to an individual claimant who seeks corrective or disciplinary action from OSC for an isolated violation of his or her veterans' preference rights.

OSC believes that its lack of authority to *receive and investigate a given veterans' preference claim* might adversely affect its ability to prosecute successfully that claim as a prohibited personnel practice under 5 U.S.C. § 2302 (b)(11).

Because OSC does not receive and investigate veterans' preference claims for corrective action purposes, OSC does not know about the existence of such claims until: 1) a claimant files a § 2302 (b)(11) prohibited personnel practice complaint with OSC or 2) VETS alerts OSC of a meritorious case per its February 7, 2001, Memorandum of Understanding (MOU) with VETS. That delay may hamper OSC's ability to investigate and prosecute the § 2302(b)(11) case successfully (e.g., a key witness is no longer available). The investigation of a § 2302 (b)(11) claim is more complex than the investigation of a veterans' preference claim. The importance of fresh evidence is especially crucial for disciplinary actions because of the high burden of proof imposed on OSC in proving disciplinary action cases and because OSC is potentially liable for attorney fees should it not prevail.

Because it is not disputed that OSC has the expertise to receive, review, investigate, resolve, and prosecute veterans' preference claims, Congress should consider granting OSC exclusive corrective action jurisdiction over all veterans' preference cases. Congress could do so by amending 5 U.S.C. § 2302(b) to make a violation of a veterans' preference right a prohibited personnel practice. By giving OSC investigative and prosecutorial authority over such claims, Congress can ensure that a meritorious veterans' preference claim does not become a stale prohibited personnel practice case.

How do you believe the Uniformed Services Employment and Reemployment Act (USERRA) pilot project between the Department of Labor and OSC is working? Are there any changes that should be made? Should the pilot project become permanent?

Response re: Status of Pilot Project

OSC's primary mission is to protect the employment rights of federal employees and applicants for federal employment by receiving, investigating, resolving, and prosecuting allegations of prohibited personnel practices. USERRA claims are just like prohibited personnel practices. During the course of the demonstration project, OSC's investigation and resolution of USERRA claims has fit squarely into its day-to-day operations wherein personnel specialists, investigators, and lawyers work side-by-side protecting the merit system.

In short, OSC has successfully taken on the additional obligations imposed under the demonstration project. Indeed, it has obtained corrective action in approximately 25% of the USERRA cases investigated under the project.

Response re: Problems with U.S. Department of Labor; Recommendation

As for particular problems regarding the demonstration project, the Special Counsel's primary concern has been the lack of mixed claims being referred by VETS to OSC. Under the demonstration project, OSC is to investigate claims filed claimants with social security numbers that end in an even-numbered digit where the claimant also alleges a prohibited

personnel practice, i.e., "mixed claims." About 15% of USERRA cases that OSC receives from sources other than VETS have prohibited personnel practice components. Yet, OSC has received only two mixed claims from VETS — and it was OSC that caused VETS to be alerted to both of those claims. Consequently, the Special Counsel, as administrator of the demonstration project, became concerned that VETS was missing mixed claims and requested that VETS provide OSC with a sampling of its cases for OSC to review.

OSC recently completed its audit of a sample of VETS even-numbered USERRA claims to determine if VETS was missing mixed claims.[3] OSC identified three such claims out of 29 files reviewed. Hence, the audit indicated that about 10% of the VETS files contained prohibited personnel practice components. The audit confirmed the Special Counsel's belief that VETS does not have the experience or expertise to identify prohibited personnel practices.

Prior to the audit, OSC offered to provide lengthy prohibited personnel practice training to select VETS staff. Instead, VETS agreed to detail one of its senior investigators to OSC to receive abbreviated (30-day) prohibited personnel practice training. Another investigator is to be detailed in mid-May 2006 for similar training. It is too early to tell whether such training of the trainers will result in the an increase in the transfer of mixed claims.

Beyond VETS lack of prohibited personnel practice training, the Special Counsel is also concerned that VETS is ignoring simple steps to identify possible prohibited personnel practice claims. Specifically, VETS's USERRA complaint form does not ask if the claimant is also alleging a prohibited personnel practice. By comparison, OSC's USERRA complaint form asks such question.

Also, it is OSC's understanding that neither the VETS intake staff nor its investigators ask claimants if they believe the agency has also committed a prohibited personnel practice. Such omission is inexplicable because VETS need only provide claimants with OSC's web address, www.osc.gov, which explains in clear and concise language the twelve prohibited personnel practices, in order to receive an informed response.

Accordingly, the Special Counsel recommends a change in the manner in which VETS conducts is basic intake of USERRA claims to include a deliberate effort to identify mixed claims. Conversely, VETS may transfer all federal sector USERRA cases to OSC for prohibited personnel practice review. After such review, OSC will transfer to VETS the non-mixed claims.

Response re: Permanency of the Pilot Project

The Special Counsel firmly believes that, at the end of the demonstration project, Congress should amend USERRA such that OSC receives all federal sector USERRA claims.

To date, the demonstration project has shown that service members obtain OSC's prosecutorial assistance more quickly. Prior to the project, it was not unusual for OSC to

[3] Claims involving only military leave issues (e.g. "Butterbaugh" claims), pure reemployment issues, and the U.S. Postal Service (a federal employer over which OSC does not have prohibited personnel practice jurisdiction) were not part of the cases audited.

receive a USERRA claim from the U.S. Department of Labor several years after the alleged violation. With the project's elimination of the bifurcation between the VETS's investigation and OSC's review for prosecutorial merit, OSC regularly begins its inquiry within days of the alleged violation. Further, the problem with VETS's inability to identify and transfer mixed claims would be resolved by having OSC receive all federal sector cases.

Accordingly, the demonstration has significantly enhanced the enforcement of USERRA for the benefit of veterans, Reservists, and National Guardsmen. Such enhancement and the benefits it provides to service members should become permanent.

You testified that over the past 18 months OSC has only brought disciplinary action against one agency for violating veterans' preference laws. How many cases are referred to OSC involving egregious violations of veterans' preference rights on an annual basis?

Response

Since the start of fiscal year 2002, OSC's intake unit has received 237 complaints where an allegation of a violation of 5 U.S.C. § 2302 (b)(11) was made. The intake unit referred 22 of those cases to OSC's Investigation and Prosecution Division or the USERRA Unit for additional investigation.

Also, pursuant to our February 7, 2001, MOU with VETS, VETS sends OSC veterans' preference cases where VETS found merit so that OSC may review those matters for possible disciplinary action under 5 U.S.C. § 2302(b)(11). Since the signing of the MOU, OSC has received 25 such cases, but none have presented facts warranting disciplinary action investigations (e.g., statements of animus, fact knowing violations of veterans' preference rights). Instead, they have involved administrative errors for which the agency voluntarily gave relief after VETS discovered the error.

Currently there are five cases with allegations of violations of 5 U.S.C. § 2302 (b)(11) undergoing initial review in OSC's intake unit.

OSC is currently investigating ten cases where an allegation of a violation of 5 U.S.C. § 2302 (b)(11) is alleged. Two of those ten cases involve allegations of systemic abuses of veterans' preference rights.

Post-Hearing Questions for the Record Submitted to

Mr. Richard Weidman, Executive Director of Policy and Government Affairs, Vietnam Veterans of America

From Senator Daniel K. Akaka

"Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government"

March 30, 2006

1. **Employee unions claim the National Security Personnel System at the Department of Defense (DoD) fails to ensure veterans preference. Specifically, DoD workers say that NSPS would allow DoD to define competitive areas for a reduction in force (RIF) that could target veterans and restrict bump and retreat rights. Do you believe veterans' preference is compromised by the NSPS regulations issued last November, and if so, how?**

   VVA does believe that the NSPS compromises veterans' preference. When OPM was first working on the so-called "band" system VVA repeatedly stated directly to the Office of Personnel Management (OPM) and to the Deputy Director of OPM that the proposed new system would essentially end the competitive merit system as we know it, and further that since current veterans' preference laws are predicated on the competitive merit system the NSPS could not help but further weaken the rights of veterans' preference eligible persons. Said more bluntly, VVA stated repeatedly "If we cannot trust you to enforce a rule of one in three, why in the world would you think that we would trust you with a rule of one in three hundred?"

   In fact, the OPM is not doing a good job at ensuring compliance with existing law, as has been repeatedly demonstrated by studies of pattern and practice of hiring and reductions in force (RIF) by many (if not most) Federal entities. While the 1998 law prohibits "designer RIFs" the involuntary reassignments and the "banded" layoffs will basically accomplish the same purpose of allowing management to keep the favored ones, and to dump those they do not care about one way or another.

   In the past, the only things that could be considered in a RIF were length of employment, length of service in that job title, performance ratings, and veterans status, with a strong preference/ protection given to service disabled veterans. Under these new regulations employees would be put into bands based on performance and longevity. Within each band veterans will theoretically be given preference, but this method opens the system up to so

many ways to manipulate the outcome as to render veterans' preference virtually useless, if that is what an agency manager wishes to do. Under the "old" rules, most service connected disabled veterans (those with a 10 point preference) were reasonably well protected, if the rules were followed.

2. **You heard Deputy Director Blair's response to my question about the impact of category ratings on veterans' preference. In your view, what has been the impact of category ratings on veterans' preference?**

Deputy Director Blair contends that more veteran preference eligible persons will be hired under the categorical (or "band") system. VVA believes that there is no good empirical data to back up this contention, and have noted to the Deputy Director on many occasions that veterans' preference is an absolute right of the individual who has earned it by virtue of military service, and is NOT an affirmative action program where modest increases from time to time in the number and percentage of veterans or disabled veterans is of little consequence if other veterans have not been accorded veterans' preference rights in either their attempt to be hired or attempt to avoid leaving because of a downsizing of the Federal entity where they are employed.

What is needed is: 1) enforcement of the current law. Honest studies of pattern and practice will reveal where there are problems that need to be addressed; and 2) Change the statute so that the word "knowingly" is eliminated from the section that declares that abridging an individual's veterans' preference rights is now a prohibited personnel practice, period (any manager who is ignorant of veterans' preference law should either receive a "needs improvement performance rating or lower); and, 3) establish a nationwide toll free line for Federal employees to report instances where an individuals earned right to veterans preference has been violated or abridged in some way. In most cases this will take more than the perfunctory "investigation" (it is a real stretch to classify what usually happens by the USDOL employee who looks into complaints. It usually consists of asking the agency involved if they violated the person's veterans' preference rights and the agency denying it, which is then certified by the USDOL employee as an "investigation."); and, 4) either make it clear in "black letter law" that the USDOL official has the right to all personnel records, etc. and the authority to do real investigations, or transfer these duties to the Department of Justice; and, 5) make it mandatory that the performance evaluation of all human resources personnel and other hiring authorities includes the safeguarding of the rights of each and every veterans' preference eligible. It is amazing how reasonable people can be once you have their attention.

Veterans are about 14% of the total workforce. However, the incidence of veterans and disabled veterans in the Federal workforce could and should be much higher if the 5 point and 10 point preferences were actually being applied properly and legally.

3. **A key goal of the Veterans Employment Opportunities Act was to stop the use of so-called designer RIFs, or RIFs targeting veterans. Do you believe that agencies are still using designer RIFs?**

A "designer RIF" by any other name is still a "designer RIF." The "selective reassignment" gimmick now being used by the US Postal Service and others is merely another devious bureaucratic device being used to fire veterans and disabled veterans by a number of agencies. Essentially the decision is made to either reduce the agency's overall workforce in a given location or reduce the number(s) of a particular type of job at a given location. Using this device in say they can target the veterans (especially the disabled veterans) and reassign them to a place thousands of miles away, knowing that the individual is unlikely to make that move. For instance, they may reassign a disabled veteran from the big island in Hawaii where he or she has lived all of their life, and where all of their family and extended family is located, and reassign them to International Falls, Minnesota (the coldest place in America) knowing full well that the individual is very unlikely to make that move. In effect, this "selective reassignment" device allows the agency to get rid of all of the service-disabled veterans that the manager wants out of the way in order to safeguard the employment of their favorite employees.

4. **What can the Office of Personnel Management, the Department of Labor, and Office of Special Counsel do to increase transparency in the enforcement of veterans' preference?**

In order to increase the compliance with current law, the current entities involved can to the following:

a) Establish and widely publicize a toll free veterans' preference "hotline" as well as an interactive site on the web that operates during the normal workday hours (with an east coast as well as a west coast location to make it work for all states, including Alaska and Hawaii). The agents fielding the calls or e-mail text conversations shall then write up the complaint by the veterans' preference eligible, and turn that over to a special unit of the Office of Special Counsel, who actually investigates the pattern and practices of the agency involved, in addition to carefully examining the particular case, Publish the monthly reports of what type of calls received, agencies involve, and the disposition of the cases; and,

b) Change the law to make it legal for the individual veterans' preference eligible to hire an attorney, and for that attorney to receive reasonable fees from the agency involved, should it be found that the case has merit; and,

c) Change the law so that an aggrieved veterans' preference eligible person can also receive damages over and above salary that the individual would have earned had not the veteran been denied his or her rights; and,

d) Publish the details (including the names of the managers involved) of the cases where an agency is found to be at fault; and,

e) Develop an online web based course that would be mandatory for all managers and other decision makers to complete, with a competence-based examination at the conclusion of the course. Further, ask that the veterans' service organizations and the military service organizations have significant input into the design and the actual content and filming for sections of this course; and,

f) Ask each agency head to ensure that the number and percentage of veterans, particularly disabled veterans and those returning from Iraq and Afghanistan today, hired by managers be a significant factor in their performance appraisals. Further, ask heads of all agencies to hold their managers responsible for doing what they pledged to in regard to fulfilling their Disabled Veterans Affirmative Action Program (DVAAP), and ask them to ensure that all hiring authorities have veterans and disabled veterans in significant numbers in any leadership or management training programs. They can accomplish virtually all of this by using the "30% hiring authority" where an agency does not have to go through any lengthy process of posting, but can just move quickly to establish and fill a position with veterans who are rated at the 30% or greater disabled level.

5. Given that over 23 percent of veterans are hired into clerical positions and over 24 percent are hired into administrative positions, do you believe veterans' preference is applied differently for more senior positions than for lower level general schedule positions?

It has been clear for twenty years that not only are veterans often denied veterans' preference as outlined in the law, but there is clear and readily apparent discrimination against veterans, particularly disabled veterans. If this were not the case, would it be possible for the Office of Management and Budget (OMB) to have no disabled veterans and fewer than ten veterans out of almost a thousand employees. OMB is supposedly subject to veterans' preference the same as every other agency, except for the few schedule C appointments.

There are often virtually no veterans at the GS-13, GS 14, GS-15, and GS-16 level at many agencies. It is because when you mention veterans to many personnel in human relations offices, they immediately start talking about security guards, which is indicative of an attitude we call "VETism." Unfortunately racism and sexism still exists in America, but so does VETism. In some ways it is even harder to confront and change because it is so difficult to get people to even acknowledge and recognize this systematic discrimination against veterans.

Given that half of the Federal workforce is now or soon will be eligible to retire, right now is the time for bi-partisan action by the Congress to take steps to ensure that as many of those soon to be vacated positions are filled by veterans returning from Iraq and Afghanistan, particularly service connected disabled veterans. The following are some reasonable steps that can be done:

a) Require all agencies to report yearly to OPM each year on how many and what percentage veterans' preference eligible persons were hired at each pay grade, including a break out of disabled veterans; and,

b) Require all agencies to list all leadership or other management preparation programs in their agency with what percentage and the number of veterans' preference eligible, and service disabled veterans' eligible persons were hired or were detailed to participate. (Since not all veterans qualify for veterans' preference eligibility if an agency wants to list a category of "other veterans" hired this would be useful, but they should not be lumped with the veterans' preference eligible number and percentages.

c) Ask each agency to analyze their DVAAP program for the previous fiscal year, and to indicate what remedial, pro-active steps they may be taking to correct where they fell short of achieving the goals.

Post-Hearing Questions for the Record
Submitted to Mr. Joseph Sharpe, Deputy Director of Economics, American Legion
From Senator Daniel K. Akaka

"Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government"

March 30, 2006

1. Employee unions claim the National Security Personnel System at the Department of Defense (DoD) fails to ensure veterans preference. Specifically, DoD workers say that National Security Personnel System (NSPS) would allow DoD to define competitive areas for a reduction in force (RIF) that could target veterans and restrict bump and retreat rights. I know you mentioned this issue in your testimony, but could you elaborate on your concerns with the impact of NSPS on veterans' preference?

2. What can the Office of Personnel Management, the Department of Labor, and Office of Special Counsel do to increase transparency in the enforcement of veterans' preference?

3. Given that over 23 percent of veterans are hired into clerical positions and over 24 percent are hired into administrative positions, do you believe veterans' preference is applied differently for more senior positions than for lower level general schedule positions?

**RESPONSES BY THE AMERICAN LEGION
TO POST-HEARING QUESTIONS:
"FULFILLING THE PROMISE? A REVIEW OF VETERANS' PREFERENCE IN THE FEDERAL GOVERNMENT"**

1. In this response The American Legion addresses the impact of NSPS on veterans preference. In particular, we focus on the actual and potential adverse impact of the new National Security Personnel System (NSPS) on the application of veterans preference, and its effect generally on employees who are veterans.

   - The American Legion has already begun to receive complaints concerning the impact of the NSPS performance-based salary system on reservists and guard members. Under the pay-band system employees, including reservists and guard members, were awarded step increases with other employees. It is unclear how the new performance-based system will operate fairly in the case of reservists or guard members who are activated and absent from work for a year or more—perhaps fighting in Iraq or Afghanistan. There is great concern that the performance-based system does not/will not properly or fairly adjust reservists' salaries because there is no "performance" upon which to base the salary adjustment. Reservists/guard members should not have to resort to a USERRA complaint.
   - With regard to reductions in force (RIFs), The American Legion has concerns similar to those voiced by the employee unions—except that our primary concern is that the NSPS RIF rules unwisely allow veterans to be targeted in RIF situations. Given that designer RIFs in the past targeted veterans, this possibility is particularly disturbing. The "competitive group" that is the basis of NSPS RIF rules is a fungible concept that provides DoD managers with the aforementioned ability to target certain employees in RIFs. DoD managers have the ability to characterize the "competitive level" in anyway they choose--it no longer matters if the "group" is composed of individuals in the same series and grade. Rules should be put in place that prevent an adverse impact on veterans in RIF situations.
   - The American Legion has received complaints concerning agencies' use of "Direct Reassignment" in order to avoid the veterans preference rules that apply to veterans during a reduction in force (RIF). These complaints do not relate only to DoD actions, but include federal agencies in general. The American Legion believes that the preference rules that now apply in RIF situations should also apply during "Direct Reassignments."

2. In this response The American Legion addresses the issue of increasing transparency in the Office of Personnel Management (OPM), the Department of Labor (DoL), and the Office of Special Counsel (OSC) with regard to enforcement of veterans preference.

First, The American Legion makes the somewhat obvious point that enforcement of veterans preference is currently handled in a piecemeal manner by several agencies, including OPM, DoL and OSC. There appears to be little communication between these entities concerning common problems, resolutions, and solutions. Although each agency is of course limited by the specific authority given to them by the Congress, this piecemeal system and lack of communication hinders the enforcement of veterans preference and does nothing to enhance transparency.

The American Legion strongly encourages the Congress—as we urged in testimony given to the Subcommittee on March 30, 2006—to consider the formation of an Office of Veterans Affairs that would monitor and enforce veterans preference.

Even without such an Office, the current piecemeal system could benefit, and transparency and effectiveness would be improved, if the OPM, DoL, and OSC develop a comprehensive Memorandum of Understanding (MOU) regarding veterans preference enforcement issues. The American Legion notes that the DoL Veterans' Employment and Training Service (VETS) have a MOU regarding the processing of Veterans' Employment Opportunities Act of 1998 (VEOA) and USERRA cases.

In addition, there should be strict enforcement of currently-existing oversight and reporting requirements with regard to veterans preference. Laws should be strengthened so that that oversight and reporting requirements have teeth.

In conclusion, The American Legion suggests the following changes in law would enhance the enforcement of veterans preference:

- Delete the word "knowingly" from 5 U.S.C. § 2302(b)(11)(A) so that it states that an employee shall not "take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement."
- Delete the word "knowingly" from 5 U.S.C. § 2302(b)(11)(B) so that it states that an employee shall not "fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement."
- Delete the current section of 5 U.S.C. § 2302 (e)(2), which states that ***no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11)*** *[providing that violating veterans preference requirements is a prohibited personnel practice]*. Revise section 2302(e)(2) to state that *if a violation of a veterans' preference prohibited personnel practice occurs, disciplinary action under 5 U.S.C. § 1215 will be taken.*
- Amend 5 U.S.C. § 3330a as follows [amended text added in bold]: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference, **or**

under any statute or regulation that may affect the operation of veterans' preference, may file a complaint with the Secretary of Labor."

3. In this response The American Legion addresses *whether veterans preference is applied differently* [emphasis intended] for more senior positions than for lower level GS positions.

The American Legion applauds every effort of the federal government to give an advantage to veterans, who are unable to further their civilian careers while serving their country.

The question cites a statistic that 23% of veterans are hired into clerical positions and over 24% of veterans are hired into administrative positions. That statistic is useful only to identify the percentage of veterans hired in the two different groups. *The statistic cited contains little direct information concerning whether veterans preference laws were properly applied by the many managers who made the thousands of hiring decisions that year.*

It is theoretically possible (although hopefully unlikely) that in a given year veterans preference *laws* are violated in 30% of the hiring decisions made by the federal agencies covered under Title 5. Under such a scenario, those agencies might have hired veterans at a rate of 24%--despite breaking veterans preference *laws* one-third of the time. Such a scenario is possible because there is little direct, logical correlation between the numbers of veterans hired and whether veterans preference laws were properly applied. The best and most logical statistic to indicate whether veterans preference laws are properly applied is a statistic based on a review of hiring decisions to determine whether veterans preference laws were properly applied.

Post-Hearing Questions for the Record
Submitted to Mr. Brian Lawrence, Assistant National Legislative Director, Disabled American Veterans
From Senator Daniel K. Akaka

"Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government"

March 30, 2006

1. Employee unions claim the National Security Personnel System (NSPS) at the Department of Defense (DoD) fails to ensure veterans preference. Specifically, DoD workers say that NSPS would allow DoD to define competitive areas for a reduction in force (RIF) that could target veterans and restrict bump and retreat rights. Do you believe veterans' preference is compromised by the NSPS regulations issued last November, and if so, how?

   Response: To date, the DAV has not received any complaints regarding the new regulations.

2. Given the state of veterans' preference as described by you and the other veterans groups, it appears that veterans' preference laws are not working. Can you compare the effectiveness of veterans' preference laws with the Americans with Disabilities Act in ensuring that disabled veterans are not discriminated against in the federal workplace?

   Response: Because Americans with Disabilities Act laws are outside the scope of the DAV mission, we have no expertise regarding ADA enforcement; therefore, I am unable to compare it to the adherence to veterans' preference laws.

3. Given that over 23 percent of veterans are hired into clerical positions and over 24 percent are hired into administrative positions, do you believe veterans' preference is applied differently for more senior positions than for lower level general schedule positions?

   Response: Because the vast majority of service members separating from the military are junior personnel, it is reasonable to assume that the majority of veterans hired would be to fill positions that are comparable to their status in the Armed Forces. However, senior military personnel such as non-commissioned officers and officers should expect and receive the preference they are due during hiring consideration for higher level positions within the federal government.

4. What can the Office of Personnel Management, the Department of Labor, and Office of Special Counsel do to increase transparency in the enforcement of veterans' preference?

   Response: Hiring authorities within the federal government should be held accountable for upholding veterans' preference. Their performance appraisals should reflect their adherence to such laws. Additionally, more uniformity in hiring procedures is needed to ensure veterans' preference is enforced. A single application process or single application portal should be established so that applicants are accorded fair measure, and veterans' preference is not circumvented.

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The Special Counsel

November 20, 2006

The Honorable Daniel Akaka
141 Hart Senate Office Building
Washington, DC 20510-1103

Dear Senator Akaka:

This letter is to follow up on your questions at the March 30, 2006 hearing entitled Fulfilling the Promise? A Review of Veterans' Preference in the Federal Government. Thank you for permitting us to respond, and I apologize for the earlier confusion.

Thank you also for holding this hearing to spotlight this important issue.

Your question for our witness, Deputy Special Counsel Jim McVay, was how many veterans are employed at the U.S. Office of Special Counsel. I can tell you that at the date of the hearing, the total number of veterans employed at OSC was 13. The total number hired under my tenure as of that date was 8. Also, our FTE level at that date was 108.

At the present date, the former number has grown to 14, and the latter number has grown to 10. Our current FTE level is 107.

Please let me know if we can be of any other assistance in this matter.

Sincerely

Scott J Bloch

Enclosure