WHISTLEBLOWER PROTECTION ADVISORY COMMITTEE (WPAC)
Minutes of Tuesday, March 11, 2014 Meeting

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, DC

The meeting of the Whistleblower Protection Advisory Committee (WPAC) was called to order by Chairman Spieler at 8:30 a.m., Tuesday, March 11, 2014. The following members and OSHA staff were present:

NAME	SECTOR REPRESENTED	TITLE & ORGANIZATION
Emily Spieler (Chair)	Public	Edwin W. Hadley Professor of Law, Northeastern School of Law
Richard Moberly	Public	Associate Dean, University of Nebraska
Jonathan Brock	Public	Emeritus Faculty Member (Retired), University of Washington
David Eherts	Management	Vice President and Chief Safety Officer, Sikorsky Aircraft Corporation
Gregory Keating	Management	Shareholder, Co-chair of the Whistleblowing Practice Group and Member of the Board of Directors, Littler Mendelson P.C.
Marcia Narine	Management	Visiting Professor, University of Missouri; Compliance Consultant, MDO Partners
Ava Barbour	Labor	Associate General Counsel, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America
Eric Frumin*	Labor	Health and Safety Director, Change to Win
Nancy Lessin	Labor	Program Director, United Steelworkers' Tony Mazzocchi Center for Health, Safety and Environmental Education
Billie Garde	Labor	Attorney, Clifford & Garde, LLP
Christine Dougherty	OSHA State Plan States	Principal Discrimination Investigator, Minnesota Department of Labor and Industry
Rina Tucker Harris	Federal Agency	Enforcement Attorney, Consumer Financial Protection Bureau
Adam Miles	Federal Agency	Director of Policy and Congressional Affairs, U.S. Office of Special Counsel

David Michaels	OSHA	Assistant Secretary, U.S. Department of Labor, Occupational Safety and Health Administration
Edmund Baird	OSHA	WPAC Counsel Office of the Solicitor, USDOL
Richard Mendelson	OSHA	Acting Director, Directorate of Whistleblower Protection Programs, USDOL OSHA
Anthony Rosa	OSHA	Acting Deputy Director, Directorate of Whistleblower Protection Programs, USDOL OSHA
Laura Seeman	OSHA	Designated Federal Official for WPAC, Directorate of Whistleblower Protection Programs, USDOL OSHA

*****participated via teleconference

Introductory Remarks

Ms. Spieler welcomed the attendees and asked all persons present to introduce themselves, including WPAC members, OSHA staff and observers in the audience. WPAC member Kenneth Wengert, management representative, was unable to attend the meeting. Approximately 25 members of the public were in attendance. Noting that sequestration had prevented the WPAC from meeting since January 2013, Ms. Spieler explained that the three work groups, Transportation Industry, Best Practices and Corporate Culture, and 11(c), had been set up in the interim and these groups have been meeting telephonically.

Welcome from Assistant Secretary David Michaels

OSHA's Protection of Employee Safety and Whistleblowers

Dr. Michaels welcomed the participants and attendees. Employers report about three million injuries a year, but studies by the Bureau of Labor Statistics show that four or five million workers may be injured each year, and about 4,000 a year are killed. OSHA's mission is to prevent those injuries and deaths, but it conducts only about 40,000 inspections each year, and its state partners conduct about 60,000 inspections each year, while there are seven or eight million workplaces with 130 million workers. OSHA relies on the meeting participants to encourage workplaces to function so that workers can raise concerns about safety without fear of retaliation.

Scope of OSHA's Responsibilities

OSHA is responsible for protecting not only workers but the health and safety of all Americans through workers' ability to report concerns and violations related to airlines; commercial motor carriers; consumer products; issues related to the environment, finance, food safety, health care, public transportation, maritime law; and the nuclear and pipeline industries.

Directorate of Whistleblower Protection Programs (DWPP) Update

DWPP has been strengthened to ensure that workers can raise concerns with their employers or federal agencies. The number of staff has increased, the office has become a directorate, it has been made a priority in the Labor Department, and it now has its own budget, which was not the case before this administration.

Thomas Perez, who has been Secretary of Labor for a little more than a year, supports the program and the importance of protecting whistleblowers. OSHA's budget for whistleblower programs for fiscal year 2014 is $17 million, with 131 FTEs, an increase of more than $1 million and 16 FTEs from the previous fiscal year. The President's budget released last week requests an increase to $21.2 million and 158 FTEs. The program has strong bipartisan support for the program in Congress, and such budget increases have been unusual in the last few years.

Last year, OSHA awarded more than $24 million to whistleblowers. The agency has also implemented a way that whistleblowers may file complaints online, which has resulted in an increased number of complaints.

Significant and Egregious Cases

Last month, the Department of Labor filed a lawsuit under Section 11(c) of the Occupational Safety and Health Act (11(c)) against AT&T on behalf of 13 workers who had been disciplined and suspended without pay for reporting workplace injuries. Most of the cases were in Ohio, and the regional solicitor's office in Cleveland is litigating the matter. The suit lets employers know that workers should not be disciplined for reporting injuries, which discourages people from reporting injuries. If injuries are not reported, they cannot be investigated, and if they are not investigated, future injuries cannot be prevented.

In November 2013, OSHA ordered Gaines Motor Lines and two of its personnel to pay back wages, interest, and compensatory and punitive damages to four truck drivers who were terminated in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act.

The Department of Labor filed an 11(c) lawsuit against a charter school in Florida that terminated a theatre arts technician who raised concerns about electrical hazards. The jury found in favor of the Department and awarded the theatre arts technician $55,000 in back wages and $120,000 in punitive damages.

Sources of Largest Volume of Cases

The 11(c) program remains OSHA's greatest challenge. Most whistleblower cases arise under 11(c), and Dr. Michaels indicated that the agency is eager to hear the Committee's recommendations about how to have a larger impact in protecting workers. Dr. Michaels also noted the large volume of cases from the transportation industry and how those issues affect both the workers and members of the public.

Working with Employers regarding Whistleblowers

Dr. Michaels reviewed the challenges surrounding best practices and corporate culture and admitted that OSHA has done nothing regarding this in the whistleblowing area. While OSHA

has done work to help employers prevent injuries, we haven't considered how to do that work in the whistleblower retaliation realm. OSHA is looking for thoughts on the programs that are out there, whether they work, and how to evaluate them. Dr. Michaels praised the group and wished them luck.

MOUs with Other Agencies

OSHA has entered into memoranda of understanding (MOUs) with the Federal Aviation Administration (FAA) and the Federal Railroad Administration (FRA) and is in discussions with the Department of Transportation (DOT). Ms. Lessin stated that she hears from many people in the rail industry that things are not changing and workers who report injuries experience brutal discipline. She asked if OSHA has evaluated what MOUs have accomplished. Dr. Michaels stated that MOUs primarily involve sharing information and do not change agency policy. Evaluating the effect of MOUs outside the agency is not their focus. He welcomes advice and discussions with other agencies about the possibility of other MOUs.

Tracking Cases after Awards of Damages

Ms. Lessin asked whether OSHA tracks how long it takes to win a case and what the workers get. Dr. Michaels stated that OSHA has no authority once it issues a finding and has no system for tracking cases that go to ALJ or court. Academic researchers do such research, including Professor Moberly, who has done so for securities cases. Dr. Michaels also noted that OSHA tries to settle cases early because reaching a final settlement can take a long time and it wants to make people whole and get their jobs back, which does not get much press or send a message. Issuing punitive damages also sends a message and is intended to begin the process of getting justice for workers.

Re-Charter and Continuation of WPAC

In response to a question from Ms. Narine, Dr. Michaels stated that he expects the WPAC to be re-chartered and to continue. He hopes that most or all of the participants will continue, though they will be appointed to staggered terms going forward.

Use of Increased Budget for Investigators and Training Staff

Mr. Keating asked whether the increase in budget and FTEs will help investigators in the field. Dr. Michaels stated that most of the new staff will be in the field but that there will also be dedicated whistleblower protection training staff at the OSHA Training Institute. There has not previously been a dedicated whistleblower training track.

Report from Directorate Whistleblower Protection Programs

DWPP Report: Introduction

Mr. Mendelson delivered the DWPP report. OSHA has experienced an increase in new whistleblower complaints every year for the last five years. Last year, the agency completed more investigations than received new complaints, but there is still a backlog of over 2,000 cases. OSHA 11(c), the Federal Railroad Safety Act (FRSA), and Sarbanes-Oxley (SOX) cases

combined equal 90 percent of the cases completed in fiscal year 2013. The only measure that the agency currently reports is the total completed measure. The target for fiscal year (FY) 2012 was 545 cases per quarter. The agency failed to meet it in the first two quarters, but, after some streamlining, exceeded it in the third and fourth quarters. In FY 2013, the agency exceeded its goal of completing 2,700 cases by completing over 3,000.

Growth and Improvements to DWPP

OSHA is considering ways to improve management and tracking of the whistleblower program. Centralizing statistical reporting will help ensure that all regions measure data the same way. In July 2011, the Office of the Whistleblower Protection Program moved out of the Directorate of Enforcement Programs and became a freestanding office. In 2012, it was reorganized as the DWPP with two divisions, (1) Operations and (2) Policy and Planning. The DWPP is growing and will have more staff this fiscal year; it continues to reassess the distribution of duties. In 2011, it had six staff and, in 2013, it had 14. It has improved communication with the field and is working on many projects.

DWPP's Processing of 11(c) Appeals

The agency is looking at other measures and statistics to improve tracking and management of the whistleblower program. In 2013, DWPP received 114 appeals and completed 96. At the end of FY 2013, it had 117 pending cases. As of the week prior to the WPAC meeting, there were 43. As a comparison, in June 2011, OSHA had over 140 cases on appeal, some pending for more than three years. DWPP decreased the appeal backlog by revising internal processing procedures. Mr. Mendelson noted that quality is not being sacrificed for speed – multiple staff members review each case separately and any differences are discussed. An unsatisfied complainant has a better opportunity for redress when an appeal is remanded and is only a few months old, rather than years old.

Online Complaint Form

OSHA has received 742 complaints through the online complaint form since it came online in December 2013. DWPP is evaluating the system. DWPP is also working to identify stakeholders to assist with the distribution of program information to employers and employees. DWPP is also responsible for promulgating regulations specifying the procedures and handling of retaliation complaints. There are currently 11 regulations and two in draft form. Since the committee met last year, OSHA has issued three whistleblower procedural rules.

Cooperation with Other Federal Agencies

DWPP is negotiating an MOU with the Federal Motor Carriers Safety Act (FMCSA) which will address FMCSA referring employees who complain of discrimination to OSHA. OSHA will provide FMSCA with copies of the Secretary's Findings. OSHA also has working relationships with 11 other federal agencies, including the National Highway Traffic Safety Administration (NHTSA), the Nuclear Regulatory Commission (NRC), the Food and Drug Administration (FDA), and the Securities and Exchange Commission (SEC).

Introduction of Assistant Regional Administrators

The new Assistant Regional Administrator (ARA) structure was piloted in Regions IV and V, which produced overwhelmingly positive results. It has been expanded to Region II, and there are plans to implement it in all ten OSHA regions this year. Under this model, supervisory investigators manage caseload and supervise investigators; ARA manages the program, its resources, the supervisory investigators, and coordinates with the solicitors. The model provides subject matter expertise throughout the chain of command and allows supervisors to be available to investigators and complainants.

Introduction of Alternate Dispute Resolution Program

An alternate dispute resolution (ADR) program was piloted in Regions V and IX, using two models. In the more successful early resolution model, the ADR coordinator worked directly with the parties early in the process regarding settlement talks. The program resulted in dozens of settlements in Region V, reducing 36 cases in fiscal year 2013. Eighteen cases were reduced in Region IX. The ADR coordinator completed as many cases as a full-time investigator, but all the cases had settlements. DWPP is preparing plans to implement the early resolution model in all regions and institute special training. In the second model, one-day sessions with the Federal Mediation and Conciliation Service (FMCS) mediators were used, but the program was not as successful as early resolution.

Mr. Moberly asked why early resolution worked better than mediation. Mr. Mendelson stated he thought that it was OSHA staff involvement in the early settlement process that made the difference. ADR will be introduced into two more regions this year, and OSHA staff in every region will be trained to identify cases and begin moving them through the system.

Participating in the ADR program is voluntary and the parties may decline to participate. No one is forced into a settlement they are not happy with. OSHA identifies cases that might settle and invites the parties to participate in the program.

Introduction of New Training and Improvement of Procedures

A permanent whistleblower coordinator is being hired at the OSHA Training Institute (OTI) and developing a whistleblower training track there with up to six courses. An OSHA subgroup working on the training will meet in the first week of April.

Re-Charter of WPAC and Nomination of Members

Mr. Mendelson also noted that OSHA would seek to fill the WPAC membership once the members' terms expire in November. To get that process started, DWPP will publish a Federal Register notice. For the next round of members, the terms will be staggered. The charter is also in the process of being renewed.

Federal versus State Investigations and Funding

In response to a question from Ms. Dougherty, Mr. Mendelson confirmed that the number of investigations he cited referred only to federal investigations, not state plans. Money from the whistleblower program's budget will not go to state plans, which receive grants from a different

budget pool. The president's budget for fiscal year 2015 requested increased funding for state plans overall, not specifically whistleblower matters.

Report of Transportation Industry Work Group and Discussion

Ms. Spieler invited the members of the work group that are not on the full WPAC to sit with the WPAC for the report, and Connie Valkan, Lawrence Mann, and Rick Inclima moved to the Committee's table. Ms. Spieler explained that the Transportation Industry Work Group was set up because of concerns relating to safety and retaliation in the transportation industry, and the full committee lacked representation from the industry.

Mr. Frumin introduced the group's report and thanked the group for their work. The report is marked as Exhibit 2. The Transportation working group considered three recommendations, and reached consensus on two of them. He said the work group has primarily focused on rail, as it is the largest sector represented on the work group, though trucking and air are also represented. He noted that the group's work in the trucking industry was made more difficult by the vacancy of the FMCSA seat on the work group. Mr. Frumin also stated information gaps continue to be a problem for the work group. Mr. Frumin noted that OSHA's whistleblower data system is inferior to the new system used in enforcement cases.

<u>First Proposed Recommendation of Transportation Industry Work Group</u>

The first draft recommendation primarily concerns the rail sector, and the working group reached consensus on it. The draft recommendation reads as follows:

> Greater transparency in investigations. Information flow from OSHA investigators to the parties is inconsistent across regions. OSHA's investigators should share information gathered during the course of their investigations with both parties in accordance with the laws, regulations, and OSHA's internal guidelines.

Mr. Frumin explained that during the work group's discussions, both industry and labor expressed concern about whether OSHA adhered to its own policies regarding information sharing; and it was inconsistent about what investigators disclosed during an investigation, even at the point of informing an employer about a specific complaint or a merit finding. There was inconsistency in investigation techniques and between regions.

<u>Second Proposed Recommendation of the Transportation Industry Work Group</u>

The second draft recommendation is not limited to the rail sector, and again the working group achieved consensus on it. It reads as follows:

> Consistency in application. Consistent application of the various whistleblower laws and regulations is necessary to give the parties clear guidance as to the requirements of the various statutes. To that end, the Whistleblower Protection Advisory Committee should recommend to OSHA that OSHA take steps such as internal training programs to improve consistency of the application of laws, regulations, and statutes subject to OSHA's jurisdiction.

Mr. Frumin stated that the transportation industry work group's second recommendation is not limited to the rail sector. Some of the problems the group discussed were investigative techniques, investigators' understanding of the statutes, and investigators' responsibilities. Although 90% of claims are covered by three or four laws, investigators deal with 22 statutes. Mr. Frumin reviewed the Government Accountability Office (GAO) report, discussed regional inconsistencies in the program and difficulties with regional administration.

Third Draft Recommendation Considered by the Transportation Work Group

Mr. Frumin reported that the Transportation Work Group considered a third draft recommendation, but could not reach consensus on it. The text of the draft recommendation considered by the working group read as follows:

> Training Draft Recommendation
>
> The Working Group recommends that the Advisory Committee consider the usefulness of recommending to OSHA that it develop and offer statutory specific periodic training to the Transportation and other industries subject to whistleblower laws. In addition, the Working Group recognizes that internal training on the topic of whistleblower laws may assist company managers, supervisors, and employees in understanding their rights and responsibilities under the whistleblower laws. In that regard, the Advisory Committee should recommend to OSHA that it give consideration *in* the secretary's findings of the fact that an employer has an established program of communicating the requirements of the FRSA to its managers, supervisors and employees.

Mr. Frumin stated that the transportation industry work group agreed that training programs by employers were important. Some people thought that OSHA should consider those programs when making decisions in enforcement cases and that the programs should provide some mitigation when computing punitive damages. The group did not reach consensus about that issue; it lacked information about the extent to which OSHA already takes such programs into account. Mr. Baird provided information about how OSHA considers employers' knowledge in punitive damage decisions, but Mr. Frumin was unsure that was relevant to this matter. The draft recommendation in the group's report (Exhibit 2) states that OSHA and employers should provide training, but the group could not separate from that the issue of OSHA considering employers' training, and did not approve the draft recommendation.

Additional Issues Considered by Transportation Industry Work Group

The Transportation Industry Work Group considered issues related to the trucking industry that are closely related to whistleblowing: hours of service and the question of overweight and poorly-maintained vehicles. The group, and particularly the trucking representatives, were concerned about incentive programs for not reporting injuries and would like to be involved in discussion about it.

Vote on Recommendations of Transportation Industry Work Group

The WPAC adopted the first and second Transportation Industry Work Group recommendations separately by unanimous voice vote.

Possible Further Issues for Study by the Transportation Working Group

WPAC members suggested that the working group consider internal training on whistleblowers and specifically whether OSHA should use the Harwood grant program to provide education and materials about whistleblower issues.

Presentation to WPAC of Conflicting Opinions in Working Groups

There was discussion of how issues on which working groups could not reach consensus should be handled. Ms. Spieler said such issues should not be allowed to die in work groups; WPAC should be able to take up issues that it is important to present to OSHA and try to develop a recommendation.

Discussion of the Third Draft Recommendation

The Committee discussed the third draft recommendation. The disagreement was whether the existence of an employer training program should be considered in OSHA investigations. Management thought employers should get credit for their training about responsibilities and making the workplace safe, similar to affirmative defenses in harassment cases. Labor believed that employers should be doing those programs and that they did should not relate to OSHA's decisions. Ms. Narine stated that employers often do nothing unless there is an incentive or penalty, and her position was that adding the sentence could only help, especially for small and mid-sized companies that would not do training if they did not have to. The work group ran out of time to discuss the issue. Mr. Inclima stated that labor's position was that everyone has to comply with the law and there should not be an incentive or disincentive to do it. There is already an incentive in that employers can reduce whistleblower complaints by reducing retaliation. Ms. Narine stated that the Transportation Industry Work Group wanted more information about the training and what OSHA did. Mr. Baird explained that if a manager knows the law and breaks it anyway, or does not know the law but acts in a way that is reckless or wanton, there are grounds for punitive damages. OSHA's whistleblower manual says that an employer has a defense if it can show it has and implements a training program, and that will be considered in connection with punitive damages. The work group agreed to continue working on the recommendation before bringing it back to the full committee.

Ms. Spieler thanked Mr. Frumin and the working group for their work.

Report of the Best Practices and Corporate Culture Work Group and Discussion

Mr. Brock delivered the report of the Best Practices and Corporate Culture Work Group, which is marked as Exhibit 3. The group has reviewed its charge and developed a work plan and protocols regarding working together and hearing information from outside experts. The group decided to begin with presentations by each member, as they had different experience and perspectives, sometimes relating to different laws that OSHA is responsible for.

Mr. Brock summarized a number of the issues the group has considered. The group has discussed the challenges of making recommendations that are generically valuable and applicable for companies of different sizes, with different histories and problems, and operating under different laws, and that make it possible for enterprises to adopt policies that make sense.

The group discussed how to audit the programs to ensure that they do what they are supposed to, getting information to allow changes and improvement to programs, the importance of and difficulty of getting consistent response, and whistleblower or retaliation issues that arise despite the programs. The group discussed practices and traditions that encourage under-reporting of issues and can often lead to retaliation and more difficulties. There were disagreements about the source of the problem and how widespread it is, but the group considers it an important problem that needs attention.

The group discussed making a business case for why it is important for companies to be interested in having issues reported. The management representatives of the committee discussed benefits they saw and that more businesses could be encouraged to see if they were given guidance about possible programs and components. The group discussed the importance of affecting front-line supervisory behavior because people tend to raise more of their issues through supervisors and management, and those people are in the best position to address the issues.

The group noted that WPAC has discussed rewards for low injury rates, and the group needs to investigate how that happens and make recommendations about the best way to provide incentives.

The group has discussed the saying, "What is measured is treasured," and they will discuss what people can usefully measure and what effect that will have. That is part of understanding workers' experience and how companies use measurements. The group wants to get information from vendors, non-profits, and others that track trends and tools because it wants to know about tools that could be recommended as best practices.

Future Plans of Best Practices and Corporate Culture Work Group

Mr. Brock presented slides showing the topics for the group's future monthly conference calls, including auditing, talking to vendors, other tools, and the front-line response, so it can develop recommendations which it hopes to have by fall. He is encouraged by the group's progress, the candor and substance of its discussions, and members' willingness to acknowledge the importance of issues and possibilities raised by other members.

Need to Find Opportunities to Provide Whistleblowing Training

Ms. Garde suggested that that the WPAC should look for opportunities for DOL to include in its programs and processes ways to give employers incentives and recognition. For example, VPP Star status is very important to companies, and she suggested that to get it they be required to have training against retaliation and to have a program for employees to raise concerns. No company wants to be responsible for the next big mistake or bury its workforce, Ms. Garde said, but they do not have tools from the DOL and frequently do not have the money to put together the right kind of program. Not much anti-retaliation training is available.

Ineffectiveness of Reportable Injuries as Measurement

Ms. Lessin stated that the current metrics used in health and safety, reportable injuries and lost time injuries, are not effective. There are too many ways to game the system to get low numbers.

Ms. Lessin said that improving conditions will take more than discontinuing recognition programs for low injury rates; it will require establishing measurements that support health and safety, such as how many hazards have been identified, reduced, or eliminated, and how many days it took to eliminate a hazard when it had been identified. There are many kinds of metrics, but measuring injuries and illness is the most prevalent.

Possible Recognition Program for Safe Workplaces

Ms. Narine stated that the EEOC used to have its local district directors recommend that companies nominate themselves for a national award, and suggests that OSHA could consider giving awards to companies based on recommendations from a committee made up of labor and management.

Methods of Measuring Performance

The WPAC discussed ways to measure performance. Ms. Spieler noted that Mr. Eherts and Ms. Lessin have mentioned methods other than number of injuries as a way to measure performance. Reports of injuries may not be an accurate measure because of possibilities of report suppression, and the committee will explore alternative ways to measure success. . A separate but related issue is how to measure the effectiveness of practices intended to encourage reporting and discourage retaliation. Having fewer people come forward is not necessarily the best way to measure the success of a program that encourages people to come forward.

Ms. Lessin stated that if WPAC finds programs or practices that seem good, it will be important to ask representatives of the workforce if they agree. Mr. Eherts agrees with Ms. Lessin, and states that employee opinion is a strong measure. He mentions that Sikorsky conducts an anonymous survey each year asking workers whether they think hazards in the workplace are being abated. One of the questions is whether workers can report without fear, and internal research shows that the departments that score well have the highest productivity and quality.

Mr. Keating stated that surveys are an example of best practices. Surveys show that even when management says compliance is important, the rank and file does not trust those statements.

Three Categories of Protected Activity

Ms. Spieler stated that there are three general areas about which people may raise concerns under the whistleblower laws: safety, which is the focus of 11(c) and other statutes; financial issues; and consumer and environmental safety. She asked whether the committee believes there are relevant differences between those three areas. Ms. Garde stated that if employees are encouraged to raise concerns, they will raise concerns about all kinds of issues. Changing a culture changes how people think about their willingness to speak up, and it takes years and a lot of commitment. She believes the programs are not separate, and that the program is changing workers' willingness to speak and management's willingness to hear.

Mr. Frumin stated that quality assurance has some of the same features as safety and health management as well as consumer concerns. His experience with quality assurance is that there are critical indicators of whether managers have a stake in whether employees are encouraged to speak up and whether their views are considered seriously and acted upon. Much of the time in

the US, quality assurance did not work because it was not taken seriously. It worked when managers relearned their jobs and learned that employees had to be supported. Unions had to change the way they approached the situation. There were good metrics but bad accounting for the benefits of quality assurance. In considering best practices, it could be helpful to consider whether organizations' managers have a structured approach to taking workers' opinions seriously and to how things need to change and who benefits monetarily.

Mr. Keating agreed with Ms. Garde that the committee can recommend best practices that encompass financial and safety issue in connection with people raising concerns about wrongdoing and how companies better respond to and investigate concerns, remedying problems, and building morale within the organization. He said that Ms. Lessin's point that some systems that are in place are inherently retaliatory is a separate issue.

Ms. Lessin agreed, and would like OSHA to provide statistics about the separate categories of workers experiencing retaliation for reporting health and safety issues and for reporting injuries, especially in connection with FRSA, 11(c), and possibly STAA.

Ms. Narine agreed that there are the three categories and thinks that the issues are essentially the same but believes there are nuances. People understand retaliation differently. Though all would agree that getting fired is retaliation, not all would understand lesser forms of adverse action to be retaliation. Retaliation and what it looks like in the particular workforce must be defined for supervisors. It does not matter what the manual says or what the CEO does; what matters is what the supervisors do. People take their cues from their supervisors. The culture of a plant may be different than that in a plant ten miles away. Company culture and location culture must be considered in discussing best practices.

Just Culture and Consistent Discipline

Mr. Eherts recommended the UK initiative "Just Culture," which stands for fairness and may come from aviation. It advocates equal and consistent punishment, e.g., if someone is punished for not wearing safety glasses because they got injured, it would be best to also punish people who did not wear safety glasses and did not get injured. Just Culture would do a substitution test, e.g., asking ten Teamsters confidentially if they would have done the same thing. If they say yes they would have broken the rule because it was the end of the quarter and management wanted them to complete the aircraft, then the person who was injured while breaking the rule cannot be punished. Just Culture is a best practice. FAA people might know about it. Ms. Dougherty stated that, in compliance, one of the standards is how other employees are disciplined for doing the same thing, e.g., if an employer claims that an employee did not have fall protection and was trained on fall protection, but it turns out that no one ever uses fall protection, the employer does not have a misconduct defense.

Addressing Lack of Data re Categories of Complaints

Ms. Spieler stated that that issue of data quality was on her list for the WPAC to consider, and that with the new directorate and more attention to whistleblower questions, the WPAC should discuss what might be useful, with the understanding that some things may be achievable and

some may not. It might be useful for the WPAC to hear some of the concerns about data. She suggested the item be put on the agenda for the next committee meeting.

Report of the 11(c) Work Group and Discussion

Mr. Eherts reported on the work of the 11(c) Work Group, marked as Exhibit 4. The group developed questions and follow-up questions: 1) How does the 11(c) provision differ from those of other whistleblower statutes and which statutes provide the most effective protection for whistleblowers? 2) How does OSHA investigate 11(c) complaints and approach settlement of cases, including punitive damages, and how does it train investigators and refer cases to the solicitor? 3) How does the process compare with the processes that OSHA and others use under other statutes? 4) How does OSHA's approach compare with the approach to whistleblowers under OSHA state plans? The work group believes there is much information about best practices and results and will discuss state plans; 5) What are OSHA's staffing levels and needs to enforce 11(c)?

The group will discuss Phase One, urgent issues today, with the intent of passing recommendations to OSHA. Phase Two issues are those that are easier to implement and do not require statutory changes. Phase Three is recommendations for statutory changes, which will take study and time.

In Phase One, the group recommends that OSHA prohibits practices, policies, and programs that discourage workers from reporting illnesses and injuries, so OSHA can use all enforcement options in addressing the issue. In about six months, the group will have recommendations in Phase Two about practices to adopt and what works in state plans. The group may recommend ways to improve the process of referral to the solicitor's office, using remedies including punitive damages and preliminary reinstatements, and reestablishing the link with the NLRB and more staffing for the DWPP. The group will investigate the informal referral process between whistleblower investigators and compliance officers, which works, but should possibly be more formal. In Phase Three, the group intends to have recommendations for statutory changes based on comparison with other statutes dealing with anti-retaliation. The group intends to complete its recommendations within 12 months.

The group has prepared a list of the information it needs to make the recommendations. OSHA is providing written information. Mr. Moberly and Mr. Rosa have offered to provide subject matter experts from OSHA and Lafe Solomon can identify subject matter experts from the National Labor Relations Board (NLRB). Ms. Lessin provides a labor perspective. Mr. Eherts invited opinions and suggestions about sources of data today or by email.

<u>Measuring Effectiveness of 11(c) and Other Statutes</u>

Mr. Moberly stated that the previous day the group discussed how to measure the effectiveness of 11(c) and other whistleblower protection and effects other than settlements. He invited suggestions about evaluating statutes' effectiveness.

<u>The 11(c) Work Group Recommendation to WPAC</u>

The work group suggested that WPAC make the following recommendation to OSHA:

> The reporting of an injury or illness by an employee is a protected activity under the Act. Building on the Fairfax memo, we recommend that OSHA adopt mechanisms that prohibit directly the use of employer practices, policies and programs that may discourage workers from reporting illnesses and injuries, so that OSHA can use its full complement of enforcement options in addressing this issue.

Committee members discussed the language used in the recommendation, and made a number of suggestions to modify the draft recommendation's language. Ms. Lessin wanted the recommendation to make clear that OSHA should be able to examine such practices and determine that they discourage reporting illnesses and injuries and violate laws and are punishable with citations and fines. There were disagreements over the word "may" versus "could" or "would" discourage injury reporting. Mr. Frumin noted that OSHA's only current applicable authority is 11(c); it can urge and guide but cannot enforce, and it needs to be able to enforce under a different authority. Ms. Spieler said she is reluctant to advise OSHA where to do its regulatory work, which could involve legal questions about its authority and how it should be used. Mr. Eherts agreed with Mr. Frumin that the recommendation is intended to cover all the statutes and is a good first step.

As a counterpoint, Mr. Keating stated that the recommendation would greatly change OSHA's ability to bring actions against employers for policies it suspects to be problematic without 11(c) complaints but would not provide guidance to employers. The Fairfax memo provided four specific examples of what OSHA considered problematic. He is concerned that the recommendation would allow OSHA to take action against employers about policies that may be a problem, and does not think that is consistent with the WPAC's charge of improving protection for whistleblowers and letting employers know what is acceptable and rewarding them if they do things right. He suggested that the recommendation say that OSHA explore using its full complement of enforcement options.

Ms. Lessin noted that OSHA has a compliance assistance division for 11(c) that can help employers determine what problems they have and how to solve them. OSHA is considering how to implement a comprehensive injury-and-illness-prevention program that helps employers identify and correct hazards. The Fairfax memo identifies practices that OSHA considers retaliation. A recommendation that would allow OSHA to tell workers that they do not have to wait to be injured and that OSHA can address retaliatory practices is consistent with OSHA practice.

A motion was made and seconded that the WPAC adopt the following text of the recommendation:

> The reporting of an injury or illness by an employee is a protected activity under the Act. Building on the Fairfax memo, we recommend that OSHA adopt mechanisms that may prohibit directly the use of employer practices, policies and programs that may discourage workers from reporting illnesses and injuries

through its enforcement and regulatory options (in addition to Section 11(c) retaliation cases).

(Exhibit 6.) Mr. Brock said he thought that the committee was not ready to vote after so much discussion, and moved to table the recommendation. Mr. Eherts seconded. The vote split 5-5. Ms. Spieler asked the work group to consider the recommendation again and bring it back for consideration at the next WPAC meeting.

Data Document

Ms. Spieler stated that the data handed out (Exhibit 5) has not been cleaned and some terms may not be correct or suitable for drawing conclusions, e.g., one includes all settlements, both what is usually called "settlements" and what is usually called "settlements, other." It is an example of what OSHA is trying to do to respond to requests for data.

Lessons Learned from the Whistleblower Process in Other Agencies

Mine Safety and Health Administration (MSHA) Operations

Derek Baxter, Counsel in the Mine Safety and Health Division of the Solicitor's Office and his colleague Charlie Lord discussed section 105(c) of the Mine Act which prohibits discrimination for or other interference with the exercise of rights under the Mine Act. MSHA has published guidance on what constitutes protected activity, which includes making complaints to MSHA, talking to a mine inspector, and making internal health and safety complaints to the company. It also prohibits interference with the exercise of a right, which includes telling miners not to speak to MSHA inspectors. Cases are heard by an Administrative Law Judge; they are not filed in district court.

Mr. Baxter discussed MSHA's process for investigating 105(c) claims. The number of temporary reinstatement cases has increased significantly, from an average of 6 temporary reinstatement cases from 1993-2008, to 47 in 2012. The Senate report says that temporary reinstatement was an essential protection, and the legislation contains a provision requiring temporary reinstatement unless the complaint appears to be frivolous. On the merits, the Secretary can file a case, and the miner has a private right of action.

National Labor Relations Board (NLRB) Cases

Lafe Solomon spoke about the NLRB. He served as acting counsel for the NLRB from June 2010 to October 2013.

In fiscal year 2013, the NLRB had 21,000 complaints. Though the Board does not keep track of how many relate to retaliation rather than other kinds of unfair labor practices, Mr. Solomon estimated that 40 to 50 percent involve retaliation.

The NLRB's goals are to hold elections and to investigate, prosecute, and remedy unfair labor practice cases impartially and promptly. It seeks to resolve all unfair labor practice charges within 120 days of a charge being filed. It sets a percentage goal each year; in 2013 the goal was 72 percent. It aims to close meritorious cases within 365 days of the charge being filed. Its goal

in connection with that is 80 percent. It met its goals in 2013 but sometimes came up a little short. It believes in prompt resolution because festering disputes do not help the worker or employer. It closely monitors the quality, thoroughness, and timeliness of investigations. Its division of operations in Washington oversees the field offices.

A supervisor is very involved with the investigator and they present the case to the regional director, with the regional attorney and other personnel present. The regional director decides whether the case has merit. About a third of cases are found to be meritorious. Charging parties are asked to withdraw non-meritorious cases, or the cases are dismissed. If the charge is found to be meritorious, the regional director issues a complaint that goes to an administrative law judge, who hears the case. The general counsel represents the charging party. There is no private right of action. The administrative law judge issues a decision. It can be appealed to the five-member board in Washington, which issues a decision. Board decisions are not self-enforcing, so the NLRB must go to a Court of Appeals to get cases enforced. Respondents have the option of filing in the DC Circuit. The board files wherever the charge occurred. The NLRB has a settlement program that is active through all stages of a case. It settles 90 percent of cases, and they can be settled at any stage, though early settlement is preferable. Because the NLRB does not have preliminary reinstatement, the regional director decides whether to seek injunctive relief.

Federal Aviation Administration's (FAA) Whistleblower Program

Vincent Murray is the acting manager and chief investigator for the FAA's office of audit and evaluation audit and analysis branch, which handles the primary coordination for all of the FAA's whistleblower efforts.

Whistleblower Protection Law in Aviation Industry

In 2000, Congress passed the Wendell H. Ford Aviation and Investment and Reform Act for the Twenty-First Century (AIR21), establishing the first whistleblower protection laws for the aviation industry. The FAA has general regulatory authority over aviation under Title 49 anyway, but AIR21 generally empowers OSHA to correct any retaliation related to safety complaints raised by an employee of an air carrier or a contractor or subcontractor. Whistleblower protection laws apply only to the operations of 121-type air carriers such Delta or United and to commuter and on-demand air carriers, which are certificated under Part 135 of FAA's regulations. The laws do not apply to air tour operators, pilot schools, or other kinds of aviation activities.

Safety and Whistleblower Complaints to FAA

The FAA investigates thousands of safety complaints each year, which is receives through various avenues. Most claims do not relate to retaliation. There was a spike in 2013, when the FAA investigated almost 100 whistleblower complaints. It received about 165 complaints but many did not meet AIR21 criteria or had already been investigated.

Mutual Notification of Complaints by FAA and OSHA

Employees who believe they have been retaliated against for raising a safety complaint can take the issue to the FAA first. There are local and oversight offices and internal reporting mechanisms. When the FAA receives the first complaint of a whistleblower case, it notifies OSHA, which may be vetting a related complaint, to be sure that the complaints are related. Sometimes, OSHA receives the first complaint, and it is important that they notify the FAA so that the FAA can investigate the safety aspects of the complaint. OSHA and the FAA have created an organizational email box and they communicate with a central point of contact at OSHA. The FAA and OSHA also do a monthly reconciliation of their AIR21 cases to ensure that all safety cases are investigated.

Difference Between FAA and OSHA Intake and Investigation

The FAA's and OSHA's processes for intake are different, and what OSHA investigates in connection with retaliation is different from what the FAA investigates related to compliance with federal aviation regulations. Where OSHA considers anything filed later than 90 days after an incident not timely, the FAA does not have a time limitation; it investigates all complaints related to safety. If the claim relates to retaliation, it is investigate under the OSHA whistleblower process. The FAA may find that there was no violation of federal regulations related to air-carrier safety, but OSHA might find merit in the retaliation claim.

Discussion of the Whistleblower Process at MSHA, the NLRB, and the FAA

The members of WPAC and the three agency representatives had a question and answer session that touched on a wide range of topics, including OSHA coordination with these agencies, how the agencies handle claims of retaliation, the use of private representation in MSHA cases, claim tracking, penalties, investigation of safety issues and retaliation in the same case, weaknesses in the National Labor Relations Act (NLRA), penalties, and the handling of mixed motive cases.

Coordination of OSHA and NLRB on Actions

In response to a question from Mr. Frumin, Mr. Solomon noted that under a 1970s-era MOU between OSHA and the NLRB, the NLRB would stay its hand and OSHA would take over a retaliation investigation. However, most people at OSHA and the NLRB do not know about the MOU now, and in practice each agency proceeds on its own unless someone calls the matter to the other agency's attention. Part of the reason Mr. Solomon is involved here is to change that practice. He is working on coordination and communication between the agencies. The remedial options under the NLRA are limited. The NLRB cannot fine or issue penalties, but can only make whole.

FAA's Determination of Violation and Appropriate Action

Mr. Brock asked Mr. Murray to discuss the FAA's equivalent of OSHA's finding of merit. Mr. Murray says that the FAA does not refer to merit, but either finds that there has been a violation of a regulatory requirement or there has not based on a preponderance of evidence. Based on its sanction guidance table, it determines what enforcement action to take, e.g., a very low-risk violation could be handled with an oral reprimand and recorded in a database. A violation with a slightly higher risk might be handled with a written warning or corrective action that was

documented. A violation with higher risk or that was intentional would warrant a civil penalty or possibly some kind of certificate action.

FAA's Determination of Violations and Taking Enforcement Action

In response to a question by Mr. Brock, Mr. Murray stated that in 41% of cases, the FAA finds a violation of a regulation, order, or standard related to air safety. It can only take action if a specific regulatory requirement has been violated. But if it finds non-regulatory violations, such as violations of safety standards issued by the National Institute of Standards and Technology standards or advisory circulars, the FAA might notify the carrier that it had not met the standard. Its oversight office might require a change to policy or manuals.

FAA's Ability to Penalize Air Carriers for AIR21 Violations

In response to a question by Ms. Spieler, Mr. Murray said that if OSHA finds merit in an AIR21 retaliation case, the FAA can issue a civil penalty against the carrier because of the retaliation finding.

MSHA's Relative Penalties for Kinds of Retaliation

Mr. Frumin asked whether there is different treatment of cases involving people who complain to the employer about a violation of a safety rule and then suffer retaliation and those involving people who file a safety complaint with an agency and are retaliated against. Mr. Baxter responded that both cases are covered by the statute. Firing someone for participating in a Mine Act proceeding could be more egregious conduct and result in more severe penalties. MSHA assesses each case individually in determining what penalties to assess, and the type of protected activity involved is a factor that is considered. Mr. Baxter said he will speak to MSHA about providing policy about that.

Advantages Provided by MSHA Statute

In answer to Mr. Moberly's question, Mr. Baxter said that the MSHA has had much success with the temporary reinstatement provision of the statute. From 1993 to 2008, there was an average of six temporary reinstatement cases filed per year. In the last three years, it went up to an average of 25 per year. In 2012, MSHA filed 47 temporary reinstatements, which was a record for MSHA. Last year they filed 45 cases on the merits.. MSHA has to focus on moving its cases, but missing deadlines is not fatal, and that lenience is a benefit. MSHA has penalties and a good range of make-whole compensatory remedies. The bar is low for temporary reinstatement cases, which was clarified by a 2009 or 2010 case, and MSHA wins a high percentage of such cases and has only lost a few in recent years.

OSC's Practices

Adam Miles stated that the office of special counsel (OSC) has no statute of limitations. Federal employees can file complaints whenever they want. OSC weeds out frivolous cases and 90% of the 3000 it receives are not investigated. Most involve prohibited activity that took place within the past year or so.

Until recently, OSC had authority to award make-whole remedies, and consequential damages, which were not well defined. Now it has authority for compensatory damages, but this can create an obstacle to settling cases when complainants seek more than just back wages. The availability of compensatory damages does not help to settle blatant retaliation cases. Injunctive relief has been critical to OSC's enforcement efforts, and the OSC has recently made greater use of its ability to stay cases to allow it to investigate.

Ms. Spieler thanked the representatives for their comments.

Public Comments

Public Comment: NELA Seminar and Materials

Richard Renner, an attorney at Kaliljarvi, Chuzi, Newman & Fitch P.C. in Washington DC, said that in October 2013, he participated in the National Employment Lawyers Association's program called "Shining the Light on Whistleblower and Retaliation Claims." The material from the seminar can be bought at nela.org. The seminar included 150 whistleblower advocates from around the country and expert panels on whistleblower topics, including many that addressed the DOL process and how the attorneys worked around the weaknesses in the law such as those in 11(c), and alternatives available to whistleblowers. Mr. Renner discussed a two-page flyer he designed to help people doing intake at low-income worker clinics, typically law students, to help them catch issues in the field, identify applicable laws, and get complaints filed on time. Filing on time is a big issue, particularly in connection with 11(c) complaints, which must be filed within 30 days. The document may be accessed at taterenner.com/whistleblowerflyerforclinics.pdf.

Mr. Renner stated that DOL's wage and hour division provides certification for immigration for undocumented employees who report violations of the law and qualify for U visas. He said that undocumented workers who file whistleblower complaints should get the same benefits, which would be especially important with the enactment of the Food Safety Modernization Act, which covers 20 million workers, many of them undocumented.

Mr. Renner has prepared such a chart listing about 49 federal whistleblower laws, which is on his website at www.taterenner.com/fedchart.php. Congress has used various enforcement schemes under those laws. Mr. Renner also discussed the differences between Title VII EEO law and 11(c).

Invitation for Public Comment

Ms. Spieler asks for further public comment; there is none.

Discussion of Next Steps for WPAC

The discussion of next steps included the following points:

- Data the WPAC needs
- Underreporting problems
- Training for employers

- How to bring to the full committee issues that do not fit within work groups but which the whole committee is interested in
- Using consensus to make work group decisions
- Inter-agency functioning under the various statutes
- Including reports from other agencies in WPAC meetings
- Hearing from whistleblowers themselves at a full committee meeting
- Possibility of a WPAC meeting by phone
- Future scheduling of WPAC
- Next steps regarding the tabled recommendation
- The need to distribute materials in advance of meetings
- Inviting staff from other agencies to participate
- Circulating draft reports from work groups
- Presentation by staff on improving administrative and operational functions
- Logistics for the next meeting

Administration's Commitment to Whistleblower Issues and Work of Staff

Ms. Spieler thanked the DWPP staff, especially Meghan Smith, Katelyn Wendell, and Rob Swick for their work, and the administration for its commitment to improving the whistleblower protection programs. She thanked the committee for its work. Mr. Frumin thanked Ms. Spieler for the time, effort, and creativity she has put into her work.

Proceedings adjourned at 4:45 PM.

Exhibits from the March 11, 2014, WPAC Meeting

Ex. 1 March 11, 2014, Meeting Agenda

Ex. 2 WPAC Transportation Work Group Report to WPAC March 10, 2010, Washington, DC

Ex. 3 Progress Report to WPAC from the "Best Practices" Work Group, March 11, 2014

Ex. 4 Work Plan for WPAC 11(c) Subcommittee and Recommendation, Presentation to WPAC, March 11, 2014

Ex. 5 Investigation Data, Report Period 10/01/2012 to 09/30/2013

Ex. 6 Committee Revision of Recommendation

Ex. 7 MSHA 105(C) slides

Ex. 8 FAA/OSHA Fact Sheet (AIR21)

Exhibits can be found on http://www.regulations.gov in the OSHA-2013-0029-0001 docket.

CERTIFICATION

I hereby certify that, to the best of my knowledge, the foregoing minutes are an accurate summary of the meeting.

Submitted by:

_____/s/_____

Emily Spieler

WPAC Chair

Date: June _18_, 2014