



Department of Veterans Affairs
Report
To
The Senate Committee on Veterans' Affairs
And
The House Committee on Veterans' Affairs
On the Activities of the
Office of Accountability and Whistleblower
Protection

For the Period:

October 1, 2017 – September 30, 2018

This report is required under section 323(f) of title 38 of the United States Code

U.S. Department of Veterans Affairs, Office of Accountability and Whistleblower Protection
Congressionally Mandated Report for October 1, 2017, through September 30, 2018

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I. INTRODUCTION

The Department of Veterans Affairs (VA) Office of Accountability and Whistleblower Protection (OAWP) was statutorily established under section 101 of the VA Accountability and Whistleblower Protection Act of 2017 (Accountability Act), Public Law 115-41, enacted on June 23, 2017. OAWP is headed by Dr. Tamara Bonzanto, who has served as the Assistant Secretary of Accountability and Whistleblower Protection (Assistant Secretary) since January 7, 2019.

This report is required under section 323(f) of title 38 of the United States Code (U.S.C.) and provides a description of OAWP's activities during Fiscal Year (FY) 2018, which covers October 1, 2017, through September 30, 2018.¹

II. MISSION

OAWP's statutory functions are elaborated under 38 U.S.C. § 323(c) and include the following:

- A. advising the Secretary of Veterans Affairs (the Secretary) on all matters relating to accountability;
- B. issuing reports and recommendations on matters addressed in subparagraph A;
- C. receiving whistleblower disclosures²;
- D. referring whistleblower disclosures received by OAWP for investigation, if the Assistant Secretary has reason to believe the whistleblower disclosure is evidence of a violation of a provision of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety;
- E. receiving and referring disclosures from the U.S. Office of Special Counsel (OSC) for investigation;
- F. recording, tracking, reviewing, and confirming implementation of recommendations from audits and investigations carried out by VA's Office of Inspector General (OIG), VA's Office of the Medical Inspector (OMI), OSC, and the Government Accountability

¹ 38 U.S.C. § 323(f)(1)(A) requires that this report contain activities of OAWP "during the calendar year in which the report is submitted." However, data would be limited to a five-month or less period of time as this report is due by the end of June. To cover a wider period of time, this report addresses data for the prior fiscal year, in this case FY 2018. Covering a prior fiscal year also aligns this report with other fiscal-year reporting requirements.

² Under 38 U.S.C. § 323(g)(3), "whistleblower disclosure" is defined as "any disclosure of information" by a VA employee or applicant for VA employment, which the employee or applicant "reasonably believes evidences (A) a violation of a law, rule, or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

Office (GAO), including the imposition of disciplinary actions and other corrective actions contained in such recommendations;

- G. analyzing data from OAWP and OIG telephone hotlines, other whistleblower disclosures, disaggregated by facility and area of health care if appropriate, and relevant audits and investigations to identify trends and issue reports to the Secretary;
- H. receiving, reviewing, and investigating allegations of misconduct, retaliation, or poor performance involving the following:
 - 1. a VA senior executive³;
 - 2. an individual employed by VA in a confidential, policy-making, policy-determining, or policy-advocating position; or
 - 3. a supervisory employee⁴, if the allegation involves retaliation against a VA employee for making a whistleblower disclosure; and
- I. making recommendations to the Secretary for disciplinary action as the Assistant Secretary considers appropriate after substantiating any allegation of misconduct or poor performance pursuant to an investigation carried out as described in subparagraph F or H.

III. VALUES

Working collaboratively with staff, OAWP has developed the following value statement: **WE²CARE**, which stands for **We** engage, **educate**, and **collaborate** to improve **accountability** and **reliability** for **everyone**.

Engagement includes ongoing communication with whistleblowers about disclosures and investigations, investigations conducted or overseen by OAWP, and recommendations made by the Assistant Secretary for disciplinary action.

Educate includes the training that OAWP has conducted and will continue to conduct for supervisors and employees.

³ Under 38 U.S.C. § 713, a VA "senior executive" is defined as a career appointee in the Senior Executive Service or an individual in an administrative or clinical position appointed under 38 U.S.C. §§ 7306(a) or 7401(1).

⁴ Under 38 U.S.C. § 323(g)(1), a "supervisory employee" is defined as a VA employee who is a supervisor, as defined under 5 U.S.C. § 7103(a). Under 5 U.S.C. § 7103(a), a "supervisor" is "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority."

Collaboration includes building trust in OAWP investigations and recommendation by maintaining ongoing dialogue and communication with stakeholders, including Congress and the public. **Collaboration** also includes liaising with GAO, OIG, OSC, and OMI on reports and recommendations and working with VA administrations and staff offices to ensure compliance with those recommendations.

Accountability begins with self-accountability. That is, employees and managers holding themselves **accountable** versus OAWP or another entity within VA forcing them to be **accountable**.

VA must be **reliable** for **everyone**. This includes the individuals who use VA services; who trust VA with their lives and those of their loved ones; entities that audit VA, including GAO and OIG; and Congress and the public.

IV. ORGANIZATION

OAWP's statutory functions are executed by its Triage Division, Investigations Division, Advisory and Analysis Division, and the newly established Compliance and Oversight Division. Those divisions are supported by administrative and operational staff who among other things develop reports, respond to Freedom of Information Act requests, and manage OAWP's budget.

OAWP has 85 full-time employees (FTE) onboard as of June 1, 2019, with 25 FTE in the Triage Division, 26 FTE in the Investigations Division, 10 FTE in the Advisory and Analysis Division, and the remainder in a leadership or administrative support capacity.⁵

During FY 2018, OAWP had a budget of \$17.366 million for personnel and operations costs. For FY 2019, which covers the period of October 1, 2018, through September 30, 2019, funding for OAWP has been increased to \$17.700 million. The funding is provided on a reimbursable basis from VA administrations and staff offices.

V. SUMMARY OF OAWP DIVISIONS

A. Triage Division:

1. Entry point for all whistleblower disclosures and matters submitted to OAWP for review.
2. Assesses matters to determine if they fall within OAWP's statutory scope.
 - a. Refers whistleblower disclosures for investigation to internal VA offices and tracks the investigatory findings of those disclosures.⁶

⁵ OAWP's Compliance and Oversight Division is currently under development and OAWP anticipates staffing it in the next fiscal year, beginning on October 1, 2019.

⁶ Depending on the specifics of the whistleblower disclosure, referrals are made to: OMI for clinical or health care allegations; OIG for allegations involving criminal or potentially criminal activity; and/or the respective VA administration or staff office for all allegations that do not involve misconduct or poor performance by VA senior executives and do not involve allegations of whistleblower retaliation by VA supervisors.

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- b. Refers whistleblower disclosures alleging misconduct or poor performance involving senior executives to OAWP's Investigation Division for investigation.
 - c. Refers whistleblower disclosures alleging whistleblower retaliation by supervisors to OAWP's Investigation Division for investigation.
3. Maintains multiple avenues to receive disclosures including via a toll-free telephone number, email, and fax.⁷

B. Investigations Division:

1. Primary entity within VA for investigating the following:
 - a. Allegations of misconduct or poor performance involving senior executives; and
 - b. Allegations of whistleblower retaliation.
2. OAWP investigators assess allegations and determine the appropriate scope and method of investigation. Investigators gather evidence, conduct witness interviews, and prepare reports of investigation.

C. Advisory & Analysis Division:

1. Reviews reports of investigation to ensure that the underlying evidence gathered by the investigator support the report.
2. Recommends to the Assistant Secretary whether OAWP should recommend discipline or a performance-based action to the Secretary.
3. Works closely with VA's Office of General Counsel and proposing and deciding officials on disciplinary and performance-based action proposal and decision letters.
4. Provides training to VA leadership and managers on whistleblower protections and the Accountability Act.

D. Compliance and Oversight Division:

1. Currently under development. OAWP anticipates staffing it in the next fiscal year, beginning on October 1, 2019.
2. Will record, track, review, monitor, and confirm VA's implementation of recommendations from audits and investigations conducted by GAO, OIG, OMI, and OSC.
3. Will analyze data from OAWP and OIG telephone hotlines, other whistleblower disclosures, disaggregated by facility and area of health care if appropriate, and

⁷ A Web site submission form is under development.

relevant audits and investigations to identify trends and issue reports to the Secretary.

VI. OAWP ACTIVITIES DURING FY 2018⁸

A. Whistleblower disclosures

1. During FY 2018, OAWP received 1,965 disclosures.⁹ The specific categories and quantities are displayed in Figures 1-3.
2. Out of those 1,965 disclosures received by OAWP:
 - a. 1,640 disclosures were referred to VA administrations and staff offices for investigation; and
 - b. 325 disclosures were referred to OAWP for investigation.
3. Out of the 1,965 disclosures, 922 were determined be whistleblower disclosures, as defined under 38 U.S.C. § 323(g)(3).¹⁰

⁸ As with all data, the numbers in this section represent a snapshot of activity at the time the data is requested. Reported data may fluctuate due to adjustments as work is categorized or data input corrected.

⁹ During FY 2018, OAWP received 2,391 submissions. However, 426 of these submissions were not accepted for investigation and not referred to VA administrations and staff offices. Typically, this was due to a lack of information or because the matter is related to another disclosure that is being investigated. Consequently, these submissions were not counted towards the number of whistleblower disclosures referenced above.

¹⁰ See footnote two for a definition of "whistleblower disclosure."

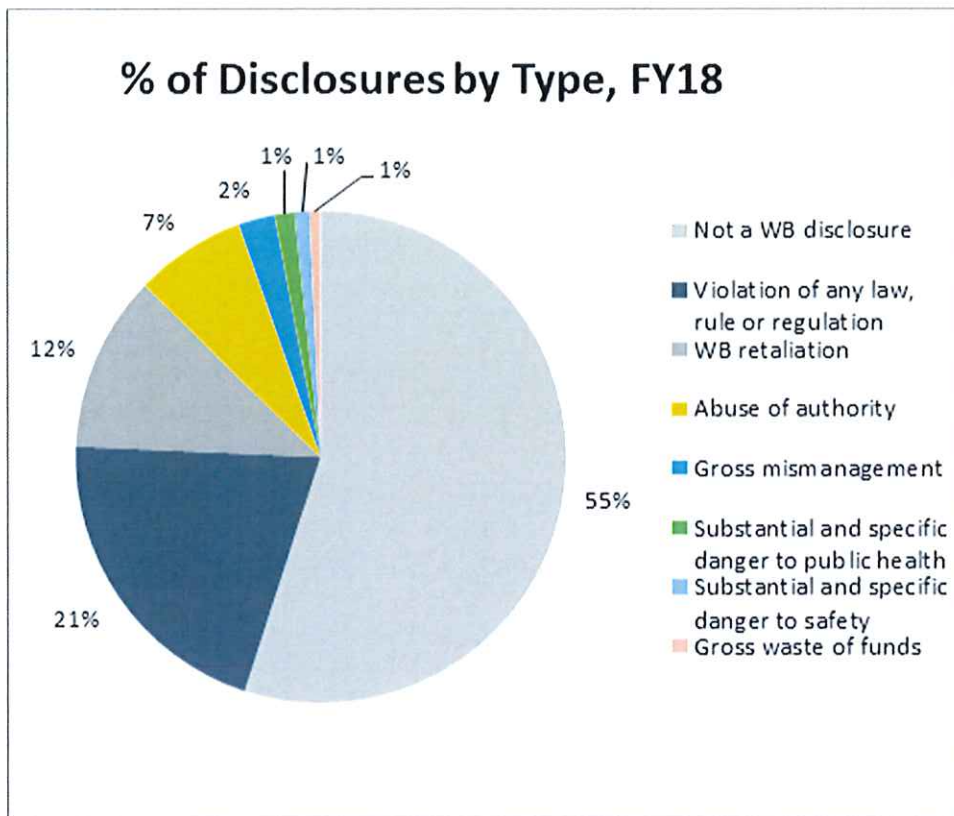


Figure 1: Percentage of Disclosures by Category, FY 2018

The above chart displays the breakdown of disclosures by general category of the disclosure as received by OAWP from October 2017 through September 2018.

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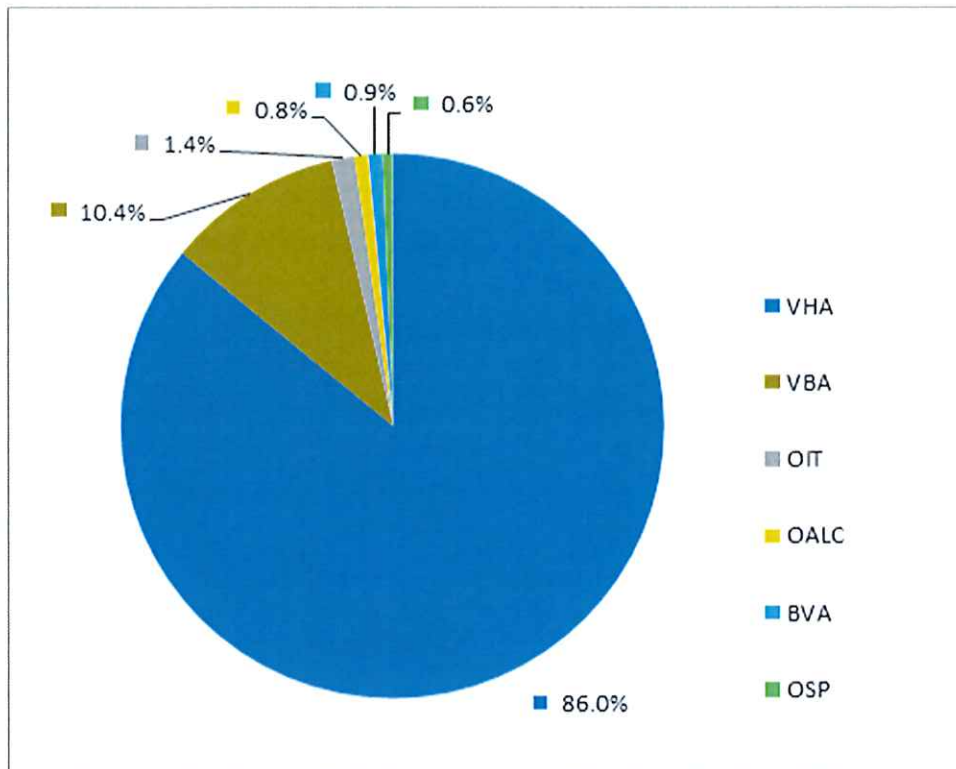


Figure 2: Percentage of Disclosures by the administration or staff office the disclosure involved, FY 2018

The above chart displays the percentage of disclosures received broken down by the administration and staff office involved in the disclosure during FY 2018. The chart excludes administrations and staff offices where disclosures were less than 0.5 percent.

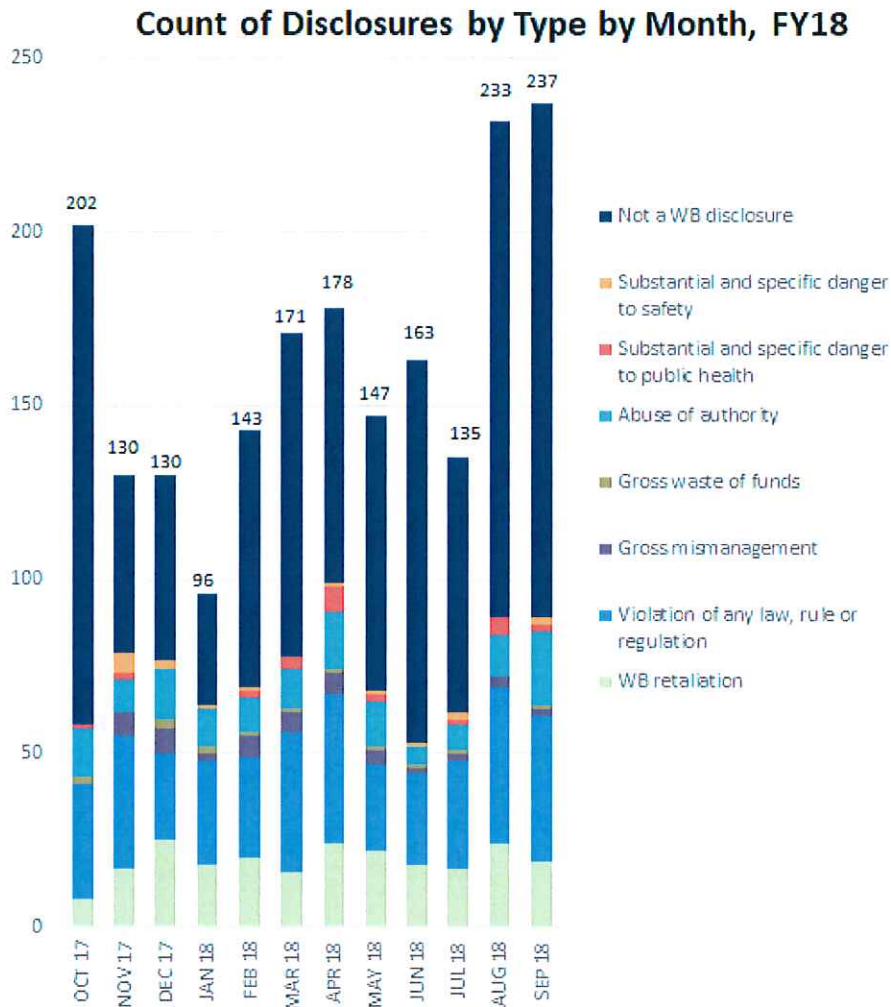


Figure 3: Count of Disclosures by Category by Month, FY 2018

The above chart graphically displays the category of disclosures received during FY 2018.

B. Investigations

During FY 2018, OAWP conducted 133 investigations and monitored 1,099 investigations. Regarding whistleblower retaliation, OAWP initially referred allegations of whistleblower retaliation to the affected administration or staff office when a senior leader¹¹ was not implicated. As part of those referrals, OAWP instructed the recipients that an investigation could not be conducted by anyone involved in the allegations. As of June 2018, OAWP took over conducting all investigations into alleged whistleblower retaliation by supervisors, regardless of whether a senior leader was implicated.

¹¹ During FY 2018, “senior leader” was defined to include, but was not limited to, individuals appointed in the Senior Executive Service and employees who occupy an administrative or executive position and who are appointed under 38 U.S.C. §§ 7306, 7401(1), or 7401(4).

C. Disciplinary recommendations

During FY 2018, OAWP reviewed 191 matters¹² for possible discipline against 358 Persons of Interest (POI). 61 cases resulted in an OAWP recommendation for disciplinary action against one or more POIs. 32 cases resulted in a disciplinary action taken against 37 POIs.¹³

VII. TRAINING AND STAKEHOLDER ENGAGEMENTS

OAWP is committed to educating VA senior executives, managers, and employees about the Accountability Act, whistleblower protections, and OAWP's process. During FY 2018, OAWP presented training on the Accountability Act, whistleblower protections, and OAWP's process to:

- Veterans Health Administration (VHA) leadership at the Veterans Integrated Service Network (VISN) Directors Conference in November 2017. OAWP subsequently trained leadership, including medical center directors, chiefs of staff, and associate directors, at six individual VISNs;
- Veterans Benefits Administration leadership at a senior leader conference in the April 2018;
- The American Federation of Government Employees (AFGE) in January and February 2018; and
- Leadership for the five national labor unions representing VA employees in April 2018.¹⁴

OAWP has also responded to emergent VA needs by deploying intake and investigation teams to facilities in Manchester, MA, Bedford, MA, Roseburg, OR, Columbia, SC, Leeds

¹² Matters include investigations completed by OAWP, reports from the Office of Special Counsel, administrative judge decisions from the Merit Systems Protection Board, final agency decisions from VA's Office of Employment Discrimination Complaint Adjudication; and local facility and fact-findings involving senior leader misconduct or poor performance.

¹³ VA recognizes that there is a difference between the number of POIs against whom OAWP recommended disciplinary action versus against whom actions were proposed or taken. Under 38 U.S.C. § 323(f)(2), VA must report to its respective oversight committees if the Assistant Secretary recommends discipline and VA "does not take or initiate the recommended disciplinary action before the date that is 60 days after the date on which the Secretary received the recommendation" from the Assistant Secretary. However, until January 7, 2019, VA did not have an Assistant Secretary for Accountability and Whistleblower Protection. Instead OAWP was managed by an Executive Director, who was delegated a series of functions that were similar to, but did not mirror, the functions that are performed by the Assistant Secretary.

The Executive Director for OAWP did not recommend a specific disciplinary action to the Secretary; rather, the recommendation was that "disciplinary action be proposed against" the respective employee. Following the Executive Director's recommendation, disciplinary action was "initiated" against the respective employee in that VA began the process of engaging with the proposing official regarding the action and drafting a proposed charge letter. Those steps were accomplished within 60 days from the receipt of the Executive Director's recommendation to the Secretary. Consequently, VA initiated the disciplinary recommendation of the Executive Director within 60 days from the receipt of the Executive Director's recommendation to the Secretary. It is important to note that 38 U.S.C. § 323 does not require the Secretary to take the disciplinary action recommended by the Assistant Secretary, even if a specific disciplinary action is recommended.

¹⁴ American Federation of Government Employees, National Federation of Federal Employees, National Nurses United, National Association of Government Employees, and Service Employees International Union.

(Northampton), MA, and Bay Pines, FL, as situations emerged in those locations. These teams provided real time disclosure intake and development of critical concerns at those facilities.

VIII. WHAT'S ON THE HORIZON?

With the appointment of its first Assistant Secretary on January 7, 2019, and on the second anniversary of the Accountability Act, OAWP intends to do the following:

- A. focus the organization on its statutory functions;
- B. establish OAWP's Compliance and Oversight Division;
- C. issue VA policy governing whistleblower disclosures, OAWP investigations, and audit and recommendation compliance;
- D. communicate, on a timely basis, with whistleblowers and POIs about disclosures and investigations;
- E. enhance the investigation process, including developing standardized training for OAWP investigators, an investigation planning tool, audit mechanisms, and a standardized reporting format;
- F. develop specialized investigatory teams, including on whistleblower retaliation matters;
- G. eliminate the backlog of cases pending investigation;
- H. ensure adequate internal controls over matters in OAWP divisions, including supervisory review of matters before they are closed out;
- I. ensure adequate internal controls over administrative and operational matters, including employee timekeeping and travel;
- J. finalize training on whistleblower protections required under 38 U.S.C. § 733;
- K. improve stakeholder engagement both within VA and outside VA;
- L. enhance transparency with Congress, whistleblowers, and stakeholder groups; and
- M. improve OAWP employee morale by rewarding employees who excel and holding poor performers accountable.

Appendix 1: 38 U.S.C. §§ 713 and 714 actions coordinated by OAWP during FY 2018

38 U.S.C. § 713 provides the Secretary with the authority to reprimand, suspend, involuntarily reassign, demote, or remove individuals in senior executive positions for misconduct or poor performance.

38 U.S.C. § 713 Actions coordinated by OAWP during FY 2018	
Number of proposed disciplinary actions issued	22
Number of proposed penalties upheld in the decision ¹⁵	7 (3 senior executive service employees (SES)/ 4 Title 38 SES-equivalent employees)
Number of proposed penalties mitigated	10
Number of employees who retired or resigned in lieu of action, or otherwise did not have a decision made on the proposal (e.g., matter was settled)	5

38 U.S.C. § 714 provides the Secretary with authority to suspend for 15-days or more, demote, or remove permanent Title 5 or certain Title 38-hybrid employees for misconduct or poor performance.

38 U.S.C. § 714 Actions coordinated by OAWP during FY 2018	
Number of proposed disciplinary actions issued	12
Number of proposed penalties upheld in the decision	6 (one General Schedule (GS)-13 employee/ 2 GS-14 employees/ 3 GS-15 employees)
Number of proposed penalties mitigated	2
Number of employees who retired or resigned in lieu of action, or otherwise did not have a decision made on the proposal (e.g., matter was settled)	4

¹⁵ VA acknowledges that, when comparing other public submissions of VA personnel data to Congress, there may be apparent differences in data for similar time frames and similar actions. These differences are based on both the source of the data and the point in time that the data is pulled. For example, data from VA's Human Resources Information System (HRSMART) (VA's official system of record) only codes disciplinary action affecting pay. Thus, other types of disciplinary actions such as reprimands will not appear in that system even though the disciplinary action was taken under 38 U.S.C. § 713. Additionally, in some cases the final nature of disciplinary action may evolve depending on the investigatory process and ultimate outcome, which may account for data differences based on the point in time reports are run. VA recognizes the need for robust and secure personnel case management systems with fidelity in data and reporting ability and is working to enhance such capabilities in the Department.

Appendix 2: 38 U.S.C. § 714(e) holds during FY 2018

38 U.S.C. § 714(e) states that a covered employee may not be removed, demoted, or suspended under 38 U.S.C. § 714: (1) while the employee is seeking corrective action from OSC regarding an alleged prohibited personnel practice, unless OSC agrees to allow the action to proceed; or (2) has made a whistleblower disclosure to OAWP until a final determination is made regarding the disclosure. Effectively, a 38 U.S.C. § 714 action is on hold until the above determination has been made.

38 U.S.C. § 714(e) holds during FY 2018	
Number of holds initiated during FY 2018	216
Number of holds pre-dating FY 2018	10
Number of holds released by OAWP and OSC during FY 2018	172
Number of holds by OSC at the end of FY 2018	27
Number of holds by OAWP at the end of FY 2018	25