

Key points:

- **PPP complaints are already on the rise and showing an upward trend**
- **OSC intends to ensure agencies pursue discipline for whistleblower reprisal**
- **Agencies may not be able to claim personnel action documents are privileged**

OSC's PPP reports on whistleblower retaliation trigger mandatory discipline

By Anjali Patel, Esq., **cyberFEDS®** Legal Editor Washington Bureau

IN FOCUS: With [prohibited personnel practice](#) complaints on the rise, agencies must pay attention to PPP reports issued by the Office of Special Counsel because these reports now have the power to trigger mandatory disciplinary procedures for supervisors who engage in retaliation under the Kirkpatrick Whistleblower Protection Act, Tristan Leavitt, the Office of Special Counsel's principal deputy special counsel said during an American Bar Association event on the latest developments at OSC.

This is "a significant change" for agencies that previously received OSC reports but had discretion over disciplining the wrongdoer, Leavitt said.

But now, if these PPP reports conclude that a supervisor has committed retaliation, they trigger the requirement to propose a minimum three-day suspension for first-time offenses and removal for second offenses, he explained.

OSC determinations are just one of the ways to trigger the Kirkpatrick WPA's mandatory discipline, which also attaches to whistleblower retaliation findings by the agency, an administrative judge, the Merit Systems Protection Board, a federal judge, or agency Office of Inspector General.

The new special counsel, Henry Kerner, is committed to ensuring any new disciplinary requirements are maintained when a prohibited personnel practice occurs, even when the agency has reached a settlement, Leavitt noted.

"Even when agencies secure settlement, the PPP report is the finding of retaliation which attaches these disciplinary provisions," Leavitt said.

So agencies should not be fooled that settling a case with OSC "is the end of it" and fulfills their legal obligations because OSC intends "to follow up and ensure agencies pursue disciplinary action so that there is no dispute that there was a PPP," he said.

This will send the message that the PPPs are not only "principles to live by, but also that there are consequences to not following them," he added.

Shirine Moazed, OSC's Diversity, Outreach & Training chief, said that OSC has already "seen a significant increase in PPP complaints" in the data for the current fiscal year, which also shows "a continuing upward trend."

Documents on personnel actions

In addition, once Congress passes the National Defense Authorization Act of 2018, OSC anticipates having greater authority to access documents on personnel actions, which agencies routinely resist providing based on attorney-client work product privilege, "saying that they can't provide the information because attorneys were involved in the personnel action," Leavitt said. This leads to large delays in the process while the agency and OSC go back and forth to determine what information the agency must provide, he added.

Yet, OSC "needs these documents to facilitate a resolution" and understand whether a prohibited personnel practice occurred.

Therefore, the NDAA of 2018's provisions on OSC reauthorization "make it clear that the OSC has to have access to those documents to do their job," so that time is not wasted arguing about privilege, he added.

This "will have significant impact on OSC's authority and increase our speed in addressing cases," Leavitt emphasized.

Resources on **cyberFEDS®**:

- [Whistleblower Roundup](#)
- [Quick Start Guide: Whistleblower Protections -- WPA and WPEA](#)
- [Quick Start Guide: Whistleblower Reprisal Charges](#)
- [Quick Start Guide: Individual Right of Action Appeals](#)

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